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Internal Revenue Bulletin

Cumulative Bulletin 1939–1
(PART 1)

JANUARY–JUNE, 1939

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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

U.S. Treasury Department : : : : : Bureau of Internal Revenue Service

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Internal Revenue Bulletin

Cumulative Bulletin 1939-1
(PART 1)

JANUARY-JUNE, 1939

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(The committee reports on the Revenue Acts (1913 to 1938, inclusive) will be published as Part 2 of this Cumulative Bulletin)

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 Chief 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 Chief 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 in 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 Chief 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 Chief Counsel for the Bureau of Internal Revenue.

UNITED STATES GOVERNMENT PRINTING OFFICE: WASHINGTON : 1939

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

The Internal Revenue Bulletin service for 1939 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 $3 per year; foreign, $4.25. 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 (containing digests of all rulings appearing in Cumulative Bulletins 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 to 1938, inclusive, may do so at prices as follows:

Year.	Cumulative Bulletin.		Price (cents).
	First 6 months.	Second 6 months.	
1922	I–1	I–2	40, 30
1923	II–1	II–2	30, 40
1924	III–1	III–2	50, 50
1925	IV–1	IV–2	40, 35
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1927	VI–1	VI–2	40, 40
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1937	1937–1	1937–2	60, 50
1938	1938–1	1938–2	60, 50
1939	1939–1	----------	50, —

Persons desiring to obtain the service in digest form may do so at prices as follows: Digest No. 13 (1922–1924), 60 cents; Digest No. 17 (1925), 25 cents; Digest No. 21 (1926), 15 cents; Digest No. 22 (1925–1927), 35 cents; and 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 1939–1, Part 1, in addition to all decisions of the Treasury Department (called Treasury decisions) pertaining to Internal Revenue matters, contains opinions of the Chief Counsel, and rulings and decisions pertaining to income, estate, gift, sales, capital stock, excess profits, social security, and miscellaneous taxes, as indicated on the title page of this Bulletin, published in the weekly Bulletins (Volume 1939–1, Nos. 1 to 26, inclusive) for the period January 1 to June 30, 1939. 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, 1939.

Income Tax rulings will be printed in three parts. The rulings in Part I will be printed as Part I, "A" (Internal Revenue Code) and "B" (Revenue Act of 1938), the section headings corresponding with the sections of the Code and the 1938 Act, respectively, and the article headings corresponding with the article headings of Regulations 101. Rulings under the Revenue Acts of 1937 and 1936 will be printed as Part II, the section headings corresponding with the section headings of those Acts and the article headings corresponding with the article headings of Regulations 94. Rulings under the Revenue Acts of 1935 and 1934 or prior Acts will be printed as Part III, the section headings corresponding with the section headings of the various Acts and the article headings corresponding with the article headings of Regulations 86.

Rulings under Title VIII of the Social Security Act are published under article headings of Regulations 91, rulings under Title IX of the Social Security Act are published under article headings of Regulations 90; rulings under the Carriers Taxing Act of 1937 are published under the article headings of Regulations 100; and rulings under Title III of the Revenue Act of 1936—Tax on unjust enrichment—are coded under the sections of that Act and the article headings of Regulations 95.

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.
A. T.—Alcohol Tax Unit.
B. T. A.—Board of Tax Appeals.
C. B.—Cumulative Bulletin.
Ct. D.—Court decision.
C. S. T.—Capital Stock Tax Division.
C. T.—Taxes on Employment by Carriers.
D. C.—Treasury Department circular.
E. T.—Estate Tax Division.
G. C. M.—General Counsel's, Assistant General Counsel's, or Chief 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.
S. S. T.—Taxes on Employment by Other than Carriers.
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.

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	1939-24-9877	Part 2
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	1939-26-9894	Part 2
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	1939-26-9896	Part 2

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BOARD OF TAX APPEALS.

CUMULATIVE LIST OF ANNOUNCEMENTS RELATING TO DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS PUBLISHED IN THE INTERNAL REVENUE BULLETIN SERVICE FROM JANUARY 1, 1932, TO JUNE 30, 1939, 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 Bulletins 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, 1939, inclusive.]

[6] 1939-26-9888

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
Abbott, John	91141	38	1290
Acme Manifolding Co., Inc	25194 38687	24	429
Adams, Charles E	88274	39	387
Adelaide Park Land et al., trustees	39980	25	211
Afremow, David, estate of	39593	25	1246
Afremow, Sarah, executrix	39593	25	1246
Akron Coca-Cola Bottling Co	84125	36	1233
Akron Standard Mold Co	84126	36	1233
Alabama Mineral Land Co	56960 69007	28	586
Albers, William H.[1]	74759	33	373
Albert Lea Packing Co., Inc	20765	24	376
Albrecht et al., Katherine B., executrices [2]	41295	27	1091
Alcoma Corporation	60700	28	1291
Alexander, J. F., estate of	39019	27	1210
Alexander, Nellie S	78995	36	929
Alexandria Gravel Co., Inc	73687	35	323
Allegheny Garbage Co	44860	30	636
Allen, Irene C	25414	25	834
Allied American Corporation	31704	25	1276
Alverson, L. T	76130	35	482
Ambassador Petroleum Co	40039	28	868

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

[6] Ruling No. 9888 includes all acquiescence and nonacquiescence notices published in the Internal Revenue Bulletin service from January 1, 1932, to June 30, 1939.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
American Central Life Insurance Co.[1]	30133, 31998, 56024, 63436	30	1182
American Central Utilities Co	83642	36	688
American Cigar Co	16229	21	464
American Circus Joint Venture	84020	39	605
American Cities Power & Light Corporation, manager, the North American Co. Common Stock Trading Account No. 5	82582	38	74
American Feature Film Co	27623	24	18
American Gas & Electric Co. and subsidiary companies.	67368, 67369, 69800	33	471
American Printing Co	39721	27	1270
American Security & Trust Co. et al., executors [2]	39167	24	334
American South African Line, Inc	62955, 68830, 70701	30	753
American Utilization Co	90527	38	322
Ames, Muriel Oakes [3]	71811	30	516
Anco Investment Co	58647	30	988
Anderson, C. K	33242	27	1305
Anderson, Gustave	36224	26	1208
Anderson, J. H	63827	30	1274
Anderson, Stanley S	42053	33	88
Anderson-Clayton Securities Corporation	78340	35	795
Ann Arbor R. R. Co	25869	29	331
Archer et al., Barbara	64163, 64165–64168, 64171–64173	37	299
Ardenghi, Anna F	68201	37	345
Arguimbau, Frank M	73614	31	604
Armstrong, C. George	58400	31	418
Armstrong, Susan B	82552	38	658
Armstrong, William B	58603	32	1261
Arnold & Winsor Co	61553	29	670
Artman, Caroline Foerderer, estate of [2]	92084	38	1020
Ashforth, Albert B., estate of [4]	47190, 48009, 49354	26	1188
Ashforth et al., Mable A., executors [4]	47190, 48009, 49354	26	1188
Asmussen, H. F	78589	36	878
Atkins, J. B., estate of	38520	28	500
Atkins, Mrs. J. B	38519	28	500
Atlanta & Charlotte Ry. Co	78077	36	558
Atlantic Coast Line R. R. Co	58958, 65310, 65311	31	730

[1] Acquiescence relates to issue whether petitioner received interest on mortgages when it bid in property upon foreclosure.

[2] Estate tax decision.

[3] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[4] Nonacquiescence published in Bulletin XII-1 (1933), withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Atwater, David H.[1]	49066	34	845
Atwater, John J.[1]	49067	34	845
Atwater, Jr., William C.[1]	49065	34	845
Axton, Edwin D	56160	32	613
Axton, Robert L	56162	32	613
Axton, Wood F	56441	32	613
B.			
Babbitt, Inc., B. T. (Delaware)	74047	32	693
Babbitt, Inc., B. T. (New York)	74047	32	693
Bailey, Bertha M	75994	37	647
Bailey, Walter C., estate of	75993	37	647
Baker, I. B	56348	32	613
Baker, R. E	61120	37	1135
Baldwin, Florence G	32387	23	512
Baldwin, Gail H	83665	36	364
Balfour, Sir Robert	40230	25	154
Ball, Phillip D. C	36737	27	388
Baltimore & Ohio R. R. Co	53702	29	368
Baltimore & Ohio R. R. Co.[2]	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
Barbour, Robert	81059	39	553
Barclay, W. L	8743	26	970
Barker, Fred	51102	28	657
Barnes, Arthur S	81873	36	764
Barnes, Henry H	56440	32	613
Barney, D. Newton, estate of	71720	36	446
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 [3]	41295	27	1091
Beers, Clara O	67873	34	754
Beers, Frank T	67874	34	754
Beggs, John I. (Trusts)	65675	30	370
Behoteguy et ux., Willis C	83820	36	1233
Behr, Charles B	39534	30	1290
Bell, Ivor B.[4]	22335	27	377
Bellows Falls Power Co	18592 29104	25	195
Benedum, M. L.[5]	30990	28	917
Bent Co., R. G	57312 59796	26	1369
Berdell, Jr., Charles P	70298	32	600
Bernstein, Isaac M	36729	28	744

[1] Acquiescence with respect to holding that petitioner was not a transferee.
[2] Acquiescence relates to issue involving contributions by shippers for construction of side and spur tracks; and deduction for internal-revenue stamps affixed to bonds.
[3] Estate tax decision; acquiescence relates to deduction of $133,000.
[4] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[5] 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.
Best, Frank E	36746	26	1070
Billings et al., May, executors [1]	81638	35	1147
Billups, George W	54917	29	804
Bingham, Robert W	51051	27	186
Birckhead, Oliver W	72389	33	466
Birdneck Realty Corporation	46079	25	1084
Biscayne Bay Islands Co	27616 35098 40147	23	731
Bishop Trust Co., Ltd	81625 87102	36	1173
Black, E. E	86961	36	346
Blair, Jr., Mrs. Wiley	69682	31	212
Blake, Israel O	82688 90661	38	1457
Bloodgood, Edith B	26750	25	513
Blossom et ux., Harold M	91572	38	1136
Blum, Julius, trustee	39242 40939 45741 51507	25	119
Blumenthal, Lucy A	64975	30	591
Boehn, Louis	78692	35	1106
Boehringer, Rudolph [2]	49891	29	8
Boeing, William E.[3]	88167	37	178
Boos Bros. Cafeteria Co	39200	25	651
Borg & Beck Co	24223 34964	24	995
Bostick, Jr., John, trustee	68382	31	25
Bostonian National Shoe Stores, Inc	91259	39	444
Bostonian Shoe Sales Corporation	91261	39	444
Boswell, William D., estate of [4]	81811	37	970
Bowden, Paul Akers	54923	26	1410
Bowen, Edwin L.[5]	62985	33	208
Branch, W. E	88893 89584	38	1139
Branson, Fred P	78211 85896	38	4
Braun, Arthur E., trustee	54556	29	1161
Brawner, Jr., Henry N., estate of	82695	36	884
Brinton, Lillian McDonald	53715	28	472
Broadway-Brompton Buildings Liquidation Trust [6]	82818	34	1089
Broderick, Emilie C., estate of [1]	89759	38	1421
Brown, Berenice	24667 36637	25	814
Brownell, Sophia Gleason Pierce	53637	35	141
Bryan et ux., C. A	24036	19	111
Bryan et ux., L. J	24037	19	111
Bryant, Waldo C., estate of [1]	72383	36	669

[1] Estate tax decision.
[2] Acquiescence relates to issue involving section 115(g) of the Revenue Act of 1928.
[3] Acquiescence relates only to the trust issue. Prior nonacquiescence published in Cumulative Bulletin 1938–1, page 36, in so far as it pertains to the trust issue, withdrawn.
[4] Estate tax decision. Acquiescence relates to exclusion of insurance proceeds payable to specific beneficiaries.
[5] Acquiescence relates to issue as to basic values of stock.
[6] Nonacquiescence published in Cumulative Bulletin 1937–1, page 30, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Buck, John A., estate of [1]	32584, 44153, 44684	25	780
Buck et al., Mary M., executors [1]	32584, 44153, 44684	25	780
Buena Vista Land & Development Co	2025	13	895
Buffalo Union Iron Furnace Co.[2]	16075, 16076	23	439
Bullington, Orville	69684	31	212
Bullington, Mrs. Sadie	69679	31	212
Bullis, Helen H	68164, 73954	32	501
Bullock, George [3]	31209	23	710
Burdick, Ella P., trustee	46322	29	731
Burdick, Joel W., estate of	46322, 61009	29	731
Burke Grain Co	81799	39	334
Burnham, Silas H	53795	29	605
Burroughs, Ambrose H., estate of	59797	29	190
Burrows, Waters F.[4]	87787	38	236
Burton, Benjamin T	61055	28	1241
Busche, F. C.[5]	9447, 10202, 10755	10	1345
Butler, U. H	46055	24	506
Byers Trust, A. T	68382	31	25
Byrnes, Clarence P	87919	39	594
C.			
Cahokia Trust	81746	36	81
California Coast Oil Co	25018	25	902
Cambria Development Co.[6]	75411	34	1155
Camp Manufacturing Co	35955	25	537
Campau Realty Co., A. M	70340	35	687
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

[1] Estate tax decision; acquiescence relates to value of certain real estate in San Francisco and value of stock of Langendorf Baking Co. for estate tax purposes; and reasonableness of Commissioner's allowance for support of the widow.

[2] Acquiescence relates to issue regarding deductions for obsolescence of blast furances.

[3] Acquiescence relates to issue 2 of decision.

[4] Acquiescence relates to issue as to deductions for expenses in connection with the practice of medicine.

[5] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[6] Acquiescence relates to determination of fair market value of obligations received from purchasers of real estate lots.

ACQUIESCENCES—Continued.

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Carolina Contracting Co	77638	32	1171
Carter Publications, Inc	44838, 66891	28	160
Carter, Jr., W. T	86558	36	853
Casey, Harriet M., estate of [1]	88565	39	13
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.[2]	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.[3]	55569, 63818	27	1312
Champion, T. Pierre [3]	55568	27	1312
Chapman & Dewey Land Co	37403, 51059	25	1166
Chapman & Dewey Lumber Co	33466, 37402, 47130, 50196, 51058	25	1166
Chemical Bank & Trust Co. et al., executors of the estate of Frank J. Saxe [1] [4]	79276	37	535
Chicago & Northwestern Ry. Co.[5]	36343	22	1407
Childs, Mary S	84497	35	1125
Chisholm, Archibald M., estate of [6]	85255	37	167
Christopher, Rachel S.[1]	47704	26	292
Church & Brighton Corporation	60970	36	1168
City Bank Farmers Trust Co., executor	59797	29	190
City Bank Farmers Trust Co. et al., executors [1]	31869	23	663
Clark et ux., Horace S	86877	39	329
Clark et al., James, executors	34499	24	1235
Claude Neon Lights, Inc.[7]	59391	35	424
Cleland Estate Co., Inc., Henry A.[8]	33585, 40890, 51197	29	436
Clements, W. L	46058	24	506
Cleveland Railway Co	84943	36	208
Cleveland Trinidad Paving Co.[9]	41962, 46297	20	772
Clinchfield Securities Co	40554	25	446
Clinton Cotton Mills, Inc	54880	28	1311

[1] Estate tax decision.
[2] Acquiescence relates to issue regarding apportionment of taxes among affiliated corporations.
[3] Acquiescence relates to basis upon which gain or loss upon redemption of stock should be computed.
[4] Nonacquiescence as to one issue, published in Internal Revenue Bulletin 1938-31, page 1, withdrawn.
[5] Acquiescence relates to following issues: Material and supplies adjustment; amortization of bond premium; assessment of Association of Railway Executives; railroad Y. M. C. A.
[6] Estate tax decision; acquiescence relates to the following issue: Expenses incurred by the estate for office rent, salary of secretary, and accountant's fees.
[7] Acquiescence relates to issues (1) exchange by petitioner of property solely for stock in the Claude Neon Displays, Inc., Elliott Claude Neon Lights, Inc., Alpha Claude Neon Corporation, New Jersey Claude Neon Corporation, and Claude Neon of Connecticut, Inc., (2) grants of exclusive rights to use of patents to certain corporations in exchange for stock; (3) in respect to previous issue the basis for gain or loss.
[8] Acquiescence does not relate to basis of property devised subject to a life estate.
[9] Nonacquiescence notice published in Cumulative Bulletin X-2 (1931), revoked.

ACQUIESCENCES—Continued.

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Clothier et al., Morris L	75740 76841	34	1066
Coast Counties Gas & Electric Co	69843	33 36	1199 385
Coats, Inc. (R. I.), J. & P.[1]	38904	28	1127
Colgate, Mary	61882	27	506
Collateral Equities Trust	92360	39	834
Collyer, Langley	81239	38	106
Colnon, Katharene Fruin	75491	36	791
Colorado & Southern Ry. Co.[2]	21974	36	1248
Colorado & Utah Coal Co	53799	26	588
Columbian Carbon Co.[3]	42743	25	456
Columbus Brick & Tile Co.[4]	42707	26	794
Commercial Investment Trust Corporation [5]	43495 50051	28	143
Commercial National Bank [6]	66959	36	239
Community Mausoleum Co.[7]	70384	33	19
Cone, Emma S., executrix [6]	68034	31	515
Cone, Irving H., estate of [6]	68034	31	515
Connally, Mary W. T	60434	32	920
Connecticut Electric Service Co	78279	35	444
Connecticut River Power Co	18591 29106	25	195
Connelly, James A.[8]	44081 45833 46267 51967 60566 66948	30	331
Connelly, L. B.[8]	44083 45834	30	331
Connelly, Mary B.[8]	44082	30	331
Conner, Archie R., administrator of the estate of Lucy Radulovich	88064	37	890
Conservative Gas Co	72391	30	552
Consolidated Holdings Corporation, manager, the North American Co. Common Stock Trading Account No. 6	82583	38	74
Consolidated Holdings Corporation, manager, the North American Co. Common Stock Trading Account No. 3/3-2	82585	38	74
Consolidated Holdings Corporation, manager, North American Co. Common Stock Trading Account No. 3-2	85027	38	74

[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] Acquiescence relates to following issues: Whether amount received in final settlement with Director General of Railroads in 1921, representing rental interest on completed additions and betterments and additional compensation for use of properties, constitutes taxable income for 1921 or during the period of Federal control; whether petitioner is entitled to a deduction in 1920 and 1921 for amortization of commissions paid in connection with the sale of its bonds prior to March 1, 1913; whether amounts of back mail pay received by petitioner and affiliated companies during 1920, in consequence of an order made by the Interstate Commerce Commission, constitute taxable income for that year.

[3] Nonacquiescence published in Internal Revenue Bulletin XI-14 (1932), revoked.

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

[5] 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.

[6] Estate tax decision.

[7] Acquiescence relates to issue whether a sale of a cemetery crypt is a sale of realty entitling the taxpayer to the installment basis when total amounts received in basic year do not exceed 40 per cent of gross price.

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Consolidated Holdings Corporation, manager, Preferred Stock Trading Account	82584	38	74
Continental Legal and Protective Association	44859	30	636
Continental Oil Co.[1]	28427	34	29
Contractors Construction & Supply Co.[2]	41963	20	772
Cook Drilling Co.[3]	82231	38	291
Cook, Elizabeth E.[4]	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
Corrigan, James W., estate of	80345	35	706
Cosmopolitan Bond & Mortgage Co.[5]	44617	30	717
Costello, Joseph [6]	22640	27	377
Cotton, G. E	59655	25	866
Couchman, William Venning	67729 70957	30	118
Coursey, Sarah A. W.[7]	71755	33	1068
Cox, Attilla	69698	31	819
Cox, Carrie G	69698	31	819
Cox, Edwin B.[8]	89292	38	865
Crane, Alexander B., estate of [9]	71718	30	29
Crane et al., Alexander M., executor [9]	71718	30	29
Crawford et al., Annie Laurie, executors of the estate of George W. Crawford	88072	39	521
Crawford, George W., estate of	88072	39	521
Crews, Charles	66766	30 31 33	615 187 441
Crews, Charles W.[10]	66766	37	387
Crews, Everett	66767	33	36
Crews, Everett, J.[10]	66767	37	387
Crews, Ralph W	66701	30 31 33 [10] 37	615 187 441 387
Crews, Robert E	66702	30 31 33 [10] 37	615 187 441 387

[1] Acquiescence in Board's decision with respect to computation of income for period January 1 to March 15, 1920.
[2] Nonacquiescence notice published in Cumulative Bulletin X-2 (1931), revoked.
[3] Nonacquiescence published in Internal Revenue Bulletin 1939-8, page 1, withdrawn.
[4] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[5] Acquiescence relates to issue involving method of accounting used by taxpayer.
[6] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[7] Acquiescence relates to the following issue: Inclusion in petitioner's taxable net income for 1930, the total profit received from sale of real estate by the trust.
[8] Gift tax decision.
[9] Nonacquiescence published in Cumulative Bulletin XIII-1 (1934), withdrawn.
[10] Acquiescence relates to question whether deduction for depletion in connection with development expenses was properly before the Board under mandates of the court.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Croker, Bula E	41121	27	588
Cromwell et al., William Nelson, executors [1]	42619	24	461
Cronan, Mr. and Mrs. Francis M	78185	33	668
Crouse, George N	43446	26	477
	51419		
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	26	234
	26875		
	28792		
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
Daly, Margaret P	65213	32	965
Dana, Edwin L	67669	36	231
Dana, Fra M	67670	36	231
Dana, Myer	50248	30	83
Dancer, Edith M., estate of [2]	70456	30	1277
Darol Trading Account	81519	34	837
Davidson, Edith L	72905	34	555
Davidson, James E	61741	34	555
	72904		
Davis, C. R.[4]	10299	10	1233
	32950	20	931
Davis, John A	20703	24	36
Davis Regulator Co	72667	36	437
Day, Charles, estate of [5]	75103	34	11
Deeds, Charles W.[6]	84663	37	293
	87383		
De Forest, Kate R.[6]	37284	27	373
Delaware & Hudson Co.[7]	50553	26	520
	50629		
Delone, Charles J	77865	34	1139
de Mille, Cecil B.[8]	52995	31	1161
	61291		
	65122		
	71951		
Dennett, Carl P.[9]	71858	30	49
Dennett, Marie G.[9]	72023	30	49
Dennis, Frank H., estate of [2]	50263	26	1120
Dennis, Merry M., executrix [2]	50263	26	1120

[1] Estate tax decision; nonacquiescence published in Cumulative Bulletin X-2 (1931), revoked.
[2] Estate tax decision.
[3] Acquiescence relates to deductions for additional royalties and officers' salaries and directors' fees.
[4] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.
[5] Estate tax decision; acquiescence relates to deduction of attorneys' fees in connection with the administration of the estate which has been estimated and contracted for but not yet paid.
[6] Gift tax decision.
[7] Nonacquiescence published in Cumulative Bulletin XI-2 (1932), withdrawn.
[8] Nonacquiescence published in Cumulative Bulletin XV-2 (1936), page 31, withdrawn; acquiescence relates to community property agreement.
[9] Acquiescence relates to deductibility of losses sustained by petitioners upon alleged sales of stock to each other during the tax year.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Denny, Reginald [1]	49516	33	738
Derby Realty Corporation [2]	81213	35	335
Detroit Trust Co. et al., executors [3]	35472	25	340
Dickey, Walter S., estate of	51643	32	1283
Dickinson, Albert G	35015 43176	23	1211
Diescher et ux., Samuel E.[4]	85715	36	732
Diescher et ux., August P.[4]	85716	36	732
Dillon, Herbert L	58025 59280	32	1254
Dirksen, Anna L., executrix	17717	24	1152
Dirksen, Theodore H., estate of	17717	24	1152
Dittmar, Emmy	63931	32	349
Dockweiler et al., Isidore B., executors and trustees [3]	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
Dombrowski, Leesa	78617	35	1028
Dome Co	41887	26	967
Domestic Management Bureau, Inc	77693 87586	38	640
Dominion National Bank	52165	26	421
Donnelly, Catherine, estate of	56443	31	577
Donnelly et al., Garrett J., executors	56443	31	577
Doric Apartment Co	44655	32	1187
Douglas Co., John	38726	23	1307
Downs, Phebe Warren McKean	86798	36	1129
Drake, Francis E	46804	30	475
Drexel Packing Co	20775	24	376
Droge, Christian H	79632	35	829
Duff, Robert C.[5]	37552	23	1342
Duke, Angier B	79942	38	1264
Duke, Anthony N	79943	38	1264
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, Lammot	79749	36	223
du Pont, Pierre S.[6]	26996	18	1028
Durkheimer Investment Co	83290	36	423
E.			
Eagle Pass & Piedras Negras Bridge Co	42460	23	1337
Eagleton, Mark D	79553	35	551
Easterwood, Jr., W. E	40181 63416	28	1283

[1] Acquiescence relates to issue involving deduction of operating expenses of aeroplane and depreciation thereon; and whether amounts expended for costumes, make-up, and wigs are deductible as ordinary and necessary expenses.
[2] Nonacquiescence published in Cumulative Bulletin 1937-1, page 33, withdrawn.
[3] Estate tax decision.
[4] Acquiescence relates to issue involving gain from inventions and patents exchanged for cash and stock.
[5] Acquiescence relates to issue 1 of decision.
[6] Nonacquiescence published in Cumulative Bulletin IX-2 (1930), revoked.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Easterwood, Jr., Mrs. W. E	40182, 63417	28	1283
Eaton, Cyrus S.[1]	86942	37	715
Edwards, B. F	89944	39	735
Edwards Drilling Co.[2]	75931	35	341
Eggerman Investment Co	79013	36	1196
Einstein, Robert E	75489	36	791
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.[3]	64779	30	1321
Eldridge, A. S.[3]	64778	30	1321
Electric Storage Battery Co	63010	39	121
Eleven Associates, Inc	60971	36	1168
Elgin Compress Co	49302	31	273
Elliott-Granite Linen Corporation	48212	26	936
Elmore Milling Co	46768, 52972	27	84
Emmons, Isabel Alley, estate of Thornton Emmons, administrator	88212, 88213	39	75
Emmons, Thornton	88212, 88213	39	75
Enameled Metals Co	19011	25	186
Ennis Ice Co	22021, 22022, 26259, 42184	24	40
Epstein, Jacob	70099	36	109
Erb et al., Ray L., executors [4]	29260	29	1350
Evans, A. T	64397	30	746
Evans et al., Anson, trustees	62664	29	710
Evans, Gordon M	88261	38	1406
Evans Products Co	43044	29	992
Evergreen Cemetery Association	30726	25	544
F.			
Fackler, John D	89253	39	395
Faison, J. M.[5]	81324	34	918
Faitoute, Moses W	82387	38	32
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

[1] Acquiescence relates to the following issues: (*a*) Deductibility of loss on transfer of securities and cash to Industrial Shares, Inc., for capital stock and assumption of notes of petitioner by said corporation. (*b*) Whether the market value of 12,500 shares of stock of the Central Alloy Steel Corporation constituted taxable net income when received during 1929.

[2] Nonacquiescence published in Cumulative Bulletin 1937-1, page 34, withdrawn.

[3] Acquiescence relates to issue whether dividends declared in 1929 constituted income to the petitioners in 1929 or 1930.

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

[5] Nonacquiescence published in Cumulative Bulletin XV-2 (1936), page 33, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Farmers Life Insurance Co.[1]	43317	27	423
Farmers' Loan & Trust Co., trustee	29465	26	1359
Farmers Union State Exchange	18105	30	1051
Fawsett, Charles F	64474	31	139
Fawsett, Charles F.[2]	72057	30	908
Federal Street & Pleasant Valley Passenger Ry. Co.	29758	24	262
Fehrman, William H., estate of [3]	87783	38	37
Ferguson, Harold G	70463	34	522
Fidelity National Bank & Trust Co. et al	85644 85648	37	473
Fidelity Savings and Loan Association	14862 31801 39406 45215	23	1059
Fidelity Union Trust Co., executor	69193	33	304
Fifth Avenue Bank of New York, executor [4]	69166	32	208
First Citizens Bank & Trust Co	71599	32	335
First National Bank of Boston, administrator	36438 46583	25	252
First National Bank of Braddock	89268	38	1244
First National Bank of Key West	45186	26	370
First National Bank in Mobile	63732	30	632
First National Bank of Skowhegan, Maine	77165	35	876
Fisher, Charles D., estate of	68338	32	82
Fisher, Miriam, estate of [4]	74826	36	534
Fitch, Florence H	51670	29	1299
Fleming, Lamar L.[5]	78362	34	384
Fleming, Margaret E. B.[6]	78416	36	773
Flinn et al., Clara Louise [7]	84483– 84491	37	1085
Florence Manufacturing Co	15383 26079	25	676
Flower et al., Henry C., trustees	85649	37	473
Folk, H. B	28396 31018	25	599
Ford, Allyn K	68707 70738	33	1229
Ford, Lina	68707 70739	33	1229
Ford, Robert E	68704 77740	33	1229
Ford, Sara C	68705	33	1229
Fordyce et al., William C., trustee	58647	30	988
Forest Products Chemical Co	46621	27	638
Forres, Lord	40229 43973	25	154
Forrester, W. A	73591	32	745
Foster, L. B.[8]	43086	26	1328
Foster, N. C., estate of [4]	32984	25	414
Foster et al., Willard, executor [4]	32984	25	414

[1] Acquiescence relates to issue in connection with option payment received for purchase of land.
[2] Nonacquiescence published in Cumulative Bulletin XIII-2 (1934) withdrawn.
[3] Nonacquiescence notice published in Internal Revenue Bulletin 1938-36, 1, withdrawn.
[4] Estate tax decision.
[5] Acquiescence relates to issue involving inclusion in income interest on the decedent's share of partnership capital; and inclusion in income the decedent's share of certain commissions earned by the partnership.
[6] Acquiescence relates to valuation date for cost purposes of securities acquired by petitioner under will of her father.
[7] Acquiescence relates to all issues except whether petitioner-beneficiaries are taxable on distributions made on January 4, 1933.
[8] Acquiescence relates to issue regarding filing of separate return for 1925.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Fox, Fontaine [1]	71084	30	451
Francke, Charles F	56438	32	613
Frank, Emil	50224	27	1158
Franklin, Herbert H	78673	37	471
Franklin Telegraph Co	29695	26	914
Franklin Title & Trust Co.[2]	51947 60167 67805	32	266
Frischkorn Development Co	30496 35170 42452	30	8
Frost, Joseph	73712	37	190
Fuhlage, Alfred E.[3]	61754	32	222
G.			
Gaffney, James E., estate of [4]	83151	36	610
Gallery et al., Daniel J., administrators of the estate of John J. McCarthy [4]	91196	38	1211
Gambill, A. A	47902	26	995
Gamble, Cecil H., executor [4]	60840	33	94
Gamble, James N., estate of	55595	32	892
Gamble, Mary H., estate of [4]	60840	33	94
Gamble & Stockton Co.[5]	42707	26	794
Gardner, Charles E.[6]	38575	25	1351
Garron et al., Isabel K. J., executors [4]	47705	26	292
Gassner, Louis [7]	4017	4	1071
Gaston, William A	52163 62309	34	57
Gay, D. J	58787	31	580
Gay, E. C	58788	31	580
Geeseman, Delbert B	81736	38	258
General Industries Corporation	79069	35	615
General Outdoor Advertising Co., Inc.[8]	66511	32	1011
George, Jerome R	45240	27	765
George Machinery Co., R. B	61218	26	594
Gessner, Herman [9]	77506	32	1258
Gibbs, G. Wildy	31329	28	18
Gibbs & Hudson, Inc	74683	35	205
Gillespie, F. A	89442	38	673
Gillette Rubber Co	43052 50073	31	483
Gimbel, Daniel	84542 85476	36	539
Ginsberg, Albert A	27628	24	18
Ginsberg, Nathan A	27629	24	18

[1] 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.

[2] Acquiescence relates to issue involving deduction of commissions paid on sale of mortgage notes.

[3] Acquiescence relates to issue whether taxpayer is entitled to the statutory personal exemption as the head of a family.

[4] Estate tax decision.

[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] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3735, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[8] Acquiescence relates to issue whether petitioner realized gain on transfer of certain of its assets to Central Outdoor Advertising Co. for stock of that company.

[9] Nonacquiescence published in Cumulative Bulletin XIV-2 (1935), page 31, withdrawn.

ACQUIESCENCES—Continued.

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		Volume.	Page.
Girard Trust Co., trustee	75740 76841	34	1066
Given, T. H., estate of	54556	29	1161
Gladstone Co., Ltd	79155	35	764
Glancy, Inc., A. R	62062	31	236
Globe Construction Co	43438 51694 53310	25	146
Godwin, Arthur M	61568 70407	34	485
Gold & Stock Telegraph Co	29470	26	914
Goldberg, Harry S.[1]	5389	4	1073
Golden, Edward A	27625	24	18
Goldman, Maxwell	30302	24	915
Goldring, John Ernest	87498	36	779
Goldsmith, Max	59722	29	804
Gordon, Alfred W	57483	29	275
Gordon, Kizzie [2]	22332	27	377
Gordon, Max L.[2]	22333	27	377
Gordon, William S.[3]	81080	36	202
Gore Bros., Inc	39538	30	1290
Gottlieb Realty Co	42528	28	418
Graeper, W. A	46619	27	632
Graham, George D	87570	37	623
Graham, Neva B	87571	37	623
Grand River Gravel Co	23085	22	1124
Grant, C. T., estate of	82574	36	1233
Grant, Harry Johnston	51794	30	1028
Grant, Helen E.[1]	62029 65577 68324	29	760
Grant, Josephine C., Trust	82177	35	239
Grauman's Greater Hollywood Theatre, Inc	86728	37	448
Great Southern Life Insurance Co	56540 64064 71114	[4] 33	512
	81328	36	828
Green, Calvin C	87639	37	25
Green, Frank O., estate of [5]	88343	37	734
Green, Robert D.[6]	53647	24	719
Green, W. S	43786 46373 63487	26	1017
Greenwood, Edna M	81485	34	1209
Greenwood, E. P	81484	34	1209
Grey Bull Corporation	47376	27	853
Griffis, Stanton [7]	38577	25	1351
Griffiths, Eva Lavino	63354	30	852

[1] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[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 in issue involving loss on account of bad debt owing law firm.

[4] Acquiescence in issue involving deductibility of interest paid on matured coupons surrendered.

[5] Estate tax decision.

[6] Acquiescence relates to transactions 1, 2, 3, and 4.

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

ACQUIESCENCES—Continued.

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Griffiths, George W	42498 82624	25 [1] 37	1292 317
Griffiths, John	43074	25	1292
Grippin, Minnie T	66345	36	1109
Griswold Co	68628	33	537
Groves, George S	87585	38	727
Groves, Wallace	77324	36	14
Guaranty Building & Loan Co	55352	27	754
Gudeon, Walter T	54739 60229	32	100
Gulf Coast Irrigation Co.[2]	33694 40081 41343	24	958
Gullett, C. E	52517	31	1067
Gullett, W. J	52518	31	1067
Gummey, Frank B.[3]	61056	26	894
Gurnee, Augustus Coe, estate of [4]	42619	24	461
Gutmann, Daniel N	85242	38	679
H.			
Haberland, Paul	29289	25	1370
Hafner, Alfred	48389 57132	31	338
Hahn, Harry W., estate of [5]	90310	38	3
Hailey-Ola Coal Co	30962	24	895
Hall, Bessie G	66825	36	1109
Hall, Edward T	81118	36	398
Halladay, Sarah P	26754	25	513
Hallowell 2d, Richard P	84777	39	50
Hamburg, Jr., Sam	30304	24	915
Hammonds, Mamie S	78210	38	4
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 [5]	44992	24	173
Hanscom et al., Melville, executors [5]	44992	24	173
Harbeson Lumber Co., W. B	33076 51012	24	542
Harkness, Edward S	65169 71310	31	1100
Harness, Mary S	71311	31	1100
Harnischfeger, Henry, estate of [5]	69636	31	224
Harnischfeger et al., Marie E., executors [5]	69636	31	224
Harper, H. T	62784	31	1126
Harrah, Marie E	25269	27	1305
Harrah, William F	21643	27	1305
Harris, Allen [6]	10980	10	1374
Harrison, Inc., J. M	50594	30	455
Hart, John H.[7]	52795 60115	27	528

[1] Acquiescence relates to fraud issue.
[2] Acquiescence relates to all issues except affiliation issue.
[3] Nonacquiescence published in Cumulative Bulletin XII-1 (1933), withdrawn.
[4] Estate tax decision; nonacquiescence published in Cumulative Bulletin X-2 (1931), revoked.
[5] Estate tax decision.
[6] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725), 12231), 46 (Dockets 61669, 68335, and 50 (Docket 7359), withdrawn.
[7] Nonacquiescence published in Cumulative Bulletin XII-1 (1933), page 17, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page
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
Hatfield, J. T	72788	32	1
Havana Electric Railway, Light & Power Co	40304, 42570, 47339	34	782
Havard, Charles	32841	25	1161
Hawk, Henry C., estate of	60690	29	1061
Hawk, Ida W., executrix	60690	29	1061
Hawke, E. R	76507, 76508	35	784
Hawkins, J. C.[1]	81323	34	918
Hawkins, Mayme [1]	81325	34	918
Hay, W. H	37499	25	96
Hayes, John A., estate of	76658	35	230
Hayman Co., B	16552	25	736
Hays et al., Eugene K., estate of [2]	78718, 79428, 80859	34	808
Hazelwood, N. H	61334	29	595
Headley, Hal Price and Genevieve M	88174	37	738
Hecla Mining Co	69916, 74813	35	454
Heiss, Charles	81179, 81997	36	833
Helck, Edwin J	56161	32	613
Hemphill, Clifford [3]	38573	25	1351
Henke Trust, Mrs. Catherine	63321	33	73
Henke, Henry, estate of	63321	33	73
Henningsen, Walter F	56668, 62845	30	301
Herder, George, estate of [4]	84051	36	934
Herder, Mary [4]	84052	36	934
Herff & Dittmar Land Co	60729, 68821	32	349
Hervey, W. R	46806	25	1282
Hesbacher, Ada L	78424	39	516
Hess, Nathaniel J	33279	24	475
Hettman, Walter E.[5]	22341	27	377
Heuisler, Marie Hilda	88632	38	26
Heuisler, Philip I., estate of	88632	38	26
Hewitt, Erskine	57032, 63141	30	962
Hiatt, Anna Belle	82569	35	292
Hiatt, P. J	82568	35	292
Hickman, Fannie Snyder	16253	24	438
Hickman, Howard C.[6]	37369	27	807

[1] Nonacquiescence published in Cumulative Bulletin XV-2 (1936), page 35, withdrawn.
[2] Estate tax decision.
[3] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[4] Acquiescence relates to issue involving accrual of interest.
[5] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[6] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7369), withdrawn.

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Himelhoch Bros. & Co	41728 42769 45663	26	541
Hindes, Joseph F., estate of	88633	38	26
Hines, William A	87399	38	1061
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
Hoffman, Jacob S., estate of	73092	36	972
Hollander, Adolph, estate of [1]	79862	35	183
Holliday, John H	64127	29	1272
Hollingsworth, A. E	54282	27	621
Hollister, George Buell	29461	26	1359
Holly Development Co	42771 52661	33	774
Holmby Corporation	51303	28	1091
Holmes, George W	53797	29	605
Hoover, Daniel P., estate of [1]	83745	38	387
Hormel, George A.[2]	93571	39	244
Hormel, Jay C.[2]	93572	39	244
Houghton, Alanson B	29445	26	1359
Houghton, Jr., Amory, estate of	29444	26	1359
Houghton, Arthur A	29446	26	1359
Houghton, Charles F., estate of	29465	26	1359
Houston Bros.[3]	12052	22	51
Houston, George T.[3]	13104 22008	22	51
Houston, Horace K.[3]	22009	22	51
Houston Land & Trust Co., trustee	63321	33	73
Houston, Philip D.[3]	22007	22	51
Howard et al., John K	52163 62309	34	57
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
Hudson-Duncan & Co	85220	36	554
Hughes, E. A	67335	32	1248
Hunt, Florence W	56325	35	1042
Hunter, C. W., executor	45417	26	417
Hunter, George H., estate of	45417	26	417
Hunter, Jr., Thomas A.[4]	58490	33	941
Huntington, Henry E., estate of	[5] 45429 [1] 47552	28 36	289 698
Huntington-Redondo Co	82366	36	116
Huntington, Samuel L	78916	35	835
Huntting, Henry R	75304	32	495

[1] Estate tax decision.

[2] Acquiescence relates only to the issue involving the taxability of the income of several trusts which is payable to the grantor's wife for life.

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

[4] Acquiescence in issue as to whether petitioner received a taxable distribution from Marshall Field & Co. on January 5, 1927, in the amount of $1,118.51.

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

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Hurt, Joel, estate of	28099	30	653
Hutchins, Charles P.[1]	49070	34	845
Hutchins, Lena C.[1]	49069	34	845
Huyler's, Inc	28369 29154 39841	24	425
Hyman, Arthur B.[2]	79557	36	202
I.			
Illinois Central R. R. Co	62023	30	1107
	62991	34	1
Illinois Power & Light Corporation	56299 59687	33	1189
Illinois Rural Credit Association [3]	5058	3	1178
Income Syndicate, Inc	88321	37	926
Independent Ice & Coal Co	67639	27	1346
Indiana Lamp Corporation	52761	28	491
Industrial Loan & Investment Co.[4]	20664	17	1328
Ingalls, Charles C., estate of [5]	57835	25	773
Ink, Mary	75731	35	846
Inland Finance Co.[6]	29916 39686	23	199
Insull, Margaret A	68002 68504	32	47 1070
Insull, Samuel	68003 68503	32	47 1070
Insull, Jr., Samuel	68001 68505	32	47 1070
International Cigar Machinery Co	71331 76285	36	124
International Mortgage & Investment Corporation	78741	36	187
International Ocean Telegraph Co	29585	26	914
International Shoe Co	82264 82265 83607 87162	38	81
Interstate Realty Co	46272 50981	25	728
Irving Trust Co	78489	36	146
Irwin, Royal W	79044	37	51
Isenberg Trust, Helen L	71373	35	1001
Isenberg Trust, Paul Otto	71374	35	1001
Iten Biscuit Co	16429 20899	25	880
Iverson, I. C	48838	29	863
Iverson, Ruphane B	48837	29	863
J.			
James, Arthur Curtiss	18395	31	712
James, William L	70278	30	491

[1] Acquiescence with respect to holding that petitioner was not a transferee.
[2] Acquiescence relates to issue whether petitioner is entitled to deduct losses from sale of securities which were purchased by petitioner's wife; and loss from bad debt owing to law firm of which petitioner was a member.
[3] Nonacquiescence published in Cumulative Bulletin VII-1 (1928), withdrawn.
[4] Nonacquiescence published in Cumulative Bulletin IX-2 (1930), withdrawn.
[5] Estate tax decision.
[6] Nonacquiescence published in Cumulative Bulletin X-2 (1931), withdrawn.

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Johnson, Christopher W	75493	36	791
Johnson, Florence D., estate of	75969	33	1003
Johnson, Florence Lindsay, estate of	57890	35	141
Johnson, William Pierce, estate of	53634 54083	35	141
Jones, Chester Addison [1]	50206	31	55
Jones, Durham	84778	39	50
Jones, R. D	69858	29	928
Jones, Inc., T. R	77871	35	232
Jones et ux., William E	84779	39	50
Jordahl & Co., Inc	59581	35	1136
K.			
Kahn, Harry	82861	38	1417
Kahn, Joseph	82860	38	1417
Kammerdiner, J	41643 46555	25	495
Kansas City Leasehold & Improvement Co.[2]	35718	17	213
Kansas City & Memphis Farms Co	51060	25	1166
Kansas City Southern Railway Co. and affiliated companies [3]	22668 35527 35528 35529 35530 35531	22	929
Karger, Marks, estate of	70659 86633	38	209
Karger et ux., Manasse	70661 71758 86632 86634	38	209
Kasch, Ed	48293	25	284
Kasch, Theodora	48293	25	284
Kauai Terminal, Ltd	87664	36	893
Kell, Frank	69677	31	212
Kell, Mrs. Frank	69678	31	212
Kell, Joe A	69681	31	212
Kell, Willie May	69685	31	212
Kelley, E. Florence	89878	38	1292
Kelley, Herbert W	89877	38	1292
Kelley, John P	38233	26	212
Kelley, Joshua C	89876	38	1292
Kelly, Orie R. and Grace V	79959	36	507
Kennedy, Elizabeth Earhart	88180	38	1307
Kent, Everett E	39576 42589 46064	26	482
Kessler, J. M	52640	31	849

[1] Acquiescence as to issue whether petitioner should be allowed to file his return on community property basis.

[2] 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.

[3] 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.

ACQUIESCENCES—Continued.

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King County Insurance Association	88016	37	288
King, Henrietta M., estate of	52632	31	95
Kingsbury, K. R	56382	31	1126
Kinnear, Roy J	80103	36	153
Kinney Co., Inc., G. R	31397 32980	26	1091
Kirby, Lelia S.[2]	73753	35	578
Kirchner, Julius C	25428	27	1305
Kirk et al., Elizabeth S., executrices and executor of the estate of C. Henderson Supplee [3] [4]	89363	39	902
Kleberg et al., Robert J., executors	52632	31	95
Kleeden, Mark	88730	38	821
Kleeman, Arthur S	68841	35	17
Knight, E. D	56865	28	188
Knox, Seymour H.[3]	82450	36	630
Kohler, G. A. E., estate of	76208	37	1019
Kohler, John B	79607	37	1019
Kohler, Mary E	79606	37	1019
Kopple, Morris D	69323	35	1056
Kraemer, Samuel	37822	25	686
Krull, Francis [5]	16985	10	1096
Kuhn, Ida L	32609 40267	24	216
Kunau et al., Oscar F. C., trustees	64815	27	509
L.			
Laird, Roy H	79760	35	75
Laird, William Winder, estate of [6] [7]	51654	38	926
Lake Charles Naval Stores	34630 36940	25	173
Lambeth, Charles E	77989	38	351
Landers, Douglas J., estate of [6]	35443	21	1347
Lang et al., Florence O. R., executors [6]	71117	32	527
Lang, Henry, estate of [6]	71117	32	527
Lang, Julius C., estate of [8]	68316	34	337
Langworthy, Marjorie C.[9]	71961	30	1216
Lanski, Samuel	49347	34	1019
Lawrence, Gladys G	75494	33	868
Lawson, John	40232	25	154
Lea, Helen Sperry	74287	35	243
Leamington Hotel Co	48413	26	1004
Lehman et al., Allan S., executors, estate of Harold M. Lehman [6]	86829	39	17
Lehman, Harold M., estate of [6]	86829	39	17
Leidesdorf, Samuel D	48305	26	881

[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 does not relate to issue involving basis for computing taxable gain in 1927, 1928, and 1929 from the sale of bonds of the Kirby Lumber Co.

[3] Gift tax decision.

[4] Acquiescence relates only to the issue, Did the Commissioner err in including, for gift tax purposes, the entire value of certain single premium policies instead of one-half value thereof?

[5] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[6] Estate tax decision.

[7] Acquiescence relates only to the issue, Is the estate entitled to additional deduction for attorneys' fees?

[8] Estate tax decision; acquiescence relates to deductibility of full amount of $1,041.89 additional income taxes accrued on decedent's separate income tax return for 1927.

[9] Acquiescence relates to reorganization issue.

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Letts, Jr., Arthur	62106	30	800
Levin, Albert A	60969	36	1168
Levine, Hyman [1]	7435	8	298
Lewis, Sr., A. S	56163	32	613
Ley, George W.[2]	22336	27	377
Ley, Mary C.[2]	22337	27	377
Liberty Farms Co	26717 29899	22	1298
Liberty Hosiery Mills	66546	31	64
Lichter, John J	75490	36	791
Lido Building Co., Inc	53385	31	461
Lilienfeld, Julius E	79298	35	391
Lincoln, Robert Todd, estate of [3]	39167	24	334
Lippincott et al., J. Bertram, executors [3]	49233	27	735
Lippincott, Walter, estate of [3]	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
Living Funded Trust of Harry E. Lyman	78200	36	161
Lloyd, S. Rose	75765	32	887
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
Lowe, Herbert G., estate of [3]	89144	38	117
Luhrig Collieries Co	40048	26	194
M.			
MacCallum Gauge Co	70437	32	544
Mackubin, George	83671	36	255
Mackubin, Maude P	83671	36	255
Magee Trust, Edith Grant	82178	35	239
Malta Temple Association [6]	29476	16	408
Manhattan Life Insurance Co	32940	32	492
Manhattan Mutual Life Insurance Co	81821	37	1041
Manistique & Lake Superior R. R. Co	35337	29	331
Marbara Corporation	67870	36	519
Markham Irrigation Co.[7]	41344	24	958
Marlow et ux., Ernest W	87400 87401	38	1061

[1] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

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

[3] Estate tax decision.

[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 (1929), withdrawn.

[7] Acquiescence relates to all issues except affiliation issue.

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Marston, Edgar L	61961	29	976
Martin, C. F	61735	34	111
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
Mason, Frank A	84780	39	50
Mason, Mary S., estate of [3 4]	84133	38	425
Masoni, Paul	58413	33	843
Matagarda Canal Co.[5]	40082 41345	24	958
Matchette, Franklin J	40710	26	909
Matthews, J. P	26250	22	858
Mauch, Russell C. and Bessie	72269	35	617
Mauldin, I. M	26239	22	858
Mayer, Mark A	78980	36	117
McArthur, R. A	88731	38	821
McAuliffe, Agnes A	49071	29	624
McCahan, Rena S	79039	35	943
McCall, Florence [3]	47702	26	292
McCarter, Uzal H	69193	33	304
McCarthy et al., John J., estate of [3]	91196	38	1211
McClung, Louise Pepper, administratrix of Georgia Anna Pepper [3]	89903	39	667
McConnell, Stella H	43478	29	32
McCool, Bess	46059	24	506
McCormack, Frederick C	88630	38	26
McCormick, L. Hamilton, estate of [3]	88951	38	308
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
McInerney, John F., estate of	83276	35	489
McKee, Arthur G	61121	37	1135
McLaughlin, Thomas J	59788	29	247
McLennan, A. R	26730	25	1052
McMillan, William Northrup, estate of [6]	45966	27	318
McRae, Louise C., executrix [3]	32303	30	1087
McRae, Philip, estate of [3]	32303	30	1087
Mead Coal Co., C. H	42718 42719 54660	28	599
Meherin, P. W.[7]	81035	35	472
Mellbank Corporation	80008	38	1108

[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] Estate tax decision.
[4] Acquiescence relates to all issues except the issue, Did the decedent have more than a life interest in the estate of her mother?
[5] Acquiescence relates to all issues except affiliation issue.
[6] Estate tax decision; acquiescence, except in so far as concerns the question of situs.
[7] Acquiescence relates to dividend issue.

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Mellon, R. B., estate of, Union Trust Co. of Pittsburgh et al., executors	74241	38	1259
Memphis Memorial Park	49259 53458	28	1037
Mente, Eugene W	54701	29	804
Mente, J. G	54708	29	804
Mente & Co., Inc	51305	29	804
Meraux, L. A	82461	38	200
Meraux, Mrs. L. A.[2]	82462	38	200
Mercantile-Commerce National Bank in St. Louis et al., executors and trustees [3]	35443	21	1347
Mercantile Trust Co. of Baltimore et al	68338	32	82
Merkra Holding Co., Inc	80583	39	117
Merrill, Isaac L	61722	31	530
Messer, Richard B., estate of [3]	42513	27	556
Metropolitan Edison Co	57869	35	1110
Metropolitan Properties Corporation	45032	24	220
Meyer Shoe Co., H. A	91260	39	444
Michigan Central R. R. Co.[4]	19930	28	437
Michigan Trust Co. et al., executors [5]	42513	27	556
Milby & Dow Coal & Mining Co	22021 22022 26259 42184	24	40
Miles Realty Co.[6]	51394	31	443
Milgrim & Bros., Inc., H.[6]	33177	24	853
Miller Bavier C., estate of	84444	38	487
Milliken, Sallie Gibbs	31330	28	18
Milton, Josephine Johnson	54092	35	141
Minneapolis, St. Paul & Sault Ste. Marie Ry. Co	74118	34	177
Mississippi Packing Co., Inc	20772	24	376
Missouri State Life Insurance Co.[7]	58241 62386	29	401
Mitchell et ux., J. A	90710 90711	38	1336
Mitchell, John T. H., estate of [3]	74805	37	1
Mitchell, L. C	41610	28	767
Mitchell, Oscar [8]	41680 41874 54673	27	101
Mobile Bar Pilots Association	77016 81295	35	12

[1] Acquiescence in Board's action with respect to the following: (*a*) That joint account of "A. W. Mellon and R. B. Mellon" was not a partnership; (*b*) deductions of losses resulting from sales to Ascalot company; (*c*) that taxpayer's return was not false and fraudulent; (*d*) that taxpayer was not during 1931 the owner of bank stocks; (*e*) that taxpayer's share of payments made in settlement of Corbett claim should be subtracted from final step in Union liquidation in computing taxable gain therefrom; (*f*) that March 1, 1913, fair market value of common stock of McClintic-Marshall Construction Co. was $300 per share; (*g*) that taxpayer made deductible contributions to "A. W. Mellon Educational and Charitable Trust."

[2] Acquiescence relates to all issues except the issue with respect to the disallowance of $1,800 as an alleged loss from the wrecking of an automobile in 1931.

[3] Estate tax decision.

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

[5] Nonacquiescence published in Cumulative Bulletin XIV-1 (1935), withdrawn.

[6] Acquiescence relates to issue 1 of decision.

[7] 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.

[8] 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.

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Mobile Light & Railroad Co.[1]	41026, 42062	23	543
Monroe Sand & Gravel Co., Inc	75782	36	747
Montgomery, Robert H. and Lois C	85542	37	232
Moore, Edward W., estate of [2]	58720	33	108
Moore, Frank J	77485	37	378
Moore, Louise C., executrix [2]	58720	33	108
Moorehead, William A	25853	22	858
Moorshead, O	57045	28	253
Morgan, Jr., Edwin D	76660	35	230
Morgan, Katherine Huntington, estate of	79652	34	433
Morris, Sol H	85277	38	265
Morton, Mary, estate of [3]	82242	37	459
Mossman, B. Paul [3]	59747	32	596
Mossman, William E., estate of [3]	59747	32	596
Mountain View Cemetery Association	83757	35	893
Mount Hope Cemetery Association	76039, 76640	37	671
Moyer, Walter W	82588, 87119	35	1155
Muchnic, H. E., administrator	63789	29	163
Munroe, Grace Johnson	76942	32	995
Murchison, Mrs. A. H	62838	28	257
Murphy, Mae A. Kelley	38222	26	212
Murray, Edward J	40176, 58858	28	624
Murray, J. Edward	88629	38	26
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
Mygatt, Henry D	76657	35	230
Mygatt, Roland F	67564	36	1109
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
	78882	37	689
National Mill Supply Co	37001	23	1362
National Packing Corporation	31668, 33971	24	952
National Tile Co	64013	30	32

[1] 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.

[2] Estate tax decision; acquiescence in holding that the commuted values of the installment policies in the first two groups should be included in the gross estate.

[3] Estate tax decision.

[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.

ACQUIESCENCES—Continued.

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Neill, James [1]	9290	8	299
Neon Electrical Products Corporation, Ltd., Claude	75685	35	563
Neracher, George A	74411	32	236
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 [2]	28045	26	696
Newbury, Mollie Netcher	38049	26	101
Newbury, Mollie Netcher, trustee	38052	26	101
Newell et al., Sterling, executors [3]	57835	25	773
New England Power Co	18593 29105	25	195
Newman, Bellagie I	78580	37	72
Newman & Carey Subway Construction Co	88775	37	1163
Newman et al., Rose, executors [3]	59598	31	772
Newman, Samuel, estate of [3]	59598	31	772
New Market Investment Co.[4]	35719	17	213
Newton, Elizabeth K.[3]	47703	26	292
Newton, Joseph R., estate of [3]	47705	26	292
New York Central R. R. Co.[5]	19932 34437 62040	28	437
New York, Chicago & St. Louis R. R. Co	21047	23	177
Niagara Share Corporation of Maryland	70813	31	832
Nibley-Mimnaugh Lumber Co	17527	32	791
Nicholson et ux., T. G	89892 89893	38	190
Nicodemus, Jr., F. C.[6]	52326 62569	26	125
Nippert et al., Alfred K., executors and trustees	55595	32	892
Noonan Estate Trust, F. R	62664	29	710
North Side Lumber & Timber Co	34924	27	1187
Northern Coal Co.[7]	34945	24	307
Noyes, Jansen [8]	38574	25	1351
O.			
Oak Woods Cemetery Association	77321 80932	38	121
Oakley, Richard H	45778	24	1082
O'Connor, Martin P	74383	35	402
O'Donohoe, John F	69686	31	212
O'Donohoe, Mrs. John F	69680	31	212

[1] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[2] Nonacquiescence published in Cumulative Bulletin XI-2 (1932), revoked.

[3] Estate tax decision.

[4] 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.

[5] 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.

[6] Nonacquiescence published in Cumulative Bulletin XI-2 (1932), withdrawn.

[7] Acquiescence relates to inventory issue.

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Oklahoma Contracting Corporation	77871	35	232
O'Laughlin, A. C., estate of	84319 86966	38	1120
Olds, Margaret A.[1]	49068	34	845
Olmsted, George W.[2]	44090 45745 48121 54714 60746	30	331
Olmsted, Iva C.[2]	44089 45746 48143 54713 60745	30	331
Olympia Harbor Lumber Co	64272	30	114
Ontario Realty Co.[3]	35721	17	213
O'Rear, E. C.[4]	32335	28	698
Oregon Casualty Association	86401	37	340
Ortiz Oil Co.[5]	86112	37	656
Osborne, Owen, estate of [6]	59957	29	374
P.			
Pacific & Atlantic Telegraph Co. of the United States	29586	26	914
Pacific Coast Biscuit Co. et al.[7]	71588	32	39
Pacific Employers Insurance Co	78000	36	585
Package Machinery Co	54334	28	980
Page, De Witt	78907	34	590
Paine et al., Francis Ward, executors	34113	25	764
Paine, William A., estate of	34113	25	764
Palladium Amusement Co	79746	37	149
Palm Beach Mather Co	43850	24	536
Palmer, Bradley W.[8]	62652	32	550
Pan American Life Insurance Co.[9]	84638	38	1430
Parke, Davis & Co	62717	31	427
Parker, Clara B., executrix [10]	58604	31	644
Parker, George D., estate of [10]	58604	31	644
Parker et ux., Harold G	90260	39	423
Parker, Wm. H., estate of	88631	38	26
Parkland Ice & Coal Storage Co	67640	27	1346
Parriott, F. B.[11]	30989	28	917

[1] Acquiescence with respect to holding that petitioner was not a transferee.

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

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

[5] Acquiescence relates to following issue: Whether respondent erred in including in petitioner's gross income certain sums received by Farrell and Moncrief and by the trustees of the Kilgore Independent School District from oil produced from properties operated by petitioner.

[6] Nonacquiescence published in Cumulative Bulletin XIII–1 (1934), withdrawn.

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

[8] Acquiescence relates to issue whether stock rights were capital assets where the stock in respect of which they were issued had been held for more than two years prior to sale of the rights.

[9] Acquiescence relates only to the issue involving the deductibility of $9,232.31 and $257.88 as interest in connection with certain life policies and trust agreements, respectively.

[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.
Patterson, Elizabeth P	76058	33	57
Patterson, Frank H., estate of [1]	76580	36	407
Peabody, Mary S	79907	38	1086
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.[2]	22338	27	377
Penn Mutual Life Insurance Co	52577 59670	32	839 876
Pennsylvania Indemnity Co	71992	30	413
Pennsylvania Investors Co	20766	24	376
Pennsylvania Water & Power Co	56720	36	467
Peoples Life Insurance Co.[3]	66969 71744	31	706
Peoples State Bank	91697	38	857
Pepper, Georgia Anna, estate of [4]	89903	39	667
Perata, John M	57923	33	843
Perkins, Albert T	75488	36	791
Perkins et al., Jacob	28701	25	1123
Perkins et al., Thomas N.[5]	57848 58305 58306 58443 58475 58770 58772 58904 58905 58906 58907 58917 58918 58925	33	606
Perry, Howard E	69855	33	394
Perry, Raymond A., estate of	63645	32	442
Pershouse, Alice E	26749	25	513
Pershouse, Mabel B	26748	25	513
Peters, Andrew J.[6]	54050	28	976
Phillips, C. J	47901	26	995
Phoenix Insurance Co	48867	29	291
Pictorial Review Co	43995	26	472

[1] Estate tax decision; acquiescence relates to issue whether transfer was made in contemplation of death.
[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 treatment of rental value.
[4] Estate tax decision.
[5] Acquiescence relates to the following issues: Is any part of the deficiency as to Eastern Carbon Black Co., Thompson Oil Co., G. H. M. Co., and Davis Bros. Co. due to fraud with intent to evade tax? Did the shares of Interstate Gas Co. stock received by G. H. M. Co. as a dividend from Eastern Carbon Black Co. constitute in part a liquidating dividend?
[6] Nonacquiescence published in Cumulative Bulletin XII-2 (1933), revoked.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Piggly Wiggly Corporation	25126, 43860	28	412
Pitkin, George P	65173	31	403
Pittsburgh Athletic Co.[1]	60569, 66964, 67422	27	1074
Pittsburgh Brewing Co	83386, 88626	37	439
Pittsburgh Melting Co	44858	30	636
Pittsburgh & West Virginia Ry. Co	72157, 72158	32	66
Pitzman Methudy Trust	81750	36	81
Pizitz Dry Goods Co., Louis	46585	22	161
Plant, Henry Bradley [2]	43889, 48984, 52094, 55659, 60923	30	133
P-M-K Petroleum Co.[3]	50576, 54779	24	360
Polar Ice & Coal Co	67638	27	1346
Ponvert, Luisa Terry, estate of [4]	81568	35	568
Pope, Olive R	29274	25	1161
Porter, F. Stanley	82425	36	475
Portland Co-Operative Labor Temple Association	89276, 93304	39	450
Powel, T. I. Hare [5]	64464	27	55
Powell, Benjamin I	50380	26	509
Powell, Joseph W	73763	34	655
Prairie Oil & Gas Co	57117	29	113
Preston, John W	74560	35	312
Preston, Sara R	74559	35	312
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, 54968	27	28
Prosser, Constance B	26752	25	513
Provident Trust Co. of Philadelphia, executor [7]	59957	29	374
Prudential Loan Co	78869	37	975
Putnam Trust Co	34743	26	655
Putty, Mrs. Malcolm	69683	31	212
Q.			
Quinn, Evan V	8544	26	970
Quinn, Florence M	80005	35	412
Quinn, Martin M	8598	26	970
Quinn, Paul H	8574	26	970

[1] Nonacquiescence published in Comulative Bulletin XII-2 (1933), revoked.
Acquiescence relates to question whether certain dividends received by the petitioner from the Griswold Company are subject to tax; nonacquiescence as to this issue published in Cumulative Bulletin XIII-2 (1934), page 33, withdrawn.
[3] Acquiescence relates to third issue of decision.
[4] Estate tax decision; nonacquiescence published in Cumulative Bulletin 1937-1, page 46, withdrawn.
[5] Nonacquiescence published in Cumulative Bulletin XII-1 (1933), withdrawn.
[6] Acquiescence relates to deduction of loss resulting from liquidation of one of its subsidiaries.
[7] Nonacquiescence published in Cumulative Bulletin XIII-1 (1934), withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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R.			
Rains, Ruth B	86469	38	1189
Ramish, Adolph	39568	30	1290
Ramish, Inc., Adolph	39569	30	1290
Rand, Jessie H., estate of [1]	81984	36	1160
Randall, George W., estate of [2]	5850 6765	4	679
Randall, Marjorie G.[3]	38971	27	475
Rands, Inc	74942	34	1094
Rands, William C	62066 68846	34	1107
Rapp, John W., estate of	28618	24	1061
Rathborne, Georgie W	83106	37	936
Rathborne, J. Cornelius	83105 84655	37	607
Raugh Realty Co	32822	26	48
Ray Oil Co.[4]	34332	28	1204
Raymond, Ralph Leslie [5]	79130	34	1171
Rea, Henry Oliver	80265	35	1132
Reardon & Sons Co., John	20773	24	376
Record Petroleum Co	50962	32	1207
Reese, Augusta Bliss	62424	29	565
Remco Steamship Co	57728	30	579
Rew, George Campbell, estate of	41404	34	451
Reynard Corporation [6]	67386 70795	30	451
Reynolds Cattle Co	68445 71463	31	206
Reynolds, Marie B., estate of [1]	81060	38	59
Rhea, Isaac T	54960	29	804
Rhea, Mrs. Isaac T	54959	29	804
Rhodes, Herman M	54899	34	212
Rialto Mining Corporation	48692 56877	25	980
Richards & Hirschfeld, Inc	21715	24	1280
Richardson, Amy S., executrix [1]	64023	31	245
Richardson, Charles W., estate of [1]	64023	31	245
Richmond, Fredericksburg & Potomac R. R. Co.[7]	68876	33	895
Ridgway, Robert	77666	35	122
Riggs National Bank [8]	30903	17	615
Ritter Lumber Co. et al., W. M	42833 42834 42835 48836 43604 43605 43606 48749 57319 57320 57321 57322	30 33	231 117

[1] Estate tax decision.
[2] Nonacquiescence published in Cumulative Bulletin X-2 (1931), page 99, withdrawn.
[3] Acquiescence in that part of decision relating to deductibility of loss sustained in 1924 from sale of residence.
[4] Acquiescence relates to issue whether petitioner was taxable in 1923 as a trust or as an association.
[5] Nonacquiescence published in Cumulative Bulletin XV-2 (1936), page 44, withdrawn.
[6] 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.
[7] Acquiescence relates to increased deduction for loss on retirements of roadway property.
[8] Nonacquiescence published in Cumulative Bulletin X-2 (1931), withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Roach Studios, Inc., Hal	61750	31	828
Roberts et ux., E. A	80697	36	549
Robertson, Callie E	42496	28	635
Robertson, Cordelia Biddle, general guardian of the property of Anthony N. Duke	79943	38	1264
Robertson, R. R	42497	28	635
Robison, Lester L	53878	33	1107
Robson, Clara P., estate of	26645	25	949
Rocky Mountain Oil Co.[1]	79421	36	365
Rodeo-Vallejo Ferry Co.[2]	36411 48528	24	936
Rodewald, F. Kingsley	76659	35	230
Roerich, Nicholas [3]	83065	38	567
Rogers, Brown & Crocker Bros., Inc	67581	32	207
Rogers et ux., Charles A	86181	38	16
Rolandelli, Guiliano [4]	57479 67286	33	843
Rosenberg, Louis	27626	24	18
Rosenbloom Finance Corporation [5]	35778 40903	24	763
Ross, Olive	83198	37	928
Rossheim, Irving D.[6]	57503	31	857
Roth, Gorton	22568	26	631
Roth, Henry, estate of	88776	37	1163
Roth, W. A.[7]	45065	22	587
Roy & Titcomb, Inc	29138	24	969
Royal Insurance Co., Ltd	83632	38	955
Rudman, I.[8]	85886	36	803
Rudman, Rose [8]	85887	36	803
Ruiz, M	67097	30	746
Rushmore, Charles E., estate of [9]	77164	36	480
Russel, Albert W	73423	35	602
Russell, C. C	46060	24	506
Russell, Mrs. C. C	46061	24	506
Rutledge, T. W	58152	37	1135
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 [10]	45966	27	318

[1] Acquiescence relates to inclusion in income of oil payments reserved by and paid to petitioner's assignors, for purposes of computing taxable income and allowable depletion.

[2] Acquiescence relates to deduction of contribution to Victory Highway Association.

[3] Acquiescence relates only to the issue involving salary and per diem allowance received by petitioner from the United States Government in 1934.

[4] Acquiescence relates to reduction of profit of members of syndicate by the 2½ per cent commission due syndicate manager; and whether portion of the syndicate income consisting of dividends should be taxed to the individuals only at surtax rates.

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

[6] Acquiescence relates to issue whether petitioner realized additional compensation on sale of stock of Warner Bros. Pictures, Inc., in 1928.

[7] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2, (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[8] Acquiescence relates to following issues: Inclusion in income of oil payments made to assignors directly by pipe line companies; deduction of cost for cement used in drilling oil well; deduction of drilling cost as an expense.

[9] Estate tax decision.

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

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Salomon, Leon [1]	3725	4	1109
	12231	8	979
Sanders, W. C	26651	25	949
Sanford, Lisa W., estate of [2]	83466	38	273
San Marcos Compress Co	49304	31	273
San Martinez Oil Co	37447	25	218
	43121		
Sanson, Harold R., estate of [2]	85192	36	651
Sappington, G. Ridgely	51944	25	1385
Savings Feature of the Relief Department of the Baltimore & Ohio R. R. Co.	59486	32	295
	61156		
Saxe, Frank J., estate of [3] [4]	79276	37	535
Scatena, Elvira [5]	63920	32	675
Schepp Co., L	42908	25	419
Schermerhorn, Harriet Pullman	43145	26	1031
Schumacker, J. P	59612	32	1242
Scofield, Marion, estate of [2] [6]	80628	38	51
Scovill Manufacturing Co	29854	25	265
	30238		
Scruggs, Gross R	33610	24	1174
Scruggs, Marian P	38711	24	1174
Scruggs Investment Co	46270	24	1174
Scullin, John, estate of	75524	36	791
Seaboard Security Co	79970	38	560
Seaboard Small Loan Corporation	79971	38	560
Seaconnet Coal Co. [7]	18089	24	307
Searles Real Estate Trust	24489	25	1115
Seaside Improvement Co	77018	37	92
Second National Bank of Philadelphia	76825	33	750
Securities Co	40553	25	446
Security First National Bank of Los Angeles et al., executors [8]	45429	28	289
Security-First National Bank of Los Angeles, trustee	86064	36	72
Selbert, Ltd	57059	29	319
Sells Sporting Goods Co	20771	24	376
Shaffer, C. B. [9]	29259	29	1350
Shand, Gadsden	26238	22	858
Shapiro, Samuel	65158	29	1012
Sharp et ux., H. Rodney	84259	38	166
	84260		
	86704		
	86705		
Shaw, David, estate of	34499	24	1235

[1] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2, (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Docket 61669, 68335), and 50 (Docket 7359), withdrawn.

[2] Estate tax decision.

[3] Estate tax decision; acquiescence relates to the following issue: Should there be included in the gross estate the value at the date of decedent's death of certain property which he had transferred in 1928 to a trustee in trust to pay the income to him for life, with remainder over of the corpus to certain named beneficiaries?

[4] Nonacquiescence as to one issue, published in Internal Revenue Bulletin 1938-31, page 1, withdrawn.

[5] Acquiescence relates to issue involving inclusion of fair market value of rights to buy bonds in petitioner's income.

[6] Acquiesc ence relates to the issue involving the allowance of a deduction from gross estate of $1,000 paid to the Bonita School pursuant to promise made by decedent.

[7] Acquiescence relates to inventory issue.

[8] 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.

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Shea, R. P	37835, 40034	24	798
Sheets, Leveret T., estate of [1]	75223	35	220
Shepherd, Cettie G., estate of [1]	69166	32	208
Shiverick, Jane B	84442	37	454
Siegel, Alexander B	82863	39	60
Silberblatt, Solomon [2]	46335	28	73
Sills, Milton, estate of [1]	64737	35	815
Simcoe Realty Co.[3]	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, E. F.[4]	19175, 19791	28	988
Simms Oil Co.[5]	61497	28	1106
Simms Petroleum Co.[5]	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
1620 Broadway Corporation	78836	36	149
Skewes-Cox, Edith Page [6]	61669, 68335	29	167
Slack, A. B., estate of [7]	72404, 78525	35	271
Slack, Jr., William H	77004	36	105
Sloss, Hattie Hecht [8]	64835	33	830
Smathers, E. E., estate of [9]	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
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

[1] Estate tax decision.

[2] Nonacquiescence published in Cumulative Bulletin XII-2 (1933), page 25, withdrawn.

[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 issues 3, 5, and 7 set forth in syllabus of published decision.

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

[6] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62329, 65577, 68224), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[7] Acquiescence in issue involving deduction of attorney's fees paid by decedent.

[8] Acquiescence relates to the following question: Did petitioner receive a dividend from Hecht Broadway Corporation in 1929 in the amount of $1,503?

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

ACQUIESCENCES—Continued.

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Sneed, Jr., J. T	45694	[1] 30 / [2] 33	1121 / 478
South Memphis Land Co	44500	27	897
Southard, Jennie	42592	27	554
Southern & Atlantic Telegraph Co	29694	26	914
Southern Railway Co. et al.[3]	21481, 29951, 37887–37898	27	673
Southern Security Co	79972, 79973	38	560
Spangler, Georgia M	56320	29	263
Spangler, J. W	56321	29	263
Sperry, Edward G	74297	35	243
Sperry, Elmer A., estate of	74296	35	243
Sperry, Jr., Elmer A	74298	35	243
Sperry, Zula A., estate of	74299	35	243
Sprague-Sells Corporation	42006, 42434	30	1165
Sprague & Son Co., C. H.[4]	34946	24	307
Sprunt & Son, Inc., Alexander	38408	24	599
Stacy, Marjorie Lipe	78477	37	786
Standard Beef Co	20770	24	376
Standard Conveyor Co	33159, 36393, 40873	25	281
Standard Island Creek Coal Co	35260, 35617	28	690
Standifer Construction Corporation, G. M	51636	30	184
Stanton, George H	62100	36	112
Starr, Frank C	69259	31	671
Stauffen, Theodora B	26756	25	513
Stearns, Robert L	37573	24	1013
Steege, W. E	67098	30	746
Steele, Charles[5]	85694, 86878, 86880	38	589
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
Stephenson, Ida	62825	33	252
Sternberg, Herman J	55758	32	1039
Stevens, John H	29685	24	52
Stevenson Consolidated Oil Co.[6]	43416	23	610

[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 issue involving deduction for depletion from advanced royalties or bonuses.

[3] 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 du ing 1920?

[4] Acquiescence relates to inventory issue.

[5] Gift tax decision.

[6] 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.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Stewart, James R.	89950	39	87
Stewart, Maco, executor	63645	32	442
Stewart, Nellie Esperson	68781	35	406
Stewart, Theodore E.	70297	32	600
Stifel, Arthur C.[1]	60738	29	1145
Stiefel, Edward W.[1]	60739	29	1145
Stiefel, Henry G.[1]	60740	29	1145
Stock Yards Bank of Cincinnati	41085	25	964
Stockhan, Elijah	22569	26	631
Stone et al, Irving K., executors and trustees [2]	43830	26	1
Stone, Irving Lee, estate of [2]	43830	26	1
Stoneman, David	27627	24	18
Storey, H. M	62813	31	1126
Story, Katherine F.[3]	66961	36	239
Story, Jr., Nelson, estate of [3]	66963	36	239
Story, Thomas B.[3]	66962	36	239
Story, Walter P.[3]	66960	36	239
Straubel, F. L. G.	56867	29	516
Street, Ralph W.	72609	36	391
Stromeyer, Irene	55341	28	472
Stromeyer, William A.	55342	28	472
Strong, Harold C.[4]	38576	25	1351
Stryker, Max H.	82516	36	326
Stuart, Charles	53796	29	605
Stuart, Jr., Willoughby H.	73869	32	573
Sugar Creek Coal & Mining Co	73758	31	344
Sullivan, Eugene C.	29389	26	1359
Summerfield Co.	58711	29	77
Summerill Tubing Co.	74070	36	347
Sunburst Oil & Refining Co.	45979	23	829
Supplee, C. Henderson, estate of [5] [6]	89363	39	902
Sweinhart, James	54784	29	1179
Symington, Elizabeth L.	62234	35	711
Symington, Elsie J.	62228	35	711
Symington, Emily H.	62161	35	711
Symington & Son, Inc., et al., T. H.	48786 48787 48788 48789 48889 48890	35	711
T.			
Talbot, J. A.[7]	36191	23	792
Tarafa y Armas, Jose M., estate of [3]	82656	37	19
Taylor Co., Inc., W. F.	89597	38	551
Teague, E. B.	73034	32	641
Terry, Anna Davis, estate of [3]	89925	38	593
Texas Irrigation Co.[8]	40083 41346	24	958

[1] Nonacquiescence published in Cumulative Bulletin XIII-1 (1934), page 30, withdrawn.
[2] Estate tax decision; acquiescence relates to issue involving deductions from gross estate.
[3] Estate tax decision.
[4] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[5] Gift tax decision.
[6] Acquiescence relates only to the issue, Did the Commissioner err in including, for gift tax purposes, the entire value of certain single premium policies instead of one-half value thereof?
[7] Acquiescence relates to loss incurred in sale of a boat.
[8] Acquiescence relates to all issues except affiliation issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Thacher et ux., Thomas C., Jr	84781	39	50
Thatcher Estate Co., the M. D.[1]	87974	38	336
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
Tichenor, Arthur L	78425	39	516
Tichenor, Charles O	78423	39	516
Tiernan, Martin F., trustee, Martin F. Tiernan trust for Martin T., Charles W., John W., Ann C., and Mary E. Tiernan et al.[2]	83167 83169 83171 83173 83175 83177 84276– 84279 84291– 84294	37	1048
Tifft, Charles	31029 33464 42340 45957	25	986
Tifft, Lewis E	31030 33465 42341 45958	25	986
Tilles, Cap Andrew	86505	38	545
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
Transcalifornia Oil Co., Ltd	73111	37	119
Tresner, Amy	66703	30 31 33 [5] 37	615 187 441 387
Tricou, Sallie S	28093 40258	25	713
Trinity Drilling Co.[6]	61498	28	1106
Troll, Annie	61215	33	598
Trosk, George	76256 77204	35	681

[1] Gift tax decision.

[2] Acquiescence relates to the issue, Is the income of a trust taxable to the donor where the trust instrument provides that the trust income may be used for support and education of the donor's children, but was never so used?

[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 1923.

[5] Acquiescence relates to question whether deduction for depletion in connection with development expenses was properly before the Board under mandates of the court.

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Trost, Edward E	73848	34	24
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.[1]	22340	27	377
Turrish, Henry	44742	24	913
Twin Bell Oil Syndicate	29518	26	165
Twining, Edmund S	70296	32	600
U.			
Ulster & Delaware R. R. Co	28927	25	109
Union Lard Corporation	20769	24	376
Union Pacific R. R. Co.[2]	51530 70183 70219	32	383
Union Pacific R. R. Co. et al.[3]	35639 35649 35684 35685 40060 40061 40062	26	1126
Union & Peoples National Bank of Jackson et al., administrators[4]	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
Valley Waste Disposal Co	86371	38	452
Van Aken, Annie Louise	76894 79334	35	151
Van Sicklen, Frederick W., estate of[4]	82545	35	306
Vermont Hydro-Electric Corporation	59638	29	1006
Virginia Iron, Coal & Coke Co	51576	29	1087
Vogel, R. Fred, estate of	56182	34	580
Von Gunten, Christian W.[5]	61378	28	702
W.			
Wagegro Corporation	82077	38	1225
Walker Products Corporation	44856	30	636
Walker, R. D	76762	34	983

[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 with respect to loss sustained by O. & W. R. R. Co. on exchange of land in Seattle in 1925; amount of loss sustained by O. &. W. Railroad & Navigation Co. in 1925 on sale of land in Multnomah County, Oreg.; contributions to hospital departments in 1924, 1925, and 1926; amortization of discount on bonds issued prior to March 1, 1913, and commissions; unrefundable portion of deposit made with petitioner in connection with construction of branch line.

[3] Acquiescence relates to donations issue; amortization of discount on bonds issued prior to 1913; computation of tax for 1920.

[4] Estate tax decision.

[5] Nonacquiescence published in Cumulative Bulletin XII-2 (1933), page 27, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Wall, Frank E.[1]	7359	4	313
Ward Bros. Co	30992	24	9158
Warner Co.[2]	53039	26	1225
	53040		
	59190		
Warner, Ralph C	62510	31	1126
Washington, Sr., George	83712	36	74
Washington Market Co	43912	25	576
Waterbury, Charlotte M.[3]	73381	33	208
Waterbury, Donald N.[3]	73380	33	208
Waterbury, Eugene W.[3]	73383	33	208
Waterbury, Whitford N.[3]	73382	33	208
Watson, Jr., John H	53414	27	463
	89671	38	1026
Wayne County & Home Savings Bank[4]	49144	26	761
Wedding, G. G	56442	32	613
Weeks, Alanson	63916	31	627
Weis, Samuel W	62126	30	478
Wells, Thomas E.[5]	78829	34	315
Wheelock, R. L	37806	28	611
Wheelock, Mrs. R. L	37805	28	611
Whitcomb, Anna S.[6]	80017	37	806
	85219		
	87196		
Whitcomb, E. B.[6]	85218	37	806
White Oak Transportation Co.[7]	18088	24	307
Whitman, Ward & Lee Co	61552	29	670
Whitney, Richard	76661	35	230
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, Alma[8]	84001	36	934
Williams, Ella J	29273	25	1161
Williams, L. H	58789	31	580
Williams, R. L.[8]	84000	36	934
Williams, W. W	46062	24	506
Williamson, Alexander B	40231	25	154
	43972		
Williamson, Archibald (Lord Forres)	40229	25	154
	43973		
Williamson, Bessie C.[9]	80545	34	668
Willis, Mary	66718	30	615
		31	187
		33	441
		[10] 37	387

[1] Nonacquiescence (relating to community property agreement) published in Cumulative Bulletin XV-2 (1936), pages 27 (Docket 71811), 29 (Dockets 9447, 10202, 10755), 31 (Dockets 10299, 32950), 34 (Dockets 4017, 5389, 62029, 65577, 68324), 35 (Docket 10980), 36 (Docket 37369), 38 (Docket 16985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

[2] Nonacquiescence published in Cumulative Bulletin XII-1 (1933), withdrawn.

[3] Acquiescence relates to issue as to basis values of stock.

[4] Nonacquiescence published in Cumulative Bulletin XI-2 (1932), revoked.

[5] Gift tax decision; nonacquiescence published in Cumulative Bulletin XV-1 (1936), page 48, withdrawn.

[6] Acquiescence relates to the following issue: Where husband and wife, residents of the State of Michigan, own realty as tenants by the entirety, may they divide equally and deduct in their separate income tax returns losses resulting from the rental of such realty?

[7] Acquiescence relates to inventory issue.

[8] Acquiescence relates to issue involving accrual of interest.

[9] Acquiescence relates to capital net gain issue as to stock sold in 1933.

[10] Acquiescence relates to question whether deduction for depletion in connection with development expenses was properly before the Board under mandates of the court.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Wilson, Benton	52894	33	649
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
Winslow, Mary N	76059	33	57
Wolf, A. C	56439	32	613
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
Work, Horace H., estate of	81027	34	741
Wray, Eliza J	25881	24	94
Wright, George M	25854	22	858
Wright, Leonard Marshall	45508	26	21
Y.			
Yazoo & Mississippi Valley Ry. Co	62023 62991	30 34	1107 1
Young, Ethel P	38868	24	815
Yukon Alaska Trust	34161	26	635
Z.			
Zimmerman, John E	82491	36	279 618
Zimmerman, Sarah A. F	82488	36	279 618
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 (1931).

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
Albers, William H.[1]	74759	33	373
Albrecht et al., Katherine B., executrices [2]	41295	27	1091
Alker, Vera M. Kohler	36116	25	243
Allen, Dorothy A. D.[3]	88569	38	871
Allen, Nathan R	81654	38	160
Allied Furriers Corporation	50059	24	457
American Brick & Tile Corporation	29994	22	1121
American Central Life Insurance Co.[4]	30133 31998 56024 63436	30	1182
American Gas & Electric Securities Corporation	62604	33	245
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.[5]	14676	14	328
Ames, Jr., Ward	49817	27	624
Anglo-American Direct Tea Trading Co., Ltd	84529	38	711
Apartment Corporation	42024	26	849
Appleby, Francis S	73089	31	533
Arabol Manufacturing Co	50489	26	1068
Archbald, Edward B	61660 65064	27	837

[1] Nonacquiescence relates to issue concerning loss on sale of stock of A. Nash & Co.
[2] Estate tax decision; nonacquiescence relates to State inheritance tax issue.
[3] Gift tax decision.
[4] 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.
[5] Acquiescence published in Cumulative Bulletin VIII-2 (1929), withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Archbald, Joseph A	61661 65062	27	837
Archbald, Jr., Joseph A	61673 65063	27	837
Arkell, William Clark	84812	38	177
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
Ayer, Henry S., estate of [1]	78778 79152 79153	36	5
B.			
Babson, Fred K	52224	27	859
Babson, Gustavus	52223	27	859
Babson, Henry B	52222	27	859
Ballinger, Bessie M., executrix [1]	32177	23	1311
Ballinger, Walter F., estate of [1]	32177	23	1311
Baltimore & Ohio R. R. Co.[2]	37239	30	194
Bank of California, National Association	55537 60699	30	556
Bankers Trust Co., trustee	32459	24	10
Barradale, E. Morgan	77376	34	1229
Bartlett, J. Kemp	63632	28	285
Bashford, Raymond I	71565	33	10
Bass, Francis M	73626	30	4
Bateman, F. L	47772	34	351
Bay, Robert P	66014	28	1168
Bebb, Richard E., estate of [3]	41295	27	1091
Bebbe, Junius, trustee	52707	26	190
Bebbe, Marcus, estate of	52707	26	190
Bechtel, Kenneth K	75485	34	824
Bechtel, Stephen D	75486	34	824
Behan, Thomas W	75428	32	1088
Bekins, Katherine, estate of	87675	38	604
Belfast Investment Co.[4]	19128	17	213
Bell, Frederic D., estate of	69534	31 32	945 701
Bell & Sons, Samuel	38056 41647 45616	22	793
Benaglia, Arthur and Elise	87638	36	838
Beresford, Vivien Helen de la Poer, estate of [5]	67259	31	329
Berkeley Hall School, Inc	47415	31	1116
Bindley, Mary M., estate of	58871	28	113
Bingham et ux., Harry Payne	82160	38	913
Bismarck Tribune Co	59660	33	281
Blacksher et al., D. W., executors, estate of James Uriah Blacksher [1]	88453	38	998
Blacksher, James Uriah, estate of [1]	88453	38	998

[1] Estate tax decision.
[2] Nonacquiescence relates to deductibility as expense for year 1920 of amount for maintenance of ways and structures.
[3] Estate tax decision; nonacquiescence relates to State inheritance tax issue.
[4] Nonacquiescence in issue as to whether petitioner is entitled to deduction for amortization of the Lee tract warehouse for 1918.
[5] Nonacquiescence relates to issue involving reorganization.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Blair, Cecil Charles	69803	29	1096
Blair, Edward T	42313 63741	31	1192
Bliss, Sydney R	55902	26	962
Bliss, Valentine	53422	26	732
Block, Meier S	84873	37	945
Blum, Bessie	52221	29	580
Blum, David	52220	29	580
Blumenthal, Harry S	75143	34	994
Board of Fire Underwriters of the City of Duluth	43150	26	860
Boca Ceiga Development Co	40446	25	941
Bochringer, Rudolph [1]	49891	29	8
Boeing, William E.[2]	88167	37	178
Boekman, Simon	82185	38	541
Bonwit, Paul J	53661	33	507
Bool, S. E	64691 70951	34	1011
Booth, Ellen S	81961	36	141
Boston Elevated Ry. Co.[3]	76751 77244	37	494
Boston Safe Deposit & Trust Co. et al., executors [4]	49272	30	679
Boswell, William D., estate of [5]	81811	37	970
Bowen, Edwin L.[6]	62985	33	208
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
Brinsmade, Henry N., estate of	86046 86047	39	195
Brinsmade, Paul S., executor, estate of Henry N. Brinsmade	86046 86047	39	195
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
Buchsbaum, William	74886	36	21

[1] Estate tax decision.

[2] Nonacquiescence published in Cumulative Bulletin 1938-1, page 36, in so far as it pertains to the trust issue, withdrawn.

[3] This notice, which was originally published in Internal Revenue Bulletin 1938-25, page 1, is being republished for the reason that it was erroneously included in the list of cases acquiesced in published in Cumulative Bulletin 1938-1, page 4.

[4] Nonacquiescence relates to issue involving reorganization.

[5] Nonacquiescence relates to taxability of a transfer under subsections (a) and (c) of section 302, Revenue Act of 1926.

[6] Nonacquiescence relates to issue whether gains on sale of stock of the Waterbury Chemical Co. were taxable to petitioners or to trusts created by them.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Buck, John A., estate of [1]	32584, 44153, 44684	25	780
Buck et al., Mary M., executors [1]	32584, 44153, 44684	25	780
Buckhardt, August	76255	32	1272
Buffalo Union Iron Furnace Co.[2]	16075, 16076	23	439
Bullington et ux., Robert McCarthy	89806	38	754
Bullock, George [3]	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
Burrows, Waters F.[4]	87787	38	236
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
Cadwalader, Jr., Richard M	71800	32	1157
Cambria Development Co.[5]	75411	34	1155
Carey, Robert	54033, 60432, 67415	31	839
Carey Fibre Products Co., Emerson	36381	26	675
Carey-Reed Co	83936	36	36
Carey Salt Co	36382	26	675
Carlson, Charles T	87564	39	185
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
Case, Montgomery B	75816	34	1229
Cassels, Robert	58793	26	1401
Central Market Street Co.[6]	24837	25	499
Central Union Trust Co. of New York, executor	31736	25	757

[1] Estate tax decision; nonacquiescence relates to deduction of amount of a claim filed against the estate and allowed by probate court.

[2] Nonacquiescence relates to issue regarding deduction from gross income of fiscal year ended April 30, 1919, of reserve for relining blast furnaces.

[3] Nonacquiescence relates to issue 1 of decision.

[4] Nonacquiescence relates to the issue, deductibility of the amount paid for a second mortgage as a bad debt.

[5] Nonacquiescence relates to inclusion in cost of real estate lots the estimated cost of future expenditures for contractual improvements.

[6] Nonacquiescence relates to issue regarding Board's jurisdiction of subsidiaries.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Central United National Bank	69212, 71063	33	588
Cereal Products Refining Corporation	86538	39	92
Champion, David J.[1]	55569, 63818	27	1312
Champion, T. Pierre[1]	55568	27	1312
Chandler, Constance	67471	32	720
Chandler, Harrison Gray	67470	32	720
Chandler, Helen	67475	32	720
Chandler, Marian Otis	67468	32	720
Chandler, Norman	67473	32	720
Chandler, Philip	67476	32	720
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.[2]	36343	22	1407
Chidlaw, Harry K	69782	29	1096
Chisholm, Archibald M., estate of[3]	85255	37	167
Christensen, Niels A	72424	33	79
Clark, Percy H	65177	31	1082
Clark Thread Co.[4]	38903, 47974	28	1127
Claude Neon Lights, Inc.[5]	59391	35	424
Cleland Estate Co., Inc., Henry A.[6]	33585, 40890, 51197	29	436
Cleveland Trust Co., trustee of Edith K. Timken et al. Trust	88561	39	113
Clovis, C. H	68433	32	646
Coastwise Transportation Corporation	39916	28	725
Cobleigh, Margaret Edwards, estate of[7]	40765	24	176
Cochrane, David K.[8]	60428	26	1167
Colorado & Southern Ry. Co.[9]	21974	36	1248
Columbia Pacific Shipping Co	50968	29	964
Columbus Brick & Tile Co.[10]	42707	26	794
Commercial Garage Co	41646	22	793
Commercial Investment Trust Corporation[11]	43495, 50051	28	143

[1] Nonacquiescence relates to issue whether redemption of stock was equivalent to taxable dividend.
[2] Nonacquiescence relates to following issues: Undermaintenance; profit and loss on bonds retired; amortization of bond discount.
[3] Nonacquiescence relates to the following issue: Value at which life insurance policies, in which the decedent had elected during his lifetime to have the proceeds paid to beneficiaries in installments, should be included in the gross estate.
[4] Nonacquiescence relates to issue respecting depreciation.
[5] Nonacquiescence relates to issues (1) the acquisition by petitioner of stock of the Bellows Corporation and the Claude Neon Federal Co.; (2) the Claude Neon Lights of Maryland, Inc., transaction involving the exchange of property for stock.
[6] Nonacquiescence relates to basis for determination of gain or loss on the sale of property devised subject to a life estate.
[7] Estate tax decision.
[8] Acquiescence published in Cumulative Bulletin XII-1 (1933), revoked.
[9] Nonacquiescence relates to the following issues: Did petitioner and affiliated corporations make expenditures in 1920 to rehabilitate its properties for undermaintenance during Federal control, for which they were allowed $756,004 in final settlement with the Director General of Railroads, and if so are such amounts deductible in determining taxable income for 1920; and the computation of net taxable income for the months of January and February, 1920, subject to the rate of tax applicable to corporations which were under Federal control.
[10] Nonacquiescence relates to inclusion in consolidated invested capital of capital stock issued for promissory notes.
[11] Nonacquiescence relates to deduction in 1926 of excess of market value over sale price of stock sold to employees.

NONACQUIESCENCES—Continued.

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		Volume.	Page.
Commonwealth, Inc	88264	36	850
Community Bond & Mortgage Corporation	43784	27	480
Community Mausoleum Co.[1]	70384	33	19
Community Telephone Co	77568	32	164
Community Water Service Co	77560	32	164
Cone, Edward K	58777	26	1401
Connelly, James A.[2]	44081 45833 46267 51967 60566 66948	30	331
Connelly, L. B.[2]	44083 45834	30	331
Connelly, Mary B.[2]	44082	30	331
Conti, Luciana	79793	35	28
Cook, Elizabeth E.[3]	38579	25	1351
Cook, Sam	35014	25	92
Cooper, A. T.[4]	3144	7	798
Cosmopolitan Bond & Mortgage Co.[5]	44617	30	717
Coughlin, R. Lawrence and Evelyn W	76106	32	1048
Coursey, Sarah A. W.[6]	71755	33	1068
Crews, Charles W.[7]	66766	37	387
Crews, Everett J.[7]	66767	37	387
Crews, Ralph W.[7]	66701	37	387
Crews, Robert E.[7]	66702	37	387
Crile, Grace McBride	43136	26	1020
Crispin, Mrs. Egerton	45267	28	236
Cronin, Ernest A.[8]	88279	37	914
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
Curren, Hector McGowan	81826	34	946
Curtis, Cyrus H. K	86613	36	899
Czajke, I. T., transferee	64639	33	564
D.			
Dahl, Chester T., estate of [10]	81962	35	282
Dalton, H. G	64711 70953	34	1011
Dana, Charles A	76699	36	97
Darling, Frank W. and Mrs. Frank W	79254	34	1062

[1] Nonacquiescence relates to issue whether the final installment on the sale price of mausoleum crypts to be retained by a trustee as a perpetual care fund should be excluded from the full contract price in computing profit, the taxpayer reporting on the accrual installment basis.

[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 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.

[4] Acquiescence published in Cumulative Bulletin VII-1 (1928), withdrawn.

[5] Nonacquiescence relates to issue involving commissions charged on real estate loans.

[6] Nonacquiescence relates to the following issue: Computation of taxable profit to petitioner from sale of land by the trust during 1930 on the basis of the value of said land as of March 1, 1913.

[7] Nonacquiescence relates to issue in respect of allowable deduction for depletion.

[8] Gift tax decision.

[9] Nonacquiescence relates to expenditures for mine equipment.

[10] Estate tax decision.

NONACQUIESCENCES—Continued.

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Dashiell, C. R.	75056	36	313
Davidson, Watson P.	46486	27	158
Davis, Frederick H.	37324	24	405
Davis, Thomas L.	37395	24	405
Day, Charles, estate of [1]	75102	34	11
Dean, Mason L.	61205 69832	35	839
Dearing, Roy E., estate of [2 3]	84195	36	843
Dearing, R. H., estate of [2 3]	84194	36	843
Dearing Trust Estate, R. H. [2 3]	84193	36	843
Dearing, Mrs. R. H. [2 3]	84196	36	843
Dearing, Willis R. [2 3]	84192	36	843
Dearing, Mrs. Willis R. [2 3]	84197	36	843
Degener, John F., estate of [4]	38500	26	185
Degener, Jr., et al., John F., executors [4]	38500	26	185
De Lisser, Horace, estate of [5]	2459	2	102
de Mille Productions, Inc., Cecil B. [6]	52996 61290 65123	31	1161
de Mille Productions, Inc., William C.	53108 61321	30	826
Dennett, Marie G. [7]	72023	30	49
Denniston et ux., Harold S.	91728	37	834
Denny, Reginald [8]	49516	33	738
Depew, Ganson	50860	27	515
des Cognets, Estelle	70892	34	540
des Cognets, Louis, estate of	70889	34	540
Des Moines Improvement Co. [9]	8573	7	279
Diescher et ux., August P. [10]	85716	36	732
Diescher et ux., Samuel E. [10]	85715	36	732
Dohrmann, Andrew B. C.	20658 23969	19 19	507 466
Dolomite, Inc.	60661	28	1270
Donnelly, Paul F., estate of [4]	87103	38	1234
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
Douglas, D. W.	87419	37	1122
Douglas, William E.	87420	37	1122
Douglass, Howard W., estate of [4]	40031	30	1143
Drawoh, Inc.	45014	28	666
Driver, Sr., Frank L., estate of	70574	36	246

[1] Estate tax decision; nonacquiescence relates to deduction of balance due on pledges made by decedent during his lifetime to certain charitable and educational institutions.

[2] Nonacquiescence relates to issue whether fair market value of oil payment contracts taken as compensation for drilling oil and gas wells for others by a partnership is taxable as income.

[3] Partial acquiescence published in Internal Revenue Bulletin 1938–16, page 1, withdrawn.

[4] Estate tax decision.

[5] Estate tax decision; acquiescence published in Cumulative Bulletin X–2 (1931), recalled.

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

[7] 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.

[8] Nonacquiescence relates to deduction of amount expended for dental bridge work and amount expended in keeping petitioner in first-class physical condition.

[9] Acquiescence published in Cumulative Bulletin VII–1 (1928), withdrawn.

[10] Nonacquiescence relates to issue whether wives of petitioners are jointly liable for deficiencies when joint returns are filed.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Drunheller, George	41515, 45752	27	209
Duff, Robert C.[1]	37552	23	1342
Dunning, Henry A. B	83459	36	1222
Dunham et al., Lucy Belle, executors [2]	46603	26	286
Dunham, Mary Virginia, estate of [2]			
Dye, Clarke E	74911	33	824
E.			
East Coast Oil Co., S. A	58180	31	558
Eaton, Cyrus S.[3]	86942	37	715
Eckhart, Bernard A., estate of [4]	76443	33	606
Edison Securities Corporation	52662	29	483
Edward Securities Corporation	71208	30	918
Eifert, Earl C	45781	23	1351
Einhorn, Max	73893	36	954
Eldridge, Alice H.[4]	64779	30	1321
Eldridge, A. S.[4]	64778	30	1321
Elkhorn Coal Co.[5]	49064	34	845
Elkins, Hallie D.[6]	39255	24	572
Elkins, William L., estate of	56449	28	367
Ellis, R. R., estate of	67967	34	631
Ely, Elizabeth Taylor	76546	33	249
Emerson, Sigurd A	77307, 77309	35	901
Emery, Mary M., estate of [6]	40899	25	585
Equitable Life Assurance Society of the United States	31110, 33241, 57867	33	708
Equitable Trust Co., of New York, ancillary administrator [2]	67259	31	329
Erb et al., Ray L., executors [7]	29260	29	1315
Ethel D. Co	32032	27	25
Eustin, Augustus H.[8]	71637	30	820
Evening Star Newspaper Co	61870, 66855	28	762
Everhart, James William	26675	26	318
F.			
Fairmount Cemetery Association	30925, 42811	25	1272
Farish, Libbie Rice	81145	36	1114
Farish, W. S	81146	36	1114
Farish & Co., W. S	87840	38	150
Farmers Cotton Oil Co	42679	27	105

[1] Nonacquiescence relates to issue 2 of decision.
[2] Estate tax decision.
[3] Nonacquiescence relates to the following issue: Whether the Commissioner erred in using as a basis for securities sold by the partnership of Otis & Co., of which the petitioner was a member, the cost of said securities to the contributing partner.
[4] Nonacquiescence relates to deduction of loss in transfer of securities to a corporation in which petitioner owned all the stock except qualifying shares.
[5] Nonacquiescence with respect to the holding that there was a reorganization.
[6] Acquiescence published in Cumulative Bulletin XI-2 (1932), revoked.
[7] Nonacquiescence relates to the following issues: Reduction of cost basis (March 1, 1913, value) of assets sold by a partnership in 1919 by depreciation allowed in computing income for period March 1, 1913, to December 1, 1915; computation of 1919 partnership profit on sale of assets by considering as part of the sale price taxes of the partners paid in 1920 by the vendee.
[8] Acquiescence published in Cumulative Bulletin XIII-2 (1934), withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Farmers Life Insurance Co.[1]	43317	27	423
Feldman, Henry O	45359	28	236
Ferree, C. B	61542	32	725
Fidelity-Bankers Trust Co	83421	37	142
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 Avenue Bank of New York, executor	69534	31 32	945 701
Fifth Street Building	16627 29264 45537	24	876
Fincke, Reginald	85679	39	510
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
Flaherty, William, estate of, and Ella	79397	35	1131
Fleitmann, William M., estate of [3]	28449	22	1291
Fleitmann, Jr., et al., William M., executors [3]	28449	22	1291
Fleming, Lamar L.[4]	78362	34	384
Fleming, Margaret E. B.[5]	78416	36	773
Fleming, William	61042 65676	31	623
Fleming, Mrs. William	61043 65677	31	623
Fletcher, Salathiel R	33041	24	75
Flinn et al., Clara Louise [6]	84483 84491	37	1085
Flintermann, Carl H. L., estate of [2]	75516	32	996
Foley, Thomas J., estate of	67217	34	258
Folger & Co., J. A	22212 30721	27	1
Folger Estate Co	31200 35147	27	1
Forest Glen Creamery Co	51833	33	564
Foster, Caroline B., estate of [2]	46672	26	708
Foster et al., Charles H. W., executors [2]	46672	26	708
Foster, L. B.[7]	43086	26	1328
Founders Associates	62684	29	326
Fox, Fontaine [8]	71084	30	451
Fox River Paper Co	20878	28	1183

[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 (1931), recalled.
[4] Nonacquiescence relates to issue involving inclusion in income the decedent's share of profits of a partnership of which he was a member up to the date of his death.
[5] Nonacquiescence relates to valuation date for cost purposes of securities acquired by petitioner from a trust under her grandfather's will.
[6] Nonacquiescence relates to issue whether petitioner-beneficiaries are taxable on distributions made on January 4, 1933.
[7] Nonacquiescence relates to deductions in 1924 and 1925 on account of losses resulting from alleged sales of securities.
[8] 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.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Franklin Title & Trust Co.[1]	51947, 60167, 67805	32	266
Franks, Jack M	53685	32	260
Frost, Mary Ryerson	88981	38	1402
Fuhlage, Alfred E.[2]	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.[3]	42707	26	794
Gambrill, Richard Van Nest	81544	38	981
Garcin, Edward H	21657	22	1027
Gardner, Charles E.[4]	38575	25	1351
Garrie, Daniel T., estate of	31736	25	757
Garvan, John Joseph, estate of [5]	44746	25	612
Gary, Virginia V., executrix [5]	40031	30	1143
General Machinery Corporation	70449	33	1215
General Motors Corporation	52824	35	523
General Outdoor Advertising Co., Inc.[6]	66511	32	1011
General Securities Co	82188	38	330
General Utilities & Operating Co	52770	29	934
Geneva Water Co	89249	37	582
Gerard, Erle	45221	28	236
Gerhardt, Philip L	77375	34	1229
Gerlach, Theodore R	38042, 41641	27	565
Gerstle et al., Mark L.[7]	[8] 62854	33	830
Gibbs-Preyer Trust, No. 1	89917	39	492
Girard Trust Co. et al., administrators	75624	32	926
Gladding, Mary D., estate of [5]	31435	27	385
G. M. & S. Co	16383	26	223
Goetjen & Metson Co	17875	26	223
Goforth, Mary B	52316	32	1206
Goforth, R. S	52316	32	1206
Goldberg, Harry S.[9]	5389	4	1073
Goldschmidt, Henry P., estate of [10]	16138	14	1010
Goldschmidt et al., Georgette, executors [10]	16138	14	1010
Goodale, Walter S	78456	34	697
Goodan, May Chandler	67472	32	720
Gordon, Bertha M.[11]	81081	36	202
Graham, M. H	38335	26	301

[1] Nonacquiescence relates to the question whether Franklin Bond & Mortgage Co. was entitled to deduct commissions paid on the sale of its bonds instead of prorating cost over the life of the bonds.

[2] Nonacquiescence relates to issue whether redemption of shares of stock represents payment in partial liquidation of a corporation or a taxable dividend.

[3] Nonacquiescence relates to inclusion in consolidated invested capital of capital stock issued for promissory notes.

[4] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.

[5] Estate tax decision.

[6] Nonacquiescence in issue involving counsel fees paid in connection with litigation.

[7] Nonacquiescence relates to the following question: Are petitioners entitled to deduct on their individual returns the operating and capital losses sustained by real estate syndicates of which they were members?

[8] And 19 related dockets.

[9] Acquiescence published in Cumulative Bulletin X-1 (1931), withdrawn.

[10] Estate tax decision; acquiescence published in Cumulative Bulletin X-2 (1931), recalled.

[11] Nonacquiescence in holding that petitioner is not individually liable for any part of deficiency.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Gray, Ralph L	86940, 86941	38	584
Great Southern Life Insurance Co.[1]	56540, 64064, 71114	33	512
Great Western Power Co. of California	48617	30	503
Green, H. A	74910	33	824
Green, Robert D.[2]	53647	24	719
Greenleaf Textile Corporation	46746	26	737
Gregory, Evelyn F	55299	27	223
Greisler, Bernard	89404	37	542
Greisler et ux., Sol	89403	37	542
Greve, William M	75686	37	450
Griffis, Stanton[3]	38577	25	1351
Griffiths, George W.[4]	82624	37	317
Grosvenor, Theodore P	60381	31	574
Guitar Trust Estate	35102	25	1213
Gulf Coast Irrigation Co.[5]	33694, 40081, 41343	24	958
Gulf, Mobile & Northern R. R. Co.[6 7]	24887, 42150	22	233
Gund, Karoline E., estate of	70891	34	540
H.			
Hackfeld, Johann Friedrich, estate of[8]	77997	33	1020
Hagerman, Stanley	78023	34	1158
Haines, Mary H.[9]	87725	37	1013
Hale, Ernest H	67105	33	504
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
Hallock, Henry, estate of[8]	76802, 76803, 76927	34	575
Hancock, G. Allan	36867	25	607
Hanson, Charles C	15398	23	590

[1] Nonacquiescence in following issues: Did the taxpayer realize interest accrued upon a loan where it foreclosed liens on certain bonds pledged as collateral? Did taxpayer realize interest as taxable net income where notes were exchanged for new notes which included interest and the new notes were not paid during the taxable year? Where taxpayer acquired the assets and business of three other insurance companies during the taxable year, was income realized upon the collection of interest that was accrued but not paid as of date of purchase?

[2] Nonacquiescence relates to transaction 5.

[3] 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.

[4] Nonacquiescence relates to issue whether sale of 5,000 shares of stock of Oakridge Cemetery Corporation is a personal or corporate transaction.

[5] Nonacquiescence relates to affiliation issue.

[6] 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.

[7] Nonacquiescence applies to the entire decision of the Board in so far as it is adverse to the Commissioner. Partial acquiescence published in Internal Revenue Bulletin XI-28 (1932), revoked.

[8] Estate tax decision.

[9] Gift tax decision.

NONACQUIESCENCES—Continued.

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Harbison, William Albert [1]	54347	26	896
Hardwick, Marjory Taylor	76545	33	249
Harlan, George H	60500	30	804
Harris, Simon	31632	24	512
Harrison, James M	66193	30	966
Harrison, J. E	45361	28	236
Hart, Julian B	75030 78877	37	360
Hart, William H.[2]	82652	36	1207
Harter Bank, The George D., trustee of Gibbs-Preyer Trust No. 1	89917	39	492
Hartley, Cavour, executor	42343	27	952
Hartley, G. G., estate of	42343	27	952
Hauser, W. E	43301 43302	26	1178
Hawaiian-Philippine Co	69619	35	173
Hawley Investment Co	45169 45170	23	953
Hazeltine Corporation	42277 47011 51931 60313	32	4
Hazleton Corporation	61954	36	908
Heath, Harriet A	90599	38	1127
Hebert, Paul Octave, estate of [3]	83238	36	491
Heckscher, August	82000	36	1181
Hedrick, J. T	33533	24	444
Heffelfinger, Frank T	41145 44852 53881 63407 69694 73479	32	1232
Heinz, Howard	79059 79450	34	885
Heller, B. G	40634	25	259
Hemphill, Clifford [4]	38573	25	1351
Hendrickson, Joseph G., estate of	73029	32	449
Henn, A. W	37102	20	1133
Henritze, J. B	60669	28	1172
Henritze, Nell	60607	28	1172
Henritze, T. R	60608	28	1172
Henritze, T. W	60606	28	1172
Herder, George, estate of [5]	84051	36	934
Herder, Mary [5]	84052	36	934
Hermann, John C	51959	27	409
Hertenstein, Freda M	55938	29	216
Hertenstein, Frederick	55936	29	216
Hieronymus, Carl Richard, estate of	48930	24	269
Highlands, Evanston-Lincolnwood Subdivision First Addition, Trust No. 1546, et al	74464	32	760

[1] Acquiescence published in Cumulative Bulletin XII-1 (1933), withdrawn.
[2] Gift tax decision.
[3] Estate tax decision.
[4] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[5] Nonacquiescence in issue relating to involuntary conversion.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
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Highway Trailer Co	44568	28	792
Highley & Co., E. B	51003	25	127
Higley Trusts, Merchants National Bank of Cedar Rapids, transferee and fiduciary [1]	78576	38	1343
Hill, D. F., estate of [1]	29399	24	1144
Hill, Louise G	80483	37	782
Hill et al., Paul F., executors [1]	29399	24	1144
Hinds, Walter DeWitt, estate of [1]	49860	32	254
Hittell, John B	70820	33	276
Hochstetter, Ralph	76160	34	791
Hodges, Agnes Wiley, executrix	38336	26	301
Hodges, W. L., estate of	38336	26	301
Hodges, W. L., trustee	38337	26	301
Hoge, Arthur K., estate of	68435	32	646
Hoge, Blanche C., executrix	68435	32	646
Hoge, James D., estate of	58118 58119	33	718
Hoge et al., Ethel H., executors	58118 58119	33	718
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
Home Title Insurance Co	63737	33	318
Honnold, W. L	55211	30	774
Hormel, Jay C.[2]	93572	39	244
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
Houston, Philip D.[3]	22007	22	51
Hoyt, 2d, Elton	64710 70954	34	1011
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
Humphrey, Dudley T	64376	32	280
Hunter, G. W., estate of [1]	33564	25	1078
Hunter, Jr., Thomas A.[4]	58490	33	941

[1] Estate tax decision.

[2] Nonacquiescence relates only to the issue involving the taxability of the income of several trusts which were created for the use and benefit of the grantor's minor children.

[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.

[4] Nonacquiescence in issue involving question of realization of taxable profit on exchange of class "B" common stock for class "A" stock.

NONACQUIESCENCES—Continued.

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Hutchison Coal Co	34939	24	973
Hyde, James H	65495, 69952	31	256
I.			
Illinois Life Insurance Co	67201	30	1160
Illinois Pipe Line Co	74525	37	1070
Imperial Elevator Co	35688	25	234
Imperial Investment Co	29291	23	1281
Independent Oil Co	67700	35	32
Indianapolis, Crawfordsville & Danville Electric Ry. Co	33859	24	197
Indianapolis & Northwestern Traction Co	33861	24	197
Ingram, Thomas J	56943	32	1063
Irving Trust Co., trustee [2]	84371	35	928
Irvington Investments Co	77557	32	1165
Isenberg, Otto Ernst, estate of	74249	37	587
Iten Biscuit Co	43667, 45164	25	870
Ives, Charles E	51527	29	822
Ives Dairy, Inc	39873	23	579
Iwicki, E. W., transferee	64653	33	564
J.			
Jackson & Eastern Ry. Co	38295, [3] 42149	22	233
Jackson, Paul Wilde, trust	74928	33	311
Jackson et al., Stonewall J	72002, 72119, 72127, 72244, 73625, 75762, 76448, 76455, 76980	37	1004
Jackson, Wermich Trust	32306	24	150
Jamison Coal & Coke Co	31690, 34088	24	554
Jane Holding Corporation	87240	38	960
Janotta, Stella S. [4]	51172	28	39
Jefferson Standard Life Insurance Co	43149	25	1335
Jeffries, James B., estate of	81968	37	742
Johnson, A. M	61345	32	156
Johnson, James Lee	82263	37	155
Johnston, F. Harold, executor	79029	33	551
Johnston, F. M., estate of	79029	33	551
Johnston, Hugh McBirney, individually and as executor and trustee	22028	27	1123
Jones, Bessie R	58285	27	171
Jones, Chester Addison [5]	50206	31	55
Jones, Fred B., estate of [2] [6]	87203	38	220
Junge, Claus, transferee	64637	33	564

[1] 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.
[2] Estate tax decision.
[3] Nonacquiescence relates to issue involving deduction for depreciation on ways and structures.
[4] Gift tax decision.
[5] Nonacquiescence as to issue regarding deduction for depletion.
[6] Acquiescence published in Internal Revenue Bulletin 1938-37, page 1, withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
K.			
Kahn, Bella	73895	36	954
Kahn, Isidor	73891	36	954
Kahn, Lenora	73894	36	954
Kansas City Southern Ry. Co. and affiliated companies [1]	22668, 35527, 35528, 35529, 35530, 35531	22	949
Keener Oil & Glass Co	60789	32	186
Keeys, Edward L	45360	28	236
Kehoe, John	64609	34	59
Kehoe, Sarah	64609	34	59
Kelly, Francis J., executor [2]	70899	31	941
Kelly, Rose A., estate of [2]	70899	31	941
Kensico Cemetery	76703	35	498
Kerbaugh, Henry S	68976	29	1014
Kerrigan, Arthur L	58794	26	1401
King, John M	41549	26	1158
Kirby, Lelia S.[3]	73753	35	578
Kirk et al., Elizabeth S., executrices and executor of the estate of C. Henderson Supplee [4 5]	89363	39	902
Kirkpatrick, John L	67474	32	720
Kitselman, C. M., estate of	77812	33	494
Knapp, Kittie A.[6]	2775	7	790
Knecland, Yale, estate of [2]	79748	34	816
Knobloch, David C	87278	38	830
Knobloch, Herman	87275	38	830
Knobloch, Wesley E	87276	38	830
Knox, Seymour H	65203	33	972
Koch, Harry A	55318	26	1025
Koninklijke, N. V., Hollandische Lloyd [7]	78662	34	830
Kountze, Charles T	37323	24	405
Kountze, Luther L., estate of	37535	24	405
Kountze et al., Charles T., executors	37535	24	405
Krause et al., Frances A., executors [2]	49860	32	254
Krug, George F	46713	30	1375
L.			
La Arcada Bondholders Committee	75684	35	80
La Brum et al., Catherine, executors	67217	34	258
Lafayette Life Insurance Co	41721, 42663	26	946
Laird, William Winder, estate of [2 8]	51654	38	926

[1] 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.

[2] Estate tax decision.

[3] Nonacquiescence relates to issue involving the basis for computing taxable gain in 1927, 1928, and 1929 from the sale of bonds of the Kirby Lumber Co.

[4] Gift tax decision.

[5] Nonacquiescence relates only to the issue, Did the Commissioner err in valuing, for gift tax purposes, certain single premium policies upon the basis of the premiums actually paid rather than the cash surrender value?

[6] Acquiescence published in Cumulative Bulletin VII-1 (1928), withdrawn.

[7] Acquiescence published in Cumulative Bulletin XV-2 (1936), page 13, withdrawn.

[8] Nonacquiescence relates to the issue involving the valuation of certain shares of stock as of the date of the decedent's death.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Lang, Julius C., estate of [1]	68316	34	337
Langford Investment Co., trustee	57203	28	222
Langford, Jr., et al., Pierce P	57203	28	222
Langworthy, Marjorie C.[2]	71961	30	1216
Lansburgh, Lester, estate of [3]	81480	35	928
Lashar, Walter B	37883	34	768
Laube, Justus	70007 71595	29	1255
Laun, Alfred A	45347	26	764
Laun, J. B	45348	26	764
Lazarus & Co., F. & R	69481 69750	32	633
Leary, Sr., H. B	76845	34	1206
Leary, Myra L	76846		
Leeper, Frank E., estate of	45266	28	236
Leeper, Pearl E	45265	28	236
Leetonia Furnace Co	32272	23	979
Lembcke, George A	75365	33	700
Leon & Son, Inc., Albert	53440	29	251
Leonard, Stephen J	65805	36	563
Lewis, Wadsworth R	75957	34	996
Liberty Marine Insurance Co	67263	32	736
Licht, Rose	86716	37	1096
Liebes & Co., H	28544 35038	23	787
Linderman, William S., executor	58871	28	113
Liquidating Co	60850	33	1173
Littauer, Eugene, estate of [4]	51858	25	21
Littauer et al., Lucius N., executors [4]	51858	25	21
Livingood, Charles J., executor [5]	40899	25	585
Lloyd, J. Darsie	71445	33	903
Lloyd, Walter [6]	48120	30	331
Loffland, J. M.[7]	13425	10	14
Loffland, T. S.[7]	13426	10	14
Louis, Cora K	49179	29	1200
Louisville Trust Co. et al., trustees	65040	30	562
Lucas, Mabelle T	72933	34	877
Luquire Burial Association Co., Inc., W. H	79098	36	621
Luquire Funeral Homes & Insurance Co., Inc	79097	36	621
Lustig, David L., estate of [3]	70582	33	1225
M.			
Mack, Eleanor L	86856	37	1101
Mack, John S.[8]	89719	39	220
Madison Railways Co	85121	36	1106
Malernee, D. B	63553	31	662
Mallinckrodt, Jr., et al., Edward, trustees	79138 87339	38	960
Mallory, L. W., estate of	33231	27	750

[1] Estate tax decision; nonacquiescence relates to deduction for funeral expenses including cost of crypt.
[2] Nonacquiescence relates to question whether distribution of stock had the effect of distribution of a taxable dividend.
[3] Estate tax decision.
[4] 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.
[5] Acquiescence published in Cumulative Bulletin XI-2 (1932), revoked.
[6] Nonacquiescence relates to issue involving the amounts paid to stockholders by J. G. Curtis Leather Co. upon cancellation of certain stock.
[7] Nonacquiescence relates to depreciation allowable under the Revenue Act of 1913; acquiescence published in Cumulative Bulletin VIII-1 (1929), withdrawn in so far as it applies to this issue.
[8] Gift tax decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Malloy & Co	57906	33	1130
Manchester Coal Co	33392	24	577
Manhattan Life Insurance Co	60827	28	129
Mann, George D	54223 63370	33	281
Manning, Charles N	70890	34	540
Manus, Muller & Co., Inc	59778	30	1015
Margay Oil Corporation	44891	26	199
Markham Irrigation Co.[1]	41344	24	958
Martinek, Belle C. Hershman, estate of	79112	38	811
Marvin, Walter S.[2]	38578	25	1351
Marvin, William Glenn, estate of [3]	77017	34	305
Mason, Mary S., estate of [3 4]	84133	38	425
Matagarda Canal Co.[1]	40082 41345	24	958
Mather, Samuel, estate of	64712	34	1011
Matheson, Hugh M	71353	31	493
Mathews, Susan H., executrix	43208	33	682
Mathews, W. B., estate of	43208	33	682
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
McCarter, Uzal H., estate of	69193	34	535
McCormick et al., Cyrus H., trustees	44139	26	1172
McCrory, Luke W., trustee	32444	25	994
McCurdy, William H., estate of [3]	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
McKinney, Ida I	45823	32	450
McLauchlan, William, estate of	62905 70952	34	1011
McLister, Frank	48562	27	155
McMillan, William Northrup, estate of [5]	45966	27	318
McVickar, Lansing	77993	37	758
Meherin, Dora M.[6]	80422	35	472
Meherin, P. W.[6]	81035	35	472
Mellon, A. W.[7]	76499	36	977
Menzies, Charles M	76148	34	163
Menzies, Inc., C. M	76147	34	163
Meraux, Mrs. L. A.[8]	82462	38	200

[1] Nonacquiescence relates to affiliation issue.

[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] Estate tax decision.

[4] Nonacquiescence relates only to the issue, Did the decedent have more than a life interest in the estate of her mother?

[5] Estate tax decision; nonacquiescence as to question of situs.

[6] Nonacquiescence in issue with respect to immunity from Federal income tax of compensation of officers and employees of the Board of State Harbor Commissioners of California.

[7] Nonacquiescence in Board's action with respect to the following: (*a*) Refusal of Board to sustain respondent's affirmative issue with respect to application of section 112 (c) to McClintic-Marshall Corporation and Union Construction Co. liquidations; (*b*) addition of $29,191.33 to taxpayer's basis of McClintic-Marshall stock *after* rather than before making any allocation of basis to Union stock.

[8] Nonacquiescence relates only to the issue with respect to the disallowance of $1,800 as an alleged loss from the wrecking of an automobile in 1931.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Mercantile-Commerce Bank & Trust Co. et al., administrators of Paul F. Donnelly [1]	87103	38	1234
Merchants National Bank of Cedar Rapids, transferee and fiduciary of Higley Trusts [1]	78576	38	1343
Merner, Delight Ward	73406	32	658
Merrell, Irving S	70103	33	1151
Metropolitan Ice Co.[2]	53936 69525	32	587
Meyer, George L., transferee	64654	33	564
Meyer, Robert R	44032	27	44
Michigan Central R. R. Co.[3]	19930	28	437
Miglietta, Olga K	36379	25	243
Miller, Albert	45368	28	236
Miller, Edward J	85083	37	830
Miller Mill Co., T. R	82625 82879	37	43
Mills, J. H. Goadby	58797	26	1401
Minnesota Tea Co	54227	34	145
Missouri State Life Insurance Co.[4]	58241 62386	29	401
Mitchell, Charles E	74720	32	1093
Mitchell, J. F. B	65834	33	806
Mitchell, Oscar [5]	41680 41874 54673	27	101
Mitchell, William	58799	26	1401
Mitten Management, Inc	42494 53990 61861	29	576
Modjeski, Ralph	49517	28	1051
Monarch Life Insurance Co	86861 87441	38	716
Montague, Miles & Co., Inc	87651	38	144
Moore, Ada Small [6]	88944	39	147
Moore, Alma V	64790 68219	30	1197
Moore, Edward W., estate of [7]	58720	33	108
Moore, G. H	38351	26	301
Moore, John R	64791 68218	30	1197
Moore, Louise C., executrix [7]	58720	33	108
Moore Bread Co	41645	22	793
Morganite Brush Co., Inc	26369	24	776
Moro Realty Holding Corporation	37406 44759 50490	25	1135
Morris, Arthur J	64246	33	241

[1] Estate tax decision.
[2] Acquiescence published in Cumulative Bulletin IV-2 (1935), withdrawn.
[3] 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.
[4] 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.
[5] Nonacquiescence relates to issue regarding deduction from income of sprinkling tax.
[6] Gift tax decision.
[7] Estate tax decision; nonacquiescence in the conclusions on the third group of policies that the proceeds thereof should be excluded from the gross estate.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Morriss et al., Julia L	41023 41024 45863 45864	23	1076
Morriss Realty Co. Trust No. 1	41023 45863	23	1076
Morriss Realty Co. Trust No. 2	41024 45864	23	1076
Morse, Emma R., estate of [1]	44652	27	1070
Morse Syndicate Nos. 1 and 2, Lillie	89531 89532	38	269
Morton, Sophia P. O	89257	38	419
Morton, Sterling	86517 91705	38 38	1270 1283
Moser, Carolyn L	55037	29	216
Mosser, Charles F	55399	27	513
Mott, Charles Stewart	51585 57506	30	1040
Mott, Dee Furey	71903	35	195
Mueller, Earl W	45362	28	236
Mulcahy, John J	80769	34	1229
Munson, Robert H	88949	39	72
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 Home Owners Service Corporation	91445	39	753
National Land & Construction Co	40126	25	562
National Outdoor Advertising Bureau, Inc	65252 70999	32	1025
National Pipe & Foundry Co.[4]	32997	19	242
Neal et al., J. Henry, trustees	45403	26	551
Nelms, Frank Haywood	51887	27	65
Nelms, Mrs. Frank Haywood	51888	27	65
Netcher, Charles, estate of	42435	31	41
Neuberger, Harry H	78919	37	223
Newberry Lumber & Chemical Co	68511	33	150
Newbury, Mollie Netcher, trustee	42435	31	41
Newport Co	35431	24	1246
New York Central R. R. Co.[5]	19932 34437 62040	28	437

[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 (1930), 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] 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.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
New York Life Insurance Co	38880	24	1217
New York, Ontario & Western Ry. Co	52693	30	408
Nibley-Minnaugh Lumber Co	17527	26	978
Nichols & Cox Lumber Co	23601	24	54
Nicholson, James	66966	32	977
Nicola, E. F	57417	33	1113
Nielsen Co., E. H	8899	26	223
North American Investment Co	30183	24	419
North American Utility Securities Corporation	75039	36	320
Northern Coal Co.[1]	34945	24	307
Northport Shores, Inc	64500	31	1013
Noyes, Jansen [2]	38574	25	1351
Nudelman, Charles W	79126	35	28
O.			
Oakman et al., Mamie R	42917	24	84
O'Donnell, Edith M.[3]	79980	35	251
O'Donnell, Thomas A	52987 62979	32	1277
Ogden, Hugh W	23943	24	1239
Old Colony Trust Co., trustee	74928	33	311
Old Mission Portland Cement Co	38853	25	305
Old National Bank in Evansville, executor [3]	67681	31	379
Olinger Mortuary Association	36502	23	1281
Oliver, Olive Hume	65640	30	1380
Olmsted, George W.[4]	44090 45745 48121 54714 60746	30	331
Olmsted, Iva C.[4]	44089 45746 48143 54713 60745	30	331
Olstad, Oscar A	76683	32	670
Omaha Coca-Cola Bottling Co	52641	26	1123
O'Rear, E. C.[5]	32335	28	698
Oregon Terminals Co	68893	29	1332
Ortiz Oil Co.[6]	86112	37	656
Oswego Falls Corporation	28301 32673 34352	26	60
Owen, III, John	79786	38	739
Owens, J. T	63149	27	469
Owens, Mrs. J. T	63150	27	469
Owens, O. O	31986	26	1147

[1] Nonacquiescence relates to statute of limitations issue.

[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] Estate tax decision.

[4] Nonacquiescence relates to issue involving the amounts paid to stockholders by J. G. Curtis Leather Co. upon cancellation of certain stock.

[5] Nonacquiescence relates to issue regarding amount of loss sustained by petitioner by reason of destruction by fire of his residence and furniture.

[6] Nonacquiescence relates to the following issue: Whether respondent erred in computing the depletion allowable to petitioner by treating as an expense of operating a certain property the cost of a dry hole drilled thereon.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
P.			
Pacific Coast Biscuit Co. et al.[1]	71588	32	39
Pacific Nash Motor Co	45169 45170	23	953
Pacific Rock & Gravel Co	28776	26	296
Palmer, Bradley W.[2]	62652	32	550
Palmer, Stacy-Merrill, Inc	87997	39	636
Pan American Life Insurance Co.[3]	84638	38	1430
Park, William	87423 90026	38	1118
Parker, Clara B., executrix [4]	58604	31	644
Parker, George D., estate of [4]	58604	31	644
Parker, Herbert L., estate of [5]	53320	30	342
Parker et al., Emily King, trustees [5]	53320	30	342
Parriott, F. B.[6]	30989	28	917
Patrick Cudahy Family Co	83436	36	1147
Patterson, Frank H., estate of [7]	76580	36	407
Peabody, Cornelia Haven, estate of [5]	39647	24	787
Peabody et al., Stephen, executors [5]	39647	24	787
Peace, Harvey W	87277	38	830
Pennsylvania Co. for Insurances on Lives and Granting Annuities, executor and trustee	73029	32	449
Perkins, Emily S.[5]	78532	35	100
Perkins, Yolande V	89905	38	189
Perkins et al., Thomas N.[8]	57848 58305 58306 58443 58475 58770 58772 58904 58905 58906 58907 58917 58918 58925	33	606

[1] Nonacquiescence with respect to deduction of amounts expended in connection with dissolution and liquidation of a corporation.

[2] Nonacquiescence in Board's decision holding that the Superpower rights were not dividends.

[3] Nonacquiescence relates to the issue involving the deductibility of an amount equal to 3¾ per cent of the mean of its reserve for incurred but not yet accrued disability benefits at the beginning and end of the taxable year.

[4] Nonacquiescence relates to issue regarding existence of George D. Parker Co. partnership.

[5] Estate tax decision.

[6] Nonacquiescence relates to interpretation of article 1567, Regulations 45, as applied to exchange of stock of Pittsburgh Texas Oil & Gas Co.

[7] Estate tax decision; nonacquiescence relates to following issues: Whether transfer is taxable as effective at death; whether transfer is taxable as one concerning which decedent alone, or in conjunction with other persons, had power at death to alter, amend, or revoke the trust.

[8] Nonacquiescence relates to the following issues:

Did the statute of limitations, at the time of the mailing of the deficiency notices, bar assessment and collection of the deficiencies as to Thompson Oil Co., Eastern Carbon Black Co., W. H. Davis, Lillian A. Davis, Matilda M. Davis, Alton N. Davis, Emma Luette Davis, executrix, u/w O. L. Davis, Lue Davis, and Davis Bros. Co., where the income tax returns were filed with a deputy collector?

Did the statute of limitations, at the time of the mailing of the deficiency notices, bar assessment, and collection of the deficiency as to Thompson Oil Co., where a consolidated return was originally filed and the Commissioner later ruled against consolidation?

Is G. H. M. Co. entitled to a deduction greater than $14,179.75 as an additional bonus to its general manager?

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Petaluma & Santa Rosa R. R. Co.[1]	13830	11	541
Phelps et al., Luis James, executors [2]	50336	27	1224
Phillips, Eben B., estate of [3]	81802	36	752
Phillips, Pamphila H., estate of [3]	87519	36	1102
Phillips, William S	24446 31769	24	98
Pierce, Edward A	58796	26	1401
Pierson Corporation, L. D	74347	35	860
Pittsburgh & Lake Erie R. R. Co.[4]	42764	28	259
Plains Realty Co	48977 65492 67197	31	412
Plant, Henry Bradley	43889 48984 52094 55659 60923	30	133
Plat, Jamima [5]	78930	35	472
Plestcheeff, Guendolen C	80026	35	508
Plestcheeff, Theodore	80025	35	508
Plettner, Maude Brown	33345	25	631
P-M-K Petroleum Co.[6]	50576 54779	24	360
Pontarelli, Michael	83199	35	872
Porter, Alexander J., estate of [3]	79322	34	798
Portland Furniture Manufacturing Co	61809 70367	30	878
Post & Sheldon Corporation	56695	28	26
Pressinger, Mable L., estate of [3]	80550	34	1248
Price, Harry	70008 71596	29	1255
Priester, H. C	55195	33	230
Proctor Shop, Inc.[7]	58909 66268	30	721
Prosperity Co., Inc.[8]	45896 59468	27	28
Prouty, Olive H	57829	30	1068
Prudential Insurance Co. of America	56641 60884 67238	33	332
Pryor & Lockhart Development Co	38872 45668 51326 63523	26 34	1054 687
Pupin, Michael I., estate of [3]	92177	38	1218
Purdy, Charles Wesley	82421	36	572
Purse, James N	54124	27	725
Q.			
Quinn, Porte F	67156	31	142

[1] 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 (1928), revoked.

[2] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.

[3] Estate tax decision.

[4] Nonacquiescence relates to rental interest question and Board's decision with respect to portion of mail pay received in 1921.

[5] Nonacquiescence in issue with respect to immunity from Federal income tax of compensation of officers and employees of the Board of State Harbor Commissioners of California.

[6] Nonacquiescence relates to first issue of decision.

[7] Acquiescence published in Cumulative Bulletin XIII–2 (1934), revoked.

[8] Nonacquiescence relates to overstatement of loss sustained as a result of liquidation of subsidiary.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
R.			
Rainbow Gasoline Corporation	65152, 72365	31	1050
Randolph, Frankie Carter	51890	27	65
Randolph, R. D	51889	27	65
Randolph, Virgil P., trust	48833	28	773
Ray Oil Co.[1]	43123, 45219, 48015, 61554	28	1204
Raymond, Howard W	58544	26	1401
Realty Associates, as syndicate manager [2]	27921	17	1173
Reed, Latham R	58800	26	1401
Reese, Augusta Bliss	70410	30	1
Rehtam, Inc	45016	28	666
Reybine, Alpheus, estate of [3]	60660	31	314
Reybine, Martha H., executrix [3]	60660	31	314
Reynard Corporation [4]	67386, 70795	30	451
Richardson et al., Forrest, executors [3]	44652	27	1070
Richfield Oil Co	42921	25	101
Richmond, Fredericksburg & Potomac R. R. Co.[5]	68876	33	895
Rieck, Edward E	79157	35	1178
Riffel, Henry [6]	3576	3	436
Riley, Anna E	61066	29	160
Riley Stoker Corporation	36584	26	749
Riley, Thomas J., transferee	64638	33	564
Rio Grande Land & Canal Co	71350	31	507
Rio Grande Reservoir & Ditch Co	71351	31	507
Robbins, Harwood	67076	33	880
Roberts, G. P	68434	32	646
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
Rocky Mountain Oil Co.[7]	79421	36	365
Rodeo-Vallejo Ferry Co.[8]	36411, 48528	24	936
Roerich, Nicholas [9]	83065	38	567
Rogers, May	45051	31, 32	994, 1176
Rollandelli, Guiliano [10]	57479, 67286	33	843
Rollins, Harry T	63954	34	319

[1] Nonacquiescence relates to issue whether petitioner was taxable for years 1926 to 1929, inclusive, as a trust or as an association.
[2] Acquiescence published in Cumulative Bulletin X-2 (1931), withdrawn.
[3] Estate tax decision.
[4] Nonacquiescence relates to inclusion in income of corporation for years ended March 31, 1930, and March 31, 1931, amounts representing rental of premises occupied by its president.
[5] Nonacquiescence relates to issue involving the question, Are payments made to holders of guaranteed stock designated in certificates as dividends deductible as interest?
[6] Estate tax decision; acquiescence published in Cumulative Bulletin X-2 (1931), recalled.
[7] Nonacquiescence relates to reduction of gross income by intangible drilling costs and overhead expenses in determining the 50 per cent limitation on depletion.
[8] Nonacquiescence relates to first issue of decision.
[9] Nonacquiescence relates to all issues except issue involving salary and per diem allowance received by petitioner from the United States Government in 1934.
[10] Nonacquiescence as to issue regarding taxability in 1929 of dividends declared in stock in 1928, certificates for which were not delivered until 1929.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Rollins, Ralph E.	63958	34	319
Roosevelt & Son Investment Fund	76196	34	38
Rorimer, Louis	58850	27	871
Rosenberg Investment & Realty Trust	81963	38	1051
Rosenbloom Finance Corporation [1]	35778, 40903	24	763
Ross, Blanche S.[2]	51171	28	39
Ross, Walter L.	73282	30	562
Rosser, E. M., executor [3]	40765	24	176
Rossheim, Irving D.[4]	57503	31	857
Rudman, I.[5]	85886	36	803
Rudman, Rose [5]	85887	36	803
Rust et ux., H. L.	89171	38	910
Ruth, Frederick S., estate of [3]	80840	36	191
S.			
Sabatina, Rafael	50134	32	705
St. Louis Southwestern Ry. Co	13319, 27768, 33938	24	917
St. Louis Union Trust Co., executor [6]	45966	27	318
San Carlos Milling Co., Ltd.[7]	39525	24	1132
San Jacinto Life Insurance Co	75348	34	186
Sand Springs Ry. Co	32438, 32439	21	1291
Sanford et al., Hugh W	83421	37	142
Sather Lease—Thomas Sather & Co	31979	26	86
Sauk Investment Co	74642	34	732
Scatena, Elvira [8]	63920	32	675
Schiffer, Jack W.	83249	39	161
Schlesinger, Armin A.	75960	36	320
Schlesinger, Kathleen M.	75961	36	320
Schlesinger, Rosa	73892	36	954
Schmoll Fils Associated, Inc.	87536, 88000	39	411
Schoen, Louis	56776	30	1075
Schoonmaker, Rebekah C.	92022	39	496
Schumacher Wall Board Corporation	61602, 69719	33	1211
Schwartz-Kasser Improvement Co.	36876	26	322
Scofield, Marion, estate of [3 9]	80628	38	51
Scott, Thomas B., estate of [10]	50336	27	1224
Scott, Thomas S.	70888	34	540
Scovell, Clinton H., estate of [3]	49272	30	679
Scripps, Robert P.	77116	33	963
Scully, Enriqueta Angela [3]	80244	34	218
Seaconnet Coal Co.[11]	18089	24	307

[1] Nonacquiescence does not relate to the Board's holding that distributions received from Joseph H. Finch & Co. were not partial liquidating dividends.
[2] Gift tax decision.
[3] Estate tax decision.
[4] Nonacquiescence relates to issue whether Commissioner is entitled to increased deficiency as raised by his amended answer filed with the Board.
[5] Nonacquiescence relates to deduction of drilling cost in computing allowable percentage depletion.
[6] Estate tax decision; nonacquiescence as to question of situs.
[7] Acquiescence as to issue 2 and nonacquiescence as to issue 1 published in Cumulative Bulletin XI-1 (1932), withdrawn.
[8] Nonacquiescence relates to dividend issue.
[9] Nonacquiescence relates to the issue involving the inclusion in gross estate of decedent's remainder interest in a trust created by decedent and her two sisters on November 12, 1927.
[10] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.
[11] Nonacquiescence relates to statute of limitations issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Seatree, William Ernest	22094, 33640	25	396
Security First National Bank of Los Angeles et al., executors [1]	45429	28	289
Security Savings & Commercial Bank	59523	29	176
Seder, Abraham, estate of	84934	38	874
Seder, Celia	84934	38	874
Segall, Karl B., transferee	82397	38	43
Selwyn Eddy Co	21612	25	1341
Shaffer, C. B.[2]	29259	29	1315
Shaffer, John C	50086, 59511	28	1293
Sharp et al., Edith Huggard, executors [3]	48317	30	532
		33	290
Sharp, Walter P., estate of [3]	48317	30	532
		33	290
Sheaffer Pen Co., W. A	36604	27	1056
Shepherd, Frederick R., estate of [3]	80961	39	38
Shepherd, Marjorie Bell, executrix of Frederick R. Shepherd [3]	80961	39	38
Shepherd Syndicate	48332, 51327	26	1062
Shlenker, Simon J	58801	26	1401
Sibley et al., John R., executors [4]	24921	16	915
Sibley, Rufus A., estate of [4]	24921	16	915
Simms, E. F.[5]	19175, 19791	28	988
Skaggs, L. L	90217	38	921
Skiff, Frank V.[6]	51173	28	39
Slack, A. B., estate of [7]	72404, 78525	35	271
Small's, Inc	53791	24	686
Smathers, E. E., estate of [2]	29260	29	1315
Smiley, Albert K	74424	33	198
Smiley, Francis G	74425	33	198
Smith, C. A	77417	34	702
Smith, Mrs. Grant	43300, 43305, 43306	26	1178
Smith, Milton	77414	34	702
Smith, Milton, estate of	52132	28	422
Smith, Jr., Milton, executor	52132	28	422
Smith, Sarah Avis	77416	34	702
Smith Transportation Co	77415	34	702
Smith, Varvara Pupin, administratrix of Michael I. Pupin [3]	92177	38	1218
Smith, William A	90703	38	317
Smith, William Alden, estate of	56465	34	170

[1] 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.

[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 part of the sale price, taxes of the partners paid in 1920 by the vendee.

[3] Estate tax decision.

[4] Acquiescence published in Cumulative Bulletin VIII-2 (1929), withdrawn.

[5] Nonacquiescence relates to issues 1 and 4 set forth in syllabus of published decision.

[6] Gift tax decision.

[7] Nonacquiescence in issue involving question of taxable gain by reason of acquisition of possession of property leased by him.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Sneed, Jr., J. T.[1]	45694	30	1121
Snyder, Inc., H. S. & M. W	36686	26	692
Southern Bell Telephone & Telegraph Co	70887	34	540
Southern California Rock & Gravel Co	30898	26	296
Southern Railway Co. et al.[2]	21481 29951 37887– 37898	27	673
Spang, Chalfant & Co.[3]	58790	31	721
Spencer, George Frinck, estate of [4]	72236	31	171
Speyer, James	56435	30	517
Spitzner & Son, Inc., C. H	80744	37	511
Sprague, C. O. M	65833	33	806
Sprague & Son Co., C. H.[5]	34946	24	307
Spring City Foundry Co	21169	25	822
Sredies, Inc	45015	28	666
Stanley Co. of America	31516 33142 40023	26	705
Stantex Petroleum Co., trustee, Lillie Morse Syndicate Nos. 1 and 2	89531 89532	38	269
Stayton, Jr., William H	71867	32	940
Stearns, Marshall, administrator	48930	24	269
Steele, William, estate of	73347	34	173
Stern, Martha S	90833	39	501
Stern et al., Samuel E. A., executors [6]	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.[7]	43416	23	610
Stewart, John B	57531	29	809
Stewart, William Rhinelander, estate of [8 9]	67776	31	201
Stewart, Jr., et al., William Rhinelander, executors [8 9]	67776	31	201
Stimson Corporation, F. S	83705	38	303
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 [10]	43830	26	1
Stone, Irving Lee, estate of [10]	43830	26	1

[1] 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.

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

[3] Acquiescence published in Cumulative Bulletin XIV–2 (1935), withdrawn.

[4] Estate tax decision.

[5] Nonacquiescence relates to statute of limitations issue.

[6] Estate tax decision; acquiescence published in Cumulative Bulletin X–2 (1931), recalled.

[7] 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 wth that corporation.

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

[9] 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 Internal Revenue Bulletin, XIV–[illegible] (1935), withdrawn.

[10] Estate tax decision; nonacquiescence relates to issue involving property transferred by trust agreement.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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.[1]	38576	25	1351
Sturgeon-Hubbard Trust	37095	25	368
Sturgeon et al., Rollin S., trustees	37095	25	368
Suffolk Co., Ltd	81817	37	1156
Sullivan, Joseph J	56671	33	629
Suncrest Lumber Co	33244	25	375
Supplee, C. Henderson, estate of [2 3]	89363	39	902
Swartz, Inc., Edward G	36650	25	1065
Swift, Mary Dodson, estate of	44909	26	615
Swisky, Toby W	42032	25	259
Swiss Oil Corporation	60177 61002 63088 70998	32	777
T.			
Taft, Anna S., estate of [4]	77923	33	671
Taft, Robert A., executor [4]	77923	33	671
Taft, Robert A., trustee	76813	34	603
Talbot, Frederick C., estate of	20411	27	829
Talbot, J. A.[5]	36191	23	792
Talbot et al., Susan D., executors	20409	27	829
Talbot William H., estate of	20409	27	829
Tant, Walter F., transferee	82434	38	43
Tanzer, Laurence Arnold	81355	37	244
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
Terminal Railroad Association of St. Louis	49832 53429 63699	33	906
Terminal Realty Corporation	43766 50762 60596 71157	32	623
Terrace Corporation	80584	37	263
Terre Haute, Indianapolis & Eastern Traction Co	33358	24	197
Terre Haute Traction & Light Co	33360	24	197
Terry, Anna Davis	45446	26	1418
Terry, Jr., J. T	65835	33	806
Texas Irrigation Co.[6]	40083 41346	24	958
Texas Pipe Line Co	59457	32	125

[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] Gift tax decision.

[3] Nonacquiescence relates only to the issue, Did the Commissioner err in valuing, for gift tax purposes, certain single premium policies upon the basis of the premiums actually paid rather than the cash surrender value?

[4] Estate tax decision.

[5] Nonacquiescence relates to depreciation allowance in computing loss in sale of a boat.

[6] Nonacquiescence relates to affiliation issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Textile Mills Securities Corporation	75423	38	623
Thatcher & Son, John	56888 65545	30	510
The Hub, Inc	46298	26	1201
Thieman, Mrs. Leo	65041	30	562
Thrall, Edna May	52449 55546	31 32	994 1176
353 Lexington Avenue Corporation	65089	27	762
Tide Water Oil Co	39936	29	1208
Tiernan, Martin F., trustee, Martin F. Tiernan trust for Martin T., Charles W., John W., Ann C., and Mary E. Tiernan et al.[1]	83167 83169 83171 83173 83175 83177 84276– 84279 84291– 84294	37	1048
Tillotson Manufacturing Co	44167	27	913
Timken et al. Trust, Edith K., Cleveland Trust Co., trustee	88561	39	113
Title & Trust Co	73785	33	25
Titus, C. Dickson	20705	24	36
Titus, Inc., C. W	42268	33	928
Todd, Willis	37536	24	405
Tolerton & Warfield Co.[2]	45320	23	892
Torrens, James H.[3]	53778	31	787
Towers & Sullivan Manufacturing Co	40508	25	922
Townsend, A. J	73186	32	940
Townsend, W. S	74541	32	940
Toy, Harvey M	72932	34	877
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
Tresner, Amy [4]	66703	37	387
Trojan Oil Co	33757	26	659
Trustees of Lumber Investment Association	52274	35	364
Turney, W. W	65258	31	308
Turney, Mrs. W. W	65257	31	308
Tuthill, Jr., Horace S	52448	31 32	994 1176
Tuttle, Carl B	70558	31	782
Twin Bell Oil Syndicate	45052	26	172
Tyler et al., Sidney F., trustees	56449	28	367
Tyng, Lucien H	74885	36	21

[1] Nonacquiescence relates to the issue, Did the six trust instruments in the associated cases create a single trust or a multiple of trusts?

[2] Nonacquiescence relates to issue regarding deduction of loss sustained by two affiliated companies during fiscal year ended January 31, 1924, and the taxable period February 1 to April 25, 1924, in computing the consolidated net income for taxable period April 26 to December 31, 1924, and the year 1925.

[3] Nonacquiescence relates to the trust and dividend issues.

[4] Nonacquiescence relates to issue in respect of allowable deduction for depletion.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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., administrator [1]	75516	32	996
Union Guardian Trust Co., executor [1]	44735	26	1321
Union Pacific R. R. Co. [2]	51530, 70183, 70219	32	383
Union Pacific R. R. Co. et al.[3]	35639–35649, 35684, 35685, 40060, 40061, 40062	26	1401
Union Trust Co., trustee	42917	24	84
United National Corporation	67949	33	790
United Oil Co	38082, 42922, 51622	25	101
V.			
Van Camp Packing Co., Inc	46131	26	256
Vancoh Realty Co	52340	33	918
Van Schaick, George S., Superintendent of Insurance of New York, liquidator	67263	32	736
Van Vorst & Co., C. B	70366	30	878
Vaughan, William W	67843	31	548
Voelbel, Jacob, estate of [4]	6009	7	276
Voelbel, Walter W., executor [4]	6009	7	276
Volunteer State Life Insurance Co	54176	27	1149
	69058, 70851	35	491
Vonnegut Hardware Co	44940	28	784
W.			
Waggoner, Ella	33517	24	657
Waggoner, W. T	33516	24	657
Wait, J. Russell	75772	35	359
Wait, Katharyn	75773	35	359
Walker, Talbot C	20407	27	829
Walters, Henry, estate of [1]	77674	35	259
Walters, John W	70010, 71597	29	1255
Ward et al., Daisy M	62644–62649	29	1251
Wardman, Harry	22348	24	102
Warfield, C. Griffith	89170	38	907

[1] Estate tax decision.

[2] Nonacquiescence relates to the issues regarding cost of intercompany transportation of material used in construction of capital assets; sale in 1926 of block 394, Seattle Tide Lands; sale of land to Kansas City Terminal Railway Co.; adjustment for depreciation sustained prior to January 1, 1909, of equipment retired in 1924.

[3] 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.

[4] Estate tax decision; acquiescence published in Cumulative Bulletin X-2 (1931), recalled.

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
Waterbury, Charlotte M.[1]	73381	33	208
Waterbury, Donald N.[1]	73380	33	208
Waterbury, Eugene W.[1]	73383	33	208
Waterbury, Whitford N.[1]	73382	33	208
Watson-Moore Co	62179	30	1197
Wayburn, Ned	74348	32	813
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
Wester, Marjorie E., estate of	67037 67146	37	29
Wester, W. L	67036 67145	37	29
Western Power Corporation	72943	34	618
Wetherill, Robert, estate of [2]	86862	36	1259
Wheeler, Dwight C	71338	32	909
Wheeler, P. L	69028	32	917
Wheeling Mold & Foundry Co. (Del.)	23410	27	929
Whipple, Frank H	57532	29	809
Whitcomb, Anna S.[3]	85219 87196	37	806
Whitcomb, N. B., Coca-Cola Syndicate	76367	35	1031
White, Juliet C	58775	26	1401
White Oak Transportation Co.[4]	18088	24	307
White, Rita M. Kohler	36112	25	243
White, Sidney J	58776	6	1401
Whiting, Dwight [2] Whiting, George N.[2]	78532	35	100
Whittell & Co., Inc., George	72414	34	1070
Wilcox & Sons, J. F	40619	28	878
Wile, Edwin [5]	54451	31	787
Williams, Alma [6]	84001	36	934
Williams et al., Frank G., executors	33564	25	1078
Williams, R. L.[6]	84000	36	934
Williamson, Bessie C.[7]	80545	34	668 924
Williamson, Ruth Chandler	67468	32	720
Willis, Mary [8]	66718	37	387
Wilshire Oil Co., Inc	67179 73955	35	450

[1] Nonacquiescence relates to issue whether gains on sale of stock of the Waterbury Chemical Co. were taxable to petitioner or to trust created by them.
[2] Estate tax decision.
[3] Nonacquiescence relates to the following issue: Where the petitioner, who is the beneficiary of a trust, makes an assignment, revocable upon notice of a year and a day, of a portion of her distributive share of the future income from the trust, is the petitioner taxable on the income paid to the assignee under such assignment?
[4] Nonacquiescence relates to statute of limitations issue.
[5] Nonacquiescence relates to the trust and dividend issues.
[6] Nonacquiescence in issue relating to involuntary conversion.
[7] Nonacquiescence in issue whether basis for gain or loss on subsequent sale within meaning of section 113(a) 5, Revenue Act of 1932, was time of actual distribution or date of court order of distribution.
[8] Nonacquiescence relates to issue in respect of allowable deduction for depletion.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Wilson, Billings	77377	34	1229
Wilson, John P	52931, 57226	29	304
Wilson et ux., Joseph B	86618, 86619	38	1171
Wilson, Luke F., estate of	32444	25	994
Wilson, Peter J., transferee	64655	33	564
Wilson Shipbuilding Co.[1]	34337	25	182
Winne, Walter G.[2]	60900	27	369
Winslow, Sidney W., Jr	88605	39	373
Winston Bros. Co	59270	29	905
Winthrop, Beekman	79850	36	314
W. & K. Holding Corporation	81216	38	830
Wobber Bros	36875	26	322
	77387	35	890
Wobbers, Inc	36874	26	322
Wolpert, Urban F	48563	27	155
Wood, Ellen Ayer	65211	29	1050
Wood Furniture Co., J. A	40565	21	564
Wood, Jr., H. O	65832	33	806
Wood, Jeremiah	74090, 74688	31	1141
Wood, Meredith	88426	37	1065
Wood, Stuart, estate of	75624	32	926
Wood, Willis D	69844	33	806
Woodruff, Annie Stevens	79784	38	739
Woodruff, Stevens	79785	38	739
Woodward, John S.[3]	71962	30	1216
Woodward, George [4]	42279	23	1258
Wrightington, Sydney R	91371	38	1230
Y.			
Young, Du Bois	78345	34	648
Young, Edythe C., executrix, estate of William J. Young, Jr.[5]	90414	39	230
Young Corporation, F. J	74321	35	860
Young, William J., Jr., estate of [5]	90414	39	230
Young, William M.[5]	81224	36	633
Youngstown Sheet & Tube Co	28149, 35511	24	1246
Yount, Thelma	87404, 89595	38	1460
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
Zukor, Adolph	76120	33	324

[1] Nonacquiescence relates to issue 5 of decision.
[2] Prior acquiescence published in Cumulative Bulletin XII-1, page 13 (1933), withdrawn.
[3] Nonacquiescence relates to question whether distribution of stock had the effect of distribution of a taxable dividend.
[4] Acquiescence published in Cumulative Bulletin X-2 (1931), withdrawn.
[5] Estate tax decision.

INCOME TAX RULINGS.—PART I.

A. INTERNAL REVENUE CODE.

CHAPTER I.—INCOME TAX.

SUBCHAPTER B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 22(a)–2: Compensation for personal services. 1939–22–9848
Mim. 4916

(Also Section 116; Regulations 101, Article 116–2.)

Taxability of compensation received by Federal officers and employees and officers and employees of States or political subdivisions thereof.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 10, 1939.

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

On April 12, 1939, the President approved the "Public Salary Tax Act of 1939" (Public, No. 32, Seventy-sixth Congress, first session; page 478, this Bulletin). That Act, hereinafter referred to as the Act, deals with the income taxation of the compensation of public officers and employees, State and Federal. Title I thereof, in so far as it relates to Federal income tax, deals with taxation of compensation of certain public officers and employees for all taxable years beginning after December 31, 1938, whereas Title II is concerned with preventing the taxation of the compensation of certain public officers and employees for years beginning prior to January 1, 1939. As will be explained below, the provisions of Titles I and II of the Act are operative without regard to the nature of the office held or services rendered by the officers or employees affected. Rules provided by the applicable revenue law as to the period for which income must be reported are unaffected by any provision of the Act.

EXPLANATION OF TERMS USED.

For the purposes of this mimeograph—

(*a*) Unless otherwise specified, section numbers mentioned refer to sections of the Act.

(*b*) The term "State employee" means an officer or employee of a State, or a political subdivision, or any agency or instrumentality of one or more States or political subdivisions, and includes a State or local judge and a member of a State or local legislative body (section 210).

(*c*) The term "Federal employee" means an officer or employee of the United States or any agency or instrumentality thereof.

(*d*) The term "tax" means Federal income tax and includes interest, additions to tax, and additional amounts.

STATE EMPLOYEES.

Except as affected by section 208 (more fully explained below) the following applies to the treatment of compensation of State employees for the purposes of the tax:

(1) *Taxable years beginning after December 31, 1938.*—Section 22(a) of the Internal Revenue Code, as amended by section 1 of the Act, requires that the compensation for personal service of all State employees, without exception, be included in gross income for taxable years beginning after December 31, 1938, regardless of the nature of the office or employment.

(2) *Taxable years beginning prior to January 1, 1938.*—Section 201 prevents the taxation of compensation for personal service as a State employee for any taxable year beginning prior to January 1, 1938. The methods by which that is accomplished are as follows:

(*a*) Assessments of such tax if not already made shall not now be made, and no court proceeding shall be begun or prosecuted to collect such tax. Collection of tax assessed before January 1, 1939, may, however, be enforced by new or now pending court proceedings (section 201(a)).

(*b*) Assessments of such tax made after December 31, 1938, shall be abated and any amounts collected in pursuance of such assessments shall be credited or refunded in the same manner as in the case of an erroneous collection of tax (section 201(b)).

(*c*) Collections of such tax made on or before April 12, 1939, shall be credited or refunded in the same manner as in the case of an erroneous collection of tax, under the following conditions:

(1) If a claim for refund therefor filed before January 19, 1939 (the date of the President's message to Congress on reciprocal income taxation of officers and employees of the Federal and State and local governments), was not disallowed prior to April 13, 1939;

(2) If a claim for refund therefor filed before January 19, 1939, has been rejected but the time for beginning suit with respect thereto had not expired on April 12, 1939;

(3) If a suit for recovery of such tax is pending on April 12, 1939; or

(4) If a petition to the Board of Tax Appeals has been filed with respect to such tax and on April 12, 1939, the Board's decision had not become final (section 201(c)).

If any one of the tests specified in section 201 is satisfied, the State employee is entitled to the relief provided in that section regardless of the nature of his office or employment. In general, State employees given relief under that section are those engaged in the exercise of what have for many years been considered as essential governmental functions and thus prior to *Helvering* v. *Gerhardt* (1938) (304 U. S.,

405) and *Graves et al.* v. *O'Keefe* (1939) (59 S. Ct., 595), were deemed not to be subject to Federal tax on their compensation.

(3) *Taxable years beginning after December 31, 1937, and before January 1, 1939.*—Section 202 prevents the taxation of compensation for personal service as a State employee for any taxable year beginning in 1938 and ending in 1938 or 1939. That is accomplished by providing that such compensation shall be exempt and not includible in gross income under Title I of the Revenue Act of 1938 if such employee either—

(*a*) did not include in his return for his taxable year beginning in 1937 and ending in 1937 or 1938 compensation as a State employee (section 202(a)); or

(*b*) did include such compensation in his return for such taxable year but is otherwise entitled to the relief provided therefor in section 201 (see section 202(b)).

In general the same groups of State employees entitled to any of the forms of relief provided for in section 201 will be relieved, by virtue of section 202, from tax for a taxable year subject to Title I of the Revenue Act of 1938. If, however, either test specified in section 202 is satisfied, the State employee is entitled to the relief provided in that section regardless of the nature of his office or employment. Thus, for example, an individual becoming for the first time a State employee in the calendar year 1938 (his taxable year) will not be taxable on his compensation received therefor in that year even though he may have been engaged in the exercise of a proprietary function.

(4) *Taxable years beginning prior to January 1, 1939—Refund claims filed after January 18, 1939.*—Section 203 provides that tax collected at any time for any taxable year beginning prior to January 1, 1939, attributable to compensation for service as a State employee shall be credited or refunded as if it were erroneously collected, if a refund claim is filed after January 18, 1939, and the Commissioner (under regulations prescribed by him and approved by the Secretary of the Treasury) finds that the disallowance of such claim would result in the application of the doctrines of *Helvering* v. *Therrell* (1938) (303 U. S., 218), *Helvering* v. *Gerhardt* (1938) (304 U. S., 405), and *Graves et al* v. *O'Keefe* (1939) (59 S. Ct., 595), extending the classes of officers and employees subject to Federal taxation. Regulations under section 203 are now being prepared.

FEDERAL EMPLOYEES.

(1) *Taxable years beginning after December 31, 1938.*—Section 22(a) of the Internal Revenue Code, as amended by section 3 of the Act, requires that compensation for personal service as a judge of any court of the United States be included in gross income for taxable years beginning after December 31, 1938, regardless of when the taxpayer took office as judge. Furthermore, compensation of school teachers in Alaska and Hawaii is not exempt from the tax for taxable years beginning after December 31, 1938 (section 2 of the Act repealed section 116(b) of the Internal Revenue Code).

(2) *Taxable years beginning prior to January 1, 1939.*—Section 209 provides that the compensation of judges of the Supreme Court and of all the inferior courts of the United States created under

Article III of the Constitution, taking office on or before June 6, 1932, shall not be subject to income tax under the Revenue Act of 1938 or any prior Revenue Act. The term "inferior courts" means circuit and district courts (including the United States Court of Appeals for the District of Columbia and the District Court of the United States for the District of Columbia), but does not include so-called legislative courts.

GENERAL.

Title II applies only to State employees and not to other persons having dealings with State and local governments since the taxability of the compensation of such other persons was long recognized prior to *Helvering* v. *Gerhardt*, supra. Such persons are generally held to be independent contractors for purposes of Federal income tax and their liability for such tax has been clearly established since *Metcalf & Eddy* v. *Mitchell* (1926) (269 U. S., 514). They are not State employees within the meaning of this mimeograph, and, consequently, the relief provisions of the Act are not applicable with respect to them.

Any amount of tax attributable to compensation of a State employee and assessed prior to January 1, 1939, shall be abated—

(1) if collection thereof has not yet been made, and

(2) if collection were made and a refund claim filed, the amount collected would have to be refunded under section 203.

The provisions of sections 201, 202, and 203 are inapplicable to compensation received by a State employee to the extent it is paid directly or indirectly by the United States or any agency or instrumentality thereof (section 205). Thus, for example, a State employee whose compensation is paid in whole or in part from funds granted by the United States under the Smith-Lever Act is not entitled to any relief under Title II with respect to his compensation to the extent it is paid from such funds. Such provisions are applicable, however, to all other compensation received by an individual for service as a State employee regardless of the source (public or private) of such other compensation.

Claims for refund, institution of suit, and petitions to the Board of Tax Appeals referred to in sections 201 and 203 mean only such claims and petitions filed and suits begun within the period of limitation properly applicable thereto. The provisions of those sections are, therefore, inoperative if the claim or petition is not timely filed or if the suit is not timely begun (section 204).

The operation of the relief provisions of sections 201, 202, and 203 with respect to State employees of any State may, under certain conditions, be terminated. Section 208 provides that after the Secretary of the Treasury has determined and proclaimed that it is the policy of a State to collect income tax from Federal employees on compensation received prior to January 1, 1939, the relief provisions of sections 201, 202, and 203 shall not thereafter apply to employees of that State. After such determination has been proclaimed it shall be the duty of the Bureau to enforce assessment and collection of tax for years beginning prior to January 1, 1939, on compensation of State employees of the State affected to the extent permitted under applicable statutes of limitation, regardless of the nature of the office or employment of such employees. In the absence, however, of

such proclaimed determination by the Secretary the provisions of sections 201, 202, and 203 shall be given full force and effect.

In the examination of returns in all cases involving the taxability of State employees, care should be taken to see that proper effect is given to the provisions of the Act. Cases in which the sole issue involved is the taxability of compensation of a State employee and which have been held in suspense in accordance with previous instructions from this office may now be closed in accordance with the provisions of Title II of the Act.

Inquiries regarding this mimeograph should refer to the number thereof and the symbols IT:JRK.

GUY T. HELVERING,
Commissioner.

ARTICLE 22(a)–2: Compensation for personal services. 1939-25-9886 T. D. 4903

(Also Section 116; Regulations 101, Article 116–2.)

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 9, SUBPART H; PART 465, SUBPART B.—INCOME TAX.

Public Salary Tax Act of 1939.
Articles 22(a)–2 and 116–2 of Regulations 101, as made applicable to the Internal Revenue Code by Treasury Decision 4885 [page 396, this Bulletin], amended.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 101 (Part 9, Subpart H, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code (53 Stat., Part 1) by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, Title 26, Code of Federal Regulations [page 396, this Bulletin]), to the Public Salary Tax Act of 1939 (Public, No. 32, Seventy-sixth Congress, first session), such regulations are amended as follows:

1. The following is inserted immediately preceding article 22(a)–1 (section 9.22(a)–1, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code:

Section 1 of the Public Salary Tax Act of 1939 provides:

"SECTION 1. Section 22(a) of the Internal Revenue Code (relating to the definition of 'gross income') is amended by inserting after the words 'compensation for personal service' the following: ('including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing)'."

Section 3 of the Public Salary Tax Act of 1939 provides:

"SEC. 3. Section 22(a) of the Internal Revenue Code is amended by adding at the end thereof a new sentence to read as follows: 'In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.'"

Section 210 of the Public Salary Tax Act of 1939 provides:

"SEC. 210. For the purposes of this Act, the term 'officer or employee' includes a member of a legislative body and a judge or officer of a court."

2. Article 22(a)–2 (section 9.22(a)–2, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code, is

amended by inserting before the last sentence thereof the following new sentence:

As used in this article the term "Federal officers and employees" includes all judges of courts of the United States irrespective of when they took office.

3. The following is inserted immediately preceding article 116-1 (section 9.116-1, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code:

Section 2 of the Public Salary Tax Act of 1939 provides:

"SEC. 2. Section 116(b) of the Internal Revenue Code (exempting compensation of teachers in Alaska and Hawaii from income tax) is repealed."

4. Article 116-2 (section 9.116-2, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code, is amended to read as follows:

ART. 116-2. *Compensation of State officers and employees.*—Compensation received for services rendered as an officer or employee of a State or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, is to be included in gross income, regardless of the nature of the office or employment. As used in this article the term "officer or employee" includes a member of a legislative body and a judge or officer of a court.

This Treasury decision is effective only for taxable years beginning after December 31, 1938. For provisions of the Public Salary Tax Act of 1939 which relate to taxable years beginning prior to January 1, 1939, see Title II of such Act.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 22 and 116 of the Internal Revenue Code (53 Stat., Part 1); sections 1, 2, 3, and 210 of the Public Salary Tax Act of 1939 (Public, No. 32, Seventy-sixth Congress, first session); and section 62 of the Internal Revenue Code (53 Stat., Part 1).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved June 13, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register June 15, 1939, 10.07 a. m.)

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

ARTICLE 23(c)-1: Taxes. 1939-20-9831
(Also Section 42, Article 42-1.) I. T. 3278

INTERNAL REVENUE CODE AND REVENUE ACT OF 1938.

The amount equal to 3 per cent of the pay roll contributed by an employer to the New York unemployment insurance fund constitutes a proper deduction for Federal income tax purposes for the taxable year in which paid or accrued.

Treatment as taxable income to the employer of the amount of credit or refund of such contribution.

Mim. 3958 (C. B. XI-2, 33 (1932)) and Mim. 4564 (C. B. 1937-1, 93) modified.

Advice is requested as to the deductibility for Federal income tax purposes of the amount equal to 3 per cent of the pay roll contributed by an employer to the New York unemployment insurance fund, and how a credit or refund received under section 516-a of the New York unemployment insurance law should be treated.

The pertinent provisions of the State law read as follows:

SEC. 516. *Contributions to the unemployment insurance fund.*—The contribution regularly payable by each employer shall be an amount equal to 3 per centum of the pay roll of the employees * * *.

SEC. 516-a. *Refund of or credit for contributions in certain cases.*—If for any calendar year beginning with 1938 the total contribution under this article of any employer who is liable for the excise tax levied by Title IX of the Federal Social Security Act is in excess of 2.7 per centum of the total remuneration paid by him during such calendar year to employees for employment, as herein defined, such employer shall not be deemed liable under this article for such excess and the amount thereof shall be refunded or credited to him in accordance with the provisions of subdivision 3 of section 523 of this chapter. (Laws of 1938, ch. 10, effective January 1, 1938.)

* * * * * * *

SEC. 523. 3. *Refunds and credits.*—If not later than three years from the payment of any contribution, interest or penalty an employer shall make application for a refund thereof or for a credit and the commissioner shall determine that such contribution, interest or penalty, or any portion thereof, was erroneously collected, the commissioner shall refund said amount, or allow a credit therefor, without interest, out of the fund unless the employer shall have already deducted said amount by way of credit against contributions payable by him. For like cause and within the same period a refund may be so made, or a credit allowed, on the initiative of the commissioner. (Laws of 1936, ch. 117; Laws of 1938, ch. 10, effective January 1, 1938.)

It is held that the amount equal to 3 per cent of the pay roll contributed by an employer to the New York unemployment insurance fund constitutes a proper deduction for Federal income tax purposes for the taxable year in which paid or accrued. The amount of credit or refund of such contribution to which the taxpayer is later entitled should be treated as income in the return for the taxable year in which the credit is applied or the refund is made, provided the prior deduction of the amount later refunded or credited had the effect of offsetting taxable income. However, if the prior deduction of such amount did not have the effect of offsetting taxable income, the amount refunded or credited should not be treated as taxable income. If only a portion of such amount previously deducted resulted in offsetting taxable income, the amount refunded or credited will be treated as taxable income only if and to the extent that it is in excess of the amount of the prior deduction which did not have the effect of offsetting taxable income. The conclusions here set forth are in accord with G. C. M. 20854 (page 102, this Bulletin. That ruling involved recoveries of bad debts previously deducted, but the principles there set forth are equally applicable to refunds or credits of taxes previously deducted.

Mim. 3958 (C. B. XI-2, 33 (1932)) and Mim. 4564 (C. B. 1937-1, 93) are hereby modified to accord with the foregoing conclusions.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

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

ARTICLE 42-1: When included in gross income.

INTERNAL REVENUE CODE.

Credits or refunds under section 516-a of the New York unemployment insurance law. (See I. T. 3278, page 76.)

SECTION 44.—INSTALLMENT BASIS.

ARTICLE 44-5: Gain or loss upon disposition of installment obligations. 1939-20-9839 T. D. 4899

TITLE 26—INTERNAL REVENUE.—CHAPTER I; SUBCHAPTER A, PART 8 AND PART 9, SUBPART H; SUBCHAPTER E, PART 465, SUBPART B.

Income tax.—Amending article 44-5 of Regulations 94, article 44-5 of Regulations 101, and such article as made applicable to the Internal Revenue Code by Treasury Decision 4885 [page 396, this Bulletin], all relating to gain or loss on disposition of installment obligations.

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

To Collectors of Internal Revenue and Others Concerned:

The next to the last paragraph of article 44-5 of Regulations 94 (section 3.44-5 of Title 26, Code of Federal Regulations), the next to the last paragraph of article 44-5 of Regulations 101 (section 9.44-5 of such Title 26), and the next to the last paragraph of that article as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26 [page 396, this Bulletin]), are each amended to read as follows:

In the case of a decedent who dies possessed of installment obligations, no gain on account of the transmission at death of such obligations is required to be reported as income in the return of the decedent for the year of his death, if the executor or administrator of the estate of the decedent or any of the next of kin or legatees files with the Commissioner a bond on Form 1132 conditioned upon the return as income, by any person receiving any payment in satisfaction of such obligations, of the same proportion of such payment as would be returnable as income by the decedent if he had lived and received such payment. The bond shall be subject to the approval of the Commissioner, shall be in an amount sufficient in his judgment to insure collection of the tax resulting from the fulfillment of the conditions stated in the bond, and shall be filed at the time of filing the return for the decedent for the year of his death or at such later time as may be specified by the Commissioner. The bond on Form 1132 may be (1) executed by a surety company holding a certificate of authority from the Secretary of the Treasury as an acceptable surety on Federal bonds, or (2) secured by deposit of bonds or notes of the United States, or the installment obligations, in such amounts as the Commissioner may deem necessary to insure collection of the tax.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 44(d) and 62 of the Revenue Act of 1936 (49 Stat., 1667, 1673; 26 U. S. C., Sup. IV, 44(d), 62); sections 44(d) and 62 of the Revenue Act of 1938 (52 Stat., 473, 480; 26 U. S. C., Sup. IV, 44(d), 62); and sections 44(d) and 62 of the Internal Revenue Code (53 Stat., Part 1).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 9, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register May 10, 1939, 3.34 p. m.)

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 116–2: Compensation of State officers and employees.

INTERNAL REVENUE CODE.

Taxability of compensation received by Federal officers and employees and officers and employees of States or political subdivisions thereof. (See Mim. 4916, page 71.)

101, ARTICLE 116–2: Compensation of State officers and employees.

INTERNAL REVENUE CODE.

Article 116–2 of Regulations 101, as made applicable to the Internal Revenue Code by Treasury Decision 4885, amended to conform to the Public Salary Tax Act of 1939. (See T. D. 4903, page 75.)

CHAPTER 38.—MISCELLANEOUS PROVISIONS.

SECTION 3797.—DEFINITIONS.

ARTICLE 901–5: Limited partnership as corporation. 1939–16–9798
T. D. 4894

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PARTS 3, 9, AND 465.

Income tax.—Amending articles 901–5 and 901–6 of Regulations 101, and such articles as made applicable to the Internal Revenue Code by Treasury Decision 4885 [page 396, this Bulletin], articles 1001–5 and 1001–6 of Regulations 94, and articles 801–5 and 801–6 of Regulations 86, all relating to classification of limited partnerships.

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

To Collectors of Internal Revenue and Others Concerned:

Article 901–5 of Regulations 101 (section 9.901–5 of Title 26, Code of Federal Regulations), and that article as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26 [page 396, this Bulletin]), and article 1001–5 of Regulations 94 (section 3.1001–5 of such Title 26), and article 801–5 of Regulations 86 are each amended to read as follows:

Limited partnerships.—A limited partnership is classified for the purpose of the Act as an ordinary partnership, or, on the other hand, as an association taxable as a corporation, depending upon its character in certain material respects. If the organization is not interrupted by the death of a general partner or by a change in the ownership of his participating interest, and if the management of its affairs is centralized in one or more persons acting in a representative capacity, it is taxable as a corporation. For want of these essential characteristics, a limited partnership is to be considered as an ordinary partnership notwithstanding other characteristics conferred upon it by local law. The Uniform Limited Partnership Act has been adopted in several States. A limited partnership organized under the provisions of that Act may be either an association or a partnership depending upon whether or not in the particular case the essential characteristics of an association exist.

Article 901–6 of Regulations 101 (section 9.901–6 of Title 26, Code of Federal Regulations), and that article as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26), and article 1001–6 of Regulations 94 (section 3.1001–6 of such Title 26), and article 801–6 of Regulations 86 are each amended to read as follows:

Partnership associations.—A partnership association of the type authorized by the statutes of several States, such, for instance, as those of the State of Pennsylvania (Purdon's Penna. Stat. Ann. (Perm. Ed.), Title 59, ch. 3), having by virtue of the statutory provisions under which it was organized, the characteristics essential to an association within the meaning of the Act, is taxable as a corporation.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 3797 and 62 of the Internal Revenue Code (53 Stat., Part 1); sections 901 and 62 of the Revenue Act of 1938 (52 Stat., 583, 480; 26 U. S. C., Sup. IV, 1696, 62); sections 1001 and 62 of the Revenue Act of 1936 (49 Stat., 1756, 1673; 26 U. S. C., Sup. IV, 1696, 62); and sections 801 and 62 of the Revenue Act of 1934 (48 Stat., 771, 700, 26 U. S. C., 1696, 62).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 7, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register April 10, 1939, 12.45 p. m.)

B. REVENUE ACT OF 1938.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 22(a)-1: What included in gross income. 1939-23-9861
I. T. 3283

REVENUE ACT OF 1938.

Advances to corn producers made under section 302 of the Agricultural Adjustment Act of 1938 (52 Stat., 31), known as corn loans, should be treated as loans and not as proceeds from the sale of the corn.

Advice is requested whether advances obtained by corn producers under the corn storage provisions of the Agricultural Adjustment Act of 1938 should be treated as loans or as proceeds from the sale of the corn in the year the loan is obtained.

Section 302 of the Agricultural Adjustment Act of 1938 (52 Stat., 31) directs the Commodity Credit Corporation to make available loans on corn during any marketing year beginning in the calendar year in which the November crop estimate for corn is in excess of a normal year's domestic consumption and export, or in any year when on November 15 the farm price of corn is below 75 per cent of the parity price as defined in the Act. Section 302(h) of that Act provides that "No producer shall be personally liable for any deficiency arising from the sale of the collateral securing any loan under this section unless such loan was obtained through fraudulent representations by the producer."

When the loans are obtained, the producer signs a "Corn producer's note" agreeing, for value received, to pay at a time certain to the order of the Commodity Credit Corporation, payee, the amount advanced with interest at 4 per cent per annum. In consideration of the loan evidenced by the note the producer represents in said loan agreement (1) that the pledged corn was produced by or for the producer on certain described land, (2) that the producer is an eligible producer as defined, and (3) that the corn is free of undisclosed liens. The loan agreement further provides that any holder of the note may declare the same due and payable (1) when and so long as the farm price of corn shall be above parity, (2) upon discovery that the producer has made fraudulent misrepresentation in obtaining the loan, (3) upon discovery that the collateral is damaged, and (4) upon the filing of a petition in bankruptcy by the producer. Upon maturity of the note, the holder is authorized to sell the corn at public or private sale, and in case the sales price (after deducting expenses and all costs) is in excess of the amount due on the note, the holder is bound to pay the excess to the producer. However, the producer is not personally liable for any deficiency unless he obtained the loan through fraudulent misrepresentation.

It is held that such advances received by the producers of corn under the provisions of the Agricultural Adjustment Act of 1938 should be treated as loans and not as proceeds from the sale of corn. (See I. T. 2931, C. B. XIV-2, 56 (1935).)

ARTICLE 22(a)-1: What included in gross income. 1939-24-9869
I. T. 3285

REVENUE ACT OF 1938.

Where producers of gum turpentine and gum rosin (known as naval stores) delivered their products to a cooperative association under an agreement whereby absolute title was to be transferred to the association on November 1, 1938, as to products previously delivered in that year, advances made in 1938 by the association to the producers from funds procured by a loan from the Commodity Credit Corporation to the association, there being no liability on the part of the producer to repay such advances, constitute partial payments for such products by the association to the producers and should be included in gross income for the year 1938.

Advice is requested as to the proper treatment for Federal income tax purposes of payments made to producers of gum turpentine and gum rosin (known as naval stores) by the M Cooperative Association with funds borrowed by it from the Commodity Credit Corporation under a marketing agreement.

The Commodity Credit Corporation was authorized by law to make loans in 1938 to the M Cooperative Association (hereinafter referred to as the association) on gum turpentine and gum rosin delivered to the association by the producer under the terms of the marketing agreement which was required to be entered into between the association and the producer. In order to obtain the loan, the association was required to execute a promissory note in the amount of the loan payable to the Commodity Credit Corporation, which note was secured by the gum turpentine and gum rosin delivered by the producer to the association.

The marketing agreement between the producer and the association provides in substance that on November 1, 1938, absolute title shall be conveyed to the association of all gum turpentine and gum rosin previously delivered in that year by the producer to, and then held by, the association under the terms of the agreement, and such conveyance shall constitute a sale by the producer and a purchase by the association of such gum turpentine and gum rosin. Absolute title to all gum rosin pledged subsequent to November 1, 1938, must be conveyed to the association, and such conveyance shall constitute a sale by the producer and a purchase by the association of such gum rosin. After April 1, 1938, and on or before September 30, 1938, the association shall make advances to the producer on the gum turpentine and gum rosin delivered to the association under the agreement on the basis as set forth therein, which advances represent the amounts loaned by the Commodity Credit Corporation to the association on such gum turpentine and gum rosin. The advances are made without recourse or right on the part of the association to recover any part of such advances from the producer except for fraud or misrepresentation. At any time after June 1, 1938, and prior to November 1, 1938, the producer may withdraw all of the gum turpentine and gum rosin delivered to the association by paying to the Commodity Credit Corporation, for the account of the association, the amounts advanced thereon together with interest and certain other charges. The gum turpentine and gum rosin delivered under the agreement are commingled with the gum turpentine and gum rosin of other producers and sold by the association, commencing on November 1, 1938, for

the best prices obtainable. The proceeds from the sale of the gum turpentine and gum rosin are to be applied by the association to (1) the payment of storage, handling, and/or selling expenses approved by the Commodity Credit Corporation, (2) the payment of the loan obtained by the association from the Commodity Credit Corporation and secured by the gum turpentine and gum rosin, and (3) the payment of the administrative expenses of the association incurred in connection with the handling and marketing of the gum turpentine and gum rosin. Upon sale of the entire pool of gum turpentine and gum rosin, the net amount remaining after payment of the aforementioned items must be distributed by the association to the producers proportionately.

Since there is no liability on the part of the producer in any event to pay the loan made by the Commodity Credit Corporation to the association, or to repay in any event the advances made to him by the association under the terms of the marketing agreement, the relationship of debtor and creditor does not exist between the producer and the association. Nor does such relationship exist between the producer and the Commodity Credit Corporation. It is held, therefore, that the advances made by the association to the producer on the gum turpentine and gum rosin, title to which passed to the association on or after November 1, 1938, do not constitute loans but, in fact, constitute partial payments by the association to the producers for the gum turpentine and gum rosin, and as such should be included in the gross income of the producer for the year 1938. (See I. T. 2107, C. B. III–2, 74 (1924).)

ARTICLE 22(a)–2: Compensation for personal services. 1939–17–9801
I. T. 3272

REVENUE ACT OF 1938.

I. T. 2219 (C. B. IV–2, 41 (1925)), holding that money allowances in lieu of subsistence and quarters paid by the United States Government to enlisted men and noncommissioned officers in the United States Army are not subject to Federal income tax, is not applicable to those retired from the service. The entire amount, including allowances in lieu of rations, clothing, quarters, etc., received by a retired enlisted man is subject to Federal income tax.

Advice is requested as to the taxability of cash allowances in lieu of subsistence, heat, light, etc., received by A in addition to his regular pay as a retired enlisted man of the United States Army.

A received compensation of $157.50 per month for his services while on active duty in the United States Army. Upon retirement his pay was reduced to 75 per cent of that amount, or $118.13. In addition he received $15.75 monthly as an allowance in lieu of subsistence, heat, light, etc., making the amount of his monthly check $133.88. It is contended that under I. T. 2219 (C. B. IV–2, 41 (1925)) the allowance is not taxable.

I. T. 2219, supra, reads as follows:

Money allowances in lieu of subsistence and quarters made by the United States Government to enlisted men and noncommissioned officers in the United States Army are not income subject to Federal income tax. * * *

It will be noted that the foregoing applies to noncommissioned officers and enlisted men "in the United States Army" and is not, therefore, necessarily applicable to those retired from the service.

The Act of March 2, 1907 (34 Stat., 1217), entitled "An Act providing for the retirement of noncommissioned officers, petty officers, and enlisted men of the Army, Navy, and Marine Corps of the United States," reads in part as follows:

Be it enacted * * * That when an enlisted man shall have served 30 years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with 75 per centum of the pay and allowances he may then be in receipt of, and that said allowances shall be as follows: Nine dollars and fifty cents per month in lieu of rations and clothing and six dollars and twenty-five cents per month in lieu of quarters, fuel, and light: *Provided*, That in computing the necessary 30 years' time all service in the Army, Navy, and Marine Corps shall be credited.

The statute does not provide that the retired noncommissioned officer or enlisted man shall receive as his retired pay a certain amount of cash and allowances in addition thereto. The amount he receives is a certain sum, this sum being 75 per cent of the pay plus allowances he may be in receipt of at the time of retirement. Such percentage of his pay and the specific cash allowances, therefore, merely constitute the measure of the retirement pay.

Retirement pay in general has long been regarded as additional compensation for services previously rendered and, as such, is taxable income to the recipient. Consequently, it is held that the entire amount received by A is subject to Federal income tax. (See also G. C. M. 341, C. B. V-2, 23 (1926).)

ARTICLE 22(a)-2: Compensation for personal services.

REVENUE ACT OF 1938.

Taxability of compensation received by Federal officers and employees and officers and employees of States or political subdivisions thereof. (See Mim. 4916, page 71.)

ARTICLE 22(a)-12: Annuities and insurance policies. 1939-26-9889 I. T. 3292

REVENUE ACT OF 1938.

A should include in his gross income the entire amount of the annuity received by him as a retired national bank examiner since he did not make any contributions to the retirement fund from which the annuity is paid.

Advice is requested as to the taxability of a retirement annuity received by A from the retirement fund established for retired national bank examiners and administered by trustees in the office of the Comptroller of the Currency. A, who was retired on December 31, 1937, did not make any contributions to the retirement fund inasmuch as he was over 65 years of age when the system providing for the retirement of the employees of the office of the Comptroller of the Currency was placed in effect on June 1, 1936.

Section 5240 of the Revised Statutes, as amended (U. S. C., Supp. IV, Title 12, section 481), relating to the appointment of national bank examiners, reads in part as follows:

* * * The examiners and assistant examiners making the examinations of national banking associations and affiliates thereof herein provided for and the chief examiners, reviewing examiners and other persons whose services may be required in connection with such examinations or the reports thereof, shall be employed by the Comptroller of the Currency with the approval of the Secretary of the Treasury; the employment and compensation of examiners, chief examiners, reviewing examiners, assistant examiners, and of the other employees of the office of the Comptroller of the Currency whose compensation, including retirement annuities to be fixed by the Comptroller of the Currency, is and shall be paid from assessments on banks or affiliates thereof shall be without regard to the provisions of other laws applicable to officers or employees of the United States. * * *

Under the foregoing provisions of law, the expenses of the examination of the various banks are to be assessed by the Comptroller of the Currency upon banks examined in proportion to assets or resources held by the banks on the dates of examination of the various banks. The funds derived from such assessments are deposited by the Comptroller of the Currency in accordance with the provisions of the law and are not Government funds or appropriated moneys. The retirement fund from which the annuity is paid is derived from such assessments and special funds held in the Comptroller's office.

It is held that inasmuch as A made no contributions whatever to the retirement fund, with the result that he paid no consideration for his annuity, he should include in his gross income the total amount of the annuity received by him in each year as a retired national bank examiner.

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

1939-3-9672
T. D. 4880

INCOME TAX.

Regulations with respect to the taxation of French citizens and French corporations as affected by the convention and protocol on double taxation between the United States and the Republic of France, proclaimed by the President of the United States April 16, 1935, effective January 1, 1936 [C. B. XIV-2, 535].

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

To Collectors of Internal Revenue and Others Concerned:

PART I.

PARAGRAPH A. The convention and protocol, proclaimed by the President of the United States on April 16, 1935, provides in part as follows:

ARTICLE I.

Enterprises of one of the contracting States are not subject to taxation by the other contracting State in respect of their industrial and commercial profits except in respect of such profits allocable to their permanent establishments in the latter State.

No account shall be taken, in determining the tax in one of the contracting States, of the purchase of merchandise effected therein by an enterprise of the other State for the purpose of supplying establishments maintained by such enterprise in the latter State.

ARTICLE II.

American enterprises having permanent establishments in France are required to submit to the French fiscal administration the same declarations and the same justifications, with respect to such establishments, as French enterprises.

The French fiscal administration has the right, within the provisions of its national legislation and subject to the measures of appeal provided in such legislation, to make such corrections in the declaration of profits realized in France as may be necessary to show the exact amount of such profits.

The same principle applies mutatis mutandis to French enterprises having permanent establishments in the United States.

ARTICLE III.

Income which an enterprise of one of the contracting States derives from the operation of aircraft registered in such State and engaged in transportation between the two States is taxable only in the former State.

ARTICLE IV.

When an American enterprise, by reason of its participation in the management or capital of a French enterprise, makes or imposes on the latter, in their commercial or financial relations, conditions different from those which would be made with a third enterprise, any profits which should normally have appeared in the balance sheet of the French enterprise, but which have been, in this manner, diverted to the American enterprise, are, subject to the measures of appeal applicable in the case of the tax on industrial and commercial profits, incorporated in the taxable profits of the French enterprise.

The same principle applies mutatis mutandis, in the event that profits are diverted from an American enterprise to a French enterprise.

* * * * * * *

ARTICLE VII.

Compensation paid by one of the contracting States to its citizens for labor or personal services performed in the other State is exempt from tax in the latter State.

ARTICLE VIII.

War pensions paid by one of the contracting States to persons residing in the territory of the other State are exempt from tax in the latter State.

ARTICLE IX.

The following classes of income paid in one of the contracting States to a corporation of the other State, or to a citizen of the latter State residing there, are exempt from tax in the former State:

(*a*) amounts paid as consideration for the right to use patents, secret processes and formulas, trade marks and other analogous rights;

(*b*) income received as copyright royalties;

(*c*) private pensions and life annuities.

ARTICLE X.

* * * * * * *

The agreement shall become effective on the 1st day of January following the exchange of ratifications and shall remain effective for a period of 5 years, and thereafter until 12 months from the date on which either contracting party gives notice of its termination.

* * * * * * *

PROTOCOL.

At the moment of signing the convention on double taxation between the United States of America and the Republic of France, the undersigned plenipotentiaries, duly authorized by their respective Governments, have agreed, as follows:

(1) The taxes referred to in this agreement are:

(*a*) for the United States:

the Federal income tax—but it is understood that Article I does not exempt from tax (1) compensation for labor or personal services performed in the United States; (2) income derived from real property located in the United States, or from any interest in such property, including rentals and royalties therefrom, and gains from the sale or the disposition thereof; (3) dividends; (4) interest.

(*b*) for France:

— in Articles I, II, III and IV, the tax on industrial and commercial profits (impot sur les benefices industriels et commerciaux);

— in Articles III, V and VI, the tax on income from securities (impot sur les revenus des valeurs mobilieres);

— in Articles VII, VIII and IX, the tax on wages and salaries, pensions and life annuities (impot sur les traitements et salaries, pensions et rentes viageres), and other schedular taxes (impots cedulaires) appropriate to the type of income specified in said articles;

(2) The provisions of this agreement shall not be construed to affect in any manner any exemption, deduction, credit or other allowance accorded by the laws of one of the contracting States in the determination of the tax imposed by such State.

(3) As used in this agreement:

(*a*) The term "permanent establishment" includes branches, mines and oil wells, factories, workshops, warehouses, offices, agencies, and other fixed places of business, but does not include a subsidiary corporation.

When an enterprise of one of the States carries on business in the other State through an agent established there who is authorized to contract for its account, it is considered as having a permanent establishment in the latter State.

But the fact that an enterprise of one of the contracting States has business dealings in the other State through a bona fide commission agent or broker shall not be held to mean that such enterprise has a permanent establishment in the latter State.

(*b*) The term "enterprise" includes every form of undertaking whether carried on by an individual, partnership (societe en nom collectif), corporation, (societe anonyme), or any other entity.

(*c*) The term "enterprise of one of the contracting States" means, as the case may be, "American enterprise" or "French enterprise."

(*d*) The term "American enterprise" means an enterprise carried on in the United States by a citizen of the United States or by an American corporation or other entity; the term "American corporation or other entity" means a partnership, corporation or other entity created or organized in the United States or under the law of the United States or of any State or Territory of the United States.

(*e*) The term "French enterprise" is defined in the same manner, mutatis mutandis, as the term "American enterprise."

(*f*) The American corporations mentioned in Articles V and VI are those which, owing to their form of organization, are subject to article 3 of the decree of December 6, 1872. The present agreement does not modify the regime of "abonnement" for securities.

(*g*) The term "United States," when used in a geographical sense, includes only the States and the Territories of Alaska and Hawaii, and the District of Columbia.

(*h*) The term "France," when used in a geographical sense, indicates the country of France, exclusive of Algeria and the Colonies.

PAR. B. The proclamation of the convention by the President of the United States on April 16, 1935, reads in part as follows:

And whereas, the said convention and protocol have been ratified on both parts, and the ratifications of the two Governments were exchanged at Paris on the 9th day of April, 1935;

And whereas, it is stipulated in Article X of the said convention that the convention shall become effective on the 1st day of January following the exchange of ratifications, that is to say on the 1st day of January, 1936;

Now, therefore, be it known that I, FRANKLIN D. ROOSEVELT, President of the United States of America, have caused the said convention and the said protocol to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof on and from the 1st day of January, 1936.

In testimony whereof, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the city of Washington this 16th day of April in the year of our Lord one thousand nine hundred and thirty-five, and of the Inde-
[SEAL] pendence of the United States of America the one hundred and fifty-ninth.

FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,
Secretary of State.

PAR. C. Section 22(b)7, Revenue Act of 1938, provides in part as follows:

SEC. 22. GROSS INCOME.

* * * * * * *

(b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * *

(7) *Income exempt under treaty.*—Income of any kind, to the extent required by any treaty obligation of the United States:

Pursuant to the provisions of section 62 of the Revenue Act of 1938, the following regulations are hereby prescribed to carry into effect the quoted provisions of the convention and protocol, or treaty, between the United States of America and the Republic of France, hereinafter referred to as the convention, for taxable years beginning after December 31, 1937:

PART II.

EFFECT OF THE CONVENTION UPON THE DETERMINATION OF UNITED STATES TAXABLE INCOME OF FRENCH CITIZENS AND FRENCH CORPORATIONS.

ARTICLE 1. *General.*—The primary purposes of the convention are to regulate the method of taxation of corporations of either of the contracting States carrying on industrial or commercial activities through a permanent establishment or a subsidiary corporation in the other State and to avoid double taxation upon certain special classes of income.

The specific classes of income relieved from United States income tax are:

(*a*) Industrial and commercial profits of a French enterprise having no permanent establishment in the United States.

(*b*) Income derived by a French enterprise from the operation of aircraft registered in France and engaged in transportation between the United States and France.

(*c*) Compensation paid by France to its citizens for labor or personal services performed in the United States.

(*d*) War pensions paid by France to persons residing in the United States.

(*e*) Income paid to a French corporation, or to a citizen of France residing in France—

(1) as consideration for the right to use patents, secret processes and formulas, trade marks and other analogous rights;

(2) as copyright royalties;

(3) as private pensions and life annuities.

Except as to those items of income expressly exempted by the convention, the tax liability of French citizens, not residents of the United States, and French corporations, is determined in accordance with the provisions of the revenue laws of the United States and the regulations thereunder applicable generally to nonresident alien individuals and to foreign corporations.

The convention does not affect the liability to tax of French citizens resident in the United States unless and to the extent such citizens are entitled to the benefits of Article VII or VIII of the convention. See articles 5 and 6 of these regulations. The tax liability of a United States citizen or United States resident, a member of a French partnership carrying on a French enterprise, is not affected by Article I of the convention. Such citizen or resident is subject to United States income tax upon his distributive share of its net income even though the other members of such partnership are not subject to tax upon their share of the partnership's industrial and commercial profits from sources within the United States.

The convention has no reference to the rates of taxation imposed by the respective countries and concerns only the determination of income arising in one of the contracting States to citizens or corporations of the other contracting State and subject to taxation in the former State.

These regulations are limited to a consideration of the factors involved in the application of: (*a*) the provisions of the convention alone; and (*b*) the provisions of the convention as extended by the Revenue Act of 1938. These regulations are not concerned with Article V or VI of the convention as such articles affect only the application of certain French tax laws and decrees.

ART. 2. *Definitions.*—Any word or term used in these regulations which is defined in the convention shall be given the definition assigned to such word or term in such convention. Any word or term used in these regulations which is not defined in the convention but is defined in the Revenue Act of 1938 shall be given the definition contained in the Revenue Act.

The term "permanent establishment" includes branches, mines and oil wells, factories, work shops, warehouses, offices, agencies and other fixed places of business. A French enterprise, as defined in the convention, carrying on business in the United States through an agent established there who is authorized to contract for its account, is considered to have a permanent establishment in the United States. However, the carrying on of business dealings in the United States by a French enterprise through a bona fide commission agent or broker does not constitute a permanent establishment in the United States. A French corporation doing business in the United States through a domestic subsidiary corporation has not, merely by reason of such fact, a permanent establishment in the United States.

The term "enterprise" means any commercial or industrial undertaking whether conducted by an individual, partnership, corporation or any other entity. It includes such activities as manufacturing, merchandising, mining, banking and insurance. It does not include the operation of, or the trading in, real property located in the United States. It does not include the rendition of personal services. Hence, a French citizen rendering personal services within the United States is not, merely by reason of such service, engaged in an enterprise within the meaning of the convention and his liability to Federal income tax is unaffected by Article I of the convention.

The term "French enterprise" means an enterprise carried on in France by a citizen of France or by a French corporation or other entity. The term "French corporation or other entity" of the convention means a partnership, corporation or other entity created or organized in France or under the law of France. If, for example, a French citizen or French corporation does not carry on an enterprise in France it is not a French enterprise within the meaning of the convention even though it carries on an enterprise in some other foreign country and hence such enterprise is not relieved by the convention from United States income tax upon its industrial and commercial profits from sources within the United States even though it has no permanent establishment therein.

The term "industrial and commercial profits" means the profits arising from the industrial, mercantile, or manufacturing or like undertakings of a French enterprise, as defined in this article. For the purpose of the exemption under Article I of the convention such term does not include gains from the sale or exchange within the United States of capital assets as defined in section

117 of the Revenue Act of 1938 unless it can be shown by clear and convincing evidence that such sale or exchange was incident, and had a necessary relation, to the commercial and industrial activities of the French enterprise. For treatment of such gains under the Revenue Act of 1938, see articles 8(*b*) and 9(*b*). Such term does not include dividends, interest, compensation for labor or personal services, or income derived from real property or from any interest in such property including rentals and royalties therefrom and gains from the sale or disposition thereof.

ART. 3. *Scope of convention with respect to determination of taxable income of French citizen or a French corporation carrying on a French enterprise in the United States.*—(*a*) *General.*—Article I of the convention adopts the principle that an enterprise of one of the contracting States shall not be taxable in the other contracting State in respect of its industrial and commercial profits unless it has a permanent establishment in the latter State. Hence, a French enterprise is subject to tax upon its industrial and commercial profits from sources within the United States only if it has a permanent establishment within the United States. From the standpoint of Federal income taxation the article has application only to a French enterprise and to the industrial and the commercial income thereof from sources within the United States. It has no application to compensation for labor or personal services performed in the United States, nor to income derived from real property located in the United States, or from any interest in such property, including rentals and royalties therefrom, and gains from the sale or the disposition thereof, nor to dividends or interest. Such latter items of income are, except as otherwise provided in the convention and in these regulations, subject to tax as income of French citizens or French corporations, in the same manner and subject to the same provisions as are applicable to other nonresident aliens and foreign corporations. As to what is a "French enterprise," a "permanent establishment," and "industrial and commercial profits," see article 2.

(*b*) *No United States permanent establishment.*—A French citizen or a French corporation carrying on a French enterprise but having no permanent establishment in the United States is not subject to United States income tax upon its industrial and commercial profits from sources within the United States. As to what constitutes a "French enterprise" see article 2. As to what constitutes "industrial and commercial profits" see article 2. For example, if such French corporation sells stock in trade, such as wine or cosmetics, through a bona fide commission agent or broker in the United States, the resulting profit is, under the terms of the convention, relieved from United States income tax. Such French corporation, however, remains subject to tax upon all other items of income from sources within the United States and not expressly exempted from such tax under the convention. However, under the provisions of Article IX of the convention the following items, otherwise taxable, paid to citizens of France residing in France, or to French corporations, are expressly exempt from the tax:

(1) Amounts paid as consideration for the right to use patents, secret processes, and formulas, trade marks and other analogous rights;

(2) Income received as copyright royalties;

(3) Private pensions and life annuities.

The exemption as to such items does not extend to French citizens residing elsewhere than in France nor to individuals residing in France who are not citizens of France.

(*c*) *United States permanent establishment.*—A French citizen or a French corporation carrying on a French enterprise which has a permanent establishment in the United States is subject to tax upon his or its entire net income (including industrial and commercial profits) from sources within the United States, subject to the exemptions expressly provided for in Article IX of the convention. See article 7. In the determination of the income of such French citizen or corporation from sources within the United States all industrial and commercial profits from sources within the United States shall be deemed to be allocable to the permanent establishment within the United States. The net income from sources within the United States of such enterprise will be determined in accordance with the provisions of section 119, Revenue Act of 1938. In determining such income no account shall be taken of the purchase of goods, wares, or merchandise within the United States for the purpose of supplying establishments of the enterprise maintained by such citizen or corporation in France.

A French citizen or corporation carrying on a French enterprise having business dealings in the United States through a bona fide commission agent or broker therein has not, merely by reason of such transactions, a permanent establishment in the United States and hence is relieved by the convention from United States income tax upon his industrial and commercial profits arising from such transactions. However, a French citizen or French corporation not carrying on a French enterprise, having business dealings in the United States through a bona fide commission agent or broker, is not by the convention relieved from United States income tax on the resulting profit. Such French citizen or French corporation is subject to tax upon the income resulting from such transactions in the same manner and subject to the same provisions and exceptions, under the Revenue Act of 1938, as are applicable to other nonresident aliens and foreign corporations. See articles 8(*a*) and 9. For definition of the terms "French enterprise," "permanent establishment," and "commercial and industrial profits," see article 2.

ART. 4. *Control of a domestic enterprise by a French enterprise.*—Article IV of the convention provides that if a French enterprise by reason of its control of a domestic business imposes conditions different from those which would result from normal bargaining between independent enterprises, the accounts between the enterprises will be adjusted so as to ascertain the true net income of the domestic enterprise. The purpose is to place the controlled domestic enterprise on a tax parity with an uncontrolled domestic enterprise by determining, according to the standard of an uncontrolled enterprise, the true net income from the property and business of the controlled enterprise. The convention contemplates that if the accounting records do not truly reflect the net income from the property and business of such domestic enterprise the Commissioner shall intervene and, by making such distributions, apportionments, or allocations as he may deem necessary of gross income or deductions or of any item or element affecting net income as between such domestic enterprise and the French enterprise by which it is controlled or directed, determine the true net income of the domestic enterprise.

ART. 5. *Compensation paid by the Republic of France to its citizens for services rendered in the United States.*—Under Article VII of the convention, French citizens are relieved from United States income tax upon wages, fees, salary, remunerations or other amounts paid by the Republic of France to its citizens as compensation for labor or personal services performed in the United States. Such exemption is effective on and after January 1, 1936. The character of the services has no bearing upon the exemption from the tax and hence the test set forth in section 116(h)1(B), Revenue Act of 1938, has no application in so far as the year 1938 and subsequent years are concerned.

ART. 6. *War pensions.*—Under Article VIII of the convention, war pensions paid by the Republic of France to persons residing in the United States are exempt from United States income tax. The term "war pensions," for the purposes of these regulations, includes pensions received under the provisions of the French Military Pensions Act of March 31, 1919, or for the services of the beneficiary or another in the military or naval forces of the Republic of France in time of war. It is not necessary that the recipient of such pension be a citizen of France. Such pension in the hands of a United States citizen recipient, if residing in the United States, is exempt from tax.

ART. 7. *Patents, formulas and copyright royalties, pensions and annuities.*—The following items of income paid to a corporation organized under the laws of France or to a citizen of France residing in France are exempt from Federal income tax under the provisions of Article IX of the convention:

(*a*) Amounts paid as consideration for the right to use patents, secret processes and formulas, trade marks and other analogous rights;

(*b*) Income received as copyright royalties;

(*c*) Private pensions and life annuities.

Such items are, therefore, not subject to the withholding provisions of the Revenue Act of 1938. To avoid withholding of the tax at the source the French citizen or corporation, as the case may be, should notify by letter the payor thereof that such income is exempt from taxation under the provisions of the convention. Such letter from a citizen of France shall contain his address and a statement that he is a citizen of France residing in France. The letter from such corporation shall contain the address of its office or place of business and a statement that it is a corporation organized under the laws of the Republic of France, and shall be signed by an officer of the corporation, giving his

official title. The letter of notification, or a copy thereof, should be immediately forwarded by the recipient to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C.

PART III.

TAX LIABILITY OF FRENCH CITIZENS AND FRENCH CORPORATIONS UNDER THE REVENUE ACT OF 1938, AS MODIFIED BY THE CONVENTION.

ART. 8. *Taxation of a French citizen (not a resident of the United States) under the Revenue Act of 1938, as modified by the convention.—General.*— A French citizen, not a resident of the United States, is subject to the provisions of the Revenue Act of 1938 applicable to nonresident alien individuals generally, but such citizen is entitled to the exemptions provided in the convention to which other nonresident aliens are not entitled. Section 211 of the Revenue Act of 1938 classifies nonresident alien individuals into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than $21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; (2) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year and deriving in the taxable year more than $21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; and (3) nonresident alien individuals who at any time during the taxable year are engaged in trade or business in the United States or have an office or place of business therein.

Whether a nonresident alien has an "office or place of business" within the United States depends upon the facts of the particular case. The term "office or place of business," however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

While Article I of the convention (in so far as concerns individuals) applies only to French citizens carrying on a French enterprise and has no application to those not carrying on such enterprise, section 211 makes no distinction between the two classes, and applies alike to both groups.

This article treats of the taxation of French citizens, not resident in the United States, under section 211, Revenue Act of 1938, as modified by the convention, following the classification prescribed in that section.

(*a*) *No United States business or office.—General rule.*—A French citizen, not a resident of the United States, coming within class (a) of the classification prescribed in section 211 (whether or not he carries on a French enterprise), is liable to the tax at the rate of 10 per cent, imposed by section 211(a), Revenue Act of 1938, upon the gross amount of his fixed or determinable annual or periodical gains, profits, and income from sources within the United States. Such gains, profits, and income are to be determined under the provisions of section 119, Revenue Act of 1938. Specific items of fixed or determinable annual or periodical income are enumerated in the Act as interest (except interest on deposits with persons carrying on the banking business which is nontaxable under the Act), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, and emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. However, a French citizen who is a resident of France is not taxable upon those items of income enumerated in Article IX of the convention and in article 3(*b*) of these regulations. See article 7.

The term "fixed or determinable annual or periodical income" within the meaning of section 211(a) does not include industrial and commercial profits as that term is used in the convention. Under the Revenue Act of 1938, as modified by the convention, a French citizen coming within section 211(a) or section 211(c) of that Act is exempt from United States income tax on industrial and commercial profits. For example, the convention exempts from tax profits realized by such French citizen who carries on a French enterprise from transactions in the United States in goods, wares, or merchandise through a resident broker or commission agent. If, however, such citizen does not carry on such enterprise such transactions are not exempt under the convention and constitute engaging in trade or business within the United States and he is accordingly taxable upon the profit resulting from such transactions under section 211(b), Revenue Act of 1938. On the other hand, a French citizen, not

a resident of the United States, but taxable under section 211(a) of the Act, whether or not he carries on a French enterprise, is not liable to United States income tax upon profits realized from transactions in stocks, securities, or commodities in the United States through a resident broker, commission agent, or custodian. However, a French citizen who performs personal services in the United States at any time within the taxable year is liable to the tax upon profits arising from transactions in stocks, securities, or commodities, except where it can be shown that such citizen is only temporarily present in the United States and meets the other conditions with respect to personal service laid down in section 211(b), Revenue Act of 1938. As to when such profits constitute "industrial and commercial profits," see article 2. As to withholding of the tax at the source, see section 143, Revenue Act of 1938.

(*b*) *No United States business or office.—Aggregate more than $21,600.*—A French citizen, not a resident of the United States, coming within class (c) of the classification prescribed in section 211 (whether or not he carries on a French enterprise) is, under the provisions of section 211(c), subject to tax only upon his fixed or determinable annual or periodical income specified in section 211(a) determined under the provisions of section 119, minus (1) the deductions properly allocable to such income and (2) the so-called "charitable contributions" deduction provided in section 213(c). Such nonresident alien is entitled to the credits against net income allowable to an individual by section 25, subject to the limitations provided in section 214. However, the tax thus computed under sections 11 and 12 shall in no such case be less than 10 per cent of the gross amount of such fixed or determinable annual or periodical income from sources within the United States.

(*c*) *United States business or office.*—A French citizen not a resident of the United States and not carrying on a French enterprise, coming within class (b) of the classification prescribed in section 211, or a French citizen carrying on a French enterprise and who has a permanent establishment in the United States is, like other nonresident aliens, liable to the normal tax of 4 per cent imposed by section 11 of the Act and to the graduated surtax imposed by section 12(b) of the Act, upon his net income from sources within the United States (gross income from sources within the United States minus the statutory deductions provided in sections 23 and 213) less the credits against net income allowed an individual by section 25. Such net income includes all industrial and commercial profits from sources within the United States. Such net income is to be determined under the provisions of section 119, Revenue Act of 1938, but in determining such income no account shall be taken of the purchase of merchandise within the United States for the purpose of supplying establishments of the enterprise, if any, maintained by such citizen in France. In the determination of the income of such French citizen from sources within the United States all industrial and commercial profits from sources within the United States shall be deemed to be allocable to his permanent establishment within the United States. If, however, such French citizen is a resident of France, he is not taxable upon those items of income enumerated in Article IX of the convention and referred to in paragraph (*a*) of this article with respect to French citizens subject to tax under section 211(a). See article 7.

A French citizen having an office or place of business within the United States within the meaning of section 211 of the Revenue Act of 1938, shall be presumed (if he carries on a French enterprise) to have a permanent establishment in the United States within the meaning of the convention.

A French citizen carrying on a French enterprise who carries on business transactions through a bona fide commission agent or broker in the United States and who has no permanent establishment in the United States is not liable to income tax on the industrial and commercial profits arising to him from such transactions. However, a French citizen not carrying on a French enterprise is held to be engaged in trade or business in the United States if he sells therein through a commission agent or broker goods, wares, or merchandise (not including stocks, securities, or commodities) and, hence, is liable to income tax on the resulting profit. Such French citizen, whether or not he carries on a French enterprise, coming within class (a) or class (c) of the classification prescribed in section 211 of the Revenue Act of 1938 is, however, not liable to the tax upon profits arising from transactions in stocks, securities, or commodities through a resident broker, commission agent, or custodian. As to what constitutes a "French enterprise," see article 2. As to what constitutes a "permanent establishment," see article 2.

As to the computation of gross income, the allowance of deductions and credits, the requirements as to filing of returns and payment of the tax in the case of nonresident aliens generally, including French citizens, see sections 211 to 219, inclusive, Revenue Act of 1938.

(*d*) *Member of French partnership.*—Whether the liability to the tax of a French citizen who is a member of a partnership is affected by Article I of the convention depends upon the status of the partnership. Article I does not apply unless such partnership: (1) is created or organized in France; and (2) carries on a French enterprise. Thus, a partnership created or organized in the United States, even though composed in whole or in part of French citizens, is not a French enterprise and hence is not affected by the convention. A French citizen, not resident in the United States, a member of such partnership, is taxable under the provisions of section 211 as are other nonresident aliens. If, however, such French citizen is a member of a partnership meeting the tests set forth in this paragraph, the United States tax liability of such French citizen shall be determined as provided in paragraph (*a*) or (*b*) or (*c*) of this article, whichever is applicable, dependent upon whether or not the partnership has a permanent establishment in the United States.

ART. 9. *Taxation of a French corporation under the Revenue Act of 1938 as modified by the convention.—General.*—A corporation organized under the laws of France is subject to those provisions of the Revenue Act of 1938 applicable to foreign corporations generally but such corporation is entitled to the exemptions provided in the convention to which other foreign corporations are not entitled.

Section 231 of the Revenue Act of 1938 classifies foreign corporations into two groups: (1) those not engaged in trade or business within the United States and not having an office or place of business therein (hereinafter referred to as nonresident foreign corporations); and (2) those which at any time within the taxable year are engaged in trade or business within the United States or have an office or place of business therein (hereinafter referred to as resident foreign corporations).

Whether a foreign corporation has an "office or place of business" within the United States depends upon the facts of the particular case. The term "office or place of business," however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

While Article I of the convention, in so far as corporations are concerned, applies only to French corporations carrying on a French enterprise and has no application to those not carrying on such enterprise, section 231 makes no distinction between the two classes, such section applying alike to both groups. This article treats of the taxation of French corporations under that section, as modified by the convention, following the classification prescribed in that section.

(*a*) *Nonresident French corporations.*—A French corporation (whether or not it carries on a French enterprise) not engaged in trade or business within the United States and not having an office or place of business therein at any time within the taxable year is liable to the tax at the rate of 15 per cent (10 per cent in the case of dividends) imposed by section 231(a), Revenue Act of 1938, upon the gross amount of its fixed or determinable annual or periodical gains, profits, and income from sources within the United States. Such gains, profits, and income are to be determined under the provisions of section 119, Revenue Act of 1938. Specific items of fixed or determinable annual or periodical income are enumerated in the Act as interest (except interest on deposits with persons carrying on the banking business which is nontaxable under the Act), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to tax, as, for instance, royalties. However, a French corporation is not taxable upon those items of income enumerated in Article IX of the convention and referred to in article 8(*a*) with respect to French citizens subject to tax under section 211(a), Revenue Act of 1938. See article 7.

The term "fixed or determinable annual or periodical income" within the meaning of section 231(a), Revenue Act of 1938, does not include industrial and commercial profits as that term is used in the convention. Under the Revenue Act of 1938 as modified by the convention a French corporation taxable under section 231(a) of that Act is exempt from United States income tax on industrial and commercial profits. For example, under the convention profits

realized by such French corporation, which carries on a French enterprise, from transactions in the United States in goods, wares, or merchandise through a resident broker or commission agent are not subject to tax. If, however, such corporation does not carry on such enterprise such transactions are not exempt under the convention and constitute engaging in trade or business within the United States and it is accordingly taxable upon the resulting profit under section 231(b), Revenue Act of 1938. On the other hand, a French corporation taxable under section 231(a), whether or not it carries on a French enterprise, is not liable to United States income tax upon profits realized from transactions in stocks, securities, or commodities in the United States through a resident broker, commission agent, or custodian.

(*b*) *Resident French corporations.*—A French corporation, not carrying on a French enterprise, which at any time within the taxable year is engaged in trade or business within the United States or has an office or place of business therein, or a French corporation, carrying on a French enterprise, which has a permanent establishment in the United States, is, like other foreign corporations, liable to the tax of 19 per cent imposed by section 14(e), Revenue Act of 1938, upon its special class net income from sources within the United States (gross income from sources within the United States minus the statutory deductions provided in sections 23 and 232 and the credits provided in section 26 (a) and (b) of the Revenue Act of 1938). Such net income includes all industrial and commercial profits from sources within the United States. See article 3(*c*). Such net income is to be determined under the provisions of section 119, Revenue Act of 1938, but in determining such income no account shall be taken of the purchase of goods, wares, or merchandise within the United States for the purpose of supplying establishments maintained by such corporation in France. In the determination of the income of such French corporation from sources within the United States all industrial and commercial profits from sources within the United States shall be deemed to be allocable to its permanent establishment within the United States. Such corporation is not taxable upon those items of income enumerated in Article IX of the convention and referred to in paragraph (*a*) of this article with respect to nonresident French corporations. See article 7.

A French corporation having an office or place of business within the United States within the meaning of section 231 of the Revenue Act of 1938, shall be presumed (if it carries on a French enterprise) to have a permanent establishment in the United States within the meaning of the convention.

A French corporation carrying on a French enterprise which carries on business transactions through a bona fide commission agent or broker in the United States and which has no permanent establishment in the United States is not liable to income tax on the industrial and commercial profits arising to it from such transactions. However, a French corporation not carrying on a French enterprise is held to be engaged in trade or business in the United States if it sells therein, through a commission agent or broker, goods, wares, or merchandise (not including stocks, securities, or commodities) and, hence, is liable to income tax on the resulting profit. Such French corporation, whether or not it carries on a French enterprise, otherwise liable to the tax imposed by subsection (a) of section 231 of the Revenue Act of 1938 is, however, not liable to the tax upon profits arising from transactions in stocks, securities, or commodities through a resident broker, commission agent, or custodian. As to what constitutes a "French enterprise," see article 2. As to what constitutes a "permanent establishment," see article 2. As to the computation of gross income, the allowance of deductions and credits, the requirements as to filing of returns and payment of the tax, in the case of foreign corporations generally, including French corporations, see sections 231 to 236, inclusive, Revenue Act of 1938.

MILTON E. CARTER,
Acting Commissioner of Internal Revenue.

Approved January 5, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register January 7, 1939, 11.16 a. m.)

ARTICLE 22(b)(3)–1: Gifts and bequests.

REVENUE ACT OF 1938.

Political contributions. (See I. T. 3276, page 108.)

ARTICLE 22(b)(4)–4: Interest upon United States obligations. 1939–12–9758 I. T. 3262

REVENUE ACTS OF 1934, 1935, 1936, 1937, AND 1938.

Exemption of interest (increment in value) on United States savings bonds.

Interest (increment in value) on United States savings bonds is entirely exempt from taxes now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority thereof, upon income or profits *except* graduated additional income taxes (commonly known as surtaxes) and excess-profits and war-profits taxes now or hereafter imposed by the United States. The interest (increment in value) on United States savings bonds is exempt from such "excepted" taxes to the extent of interest on an amount of the bonds the principal of which does not exceed in the aggregate $5,000 (including other bonds and certificates owned by the taxpayer which were issued under the authority of the Second Liberty Bond Act, as amended). In determining whether the principal amount of such bonds and certificates owned by a taxpayer is within or in excess of $5,000, the issue or purchase price only is considered as principal of United States savings bonds.

The above-mentioned exception to exemption from taxes upon interest on such bonds is not applicable while they are beneficially owned by a nonresident alien individual, or a foreign corporation, partnership, or association, not engaged in business in the United States.

The rates of surtaxes now imposed by the United States on income of individuals, estates, and trusts, to which interest (increment in value) on United States savings bonds may be subject, are dependent upon the amount of the taxpayer's net income after allowance of credits for personal exemption and/or dependents. Under the Revenue Acts of 1934, 1936, and 1938, there is no surtax due on such "surtax net income" of $4,000 or less, and if the "surtax net income" exceeds $4,000, the surtax rates apply only to the excess.

Surtaxes, to which interest (increment in value) on United States savings bonds may be subject, are now imposed by the United States on corporations only in certain special cases. See Title IA of the Revenue Act of 1938, and corresponding provisions of the Revenue Acts of 1934, 1935, 1936, and 1937, relative to surtax on personal holding companies; and section 102 of the Revenue Act of 1938, and corresponding provisions of the Revenue Acts of 1934, 1936, and 1937, relative to surtax on corporations improperly accumulating surplus.

The excess-profits tax now imposed by the United States, to which interest (increment in value) on United States savings bonds may be

subject, is applicable only to corporations (including associations and joint stock companies).

There is no war-profits tax now imposed by the United States to which interest (increment in value) on United States savings bonds is subject.

SECTION 22(b)5: Compensation for injuries or sickness. 1939-22-9849 I. T. 3281

REVENUE ACT OF 1938.

Compensation paid by the United States under the provisions of the Federal Compensation Act of September 7, 1916 (39 Stat., 742), on account of the disability or death of an employee of the Federal Government resulting from a personal injury sustained by the employee while in the performance of his duty is not subject to Federal income tax.

Advice is requested whether compensation paid under the Federal Compensation Act of September 7, 1916 (39 Stat., 742), is taxable for Federal income tax purposes.

The Act provides, among other things, that the United States shall pay compensation on account of the death or disability of an employee of the Federal Government resulting from a personal injury sustained while in the performance of his duty.

Section 22(b) of the Revenue Act of 1938 provides that the following items shall not be included in gross income and shall be exempt from income taxation:

* * * * * * *

(5) *Compensation for injuries or sickness.*—Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness * * *.

The provisions of the Act of September 7, 1916, are similar in many respects to those of the so-called workmen's compensation acts of the various States. While there is no provision in the Act of September 7, 1916, supra, designating or defining it as a "workmen's compensation act," it is held that by reason of its stated purposes and the provisions for the payment of the compensation in question, such amounts received under the provisions of the Act are not subject to Federal income tax.

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

ARTICLE 23(a)-1: Business expenses. 1939-13-9764 I. T. 3265

REVENUE ACT OF 1938.

An employer who keeps his accounts on either the cash receipts and disbursements basis or the accrual basis, and who makes voluntary contributions to the Michigan unemployment compensation fund under the provisions of section 14 of the Michigan Unemployment Compensation Act, as amended, is entitled to deduct such contributions as ordinary and necessary business expenses in his Federal income tax return for the year of payment.

Advice is requested as to the deductibility, for Federal income tax purposes, of voluntary contributions paid into the Michigan unemployment compensation fund under section 14 of the Michigan Unemployment Compensation Act, as amended.

Pertinent provisions of the Michigan Unemployment Compensation Act, as amended, read as follows:

SEC. 14. *Contributions; voluntary contributions.*—Any employer subject to this act may make voluntary contributions in addition to the contributions required herein, and any such voluntary contributions shall be credited to such employer's reserve account for the purposes of section 19 of this act, and shall become a part of the unemployment compensation fund.

* * * * * * *

SEC. 17. *Future rates based on benefit experience; reserve account.*—The commission shall maintain a separate reserve account for each employer, crediting his reserve account with 80 per cent of the contributions which he has paid during each calendar year, and charging his reserve account with all amounts paid within such year as benefits which, under section 20 of this act, were charged against wages earned in employment in his service: *Provided*, That 100 per cent of all voluntary contributions paid by an employer in pursuance of the provisions of section 14 of this act shall be credited to such employer's reserve account. But nothing in this act shall be construed to grant any employer or individuals in his service prior claims or rights to the amount paid by him to the unemployment compensation fund either on his own behalf or on behalf of such individuals. All contributions to the said fund shall be pooled and available to pay benefits to any individual entitled thereto under this act, irrespective of the source of such contributions.

It is to the employer's advantage to make voluntary contributions to increase his reserve account, since by thus increasing his reserve ratio he materially reduces the rate of his contributions.

It is held that an employer, keeping his books of account either on the accrual or cash receipts and disbursements basis, who makes voluntary contributions to the Michigan unemployment compensation fund under the provisions of section 14 of the Michigan Unemployment Compensation Act, as amended, is entitled to deduct such contributions as ordinary and necessary business expenses in his Federal income tax return for the year of payment.

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

ARTICLE 23(b)-1: Interest. 1939-9-9730
I. T. 3254

REVENUE ACT OF 1938.

Finance charges paid in connection with the purchase of an automobile, although denominated as interest, are not deductible as interest where such amounts are in fact a part of the purchase price.

Advice is requested whether any part of the finance charges paid in connection with the purchase of an automobile may be deducted as interest under the provisions of section 23(b) of the Revenue Act of 1938.

Whether any part of the finance charges paid in connection with the purchase of an automobile should be treated as interest and, therefore, deductible to the extent allowed by section 23(b) of the Revenue Act of 1938, or should be treated as a part of the cost of

the automobile and, therefore, a capital expenditure, is to be determined by the provisions of the contract of sale. (*Henrietta Mills, Inc.*, v. *Commissioner*, 52 Fed. (2d), 931; and *Daniel Bros. Co.* v. *Commissioner*, 28 Fed. (2d), 761.) However, amounts, even though specifically denominated as interest, are not deductible under the provisions of section 23(b), supra, in situations where it is clear from an examination of the entire contract that such amounts were intended as a part of the purchase price and were not actually paid as interest. (*Pratt-Mallory Co., Inc.*, v. *United States*, 12 Fed. Supp., 1020; *Appeal of Anderson & Co.*, 6 B. T. A., 713; and *Appeal of Marsh & Marsh, Inc.*, 5 B. T. A., 902.)

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

ARTICLE 23(c)-1: Taxes. 1939-17-9802
(Also Section 43, Article 43-1.) I. T. 3273

REVENUE ACT OF 1938.

For Federal income tax purposes, personal property taxes in the State of Pennsylvania and the city (county) of Philadelphia, Pa., accrue on January 1 of the tax (calendar) year for which the taxes are assessed.

Advice is requested as to the accrual date, for Federal income tax purposes, of personal property taxes in the State of Pennsylvania and in the city (county) of Philadelphia, Pa.

With reference to the State of Pennsylvania personal property taxes, the provisions of the State personal property tax act (approved May 18, 1937) which control are found in Title 72 of Purdon's Pennsylvania Statutes, Annotated, and are as follows:

SEC. 3244. * * *
All personal property of the classes hereinafter enumerated, owned, held or possessed by any resident * * * is hereby made taxable, annually, for State purposes, at the rate of 4 mills on each dollar of the value thereof, as of a date to be fixed annually, in the manner provided in section * * * [3246, infra] * * *.

As to the city (county) of Philadelphia personal property taxes, the provisions of the Pennsylvania laws which control are found in Title 72 of Purdon's Pennsylvania Statutes, Annotated, and are as follows:

SEC. 4821. * * *
All personal property of the classes hereinafter enumerated, owned, held, or possessed by any person, persons, copartnership, or unincorporated association or company, resident, located, or liable to taxation within this Commonwealth, or by any joint-stock company or association, limited partnership, bank or corporation whatsoever, formed, erected, or incorporated by, under, or in pursuance of any law of this Commonwealth or of the United States, or of any other State or government, and liable to taxation within this Commonwealth * * * is hereby made taxable, annually, for county purposes, and, in cities coextensive with counties, for city and county purposes, at the rate of 4 mills on each dollar of the value thereof * * *.

There is no State statute which specifies the date on which such taxes accrue. However, relative to the question as to liability for the taxes, the Supreme Court of Pennsylvania said in the *Appeal of*

Callery (272 Pa., 255, 116 Atl., 222) that "A personal property tax is a personal levy against resident holders, computed on the value of" the property "owned by them."

No cases have been found in which the courts of Pennsylvania have determined the date on which liability for the State and county taxes attaches. However, with reference to Philadelphia real property tax, as to which there is no statutory provision specifying the date on which such tax accrues, the courts of Pennsylvania have determined the date on which liability for the tax attaches.

In *Wood* v. *United States National Building and Loan Association* (105 Pa. Super. Ct., 184, 160 Atl., 244), the Superior Court of Pennsylvania said in part:

* * * No matter what plaintiff may have done in the way of selling the premises, upon advantageous terms, defendant failed to pay the [city of Philadelphia] taxes for which it was liable on January 1, 1930, and has done absolutely nothing to relieve itself of that liability. * * *

In *Provident Trust Co. of Philadelphia* v. *Judicial Building and Loan Association et al.* (112 Pa. Super. Ct., 352, 171 Atl., 287), the Superior Court of Pennsylvania said in part:

Taxes in Philadelphia are assessed prior to the beginning of the tax year, and the whole tax is due at the *beginning* of the year. (*King.* v. *Mt. Vernon Bldg. Ass'n.*, 106 Pa., 165; *City of Philadelphia* v. *Penna. Institution*, 28 Pa. Super. Ct., 421, 424; *Theobald* v. *Sylvester*, 27 Pa. Super. Ct., 362, 365.) * * *

While the Wood and Provident Trust Co. cases, supra, relate to real property taxes in the city of Philadelphia, it is, nevertheless, thought that the reasoning used in those cases is equally applicable to the instant case where State of Pennsylvania and city (county) of Philadelphia personal property taxes are in question.

In view of the foregoing, it is held that the accrual date, for Federal income tax purposes, of the State of Pennsylvania personal property taxes and of the city (county) of Philadelphia, Pa., personal property taxes is January 1 of the tax (calendar) year for which the taxes are assessed. (See I. T. 2908, C. B. XIV-2, 72 (1935), relating to Philadelphia real property taxes.)

ARTICLE 23(c)-1: Taxes.

REVENUE ACT OF 1938.

Percentage of pay roll contributed by an employer to New York unemployment insurance fund. (See I. T. 3278, page 76.)

ARTICLE 23(c)-1: Taxes.

REVENUE ACT OF 1938.

Tax imposed under articles 20 and 21 of the Mexican law, "Ley del Impuesto sobre la Renta." (See I. T. 3288, page 139.)

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

ARTICLE 23(e)-1: Losses by individuals. 1939-23-9862
G. C. M. 21013

REVENUE ACT OF 1938.

Where a residential estate containing ornamental trees and shrubbery is damaged by hurricane and many of the trees destroyed, the loss deductible under section 23(e)3 of the Revenue Act of 1938 is the difference between the value of the estate immediately preceding the casualty and the value after the casualty, but not in excess of an amount equal to the adjusted basis of the property. This conclusion is applicable whether the value of the estate immediately preceding the casualty is greater or less than an amount equal to the adjusted basis.

An opinion is requested relative to the method of determining the deductible loss, under section 23(e)3 of the Revenue Act of 1938, resulting from damage to a residential estate caused by a hurricane. In the case presented, the estate contained valuable ornamental trees and shrubbery which were, in a large part, destroyed. The value of the estate when the hurricane occurred was in excess of its basis.

The first question which will be considered is whether in determining the loss the trees and shrubbery should be treated as an integral part of the estate and no separate basis apportioned thereto. In *Mary Cheney Davis* v. *Commissioner* (16 B. T. A., 65, acquiescence, C. B. VIII-2, 13 (1929)), the facts were that considerable damage was caused to ornamental trees and shrubbery on the taxpayer's residential estate by a high wind, accompanied by rain and sleet. Many of the trees and shrubs were badly damaged and others were destroyed. The Board held that the taxpayer was entitled to deduct a loss equal to the difference in the market value of the entire estate immediately before the storm and the value after the storm. In *John S. Hall et al.* v. *Commissioner* (16 B. T. A., 71, acquiescence, C. B. VIII-2, 21 (1929)), ornamental trees and shrubs on the taxpayer's estate were damaged by a severe ice storm. The Board allowed a loss equal to the difference between the reasonable value of the estate immediately before and after the storm. To the same effect is *Frederick H. Nash* v. *Commissioner* (22 B. T. A., 482, acquiescence, C. B. X-2, 50 (1931)). Those cases follow *Whipple* v. *United States* (25 F. (2d), 520), which adopts as a measure of damage the difference between the value of the *entire estate* before and after the casualty. In none of those cases was the question expressly raised whether ornamental trees and shrubs might be treated separately from the entire estate in computing loss from casualty. It seems to have been assumed that the trees and shrubbery should be considered as an integral part of the entire estate in determining the loss. However, in *Harry Johnston Grant* v. *Commissioner* (30 B. T. A., 1028, acquiescence, C. B. XIII-2, 8 (1934)), the question here presented appears to have been specifically raised. In that case an extensive deep sinking of the taxpayer's land close to his house took place. This sinking was held to be a "casualty" within the meaning of section 214(a)6 of the Revenue Act of 1926, which was similar, in so far as here pertinent, to section 23(e)3 of the Revenue Act of 1938. The Commissioner contended that the amount of the loss should be limited to the land as the house was in no way physically damaged. The Board held, however, that the land and improvements

should be treated as a unit in determining the loss, and stated that the improvements "become an integral part of it [the land] and to divorce them in the situation here present would be contrary to the common, ordinary understanding and conception of such values." (See also 17 C. J., 891; 20 C. J., 798; 50 C. J., 749; Tiffany on Real Property (1920), 2d ed., volume 1, pages 876, 883, 886.)

In view of the foregoing, it is held in the present case that the trees and shrubbery should be considered as an integral part of the entire estate and no separate basis apportioned thereto in determining the loss sustained.

In regard to the amount of the deductible loss, it is the opinion of this office that such loss is the difference between the value of the estate immediately preceding the casualty and the value after the casualty, but not in excess of an amount equal to the adjusted basis of the estate. This is true even though the value of the estate immediately preceding the casualty is far in excess of the value after the casualty. For example, A owns an estate, the adjusted basis of which is $100,000. Immediately preceding the casualty, the estate has a market value of $200,000. Immediately after the casualty, the estate has a market value of $190,000, the damage being caused by the casualty. In this case A's loss is $10,000 and is deductible in its entirety since such loss does not exceed the adjusted basis of the estate. The adjusted basis of the estate, however, should be reduced by the amount of the loss allowable. (See section 113(b).) This conclusion is in accord with the decisions of the United States Supreme Court in *Helvering* v. *Owens* (59 S. Ct., 260; Ct. D. 1378, page 234, this Bulletin). In that case the Court stated in part as follows:

* * * we think section 113(b)1(B) must be read as a *limitation* upon the amount of the deduction so that it may not *exceed* cost, and in the case of depreciable nonbusiness property may not *exceed* the amount of the loss *actually sustained* in the taxable year, measured by the then depreciated value of the property. The Treasury rulings have not been consistent, but *this construction* is the one which has finally been *adopted.* [Italics supplied.]

This method of computing losses in such cases is likewise in accord with the rule laid down in G. C. M. 16255 (C. B. XV-1, 115 (1936)), in which it was concluded that:

* * * Therefore, although computation must be made in accordance with section 23(h) and section 113, the amount deductible is the loss actually sustained, and not in excess of the amount computed under section 113. * * *

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

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

ARTICLE 23(k)-1: Bad debts. 1939-9-9731
G. C. M. 20854

REVENUE ACT OF 1938 AND PRIOR REVENUE ACTS.

Recoveries of debts previously deducted for Federal income tax purposes do not constitute taxable income unless the deduction of the debts in prior years resulted in a reduction of tax liability.

S. R. 2940 (C. B. IV-1, 129 (1925)) modified. Recommended that I. T. 3172 (C. B. 1938-1, 150) be modified.

Advice is requested whether the ruling in G. C. M. 18525 (C. B. 1937-1, 80), to the effect that recoveries of debts previously charged off at the direction of Federal or State supervisory officers by banks and other corporations under Federal or State supervision do not constitute taxable income unless the prior charge-off accomplished a reduction in tax liability, is equally applicable to recoveries of debts otherwise ascertained to be worthless and charged off by banks and corporations under Federal and State supervision and to recoveries of debts previously charged off by other taxpayers generally.

The inquiry is directed particularly to the following paragraphs of G. C. M. 18525, supra:

(*a*) The order of the bank examiner relating to the charge-off in whole or in part of a debt owed to the bank is material only as *establishing conclusively* either total or partial worthlessness of such debt.

* * * * * * *

(*g*) If a debt has been so ascertained to be worthless either in whole or in part in any particular taxable year but has not been allowed as a deduction for income tax purposes in whole or in part as the case may be, amounts subsequently collected on account of such debt are not required to be included in gross income for the taxable year of such receipt (article 191, Regulations 77; article 23(k)-1, Regulations 86 and 94).

* * * * * * *

The deductions for bad debts contemplated by the clause "allowed as a deduction for income tax purposes" (as used in * * * (*g*) * * * above) refer to deductions for bad debts which accomplished a reduction in tax liability and do not refer to deductions for bad debts in cases in which the taxpayer, on account of other allowable deductions, had no net income irrespective of the deduction for bad debts.

The issue presented requires a general discussion of the proper treatment, for Federal income tax purposes, of recoveries of debts charged off and claimed as deductions in prior years and involves an interpretation of the following provisions of Regulations 94:

Any amount subsequently received on account of a bad debt or on account of a part of such debt previously charged off and allowed as a deduction for income tax purposes, must be included in gross income for the taxable year in which received. (Article 23(k)-1.)

Bad debts or accounts charged off subsequent to March 1, 1913, because of the fact that they were determined to be worthless, which are subsequently recovered, whether or not by suit, constitute income for the year in which recovered, regardless of the date when the amounts were charged off. (See article 23(k)-1.) (Article 42-1.)

It is well settled that in the ordinary case amounts received in repayment of loans do not constitute income but are reimbursements of capital. (*Charles M. Howell, Admr.*, 21 B. T. A., 757, petition to review dismissed on motion of the Commissioner, *Burnet v. Howell, Admr.*, 59 Fed. (2d), 1053.) This is also true with respect to amounts received in payment of debts arising from unpaid wages, salaries, rents, and similar items of taxable income which have been included in gross income. Unless a taxpayer has already recovered his capital for income tax purposes, recoveries with respect to a debt, in the opinion of this office, can not be considered as income.

In any case in which a bad debt has been allowed as a deduction and has had the effect of offsetting taxable income (meaning, for present purposes, income which would be the basis for the computation of a tax liability), the taxpayer has, to that extent, in effect had the benefit of a recovery of capital for income tax purposes. In

determining the extent, if any, to which a taxpayer has thus benefited, the credits against net income provided in the Revenue Acts must be taken into account. To the extent that a deduction does not result in such a benefit to the taxpayer, the deduction can not be said to have accomplished a return of capital. Until a taxpayer has had the income tax equivalent of a full return of the capital represented by his debt, there is no valid ground for treating as income any amount received in recovery of the debt. Accordingly, the above-quoted provisions of the regulations are not to be interpreted as requiring the inclusion in income of amounts received in recovery of a debt until the taxpayer has fully recovered the capital represented by the debt either by the means referred to above or partly by such means and partly by repayment by the debtor.

G. C. M. 18525, supra, involved only bad debt deductions by banks or other corporations subject to supervision of Federal or State authorities as a result of the conclusive presumption of partial or total worthlessness established by orders of Federal or State supervisory officers. (I. T. 3172, C. B. 1938-1, 150.) However, the principle stated therein, that recoveries of debts previously deducted do not constitute taxable income unless the deduction of the debts in prior years resulted in a reduction of tax liability, is equally applicable in cases of recoveries of debts voluntarily deducted by banks or other corporations subject to Federal or State supervision and to recoveries of debts deducted by other taxpayers.

In any case where the total of the allowable deductions, including bad debt deductions, taken by a taxpayer in his return exceeds the gross income less the credits against net income, the question will arise as to the extent to which the deduction of the bad debt results in a benefit. In such case it will be assumed that all deductions other than bad debt deductions first apply in reduction of the taxable income. For example, if in his return for 1933 a taxpayer showed gross income (less the credits against net income) of $6,000 and claimed a bad debt deduction of $10,000 and other deductions aggregating $2,000, it would be considered that only $4,000 of the deduction for the bad debt operated to offset taxable income. There would thus remain $6,000 of the debt as to which the taxpayer did not have a return of capital.

If, in any one year, two or more bad debt deductions are taken and the aggregate amount deducted on account thereof is more than sufficient to offset the taxable net income remaining after applying the other allowable deductions, the bad debt deductions will be treated as a unit (as if they constitute a single bad debt deduction); and if amounts are subsequently recovered on any of such debts, they will be treated as returns of capital until the aggregate collected on any and all such debts equals that portion of the unit which did not operate to offset taxable income. After the capital has been thus recovered, any amounts received in recovery of any of the debts will be treated as gross income. I. T. 3172, supra, sets forth a different rule, and it is recommended that that ruling be modified to accord with the foregoing conclusion.

What has been said herein with respect to the extent to which bad debt deductions operate to offset taxable income applies to debts deducted both before and after the effective date of the Revenue Act

of 1934. However, as to debts deducted before the effective date of the Revenue Act of 1934, another factor must be taken into consideration. Under the prior Revenue Acts, a net loss sustained by a taxpayer in one taxable year is allowable as a deduction in computing net income of other taxable years in the manner and to the extent provided in the various Revenue Acts. See section 117 of the Revenue Acts of 1932 and 1928; section 206 of the Revenue Acts of 1926 and 1924; and section 204 of the Revenue Acts of 1921 and 1918. In determining whether the deduction of a bad debt in any year prior to the effective date of the Revenue Act of 1934 resulted in offsetting taxable income (or, in other words, resulted in a return of capital), it must be determined whether such a result was accomplished by means of the application of a net loss.

In view of the fact that it will be impracticable for the Bureau to undertake the great amount of research necessary to determine whether any particular debt which has been previously deducted had the effect of offsetting taxable income, every taxpayer who receives any amount in complete or partial recovery of a debt previously deducted and who claims that such amount constitutes in whole or in part capital rather than income will be required to submit with his return a statement including complete details with respect to the prior deduction and other facts necessary for the Bureau to determine the extent, if any, to which the deduction served to offset taxable income. In the event that the taxpayer does not reasonably substantiate his claim that the amount received in recovery, or a portion thereof, constitutes a return of capital, the full amount received in recovery will be included in gross income for the year in which received.

S. R. 2940 (C. B. IV–1, 129 (1925)), in so far as it holds that amounts which might be received in recovery of debts under the circumstances there presented would constitute taxable income, is hereby modified.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

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

ARTICLE 23(o)–1: Contributions or gifts by individuals. 1939–16–9793 I. T. 3271

REVENUE ACT OF 1938.

Application of the decision of the Supreme Court of the United States in *United States* v. *Pleasants* (59 Sup. Ct., 281, Ct. D. 1379, page 239, this Bulletin), rendered under the Revenue Act of 1932, to the determination of the deduction for charitable contributions allowable under the Revenue Act of 1938 in cases where net long-term capital gain or loss requires the computation of a "partial tax" as prescribed in section 117(c) of that Act.

Advice is requested relative to the application of the decision of the Supreme Court of the United States in *United States* v. *Pleasants* (59 Sup. Ct., 281, Ct. D. 1379, page 239, this Bulletin), rendered under the Revenue Act of 1932, in determining the 15 per cent deduction for

charitable contributions allowable under the Revenue Act of 1938 in cases involving the computation of a "partial tax" as prescribed in section 117 of that Act.

The effect of the Supreme Court decision in the Pleasants case is very similar under the Revenue Acts of 1932 and 1938, and may be summarized as follows: In cases where the special tax provided by section 101(b) of the Revenue Act of 1932 and by section 117(c)2 of the Revenue Act of 1938 *is applicable*, the 15 per cent maximum deduction which may be taken for charitable contributions under section 23(n) of the Revenue Act of 1932 and section 23(o) of the Revenue Act of 1938 is based upon the same "net income" upon which the special tax is *in fact* computed and paid.

In the following discussion it should be borne in mind that the term "net long-term capital loss" is defined by section 117(a)9 of the Revenue Act of 1938 as meaning "the excess of long-term capital losses for the taxable year over the long-term capital gains for such year." It therefore follows that in the very process of ascertaining the "net long-term capital loss" all the long-term capital gains and an equivalent amount of long-term capital losses are in effect made use of to cancel each other, leaving only the excess of losses over gains, namely, the "net long-term capital loss." When this excess is also excluded from the computation of the amount upon which the "partial tax" is to be computed, the effect is that the "partial tax" is based upon what the taxpayer's net income would have been if he had no long-term capital gains and no long-term capital losses whatever.

Under the Revenue Act of 1932, the special tax provided by section 101(b) is applicable whenever it is greater than the tax computed in the ordinary manner. Under the Revenue Act of 1938, the special tax provided by section 117(c)2 is also applicable whenever it is greater than the tax computed in the ordinary manner. Under section 101(b) of the Revenue Act of 1932, the special tax is determined by first computing a "partial tax" in the ordinary manner upon the taxpayer's "ordinary net income" (that is, upon what his net income would be if there were excluded in computing such net income all items of capital gain, capital loss, and all deductions properly allocable to the capital assets disposed of during the year) and then subtracting from such "partial tax" an amount equal to 12½ per cent of the "capital net loss." Under section 117(c)2 of the Revenue Act of 1938, the special tax is determined by first computing a "partial tax" in the ordinary manner upon the taxpayer's "net income increased by the amount of the net long-term capital loss" (that is, upon what his net income would be if there were excluded in computing it all the long-term capital gains and all the long-term capital losses) and then subtracting from such "partial tax" an amount equal to 30 per cent of the net long-term capital loss. As defined in section 101(c)6 of the Revenue Act of 1932, the term "capital net loss" means "the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain," and "capital deductions" are defined in section 101(c)3 of that Act as being "such deductions as are allowed by section 23 * * * and are properly allocable to * * * capital assets sold or exchanged

during the taxable year." In section 117(a)9 of the Revenue Act of 1938, the term "net long-term capital loss" is defined as being "the excess of long-term capital losses for the taxable year over the long-term capital gains for such year."

The reasoning of the Court in the Pleasants case is that (1) since, in computing the special tax under section 101(b) of the Revenue Act of 1932 the "capital net loss" is not allowed as a deduction from *gross income*, but only as an offset (to the extent of 12½ per cent of such "capital net loss") against a "partial tax" determined by excluding capital losses from the computation, it follows that the "net income" *upon which the tax is actually paid* in such cases is the "ordinary net income," that is, the "net income" with capital losses excluded; and (2) since, when the special tax under section 101(b) applies, the "net income" *upon which a tax is actually paid* is the net income with capital losses excluded, it follows that whenever such special tax applies, the term "net income" in the phrase "15 per centum of the taxpayer's net income" in section 23(n) of the Revenue Act of 1932 must be given a corresponding meaning; and, therefore, (3) the taxpayer, whenever the special tax applies, may have a deduction for charitable contributions to the extent of not more than 15 per cent of the "net income" upon which his special tax is actually computed, that is, 15 per cent of his "ordinary net income," which in turn means 15 per cent of his net income computed by excluding all items of capital gain, capital loss, and capital deductions.

Applying the same reasoning to a case arising under the Revenue Act of 1938, it is held that (1) since, in computing the special tax under section 117(c)2 of the Revenue Act of 1938 the "net long-term capital loss" is not allowed as a deduction from *gross income*, but only as an offset (to the extent of 30 per cent of such net long-term capital loss) against a "partial tax" determined by excluding from the computation the amount of the net long-term capital loss, it follows that the "net income" *upon which the special tax is actually paid* in such cases is the "net income" computed by excluding the amount of the net long-term capital loss (or, in the words of section 117(c)2, "the net income increased by the amount of the net long-term capital loss"); and (2) since, when the special tax under section 117(c)2 is applicable, the "net income" *upon which a tax is actually paid* is the net income with net long-term capital loss excluded, it follows that whenever such special tax applies, the term "net income" in the phrase "15 per centum of the taxpayer's net income" in section 23(o) of the Revenue Act of 1938 must be given a corresponding meaning; and, therefore, (3) the taxpayer, whenever the special tax applies, is entitled to a deduction for charitable contributions to the extent of not more than 15 per cent of the "net income" upon which his special tax is actually computed, that is, 15 per cent of his net income computed by excluding the amount of his net long-term capital loss.

The Supreme Court's opinion in the Pleasants case implies that where the taxpayer has a "capital net loss" under the Revenue Act of 1932, but the special tax under section 101(b) of that Act is *not*

applicable because not greater than the tax computed in the ordinary manner, the 15 per cent limitation is likewise based upon the net income upon which the *ordinary* tax is computed, but since, in computing the ordinary tax, the capital net loss is *deducted* from gross income, it follows that when the ordinary tax is applicable, the maximum deduction for charitable contributions which the taxpayer may take is 15 per cent of the net income computed by *including* in the computation (i. e., deducting from gross income) the amount of the "capital net loss." In cases under the Revenue Act of 1938, where the taxpayer has a net long-term capital loss, but the special tax under section 117(c)2 is *not applicable* because not greater than the tax computed in the ordinary manner, it is, therefore, held that the 15 per cent limitation is also based upon the net income upon which the ordinary tax is computed, and that since, in computing the ordinary tax, the net long-term capital loss is *deducted* from gross income, it follows that when the ordinary tax is applicable, the maximum deduction for charitable contributions which the taxpayer may take is 15 per cent of the net income computed by *including* in the computation (i. e., deducting from gross income) the amount of the net long-term capital loss.

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

REVENUE ACT OF 1938.

Contributions to the American National Red Cross and its chapters and branches. (See I. T. 3258, page 123.)

ARTICLE 23(o)–1: Contributions or gifts by individuals. 1939–19–9822
(Also Section 22(b); Article 22(b)(3)–1.) I. T. 3276

REVENUE ACT OF 1938.

Contributions to a political organization are not deductible by the donor. A political gift received by an individual or by a political organization is not taxable income to the recipient.

Advice is requested whether (1) contributions to political organizations are allowable deductions in the donor's Federal income tax return, and whether (2) political gifts or donations to individuals or to political organizations are subject to Federal income tax.

With respect to the first inquiry, it is held that contributions to a political organization are not proper deductions in the donor's Federal income tax return, there being no provision in the Revenue Act of 1938 which allows such deductions.

With respect to the second inquiry, it is held that a political gift received by an individual or by a political organization is not taxable income to the recipient.

SECTION 23(p).—DEDUCTIONS FROM GROSS INCOME: PENSION TRUSTS.

ARTICLE 23(p)–1: Payments to employees' pension trusts.

REVENUE ACT OF 1938.

Lump sum and current annual contributions to an employees' trust. (See I. T. 3266, page 144.)

SECTION 23(q).—DEDUCTIONS FROM GROSS INCOME: CHARITABLE AND OTHER CONTRIBUTIONS BY CORPORATIONS

ARTICLE 23(q)–1: Contributions or gifts by corporations.

REVENUE ACT OF 1938.

Contributions to the American National Red Cross and its chapters and branches. (See I. T. 3258, page 123.)

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 25–5: Personal exemption of married person. 1939–19–9823 I. T. 3277

REVENUE ACTS OF 1936 AND 1938.

Determination of personal exemption in the case of persons who married during the year and who had different accounting periods. Requirements which are necessary in such a case to change accounting period and file a joint return.

Advice is requested relative to the personal exemptions allowable in the returns filed by A for the year ended January 31, 1938, and by B, his wife, for the calendar year 1937, and also what requirements must be met by A and B who were married in the latter part of October, 1937, in order properly to file joint returns for fiscal years ending January 31, beginning with the fiscal year ended January 31, 1939.

B, the wife, is entitled for the period of her taxable year during which she was single (January 1 to the latter part of October, 1937) to a personal exemption of ten-twelfths of $1,000, or $833.33, and A, the husband, is entitled for the period of his taxable year during which he was single in 1937 (February 1 to the latter part of October, 1937) to a personal exemption of nine-twelfths of $1,000 or $750. The personal exemption applicable to married persons living together during a taxable year of 12 months is $2,500, which exemption is apportioned, if the status of the taxpayers changes during the taxable year, according to the number of months during which they

occupy the married status. Therefore, there may be added to the personal exemption allowable to A and B for the periods they were single ($750 and $833.33, respectively, as indicated above), a joint personal exemption of three-twelfths of $2,500, or $625, which amount may be taken by either or divided between them in any proportion agreed upon, so long as the amount thereof claimed by B does not exceed two-twelfths of $2,500, or $416.67, since she occupied the married status but two months of her taxable year, 1937.

Relative to the filing of a joint return by A and B for the fiscal year February 1, 1938, to January 31, 1939, attention is invited to I. T. 1514 (C. B. I–2, 174 (1922)), which provides that it is not permissible under the statute for a husband and wife to file a joint return unless their accounting periods are concurrent, since such return would not reflect the aggregate income for the "taxable year" within the meaning of the statute. Accordingly, in order to file a joint return for the fiscal year ended January 31, 1939, it was necessary for B, the wife, to request permission to change her taxable year from the calendar year to the fiscal year ending January 31, effective as of January 31, 1938. In this connection the income tax regulations provide that if a taxpayer changes his accounting period he shall, prior to the expiration of 30 days from the close of the proposed period for which a return would be required to effect the change, furnish to the collector, for transmission to the Commissioner, the information required on Form 1128 (application for change in accounting period). (See article 46–1 of Regulations 94 and 101.) Assuming that permission had been granted B to change her accounting period from the calendar year to the fiscal year ending January 31, effective as of January 31, 1938, it was with the stipulation that proper adjustments be made on her books of account and returns of income. (See paragraph 2 of the instructions on the back of Form 1128.) Further, she was required to close her books as of January 31, 1938, and to file a return on or before April 15, 1938, covering the period January 1 to January 31, 1938. Her returns for subsequent years should then be made on the basis of the full fiscal year ending January 31, the taxable year already established by A for the filing of his returns, in which case the husband and wife could elect to file a joint return or separate returns as provided by the statute.

SECTION 26.—CREDITS OF CORPORATIONS.

ARTICLE 26–2: Credit of corporation for net operating loss of preceding year. (Also Section 27(b), Article 27(b)–1.) — 1939–25–9880, I. T. 3290

REVENUE ACT OF 1938.

Credit for a net operating loss sustained by the M Corporation for the year 1937 is not allowable under section 26(c) of the Revenue Act of 1938 in determining its tax liability for the year 1938. Such credit is allowable only as a part of the basic surtax credit under section 27(b)2 of the Act, which limits the credit to taxable years beginning after December 31, 1938.

Advice is requested whether, under the provisions of section 26(c) of the Revenue Act of 1938, the M Corporation is entitled to a credit in determining its tax liability for the year 1938 on account of its net loss for the year 1937.

Section 26(c) of the Revenue Act of 1938 provides for the allowance of a credit to a corporation for the amount of the "net operating loss" of the preceding year to the extent provided in the various sections imposing tax. This net operating loss is allowed only as a part of the basic surtax credit under section 27(b)2, which limits the credit to taxable years beginning after December 31, 1938.

Since under the specific provisions of the Act no credit is allowable for the net operating loss of a corporation for the calendar year 1937, the M Corporation is not entitled to a credit on account of its net operating loss for that year.

SECTION 27(b).—CORPORATION DIVIDENDS PAID CREDIT: BASIC SURTAX CREDIT.

ARTICLE 27(b)-1: Basic surtax credit.

REVENUE ACT OF 1938.

Credit for net operating loss for year 1937. (See I. T. 3290, page 110.)

SECTION 28(d).—CONSENT DIVIDENDS CREDIT: SHAREHOLDERS' CONSENTS.

ARTICLE 28(d)-1: Making and filing of consents. 1939-7-9709
I. T. 3250

REVENUE ACT OF 1938.

> Shareholders' consents required in connection with the consent dividends credit under section 28 of the Revenue Act of 1938 may be executed by the shareholders at any time on or before the due date of the corporation's income tax return for the taxable year for which the credit is claimed.

Advice is requested as to the time within which the shareholders' consents provided for in section 28(d) of the Revenue Act of 1938 may be executed by the shareholders.

Section 28(d) of the Revenue Act of 1938 provides in part as follows:

> (d) *Shareholders' consents.*—The corporation shall not be entitled to a consent dividends credit with respect to any taxable year—
>
> (1) Unless it files with its return for such year (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary) signed consents made under oath by persons who were shareholders, on the last day of the taxable year of the corporation, of any class of consent stock; and
>
> (2) Unless in each such consent the shareholder agrees that he will include as a taxable dividend, in his return for the taxable year in which or with which the taxable year of the corporation ends, a specific amount * * *.

As the consents must be filed with the return, they may be signed and sworn to at any time before the return is required to be filed.

It is held, therefore, that a shareholder's consent, provided for under section 28(d) of the Revenue Act of 1938, may be executed as therein prescribed at any time on or before the due date of the corporation's income tax return for the taxable year for which the consent dividends credit is claimed by the corporation.

PART III.—CREDITS AGAINST TAX.

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

1939-4-9684
I. T. 3245

REVENUE ACT OF 1938.

The tax known as the Fondo Obrero imposed by the Republic of Panama is an income tax and is allowable as a credit under section 31 of the Revenue Act of 1938 to the extent provided in section 131 of that Act.

Advice is requested whether the tax known as Fondo Obrero imposed by the Republic of Panama is allowable as a credit against Federal income tax under the provisions of section 31 of the Revenue Act of 1938.

The tax referred to was levied by "Law 49 of 1934" and became effective December 24, 1934. The pertinent provisions of the law are as follows:

THE NATIONAL CONGRESS OF PANAMA DECREES:

ARTICLE 1. That there be established a tax on the profits or income that are obtained or derived from employment, business, profession or any occupation performed in the Republic; or gains from property or fees of any nature. This tax will be called the Reserve Fund of the Laborer and Farmer.

ART. 2. With the exemptions set forth in paragraph 1 of this article, the tax created by this law will be determined and collected on the following scale:

(*a*) If the net monthly income reaches a total of more than 50 balboas and less than 75 balboas---------- ½ per cent

* * * * * * *

Of more than 2,000 balboas---------- 5 per cent

PARAGRAPH 1. There is established an exemption of 10 balboas for each head of a family and 10 additional balboas for each child or dependent having no income. This exemption will be extended only to those taxpayers with a net income less than 75 balboas.

PAR. 2. For those that reside outside of the country under the jurisdiction of the Government of Panama, the tax here established will carry an additional tax of 20 per cent.

ART. 3. The revenues coming from this tax will be entered in a public fund, article 610 of the Department of Agriculture, to be invested in farming and in salaries of laborers, and there will be made on them a special account by the treasury in order that they be applied to the ends designated by the law.

It is held that the tax known as Fondo Obrero imposed by the Republic of Panama is an income tax which, under the provisions of section 31 of the Revenue Act of 1938, is allowable as a credit against Federal income tax to the extent provided in section 131 of that Act.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 41–1: Computation of net income. 1939–6–9702
I. T. 3247

REVENUE ACT OF 1938.

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, 1938:

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	$0.309506	Italy	Lira	$0.052604
Australia	Pound	3.688281	Japan	Yen	.270315
Belgium	Belga	.168379	Mexico	Peso	.194250
Brazil	Milreis	.058600	Netherlands	Guilder	.543944
British India	Rupee	.346646	New Zealand	Pound	3.707750
Bulgaria	Lev	.012325	Norway	Krone	.233103
Canada	Dollar	.990039	Panama	Balboa	1.000000
Chile	Peso [1]	.051733	Peru	Sol	.200132
Chile	Peso [2]	.040000	Philippine Islands	Peso	.500000
China (Shanghai)	Yuan	.162812	Poland	Zloty	.189100
Colombia	Peso	.570600	Portugal	Escudo	.042243
Cuba	Peso	.999333	Rumania	Leu	.007278
Czechoslovakia	Koruna	.034273	South Africa	Pound	4.593333
Denmark	Krone	.207121	Spain	Peseta	.050925
England	Pound	4.639791	Straits Settlements	Dollar	.540000
Finland	Markka	.020437	Sweden	Krona	.238975
France	Franc	.026253	Switzerland	Franc	.225405
Germany	Reichsmark	.401000	Uruguay	Peso	.610705
Greece	Drachma	.008514	Venezuela	Bolivar	.313479
Hong Kong	Dollar	.290281	Yugoslavia	Dinar	.022766
Hungary	Pengo	.196500			

[1] Official rate.
[2] Export rate.

ARTICLE 41–1: Computation of net income. 1939–7–9710
I. T. 3251

REVENUE ACT OF 1938.

The M Company, which keeps its books of account on the cash receipts and disbursements basis, should amortize over the life of the lease of a building the amount paid as legal fees for drawing the lease, the amount paid for alterations to the building, and the amount paid as a leasing commission. G. C. M. 20307 (C. B. 1938–1, 157) is not applicable to the expenditures in question.

Advice is requested whether G. C. M. 20307 (C. B. 1938–1, 157) affects the M Company's method of treating certain expenditures for income tax purposes.

The M Company reports its income on the cash receipts and disbursements basis. In 1938 it leased a building and paid a legal fee of $82x$ dollars for drawing the lease which expires in 1948. Alterations costing $41x$ dollars were also made to the building in 1938 and a leasing commission of $96x$ dollars was paid in that year. The M

Company is amortizing these expenditures over the life of the lease and inquires whether in view of G. C. M. 20307, supra, such action is correct.

G. C. M. 20307, supra, was based upon the decision of the United States Circuit Court of Appeals for the First Circuit in *Welch* v. *DeBlois et al., Trustees* (94 Fed. (2d), 842), where it was held that a taxpayer who renders Federal income tax returns on the basis of cash receipts and disbursements may deduct as ordinary and necessary business expense in the year of payment insurance premiums on business property even though such premiums are paid in advance for a period of more than one year. G. C. M. 20307 relates to prepaid insurance and is not applicable to the items involved in the instant case which should be prorated and deducted over the life of the lease. (See generally article 23(a)–10, Regulations 94; I. T. 2263, C. B. V–1, 66 (1926).) The M Company, therefore, should continue to amortize over the life of the lease of the building the amount of $32x$ dollars paid as legal fees, the amount of $41x$ dollars paid for alterations to the building, and the amount of $96x$ dollars paid as a leasing commission.

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

ARTICLE 42–1: When included in gross income.

REVENUE ACT OF 1938.

Credits or refunds under section 516–a of the New York unemployment insurance law. (See I. T. 3278, page 76.)

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

ARTICLE 43–1: " Paid or incurred " and " paid or accrued."

REVENUE ACT OF 1938.

Personal property taxes in the State of Pennsylvania and city (county) of Philadelphia, Pa. (See I. T. 3273, page 99.)

SECTION 44.—INSTALLMENT BASIS.

ARTICLE 44–5: Gain or loss upon disposition of installment obligations.

REVENUE ACT OF 1938.

Amendment of Regulations 101, article 44–5. (See T. D. 4899, page 78.)

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 55.—PUBLICITY OF RETURNS.

1939–3–9673
T. D. 4878

Income, excess-profits, capital stock, estate, gift tax returns; returns made under Title III of the Revenue Act of 1936; and returns made under Title IX of the Social Security Act.

Use of original returns open to inspection in accordance with

Use of original returns open to inspection in accordance with of returns; inspection of returns of corporations by State officers and shareholders; and inspection of estate and gift tax returns.

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

Collectors of Internal Revenue and Others Concerned:

By Executive Order dated November 12, 1938, the President ordered that income, excess-profits, and capital stock tax returns, estate and gift tax returns made under the Revenue Act of 1932 and filed after June 16, 1933, and returns made under Title IX of the Social Security Act, shall be open to inspection in accordance and upon compliance with the rules and regulations promulgated in Treasury Decision 4873 approved by the President on the same date [C. B. 1938–2, 261]. That Treasury decision deals with the inspection of returns in so far as inspection is permissible only upon order of the President and under regulations approved by the President. Under authority of law, and without action by the President, returns of corporations, except income and excess-profits tax returns and returns for the purpose of surtax on personal holding companies for years beginning after December 31, 1934, are open to inspection by the proper officers of any State; all returns of corporations are open to inspection by bona fide shareholders of record owning 1 per cent or more of the outstanding stock; and all returns under Title III of the Revenue Act of 1936 (or copies thereof) are 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.

Pursuant to sections 62, 409, 601(e), and 602(c) of the Revenue Act of 1938, sections 62, 351(c), and 503(a) of the Revenue Act of 1936, sections 105(d) and 106(c) of the Revenue Act of 1935, sections 62, 351(c), 701(d), and 702(b) of the Revenue Act of 1934, sections 62, 403, and 530 of the Revenue Act of 1932, section 62 of the Revenue Act of 1928, sections 257 and 1101 of the Revenue Act of 1926, section 905(c) of the Social Security Act, and sections 215(e) and 216(b) of the National Industrial Recovery Act, the following regulations are hereby prescribed with respect to the use of original, and the furnishing of copies of, returns open to inspection in accordance with Treasury Decision 4873, or otherwise; with respect to examinations by shareholders of the returns of corporations; by State officers of

returns of corporations made under the income, capital stock, or excess-profits tax provisions of the Revenue Act of 1926, the Revenue Act of 1928, the Revenue Act of 1932, sections 215 and 216 of the National Industrial Recovery Act, the Revenue Act of 1934, the Revenue Act of 1935, the Revenue Act of 1936, the Revenue Act of 1938, and under Title IX of the Social Security Act, except income and excess-profits tax returns and returns for the purpose of surtax on personal holding companies for years beginning after December 31, 1934; with respect to the inspection of returns under Title III of the Revenue Act of 1936 by any official, body, or commission, lawfully charged with the administration of any State tax law; and with respect to the inspection of estate and gift tax returns made under the Revenue Act of 1932 and filed prior to June 17, 1933, and made under the Revenue Act of 1926 and under prior Revenue Acts. For inspection by State taxing officials of income returns other than returns under Title III of the Revenue Act of 1936, for any taxable year beginning after December 31, 1934, see articles 55(b)–1 to 55(b)–4, inclusive, of Regulations 86, as substituted by Treasury Decision 4626 (C. B. XV–1, 61, 71) and articles 55(b)–1 to 55(b)–4, inclusive, of Regulations 94, both as amended by Treasury Decision 4732 (C. B. 1937–1, 145), and section 55 of the Revenue Act of 1938:

PART I.

INCOME AND EXCESS-PROFITS TAX RETURNS, EXCEPT RETURNS UNDER TITLE III OF THE REVENUE ACT OF 1936, CAPITAL STOCK TAX RETURNS, AND RETURNS UNDER TITLE IX OF THE SOCIAL SECURITY ACT.

ARTICLE 1. *Definitions.*—When used in Part I of these regulations—

(*a*) the term "return" means the original return (except a return under Title III of the Revenue Act of 1936) made for income, excess-profits, or capital stock tax purposes, or for purposes of the tax imposed by Title IX of the Social Security Act;

(*b*) the term "corporation" includes associations, joint-stock companies, and insurance companies;

(*c*) the term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of the Federal tax laws, a trust or estate or a corporation;

(*d*) the term "stock" includes shares in an association, joint-stock company, or insurance company; and the term "shareholder" includes a member in an association, joint-stock company, or insurance company.

ART. 2. *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 why access is desired, and the names and official positions of the officers designated to have the access. The request or application should be addressed 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).

(3) 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.

ART. 3. *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 returns of such corporation and of its subsidiaries. His request for permission to examine such returns must be made in writing, verified by affidavit, and shall

show 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 shall 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 shall 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 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. In the case of a corporation which has been dissolved, the returns may be examined by any person who would have been entitled to examine them at the date of dissolution.

ART. 4. *Penalties for disclosure of returns.*—Section 3167, Revised Statutes, as amended by the Revenue Act of 1918 and reenacted without change by section 1115 of the Revenue Act of 1926, makes it a misdemeanor punishable by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court, for any person to print or publish in any manner whatever not provided by law information contained in any income return, and further provides that if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment. The penalties provided in section 3167, Revised Statutes, are applicable also to disclosure of information contained in excess-profits and capital stock tax returns and returns made under Title IX of the Social Security Act.

PART II.

RETURNS UNDER TITLE III OF THE REVENUE ACT OF 1936.

ARTICLE 1. *Inspection of returns by State taxing officials.*—Original returns of taxes imposed by Title III shall be open to inspection, at convenient times and places, by any official, body, or commission lawfully charged with the administration of any State tax law, or by the representatives of such official, body, or commission designated in writing by the governor of the State, for the purpose of such administration, or for the purpose of obtaining information to be furnished to local taxing authorities, as provided in section 55(b) (1) and (2) of the Revenue Act of 1936. Requests for permission to inspect the returns must be in writing signed by the governor under the seal of his State, and must be addressed to the Commissioner of Internal Revenue, Records Division, Washington, D. C. The request shall state (*a*) the kind of returns it is desired to inspect, (*b*) the taxable year or years covered by the returns it is desired to inspect, (*c*) the name of the official, body, or commission by whom or which the inspection is to be made, (*d*) the name of the representative of such official, body, or commission, designated to make the inspection, (*e*) by specific references, the State tax law which such official, body, or commission is charged with administering and the law under which he, she, or it is so charged, (*f*) the purpose for which the inspection is to be made, and (*g*) if the inspection is for the purpose of obtaining information to be furnished to local taxing authorities, (1) the name of the official, body, or commission of any political subdivision of the State, lawfully charged with the administration of the tax laws of such political subdivision, if any, to whom or to which the information secured by the inspection is to be furnished, and (2) the purpose for which the information is to be used by such official, body, or commission.

ART. 2. *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 returns of such corporation and of its subsidiaries. His request for permission to examine such returns shall be made in writing, verified by affidavit, and shall show his address, the name of the corporation, the period of time covered by the return he desires to inspect, the amount of the corpora-

tion'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 shall 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 shall 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 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. In the case of a corporation which has been dissolved, the returns may be examined by any person who would have been entitled to examine them at the date of dissolution.

PART III.

ESTATE AND GIFT TAX RETURNS FILED ON OR BEFORE JUNE 16, 1933.

Estate tax returns and notices, and gift tax returns, shall be treated as privileged communications and shall not be inspected nor their contents disclosed, except as follows:

ARTICLE 1. *Inspection by executor or donor.*—Upon application to the Commissioner an estate tax return or notice may be inspected by the executor, or his successor in office, or by his duly authorized attorney in fact. Upon like application a gift tax return may be inspected by the donor or by his duly authorized attorney in fact.

ART. 2. *Disclosure of information by revenue officer.*—An internal revenue officer engaged in an official investigation of an estate tax or gift tax liability may disclose the returned value of any item or the amount of any specific deduction or other limited information, if such disclosure is necessary in order to verify the same or to arrive at a correct determination of the tax. This right of disclosure, however, is limited to the purposes of the investigation, and in no case extends to such information as the amount of the estate, the amount of tax, or other general data.

ART. 3. *Inspection by State officers.*—Upon written application to the Commissioner, a return or notice may be exhibited, or information contained therein may be disclosed, to an officer of any State, for official use in connection with an estate, inheritance, legacy, succession, gift, or other tax of the State, provided a like cooperation is given by the State to the Commissioner of Internal Revenue or his representatives for use in the administration of the Federal tax laws. Such officer may also be permitted to inspect schedules, lists, and other statements designed to be supplemental to, or to become a part of, the original return, and other records and reports which contain information included or required by statute to be included in the return.

ART. 4. *Inspection by person having material interest.*—If any other person has a material interest in ascertaining any fact disclosed by the return, or in obtaining information as to the payment of the tax, he may make a written application to the Commissioner of Internal Revenue for such information, setting forth the nature of his interest and the purpose of the application. Thereupon, the Commissioner may permit an inspection of, or furnish a copy of, the return, or may furnish such information as he deems advisable.

ART. 5. *Inspection by Government attorneys.*—Returns shall be open to inspection by a United States attorney or by an attorney of the Department of Justice in the course of his official duties. The request for inspection shall be in writing and, except as provided in article 6, shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States attorney.

ART. 6. *Returns in custody of collector or revenue agent in charge.*—If the return is in the custody of a collector or internal revenue agent in charge, such collector or agent in charge may, upon like written request made to him, permit inspection thereof by a United States attorney or an attorney of the Department of Justice. Upon written application to him such collector or agent in charge may also permit inspection by the executor or his successor in office, or his duly

authorized attorney in fact, in case of estate tax returns, or the donor or his duly authorized attorney in fact in case of gift tax returns, in accordance with these regulations.

PART IV.

GENERAL PROVISIONS.

ARTICLE 1. *Use of returns in litigation.*—The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto.

ART. 2. *Furnishing of copies of returns.*—A copy of a return may be furnished to any person who is entitled to inspect such return upon written application therefor and the submission of evidence satisfactory to the Commissioner of his right to receive the same, except that if a return is in the custody of a collector or of an internal revenue agent in charge, such collector or agent in charge may furnish a copy of such return to a United States attorney, or an attorney of the Department of Justice, or to the taxpayer or his duly authorized attorney in fact, in accordance with these regulations. Certified copies will be furnished only upon specific request therefor sent to the Commissioner at Washington.

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

ART. 3. *Supplemental documents, records, and reports.*—Persons entitled to inspect returns may have access to information returns, schedules, lists, and other statements designed to be supplemental to, or to become a part of, the returns to which they are given access, and the Commissioner may, in his discretion, permit such persons to inspect other records and reports which contain information included or required by statute to be included in the return.

ART. 4. This Treasury decision supersedes Treasury Decision 4798, approved March 25, 1938 [C. B. 1938–1, 364].

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved January 4, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register January 6, 1939, 12.17 p. m.)

1939–21–9841
T. D. 4900

Regulations governing the inspection of income, excess-profits, and capital stock tax returns by the Special Committee on Un-American Activities, House of Representatives.

TREASURY DEPARTMENT,
Washington, D. C.

Collectors of Internal Revenue and Others Concerned:

Pursuant to the provisions of section 257(a) of the Revenue Act of 1926; section 55 of the Revenue Act of 1932, as amended by section 218(h) of the National Industrial Recovery Act; sections 215(e) and

216(b) of the National Industrial Recovery Act; sections 55(a), 701(e), and 702(b) of the Revenue Act of 1934; sections 105(e) and 106(c) of the Revenue Act of 1935; sections 55(a), 351(c), and 503(a) of the Revenue Act of 1936; and sections 55(a), 409, 601(e), and 602(c) of the Revenue Act of 1938, income tax returns made under the Revenue Act of 1932, the Revenue Act of 1932, as amended by the National Industrial Recovery Act, the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1936, as amended by the Revenue Act of 1937, and the Revenue Act of 1938, and capital stock and excess-profits tax returns made under the National Industrial Recovery Act, the Revenue Act of 1934, the Revenue Act of 1935, as amended by the Revenue Act of 1936, the Revenue Act of 1936, and the Revenue Act of 1938, for the calendar year 1932 and subsequent taxable years, shall be open to inspection by the Special Committee on Un-American Activities, House of Representatives, or any duly authorized subcommittee thereof, for the purpose of carrying out the provisions of House Resolution 26 (Seventy-sixth Congress, first session), passed February 3, 1939. The inspection of returns herein authorized may be by the committee or a duly authorized subcommittee thereof, acting directly as a committee or a subcommittee, or by or through such examiners or agents as the committee or subcommittee may designate or appoint. Upon written notice by the chairman of the committee or of the authorized subcommittee to the Secretary of the Treasury, giving the names and addresses of the taxpayers whose returns it is necessary to inspect and the taxable periods covered by the returns, the Secretary and any officer or employee of the Treasury Department shall furnish such committee or subcommittee with any data relating to or contained in any such return, or shall make such return available for inspection by the committee or subcommittee or by such examiners or agents as the committee or subcommittee may designate or appoint, in the office of the Commissioner of Internal Revenue. Any information thus obtained by the committee or the subcommittee thereof, which is relevant or pertinent to the purpose of the investigation, may be submitted by the committee or the subcommittee to the House.

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

Approved May 11, 1939.

Franklin D. Roosevelt,
The White House.

(Filed with the Division of the Federal Register May 13, 1939, 10.29 a. m.)

EXECUTIVE ORDER—INSPECTION OF INCOME, EXCESS-PROFITS, AND CAPITAL STOCK TAX RETURNS BY THE SPECIAL COMMITTEE ON UN-AMERICAN ACTIVITIES, HOUSE OF REPRESENTATIVES.

By virtue of the authority vested in me by section 257(a) of the Revenue Act of 1926 (44 Stat., 9, 51); section 55 of the Revenue Act of 1932 (47 Stat., 169, 189) as amended by section 218(h) of the National Industrial Recovery Act (48 Stat., 195, 209); sections 215(e) and 216(b) of the National Industrial Recovery Act (48 Stat., 195, 208); sections 55(a), 701(e), and 702(b) of the Revenue Act of 1934

(48 Stat., 680, 698, 770); sections 105(e) and 106(c) of the Revenue Act of 1935 (49 Stat., 1014, 1018, 1019); sections 55(a), 351(c), and 503(a) of the Revenue Act of 1936 (49 Stat., 1648, 1671, 1733, 1738); and sections 55(a), 409, 601(e), and 602(c) of the Revenue Act of 1938 (52 Stat., 447, 478, 564, 566, 568), it is hereby ordered that income, excess-profits, and capital stock tax returns made under the Revenue Act of 1932, the Revenue Act of 1932, as amended by the National Industrial Recovery Act, the National Industrial Recovery Act, the Revenue Act of 1934, the Revenue Act of 1935, as amended by the Revenue Act of 1936, the Revenue Act of 1936, the Revenue Act of 1936, as amended by the Revenue Act of 1937, and the Revenue Act of 1938, for the calendar year 1932 and subsequent taxable years, shall be open to inspection by the Special Committee on Un-American Activities, House of Representatives, or any duly authorized subcommittee thereof, for the purpose of carrying out the provisions of House Resolution 26, passed February 3, 1939 (Seventy-sixth Congress, first session); such inspection to be in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury in the Treasury decision relating to the inspection of returns by that committee, approved by me this date.

This order shall be published in the Federal Register.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
May 11, 1939.

(8131)

(Filed with the Division of the Federal Register May 13, 1939, 10.29 a. m.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT A.—RATES OF TAX.

SECTION 101.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 101-1: Proof of exemption. 1939-12-9760
I. T. 3264

REVENUE ACT OF 1938.

The M Building Corporation, incorporated for the particular purpose of building and maintaining a chapter house for the N Chapter of the M Fraternity, whose stock is held by others than an exempt corporation, is not entitled to exemption from Federal income taxation under the provisions of section 101(14) of the Revenue Act of 1938.

Advice is requested whether the M Building Corporation is entitled to exemption from Federal income taxation under section 101(14) of the Revenue Act of 1938.

The organization was incorporated under the laws of the State of R for the following purposes:

(*a*) To at all times and in every manner possible promote the interests of the M Fraternity and especially to maintain among the alumnae of the N Chapter

of the M Fraternity friendship and communication; also to maintain continuous communication with the active chapter there and to give to said active chapter all possible support and assistance, whether social or financial;

(*b*) To build and maintain for said N Chapter a chapter house and to this end to buy, purchase, or otherwise acquire, hold, mortgage, encumber, lease, sell or otherwise transfer, hire, rent and deal in real, personal or mixed property of every kind and description situated in the State of R or in any of the States of the United States, and to direct and do any and all of said things.

There are nearly 400 shares of stock of this corporation outstanding, all of which are owned by individuals.

Section 101(14) of the Revenue Act of 1938 provides for the exemption of:

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 * * *.

The capital stock of the corporation is held by others than the N Chapter. It can not be said that the property is held exclusively for the beneficial use of that organization. It is, therefore, held that the M Building Corporation, which has capital stock outstanding in the hands of others than an exempt organization for which the beneficial use of the property is held, is not entitled to exemption under section 101(14) of the Revenue Act of 1938.

ARTICLE 101(3)–1: Fraternal beneficiary societies. 1939–11–9750
I. T. 3261

REVENUE ACT OF 1938.

The grand lodge of the order of N, which includes the N Home established for the care of the members of the order, their dependents, and members of an affiliated order unable to earn a livelihood by reason of the infirmities of age, is entitled to exemption as a fraternal beneficiary society under section 101(3) of the Revenue Act of 1938, and contributions to the organization by individual donors for the use of the N Home are deductible by such individuals in the manner and to the extent provided by section 23(o)5 of the Revenue Act of 1938.

Advice is requested whether the grand lodge of the order of N, which includes the N Home, is entitled to exemption from Federal income tax as a fraternal beneficiary society under the provisions of section 101(3) of the Revenue Act of 1938, which exempts—

Fraternal beneficiary societies, orders, or associations, (A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system; and (B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents; * * *

The evidence shows that the organization is incorporated under the laws of the State of R, that it is a fraternal beneficiary society operating under the lodge system, and that it is the governing organization of all subordinate related branches throughout the State of R. The N Home was chartered by that State but surrendered its charter to the grand lodge and conveyed all the property held by it to the grand lodge, which now controls and manages the home through a board of trustees. Each subordinate lodge in the State is required to pay to the grand lodge semiannually such amount per member

as is prescribed by the grand lodge for the support of the grand lodge and the home. In addition the home receives income from the N Home Endowment Fund. This fund consists of voluntary contributions and bequests of money or other property and is controlled by the endowment fund trustees under the direction of the grand lodge. The home is not founded as a hospital for the care of persons temporarily disabled by sickness or accident. It is established for the care and maintenance of the members of the order who are unable to earn a livelihood by reason of the infirmities of age and afflictions incident thereto and who are in indigent circumstances without other means of support; and for the care of infirm and helpless wives and widows of members of the order, and of helpless orphans of members of the order who are without other and proper provisions for their care and education. All such persons on being admitted to the home are cared for while they are members thereof and are required to relinquish all claims upon their respective lodges for benefits (such as widow's, orphan's, and funeral benefits) of any kind as a condition of their admission to and support in the home.

Based upon the facts presented, it is held that the grand lodge of the order of N, which includes the N Home of the State of R, is entitled to exemption under the provisions of section 101(3) of the Revenue Act of 1938.

Contributions to this organization by individual donors for the use of the N Home of the State of R are deductible by such individuals in arriving at their taxable net incomes in the manner and to the extent provided by section 23(o)5 of the Revenue Act of 1938.

ARTICLE 101(6)–1: Religious, charitable, scientific, literary, and educational organizations and community chests. 1939–10–9741 I. T. 3258

(Also Section 23(o), Article 23(o)–1, and Section 23(q), Article 23(q)–1.)

REVENUE ACT OF 1938.

The American National Red Cross and its various chapters, branches, and auxiliaries are exempt from Federal income taxation under section 101(6) of the Revenue Act of 1938, and contributions thereto are deductible in the manner and to the extent provided in section 23(o) and section 23(q) of the Revenue Act of 1938.

Advice is requested whether the American National Red Cross and its constituent chapters and branches are exempt from Federal income taxation under the provisions of section 101(6) of the Revenue Act of 1938, and whether contributions thereto are allowable deductions in the income tax returns of the donors.

The activities of the organization are conducted through chapters, each of which has one or more branches and auxiliaries through which it operates. Each chapter is responsible to the national organization for the policy pursued in its district.

It is held that the American National Red Cross and its various chapters, branches, and auxiliaries are entitled to exemption from Federal income taxation under the provisions of section 101(6) of the Revenue Act of 1938. Contributions to such organizations are

allowable deductions in the income tax returns of individuals in the manner and to the extent provided by section 23(o) of the Revenue Act of 1938. The deductibility of contributions by taxable corporations is governed by section 23(q) of the Revenue Act of 1938.

ARTICLE 101(7)-1: Business leagues, chambers of commerce, real estate boards, and boards of trade. 1939-15-9782 G. C. M. 21000

REVENUE ACT OF 1938.

The M Association, the membership of which is composed of persons, firms, associations, and corporations, each representing a different trade, business, occupation, or profession, in which any firm, association, corporation, or person whose main activity or profession is not in competition with the main activity or profession of a member is eligible for membership, is entitled to exemption from Federal income taxation as a business league under the provisions of section 101(7) of the Revenue Act of 1938.

Advice is requested whether the M Association is entitled to exemption from Federal income taxation as a business league under the provisions of section 101(7) of the Revenue Act of 1938.

The purposes for which the organization was incorporated, as provided in the articles of incorporation, are as follows:

To institute and maintain a method of exchanging business information among its members;

To create and encourage cooperation, business efficiency, and service to its members and to bring its members in touch with prospective business;

To encourage local, national, and foreign trade expansion for the benefit of its members;

To develop the business efficiency of its members, and to promote a better acquaintance and closer association among them.

The by-laws provide that the membership in the association shall be composed of persons, firms, associations, and corporations, each representing a different trade, business, occupation, or profession; that any firm, association, corporation, or person whose main activity or profession is not in competition with the main activity or profession of a member is eligible for membership in the association; that an application for membership shall not be denied by reason of any conflict between the main activity of such applicant and the incidental activity of a member; and that each member of the association shall designate an executive of its firm to be its representative in the association, and such representative shall not be changed without the approval of the board of directors of the association. The by-laws further provide that there shall be an admission membership fee, that each member shall pay x dollars per month for the general expenses of the association, and that the management of the organization shall be vested in a board of trustees composed of the president, vice president, treasurer, secretary, and five others.

The organization holds weekly meetings, maintains an office, and employs a manager in order to facilitate the exchange of business information among its members, and in order to create and encourage cooperation, business efficiency, and service to its members and to bring them in touch with prospective business. It is stated that the character of business information exchanged among its members is

of a sales and sales prospect nature. Upon admission to the association, each member submits to the manager a list of business men with whom he is acquainted and to whom he will furnish another member (or members) a letter of introduction. Each member of the association agrees to keep other members of the association informed of any business changes which come to his attention and which may, by their nature, indicate potential markets for the sale of the products of such other members. At each meeting of the association certain members are called upon to explain how other members of the association can help them to secure more business. The income of the association is derived from its members and is expended for salaries and general office expenses.

Article 101(7)-1 of Regulation 101, dealing with the exemption of business leagues, reads in part as follows:

Business leagues, chambers of commerce, real estate boards, and boards of trade.—A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. * * *

It will be noted that the regulations recognize that a "business league" within the contemplation of section 101(7) is an organization which has for its purpose the promotion of the business interests of those who compose its membership. There is nothing in the regulations which requires that a business league promote the betterment of general commercial welfare. The regulations merely require that the activities of the organization be "directed to the improvement of business conditions of one or more lines of business." While the interests of the members of the instant organizations are diversified, they are no more so than the business interests of the members of a local board of trade or a chamber of commerce.

It is, accordingly, the opinion of this office that the M Association is a "business league" within the contemplation of section 101(7) of the Revenue Act of 1938.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

SECTION 101(9): Social clubs. 1939-5-9693
G. C. M. 20647

REVENUE ACTS OF 1936 AND 1938.

The M Social Club, which derives over 75 per cent of its income from leasing part of its property and is not supported by membership fees, dues, and assessments, is not entitled to exemption from Federal income taxation under section 101(9) of the Revenue Acts of 1936 and 1938.

Advice is requested whether the M Social Club is entitled to exemption from Federal income taxation under section 101(9) of the Revenue Acts of 1936 and 1938, which exempt—

Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder;

For the year 1936 over 75 per cent of the income of the M Social Club consisted of income from leasing a part of its property, and the same condition existed throughout the years 1937 and 1938. The club in renting its property is engaged in a business ordinarily carried on for profit. Such activity is not carried on for the accommodation of its members. It is, therefore, not operated exclusively for pleasure, recreation, or other nonprofitable purposes within the meaning of the statute and is not supported by membership fees, dues, and assessments. (See article 101(9)-1 of Regulations 94, relating to the Revenue Act of 1936.) It is evident from the statement of receipts and expenditures for the year 1936 that if the organization did not have this source of income, it would have to modify or discontinue its other activities or raise its membership dues, which is indicative that the rentals inure to the benefit of its members within the meaning of the statute. (See G. C. M. 16807, C. B. XV-2, 157 (1936), wherein a tennis club was denied exemption under substantially similar circumstances.) Furthermore, the fact that the income may be used entirely in the furtherance of its other nonprofitable activities is not sufficient to justify the exemption. (G. C. M. 16807, supra; G. C. M. 9470, C. B. X-2, 162 (1931); and *The Associates* v. *Commissioner*, 28 B. T. A., 521.)

It is, therefore, held that the M Social Club is not entitled to exemption from Federal income taxation under section 101(9) of the Revenue Acts of 1936 and 1938.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

ARTICLE 101(10)-1: Local benevolent life insurance associations, mutual irrigation and telephone companies, and like organizations. 1939-24-9870 I. T. 3286

REVENUE ACTS OF 1936 AND 1938.

The M Company, organized for the purpose of entering into a contract with the United States or its agencies for the protection of the banks of the R River against erosion, the only income of which consists of assessments against property owners affected solely to meet expenses, no part of such income inuring to the benefit of any private shareholder or individual, is exempt from Federal income tax under section 101(10) of the Revenue Acts of 1936 and 1938.

Advice is requested whether the M Company is entitled to exemption from Federal income tax under section 101(10) of the Revenue Acts of 1936 and 1938, which exempts from Federal income taxation—

Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 per centum or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

The M Company was incorporated in 1937 for the purpose of entering into contracts with the United States or its duly constituted agencies for the protection of the banks of the R River, that is, to prevent the banks from being damaged by erosion. The company has complied with the requirements of the Government by entering into an agreement to furnish the Government a right of way and save it

harmless from damages due to construction work. It further agreed to maintain the work after completion. Its source of income is from contributions or assessments against its members and such amounts are used to pay expenses. No part of its income inures to the benefit of any private shareholder or individual.

It is held that the M Company is exempt from Federal income taxation under the provisions of section 101(10) of the Revenue Acts of 1936 and 1938.

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

1939–10–9742
I. T. 3259

REVENUE ACT OF 1938.

The compensation for overtime, paid pursuant to article 1242, subdivisions (*a*) and (*e*) of the Customs Regulations of 1937, to employees of the Customs Service stationed in Canada is not exempt from Federal income taxation.

Advice is requested as to the treatment for Federal income tax purposes of compensation for overtime, paid pursuant to article 1242, subdivisions (*a*) and (*e*) of the Customs Regulations of 1937, to employees of the Customs Service stationed in Canada.

Article 1242(*a*) of the Customs Regulations of 1937 reads as follows:

ART. 1242. *Extra compensation.*—(*a*) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading of cargo or merchandise, or lading cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo or merchandise on or from the wharf, or in connection with the unlading, receiving or examination of passengers' baggage, or in boarding vessels, or in the entrance and clearance of vessels, or in the issuance and recording of their marine documents and instruments of title, shall receive extra compensation, to be paid by the master, owner, or agent of the vessel, or by the transportation company.

Article 1242(*e*) of the Customs Regulations of 1937 reads as follows:

(*e*) The extra compensation for overtime services is in addition to the regular compensation paid by the Government in the case of officers and employees whose compensation is fixed on the ordinary per diem basis and those receiving a compensation per month or per annum.

Vouchers covering extra compensation for overtime services are paid from the appropriation "Collecting the revenue from customs" for the fiscal year in which the services are rendered. Collections from the persons in interest in payment for such services are deposited as a repayment to the appropriation from which the extra compensation is paid. No deductions are made from the extra compensation for the retirement fund for Federal employees.

Section 116 of the Revenue Act of 1938 provides in part:

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this title:

(a) *Earned income from sources without United States.*—In the case of an individual citizen of the United States, a bona fide nonresident of the United

States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

The four controlling factors in the application of the foregoing provision of law to the case of a particular taxpayer are: (1) the taxpayer must be a native born or fully naturalized citizen of the United States, (2) he must be away from the United States for more than six months of the taxable year, (3) he must receive earned income within the meaning of that term as defined in section 25(a) of the Revenue Act of 1938 for personal services rendered without the United States, and (4) the payor of the salary, wages, or compensation must not be the United States or any agency thereof. The instant employees qualify as to requirements (1) and (2), and the extra compensation received for the services rendered by the employees at night, on Sundays, and on holidays unquestionably constitutes "earned income" within the meaning of that term as defined in section 25(a) of the Revenue Act of 1938. The sole question at issue is, therefore, whether the payor of the extra compensation is the United States, or any agency thereof, or the transportation companies or other persons who are required to pay for the overtime service.

The last paragraph of section 4 of the Act of May 29, 1930 (46 Stat., 468), provides:

The term "basic salary, pay, or compensation," wherever used in this Act, shall be so construed as to exclude from the operation of the Act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the position as fixed by law or regulation.

As the overtime compensation of employees of the United States Government is not subject to deductions for the retirement fund in which such employees participate, the fact that no deductions are made from the extra compensation of customs employees for the retirement fund is no test that the amounts so received are not paid by the United States Government or any agency thereof.

In an opinion rendered by the Attorney General on February 16, 1933 (37 Ops. Atty. Gen., 121), which related to the status of employees in the Insolvent National Bank Division of the Office of Comptroller of Currency, it was held that, notwithstanding the fact that the expenses of preliminary and other examinations made by such employees are paid out of the assets of the insolvent banks from funds obtained by assessments on the national banks in receivership and not from Federal appropriations, the employees must be regarded as employees of the United States, and the fact that they are not paid from funds appropriated by Congress does not affect their status as employees in the executive civil service of the United States.

Applying that principle to the facts in the instant case, this office is of the opinion that the payment into the Treasury by the transportation companies, or others similarly interested, of the amount of compensation due employees of the Customs Service for overtime results in the moneys so paid belonging to the United States.

It is, accordingly, held that the compensation for overtime paid to employees of the Customs Service stationed in Canada for services rendered at night, on Sundays, and on holidays is not exempt from Federal income tax, and that such compensation falls within the exception from earned income from sources without the United States contained in section 116(a) of the Revenue Act of 1938.

ARTICLE 116-2: Compensation of State officers and employees. 1939-15-9783 Ct. D. 1390

STATE INCOME TAX—TAX LAW OF NEW YORK—DECISION OF SUPREME COURT.

1. TAX ON SALARY OF EMPLOYEE OF CORPORATE INSTRUMENTALITY OF THE FEDERAL GOVERNMENT—CONSTITUTIONALITY.

The imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation, a corporate instrumentality of the Federal Government, does not impose an unconstitutional burden upon that Government.

2. FEDERAL INCOME TAX—DECISION OVERRULED.

Collector v. *Day* (11 Wall., 113) overruled, so far as it recognizes an implied constitutional immunity from income taxation of the salaries of officers or employees of a State government or its instrumentalities.

SUPREME COURT OF THE UNITED STATES.

Mark Graves, John J. Merrill and John P. Hennessy, as Commissioners Constituting the State Tax Commission of the State of New York, petitioners, v. *The People of the State of New York, Upon the Relation of James B. O'Keefe.*

[59 S. Ct., 595.]

On writ of certiorari to the Supreme Court of the State of New York.

[March 27, 1939.]

OPINION.

Mr. Justice STONE delivered the opinion of the Court.

We are asked to decide whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden upon the Federal Government.

Respondent, a resident of New York, was employed during 1934 as an examining attorney for the Home Owners' Loan Corporation at an annual salary of $2,400. In his income tax return for that year he included his salary as subject to the New York State income tax imposed by article 16 of the tax law of New York (Consol. Laws, ch. 60). Subdivision 2f of section 359, since repealed, exempted from the tax "Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States. * * *" Petitioners, New York State tax commissioners, rejected respondent's claim for a refund of the tax based on the ground that his salary was constitutionally exempt from State taxation because the Home Owners' Loan Corporation is an instrumentality of the United States Government and that he, during the taxable year, was an employee of the Federal Government engaged in the performance of a governmental function.

On review by certiorari the board's action was set aside by the Appellate Division of the Supreme Court of New York (253 App. Div., 91), whose order was affirmed by the Court of Appeals. (278 N. Y., 221.) Both courts held respondent's salary was free from tax on the authority of *New York ex rel. Rogers* v. *Graves* (299 U. S., 401), which sustained the claim that New York could not

constitutionally tax the salary of an employee of the Panama Rail Road Co., a wholly-owned corporate instrumentality of the United States. We granted certiorari December 19, 1938, the constitutional question presented by the record being of public importance.

The Home Owners' Loan Corporation was created pursuant to section 4(a) of the Home Owners' Loan Act of 1933 (48 Stat., 128, 12 U. S. C., section 1461 *et seq.*), which was enacted to provide emergency relief to home owners, particularly to assist them with respect to home mortgage indebtedness. The corporation, which is authorized to lend money to home owners on mortgages and to refinance home mortgage loans within the purview of the Act, is declared by section 4(a) to be an instrumentality of the United States. Its shares of stock are wholly Government-owned. (Section 4(b).) Its funds are deposited in the Treasury of the United States, and the compensation of its employees is paid by drafts upon the Treasury.

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the Federal Government. (Cf. *Kay* v. *United States*, 303 U. S., 1.) As that Government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. (*McCulloch* v. *Maryland*, 4 Wheat., 316, 432; *Van Brocklin* v. *Tennessee*, 117 U. S., 151, 158–159; *South Carolina* v. *United States*, 199 U. S., 437, 451–452; *Helvering* v. *Gerhardt*, 304 U. S., 405, 412–415 [Ct. D. 1343, C. B. 1938–1, 246].) And when the National Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the Government itself through its departments. (See *McCulloch* v. *Maryland*, supra, 421–422; *Smith* v. *Kansas City Title Co.*, 255 U. S., 180, 208; *Federal Land Bank* v. *Crosland*, 261 U. S., 374; *New York ex rel. Rogers* v. *Graves*, supra.)

The single question with which we are now concerned is whether the tax laid by the State upon the salary of respondent, employed by a corporate instrumentality of the Federal Government, imposes an unconstitutional burden upon that Government. The theory of the tax immunity of either Government, State or National, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning (*McCulloch* v. *Maryland*, supra, 435–436), and possible differences in application, deriving from differences in the source, nature and extent of the immunity of the Governments and their agencies, were pointed out and discussed by this Court in detail during the last term. (*Helvering* v. *Gerhardt*, supra, 412–413, 416.)

So far as now relevant, those differences have been thought to be traceable to the fact that the Federal Government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of Federal agencies from State taxation. (See *Van Allen* v. *The Assessors*, 3 Wall., 573, 583, 585; *Bank* v. *Supervisors*, 7 Wall., 26, 30, 31; *Thomson* v. *Pacific Railroad*, 9 Wall., 579, 588, 590; *People* v. *Weaver*, 100 U. S., 539, 543; *Mercantile Bank* v. *New York*, 121 U. S., 138, 154; *Owensboro National Bank* v. *Owensboro*, 173 U. S., 664, 668; *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S., 575, 581; *Oklahoma* v. *Barnsdall Corporation*, 296 U. S., 521, 525–526; *Baltimore National Bank* v. *State Tax Comm'n*, 297 U. S., 209, 211–212; *British-American Co.* v. *Board*, 299 U. S., 159; *James* v. *Dravo Contracting Co.*, 302 U. S., 134, 161; *Helvering* v. *Gerhardt*, supra, 411, 412, 417; cf. *United States* v. *Bekins*, 304 U. S., 27, 52.) Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of Federal agencies which courts have implied, is a question which need not now be determined.

Congress has declared in section 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from Federal and State taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, "including its franchise, its capital, reserves and surplus, and its loans and income," is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from State taxation of the salary of the corporation's employees, and the congressional intention is not to be gathered from the statute by implication. (Cf. *Baltimore National Bank* v. *State Tax Comm'n*, supra.)

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the congressional purpose. The nature and extent of that implication depend upon the nature of the congressional power and the effect of its exercise.[1] But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the Federal Government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from State taxation is claimed on the ground that the Federal Government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The present tax is a nondiscriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the Government from their funds. It is laid upon income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the Government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable (*New York ex rel. Cohn* v. *Graves*, 300 U. S., 308, 313, 314; *Hale* v. *State Board*, 302 U. S., 95, 108; *Helvering* v. *Gerhardt*, supra; cf. *Metcalf & Eddy* v. *Mitchell*, 269 U. S., 514 [T. D. 3824, C. B. V–1, 218 (1926)]; *Fox Film Corporation* v. *Doyal*, 286 U. S., 123; *James* v. *Dravo Contracting Co.*, supra, 149; *Helvering* v. *Mountain Producers Corporation*, 303 U. S., 376 [Ct. D. 1321, C. B. 1938–1, 343]), and the only possible basis for implying a constitutional immunity from State income tax of the salary of an employee of the National Government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the National Government tantamount to an interference by one Government with the other in the performance of its functions.

In the four cases in which this Court has held that the salary of an officer or employee of one government or its instrumentality was immune from taxation by the other, it was assumed, without discussion, that the immunity of a government or its instrumentality extends to the salaries of its officers and em-

[1] The failure of Congress to regulate interstate commerce has generally been taken to signify a congressional purpose to leave undisturbed the authority of the States to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority. (*Cooley* v. *Board of Wardens*, 12 How., 299, 319; *Minnesota Rate Cases*, 230 U. S., 352, 399–400; *Kelly* v. *Washington*, 302 U. S., 12, 14; *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S., 177, 184–185; *Milk Control Board* v. *Eisenberg Farm Products*, decided February 27, 1939.) As to the implications from congressional silence in the field of State taxation of interstate commerce and its instrumentalities, see *Western Live Stock* v. *Bureau of Revenue*, 303 U. S., 250; *Gwin, White & Prince, Inc.*, v. *Henneford*, decided January 3, 1939.)

ployees.[2] This assumption, made with respect to the salary of a governmental officer in *Dobbins* v. *Commissioners of Erie County* (16 Pet., 435) and in *Collector* v. *Day* (11 Wall., 113), was later extended to confer immunity on income derived by a lessee from lands leased to him by a government in the performance of a governmental function (*Gillespie* v. *Oklahoma*, 257 U. S., 501; *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S., 393 [Ct. D. 485, C. B. XI-1, 265 (1932)] and cases cited), although the claim of a like exemption from tax on the income of a contractor engaged in carrying out a Government project was rejected both in the case of a contractor with a State (*Metcalf & Eddy* v. *Mitchell*, supra), and of a contractor with the National Government (*James* v. *Dravo Contracting Co.*, supra).

The ultimate repudiation in *Helvering* v. *Mountain Producers Corporation*, supra, of the doctrine that a tax on the income of a lessee derived from a lease of government owned or controlled lands is a forbidden interference with the activities of the government concerned led to the reexamination by this Court, in the Gerhardt case, of the theory underlying the asserted immunity from taxation by one government of salaries of employees of the other. It was there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. (See *Metcalf & Eddy* v. *Mitchell*, supra, 523-524; *James* v. *Dravo Contracting Co.*, supra, 156-158.) It was further pointed out that, as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or

[2] In *Dobbins* v. *Commissioners of Erie County* (16 Pet., 435) a Pennsylvania tax, nominally laid upon the office of the captain of a Federal revenue cutter, but roughly measured by the salary paid to the officer, was held invalid. The Court seems to have rested its decision in part on the ground that a tax on the emoluments of his office was the equivalent of a tax upon an activity of the National Government, and in part on the ground that it was an infringement of the implied superior power of Congress to fix the compensation of Government employees without diminution by State taxation.

In *Collector* v. *Day* (11 Wall., 113), this Court held that the salary of a State probate judge was constitutionally immune from Federal income tax on the grounds that the salary of an officer of a State is exempt from Federal taxation if the function he performs as an officer is exempt, citing *Dobbins* v. *Commissioner of Erie County*, supra, and that there was an implied constitutional restriction upon the power of the National Government to tax a State in the exercise of those functions which were essential to the maintenance of State governments as they were organized at the time when the Constitution was adopted. The possibility that a nondiscriminatory tax upon the income of a State officer did not involve any substantial interference with the functioning of the State government was not discussed either in this or the Dobbins case.

In *New York ex rel. Rogers* v. *Graves* (299 U. S., 401) the question was whether the salary of the general counsel of the Panama Rail Road Co. was exempt from State income tax because the railroad company was an instrumentality of the Federal Government. The sole question raised by the taxing State was whether the railroad company was a Government instrumentality. The court, having found that the railroad company was such an instrumentality, disposed of the matter of tax exemption of the salary of its employees by declaring: "The railroad company being immune from State taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune." (*New York ex rel. Rogers* v. *Graves*, supra, 408.)

In *Brush* v. *Commissioner* (300 U. S., 352 [Ct. D. 1212, C. B. 1937-1, 217]) the applicable Treasury regulation upon which the Government relied exempted from Federal income tax the compensation of "State officers and employees" for "services rendered in connection with the exercise of an essential governmental function of the State." The Court held that the maintenance of the public water system of New York City was an essential governmental function, and in determining whether the salary of the engineer in charge of that project was subject to Federal income tax the Court declared, citing *New York ex rel. Rogers* v. *Graves*, supra, 408: "The answer depends upon whether the water system of the city was created and is conducted in the exercise of the city's governmental functions. If so, its operations are immune from Federal taxation and, as a necessary corollary, 'fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.'" (*Brush* v. *Commissioner*, supra, 360.)

private,[3] but to prevent undue interference with the one government by imposing on it the tax burdens of the other.

In applying these controlling principles in the Gerhardt case the Court held that the salaries of employees of the New York Port Authority, a State instrumentality created by New York and New Jersey, were not immune from Federal income tax, even though the Authority be regarded as not subject to Federal taxation. It was said that the taxpayers enjoyed the benefit and protection of the laws of the United States and were under a duty, common to all citizens, to contribute financial support to the Government; that the tax laid on their salaries and paid by them could be said to affect or burden their employer, the Port Authority, or the States creating it, only so far as the burden of the tax was economically passed on to the employer; that a nondiscriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which New York and New Jersey had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials.[4] The Court concluded that the claimed immunity would do no more than relieve the taxpayers from the duty of financial support to the National Government in order to secure to the State a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from taxation.

The conclusion reached in the Gerhardt case that in terms of constitutional tax immunity a Federal income tax on the salary of an employee is not a prohibited burden on the employer makes it imperative that we should consider anew the immunity here claimed for the salary of an employee of a Federal instrumentality. As already indicated, such differences as there may be between the implied tax immunity of a State and the corresponding immunity of the National Government and its instrumentalities may be traced to the fact that the National Government is one of delegated powers, in the exercise of which it is supreme. Whatever scope this may give to the National Government to claim immunity from State taxation of all instrumentalities which it may constitutionality create, and whatever authority Congress may possess as incidental to the exercise of its delegated powers to grant or withhold immunity from State taxation, Congress has not sought in this case to exercise such power. Hence these distinctions between the two types of immunity can not affect the question with which we are now concerned. The burden on government of a nondiscriminatory income tax applied to the salary of the employee of a government or its instrumentality is the same, whether a State or National Government is concerned. The determination in the Gerhardt case that the Federal income tax imposed on the employees of the Port Authority was not a burden on the Port Authority made it unnecessary to consider whether the Authority itself was immune from Federal taxation; the claimed immunity failed because even if the Port Authority were itself immune from Federal income tax, the tax upon the income of its employees cast upon it no unconstitutional burden.

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[3] The fact that the expenses of the one government might be lessened if all those who deal with it were exempt from taxation by the other was thought not to be an adequate basis for tax immunity in *Metcalf & Eddy* v. *Mitchell* (269 U. S. 514); *Group No. 1 Oil Corporation* v. *Bass* (283 U. S., 279 [Ct. D. 330, C. B. X–1, 153 (1931)]); *Burnet* v. *Jergins Trust* (288 U. S., 508 [Ct. D. 653, C. B. XII–1, 214 (1933)]); *James* v. *Dravo Contracting Co.* (302 U. S., 134); *Helvering* v. *Mountain Producers Corporation* (303 U. S., 376).

[4] That the economic burden of a tax on salaries is passed on to the employer or that employees will accept a lower Government salary because of its tax immunity, are formulas which have not won acceptance by economists and can not be judicially assumed. As to the "passing on" of the economic burden of the tax, see Seligman, Income Tax, VII Encyclopedia of Social Sciences, 626–638; Plehn, Public Finance (5th Ed.), page 320; Buehler, Public Finance, page 240; Lutz, Public Finance (2d Ed.), page 336, and see *Indian Motocycle Co.* v. *United States* (283 U. S., 570, 581, footnote 1 [Ct. D. 354, C. B. X–1, 439 (1931)]). As to preference for Government employment because the salary is tax exempt, see Dickinson, Compensating Industrial Effort (1937), pages 7–8; Douglas, The Reality of Non-Commercial Incentives in Industrial Life, Ch. V of The Trend of Economics (1924); Volume I, Fetter, Economic Principles (1915), page 203.

Assuming, as we do, that the Home Owners' Loan Corporation is clothed with the same immunity from State taxation as the Government itself, we can not say that the present tax on the income of its employees lays any unconstitutional burden upon it. All the reasons for refusing to imply a constitutional prohibition of Federal income taxation of salaries of State employees, stated at length in the Gerhardt case, are of equal force when immunity is claimed from State income tax on salaries paid by the National Government or its agencies. In this respect we perceive no basis for a difference in result whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employee or an officer of either a State or the National Government, or of its instrumentalities. In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in *Collector* v. *Day*, supra, and in *New York ex rel. Rogers* v. *Graves*, supra, is contrary to the reasoning and to the conclusions reached in the Gerhardt case and in *Metcalf & Eddy* v. *Mitchell*, supra; *Group No. 1 Oil Corporation* v. *Bass* (283 U. S., 279); *James* v. *Dravo Contracting Co.*, supra; *Helvering* v. *Mountain Producers Corporation*, supra; *McLoughlin* v. *Commissioner* (303 U. S., 218 [Ct. D. 1316, C. B. 1938–1, 243]). In their light the assumption can no longer be made. *Collector* v. *Day*, supra, and *New York ex rel. Rogers* v. *Graves*, supra, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the National or a State Government or their instrumentalities.

So much of the burden of a nondiscriminatory general tax upon the incomes of employees of a government, State or National, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it can not rightly be deemed to be within an implied restriction upon the taxing power of the National and State Governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the State governments.

Reversed.

Mr. Chief Justice HUGHES concurs in the result.

MR. JUSTICE FRANKFURTER, CONCURRING.

I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions.[1] But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.

For 120 years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which they had before, barring only duties affecting exports, imports, and on tonnage.[2] Congress, on the other hand, to lay taxes in order "to pay the Debts and provide for the common Defense and general Welfare of the United States" (Article I, section 8), can reach every person and every dollar in the land with due regard to constitutional limitations as to the method of laying

[1] The state of the docket of the High Court of Australia and that of the Supreme Court of Canada still permits them to continue the classic practice of *seriatim* opinions.

[2] Article I, section 10, United States Constitution.

taxes. But, as is true of other great activities of the State and National Governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore State and Federal Governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

The arguments upon which *McCulloch* v. *Maryland* (4 Wheat., 316) rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch* v. *Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that "the power to tax involves the power to destroy." (Id., at page 431.) This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch* v. *Maryland*.[3] The seductive *cliché* that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the National Government implies immunities from State taxation, the existence of State governments implies equivalent immunities from Federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent,[4] the force of which gathered rather than lost strength with time. (*Collector* v. *Day*, 11 Wall., 113, 128.)

All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called "pernicious abstractions." The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: "The power to tax is not the power to destroy while this Court sits." (*Panhandle Oil Co.* v. *Mississippi*, 277 U. S., 218, 223 (dissent).) Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism,[5] and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent.[6] In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity.[7] Both the Supreme Court of Canada and the High Court of Australia on fuller

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[3] *Weston* v. *City Council of Charleston* (2 Pet., 449, 472–473).

[4] "I dissent from the opinion of the Court in this case, because, it seems to me that the General Government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. * * * In my judgment, the limitation of the power of taxation in the General Government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? * * * How can we now tell what the effect of this decision will be? I can not but regard it as founded on a fallacy, and that it will lead to mischievous consequences." (11 Wall., 113, 128–129.)

[5] *E. g.*, *Gillespie* v. *Oklahoma* (257 U. S., 501); *Panhandle Oil Co.* v. *Mississippi* (277 U. S., 218); *Macallen Co.* v. *Massachusetts* (279 U. S., 620); *Indian Motocycle Co.* v. *United States* (283 U. S., 570); *Burnet* v. *Coronado Oil & Gas Co.* (285 U. S., 393); *New York ex rel. Rogers* v. *Graves* (299 U. S., 401); *Brush* v. *Commissioner of Internal Revenue* (300 U. S., 352).

[6] *E. g.*, Mr. Justice Brandeis, dissenting, in *Jaybird Mining Co.* v. *Weir* (271 U. S., 609, 615); Justice Holmes, dissenting, in *Panhandle Oil Co.* v. *Mississippi* (277 U. S., 218, 222); Mr. Justice Stone, dissenting, in *Indian Motocycle Co.* v. *United States* (283 U. S., 570, 580); Mr. Justice Roberts, dissenting, in *Brush* v. *Commissioner of Internal Revenue* (300 U. S., 352, 374). See, also, Mr. Justice Black, concurring, in *Helvering* v. *Gerhardt* (304 U. S., 405, 424).

[7] *Bank of Toronto* v. *Lambe* (12 App. Cas., 575); *D'Emden* v. *Pedder* (1 C. L. R., 91).

consideration—and for present purposes the British North America Act (30 and 31 Vict., ch. 3), and the Commonwealth of Australia Constitution Act (63 and 64 Vict., ch. 12), raise the same legal issues as does our Constitution[8]—have completely rejected the doctrine of intergovernmental immunity.[9] In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined.[10]

The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.[11] Neither *Dobbins* v. *Commissioners* (16 Pet., 435), and its offspring, nor *Collector* v. *Day*, supra, and its, can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an interdependent doctrine, both should be, as I assume them to be, overruled this day. Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live is matter for another day.

MR. JUSTICE BUTLER, DISSENTING.

Mr. Justice MCREYNOLDS and I are of opinion that the Home Owners' Loan Corporation, being an instrumentality of the United States heretofore deemed immune from State taxation, "it necessarily results," as held in *New York ex rel. Rogers* v. *Graves* (1937) (299 U. S., 401), "that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune"; and that the judgment of the State court, unquestionably required by that decision, should be affirmed.

From the decision just announced, it is clear that the Court has overruled *Dobbins* v. *The Commissioners of Erie County* (1842) (16 Pet., 435), *Collector* v. *Day* (1871) (11 Wall., 113), *New York ex rel. Rogers* v. *Graves*, supra, and *Brush* v. *Commissioner* (1937) (300 U. S., 352). Thus now it appears that the United States has always had power to tax salaries of State officers and employees and that similarly free have been the States to tax salaries of officers and employees of the United States. The compensation for past as well as for future service to be taxed and the rates prescribed in the exertion of the newly disclosed power depend on legislative discretion not subject to judicial revision. Futile indeed are the vague intimations that this Court may protect against excessive or destructive taxation. Where the power to tax exists, legislatures may exert it to destroy, to discourage, to protect or exclusively for the purpose of raising revenue. (See e. g. *Veazie Bank* v. *Fenno*, 8 Wall., 533, 548; *McCray* v. *United States*, 195 U. S., 27, 53 *et seq.*; *Magnano Co.* v. *Hamilton*, 292 U. S., 40, 44 *et seq.*; *Cincinnati Soap Co.* v. *United States*, 301 U. S., 308 [Ct. D. 1227, C. B. 1937-1, 317].)

Appraisal of lurking or apparent implications of the Court's opinion can serve no useful end for, should occasion arise, they may be ignored or given direction differing from that at first seemingly intended. But safely it may be said that presently marked for destruction is the doctrine of reciprocal immunity that by recent decisions here has been so much impaired.

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[8] Especially is this true of the Australian Constitution. One of its framers, who afterwards became one of the most distinguished of Australian judges, Mr. Justice Higgins, characterized it as having followed our Constitution with "pedantic imitation." (*Australasian Temperance and General Mutual Life Assurance Co., Ltd.*, v. *Howe*, 31 C. L. R., 290, 330.)

[9] *Abbott* v. *City of St. John* (40 Can. Sup. Ct., 597); *Caron* v. *The King* (1924) (A. C., 999); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.* (28 C. L. R., 129); *West* v. *Commissioner of Taxation* (56 C. L. R., 657).

[10] *E. g., James* v. *Dravo Contracting Co.* (302 U. S., 134); *Helvering* v. *Mountain Producers Corporation* (303 U. S., 376); *Helvering* v. *Gerhardt* (304 U. S., 405).

[11] Compare Taney, C. J., in *Passenger Cases* (7 How., 283, 470): "I * * * am quite willing that it be regarded as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

ARTICLE 116-2: Compensation of State officers and employees.

REVENUE ACT OF 1938.

Taxability of compensation received by Federal officers and employees and officers and employees of States or political subdivisions thereof. (See Mim. 4916, page 71.)

SECTION 117.—CAPITAL GAINS AND LOSSES.

ARTICLE 117-1: Meaning of terms. 1939-4-9685
I. T. 3246

REVENUE ACT OF 1938.

In applying section 117(a)1 of the Revenue Act of 1938 to a sale or other disposition of real property consisting of land and improvements, the net proceeds of sale should be apportioned on the basis of the value of the land and the value of the depreciable improvements on the date of sale.

I. T. 3217 (C. B. 1938-2, 94) amplified.

Advice is requested with respect to the application of I. T. 3217 (C. B. 1938-2, 94), which involved the interpretation of section 117(a)1 of the Revenue Act of 1938, in connection with a sale of certain improved real estate used in business.

I. T. 3217 held, syllabus, as follows:

Under section 117(a)1 of the Revenue Act of 1938, which excludes from the term "capital assets" "property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l)," the gain derived or loss sustained upon the sale of improved real property used in trade or business constitutes a capital gain or loss in so far as such gain or loss is allocable to the land and an ordinary gain or loss in so far as allocable to the depreciable improvements.

Information is desired whether gain realized in such a case should be apportioned to the land and improvements thereon on the basis of the values thereof on the date of sale or on the basis of the adjusted costs.

Upon the sale of real property consisting of land and improvements thereon, the net proceeds of the sale should be apportioned on the basis of the value of the land and the value of the depreciable improvements on the date of sale in order to determine the amount realized from the land and from the depreciable improvements separately, and the net profit on each should then be determined by deducting the cost or other basis of each part from the respective amounts realized. If the commission on the sale is not deducted from the selling price in determining the proceeds of the sale, and the amount applicable to each class of assets can not be separately determined, it should be allocated on the basis of the separate selling prices.

In the case presented for an application of the rule, the taxpayer has satisfactorily established that the selling price of the property, $3,000, should be allocated on the basis of $1,800 to the land and $1,200 to the building. The cost of the land was $1,550 and the cost of the building was $1,100. Depreciation on the building in the amount of $233.74 has been sustained and allowed as a deduction.

A selling commission of $165.22 was paid. The profit on the sale was $418.52, which should be allocated to the land and buildings as follows:

	Land.	Building.	Total.
Sale price	$1,800.00	$1,200.00	$3,000.00
Less commission on sale	99.13	66.09	165.22
Net selling price	1,700.87	1,133.91	2,834.78
Cost—			
Land	1,550.00		
Building		$1,100.00	
Less depreciation		233.74	
		866.26	2,416.26
Net profit	150.87	267.65	418.52

Therefore, in the case presented, $150.87 of the gain is allocable to the land and $267.65 to the building. I. T. 3217 (C. B. 1938–2, 94) is amplified accordingly.

ARTICLE 117–1: Meaning of terms. 1939–24–9871
I. T. 3287

REVENUE ACT OF 1938.

For the purpose of determining capital gains and losses under section 117 of the Revenue Act of 1938, the period during which an asset was held is to be computed by excluding the day on which the asset was acquired by the taxpayer and including the day on which sold by him.

Advice is requested whether for the purpose of determining short-term capital gains and losses for Federal income tax purposes, both the date of purchase and the date of sale should be included in arriving at the period during which an asset was held.

Section 117 of the Revenue Act of 1938 reads in part as follows:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this title—

* * * * * * *

(2) *Short-term capital gain.*—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 18 months, if and to the extent such gain is taken into account in computing net income;

(3) *Short-term capital loss.*—The term "short-term capital loss" means loss from the sale or exchange of a capital asset held for not more than 18 months, if and to the extent such loss is taken into account in computing net income;

It is held that for the purpose of determining short-term capital gains and losses under section 117 of the Revenue Act of 1938, the period during which an asset was held is to be computed by excluding the day on which the asset was acquired by the taxpayer and including the day on which sold by the taxpayer. This holding is also applicable in all other cases involving determination of capital gain or loss under section 117 of the Revenue Act of 1938. (See *Hooper* v. *Commissioner*, 26 B. T. A., 758, citing *Sheets* v. *Selden's Lessee*, 2 Wall., 177, *Siegelschiffer* v. *Penn Mutual Life Ins. Co.*, 248 Fed., 226, and other cases.)

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

ARTICLE 131-1: Analysis of credit for taxes. 1939-24-9872
(Also Section 23(c), Article 23(c)-1.) I. T. 3288

REVENUE ACT OF 1938.

The tax imposed under articles 20 and 21 of the Mexican law, "Ley del Impuesto sobre la Renta" is not an income tax, and credit therefor is not allowable under section 131 of the Revenue Act of 1938. The amount of such tax, however, is allowable as a deduction under section 23(c) of that Act.

Advice is requested whether the tax imposed under articles 20 and 21 of the Mexican law "Ley del Impuesto sobre la Renta" is an income tax, credit for which is allowable under section 131 of the Revenue Act of 1938, relating to credits for income taxes imposed by foreign countries.

Pertinent provisions of the law are found in Chapter III, second schedule, articles 20 and 21, which, together with the regulations thereon, read as follows:

ART. 20. Taxpayers who, normally or occasionally, receive income from any of the following sources, are included under this schedule:

* * * * * * *

XIII.— * * *

* * * the persons or companies which receive income in the country from the exploitation of moving picture films shall be especially considered as included under this section.

* * * * * * *

ART. 21. * * *.

The tax shall be payable at the rate of 5 per cent in the case referred to in Section XIII of the foregoing article, on the total revenue of the distributor or lessor of the films, and be collectible at the time of receipt. * * *

Article 74 of the regulations reads in part as follows:

ART. 74. Persons who are granted the right to exploit cinematograph films by exhibiting them, shall exact a receipt from the distributors or lessors of the films when paying the amount specified in Section XIII of article 20 of the law. These receipts shall state the total amount paid, 5 per cent being payable thereon in accordance with the last paragraph of article 21 of the law. Stamps for this amount shall be canceled thereon for account of said distributors or lessors.

It will be noted that under articles 20 and 21 of the law, supra, the tax payable by a motion picture company shall be at the rate of 5 per cent on the *total revenue* of the distributor of the films. In I. T. 2596 (C. B. X-2, 184 (1931)), it was held that in general a tax based on gross receipts is an excise tax and may not be claimed as a credit under section 131 of the Revenue Act of 1938. Since the basis for the tax here involved is *total revenue*, the tax is in the nature of an excise tax based on the gross receipts of the taxpayer. (See I. T. 3193, C. B. 1938-1, 193, which involved a different section of the same Mexican statute.)

It is held, therefore, that the tax imposed under articles 20 and 21 of the Mexican law, "Ley del Impuesto sobre la Renta," is not an income tax, and credit therefor is not allowable under section 131 of the Revenue Act of 1938. However, the amount of such tax is allowable as a deduction under section 23(c) of the Revenue Act of 1938.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 142.—FIDUCIARY RETURNS.

ARTICLE 142-1: Fiduciary returns. 1939-6-9703
(Also Section 147.) I. T. 3248

REVENUE ACT OF 1938.

Fiduciary returns under the Revenue Act of 1938.

Advice is requested whether under the Revenue Act of 1938 a fiduciary is required to file a return for a trust which had a gross income for the year 1938 of less than $5,000 and a net income of less than $100 (section 142(a) (5) and (6), Revenue Act of 1938) after deductions allowable under section 162 (b) and (c) of that Act, that is, distributions to beneficiaries.

It is held that where the gross income of a trust for the calendar year 1938 is less than $5,000 and the net income of the trust under section 162 of the Revenue Act of 1938 is less than $100, no return for Federal income tax purposes is required of the fiduciary unless a distribution of $1,000 or more is made to a beneficiary, in which case an information return under section 147 is required on Form 1041 instead of on Form 1099.

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 143-1: Withholding tax at source. 1939-25-9881
I. T. 3291

REVENUE ACT OF 1938.

Where a Canadian citizen is actually residing in England and has no address in Canada, a withholding agent should, in accordance with the provisions of section 143(b) of the Revenue Act of 1938, withhold income tax at the rate of 10 per cent, instead of 5 per cent, from a dividend payment upon stock of a domestic corporation.

Advice has been requested relative to the amount of tax to be deducted at the source from dividends paid to A upon stock of a domestic corporation.

It appears that A is a Canadian citizen but resides in England for business reasons. The question presented is whether in view of the reciprocal tax convention between the United States and Canada, an income tax of only 5 per cent should be withheld from the dividend payment or whether 10 per cent should be withheld.

Article I(*a*) of the reciprocal tax convention between the United States and Canada, ratified August 13, 1937, provides in part:

> The rate of income tax imposed by one of the contracting States, in respect of income derived from sources therein, *upon individuals residing in the other State*, who are not engaged in trade or business in the taxing State and have no office or place of business therein, shall not exceed 5 per centum for each taxable year * * *. [Italics supplied.]

Article 3 of Treasury Decision 4883 (page 668 of Regulations 101, page 147, this Bulletin), containing the regulations promulgated under the Revenue Act of 1938 to carry into effect the provisions of the convention between the United States and Canada, provides in part:

> *Resident of Canada or corporation organized under the laws of Canada.*— For the purpose of withholding, every individual *whose address is in Canada* (including a nonresident alien individual, fiduciary, or partnership) shall be considered by United States withholding agents as a resident of Canada * * *. [Italics supplied.]

In the instant case, the nonresident alien stockholder, A, is not residing in Canada but is residing in England, and apparently he was residing in England during the year 1938 when the dividend was paid. The provisions of the tax convention between the United States and Canada apply only to "individuals residing in the other State." Moreover, from a reading of the language contained in section 143(b) of the Revenue Act of 1938, it is clear that income tax shall be withheld from dividends at the rate of 10 per cent where the nonresident alien individual is not a resident of a contiguous country.

It is held, therefore, that where a Canadian citizen is actually residing in England and has no address in Canada, a withholding agent should, in accordance with the provisions of section 143(b), supra, withhold income tax at the rate of 10 per cent, instead of 5 per cent, from a dividend payment upon stock of a domestic corporation.

ARTICLE 143-3: Exemption from withholding. 1939-18-9813
G. C. M. 21187

REVENUE ACT OF 1938.

> A French citizen residing in France is exempt from Federal income taxation on annuity payments made to her by a domestic insurance company. However, interest on the proceeds of a life insurance policy paid to her by the insurance company constitutes taxable income and is subject to the withholding provisions of section 143(b) of the Revenue Act of 1938.

Advice is requested as to the taxability for Federal income tax purposes of interest and annuity payments made by a domestic company to A, a French citizen.

The taxpayer, A, acquired French citizenship on June —, 1937, the date of her marriage to a French citizen. Under the terms of a policy of insurance issued by the M Life Insurance Co. of the United States, and in accordance with an agreement with the insured, B, made during his lifetime, the proceeds of the policy are held in trust by the insurance company and interest thereon is paid monthly to the taxpayer in addition to an annuity of x dollars a month until July 7, 1954. The specific question involved is whether the annuity payments and the interest on the proceeds of the policy are exempt

from Federal income tax in view of the convention and protocol on double taxation between the United States and France, proclaimed by the President of the United States April 16, 1935, effective January 1, 1936. (See T. D. 4880, page 85, this Bulletin.)

Article IX of the convention provides in part as follows:

> The following classes of income paid in one of the contracting States to a corporation of the other State, or to a citizen of the latter State residing there, are exempt from tax in the former State:
>
> * * * * * * *
>
> (c) private pensions and life annuities.

The term "life annuities" is not defined in the convention and protocol but the term "annuity" is defined in S. O. 160 (C. B. III-2, 60 (1924)) as a "stated sum payable periodically at stated times during life, or a specified number of years, under an obligation to make the payments in consideration of a gross sum paid for such obligation." Inasmuch as the annuity in the instant case is paid by an insurance company periodically during life, or a specified number of years, under an obligation contained in an insurance policy, the annuity is held to come within the provisions of Article IX(c) of the convention quoted above. As the taxpayer is a French citizen residing in France, the annuity paid to her is exempt from taxation and is, therefore, not subject to the deduction of income tax at the source. However, inasmuch as there is no provision in the convention and protocol, or the regulations issued thereunder, which exempts interest from taxation, it follows that interest on the proceeds of a life insurance policy paid to A by a domestic insurance company constitutes taxable income and is subject to the withholding provisions of section 143(b) of the Revenue Act of 1938. (Cf. I. T. 3060, C. B. 1937-1, 113; T. D. 4880, page 85, this Bulletin.)

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

ARTICLE 143-8: Ownership certificates in the case of fiduciaries and joint owners. 1939-20-9832 I. T. 3279

REVENUE ACT OF 1938.

> In the case of joint owners of bonds, including estates by the entireties, separate ownership certificates must be executed in behalf of each joint owner showing his or her proportionate part of the interest.

Reference is made to the last sentence of article 143-8 of Regulations 101, reading as follows:

> If bonds are owned jointly by two or more persons, a separate ownership certificate must be executed in behalf of each of the owners.

Advice is requested as to the applicability of that sentence to the case where a bond is owned jointly by husband and wife in a State where a joint tenancy between the two spouses is recognized as an estate by the entireties.

The above-quoted sentence of the regulations is based upon section 143 of the Revenue Act of 1938 dealing with the withholding of income tax at the source and section 147 of that Act relating to information at the source.

For Federal income tax purposes, the State law is controlling on the question of who is entitled to the income from property owned jointly by a husband and wife as tenants by the entireties. Since the specific wording of the above-quoted provision of the regulations is broad enough to include in its scope all forms of joint ownership, one form of which is tenancy by the entireties, it follows that separate ownership certificates must be prepared in behalf of each joint owner showing his or her proportionate part of the interest. If separate income tax returns are filed by the husband and wife, each should include in his or her return the respective portion of the interest as disclosed by the ownership certificate.

SECTION 147.—INFORMATION AT SOURCE.

ARTICLE 147-1: Return of information as to payments of $1,000.

REVENUE ACT OF 1938.

Return required of fiduciary. (See I. T. 3248, page 140.)

SECTION 148.—INFORMATION BY CORPORATIONS.

ARTICLE 148-2: Return of information respecting contemplated dissolution or liquidation. 1939-6-9704 I. T. 3249

REVENUE ACT OF 1938.

Where under the law of the State a corporation may be voluntarily dissolved without the adoption of a corporate resolution, and a certificate of dissolution is executed in the form required and forwarded to the proper State official, such action will be considered as the adoption of a plan by the corporation for its dissolution within the meaning of section 148(d) of the Revenue Act of 1938, requiring the filing of an information return in the case of contemplated dissolution or liquidation of a corporation.

Advice is requested by the M Company whether it is required to file an information return under section 148(d) of the Revenue Act of 1938, and, if so, the due date of such return.

It is stated that the corporation was duly dissolved on August 2, 1938, in accordance with the laws of the State of R by the filing of a certificate of voluntary dissolution executed by A, who was then the owner and holder of all the authorized and outstanding stock of the corporation. Since neither a resolution nor a plan for dissolution was ever adopted, the question arises whether an information return is required pursuant to section 148(d) of the Revenue Act of 1938, which provides:

(d) *Contemplated dissolution or liquidation.*—Every corporation shall, within 30 days after the adoption by the corporation of a resolution or plan for the dissolution of the corporation or for the liquidation of the whole or any part of its capital stock, render a correct return to the Commissioner, verified under oath, setting forth the terms of such resolution or plan and such other information as the Commissioner shall, with the approval of the Secretary, by regulations prescribe.

If such a return is required from the M Company, advice is requested as to the due date of the return.

Under the provisions of article 148(d)–1 of Treasury Decision 4811 (C. B. 1938–1, 67), promulgated under the provisions of section 148(d) of the Revenue Act of 1938, a corporation is required, within 30 days after the adoption on or after May 28, 1938, of any resolution or plan for or in respect of the dissolution of the corporation or the liquidation of the whole or any part of its capital stock, to file with the Commissioner an information return on Form 966. A like return is required to be filed by the corporation in the case of any amendment of, or supplement to, a resolution or plan for or in respect of the dissolution of the corporation or the liquidation of the whole or any part of its capital stock adopted on, before, or after May 28, 1938, if such amendment or supplement was adopted on or after May 28, 1938.

If under a State law a corporation may be voluntarily dissolved without the adoption of a corporate resolution or plan simply by complying with certain statutory requirements, and a certificate of dissolution is executed in the form required and forwarded to the proper State official, such action will be considered as the adoption of a plan by a corporation for its dissolution within the meaning of section 148(d) of the Act. The date the certificate was executed is held to be the date of adoption of the plan.

Accordingly, inasmuch as August 2, 1938, was the date on which the certificate of dissolution was executed (and it was subsequently filed with the proper officer of the State of R), the return on Form 966 was due to be filed with the Bureau within 30 days after August 2, or on or before September 1, 1938. In such a case the date the certificate of dissolution was executed should be stated on line 4 of the return and a duly certified copy of such certificate of dissolution should be attached to the return. (See item 6 of Form 966.)

SUPPLEMENT E.—ESTATES AND TRUSTS.

SECTION 165.—EMPLOYEES' TRUSTS.

ARTICLE 165–1: Employees' trusts. 1939–13–9765
(Also Section 23(q); Article 23(p)–1.) I. T. 3266

REVENUE ACT OF 1938.

The pension trust created by the M Company and its subsidiaries, effective January 1, 1939, solely for the purpose of providing retirement annuities for all of its employees, including officers, no benefits or reimbursements from which may inure to the employers, meets the requirements of sections 23(p) and 165 of the Revenue Act of 1938. To the extent that contributions by the employers to the fund will provide reasonable pensions based on services *prior* to January 1, 1939, they are deductible over a 10-year period as provided in section 23(p) of the Revenue Act of 1938. Contributions made by the employers with respect to services rendered by employees *after* January 1, 1939, are deductible in the year contributed, provided the amount of the contribution with respect to each employee when added to his stipulated compensation does not exceed reasonable compensation for services rendered by him.

Advice is requested whether the employees' pension trust created by the M Company and its subsidiaries meets the requirements of sections 23(p) and 165 of the Revenue Act of 1938. Advice is also requested as to the proper treatment for income tax purposes of contributions made to the pension trust fund by the M Company and its subsidiaries.

Prior to January 1, 1939, the M Company had a pension plan which was a noncontributing plan, the company assuming the entire cost of pensions. Effective January 1, 1939, a new plan, under which both the employer and employees contribute, was adopted. The trust agreement creating the pension trust effective January 1, 1939, was entered into with a trust company of the city of R. Participation in the pension plan is wholly voluntary. Employees who had been in the service of the company or its controlled subsidiaries for one year on December 31, 1938, and who had not attained the age of more than 65 years were eligible to participate in the pension plan on January 1, 1939. The employees in the service of the company and controlled subsidiaries on December 31, 1938, and those hired thereafter are eligible to participate in the pension plan on the date on which they complete one year of service, provided they have not attained the age of 65 years.

The pension plan is divided into two main parts. One part relates to services rendered prior to January 1, 1939, and the other part relates to services rendered on and after January 1, 1939. Under the first part, the M Company and controlled subsidiaries made a lump-sum payment to the trustee with respect to services rendered by employees prior to January 1, 1939, as to those employees who signified their intention prior to February 1, 1939, to participate in the pension plan. The financing of the liability on account of services rendered prior to January 1, 1939, is being spread over an indefinite period in amounts dependent on the future financial conditions of the employing companies. It is planned, however, to make payments as amounts can be spared up to not more than — per cent of the consolidated annual net earnings after Federal taxes. The pension trust may be amended, modified, altered, or terminated at any time, *provided, however, that all of the fund shall be used for the exclusive benefit of the trust beneficiaries.* It is also provided that the trust fund is created solely for the benefit of the trust beneficiaries and that *no contribution made thereto nor any earnings of the fund shall under any circumstances whatsoever be returned to any one or more of the employers.*

Under the second part, relating to services rendered after December 31, 1938, equal contributions are made by the employee and the employer. Contributions of employees are deducted from their pay. The joint contributions of employer and employee with respect to services rendered after December 31, 1938, are transmitted each month to the employees' trust. Contributions will cease when an employee's monthly retirement income for services rendered after December 31, 1938, reaches a specified amount. If an employee should die before retirement payments commence, there will be payable to a beneficiary or beneficiaries designated by him a sum which will equal the employee's own contributions to the pension fund, plus interest compounded annually. In case of termination of service

before the retirement date and before the completion of 10 years of service, an employee may elect to receive a cash payment equal to the amount of his contributions, plus interest compounded annually. After 10 years of service but before retirement, an employee receives a vested right to his interest in the fund acquired by his own and the employer's contributions for services rendered after December 31, 1938. An employee who reaches normal retirement age, and an employee who is retired with the consent of the employer before the normal retirement age, receives a vested right to all of the retirement income provided for him for services rendered after December 31, 1938. All of the employees, including officers, of the M Company and controlled subsidiaries are eligible to participate in the pension plan.

Section 165 of the Revenue Act of 1938 provides:

* * * EMPLOYEES' TRUSTS.

(a) *Exemption from tax.*—A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of some or all of his employees—

(1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, and

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees,

shall not be taxable under section 161, but the amount actually distributed or made available to any distributee shall be taxable to him in the year in which so distributed or made available to the extent that it exceeds the amounts paid in by him. Such distributees shall for the purpose of the normal tax be allowed as credits against net income such part of the amount so distributed or made available as represents the items of interest specified in section 25(a).

(b) *Taxable year beginning before January 1, 1939.*—The provisions of clause (2) of subsection (a) shall not apply to a taxable year beginning before January 1, 1939.

Based on the foregoing, it is held that the pension trust in question qualifies as an employees' trust under section 165 of the Revenue Act of 1938. The earnings of such pension trust, therefore, will not constitute taxable income in the hands of the trustee. To the extent that contributions to the pension trust fund by the M Company and controlled subsidiaries with respect to services rendered by employees prior to January 1, 1939, provide reasonable pensions for the employee participants, the amounts so contributed by each company are deductible over a 10-year period as provided in section 23(p) of the Revenue Act of 1938. With respect to the amounts contributed by the M Company and controlled subsidiaries for services rendered by employees after December 31, 1938, it is held that such contributions are deductible in the year in which contributed, provided, however, that the amount of the contribution for each employee when added to his stipulated compensation does not exceed a reasonable compensation for services rendered by him.

SUPPLEMENT H.—NONRESIDENT ALIEN INDIVIDUALS.

SECTION 211.—TAX ON NONRESIDENT ALIEN INDIVIDUALS.

ARTICLE 211-7: Taxation of nonresident alien individuals. 1939-4-9690
T. D. 4883
(Also Section 231, Article 231-1: Taxation of foreign corporations.

INCOME TAX.

Regulations with respect to the taxation of nonresident alien individuals and foreign corporations not engaged in trade or business within the United States and not having an office or place of business therein as affected by the reciprocal tax convention between the United States and Canada, effective January 1, 1936.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. The reciprocal tax convention between the United States and Canada which was ratified August 13, 1937, provides as follows:

ARTICLE I.

The high contracting parties mutually agree that the income taxation imposed in the two States shall be subject to the following reciprocal provisions:

(*a*) The rate of income tax imposed by one of the contracting States, in respect of income derived from sources therein, upon individuals residing in the other State, who are not engaged in trade or business in the taxing State and have no office or place of business therein, shall not exceed 5 per centum for each taxable year, so long as an equivalent or lower rate of income taxation is imposed by the other State upon individuals residing in the former State who are not engaged in trade or business in such other State and do not have an office or place of business therein.

(*b*) The rate of income tax imposed by one of the contracting States, in respect of dividends derived from sources therein, upon nonresident foreign corporations organized under the laws of the other State, which are not engaged in trade or business in the taxing State and have no office or place of business therein, shall not exceed 5 per centum for each taxable year, so long as an equivalent or lower rate of income taxation on dividends is imposed by the other State upon corporations organized under the laws of the former State which are not engaged in trade or business in such other State and do not have an office or place of business therein.

(*c*) Either State shall be at liberty to increase the rate of taxation prescribed by paragraphs (*a*) and (*b*) of this article, and in such case the other State shall be released from the requirements of the said paragraphs (*a*) and (*b*).

(*d*) Effect shall be given to the foregoing provisions by both States as and from the 1st day of January, 1936.

ARTICLE II.

The provisions of this convention shall not apply to citizens of the United States of America domiciled or resident in Canada.

ARTICLE III.

This convention shall be ratified and shall take effect immediately upon the exchange of ratifications which shall take place at Washington as soon as possible.

Signed, in duplicate, at Washington by the duly authorized representatives of Canada and the United States of America, this 30th day of December, in the year of our Lord, one thousand nine hundred and thirty-six.

PAR. B. Section 211 of the Revenue Act of 1938 provides:

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) NO UNITED STATES BUSINESS OR OFFICE.—

(1) *General rule.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 10 per centum of such amount, except that such rate shall be reduced, in the case of a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

(2) *Aggregate more than $21,600.*—The tax imposed by paragraph (1) shall not apply to any individual if the aggregate amount received during the taxable year from the sources therein specified is more than $21,600.

(3) *Residents of contiguous countries.*—Despite the provisions of paragraph (2), the provisions of paragraph (1) shall apply to a resident of a contiguous country so long as there is in effect a treaty with such country (ratified prior to August 26, 1937) under which the rate of tax under section 211(a) of the Revenue Act of 1936, prior to its amendment by section 501(a) of the Revenue Act of 1937, was reduced.

* * * * *

(c) NO UNITED STATES BUSINESS OR OFFICE AND GROSS INCOME OF MORE THAN $21,600.—A nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein who has a gross income for any taxable year of more than $21,600 from the sources specified in subsection (a)(1), shall be taxable without regard to the provisions of subsection (a)(1), except that—

(1) The gross income shall include only income from the sources specified in subsection (a)(1);

(2) The deductions (other than the so-called "charitable deduction" provided in section 213(c)) shall be allowed only if and to the extent that they are properly allocable to the gross income from the sources specified in subsection (a)(1);

(3) The aggregate of the normal tax and surtax under sections 11 and 12 shall, in no case, be less than 10 per centum of the gross income from the sources specified in subsection (a)(1); and

(4) This subsection shall not apply to a resident of a contiguous country so long as there is in effect a treaty with such country (ratified prior to August 26, 1937) under which the rate of tax under section 211(a) of the Revenue Act of 1936, prior to its amendment by section 501(a) of the Revenue Act of 1937, was reduced.

PAR. C. Section 231(a) of the Revenue Act of 1938 provides:

NONRESIDENT CORPORATIONS.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

PAR. D. Section 143(a) of the Revenue Act of 1938 provides in part:

TAX-FREE COVENANT BONDS.—

(1) REQUIREMENT OF WITHHOLDING.—In any case where bonds, mortgages, or deeds of trust, or other similar obligations of a corporation, issued before January 1, 1934, contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by this title upon the obligee, or to reimburse the obligee for any portion of the tax, or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon, or to retain therefrom under any law of the United States, the obligor shall deduct and withhold a tax equal to 2 per centum of the interest upon such bonds, mortgages, deeds of trust, or other obligations, whether such interest is payable annually or at shorter or longer periods, if payable to an individual, a partnership, or a foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein: *Provided*, That if the liability assumed by the obligor does not exceed 2 per centum of the interest, then the deduction and withholding shall be at the following rates: (A) 10 per centum in the case of a nonresident alien individual (except that such rate shall be reduced, in the case of a resident of a contiguous country, to such rate, not less than 5 per centum, as may be provided by treaty with such country), 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, (B) in the case of such a foreign corporation, 15 per centum, and (C) 2 per centum in the case of other individuals and partnerships: *Provided further*, That if the owners of such obligations are not known to the withholding agent the Commissioner may authorize such deduction and withholding to be at the rate of 2 per centum, or, if the liability assumed by the obligor does not exceed 2 per centum of the interest, then at the rate of 10 per centum.

PAR. E. Section 143(b) of the Revenue Act of 1938 provides:

NONRESIDENT ALIENS.—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical

gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), 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, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country: *Provided*, That no such deduction or withholding shall be required in the case of dividends paid by a foreign corporation unless (1) such corporation is engaged in trade or business within the United States or has an office or place of business therein, and (2) more than 85 per centum of the gross income of such corporation for the three-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: *Provided further*, That the Commissioner may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent. Under regulations prescribed by the Commissioner, with the approval of the Secretary, there may be exempted from such deduction and withholding the compensation for personal services of nonresident alien individuals who enter and leave the United States at frequent intervals.

PAR. F. Section 143(c) of the Revenue Act of 1938 provides:

RETURN AND PAYMENT.—Every person required to deduct and withhold any tax under this section shall make return thereof on or before March 15 of each year and shall on or before June 15, in lieu of the time prescribed in section 56, pay the tax to the official of the United States Government authorized to receive it. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section.

PAR. G. Section 144 of the Revenue Act of 1938 provides:

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 15 per centum thereof, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country; 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.

PAR. H. Section 901 of the Revenue Act of 1938 provides in part:

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

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

(4) 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 or of any State or Territory.

(5) The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

(6) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(7) The term "withholding agent" means any person required to deduct and withhold any tax under the provisions of section 143 or 144.

* * * * *

(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

Pursuant to the provisions of section 62 of the Revenue Act of 1938 the following regulations are hereby prescribed to carry into effect the quoted provisions of the convention between the United States of America and Canada under the Revenue Act of 1938 (the provisions of T. D. 4766, C. B. 1937-2, 158, applicable under the Revenue Acts of 1936 and 1937, remaining in full force and effect as to taxable years beginning prior to January 1, 1938):

ARTICLE 1. *Rate of tax.*—The convention was ratified and became effective August 13, 1937. Under the terms of the convention, the provisions of which are retroactive to January 1, 1936, the tax at the rate of 10 per cent imposed by section 211(a) is reduced to 5 per cent with respect to the amount received from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, provided he is a resident of Canada.

Under the terms of the convention the tax at the rate of 10 per cent imposed by section 231(a) is reduced to 5 per cent with respect to the amount received from sources within the United States as dividends, by every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, provided it is organized under the laws of Canada.

ART. 2. *Withholding in general.*—The items of income from sources within the United States enumerated in sections 211(a) and 231(a) are subject to the withholding provisions of sections 143 and 144, at the rates specified therein, with the exception that all items of fixed or determinable annual or periodical income paid to nonresident alien individuals who are residents of Canada (other than the compensation for personal services received by such residents who enter and leave the United States at frequent intervals) and dividends paid to nonresident foreign corporations which are organized under the laws of Canada are subject to withholding at the reduced rate of 5 per cent.

ART. 3. *Resident of Canada or corporation organized under the laws of Canada.*—For the purpose of withholding, every individual whose address is in Canada (including a nonresident alien individual, fiduciary, or partnership) shall be considered by United States withholding agents as a resident of Canada, and every corporation whose address is in Canada shall be considered by such withholding agents as a corporation organized under the laws of Canada. These provisions relative to Canadian residents and Canadian corporations are based

upon the assumption that the payee is the actual owner of the property from which the income is derived and consequently is the person liable to the tax upon such income.

A person receiving income which is distributable to an organization exempt from Federal income tax under section 101 of the Revenue Act of 1938, or corresponding sections of prior Revenue Acts, shall be considered merely a conduit through which the income flows and not a taxable entity. In preparing ownership certificate, Form 1001, the person receiving the income should make a notation thereon substantially as follows: "As this organization has been held to be exempt from the payment of income tax by the Commissioner of Internal Revenue under date of _____, the interest on this certificate is not subject to withholding," giving the date of the official letter in which the organization was held to be exempt. A similar statement made with respect to other items of fixed or determinable annual or periodical income which are subject to withholding will relieve the withholding agent from liability to withhold the tax.

ART. 4. *Recipient not actual owner.*—If the recipient in Canada is a nominee or agent through whom the income flows to a person who is not entitled to the reduced rate of 5 per cent, i. e., a nonresident alien individual who is not a resident of Canada, or a nonresident foreign corporation not organized under the laws of Canada, the recipient in Canada from whom a tax of only 5 per cent was withheld, becomes in turn a withholding agent, and is required to withhold an additional tax of 5 per cent (10 per cent on income other than dividends received for such foreign corporation) before transmitting the income.

(*a*) *Fiduciaries and partnerships.*—Fiduciaries and partnerships with an address in Canada are liable to have 5 per cent income tax deducted at the source. If the fiduciary or partnership is acting as a nominee or agent receiving the income for and on behalf of a person other than a resident of Canada or a corporation organized under the laws of Canada, an additional tax of 5 per cent or 10 per cent, as the case may be, must be deducted by such Canadian fiduciary or partnership and remitted to the United States Treasury. If the fiduciary or partnership receives the income in its own right and distributes its income under a trust deed or partnership agreement, then no further tax in Canada need be deducted.

(*b*) *Tax-free covenant bonds.*—No additional withholding is required with respect to interest on so-called tax-free covenant bonds issued prior to January 1, 1934, where the liability assumed by the obligor exceeds 2 per cent but under section 143(a) of the Revenue Act of 1938 only 2 per cent income tax is required to be withheld at the source. An additional tax of 5 per cent or 10 per cent, as the case may be, is required to be withheld, however, by Canadian withholding agents as above provided, (1) where the bonds were issued prior to January 1, 1934, and the liability assumed by the obligor does not exceed 2 per cent; (2) where the bonds were issued on or after January 1, 1934, irrespective of the liability assumed by the obligor; (3) where the bonds do not contain a tax-free covenant, regardless of the date of issue.

ART. 5. *Return of tax withheld from persons whose addresses are in Canada.*—Every United States withholding agent shall make and file with the collector, in duplicate, an information return on Form 1042B, for the calendar year 1938 and each subsequent calendar year, in addition to withholding return, Form 1042, with respect to the items of income from which a tax of only 5 per cent was withheld from persons whose addresses are in Canada. There shall be reported on Form 1042B not only such items of income listed on Form 1042, but also such items of interest listed on monthly returns, Form 1012, including items of interest where the liability for withholding is only 2 per cent. In the case of corporations whose addresses are within Canada, only the fixed or determinable annual or periodical income from sources within the United States consisting of dividends should be reported.

ART. 6. *Returns filed by Canadian withholding agents.*—Form 1042 is the form to be prepared annually for the calendar year 1938 and each subsequent calendar year by persons in Canada who receive for the account of any person (other than a resident of Canada or a corporation organized under the laws of Canada) fixed or determinable annual or periodical income from sources within the United States which is subject to tax at the rate of 10 per cent or 15 per cent, as the case may be, but from which only 5 per cent has been withheld as a result of the convention. Annual withholding return, Form 1042, should be forwarded to the collector of internal revenue, Baltimore, Md., accompanied by the tax shown to be due in United States dollars. An extension of time to

June 15 is hereby granted to Canadian withholding agents in which to file such returns.

The following table of withholding rates under the Revenue Act of 1938 and the tax convention between the United States and Canada has been prepared for the purpose of making a summary of such rates readily available to withholding agents:

Withholding rates under the Revenue Act of 1938.

Classes of taxpayers.	Corporate bond interest— With tax-free covenant and issued before Jan. 1, 1934— If corporation assumes over 2 per cent of the tax.	Corporate bond interest— With tax-free covenant and issued before Jan. 1, 1934— If corporation assumes not over 2 per cent of the tax.	Corporate bond interest— Without tax-free covenant or issued on or after Jan. 1, 1934, with tax-free covenant.	Dividends from domestic corporation.	Dividends from foreign corporation.	Salary or other compensation for personal services.	Other fixed or determinable annual or periodical income from sources within the United States.
1. Citizen or resident individual, fiduciary, or partnership	*Per cent.* 2	*Per cent.* 2	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
2. Nonresident individual, fiduciary, or partnership (except as stated in item 5 below)	2	10	10	10	10	[1] 10	10
3. Domestic corporation or resident foreign corporation							
4. Nonresident foreign corporation (except as stated in item 6 below)	2	15	15	10	10	15	15
5. Individual, fiduciary, or partnership, resident of Canada	2	5	5	5	5	(1)	5
6. Nonresident corporation organized under laws of Canada	2	15	15	5	5	15	15
7. Unknown owner	2	10	10				

[1] Salary or compensation for personal services rendered in the United States is not subject to withholding in the case of nonresident aliens, residents of Canada or Mexico, who enter and leave the United States at frequent intervals.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved January 16, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register January 17, 1939, 3.47 p. m.)

SUPPLEMENT I.—FOREIGN CORPORATIONS.

SECTION 231.—TAX ON FOREIGN CORPORATIONS.

ARTICLE 231–1: Taxation of foreign corporations.

REVENUE ACT OF 1938.

Regulations with respect to taxation of nonresident alien individuals and foreign corporations not engaged in a trade or business within the United States and not having an office or place of business therein as affected by the reciprocal tax convention between the United States and Canada, effective January 1, 1936. (See T. D. 4883, page 147.)

TITLE V.—MISCELLANEOUS PROVISIONS.

SECTION 818.—TAXES OF INSOLVENT BANKS.

1939-4-9691
T. D. 4882

REVENUE ACT OF 1938.

Regulations relating to assessment and collection of taxes of insolvent banks and trust companies.

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

To Collectors of Internal Revenue and Others Concerned:

Section 818 of the Revenue Act of 1938, enacted May 28, 1938 (Public, No. 554, Seventy-fifth Congress, chapter 289, third session), provides:

SEC. 818. TAXES OF INSOLVENT BANKS.

Section 22 of the Act of March 1, 1879 (20 Stat. 351; 12 U. S. C. 570), is amended to read as follows:

"SEC. 22. (a) Whenever and after any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall appear to him, is authorized to remit so much of the said tax against any such insolvent banks and trust companies organized under State law as shall be found to affect the claims of their depositors.

"(b) Whenever any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has been released or discharged from its liability to its depositors for any part of their claims against it, and such depositors have accepted, in lieu thereof, a lien upon subsequent earnings of such bank or trust company, or claims against assets segregated by such bank or trust company or against assets transferred from it to an individual or corporate trustee or agent, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, such individual or corporate trustee or such agent, which shall diminish the assets thereof which are available for the payment of such depositor claims and which are necessary for the full payment thereof.

"(c) Any such tax so collected shall be deemed to be erroneously collected, and shall be refunded subject to all provisions and limitations of law, so far as applicable, relating to the refunding of taxes, but tax so abated or refunded after the date of the enactment of the Revenue Act of 1938 shall be reassessed whenever it shall appear that payment of the tax will not diminish the assets as aforesaid. The running of the statute of limitations on the making of assessment and collection shall be suspended during, and for ninety days beyond, the period for which, pursuant to this section, assessment or collection may not be made, and a tax which has been abated may be reassessed and collected during the time within which, had there been no abatement, collection might have been made.

"(d) This section shall not apply to any tax imposed by the Social Security Act."

ARTICLE 1. *Effective date of amendment.*—The amendment of section 22, made by section 818 of the Revenue Act of 1938, is effective on May 28, 1938, the date of enactment of the Revenue Act of 1938.

ART. 2. *Banks and trust companies covered.*—Section 22 (as amended) of the Act of March 1, 1879, applies to any national bank, or bank or trust company organized under State law, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, and which has—

(*a*) ceased to do business by reason of insolvency or bankruptcy, or

(*b*) been released or discharged from its liability to its depositors for any part of their deposit claims, and the depositors have accepted in lieu thereof a lien upon its subsequent earnings or claims against its assets either (1) segregated and held by it for benefit of the depositors or (2) transferred by it to an individual or corporate trustee or agent who holds the assets for the benefit of the depositors.

ART. 3. *Definitions.*—As hereinafter used in these regulations:

(*a*) The term "section," unless otherwise indicated by the context, means section 22 of the Act of March 1, 1879, as amended by section 818 of the Revenue Act of 1938.

(*b*) The term "bank," unless otherwise indicated by the context, means any national bank, or bank or trust company organized under State law, within the scope of the section. See article 2.

(*c*) The term "effective date" means May 28, 1938.

(*d*) The term "Commissioner" means the Commissioner of Internal Revenue.

(*e*) The term "collector" means collector of internal revenue.

ART. 4. *Scope of section generally.*—The section prior to amendment was intended to assist depositors of a bank which had ceased to do business by reason of insolvency to recover their deposits, by prohibiting collection of taxes of the bank which would diminish the assets necessary for payment of its depositors. By the amendment like assistance is given to depositors of banks which are in financial difficulties but which, in certain conditions, continue in business.

In order that the section shall operate in a case where the bank continues business it is necessary that the depositors shall agree to accept, in lieu of all or a part of their deposit claims as such, claims against segregated assets, or a lien upon subsequent earnings of the bank, or both. When such an agreement exists no tax diminishing such assets or earnings, or both, otherwise available and necessary for payment of depositors, may be collected therefrom. If, under such an agreement, the depositors have the right also to look to the unsegregated assets of the bank for recovery, in whole or part, the unsegregated assets are likewise, to the extent of the depositors' claims, unavailable for tax collection.

To illustrate the working of the section, assume that depositors agree to forego 30 per cent of their deposit claims, that as to 45 per cent they will look to segregated assets and 60 per cent of the earnings from bank operations, and that as to the remaining 25 per cent of the deposit claims the bank remains liable. The segregated assets and 60 per cent of the earnings from bank operations are immune from tax collection until the total realizations from such source are sufficient to meet the percentage of the depositors' claims payable from that source. When the realization from such source is sufficient to satisfy the percentage of the depositors' claims chargeable thereto, any balance of the segregated assets, and the stated percentage of bank earnings, will be available for tax collection. The unsegregated assets and the other 40 per cent of bank earnings will be available for tax collection to the extent that collection therefrom will not diminish the amount necessary for payment of outstanding depositors' claims other than those allocated to the segregated assets. See article 11.

For the purposes of the section, depositors' claims include bona fide interest, either on the deposits as such, or on the claims accepted in lieu of deposits as such.

The section is not intended for the relief of banks as such, and does not prevent collection of tax from assets not necessary, or not available, for payment of depositors. The section is not for the relief of creditors other than depositors, although it may incidentally operate for their benefit. See article 11.

ART. 5. *Segregated or transferred assets.*—In a case involving segregated or transferred assets, it is not necessary, for application of the section, that

the assets shall technically constitute a trust fund. It is sufficient that segregated assets be definitely separated from other assets of the bank and that transferred assets be definitely separated both from other assets of the bank and from other assets held or owned by the trustee or agent to whom assets of the bank have been transferred; that the bank be wholly or partially released from liability for repayment of deposits made with it as such; and that the depositors have claims against the separated assets. Any excess of separated assets over the amount necessary for payment of such depositors will be available for tax collection.

Where the segregated assets are transferred to a separate corporate trustee or corporate agent the assets are within the protection of the section no matter by whom the stock of such corporation is held.

However, property of a separate corporation not conveyed by the bank pursuant to an insolvency agreement with depositors, is not within the immunity of the section, even though the corporation's stock is owned by the bank. Tax due from a separate corporation to which assets of an insolvent bank are conveyed is collectible, even though such tax be due to the property so conveyed, except in so far as tax collection will diminish assets conveyed by the bank for benefit of depositors or the earnings from such assets to which the depositors are entitled, and which are necessary for payment of the depositors' claims. Other assets and earnings of a separate corporation are available for collection of the taxes of such corporation even though the assets and earnings of such corporation if received by the bank would be available for satisfaction of claims of the bank's depositors and such claims can not otherwise be paid.

ART. 6. *Unsegregated assets.*—(*a*) *Depositors' claims against assets.*—Claims of depositors, to the extent that they are to be satisfied out of segregated assets, will not be considered in determining the availability of unsegregated assets for tax collection. If depositors have agreed to accept payment out of segregated assets only, collection of tax from unsegregated assets will not diminish the assets available and necessary for payment of the depositors' claims. Thus, it may be possible to collect taxes from the unsegregated assets of a bank although the segregated assets are immune under the section.

If the unsegregated assets of the bank remain subject to any portion of the depositors' claims, such unsegregated assets will be within the immunity of the section only to the extent necessary to satisfy the claims to which such assets are subject. Taxes will still be collectible from the unsegregated assets to the extent of the amount by which the total value of such assets exceeds the liability to depositors to be satisfied therefrom.

(*b*) *Depositors' claims against earnings.*—Even though under a bona fide agreement a bank has been released from depositors' claims as to unsegregated assets, if all or a portion of its earnings are subject to depositors' claims, all assets the earnings from which, in whole or part, are charged with the payment of depositors' claims, will be immune from tax collection. But see article 7.

ART. 7. *Income.*—(*a*) *Availability for tax collection.*—Income, whether from segregated or unsegregated assets, which is necessary for, applicable to, and actually used for, payment of depositors' claims, is within the immunity of the section. If only a portion or percentage of income from segregated or unsegregated assets is available and necessary for payment of depositors' claims, the remaining income is available for tax collection.

(*b*) *Tax liability.*—The fact that earnings may be wholly or partly unavailable under the section for collection of taxes does not exempt the income, or any part thereof, from tax liability. The section affects collectibility only, and is not concerned with taxability. Accordingly, the tax on income of a given year shall ordinarily be determined, even though, under the section, assessment and collection must be postponed. The tax shall be determined with respect to the entire taxable income and not merely with respect to the portion of the earnings out of which tax may be collected.

(*c*) *Example:* An agreement between a bank subject to tax under section 14(d) of the Revenue Act of 1938 and its depositors provides (*a*) that certain assets are to be segregated for the benefit of the depositors who have waived a percentage of their deposits; (*b*) that 60 per cent of the bank's earnings shall be paid to the depositors until the portion of their claims not waived has been paid; and (*c*) that the unsegregated capital assets shall not be subject to depositors' claims. The special class net income of the bank for the calendar year 1938 is $10,000, and that amount also constitutes its earnings for that year. The bank has an outstanding tax liability for prior years of $7,000. The income tax liability of the bank for 1938 is 16½ per cent of $10,000, or

$1,650, making a total outstanding tax liability of $8,650. The portion of the earnings of the bank for 1938 available for tax collection after provision for depositors is $4,000 ($10,000 less 60 per cent, or $6,000). Of the total outstanding tax liability of $8,650, $4,000 may be assessed and collected immediately, leaving $4,650 to be collected from the 40 per cent of future annual earnings not covered by the agreement, from any excess of the segregated assets over the amount due depositors therefrom, and from unsegregated assets to the extent that collection of tax therefrom will not reduce the earnings to which depositors are entitled under the agreement. See article 6(*b*).

ART. 8. *Abatement and refund.*—An assessment or collection, whether made before or after the amendment, contrary to the section when made, is subject to abatement or refund within the applicable statutory period of limitations.

An abatement or refund after the amendment is equally allowable whether assessment or collection was erroneous because collection would diminish assets necessary for payment of depositors, or because the same tax had been properly abated or refunded on or before the effective date of the amendment, and reassessed or collected after such date. See article 12. However, in the absence of prior abatement or refund on or before the date of the amendment, a claim for abatement or refund will not be allowed if, at the time of examination of the claim, collection would not diminish the assets necessary for payment of depositors. If there was a prior proper abatement or refund on or before the effective date of the amendment, a claim for abatement or refund of the same tax reassessed or re-collected after the effective date of the amendment may be allowed even though the assets are sufficient to meet claims of depositors.

A tax assessed prior to the effective date of the amendment and in accordance with the section as it then existed is subject to abatement where assessment, had it been made after the effective date of the amendment, would have been contrary to the amended section. However, tax properly collected in accordance with the section prior to amendment, may not be refunded thereafter even though collection after the effective date of the amendment would have been contrary to the amended section.

Any abatement or refund is subject to existing statutory periods of limitation, which periods are not suspended or extended by the amended section.

ART. 9. *Establishment of immunity.*—The mere showing of insolvency, or that depositors have claims against segregated or other assets or earnings will not of itself secure immunity from tax collection. It must be affirmatively established to the satisfaction of the Commissioner that collection of tax will diminish the assets necessary for payment of depositors' claims. See also article 10.

Any claim of immunity under the section shall be supported by a statement, under oath or affirmation, which shall show (*a*) the total of depositors' claims outstanding, and (*b*) separately and in detail, the amount of each of the following, and the amount of depositors' claims properly chargeable against each—(1) segregated or transferred assets; (2) unsegregated assets; (3) estimated future average annual earnings and profits; (4) amount collectible from shareholders; and (5) any other resources available for payment of depositors' claims. The detail shall show the full amount of depositors' claims chargeable against each of the items (1) to (5), inclusive, even though part or all of the amount chargeable against a particular item is also chargeable against some other item or items. There shall also be filed a copy of any agreement between the bank and its depositors, and any other agreement bearing on the claim of immunity under the section.

ART. 10. *Procedure during immunity.*—As long as, pursuant to the section, any tax remains unpaid, the bank shall file with each income tax return a statement as required by article 9, in duplicate, and shall also file such additional statements as the Commissioner may require. Whether or not such additional statements shall be required, and the frequency thereof, will depend on the circumstances, including the financial status and apparent prospects of the bank, and the time which is available for assessment and collection after the bank becomes financially able to pay taxes without diminishing the assets necessary for payment of depositors' claims.

ART. 11. *Termination of immunity.*—Immunity under the section is terminated whenever, within the statutory period of limitations as extended by the section, the tax can be collected without diminishing the assets necessary for payment of depositors' claims, including claims of new depositors secured during the period of immunity from tax collection. For the immunity to end, the assets must be sufficient to cover any remaining balance still due under the agreement and any outstanding additional deposits made by the same or other depositors

subsequent to the agreement. In other words, the bar of the section, when once in force, is terminated only as, and to the extent that, collection may be made without diminishing assets available for satisfaction of all outstanding depositors' claims, regardless of when their deposits were made.

While the immunity from tax collection is for protection of depositors only, in some cases the immunity will not end until the assets are sufficient to cover indebtedness of creditors generally. This situation will exist where under applicable law the claims of general creditors are on a parity with those of depositors, so that to pay depositors in full it is necessary to pay all creditors in full.

In determining the sufficiency of the assets to satisfy the depositors' claims, shareholders' liability to the extent collectible shall be treated as available assets. See article 9. Deposit insurance payable to depositors shall not be treated as an asset of the bank and shall be disregarded in determining the sufficiency of the assets to meet the claims of depositors.

ART. 12. *Collection of tax after termination of immunity.*—(*a*) *General.*—If assets in excess of those necessary for payment of outstanding deposits become available, such excess assets shall be applied toward satisfaction of accumulated outstanding taxes, collectible under the section, and not barred by the statute of limitations. But see article 5. Where sufficient assets are available, statutory interest shall be collected with the tax. Generally, unless the interests of the United States will be jeopardized thereby, it will be sufficient if the amount available for payment of collectible taxes without diminishing assets necessary for payment of depositors, is determined and paid by the taxpayer each time a Federal income tax return is filed. However, assessments and collections may be made at such other times as the collector or Commissioner shall find appropriate and necessary to protect the interests of the United States.

(*b*) *Tax due before the effective date of the amendment.*—The section does not permit assessment or reassessment or collection of tax properly abated or refunded pursuant to the section on or before May 28, 1938. Tax due on or before that date, and not so abated or refunded, and still outstanding on the said date, is within the provisions of the amended section and collectibility is determinable in accordance with the amended section the same as in the case of tax due after such date. Accordingly, a tax due prior to the effective date of the amendment and then collectible under the section may not be assessed or collected thereafter if such assessment or collection would be contrary to the section as amended. See article 8.

If the statutory period for assessment or collection had expired before the effective date of amendment, the section does not revive it. Accordingly, in such situation the tax is not collectible under the amended section, regardless of the bank's financial condition.

ART. 13. *Social security taxes.*—These regulations do not relate to social security taxes, since the immunity granted by the amended section does not apply to taxes imposed by the Social Security Act.

ART. 14. *Authority for regulations.*—These regulations are issued under authority of section 3447, Revised Statutes of the United States.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved January 16, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register January 17, 1939, 8.47 p. m.)

TITLE VI.—GENERAL PROVISIONS.

SECTION 901.—DEFINITIONS.

ARTICLE 901–5: Limited partnership as corporation.

REVENUE ACT OF 1938.

Amendment of Regulations 101, articles 901–5 and 901–6. (See T. D. 4894, page 79.)

INCOME TAX RULINGS.—PART II.

REVENUE ACTS OF 1937 AND 1936.

SUBTITLE B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 22(a)-1: What included in gross income. 1939-3-9674
T. D. 4879

INCOME TAX.

Article 22(a)-1 of Regulations 94 and 86, relating to items to be included in gross income, amended.

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

To Collectors of Internal Revenue and Others Concerned:

The first sentence of the second paragraph of article 22(a)-1 of Regulations 94 and of article 22(a)-1 of Regulations 86 reading as follows:

If property is transferred by a corporation to a shareholder, or by an employer to an employee, for an amount substantially less than its fair market value, such shareholder of the corporation or such employee shall include in gross income the difference between the amount paid for the property and the amount of its fair market value.—

is amended to read as follows:

If property is transferred by a corporation to a shareholder, or by an employer to an employee, for an amount substantially less than its fair market value, regardless of whether the transfer is in the guise of a sale or exchange, such shareholder or employee shall include in gross income the difference between the amount paid for the property and the amount of its fair market value to the extent that such difference is in the nature of (1) compensation for services rendered or to be rendered or (2) a distribution of earnings or profits taxable as a dividend, as the case may be.

The second sentence of the second paragraph of article 22(a)-1 of Regulations 86 reading as follows:

In computing the gain or loss from the subsequent sale of such property its cost shall be deemed to be its fair market value at the date of acquisition by the shareholder or the employee.—

is amended to read as follows:

In computing the gain or loss from the subsequent sale of such property its basis shall be the amount paid for the property, increased by the amount of such difference included in gross income.

This Treasury decision is prescribed pursuant to the provisions of section 62 of the Revenue Acts of 1936 and 1934.

MILTON E. CARTER,
Acting Commissioner of Internal Revenue.

Approved January 4, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register January 6, 1939, 12.17 p. m.)

ARTICLE 22(a)-2: Compensation for personal services.

REVENUE ACT OF 1936.

Taxability of compensation received by Federal officers and employees and officers and employees of States or political subdivisions thereof. (See Mim. 4916, page 71.)

ARTICLE 22(a)-2: Compensation for personal services. 1939-23-9863 Ct. D. 1401

INCOME TAX—REVENUE ACTS OF 1932 AND 1936—DECISION OF SUPREME COURT.

GROSS INCOME—COMPENSATION OF JUDGES OF UNITED STATES COURTS—CONSTITUTIONALITY OF STATUTE.

The provision of section 22 of the Revenue Act of 1932, reenacted by section 22(a) of the Revenue Act of 1936, is not unconstitutional in so far as it includes in "gross income," on the basis of which taxes are to be paid, the compensation of "judges of courts of the United States taking office after June 6, 1932."

SUPREME COURT OF THE UNITED STATES.

George W. O'Malley, Individually and as Collector of Internal Revenue, appellant, v. *Joseph W. Woodrough and Ella B. Woodrough.*

[59 S. Ct., 838.]

On appeal from the District Court of the United States for the District of Nebraska.

[May 22, 1939.]

OPINION.

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case is here under section 2 of the Act of August 23, 1937 (50 Stat., 751), as a direct appeal from a judgment of a district court whose "decision was against the constitutionality" of an Act of Congress. The suit below, an action at law to recover a tax on income claimed to have been illegally exacted, was disposed of upon the pleadings and turned on the single question now before us, to wit: Is the provision of section 22 of the Revenue Act of 1932 (47 Stat., 169, 178), reenacted by section 22(a) of the Revenue Act of 1936 (49 Stat., 1648, 1657), constitutional in so far as it included in the "gross income," on the basis of which taxes were to be paid, the compensation of "judges of courts of the United States taking office after June 6, 1932."

That this is the sole issue will emerge from a simple statement of the facts and of the governing legislation. Joseph W. Woodrough was appointed a United States circuit judge on April 12, 1933, and qualified as such on May 1, 1933. For the calendar year of 1936 a joint income tax return of Judge Woodrough and his wife disclosed his judicial salary of $12,500, but claimed it to be constitutionally immune from taxation. Since it was not included in "gross income" no tax was payable. Subsequently a deficiency of $631.60 was assessed on the basis of that item, which, with interest, was paid under protest. Claim for refund having been rejected, the present suit was brought, and judgment went against the collector. The assessment of the present tax was technically under the Act of 1936, but that Act merely carried forward the provisions of the Act of 1932, for the inclusion of compensation of "judges of courts of the United States, taking office after June 6, 1932," which had been similarly incorporated in the Revenue Act of 1934 (48 Stat., 680, 686-687). Therefore, the power of Congress to include Judge Woodrough's salary as a circuit judge in his "gross income" must be judged on the basis of the validity of section 22 of the Revenue Act of 1932, and not as though that power had been originally asserted by the Revenue Act of 1936. For it was the Act of June 6, 1932, that gave notice to all judges thereafter to be appointed, of the new congressional policy to include the judicial salaries of such judges in the assessment of income taxes. The fact that Judge Woodrough before he became a circuit judge and prior to June 6, 1932, had been a district judge is wholly irrelevant to the matter in issue. The two offices have different statutory origins, are filled by separate nominations and confirmations, and enjoy different emoluments. A new appointee to a circuit court of appeals occupies a new office no less when he is taken from the district bench than when he is drawn from the bar.

By means of section 22 of the Revenue Act of 1932, Congress sought to avoid, at least in part, the consequences of *Evans* v. *Gore* (253 U. S., 245 [T. D. 3037, C. B. 3, 93 (1920)]). That case, decided on June 1, 1920, ruled for the first time that a provision requiring the compensation received by the judges of the United States to be included in the "gross income" from which the net income is to be computed, although merely part of a taxing measure of general, nondiscriminatory application to all earners of incomes, is contrary to Article III, section 1, of the Constitution which provides that the "Compensation" of the "Judges" "shall not be diminished during their Continuance in Office." (See also the separate opinion of Mr. Justice Field in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 586, 604 et seq.) To be sure, in a letter to Secretary Chase, Chief Justice Taney expressed similar views.[1] In doing so, he merely gave his extra-judicial opinion, asserting at the same time that the question could not be adjudicated.[2] Chief Justice Taney's vigorous views were shared by Attorney General Hoar.[3] Thereafter, both the Treasury Department[4] and Congress[5] acted upon this construction of the Constitution. However, the meaning which *Evans* v. *Gore* imputed to the history which explains Article III, section 1, was contrary to the way in which it was read by other English-speaking courts.[6] The decision met wide and steadily growing disfavor from legal scholarship and professional opinion.[7] *Evans* v. *Gore*

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[1] The letter was written on February 16, 1863, and will be found in 157 U. S., 701.

[2] "* * * I should not have troubled you with this letter, if there was any mode by which the question could be decided in a judicial proceeding. But all of the judges of the courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it." (157 U. S., at 702.)

[3] 13 Op. A. G., 161; but see the opinion of Attorney General Palmer (31 Op. A. G., 475).

[4] See Mr. Justice Field, concurring, in *Pollock* v. *Farmers' Loan & Trust Co.* (157 U. S., 429, 588, 606-607).

[5] See *Wayne* v. *United States* (26 Ct. Cl., 274); Act of July 28, 1892 (ch. 311, 27 Stat., 306).

[6] See judgments in *Cooper* v. *Commissioner of Income Tax* (4 Comm. L. R., 1304), construing section 17 of the Queensland Constitution Act of 1867 which prohibited "any reduction or diminution of the salary of a judge during his term of office"; also, *Judges* v. *Attorney-General for Saskatchewan* [1937] (2 D. L. R., 209), construing section 96 of the British North America Act, 1867, that "The salaries * * * of the judges * * * shall be fixed and provided by the Parliament of Canada" in connection with the Income Tax Act, 1932, of Saskatchewan.

[7] See Clark, Further Limitations Upon Federal Income Taxation (30 Yale L. J., 75); Corwin, Constitutional Law in 1919-1920 (15 Am. Pol. Sci. Rev., 635, 641-644); Fellman, Diminution of Judicial Salaries (24 Iowa L. Rev., 89); Lowndes, Taxing Income of Federal Judiciary (19 Va. L. Rev., 153); Powell, Constitutional Law in 1919-1920 (19 Mich. L. Rev., 117-118); Powell, The Sixteenth Amendment and Income from State Securities (National Income Tax Magazine (July, 1923), 5-6; 20 Col. L. Rev., 794; 43 Harv. L. Rev., 818; 20 Ill. L. Rev., 376; 45 L. Q. Rev., 291; 7 Va. L. Rev., 69; 3 U. of Chi. L. Rev., 141).

itself was rejected by most of the courts before whom the matter came after that decision.[8]

Having regard to these circumstances, the question immediately before us is whether Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected. Thereby, of course, Congress has committed itself to the position that a nondiscriminatory tax laid generally on net income is not, when applied to the income of a Federal judge, a diminution of his salary within the prohibition of Article III, section 1 of the Constitution. To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, section 1.[9] To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the Government whose Constitution and laws they are charged with administering.

After this case came here, Congress, by section 3 of the Public Salary Tax Act of 1939, amended section 22(a) so as to make it applicable to "judges of courts of the United States who took office on or before June 6, 1932."[10] That section, however, is not now before us. But to the extent that what the Court now says is inconsistent with what was said in *Miles* v. *Graham* (268 U. S., 501), the latter can not survive.

Judgment reversed.

Mr. Justice McREYNOLDS did not hear the argument in this cause and took no part in its consideration or decision.

[Mr. Justice BUTLER dissents in an opinion adhering to the theory that the imposition of an income tax on compensation of judges of constitutional courts is violative of the prohibition contained in Article III, section 1 of the Constitution, against diminishing such compensation during their continuance in office.]

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

1939-3-9675
I. T. 3243

REVENUE ACT OF 1936.

Rental received by A, a minister of the gospel, who leased the house furnished to him by the M Church and used the rental therefrom to pay for an apartment occupied by him, is exempt from Federal income tax.

Advice is requested whether A, a minister of the gospel, is taxable on the money he received in 1937 from renting the house furnished to him by the M Church of which he is the minister, which money he used to pay for an apartment occupied by him.

It is stated that the church of which A is the minister owns the house which it furnishes for the use of its minister. Since A was

[8] The cases, pro and con, are collected in the recent dissenting opinion by Chief Judge Bond of the Court of Appeals of Maryland in *Gordy* v. *Dennis* (5 A. (2d), 69, 82). Particular attention should be called to the decision of the Supreme Court of South Africa (*Krause* v. *Commissioner for Inland Revenue* [1929], So. Afr. R. (A. D.), 286), construing section 100 of the South Africa Act, which had taken over the identical clause from Article III, section 1, of our Constitution.

[9] The provisions regarding security of salary came from the Act of Settlement of 1700 (12 and 13 Will. III, ch. 2, Section III), and the Act of 1760 (1 Geo. III, ch. 23). See Holdsworth, The Constitutional Position of the Judges (48 L. Q. Rev., 25); 2 Holdsworth, The History of English Law (559–564); 6 id., 234, 514.

[10] Public, No. 32, Seventy-sixth Congress, first session, chapter 59. Section 209 of the same statute, however, provides that "In the case of the judges of the Supreme Court, and of the inferior courts of the United States created under Article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior Revenue Act."

single and did not require a house for his residence, the church approved the leasing thereof by the minister and the renting of an apartment by him with the money received as rental from the house.

Section 22(b)6 of the Revenue Act of 1936 provides as follows:

(b) *Exclusions from gross income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * *

(6) *Ministers.*—The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation * * *.

It is held that the rental received by A from the house furnished to him by the church, which rental he used to pay for an apartment occupied by him, comes within the above provisions of law and is exempt from Federal income tax.

ARTICLE 22(b)(4)-4: Interest upon United States obligations.

REVENUE ACT OF 1936.

Exemption of interest (increment in value) on United States savings bonds. (See I. T. 3262, page 96.)

ARTICLE 22(b)(4)-5: Treasury bond exemption in the case of trusts or partnerships. 1939-15-9784 I. T. 3269

REVENUE ACT OF 1936.

Where a trust owns bonds issued under the Second Liberty Bond Act, and the interest on such bonds is apportioned between the trust and the beneficiary, each is entitled to the exemption provided under section 7 of the Second Liberty Bond Act, as amended, with respect to interest on $5,000 principal amount of such bonds.

Advice is requested with respect to the exemption from income tax of interest upon United States Treasury bonds issued under the Second Liberty Bond Act in the case of a trust created by the will of A, the income of which is taxable in part to the trust and in part to the beneficiary.

By the terms of the trust created under the will of A, one-half of the income of the trust is to be paid to B, and the remainder of the income is to be accumulated. The income of the trust consists of interest on municipal bonds, Treasury bonds, and bonds issued by private corporations. The classes of interest income are apportioned between the trust and the beneficiary, one-half to each. The trust owns United States Treasury bonds issued under the Second Liberty Bond Act on which the total interest received amounted in 1937 to $14x$ dollars. Of this interest, the trustee allotted one-half to the income to be reported by the trust and one-half to the income to be reported for the account of the beneficiary. Inasmuch as the amounts apportioned to the trust and to the beneficiary represent interest on such Treasury bonds in excess of $5,000, the question has arisen whether the trust and the beneficiary are each entitled to claim the exemption in respect of interest on $5,000 of such Treasury bonds as provided in section 7 of the Second Liberty Bond Act, as amended.

Section 7 of the Second Liberty Loan Bond Act, approved September 24, 1917, provides as follows:

That none of the bonds authorized by section 1, nor of the certificates authorized by section 5, or by section 6, of this Act, shall bear the circulation privilege. All such bonds and certificates shall be exempt, both as to principal and interest from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations. The interest on an amount of such bonds and certificates the principal of which does not exceed in the aggregate $5,000, owned by any individual, partnership, association, or corporation, shall be exempt from the taxes provided for in subdivision (b) of this section. (40 Stat., 288.)

Article 22(b)(4)-5 of Regulations 94 provides in part as follows:

Treasury bond exemption in the case of trusts or partnerships.—(*a*) When the income of a trust is taxable to beneficiaries, as in the case of a trust the income of which is to be distributed to the beneficiaries currently, each beneficiary is entitled to exemption as if he owned directly a proportionate part of the Treasury bonds held in trust. When, on the other hand, income is taxable to the trustee, as in the case of a trust the income of which is accumulated for the benefit of unborn or unascertained persons, the trust, as the owner of the bonds held in trust, is entitled to the exemption on account of such ownership.

In view of the provisions of section 7 of the Second Liberty Bond Act and article 22(b)(4)-5 of Regulations 94, which are quoted above, it is held that where a trust owns Treasury bonds issued under authority of the Second Liberty Bond Act, and the interest on such bonds is apportioned between the trust and the beneficiary, each is entitled to claim the exemption from income tax, as provided in section 7 of that Act, in respect of the interest on $5,000 principal amount of such bonds.

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

ARTICLE 23(a)-1: Business expenses.

REVENUE ACT OF 1936.

Applicability of G. C. M. 20307 (C. B. 1938-1, 157) to items other than prepaid insurance. (See I. T. 3251, page 113.)

ARTICLE 23(a)-1: Business expenses. 1939-26-9890
G. C. M. 21103

REVENUE ACTS OF 1934 AND 1936.

The ordinary and necessary expenses incurred by A in operating his farm for the breeding and development of horses and in conducting a racing stable are deductible for Federal income tax purposes since the enterprise was carried on for the purpose and with reasonable expectation of deriving a profit.

Advice is requested relative to the deductibility, for Federal income tax purposes, of the ordinary and necessary expenses incurred by the taxpayer in operating a farm and racing stable.

The taxpayer is a man of independent means and resides in the State of R. He has numerous business interests in that State. Beginning with the year 192—, he was engaged in the purchasing, de-

veloping, and selling of saddle horses and show horses, using rented quarters for that purpose. Later he acquired an interest in a racing stable. Horses were purchased and entered in various racing meets and several purses were won by the horses so entered. However, these operations were not profitable and substantial losses were incurred. The taxpayer states that as the result of the experience thus obtained he became convinced that the best prospects for making profits out of such a business lay in breeding, developing, and selling saddle horses and show horses and in breeding, racing, and selling thoroughbred horses, and that this could only be done by the acquisition and ownership of sufficient acreage, buildings, and equipment to carry out a continuous program of breeding and developing and in establishing a reputation for an outstanding farm and stable. It was with this in mind that he acquired the land, buildings, and equipment located in the State of S. From time to time he has acquired additional acreage and added necessary buildings and equipment.

The taxpayer further states that prior to, and at the time of, the acquisition of the farm he was fully aware of the fact that it would require considerable time to develop outstanding blood lines in the saddle horse, show horse, and thoroughbred divisions of the business; that he was also aware of the fact that the development of a few outstanding horses would result in large earnings and profits; that he acquired the original farm and the additional acreage, buildings, and equipment as a business venture for the purpose and with the intention of making profits from the operation of this business; and that all of his programs and policies during all of the years of his operation of the farm were determined with that in view.

It has been the policy of the taxpayer at all times to hire experienced and competent managers, trainers, assistants, and other farm help, and from time to time he has changed the personnel in order that expenses could be reduced and the efficiency of operations improved. B, whom he hired as general farm manager, had been in the business of horse breeding, training, and showing of horses for many years and was recognized as one of the outstanding men in the country in that business. He was employed at an annual salary plus a bonus based upon the financial and business progress of the farm and especially upon the profit derived from the sale of horses. It was the understanding that his employment would continue only so long as the operations of the farm showed a profit or had good prospects of showing a profit. From the outset there was installed, and there has been continuously maintained, at the farm a complete and detailed accounting system in charge of a resident accountant. An assistant accountant employed in the taxpayer's office in the State of R visits the farm several times each year to audit the books. The accountant's reports are carefully reviewed by the taxpayer and discussed with the accountant and secretary and with the general farm manager. The taxpayer devotes a great deal of his time and attention to the operations and business affairs of the farm. He consults with his employees as to operating policies and at all times has insisted on rigid economy of operations, reduction of expenses, and the necessity of putting the enterprise on a paying basis. All costs and expenses incident to his trips to the farm and to attend race meetings

and horse shows are paid by him personally and are not charged as expenses of operating the farm. None of his office expenses in the State of R is charged to the operation of the farm. The entire cost of the operation and maintenance of the taxpayer's residence on the farm is paid by the taxpayer personally and has never been charged to the operations of the farm, nor is the farm residence used as a place of social entertainment.

The expenses incurred in the operation of the enterprise materially exceeded the gross income for the years 1930 to 1937, inclusive, but the prospects of making a profit are now much improved as indicated by results in recent months. The income derived consists principally of receipts from sales of horses and from racing purses. There is also some income from sales of cattle, sheep, miscellaneous live stock, stud fees, etc. The principal expenditures consist of operating expenses, including depreciation on buildings and equipment.

The taxpayer states that, in his judgment, his failure thus far to place the farm on a paying basis has been due largely to two factors, (1) the inability thus far to breed, develop, and continue to maintain several outstanding race horses, and (2) unfavorable economic conditions. He points out that the blood line of his horses has been constantly improving and the sales have been bringing better prices and greater revenue. In each of the years since 1932, sales of horses have resulted in substantial profits. A conservative estimate of the value of horses on hand on December 31, 1937, shows that such value far exceeded their cost. It is stated, and the evidence indicates, that the farm is now in a position to capitalize on its outstanding reputation which has been built up over the years. The trainer of thoroughbred horses for the taxpayer states that the decision upon the question of whether to keep or sell a horse has at all times been made by reference to whether the sale or keeping of the horse will bring in the most money. He further states that the same consideration governs in the matter of which horses to race and which meets to attend.

The fundamental question is whether, under the facts presented, the taxpayer's operation of the enterprise constitutes a trade or business entitling him to the deductions provided by section 23 of the Revenue Acts of 1934 and 1936 for expenses, etc., incurred in carrying on a trade or business.

Numerous cases have been decided by the courts and by the Board of Tax Appeals involving the question of whether horse breeding and racing activities constitute a trade or business. In a few cases such activities have been held not to constitute a trade or business. (*Reginald C. Vanderbilt* v. *Commissioner*, 5 B. T. A., 1055, affirmed in *Deering* v. *Blair*, 23 F. (2d), 975; *Harry C. Fisher* v. *Commissioner*, 29 B. T. A., 1041, affirmed per curiam in *Fisher* v. *Commissioner*, 74 F. (2d), 1014. See also *Thacher* v. *Lowe*, 288 Fed., 994, and *Louise Cheney* v. *Commissioner*, 22 B. T. A., 672, in which farming operations were held not to constitute a business.) In other cases, which are much more numerous, the decision has been to the contrary. (Among such cases are *Wilson* v. *Eisner*, 282 Fed., 38; *Commissioner* v. *Widener*, 33 F. (2d), 833; *Commissioner* v. *Field*, 67 F. (2d), 876; *Whitney* v. *Commissioner*, 73 F. (2d), 589; *Smith* v. *Commissioner*, 78 F. (2d), 408; *Margaret E. Amory* v. *Commissioner*, 22 B. T. A., 1398, acquiescence, C. B. X-2, 3 (1931); *James Clark*

et al., Executor, v. *Commissioner*, 24 B. T. A., 1235, acquiescence, C. B. XI–1, 2 (1932); and *Laura M. Curtis* v. *Commissioner*, 28 B. T. A., 631, acquiescence, C. B. XII–2, 4 (1933). See also *Plant* v. *Walsh*, 280 Fed., 722, in which it was held that a farm was conducted as a business.)

An analysis of the above-cited cases discloses that the operation of horse breeding farms and racing stables may constitute a trade or business; that the question of whether or not such operations constitute a trade or business depends upon whether the activities are for the purpose or with the intention of making a profit, provided the expectation of profit is reasonable; that the question of intention is a question to be determined in each case upon the particular facts presented; that the taxpayer's intention or purpose of making a profit, as disclosed by his own testimony and by other evidence, is sufficient to establish the business character of the enterprise, provided the expectation of profit is reasonable; and that the fact that losses are incurred year after year does not necessarily indicate that the prospect of profit is not reasonable or that the taxpayer's intention is not to make a profit. It is true that in *Thacher* v. *Lowe*, supra, the court stated that in ascertaining the intention of the taxpayer it could "see no escape from making the crux of the determination his receipts and expenditures." However, as pointed out in *Commissioner* v. *Field*, supra, the only evidence submitted in the Lowe case was a statement of the taxpayer's receipts and losses.

In the instant case the taxpayer states that his intention and purpose in operating the farm and racing stable is to make a profit and that, in his opinion, the prospects for profit are reasonable. The evidence in the case indicates that there is a reasonable prospect that the operations may be profitable in the near future. The operations are carried on in a businesslike manner and economy is stressed. The farm is not used by the taxpayer for entertainment, social activities, or other nonbusiness purposes. The taxpayer himself devotes a great deal of time and attention to the operations in an effort to make them successful from a financial standpoint.

In the light of the facts in this case and the cited decisions, it is the opinion of this office that the taxpayer, in carrying on the activities in question, is engaged in carrying on a trade or business. The case of Reginald C. Vanderbilt, supra, is distinguishable from the instant case in that the Board of Tax Appeals did not there have testimony of the taxpayer himself as to his intention. Furthermore, in that case there was evidence to indicate that the farm was operated as a place of pleasure, exhibition, and social diversion. Likewise, in the case of Harry C. Fisher, supra, the Board had no evidence as to the taxpayer's intention or object in carrying on the enterprise. The case of Louise Cheney, supra, is distinguishable in that there the Board found that there was merely a vain hope that on some remote day a profit might result.

Since the operation of the farm and racing stable in the present case constitutes a trade or business, the taxpayer is entitled to deduct such ordinary and necessary expenses and other items as the statute permits to be deducted in carrying on a trade or business.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

ARTICLE 23(a)-6: Compensation for personal services.

REVENUE ACT OF 1936.

Purchase of life insurance policies for employees. (See I. T. 3268, page 196.)

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

ARTICLE 23(c)-1: Taxes. 1939-1-9661
I. T. 3241

REVENUE ACT OF 1936.

A purchaser of real estate in Virginia, in which State real estate taxes accrue for the entire year on January 1, is not entitled to a deduction for any taxes assessed for the first calendar year in which he owns the property, even though by the terms of the contract of sale the taxes are apportioned between the vendor and vendee as of the date of sale. Any part of the taxes for the first calendar year paid by the purchaser should be added to the cost of the property.

Advice is requested whether taxes paid in 1937 on real estate situated in the city of R, State of Virginia, purchased during that year by A, constitute a part of the cost of the property or whether such taxes are an allowable deduction for Federal income tax purposes.

During 1937 the taxpayer purchased certain parcels of real estate situated in the city of R, Virginia. In accordance with the custom in that State, taxes for the year were prorated to the date of purchase and charged to the seller and the purchaser assumed the taxes after that date. The taxpayer treated the taxes accrued to the date of purchase as part of the cost of the property and claimed the taxes paid for the period from the date of purchase to the end of the year as a deduction in his return for 1937.

Pertinent sections of the law applicable, contained in the tax code of Virginia, Virginia Code of 1936, Annotated, read as follows:

SEC. 251. *What real estate to be taxed; lien for taxes* * * *.—All real estate, except such as is exempted by the constitution of Virginia, shall be subject to such annual taxation as may be prescribed by law, and there shall be a lien on such real estate for the payment of taxes and levies imposed thereon, hereafter assessed, prior to any other lien or encumbrance thereon. * * *

SEC. 252. *When commissioners of the revenue to commence assessments.*—Each commissioner of revenue shall commence, annually, on the 1st day of January, and proceed without delay to ascertain all the real estate in his county or city, as the case may be, and the person to whom the same is chargeable with taxes on that day. The beginning of the tax year for the assessment of taxes on real estate shall be January the 1st, and the owner of real estate on that day shall be assessed for the taxes for the year beginning on that day.

* * * * * * *

SEC. 424. *Tax year.*—Except where otherwise specifically provided, the tax year shall begin on the 1st day of January of each year and shall end on the 31st day of December of each year and all assessments shall be made as of the 1st day of January of each year.

Under section 297 of the tax code, the council of any city or town in Virginia may by ordinance provide for the collection of city or town taxes in equal semiannual installments. The city of R, Virginia, has provided by action of the council that the real estate taxes for each year are due and payable on June 30 and December 31 of each year in equal installments.

Under the statutes of Virginia, taxes on real property are assessed to the owner as of January 1 for the period of the calendar year beginning on that date. Inasmuch as ownership of the property on January 1 is the event which determines liability for the taxes thereon, it is held that Virginia real property taxes accrue, for Federal income tax purposes, on January 1 of each year.

Under the laws of Virginia, as a general rule proration of taxes is not allowed, and when an assessment has been made, the then owner and the property become liable for the tax for the whole year. (*Warwick County* v. *City of Newport News*, 153 Va., 789, 151 S. E., 417.) Exceptions to the general rule against proration exist in cases where the property is acquired for public purposes and the statute relieves the taxpayer from the payment of taxes for the portion of the year after the date of sale. Similarly, taxpayers whose lands are acquired by the United States are relieved from payment of tax for the period subsequent to the date of sale. (Sections 277 and 278.)

Since the purchaser of real estate subsequent to January 1 takes it subject to the lien which attaches on that date, and since real property is ordinarily conveyed by warranty deed in which the grantor covenants to convey free from all encumbrances, it becomes the duty of the grantor to discharge the lien for taxes which attached on January 1. Although it is the general custom in Virginia to provide for the apportionment of taxes for the year in which the sale takes place, it is a matter of agreement between grantor and grantee and does not affect the date as of which liability for property taxes becomes fixed. In other words, if the grantee, by agreement with the grantor, chooses to pay part of the tax liability of the grantor, he merely adds the amount to the cost of his property.

In the instant case, therefore, the taxes paid by the grantee, which had previously accrued against the grantor, are not deductible, and such payment must be treated, for Federal income tax purposes, as a capital expenditure constituting part of the purchase price of the property.

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

ARTICLE 23(e)-3: Loss of useful value. 1939-22-9850
G. C. M. 21171

REVENUE ACT OF 1936.

The M Railroad Co. is entitled to deductions, in accordance with the provisions of article 23(e)-3, Regulations 94, on account of the discarding of roadway property in connection with two construction projects regardless of the fact that the projects are paid for by the State out of funds allotted in whole or in part by the Federal Government.

An opinion is requested relative to the allowance of deductions from the gross income of the M Railroad Co. for the year 1936 on account of certain roadway property discarded or retired during that year in connection with construction projects, the cost of which projects was borne by the States out of funds allotted in whole or in part by the Federal Government from unemployment relief funds.

The construction involved two projects. The first consisted of a subway under two bridges in order to eliminate a dangerous grade crossing. The second consisted of the installation of flashing light signals at six grade crossings to replace ordinary wooden and metal signs which were discarded. The cost of completing the two projects was borne entirely by the States from funds allotted in whole or in part by the Federal Government, the cost of the first project being $35x$ dollars and of the second, $5x$ dollars. The deduction claimed by the taxpayer, representing the retirement value of the roadway property removed to make way for the new construction and installation, is shown as $2x$ dollars as to the first project and $1x$ dollars as to the second, or a total of $3x$ dollars. The discarded or retired roadway property and facilities consisted in general of slag, plank, fence guards, crossings, signs, etc. The M Railroad Co. handles its roadway accounts by the retirement method of accounting rather than by depreciation.

The question has been raised whether the retirement of the old roadway property represented an involuntary conversion of property within the meaning of section 112(f) of the Revenue Act of 1936, recompense for which was received in excess of the value of the old property through the award covering the new installation. If so, no deduction would be allowable in view of the provisions of section 112(f). If the transaction did not represent an involuntary conversion under section 112(f), the question is presented whether any deduction is allowable for Federal income tax purposes since any loss which the taxpayer may have sustained by reason of discarding or retiring the property in question appears to have been compensated for within the meaning of section 23(f) of the Act (providing for the deduction of losses sustained by corporations and not compensated for by insurance or otherwise) by the new and better facilities erected in its place at the expense of the Federal and State Governments.

Section 112(f) of the Revenue Act of 1936 provides in part as follows:

> (f) *Involuntary conversions.*—If property (as a result of its destruction in whole or in part * * * 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, * * * no gain or loss shall be recognized. * * *

Under the facts of this case, this office is of the opinion that the discarding or retirement of the old roadway property did not constitute an involuntary conversion within the meaning of section 112(f) of the Revenue Act of 1936 and article 112(f) of Regulations 94.

In connection with the second question raised in the case, it appears that no part of the award for the new facilities was made by way of compensation to the taxpayer for the value of the old facilities discarded or retired to make way for the new construction. It is stated that the entire amount of the award was made after the roadway had been cleared of the old property. The mere fact that the cost of the new facilities was borne by the Federal and State Governments rather than by the taxpayer does not of itself change the character of the loss to the taxpayer. To offset any portion of the value of the

new property against the old property discarded or retired would require that such portion be subject to a deduction whenever the new property is discarded or retired. In other words, such portion would then constitute a capital asset on which losses and/or depreciation might be taken. Moreover, it would seem that if the award is treated as having been received in payment for the retirement of the old property, the excess of the award over such retirement value would constitute gain or income to the taxpayer, a conclusion contrary to that reached by the Supreme Court of the United States in *Edwards* v. *Cuba Railroad Co.* (268 U. S., 628; T. D. 3728, C. B. IV–2, 122 (1925)). The transaction is also clearly not an exchange of properties of like kind within the meaning of section 112(b)1 of the Act.

In view of the foregoing, this office is of the opinion that, for Federal income tax purposes, a loss was sustained by the taxpayer through discarding or retiring the property in question, which loss is allowable in accordance with the provisions of article 23(e)–3 of Regulations 94, relating to "loss of useful value" of assets and the permanent discarding thereof.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

ARTICLE 23(e)–4: Shrinkage in value of stocks. 1939–9–9732
I. T. 3255

REVENUE ACT OF 1936.

I. T. 3215 (C. B. 1938–2, 152), holding that a stockholder of the M Corporation whose only asset, real estate located in Wisconsin, was sold at foreclosure was not entitled to deduct a loss in his return for 1936 on account of the worthlessness of such stock based on the foreclosure judgment because the right of redemption had not expired at the close of the year 1936, relates only to a determination of worthlessness based solely on the foreclosure and does not preclude a deduction on account of worthlessness based on other facts.

Advice is requested relative to I. T. 3215 (C. B. 1938–2, 152), which involves the deductibility of a loss by a stockholder of the M Corporation on account of worthlessness of the stock of the corporation where its only asset, real estate in Wisconsin, was sold under foreclosure proceedings.

The last paragraph of I. T. 3215 reads as follows:

* * * it is held that the stock of the M Corporation did not become worthless *through the foreclosure judgment* obtained on March —, 1936. Under the State law, the property was subject to redemption until public sale thereof at least one year after the date of the judgment, unless an earlier sale was made pursuant to stipulation of the parties. Until final sale occurs, whereunder the property is no longer subject to redemption by the corporation, it can not be said that the corporation has lost its only asset (G. C. M. 19367 (C. B. 1937–2, 115)), and *the facts do not indicate that the stock will be worthless for other reasons prior thereto.* (Cf. I. T. 1697, C. B. II–1, 95 (1923), and *Hiram R. Lloyd* v. *Commissioner*, 34 B. T. A., 301.) * * * [Italics supplied.]

It is contended that I. T. 3215 is authority for the position that inasmuch as the M Corporation did not lose its only asset through the foreclosure until the period of redemption expired, the stock of the corporation could not have become worthless in the hands of a stockholder until expiration of the period of redemption; and that, therefore, no loss is deductible by a stockholder prior to the expiration of such period.

In I. T. 1697, cited in the above-quoted paragraph, the following language occurs:

* * * The fact that the M Company had an equity of redemption until October, 1919, was a condition subsequent which would not of itself prevent the stock from being determined worthless at the time of the foreclosure sale if the other existing facts at that time showed the stock to be in fact worthless. * * *

It is apparent that I. T. 3215 relates only to a determination of worthlessness based *solely* on the foreclosure judgment on the only asset (real estate) of the corporation there involved where the period of redemption allowed under State law had not expired; that the ruling in that case is limited in its application to the situation involved therein where the facts did not indicate worthlessness for other reasons; and that each case of this nature must be decided on the particular facts involved.

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

ARTICLE 23(k)-1: Bad debts. 1939-9-9733
I. T. 3256

REVENUE ACT OF 1936.

I. T. 3172 (C. B. 1938-1, 150), concerning taxability of amounts recovered on debts deducted by banks in a prior year pursuant to charge-offs at the specific direction of Federal or State supervisory officers, is modified, in view of G. C. M. 20854. (See page 102.)

ARTICLE 23(k)-1: Bad debts.

REVENUE ACT OF 1936.

Recoveries of bad debts charged off in prior years. (See G. C. M. 20854, page 102.)

SECTION 24.—ITEMS NOT DEDUCTIBLE.

ARTICLE 24-7: Disallowance of deductions for unpaid expenses and interest. 1939-2-9664
I. T. 3242

REVENUE ACTS OF 1936 AND 1937.

Section 24(c) of the Revenue Act of 1936, as added by section 301 of the Revenue Act of 1937, does not prohibit the deduction by A as ordinary business expenses of the amounts of accrued salaries payable for 1937 to his sons for services rendered by them in that year, where such amounts were credited in 1937 to the sons' accounts without limitation or restriction and were returned by them as income constructively received for that year.

Advice is requested relative to the application of section 24(c) of the Revenue Act of 1936, as added by section 301 of the Revenue Act of 1937, to the case of A, who keeps his books on the accrual basis and claimed deductions for the year 1937 on account of salaries payable to his two sons in excess of amounts actually paid to them.

During the year 1937, A was the proprietor of an individual business employing his two sons, B and C, who performed services for

the compensation accrued by the taxpayer. During that year, A accrued on his books as salary expense $3,000 payable to B and $3,000 payable to C. The amounts actually paid during the year were $1,900 to B and $1,800 to C. Each reported on his individual return for 1937 the entire amount of $3,000 as compensation for that year. The question is presented whether, since each son reported the entire amount of $3,000 and paid the tax thereon, A should be allowed a deduction of $6,000 in his return for 1937 as a business expense even though the entire amount was not paid during that taxable year or within two and one-half months thereafter. The question arises by reason of the provisions of section 24(c) of the Revenue Act of 1936, as added by section 301 of the Revenue Act of 1937, reading as follows:

(c) *Unpaid expenses and interest.*—In computing net income no deduction shall be allowed in respect of expenses incurred under section 23(a) or interest accrued under section 23(b)—

(1) If not paid within the taxable year or within two and one-half months after the close thereof; and

(2) If, by reason of the method of accounting of the person to whom the payment is to be made, the amount thereof is not, unless paid, includible in the gross income of such person for the taxable year in which or with which the taxable year of the taxpayer ends; and

(3) If, at the close of the taxable year of the taxpayer or at any time within two and one-half months thereafter, both the taxpayer and the person to whom the payment is to be made are persons between whom losses would be disallowed under section 24(b).

The report of the Ways and Means Committee of the House of Representatives (report No. 1546, dated August 13, 1937) in explanation of the purpose of section 301 of the Revenue Act of 1937 states in part as follows (page 29):

Your committee recommends that section 24 of the Revenue Act of 1936 be amended by adding a new subsection under which it is provided *that where the creditor, by reason of his method of accounting, is not required to include in his gross income the amount of the expenses or the interest until it is paid,* no deduction shall be allowed to the debtor under section 23(a) (for expenses) or section 23(b) (for interest) for sums not paid by the debtor during his taxable year or within two and one-half months after the close of such taxable year. * * * [Italics supplied.]

Article 24–7, Treasury Decision 4791 (C. B. 1938–1, 83), amending Regulations 94, provides as follows:

ART. 24–7. *Disallowance of deductions for unpaid expenses and interest.*

The application of section 24(c), as added by the Revenue Act of 1937, may be illustrated by the following example:

Example: A is the holder and owner of an interest-bearing note executed by the M Corporation all of the stock of which is owned by him. A and the M Corporation make their income returns on the basis of a calendar year but the M Corporation makes its returns on the accrual basis and A makes his returns on the cash receipts and disbursements basis. The M Corporation does not pay any interest on such note during the calendar year 1937 or within two and one-half months after the close thereof, but claims a deduction for the year 1937 with respect to the interest accruing on the note in that year. *A, being on the cash receipts and disbursements basis, does not include such interest in his return for the year 1937.* By the application of section 24(c), as added by the Revenue Act of 1937, no deduction for such interest is allowable in computing the net income of the M Corporation for the year 1937. The provisions of such section 24(c) do not otherwise affect the general rules governing the allowance of deductions under the accrual basis. Hence in the event the M Corporation should pay such interest after March 15, 1938, no deduction therefor would be allowable in computing its net income for the year in which the payment was made. [Italics supplied.]

It will be noted that the report of the Ways and Means Committee and the example given under article 24–7 (T. D. 4791, supra) indicate that the question of the deductibility of expenses and interest under section 24(c) of the Revenue Act of 1936, as added by section 301 of the Revenue Act of 1937, depends in part on whether the creditor taxpayer is required to include in gross income in his return for the same taxable year the sums for which deduction is taken by the debtor taxpayer.

Article 42–2 of Regulations 94, interpreting the provisions of section 42 of the Revenue Act of 1936 with respect to the question of constructive receipt of income, provides that:

> 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 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 must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. * * *

In view of the intent and purpose of Congress in enacting the provisions of section 24(c) of the Revenue Act of 1936, as added by section 301 of the Revenue Act of 1937, it is the opinion of this office that where it is conclusively shown that amounts deducted for accrued expenses (and interest) by a debtor taxpayer have been credited to the account of the person to whom such amounts are due under circumstances which would require the reporting of the sums credited as income constructively received under the provisions of article 42–2 of Regulations 94, the deduction for such amounts is allowable since factor (2) of section 24(c), supra, is absent in such a case and there is no basis for the disallowance of the deduction.

In the instant case the established method of reporting income by B and C is the cash basis and the accrued salary was credited by A, without restriction or limitation, to their accounts in the year 1937, so that it is properly includible in their returns for that year on the basis of constructive receipt. In this case, factor (2) of section 24(c), supra, is absent, as a consequence of which a deduction by the payor in 1937 for the accrued salaries should be allowed.

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 25–4: Personal exemption of head of family. 1939–2–9665 G. C. M. 20921

REVENUE ACT OF 1936.

A, who contributed the greater part of the amount expended in 1936 for the maintenance of the home and the support of the family consisting of his father, mother, two minor brothers, and himself, is not entitled to a personal exemption of $2,500 as head of a family nor to a credit for dependents, since he did not have the "right to exercise family control," his father's income, though less than A's income, was available for family support, and the members of the family can not be said to have been dependent on him chiefly for support.

An opinion is requested whether A is entitled to credits under section 25 of the Revenue Act of 1936 as head of a family and for dependents, the circumstances being as follows:

During the year 1936, A resided in the same household with his mother, father, and two brothers, 17 and 15 years of age, respectively. A's earnings for the year were $2,800 and the earnings of his father, the only other member of the family who had any income during the year, were $1,900. The total amount expended by A and his father during the year 1936 for maintenance of the home and support of the entire family was $3,600, of which A contributed in excess of $2,000. The income of A and his father was deposited in a single checking account and withdrawals from this account were under A's supervision and could be made only over his signature. The lease for the house occupied by the family was in the name of A. It is contended that under these circumstances A should be allowed a personal exemption as head of a family and credit for dependents.

Section 25(b), Revenue Act of 1936, provides in part—

Credits for both normal tax and surtax.—There shall be allowed for the purposes of the normal tax and the surtax the following credits against net income:

(1) *Personal exemption.*—In the case of a single person, a personal exemption of $1,000; or in the case of the head of a family or a married person living with husband or wife, a personal exemption of $2,500. * * *

(2) *Credit for dependents.*—$400 for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer if such dependent person is under 18 years of age or is incapable of self-support because mentally or physically defective.

Article 25–4 of Regulations 94, based upon section 25 of the Revenue Act of 1936, provides in part as follows:

A head of a family is an individual who actually supports and maintains in one household one or more individuals who are closely connected with him by blood relationship, relationship by marriage, or by adoption, and whose right to exercise family control and provide for these dependent individuals is based upon some moral or legal obligation.

Under the facts presented in the instant case, it does not appear that the taxpayer had the "right to exercise family control" within the meaning of the above-quoted provisions of the regulations. The facts regarding the amount which the taxpayer contributed to the family's maintenance, the leasing of the house in his name, and his control of the joint checking account, are not sufficient to rebut the presumption that the "right to exercise family control" continued to remain in the father, whose income was available and used for family support. It was, of course, necessary that the taxpayer expend a certain amount of his income for living quarters, food, etc., for himself wherever he resided. Amounts paid by him for such benefits are not contributions to the support of dependent members of his family. (I. T. 1998, C. B. III–1, 208 (1924).) In view of this fact and considering the amount of the father's income available for family maintenance in the taxable year, it does not appear that any of the other members of the family were dependent chiefly upon the taxpayer for support in that year. Contributions to the support of persons who are not dependent chiefly upon him do not entitle the taxpayer to exemption as head of a family. (*Hannah D. Stratton* v. *Commissioner*, 5 B. T. A., 1025; *Chester F. Morrow* v. *Commissioner*, 9 B. T. A., 448; *Louise Kingsley* v. *Commissioner*, 11 B. T. A., 296;

Louise C. Ball v. *Commissioner*, 16 B. T. A., 785; *Joseph H. Rudiger* v. *Commissioner*, 22 B. T. A., 204.)

It is the opinion of this office, therefore, that the taxpayer is not entitled to the credit of $2,500 as head of a family nor to a credit for dependents for the year 1936.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

ARTICLE 25–4: Personal exemption of head of family. 1939–14–9770 I. T. 3267

REVENUE ACT OF 1936.

Two brothers, A and B, own the house in which they and their dependent mother live. A, who is absent from home the greater part of the time, makes the major contribution toward the maintenance of the home and the support of the mother. *Held*, A is entitled to personal exemption as head of a family and to credit for one dependent under sections 25(b)1 and 25(b)2 of the Revenue Act of 1936.

Advice is requested whether A is entitled to the personal exemption allowed the head of a family under section 25(b)1 of the Revenue Act of 1936, and article 25–4 of Regulations 94, and whether he is also entitled to a credit for one dependent under section 25(b)2 of that Act and article 25–6 of Regulations 94.

A and his brother, B, both single men, own the house in which they and their mother live. The taxpayer, A, is away from the home a great deal of the time as a traveling salesman. The brother, B, resides at home all of the time. In the year 1937, the taxpayer, A, contributed over $1,200 toward the maintenance of the home while his brother during the same year contributed approximately $600. His mother, the dependent for whom the exemption and credit are claimed, is physically incapacitated and has no income.

Inasmuch as during the year 1937 A furnished more than one-half of the amount required for the maintenance of the home and the support of his dependent mother who resided in the same household with him, he is entitled to classification as the head of a family for the taxable year 1937 regardless of his frequent absences from home. Furthermore, inasmuch as he contributed the chief support of his mother in 1937, he is also entitled to a credit of $400 for her as a dependent.

ARTICLE 25–5: Personal exemption of married person.

REVENUE ACT OF 1936.

Division of the married person's exemption between husband and wife where their taxable years are not concurrent. (See I. T. 3277, page 109.)

ARTICLE 25–6: Credit for dependents. 1939–17–9803
I. T. 3274

REVENUE ACT OF 1936.

A, who is required by court order to pay $2x$ dollars monthly for alimony and support money for his divorced wife and his two children under 18 years of age living with their mother, is entitled to a credit for two dependents with respect to the minor children, the alimony payments being the only means of support of the divorced wife and the children, even though no specific amount is designated in the court order for support of the children.

I. T. 2096 (C. B. III–2, 163 (1924)) distinguished.

Advice is requested whether a credit of $800 claimed by A in his income tax return for 1937 on account of the support furnished his two minor children is allowable under the circumstances herein set forth.

In the year 1936 the taxpayer and his wife were divorced. The following is a part of the order issued by the court in connection with the divorce proceedings:

IT IS FURTHER ORDERED that the defendant, A, be and he hereby is required to pay to the plaintiff for alimony and support money for the plaintiff and the minor children of the parties, the sum of $2x$ dollars per month; the first payment to commence as of the 1st day of September, 1936, and to continue in a like amount monthly until the further order of the court.

During the taxable year 1937, the minor children resided with their mother. Payments aggregating $24x$ dollars were made during that year by the taxpayer in accordance with the court order. The taxpayer's former wife had no income other than the payments made by the taxpayer. It appears that the provisions of the court order were in effect for the entire taxable year 1937. It is noted that no specific mention was made in the court order as to any amount to be set aside for the support of the children. The evidence indicates, however, that in the jurisdiction in question sometimes no mention is made in the court order as to the amount which represents alimony to be paid to the wife and the amount which represents money for the support of the children.

The contention is made that since A, the taxpayer, contributed the chief support of his minor children he should be allowed the credit provided for dependents irrespective of the provisions of I. T. 2096 (C. B. III–2, 163 (1924)), which reads as follows:

A father who furnishes the chief support of his child is entitled to the credit for a dependent whether the custody of the child has been awarded to the mother under the court decree or whether the support is furnished as the result of an agreement between husband and wife not entered into through court proceedings. If the court orders the father to pay the wife alimony and no specific mention is made in the decree as to any amount to be set aside for the support of the child, the father is not entitled to the credit for a dependent, even though the alimony is the only means which the wife has for the support of herself and child.

The instant case does not fall squarely within the provisions of I. T. 2096, supra, which contemplated a case in which the court did not require that *any* portion of the payments be used for the support of the child. Here the court ordered the payment by the taxpayer of a designated amount each month " for alimony and support money for the plaintiff (wife) and the minor children of the parties

* * *." In view of the provisions of the court order, and the fact that the wife had no other source of income, it is evident that during the taxable year 1937 the husband furnished the chief support of his two children, both of whom were under 18 years of age. It is held, therefore, that he is entitled to the credit for two dependents under section 25(b)2 of the Revenue Act of 1936, that is, a credit of $800.

I. T. 2096, supra, has not been amended or revoked and is to be followed in any case where the facts are substantially the same as those set forth in that ruling.

SECTION 26.—CREDITS OF CORPORATIONS.

ARTICLE 26-2: Credit in connection with contracts restricting payment of dividends.

REVENUE ACT OF 1936.

Delivery to sinking fund trustee in 1937 of dividend notes received in 1937 but payable in 1938. (See I. T. 3270, page 179.)

SECTION 27(a).—CORPORATION CREDIT FOR DIVIDENDS PAID: DIVIDENDS PAID CREDIT IN GENERAL.

ARTICLE 27(a)-1: Dividends paid credit in general. 1939-8-9719
I. T. 3253

REVENUE ACT OF 1936.

In determining the amount of dividends paid credit under section 27 of the Revenue Act of 1936, a capital loss which is an unallowable deduction and accrued income tax reduce the earnings or profits available for dividend distribution within the meaning of section 115(a) of that Act.

Advice is requested in the case of the M Corporation relative to the dividends paid credit provided in section 27 of the Revenue Act of 1936 in the computation of surtax on undistributed profits imposed by section 14 of that Act.

The M Corporation keeps its books of account on the accrual basis. At the close of business on December 31, 1936, it had no accumulated earnings and for the calendar year 1937 its books showed net earnings or profits of $5,000 after taking into consideration a loss of $5,000 during the year from the sale of securities. As the corporation, for Federal income tax purposes, was limited to a capital net loss of $2,000, its net income for such purposes amounted to $8,000. The amount of $8,000 was distributed to stockholders during the year. The question involved is the amount of the dividends paid credit allowable to the corporation.

Section 27(a) of the Revenue Act of 1936 provides as follows:

(a) DIVIDENDS PAID CREDIT IN GENERAL.—For the purposes of this title, the dividends paid credit shall be the amount of dividends paid during the taxable year.

The term "dividend" is defined in section 115(a) of the Revenue Act of 1936 as "any distribution made by a corporation to its shareholders * * * (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year * * *."

Section 27(h) of the Revenue Act of 1936 provides as follows:

(h) NONTAXABLE DISTRIBUTIONS.—If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the shareholders as are subject to taxation under this title for the period in which the distribution is made, no dividends paid credit shall be allowed with respect to such part.

Article 27(h)-1 of Regulations 94 provides in part as follows:

Nontaxable distributions.—No dividends paid credit shall be allowed with respect to any part of the distribution by a corporation to its shareholders which is—

(*a*) not out of earnings or profits of the taxable year or out of earnings or profits of the corporation accumulated subsequent to February 28, 1913 * * *.

While the corporation's net income, for Federal income tax purposes, was $8,000, in determining its actual earnings or profits for the year available for distribution as dividends this amount must be reduced by $3,000, the amount of the loss not allowable for income tax purposes. Furthermore, a proper reserve for the payment of accrued income taxes is deductible in the computation of the earnings or profits, which, in this instance, amounts to $820. Accordingly, the earnings or profits available for distribution as dividends amounted to $4,180 ($8,000 less $3,000 and $820). (Cf. G. C. M. 2951, C. B. VII–1, 160 (1928).) Since a dividends paid credit is not allowable when the distribution is not paid out of earnings or profits, and since only $4,180 of the $8,000 distribution in 1937 by the M Corporation was so paid, the corporation is entitled to a dividends paid credit of $4,180 under section 27(a) of the Revenue Act of 1936.

SECTION 27(d).—CORPORATION CREDIT FOR DIVIDENDS PAID: DIVIDENDS IN OBLIGATIONS OF THE CORPORATION.

ARTICLE 27(d)-1: Dividends in obligations of the corporation. 1939–15–9785 I. T. 3270
(Also Section 26; Article 26–2.)

REVENUE ACT OF 1936.

Dividends paid credits are allowable for 1937, under section 27(d) of the Revenue Act of 1936, to the subsidiaries of the M Company for the face value of dividend notes issued by such subsidiaries during that year. Such credits are not allowable to the subsidiaries under section 27(a)4 of the Revenue Act of 1938 with respect to the same notes when redeemed in 1938. No dividends paid credit is allowable under section 27(a)4 of the Revenue Act of 1938 to the M Company, itself, for the year 1938 when payments in redemption of the notes were received by the M Company and paid over to the sinking fund trustee under a trust indenture covering the issuance of collateral trust certificates by the M Company.

Advice is requested as to the dividends paid credits allowable to the M Company and to its subsidiaries with respect to the payment of dividends by the subsidiaries in the form of notes, which notes were delivered by the M Company to a sinking fund trustee under the circumstances herein set forth.

The subsidiaries of the M Company issued in the year 1937 notes in payment of dividends for that year and dividends paid credits in the amount of the face value of the notes were taken by the subsidiaries in their income tax returns for the year 1937. Under a trust indenture covering the issuance of collateral trust certificates by the M Company, the capital stock of the subsidiaries is pledged by the M Company with a sinking fund trustee and the dividend notes in question were required to be, and were, turned over to the sinking fund trustee, the terms of the indenture providing that all income from the pledged stock shall be paid into the sinking fund. During the year 1938, payments were made to the M Company by the subsidiaries in liquidation of the dividend notes (which were held by the trustee) and the M Company turned over these payments to the sinking fund trustee in accordance with the requirements of the trust instrument.

It is the contention of the taxpayer that the subsidiaries are entitled to full dividends paid credits under section 27(a)4 of the Revenue Act of 1938 for all payments made by them in liquidation of these dividend notes since these payments were made in liquidation of an indebtedness, evidenced by notes, in existence on December 31, 1937, regardless of the dividends paid credits taken in their returns for 1937. It is also contended that since the payments in 1938 by the M Company to the sinking fund trustee of these amounts of money constituted an irrevocable setting aside of funds to retire an indebtedness of a kind described in section 27(a)4 of the Revenue Act of 1938, the M Company is entitled to a dividends paid credit in 1938 for these payments; or, in the alternative, the dividends paid credit should be allowed when funds so deposited with the sinking fund trustee are used to purchase and retire outstanding collateral trust certificates of the M Company.

Under the provisions of section 27(d) of the Revenue Act of 1936, and also under the provisions of section 27(e) of the Revenue Act of 1938, the subsidiaries, having used in the year 1937 the full face value of these obligations (notes), rather than an amount less than the face value thereof, as dividends paid credits are precluded from further dividends paid credits either in the year 1937 or 1938 as a result of the issuance in 1937 and payment in 1938 of these notes. Section 27(a)4 of the Revenue Act of 1938, relied upon by the taxpayer as giving its subsidiaries the right to a further credit in the year 1938 for all payments made by them in that year in liquidation of the dividend notes issued in 1937, deals with notes in general, while section 27(e) of the Revenue Act of 1938 deals specifically with the credit to be allowed on payment of obligations issued in payment of dividends and is, therefore, controlling.

It appears that the dividend notes of the subsidiaries payable to the M Company were immediately upon their receipt by the M Company turned over to the trustee under the terms of the collateral trust indenture to be applied to an obligation or indebtedness of the M

Company. It is stated that the M Company did not actually receive credit upon its obligation upon turning over the notes to the trustee, and it was only when the notes were paid and the trustee used the proceeds therefrom to pay and retire the collateral trust notes that the M Company received actual credit upon the obligation. Regardless of when credit was allowed by the trustee upon the obligation of the M Company, it is held that the M Company is not entitled to a dividends paid credit in the year in which the redemption of the dividend notes occurred. The amount for which the credit for 1938 is sought was set aside in 1937 by the M Company to pay or to retire its indebtedness by its action in indorsing and delivering to the trustee the dividend notes of the subsidiaries in accordance with the terms of the collateral trust indenture. The notes in question had a fair market value at the time of issuance and delivery to the M Company equal to their face value, and no question is, therefore, involved of the right to an additional dividends paid credit for an amount by which the obligations are redeemed over their fair market value at the time of the dividend payment.

SECTION 27(g).—CORPORATION CREDIT FOR DIVIDENDS PAID: PREFERENTIAL DIVIDENDS.

ARTICLE 27(g)–1: Preferential distributions. 1939–3–9676
I. T. 3244

REVENUE ACT OF 1936.

The M Company is not entitled to a dividends-paid credit with respect to liquidating distributions made in acquiring a part of its outstanding preference shares at different prices by direct purchases from stockholders and by purchases on the R Stock Exchange.

Advice is requested as to the amount of dividends-paid credit, if any, allowable to the M Company under the provisions of sections 14 and 27 of the Revenue Act of 1936 by reason of the distributions in partial liquidation made by the company in redeeming and canceling a part of its preference shares during the calendar years 1936 and 1937.

In November, 1936, the board of directors of the M Company adopted a resolution offering to purchase for retirement 10x shares of the company's preference stock at the lowest prices obtainable but not in excess of $— per share. The proposal was to be made by letter to each holder of preference shares and by advertising. Circulars were immediately sent to preference stockholders requesting tenders for 10x preference shares to be acquired for retirement. As the result of this request for tenders, 6x shares were purchased by the company, some being delivered in 1936 and some in 1937. In December, 1936, the M Company adopted a resolution authorizing the treasurer to complete the acquisition of the desired 10x shares by purchase from the shareholders or on the R Stock Exchange so as to obtain the shares at the lowest possible cost to the company. During December, 1936, 4x shares were purchased on the exchange, thus making a total of 10x shares purchased for retirement. Under the articles of incorporation, the preference shares thus acquired may not be reissued.

Section 27(g) of the Revenue Act of 1936 provides that no dividends-paid credit shall be allowed with respect to any distribution unless the distribution is pro rata, equal in amount, and with no preference to any share of stock as compared with other shares of the same class. Before a corporation may be entitled to any dividends-paid credit with respect to a distribution, regardless of the medium in which the distribution is made, every shareholder of the class of stock with respect to which the distribution is made must be treated the same as every other shareholder of that class. The limitation imposed is unqualified and the existence of a preference is sufficient to prohibit allowance of a dividends-paid credit, regardless of the fact (1) that such preference is authorized by all the shareholders of the corporation, or (2) that the part of the distribution received by the shareholder benefited by the preference is taxable to him as a dividend. The disallowance of the dividends-paid credit, where any preference or inequality in fact exists, extends to the entire amount of the distribution and not merely to a part of such distribution. (See article 27(g)-1, Regulations 94.)

In the instant case, tenders with respect to $6x$ preference shares of stock for retirement were accepted and paid for by the M Company, but it is not shown that these shares were tendered on a pro rata basis by all the shareholders. Furthermore, $4x$ shares which were necessary to make up the total of $10x$ shares to be retired were purchased on the R Stock Exchange.

In view of the fact that the purchase of preference shares for cancellation and retirement was not on a pro rata basis and that every shareholder of the class did not receive (in proportion to the number of shares held by him) his pro rata part of the distribution, it is held that the M Company is not entitled to a dividends-paid credit for any portion of the distribution in partial liquidation by reason of the limitation imposed by section 27(g) of the Act.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

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

ARTICLE 43-2: When charges deductible. 1939-7-9711
I. T. 3252

REVENUE ACT OF 1936.

In the year 1936, A, who keeps his books of account on the cash receipts and disbursements basis, purchased from the M Company for $5x$ dollars stock of the O Company. Under his contract with the M Company, A agreed to pay for the stock on or before July —, 1939, when the stock is to be delivered to him. The stock became worthless in 1937, A having made his only payment on the stock in that year. *Held*, the loss sustained by A is deductible in the year or years in which he makes payments on account of his contractual obligation. The M Company is not entitled to deduct a loss for the year 1937 on account of the worthlessness of such stock since it holds A's contractual obligation to pay therefor.

Advice is requested with respect to the deductibility, for Federal income tax purposes, of a loss incurred in connection with certain stock which A purchased in 1936 under a contract with the M Company.

By written agreement dated July —, 1936, A, whose books of account are kept on the cash receipts and disbursements basis, purchased from the M Company, whose books of account are kept on the accrual basis, certain stock of the O Company for an agreed price of $5x$ dollars (being the price at which the former company subscribed for such stock). Under the terms of the agreement, the stock is to be paid for by A on or before July —, 1939, and is to be transferred and delivered to him upon payment of the agreed purchase price. In the meanwhile the dividends on such stock are to be paid to A. In the year 1937 A paid to the M Company x dollars on the agreed purchase price and this is the only payment made by A. However, he has definitely obligated himself to pay the balance of the purchase price of the stock even though the stock became worthless in November, 1937.

It is held that inasmuch as A maintains books of account on the cash receipts and disbursements basis he will be deemed to have sustained a loss for Federal income tax purposes in the taxable year or years in which he actually makes payments on the amount of the agreed purchase price of such stock in an amount not in excess of such payments.

It is further held that inasmuch as the M Company holds A's contractual obligation to pay to it the sum of $5x$ dollars for the stock (being the cost of such stock to the M Company), these particular shares of stock are not worthless in its hands and, therefore, it is not entitled, for Federal income tax purposes, to deduct from its gross income for the year 1937 any part of its investment in such shares of stock.

SECTION 44.—INSTALLMENT BASIS.

ARTICLE 44–5: Gain or loss upon disposition of installment obligations.

REVENUE ACT OF 1936.

Amendment of Regulations 94, article 44–5. (See T. D. 4899, page 78.)

ARTICLE 44–5: Gain or loss upon disposition of installment obligations. 1939–26–9891 I. T. 3293

REVENUE ACT OF 1936.

Where a taxpayer in 1937 transmitted by gift to his wife a one-half interest in his business, including unrealized profit on installment accounts receivable, and the other one-half to a partnership then formed by him and his wife, gain or loss resulted to him upon both dispositions.

Although the partnership has elected to report its income from sales on the installment basis, it is not required to include in its income for 1937 or subsequent years collections received by it on account of sales or other dispositions made by the taxpayer as an individual.

Advice is requested relative to certain transactions in connection with the income tax return of A for the year 1937 involving section 44 (c) and (d) of the Revenue Act of 1936.

A operated a retail store and reported income from his sales on the installment basis until February 28, 1937, at which time he had installment accounts receivable containing unrealized profit of x dollars. On March 1, 1937, he gave to his wife, B, a one-half interest in the entire assets of his business, including such installment accounts receivable. He and his wife then entered into a partnership agreement and continued to operate the business. The partnership adopted a fiscal taxable year ended September 30, 1937, and in its return therefor reported income from sales on the installment basis. A filed his return for the taxable year 1937 on the calendar year basis.

The questions presented are (1) whether, under section 44(d) of the Revenue Act of 1936, there was a disposition of the one-half of the installment obligations transferred to the wife which resulted in gain or loss to the husband, and whether the turning over of the remaining one-half of the husband's installment obligations to the partnership constituted a disposition which would give rise to gain or loss at the moment of the forming of the partnership with the wife; and (2) whether, under section 44(c) of that Act, the partnership is required to report the installment profit included in later collections with respect to sales in periods prior to the disposition, due to the fact that it is reporting on the installment basis.

Section 44(c) of the Revenue Act of 1936 provides:

Change from accrual to installment basis.—If a taxpayer entitled to the benefits of subsection (a) elects for any taxable year to report his net income on the installment basis, then in computing his income for the year of change or any subsequent year, amounts actually received during any such year on account of sales or other dispositions of property made in any prior year shall not be excluded.

Section 44(d) of the Act provides in part:

Gain or loss upon disposition of installment obligations.—If an installment obligation is satisfied at other than its face value or distributed, transmitted, sold, or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and (1) in the case of satisfaction at other than face value or a sale or exchange—the amount realized, or (2) in case of a distribution, transmission, or disposition otherwise than by sale or exchange—the fair market value of the obligation at the time of such distribution, transmission, or disposition. Any gain or loss so resulting shall be considered as resulting from the sale or exchange of the property in respect of which the installment obligation was received. The basis of the obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligations satisfied in full. * * *

In view of the foregoing it is held:

(1) Under the specific provisions of section 44(d), supra, inasmuch as the taxpayer, in March, 1937, transmitted to his wife by gift one-half of the installment obligations and transmitted the other one-half thereof to a partnership then formed by him and his wife, gain or loss, computed in accordance with that section and recognized under the Act, resulted to him upon both such dispositions at that time and, hence, is includible in determining his net income for his taxable (calendar) year 1937.

(2) The partnership, although it has elected to report its business sales on the installment basis, is not required, under the provisions of

section 44(c), supra, to include in computing its income for its taxable year 1937, or any subsequent taxable year, collections received by it on account of sales or other dispositions of property which were made by the taxpayer as an individual. The partnership did not change from the accrual to the installment basis. (See, in this connection, I. T. 2521, C. B. IX–1 (1930), 123.)

Generally, taxable income from collection, recognized gain or loss upon disposition, or allowable bad debt deduction, resulting (entirely aside from section 44(c)) to the partnership in respect of any installment account receivable acquired by it upon its formation, is dependent upon the facts relevant to the collection, disposition, or worthlessness thereof, and is measured by the difference between the proper gain or loss basis thereof to the partnership and the amount which it ultimately realizes therefor. Interest earned by the partnership thereon is includible (as such) in computing its net income as and when received or accrued, depending upon the method of accounting and making returns regularly employed by it.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 55.—PUBLICITY OF RETURNS.

REVENUE ACT OF 1936.

Regulations governing the inspection of income, excess-profits, and capital stock tax returns by the Special Committee on Un-American Activities, House of Representatives. (See T. D. 4900, page 119.)

ARTICLE 55(b)3: Inspection of copies of returns.

REVENUE ACT OF 1936.

Use of original returns open to inspection in accordance with Treasury Decision 4873 (C. B. 1938–2, 261); furnishing copies of returns; inspection of returns of corporations by State officers and shareholders; and inspection of estate and gift tax returns. (See T. D. 4878, page 115.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT A.—RATES OF TAX.

SECTION 101.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 101(6)–1: Religious, charitable, scientific, literary, and educational organizations and community chests.

REVENUE ACT OF 1936.

Nurses' association organized and operated for the betterment of the profession. (See G. C. M. 20941, page 186.)

ARTICLE 101(7)-1: Business leagues, chambers of commerce, real estate boards, and boards of trade. 1939-5-9694 G. C. M. 20941

(Also Section 101, Article 101(6)-1.)

REVENUE ACT OF 1936.

The M Nurses' Association, which was incorporated and is operated for the betterment of the profession, is entitled to exemption from Federal income taxation as a business league under section 101(7) of the Revenue Act of 1936, but it is not entitled to such exemption under section 101(6) of the Act as an organization organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

Advice is requested whether the M Nurses' Association is entitled to exemption from Federal income taxation either under section 101(6) or section 101(7) of the Revenue Act of 1936.

The purposes of the association as stated in its articles of incorporation are as follows:

The objects of this association shall be the advancement of the educational and literary standard of nurses and nursing, the furtherance of the efficient and scientific care of the sick, to aid in the practice of medicine and surgery, the maintenance of the honor and character of the nursing profession and the furtherance of cordial relations between the nurses of the State of R and the nurses of other States and countries.

The membership of the association consists of registered nurses who are active members of nurses' alumnae associations, registered nurses residing or practicing in the State who hold acceptable certificates of training, registered nurses residing in the State who hold certificates of registration in any State and who are members of district associations in the State of R, and resident Government nurses on duty within the State.

The activities of the association consist generally of service to nurses, including programs at State, district, and special meetings at which consideration is given to problems of importance to the nursing profession through the development of courses for graduate nurses under the auspices of the State of R University, and service to health organizations by aiding them in an advisory capacity, finding proper nurses, etc. The by-laws of the association provide for certain standing committees, including a committee on legislation. It is provided that this committee shall keep informed as to all proposed legislative action and actively work for the same as the board of directors shall deem advisable.

This office is of the opinion that the M Association is an association of persons in a profession, organized and operated for the betterment of the profession through numerous methods, rather than an association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. The association is substantially similar to other professional organizations, such as a bar association, a medical association, or an association of accountants, which have been held not entitled to exemption under section 101(6) of the Revenue Act of 1936 or corresponding provisions of prior Revenue Acts. (See *Alfred A. Cook* v. *Commissioner*, 30 B. T. A., 292; G. C. M. 4805, C. B. VII-2, 58 (1928); I. T. 2437, C. B. VII-2, 292 (1928), revoking I. T. 1882, C. B. II-2, 201 (1923); I. T. 3182, C. B. 1938-1, 168; *Appeal of George O. May*, 1 B. T. A., 1220.) Although the M Nurses'

Association and the other professional organizations above referred to have some activities of an educational, scientific, etc., nature, it can not be said that they are organized and operated exclusively for any of the purposes contemplated by section 101(6) of the Revenue Act of 1936. The organization is, however, entitled to exemption from Federal income taxation as a "business league" under the provisions of section 101(7) of that Act.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

ARTICLE 101(9)–1: Social clubs.

REVENUE ACT OF 1936.

Social club deriving income from leasing part of its property. (See G. C. M. 20647, page 125.)

ARTICLE 101(10)–1: Local benevolent life insurance associations, mutual irrigation and telephone companies, and like organizations.

REVENUE ACT OF 1936.

Corporation organized for protection of river banks from erosion. (See I. T. 3286, page 126.)

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 115–2: Sources of distributions in general. 1939–14–9771
G. C. M. 21122

REVENUE ACT OF 1936.

Where the total distributions by the M Company to several classes of stockholders during the year 1937 were in excess of earnings available for dividends, as determined in accordance with article 115–2, Regulations 94, dividends must be regarded as having been distributed in accordance with the corporate charter giving stockholders with priority the right to dividends before any earnings or profits can be distributed to other stockholders.

Advice is requested as to the proper treatment under article 115–2, Regulations 94, of dividend payments made by the M Company in 1937 to two classes of stockholders, one having priority over the other, where such payments are in excess of earnings and profits.

In addition to its common stock, the M Company had outstanding for the year 1937 cumulative preferred stock, commonly called prior preferred stock, which was entitled under the corporate charter to dividends at the rate of $6 per share before the payment of any dividends on any other class of stock. It also had outstanding during that year cumulative convertible stock entitled to cumulative dividends at the rate of $2 per share. During the year 1937 the corporation made periodic dividend distributions on the prior preferred stock in the total amount of $6 per share and on the cumulative convertible stock in the total amount of $2 per share. The total amount thus dis-

tributed in the year 1937 as dividends was $35x$ dollars whereas the corporation earned only $24x$ dollars during that year and had no accumulated earnings or profits as of January 1, 1937. The earnings and profits of the corporation were sufficient to cover the dividend requirements on the prior preferred stock, and if applied first to the dividends on that stock, would leave earnings and profits to be applied to the dividends paid on the cumulative convertible stock equal to 12 per cent of the amount distributed to holders of such stock. On the other hand, if the earnings and profits were prorated as to all the dividends paid, then 68.57 per cent of the amount received by the holders of each class of stock would be regarded as a distribution of earnings and profits and the remainder would constitute a distribution of capital.

Article 115–2 of Regulations 94 provides in part as follows:

> If the distributions made during the taxable year exceed the earnings or profits of such year, then that proportion of each distribution which the total of the earnings or profits of the year bears to the total distributions made during the year shall be regarded as out of the earnings or profits of that year.

It is the opinion of this office that effect should be given to the prior rights of the holders of the prior preferred stock and that the entire amount received by them should be taxed as having been paid out of the earnings and profits of the corporation. This conclusion is based primarily upon the fact that there is nothing in section 115(a) of the Revenue Act of 1936 which impairs the contractual rights of the stockholders. The pertinent portion of that section reads as follows:

> SEC. 115. DISTRIBUTIONS BY CORPORATIONS.
> (a) *Definition of dividend.*—The term "dividend" when used in this title * * * means any distribution made by a corporation to its shareholders, * * * out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

In explanation of the last clause of the above section, which first appeared in the Revenue Act of 1936, the Senate Committee on Finance in its report on the 1936 revenue bill (Report No. 2156, June 1, 1936, page 18) stated:

> In order to enable corporations without regard to deficits existing at the beginning of the taxable year to obtain the benefit of the dividends paid credit for the purposes of the undistributed profits surtax, section 115(a) changes the definition of a dividend so as to include distributions out of the earnings or profits of the current taxable year. The amendment simplifies the determination by providing that distributions during the year, not exceeding in amount the current earnings, are dividends constituting taxable income to the shareholder and a dividends paid credit to the corporation. As respects such dividends the complicated determination of accumulated earnings or profits is rendered unnecessary.

Thus, it appears that Congress intended that a corporation should compute its net earnings and profits as of the end of the year, and that if dividend distributions had been made in excess of that amount, determination of the amount of each distribution which was paid out of earnings and profits would be determined on the pro rata basis rather than looking to the actual earnings on hand at the time of each distribution. However, it does not follow that where dividends are paid to different classes of stockholders the priorities as between

stockholders must be disregarded. If, for example, a corporation earns only an amount sufficient to meet its preferred stock requirements and pays the required dividends on its preferred stock and also makes distributions on its common stock, the preferred stockholders should, nevertheless, report as dividends the entire amount distributed to them even though the corporation also made distributions to its common stockholders which, when added to the preferred stock dividends, were in excess of the corporate earnings and profits for that year. In such a case, if the preferred stockholders are entitled to payment of their dividends before any distribution can be made to common stockholders, it is apparent that the earnings and profits are used first for the preferred stockholders, and if the earnings and profits are thereby exhausted, the payments to the common stockholders merely reduce their equity and constitute in effect a return of capital.

The right of a preferred stockholder to preference out of the earnings of the corporation for each year was recognized in *Barclay et al.* v. *Wabash Ry. Co. et al.* (30 F. (2d), 260), wherein the court granted a decree forbidding payment of the dividends on junior stock out of earnings accumulated during the year for which the preferred dividends had not been paid. Thus, the preferred stockholders have an equitable claim on the earnings of the corporation for each year which must be met before any part of those earnings can be paid to other classes of stockholders.

In the present case, therefore, the earnings and profits must be regarded as having been first used for the payment of the dividends on the prior preferred stock as required by the charter of the corporation and the contract with the prior preferred stockholders, and only the earnings and profits remaining after such dividend requirements have been met should be regarded as having been paid to the junior stockholders. In other words, the earnings and profits of the M Company for the year 1937 must be regarded as having been distributed in accordance with the provisions of the corporate charter giving the prior preferred stockholders the right to dividends before any earnings or profits can be distributed to the other stockholders.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 116-2: Compensation of State officers and employees.

REVENUE ACT OF 1936.

(1) Taxation by State of salary of Federal employee; (2) *Collector* v. *Day* (11 Wall., 113), overruled. (See Ct. D. 1390, page 129.)

ARTICLE 116-2: Compensation of State officers and employees.

REVENUE ACT OF 1936.

Taxability of compensation received by Federal officers and employees and officers and employees of States or political subdivisions thereof. (See Mim. 4916, page 71.)

SECTION 119.—INCOME FROM SOURCES WITHIN UNITED STATES.

ARTICLE 119-14: Telegraph and cable service. 1939-1-9656
(Also Article 119-15.) T. D. 4877

INCOME TAX.

Income from transmission of messages from points within the United States to points without the United States.—Regulations 94 and 86, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 94, approved November 12, 1936, and Regulations 86, approved February 11, 1935, are amended as follows:

(*a*) Article 119-14 of Regulations 94 and 86 is redesignated "Article 119-15."

(*b*) A new article is added after article 119-13 of Regulations 94 and 86 to read as follows:

ART. 119-14. *Telegraph and cable service.*—A foreign corporation carrying on the business of transmission of telegraph or cable messages between points in the United States and points outside the United States derives income partly from sources within and partly from sources without the United States.

(1) *Gross income.*—The gross income from sources within the United States derived from such services shall be determined by adding (*a*) its gross revenues derived from messages originating in the United States and (*b*) amounts collected abroad on collect messages originating in the United States and deducting from such sum amounts paid or accrued for transmission of messages beyond the company's own circuit. Amounts received by the company in the United States with respect to collect messages originating without the United States shall be excluded from gross income.

(2) *Net income.*—In computing net income from sources within the United States there shall be allowed as deductions from gross income determined in accordance with paragraph (1), (*a*) all expenses incurred in the United States (not including any general overhead expenses) incident to the carrying on of the business in the United States, (*b*) all direct expenses incurred abroad in the transmission of messages originating in the United States (not including any general overhead expenses or maintenance, repairs and depreciation of cables and not including any amount already deducted in computing gross income), (*c*) depreciation of property (other than cables) located in the United States and used in the trade or business therein, and (*d*) a proportionate part of the general overhead expenses (not including any items incurred abroad corresponding to those enumerated in (*a*), (*b*), and (*c*)) and of maintenance, repairs, and depreciation of cables of the entire cable system of the enterprise based on the ratio which the number of words originating in the United States bears to the total words transmitted by the enterprise.

This Treasury decision is issued under the authority contained in sections 62 and 119 of the Revenue Acts of 1936 and 1934.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved December 22, 1938.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register December 23, 1938, 11.59 a. m.)

ARTICLE 119-15: Computation of income.

REVENUE ACT OF 1936.

Article 119-14, Regulations 94, redesignated. (See T. D. 4877, page 190.)

SUPPLEMENT C.—CREDITS AGAINST TAX.

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

ARTICLE 131-1: Analysis of credit for taxes. 1939-20-9833
G. C. M. 21227

REVENUE ACT OF 1936.

The 5 per cent tax imposed upon nonresidents of Canada with respect to dividends is an income tax within the meaning of section 131(a) of the Revenue Act of 1936 and allowable as a credit against the United States income tax to the extent provided by section 131(b) of that Act.

A taxpayer who claims tax paid to a foreign country as a deduction is precluded, after the expiration of the due date for filing his return, from amending his return and claiming the amount of the tax as a credit against his total United States income tax liability rather than as a deduction.

An opinion is requested whether the tax on dividends imposed by the Dominion of Canada may be claimed as a credit under section 131(a) of the Revenue Act of 1936.

A, the taxpayer, filed a return for the taxable year 1937 in which a deduction of $3x$ dollars was claimed as income tax paid to the Dominion of Canada. This return was filed on March 15, 1938. An amended return was filed on January 18, 1939, accompanied by a claim for refund on account of x dollars claimed as credit for income tax paid to a foreign country on the dividends referred to above. There are in reality two questions involved, namely, (1) whether the tax imposed by Canada on dividends is an income tax, and (2) whether, having claimed the foreign tax as a deduction in the original return, the taxpayer may, after the period for filing the original return has expired, file an amended return and obtain the benefit of such tax as a credit against his United States income tax.

The Canadian income tax on dividends is provided for in section 9B, Part III, of the Income Tax War Act of Canada, which provides in part as follows:

2. *Rate of tax.*—In addition to any other tax imposed by this act an income tax of 5 per centum is hereby imposed on all persons who are nonresidents of Canada in respect of

(a) All dividends received from Canadian debtors irrespective of the currency in which the payment is made * * *.

This office is of the opinion that the 5 per cent tax imposed upon nonresidents of Canada with respect to dividends is an income tax within the meaning of section 131(a) of the Revenue Act of 1936, and is allowable as a credit against the United States income tax to the extent provided by section 131(b) of that Act.

Section 131(a) of the Revenue Act of 1936 provides in part that if the taxpayer signifies in his return his desire to have the benefits of that section, the tax imposed by Title I (Income Tax) shall be credited with the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country, etc. In G. C. M. 19727 (C. B. 1938–1, 255) it was held that income taxes paid to a foreign country should either be allowed as a credit against United States income tax, subject to the limitations contained in section 131 of the Revenue Act of 1936, or allowed as a deduction from gross income under section 23(c) of the Act. That conclusion was based on the decision of the Board of Tax Appeals in *Ralph Leslie Raymond* v. *Commissioner* (34 B. T. A., 1171, acquiescence, C. B. 1938–1, 25) and *Connor* v. *United States* (19 Fed. Supp., 97).

In the instant case, the taxpayer did not signify in his original return his desire to have the benefits of section 131, but claimed a deduction in such return for the income tax paid to Canada on dividends. A taxpayer may claim foreign taxes as a deduction from gross income, or as a credit against his United States income tax, at any time before the due date of his income tax return but not later. Support for this position is found in *Grant* v. *Rose* (24 Fed. (2d), 115), wherein the court stated that "the statutory right of choice is exhausted on expiration of the time for filing returns." The choice referred to in that case was the choice of filing a joint or separate return by the husband or wife. The district court decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit (*Rose* v. *Grant*, 39 Fed. (2d), 340) and has been accepted by the Bureau as a precedent. (See I. T. 2535, C. B. IX–1, 125 (1930).)

In view of the foregoing, this office is of the opinion that a taxpayer also has the right of choice to claim foreign taxes as a credit, or as a deduction, at any time before the last due date on which his return is required to be filed under the applicable Revenue Act. In the instant case, therefore, inasmuch as the taxpayer's return for 1937 was required to be filed on or before March 15, 1938, he could have claimed the foreign taxes as a credit against his United States income tax, or as a deduction from gross income, at any time on or before that date whether in the original or amended return. The right of choice to claim such taxes as a credit having been exhausted after March 15, 1938, there is no basis for allowing the taxpayer to claim such taxes as a credit in the amended return filed on January 18, 1939.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 143–1: Withholding tax at source.

REVENUE ACT OF 1936.

Foreign corporations trading in securities through resident brokers. (See I. T. 3260, page 199.)

ARTICLE 143-1: Withholding tax at source. 1939-12-9759
I. T. 3263

REVENUE ACT OF 1936.

Although payments by the United States under the laws relating to World War veterans are exempt from taxation under section 3 of the Act of August 12, 1935 (49 Stat., 607), the provisions of section 143(b) of the Revenue Act of 1936, with respect to the deduction of income tax of 10 per cent at the source, are applicable with respect to the income derived from estates of nonresident alien veterans accumulated from such payments or from the investment of such funds.

Advice is requested as to the applicability of the withholding provisions of section 143(b) of the Revenue Act of 1936 with respect to payments made to A, a nonresident alien veteran.

The M Company, a domestic corporation, conservator of the estate of A, an incompetent veteran, is receiving from the United States through the Veterans' Administration on behalf of the veteran $4x$ dollars each month based upon service-connected disability. The veteran is a nonresident alien residing in Europe, and his estate has been accumulated from payments made by the Government. The conservator during 1937 deducted 10 per cent income tax at the source from $7x$ dollars income received from investments for the account of the nonresident alien. The question is presented whether the conservator was required to withhold a tax under section 143(b) of the Revenue Act of 1936 in view of the provisions of section 3 of the Act of August 12, 1935 (Public, No. 262, Seventy-fourth Congress, 49 Stat., 607).

Section 3 of the Act of August 12, 1935, provides in part as follows:

* * * Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of a beneficiary under any of the laws relating to veterans *shall be exempt from taxation*, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws *nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments.* * * * [Italics supplied.]

Inasmuch as section 3 is applicable to the benefit payments made to A, such payments are not subject to Federal income tax and withholding of the tax of 10 per cent is not required to be made by the conservator.

As the provisions of such section with respect to exemption from taxation of payments of benefits to veterans or their beneficiaries do not extend to property purchased in part or wholly out of such payments there is nothing in section 3 to prevent the deduction of income tax of 10 per cent at the source from income (as distinguished from the amount of such benefit payments) derived from estates of veterans accumulated from such payments or from the investment of such funds. (See generally *Lawrence* v. *Shaw*, 300 U. S., 245; *McCurry* v. *Peek*, 187 S. E., 854; *Henderson* v. *City of Missoula*, 79 P. (2d), 547.)

ARTICLE 143–1: Withholding tax at source.

REVENUE ACT OF 1936.

Annuities paid by branch office of domestic life insurance company in China on contracts issued in China. (See I. T. 3280, page 197.)

SUPPLEMENT E.—ESTATES AND TRUSTS.

SECTION 162.—NET INCOME.

ARTICLE 162–1: Income of estates and trusts. 1939–14–9772
G. C. M. 20965

REVENUE ACT OF 1936.

Where, by a decree of a court of competent jurisdiction, ultimate disposition of that portion of the income of the trust created under the will of A which is allocable to the share of C, a deceased beneficiary, was deferred until it is determined who is entitled to the corpus, such income is taxable to the trust.

An opinion is requested as to the taxation of that part of the income of a testamentary trust created by A, a resident of the State of S, which is allocable to the share of C, a deceased beneficiary.

Decedent's estate was devised to his three childern, B, C, and D, to hold in trust for a period of 15 years after his death and so long thereafter as might be necessary to carry out the purposes of article — of his will. Certain annuities were provided for and the income from the remainder of the estate was, during the 15-year period, to be divided into three equal parts for the use of the three children of the decedent. It was further provided that "if any of my said children die without issue, said share shall revert to the corpus of my estate." C died prior to 1936 without issue and B and D, the surviving trustees of the trust, retained in trust the one-third of the income which would have been distributable to C had she been alive in 1936. To whom such income is taxable is the issue presented.

It is admitted that there is considerable doubt whether under the laws of the State of S the provision in the will that the share of any child dying without issue shall revert to the corpus of the estate is valid. The taxpayer, B, states, however, that it is not now possible to say whether that particular one-third of the trust income is properly distributable to B and D or whether it is properly distributable to the statutory takers, if any, of that part of the estate of which A should die intestate. It is also pointed out that if the provision in the will for the reversion to corpus of the share of any child dying without issue is valid, it is impossible to determine conclusively prior to the expiration of the 15-year period whether B and D will be entitled equally to such income.

In the year 1936, the surviving trustees filed a second and partial accounting of the trust in the Orphans Court of R County, State of S. This accounting came up for audit and in its decree dated ———, 1936, the accumulated income of the trust was disposed of by the following statement:

To B and D, surviving trustees, to be held by them until it can be determined who is entitled to the corpus, ⅓ of income, viz: $23x$ dollars.

The trustees state that the decree of the court was considered by them as binding and conclusive in so far as the distribution of the one-third of the income of the trust is concerned; and that so long as the decree was in effect the income was not distributable to anyone.

It is the opinion of this office that the decree of the Orphans Court of R County, State of S, until reversed or overruled establishes the law of that State as to the distribution of the income in question. It is a well recognized rule that where the question involved is the meaning of a Federal revenue law, the will of Congress controls over local law. (*Eagan* v. *Commissioner*, 43 Fed. (2d), 881.) However, when the application of the Federal revenue law is dependent upon facts which can be interpreted only in accordance with State rules of property, the State rule must prevail. Such appears to be the situation here.

Freuler v. *Helvering* (291 U. S., 35) is one of the leading cases on the conclusiveness of a determination by a local court concerning the correct amount distributable to a trust beneficiary. It was there held that the decree of the State court was binding. The court stated:

> Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying section 219 of the Act of 1921.

In the Freuler case it was argued that the proceeding in the State court was a collusive one, but the Supreme Court refused to accept the argument, stating:

> The respondent suggests that the proceeding in the State court was a collusive one—collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax. We can not so hold, in view of the record in the State court which is made a part of the record here. The case appears to have been initiated by the filing of a trustee's account, in the usual way. Notice was given to the interested parties. Objections to the account were presented, and the matter came on for hearing in due course, all parties being represented by counsel. The decree purports to decide issues regularly submitted and not to be in any sense a consent decree. * * *

(To the same effect are *Blair* v. *Commissioner*, 300 U. S., 5; *Letts* v. *Commissioner*, 84 Fed. (2d), 760; *Hubbell* v. *Helvering*, 70 Fed. (2d), 668; and *Susan B. Armstrong* v. *Commissioner*, 38 B. T. A., 658, acquiescence, page 2, this Bulletin.)

It is clear in the present case that the Orphans Court of R County was a court having jurisdiction of the administration of the trust. It is established that the decree obtained was in no way collusive. The effect of this decree was to determine that the income in question, which would have been distributable to C had she lived, was to be held in trust until a determination is made as to the person or persons entitled thereto.

Article 162–1 of Regulations 94 provides as follows:

> There is taxable to the estate or to the trust * * * all income thereof accumulated for the benefit of unborn or unascertained persons or persons with contingent interests * * *.

Under the facts presented in the present case, and in view of the decree of the Orphans Court, County of R, State of S, it is the opinion

of this office that the income in question is to be accumulated for the benefit of unascertained persons within the meaning of the above-quoted provision of the regulations. Accordingly, it is held that such income is not distributable to B and D within the meaning of section 162 of the Revenue Act of 1936, but is taxable to the trust.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

SECTION 165.—EMPLOYEES' TRUSTS.

(Also Section 23(a), Article 23(a)-6.) 1939-14-9773
I. T. 3268

REVENUE ACT OF 1936.

The trust established by A for the purpose of providing payment of reasonable pensions to his regular employees, A not being a beneficiary of the trust, is within the purview of section 165 of the Revenue Act of 1936, relating to employees' trusts. Taxpayer's contributions to the trust are deductible by him as additional compensation paid. However, to the extent taxpayer's contributions are applied toward the payment of premiums on life insurance policies covering lives of employees, such amount constitutes additional income to the employees and should be included in their returns for the year or years in which so applied.

Advice is requested whether the pension fund created by the taxpayer, A, is within the provisions of section 165 of the Revenue Act of 1936, relating to employees' trusts, and whether taxpayers' contributions to the trust are deductible by him.

The pension trust was created by the taxpayer under indenture dated June —, 1937. The stated purpose of the plan is to provide for the payment of reasonable pensions to taxpayer's employees. Provision is made for the establishment of a trust fund known as the pension fund. The pension fund consists of contributions made by the taxpayer together with dividends and earnings thereon. All employees, except part time and casual employees, are eligible to participate in trust fund benefits. Although the trust instrument as originally drawn included A as a beneficiary of the trust, his name was withdrawn prior to the effective date of the trust since an employer can not be his own employee. If A were included as a beneficiary, the trust would not operate for the "exclusive" benefit of his employees as required by section 165 of the various Revenue Acts.

The trustees are to purchase retirement income insurance "with or without death benefits" for each insurable participant. The plan also provides that in the event of death of a participant, death benefits under the policy shall be paid to the employee's wife, or to his estate. The trust instrument may be amended, modified, altered, or terminated at any time by taxpayer, with the provision, however, that any such action shall not have retroactive effect and no part of the fund then existing may be returned to the taxpayer.

On the basis of the foregoing, it is held that the trust in question qualifies as an employees' trust under section 165 of the applicable

Revenue Acts, and taxpayer's contributions thereto are deductible by him as additional compensation paid. However, it will be observed that a part of taxpayer's contributions may be used for the purpose of providing insurance on the lives of his employees. To the extent taxpayer's contributions are applied toward the payment of premiums on life insurance policies covering lives of employees, such amount constitutes additional income to the employees and should be included in their returns for the year or years in which so applied.

SUPPLEMENT H.—NONRESIDENT ALIEN INDIVIDUALS.

SECTION 212.—GROSS INCOME.

ARTICLE 212-1: Gross income of nonresident alien individuals. (Also Section 143, Article 143-1.)

1939-21-9842
I. T. 3280

REVENUE ACT OF 1936.

Withholding of income tax is not required of the M Company, a domestic life insurance company, with respect to the periodic payments made in China on annuity contracts issued by its branch office in China to nonresident aliens, which contracts are secured by assets held in China.

Advice is requested whether section 143(b) of the Revenue Act of 1936 requires withholding of income tax by the M Company, a domestic life insurance company, with respect to periodic payments on annuity contracts written in Hongkong, China, where such payments are made to nonresident aliens residing in China.

The M Company issues annuity contracts through its branch office in China in foreign currencies such as Hongkong dollars and British pounds. Receipts in foreign currencies are maintained in banks and are invested in China, as it is the policy of the company to maintain bank deposits or investments in foreign currency assets approximately equivalent to its foreign currency liabilities, so that it may not be subject to possible loss as the result of fluctuation in the exchange rates as between assets and liabilities. Payments on foreign currency contracts are made from such funds. The M Company is required to make deposits in the Crown Colony of Hongkong in accordance with the following provisions of the Hongkong Life Insurance Companies Ordinance No. 11 of 1907:

3-(1) Every company, wherever established, which shall begin to carry on the business of life insurance within the colony, and every company registered in Hongkong which shall begin to carry on the business of life insurance in China, shall deposit and keep deposited with the registrar securities to be approved by the governor in council to the value of 50,000 Hongkong dollars.

(4) In augmentation of the deposit mentioned in subsection (1), every company liable to make a deposit under this section shall be required to make and keep deposited further deposit up to 200,000 Hongkong dollars, and until such further deposit is made it shall send in yearly to the registrar returns under the oath of the chairman, agent, secretary, or other principal officer

of the company of the amount of premiums received by the company on account of such policies issued, granted, or entered into in Hongkong, and in the case of a company registered in Hongkong, entered into in China, by such company whether before or after the commencement of this ordinance, as the company is, for the time being liable in respect of. And the company shall after deducting 25 per cent therefrom and the net amount of losses or claims actually paid in respect of such policies, deposit with the registrar securities of such kinds as aforesaid, to the value of such balance of premiums, until the deposit equals 200,000 Hongkong dollars.

(7) All securities deposited with the registrar shall be lodged by him with the treasurer for safe custody.

As of December —, 1938, the M Company had on deposit with the registrar certificates of deposit of the N Bank, Hongkong, aggregating $80x$ dollars, and Hongkong Government bonds in the amount of $45x$ dollars, or a total of $125x$ dollars. The above deposits were in Hongkong dollar currency as required by the law. The M Company's entire liability to contract holders in Hongkong, including the reserves on outstanding contracts as at the date of its last valuation, totaled $61x$ Hongkong dollars. Assets equaling obligations to contract holders in Hongkong were physically held in Hongkong. The payments made to annuitants in Hongkong are made from funds deposited there and derived from the income of such Hongkong assets and from payments made by Hongkong annuitants.

Section 212(a) of the Revenue Act of 1936 provides:

General rule.—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.

The term "source" is defined in Webster's New International Dictionary as:

That from which anything comes forth, regarded as its cause or origin; the first cause.

It is the opinion of this office that the word "sources" as used in section 212(a) in determining the taxability of annuity payments means the thing or activity from which income is derived, and the situs of such thing or activity will determine the source of the income. Applying this principle to the instant case, it is held that the annuity contract is the thing or activity from which the income, consisting of annuity payments, is derived. The annuity contracts which are issued by the branch office of the M Company in China have a situs in China. It follows, therefore, that the situs of the income derived from such annuity contracts is also in China. Consequently, the income derived by nonresident aliens from such annuity contracts is not to be treated as income from sources within the United States. This ruling applies to the annuity contracts issued by the branch office in Hongkong whether they are issued in Hongkong dollars or British pounds. As the income derived from such annuity contracts is not to be treated as income from sources within the United States, the withholding provisions of the Federal income tax laws are not applicable. (See section 143(b) of the Revenue Act of 1936.)

SECTION 231.—TAX ON FOREIGN CORPORATIONS.

ARTICLE 231–1: Taxation of foreign corporations. 1939–10–9743
(Also Section 143, Article 143–1.) I. T. 3260

REVENUE ACT OF 1936.

The renting in the United States of an office which is occupied by an assistant secretary, whose only duties were to receive dividends and interest from securities purchased by foreign corporations through resident brokers, such securities being held by local banks as custodians, does not result in such foreign corporations being engaged in a trade or business within the United States or having an office or place of business therein.

Advice is requested whether the M Company, the N Company, and the O Company, three foreign corporations, are to be considered as engaged in a trade or business or having an office or place of business in the United States during the calendar year 1936 for the purposes of section 231(b) and section 143(b) of the Revenue Act of 1936.

Until December —, 1936, the M Company, the N Company, and the O Company had custodian accounts with the P Company and the Q National Bank, both of the city of S. These custodian accounts consisted of American securities and the income derived therefrom. Sales of securities in the United States were based on cable orders to American stock brokers and instructions to the custodians concerning the delivery of the securities involved in such sales. Purchases of securities were also based on instructions issued to brokers who were requested to deliver the securities purchased to the respective custodians.

On December —, 1936, the custodians of the securities purchased and sold within the United States by the foreign corporations were advised that an office had been established in the United States at —— R Street, city of S, and that one, A, had been appointed as assistant secretary. In these communications the custodians were requested to transfer the securities held by them as custodians into the "name of such nominee as you may select"; and that after the making of the necessary transfers "your nominee issue such dividend orders as may be required" so that future dividends would be mailed to the assistant secretary. The custodians remained in possession of the securities but collected no income therefrom. The procedure theretofore followed with respect to purchases and sales of securities was not changed, the authority to consummate all such transactions being retained by the foreign office so that the only function of the assistant secretary was the collection of the income from securities and the keeping of the necessary records with respect to such collections.

It is stated by the assistant secretary that the purpose of maintaining the office was only to collect the income from the investments held by the foreign corporations through two resident custodians. The lease executed by and between the T Corporation as the "landlord" and A as assistant secretary of the N Company was for a period of five months and contains a specific provision that the lease

may be terminated as of the last day of any month during such period.

Section 211(b) of the Revenue Act of 1936 provides in part that as used in that section and section 231 the phrase "engaged in trade or business within the United States" does not include the effecting of transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian. It follows, therefore, that the buying and selling of securities in the United States on cable orders to resident stock brokers or through custodians do not constitute engaging in trade or business within the United States.

The three corporations are not otherwise engaged in trade or business within the United States and can not be classed as resident foreign corporations under section 231(b) unless the appointment of A as assistant secretary and the leasing of office space constitutes "having an office or place of business" within the United States within the meaning of section 231 of the Revenue Act of 1936.

Article 231–1(*b*) of Regulations 94, promulgated under the Revenue Act of 1936, states in part as follows:

> Whether a foreign corporation has an "office or place of business" within the United States depends upon the facts in a particular case. The term "office or place of business," however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

The office in the instant case was not a place established for the regular transaction of the business, but was a place where casual or incidental transactions were effected. The regular business of each of the corporations under consideration was the buying and selling of securities through resident brokers or through custodians in the United States. This is the type of business specifically excluded by section 211(b) as not coming within the meaning of the term "trade or business" as used in that section and section 231(b). It appears from the facts that although the corporations appointed A as assistant secretary, his duties consisted merely of the collecting of income derived from interest and dividends. Such activities, being incidental to the regular business of the corporations, could not reasonably be considered as the active conduct of a trade or business within the United States. (See G. C. M. 18835, C. B. 1937–2, 141; *Eaton* v. *Phoenix Securities Co.*, 22 Fed. (2d), 497; *Del Norte Co.* v. *Wilkinson*, 28 Fed. (2d), 876; *Rose* v. *Nunnally Investment Co.*, 22 Fed. (2d), 102.) The mere renting of office space for certain limited purposes does not meet the requirement of the statute. (See also *Hovey* v. *De Long Hook & Eye Co.*, 211 N. Y., 420, 105 N. E., 667.)

In *McCoach* v. *Minehill & Schuylkill Haven Railroad Co.* (228 U. S., 295), which arose under the Act of August 5, 1909, the Court stated that the mere receipt of income from property did not constitute engaging in business and commented as follows:

> * * * The distinction is between (*a*) the receipt of income from outside property or investments by a company that is otherwise engaged in business; in which event the investment income may be added to the business income in order to arrive at the measure of the tax, and (*b*) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income and dividing it among its stockholders. In the former case the tax is payable; in the latter not.

In G. C. M. 17014 (C. B. XV–2, 317 (1936)) it was held in part that "the test of liability for income tax, excess-profits tax, and capital stock tax, in so far as such taxes were based upon, or measured by, engaging in or doing business within the United States, should be identical." It was concluded that if the foreign corporation was engaged in trade or business for income tax purposes it was doing business for capital stock tax purposes. Conversely, if a foreign corporation was not engaged in business for income tax purposes, it was not doing business for capital stock tax purposes. In this connection attention is invited to the case of the *Union Internationale de Placements* v. *Hoey* (96 Fed. (2d), 591), in which the court held with respect to tax years not affected by the Revenue Act of 1936 that the buying and selling of securities through domestic brokers did not constitute "doing business" in the United States for capital stock tax purposes.

In view of the foregoing, it is held that during the calendar year 1936, for the purposes of section 231(b) and section 143(b), the three corporations referred to herein (1) were not engaged in trade or business within the United States, and (2) had no office or place of business within the United States.

ARTICLE 231–1: Taxation of foreign corporations. 1939–25–9882
G. C. M. 21219

REVENUE ACT OF 1936.

The arrangement for the exclusive sale of its products in the United States between the M Company, a foreign corporation, and the N Company, a domestic corporation, was one of ordinary principal and agent, and the M Company was engaged in trade or business within the United States during the year 1936. The M Company was, therefore, a resident corporation within the meaning of section 231(b) of the Revenue Act of 1936.

An opinion is requested whether the M Company, a foreign corporation, is to be regarded as a resident corporation within the meaning of section 231(b) of the Revenue Act of 1936.

The agreement between the M Company, a foreign corporation, and the N Company, a domestic corporation, provides that the M Company conveys to the N Company the sole agency for the sale of its products in the United States. The N Company agrees to make sales of such products within the United States; not to make sales of the same kind of products of any other company except on express permission from the M Company; not to make sales of M Company products to purchasers domiciled outside of the United States or to any competitor of the M Company without consent of that company; and not to take a financial interest in any competitor of the M Company. It is also provided that the N Company will secure yearly contracts which will be subject to the approval of the M Company. The N Company assumes the full del credere for all sales executed, except that the M Company agrees to share equally with the N Company any loss incurred up to a specified amount in any one year during the life of the agreement. It is further provided that the N Company is to receive a commission based on a graduated percentage of the selling price of the products.

The taxpayer contends that it is a nonresident foreign corporation within the meaning of section 231(a) of the Revenue Act of 1936 and relies on G. C. M. 17014 (C. B. XV-2, 317 (1936)). In that memorandum it was held that where a foreign corporation has a capital stock tax taxable year ending within an income-tax taxable year controlled by the Revenue Act of 1936, and such corporation has no office or place of business within the United States, and its only activities consist of effecting transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian, such corporation is exempt from the capital stock tax imposed by section 105(b) of the Revenue Act of 1935, as amended. It was also held in G. C. M. 17014, supra, that the term "engaged in trade or business within the United States" as used in section 231(b) of the Revenue Act of 1936 relating to income tax, and the term "carrying on or doing business in the United States" as used in section 105(b) of the Revenue Act of 1935, as amended, relating to capital stock tax, have the same meaning. It was stated in that ruling that it apparently was the intention of Congress that the test of liability for income tax, excess-profits tax, and capital stock tax, in so far as such taxes were based upon, or measured by, engaging in or doing business within the United States, should be identical.

Under the terms of the agreement in the instant case, it is evident that the taxpayer (the M Company) is engaged in trade or business in the United States through an ordinary agent who sells its products in the United States. The so-called "del credere" provision indicates an ordinary agency rather than that of a "commission agent," and this is not changed by the fact that the agent agrees to share in the losses. On this point it is stated in the American Law Institute Restatement of the Law of Agency, section 424, page 970, as follows:

> d. *Del credere liability.*—A sales agent may assume a del credere liability. If so, he has a duty to pay the principal what the purchaser fails to pay, whether or not this is due to the insolvency of the purchaser or to other causes. * * *

The words "commission agent" in section 211(b) of the Revenue Act of 1936 contemplate a person similar to a broker who effects transactions in commodities for the public in general as distinguished from an ordinary agent who receives his compensation on the basis of a percentage of merchandise sold. The idea of exclusiveness enters into an employment of agency, while, with respect to brokers, there is a holding out of one's self generally for employment in matters of trade, commerce, etc. (See *Stratford* v. *City Council of Montgomery*, 110 Ala., 619, 20 S., 127.) The use of the words "commission agent" in the statute does not contemplate the case where a foreign corporation carries on the business in the United States of selling products or merchandise in this country through an ordinary agent, nor is this situation changed by the fact that the compensation of the agent is measured by a percentage of the volume of business transacted. Such an agent is more in the nature of an employee than an independent broker or commission merchant. It has been held that even where a person was employed to sell or distribute products of an employer and described as a "commission agent," being paid on a commission basis, he was nevertheless an "agent" and the principal was liable for the

agent's acts under the Workmen's Compensation Act. (*Roberts* v. *United States Fidelity & Guaranty Co.*, 42 Ga. App., 668, 157 S. E., 537.)

In view of the foregoing, it is evident that the arrangement is one whereby the M Company conveys to the N Company the sole agency for the sale of the former's products in the United States and the agent agrees to sell such products exclusively for its principal. The arrangement is one of ordinary principal and agent through which the M Company carries on its activities in the United States. In other words, the taxpayer (the M Company) ships products to this country which are sold from time to time by an agent employed exclusively for the purpose of securing orders—making sales—for the taxpayer's products. It is the opinion of this office that the gist of the whole agreement is contained in that part thereof which states that "The M Company conveys to the N Company the *sole agency* for the sale of its products in the United States."

After careful consideration of the facts submitted, it is held that the M Company was engaged in trade or business within the United States during the year 1936, and is, therefore, a resident corporation within the meaning of section 231(b) of the Revenue Act of 1936.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

SUPPLEMENT L.—ASSESSMENT AND COLLECTION OF DEFICIENCIES.

SECTION 274.—BANKRUPTCY AND RECEIVERSHIPS.

ARTICLE 274–1: Bankruptcy, proceedings for the relief of debtors, and receiverships. 1939–15–9791 T. D. 4892

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 3.

Income tax—Immediate assessment in bankruptcy and receivership cases.—Articles 1293 and 1294 of Regulations 69, 1191 and 1192 of Regulations 74 and 77, and 274–1 and 274–2 of Regulations 86 and 94 amended.

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

To Collectors of Internal Revenue and others concerned:

Article 1293 of Regulations 69 is amended to read as follows:

ART. 1293. *Bankruptcy and receivership proceedings.*—During a bankruptcy proceeding, or an equity receivership proceeding in either a Federal or a State court, the assets of the taxpayer are in general under the control of the court in which such proceeding is pending, and the collection of taxes can not be made by distraining upon such assets. However, any assets which under applicable provisions of law are not under the control of the court may be subject to distraint.

As used in these regulations the term "bankruptcy proceeding" includes proceedings under Chapters I to VII of the Bankruptcy Act, as amended, or under section 74, 75, 77, or 77B, or Chapters X to XIII, of such Act, as amended; and the term "adjudication of bankruptcy" includes, in addition to an adjudication in a proceeding under Chapters I to VII, the approval of a petition as properly filed under section 77 or 77B or Chapter X by a court of competent jurisdiction or the filing of a petition under section 74 or 75 or Chapters XI to XIII with a court of competent jurisdiction.

A trustee in bankruptcy (including a trustee, receiver, debtor in possession, or other person designated as in control of the assets of a debtor in any bankruptcy proceeding by order of the court in which such proceeding is pending) or a receiver in any receivership proceeding is required to give notice in writing to the Commissioner of Internal Revenue in Washington, D. C., of the adjudication of bankruptcy or the appointment of a receiver. (See section 282(a), as amended by section 505 of the Revenue Act of 1934.)

Collectors should, promptly after notice of outstanding liability against a taxpayer in any bankruptcy or receivership proceeding, and in any event within the time limited by the appropriate provisions of the Bankruptcy Act, as amended, and the orders of the court in which such proceeding is pending, file claim covering such liability in the court in which such proceeding is pending. Such claim should be filed whether the unpaid taxes involved have been assessed or not, except in cases where the departmental instructions direct otherwise; for example, where the payment of the taxes is secured by a sufficient bond. Such claim should cover the amount represented by the assessment, plus interest at the rate of 6 per cent per annum for the period from the date of filing claim by the collector to the date of termination of the bankruptcy or receivership proceeding or to the date of payment if payment is made in full prior to such termination. At the same time claim is filed with the bankruptcy or receivership court, the collector will send notice and demand for payment to the taxpayer together with a copy of such claim.

Under section 3466 of the Revised Statutes and section 3467 of the Revised Statutes, as amended, and section 64 of the Bankruptcy Act, as amended, taxes are entitled to the priority over other claims therein stated and the trustee, receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which bankruptcy or receivership proceeding is pending, may be held personally liable for failure on his part to protect the priority of the Government respecting taxes of which he has notice. Bankruptcy courts have jurisdiction under the Bankruptcy Act, as amended, to determine all disputes regarding the amount and validity of taxes of a bankrupt or of a debtor in a proceeding under the Bankruptcy Act, as amended. A bankruptcy or receivership proceeding does not discharge any portion of a claim of the United States for taxes except in the case of a proceeding under Chapter X of the Bankruptcy Act, as amended, and except to the extent which may be provided in a plan or arrangement duly effectuated in a bankruptcy proceeding; and any portion of a claim of the United States for taxes which has been allowed by the court in which the bankruptcy or receivership proceeding is pending and which remains unsatisfied after the termination of the bankruptcy or receivership proceeding shall be collected with interest as provided in sections 282 (b) and (c) of the Act and section 404 of the Revenue Act of 1935.

Article 1294 of Regulations 69 is amended to read as follows:

ART. 1294. *Immediate assessments in bankruptcy and receivership cases.*—If the Commissioner has determined that a deficiency is due in respect of income tax and the taxpayer has filed a petition with the Board of Tax Appeals prior to the adjudication of bankruptcy or the appointment of a receiver, the trustee, receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which the bankruptcy or receivership proceeding is pending, may prosecute the taxpayer's appeal before the Board as to that particular determination. No petition shall be filed with the Board for a redetermination of the deficiency after the adjudication of bankruptcy or the appointment of a receiver.

Claim for the amount of a deficiency, even though pending before the Board for consideration, may be filed with the court in which the bankruptcy or receivership proceeding is pending without awaiting final decision of the Board. In case of final decision of the Board before the termination of the bankruptcy, debtor, or receivership proceeding, a copy of the Board's decision may be filed by the Commissioner with the court in which such proceeding is pending.

While the Commissioner is required by section 282, as amended by section 505 of the Revenue Act of 1934, to make immediate assessment of any deficiency, such assessment is not made as a jeopardy assessment within the meaning of section 279, as amended by section 819 (b) and (c) of the Revenue Act of 1938, and consequently the provisions of that section do not apply to any assessment made under section 282, as amended. Therefore, the notice of the deficiency provided for in section 279(b) will not be mailed. Although such notice will not

be issued, nevertheless a letter will be sent to the taxpayer, or to the trustee, receiver, debtor in possession, or other person designated by the court in which the bankruptcy or receivership proceeding is pending as in control of the assets of the debtor, notifying him in detail how the deficiency was computed, that he may furnish evidence showing wherein the deficiency is incorrect, and that upon request he will be granted a hearing with respect to such deficiency. If after such evidence is submitted and hearing held any adjustment appears necessary in the deficiency, appropriate action will be taken. A copy of the notification letter will be attached to the assessment list as the collector's authority for filing claim in any bankruptcy or receivership proceeding.

If any portion of the claim allowed by the court in a bankruptcy or receivership proceeding remains unpaid after the termination of such proceeding, the collector will send notice and demand for payment thereof to the taxpayer. Such unpaid portion with interest as provided in sections 282 (b) and (c) of the Act and section 404 of the Revenue Act of 1935, may be collected from the taxpayer by distraint or proceeding in court within six years after the termination of the bankruptcy, debtor, or receivership proceeding. Extensions of time for the payment of such unpaid amount may be granted in the same manner and subject to the same provisions and limitations as provided in section 274(k), as amended by section 502 of the Revenue Act of 1928 and by section 816 of the Revenue Act of 1938. (See article 1234.)

This article deals only with immediate assessments provided for in section 282, as amended, and the procedure in connection with such assessments.

Articles 1191 of Regulations 74 and 77 are amended to read as follows:

ART. 1191. *Bankruptcy and receivership proceedings.*—During a bankruptcy proceeding, or an equity receivership proceeding in either a Federal or a State court, the assets of the taxpayer are in general under the control of the court in which such proceeding is pending, and the collection of taxes can not be made by distraining upon such assets. However, any assets which under applicable provisions of law are not under the control of the court may be subject to distraint.

As used in these regulations the term "bankruptcy proceeding" includes proceedings under Chapters I to VII of the Bankruptcy Act, as amended, or under section 74, 75, 77, or 77B, or Chapters X to XIII, of such Act, as amended; and the term "adjudication of bankruptcy" includes, in addition to an adjudication in a proceeding under Chapters I to VII, the approval of a petition as properly filed under section 77 or 77B or Chapter X by a court of competent jurisdiction or the filing of a petition under section 74 or 75 or Chapters XI to XIII with a court of competent jurisdiction.

A trustee in bankruptcy (including a trustee, receiver, debtor in possession, or other person designated as in control of the assets of a debtor in any bankruptcy proceeding by order of the court in which such proceeding is pending) or a receiver in any receivership proceeding is required to give notice in writing to the Commissioner of Internal Revenue in Washington, D. C., of the adjudication of bankruptcy or the appointment of a receiver. (See section 274(a), as amended by section 505 of the Revenue Act of 1934.)

Collectors should, promptly after notice of outstanding liability against a taxpayer in any bankruptcy or receivership proceeding, and in any event within the time limited by the appropriate provisions of the Bankruptcy Act, as amended, and the orders of the court in which such proceeding is pending, file claim covering such liability in the court in which such proceeding is pending. Such claim should be filed whether the unpaid taxes involved have been assessed or not, except in cases where the departmental instructions direct otherwise; for example, where the payment of the taxes is secured by a sufficient bond. Such claim should cover the amount represented by the assessment, plus interest at the rate of 6 per cent per annum for the period from the date of filing claim by the collector to the date of termination of the bankruptcy or receivership proceeding or to the date of payment if payment is made in full prior to such termination. At the same time claim is filed with the bankruptcy or receivership court, the collector will send notice and demand for payment to the the taxpayer together with a copy of such claim.

Under section 3466 of the Revised Statutes and section 3467 of the Revised Statutes, as amended, and section 64 of the Bankruptcy Act, as amended, taxes are entitled to the priority over other claims therein stated and the trustee,

receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which bankruptcy or receivership proceeding is pending, may be held personally liable for failure on his part to protect the priority of the Government respecting taxes of which he has notice. Bankruptcy courts have jurisdiction under the Bankruptcy Act, as amended, to determine all disputes regarding the amount and validity of taxes of a bankrupt or of a debtor in a proceeding under the Bankruptcy Act, as amended. A bankruptcy or receivership proceeding does not discharge any portion of a claim of the United States for taxes except in the case of a proceeding under Chapter X of the Bankruptcy Act, as amended, and except to the extent which may be provided in a plan or arrangement duly effectuated in a bankruptcy proceeding; and any portion of a claim of the United States for taxes which has been allowed by the court in which the bankruptcy or receivership proceeding is pending and which remains unsatisfied after the termination of the bankruptcy or receivership proceeding shall be collected with interest as provided in section 298 of the Act and section 404 of the Revenue Act of 1935.

Articles 1192 of Regulations 74 and 77 are amended to read as follows:

ART. 1192. *Immediate assessments in bankruptcy and receivership cases.*— If the Commissioner has determined that a deficiency is due in respect of income tax and the taxpayer has filed a petition with the Board of Tax Appeals prior to the adjudication of bankruptcy or the appointment of a receiver, the trustee, receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which the bankruptcy or receivership proceeding is pending, may prosecute the taxpayer's appeal before the Board as to that particular determination. No petition shall be filed with the Board for a redetermination of the deficiency after the adjudication of bankruptcy or the appointment of a receiver.

Claim for the amount of a deficiency, even though pending before the Board for consideration, may be filed with the court in which the bankruptcy or receivership proceeding is pending without awaiting final decision of the Board. In case of final decision of the Board before the termination of the bankruptcy, debtor, or receivership proceeding, a copy of the Board's decision may be filed by the Commissioner with the court in which such proceeding is pending.

While the Commissioner is required by section 274, as amended by section 505 of the Revenue Act of 1934, to make immediate assessment of any deficiency, such assessment is not made as a jeopardy assessment within the meaning of section 273, as amended by section 819 (a) and (e) of the Revenue Act of 1938, and consequently the provisions of that section do not apply to any assessment made under section 274, as amended. Therefore, the notice of the deficiency provided for in section 273(b) will not be mailed. Although such notice will not be issued, nevertheless a letter will be sent to the taxpayer, or to the trustee, receiver, debtor in possession, or other person designated by the court in which the bankruptcy or receivership proceeding is pending as in control of the assets of the debtor, notifying him in detail how the deficiency was computed, that he may furnish evidence showing wherein the deficiency is incorrect, and that upon request he will be granted a hearing with respect to such deficiency. If after such evidence is submitted and hearing held any adjustment appears necessary in the deficiency, appropriate action will be taken. A copy of the notification letter will be attached to the assessment list as the collector's authority for filing claim in any bankruptcy or receivership proceeding.

If any portion of the claim allowed by the court in a bankruptcy or receivership proceeding remains unpaid after the termination of such proceeding, the collector will send notice and demand for payment thereof to the taxpayer. Such unpaid portion with interest as provided in section 298 of the Act and section 404 of the Revenue Act of 1935, may be collected from the taxpayer by distraint or proceeding in court within six years after the termination of the bankruptcy, debtor, or receivership proceeding. Extensions of time for the payment of such unpaid amount may be granted in the same manner and subject to the same provisions and limitations as provided in sections 272(j), as amended by section 816 of the Revenue Act of 1938, and 297. (See article 1173.)

This article deals only with immediate assessments provided for in section 274, as amended, and the procedure in connection with such assessments.

Article 274–1 of Regulations 86 is amended to read as follows:

ART. 274–1. *Bankruptcy and receivership proceedings.*—During a bankruptcy proceeding, or an equity receivership proceeding in either a Federal or a State court, the assets of the taxpayer are in general under the control of the court in which such proceeding is pending, and the collection of taxes can not be made by distraining upon such assets. However, any assets which under applicable provisions of law are not under the control of the court may be subject to distraint.

As used in these regulations the term "bankruptcy proceeding" includes proceedings under Chapters I to VII of the Bankruptcy Act, as amended, or under section 74, 75, 77, or 77B, or Chapters X to XIII, of such Act, as amended; and the term "adjudication of bankruptcy" includes, in addition to an adjudication in a proceeding under Chapters I to VII, the approval of a petition as properly filed under section 77 or 77B or Chapter X by a court of competent jurisdiction or the filing of a petition under section 74 or 75 or Chapters XI to XIII with a court of competent jurisdiction.

A trustee in bankruptcy (including a trustee, receiver, debtor in possession, or other person designated as in control of the assets of a debtor in any bankruptcy proceeding by order of the court in which such proceeding is pending) or a receiver in any receivership proceeding is required to give notice in writing to the Commissioner of Internal Revenue in Washington, D. C., of the adjudication of bankruptcy or the appointment of a receiver. (See section 274(a) and article 275–1.)

Collectors should, promptly after notice of outstanding liability against a taxpayer in any bankruptcy or receivership proceeding, and in any event within the time limited by the appropriate provisions of the Bankruptcy Act, as amended, and the orders of the court in which such proceeding is pending, file claim covering such liability in the court in which such proceeding is pending. Such claim should be filed whether the unpaid taxes involved have been assessed or not, except in cases where the departmental instructions direct otherwise; for example, where the payment of the taxes is secured by a sufficient bond. Such claim should cover the amount represented by the assessment, plus interest at the rate of 6 per cent per annum for the period from the date of filing claim by the collector to the date of termination of the bankruptcy or receivership proceeding or to the date of payment if payment is made in full prior to such termination. At the same time claim is filed with the bankruptcy or receivership court, the collector will send notice and demand for payment to the taxpayer together with a copy of such claim.

Under section 3466 of the Revised Statutes and section 3467 of the Revised Statutes, as amended (paragraphs 40 and 41, respectively, of the Appendix to these regulations), and section 64 of the Bankruptcy Act, as amended, taxes are entitled to the priority over other claims therein stated and the trustee, receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which bankruptcy or receivership proceeding is pending, may be held personally liable for failure on his part to protect the priority of the Government respecting taxes of which he has notice. Bankruptcy courts have jurisdiction under the Bankruptcy Act, as amended, to determine all disputes regarding the amount and validity of taxes of a bankrupt or of a debtor in a proceeding under the Bankruptcy Act, as amended. A bankruptcy or receivership proceeding does not discharge any portion of a claim of the United States for taxes except in the case of a proceeding under Chapter X of the Bankruptcy Act, as amended, and except to the extent which may be provided in a plan or arrangement duly effectuated in a bankruptcy proceeding; and any portion of a claim of the United States for taxes which has been allowed by the court in which the bankruptcy or receivership proceeding is pending and which remains unsatisfied after the termination of the bankruptcy or receivership proceeding shall be collected with interest as provided in section 298.

Article 274–2 of Regulations 86 is amended to read as follows:

ART. 274–2. *Immediate assessments in bankruptcy and receivership cases.*—If the Commissioner has determined that a deficiency is due in respect of income tax and the taxpayer has filed a petition with the Board of Tax Appeals prior to the adjudication of bankruptcy or the appointment of a receiver, the trustee, receiver, debtor in possession, or other person designated

as in control of the assets of the debtor by the court in which the bankruptcy or receivership proceeding is pending, may prosecute the taxpayer's appeal before the Board as to that particular determination. No petition shall be filed with the Board for a redetermination of the deficiency after the adjudication of bankruptcy or the appointment of a receiver.

Claim for the amount of a deficiency, even though pending before the Board for consideration, may be filed with the court in which the bankruptcy or receivership proceeding is pending without awaiting final decision of the Board. In case of final decision of the Board before the termination of the bankruptcy, debtor, or receivership proceeding, a copy of the Board's decision may be filed by the Commissioner with the court in which such proceeding is pending.

While the Commissioner is required by section 274 to make immediate assessment of any deficiency, such assessment is not made as a jeopardy assessment within the meaning of section 273, as amended by section 819 (a) and (e) of the Revenue Act of 1938, and consequently the provisions of that section do not apply to any assessment made under section 274. Therefore, the notice of the deficiency provided for in section 273(b) will not be mailed. Although such notice will not be issued, nevertheless a letter will be sent to the taxpayer, or to the trustee, receiver, debtor in possession, or other person designated by the court in which the bankruptcy or receivership proceeding is pending as in control of the assets of the debtor, notifying him in detail how the deficiency was computed, that he may furnish evidence showing wherein the deficiency is incorrect, and that upon request he will be granted a hearing with respect to such deficiency. If after such evidence is submitted and hearing held any adjustment appears necessary in the deficiency, appropriate action will be taken. A copy of the notification letter will be attached to the assessment list as the collector's authority for filing claim in any bankruptcy or receivership proceeding.

If any portion of the claim allowed by the court in a bankruptcy or receivership proceeding remains unpaid after the termination of such proceeding, the collector will send notice and demand for payment thereof to the taxpayer. Such unpaid portion with interest as provided in section 298 of the Act and section 404 of the Revenue Act of 1935, may be collected from the taxpayer by distraint or proceeding in court within six years after the termination of the bankruptcy, debtor, or receivership proceeding. Extensions of time for the payment of such unpaid amount may be granted in the same manner and subject to the same provisions and limitations as provided in sections 272(j), as amended by section 816 of the Revenue Act of 1938, and 297. (See article 272–3.)

This article deals only with immediate assessments provided for in section 274 and the procedure in connection with such assessments.

Article 274–1 of Regulations 94 (section 3.274–1 of Title 26, Code of Federal Regulations) is amended to read as follows:

ART. 274–1. *Bankruptcy and receivership proceedings.*—During a bankruptcy proceeding, or an equity receivership proceeding in either a Federal or a State court, the assets of the taxpayer are in general under the control of the court in which such proceeding is pending, and the collection of taxes can not be made by distraining upon such assets. However, any assets which under applicable provisions of law are not under the control of the court may be subject to distraint.

As used in these regulations the term "bankruptcy proceeding" includes proceedings under Chapters I to VII of the Bankruptcy Act, as amended, or under section 74, 75, 77, or 77B, or Chapters X to XIII, of such Act, as amended; and the term "adjudication of bankruptcy" includes, in addition to an adjudication in a proceeding under Chapters I to VII, the approval of a petition as properly filed under section 77 or 77B or Chapter X by a court of competent jurisdiction or the filing of a petition under section 74 or 75 or Chapters XI to XIII with a court of competent jurisdiction.

A trustee in bankruptcy (including a trustee, receiver, debtor in possession, or other person designated as in control of the assets of a debtor in any bankruptcy proceeding by order of the court in which such proceeding is pending) or a receiver in any receivership proceeding is required to give notice in writing to the Commissioner of Internal Revenue in Washington, D. C., of the adjudication of bankruptcy or the appointment of a receiver. (See section 274(a) and article 275–1.)

Collectors should, promptly after notice of outstanding liability against a taxpayer in any bankruptcy or receivership proceeding, and in any event within the time limited by the appropriate provisions of the Bankruptcy Act, as amended, and the orders of the court in which such proceeding is pending, file claim covering such liability in the court in which such proceeding is pending. Such claim should be filed whether the unpaid taxes involved have been assessed or not, except in cases where the departmental instructions direct otherwise; for example, where the payment of the taxes is secured by a sufficient bond. Such claim should cover the amount represented by the assessment, plus interest at the rate of 6 per cent per annum for the period from the date of filing claim by the collector to the date of termination of the bankruptcy or receivership proceeding or to the date of payment if payment is made in full prior to such termination. At the same time claim is filed with the bankruptcy or receivership court, the collector will send notice and demand for payment to the taxpayer together with a copy of such claim.

Under section 3466 of the Revised Statutes and section 3467 of the Revised Statutes, as amended (paragraphs 41 and 42, respectively, of the Appendix to these regulations), and section 64 of the Bankruptcy Act, as amended, taxes are entitled to the priority over other claims therein stated and the trustee, receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which bankruptcy or receivership proceeding is pending, may be held personally liable for failure on his part to protect the priority of the Government respecting taxes of which he has notice. Bankruptcy courts have jurisdiction under the Bankruptcy Act, as amended, to determine all disputes regarding the amount and validity of taxes of a bankrupt or of a debtor in a proceeding under the Bankruptcy Act, as amended. A bankruptcy or receivership proceeding does not discharge any portion of a claim of the United States for taxes except in the case of a proceeding under Chapter X of the Bankruptcy Act, as amended, and except to the extent which may be provided in a plan or arrangement duly effectuated in a bankruptcy proceeding; and any portion of a claim of the United States for taxes which has been allowed by the court in which the bankruptcy or receivership proceeding is pending and which remains unsatisfied after the termination of the bankruptcy or receivership proceeding shall be collected with interest as provided in section 298.

Article 274–2 of Regulations 94 (section 3.274–2 of Title 26, Code of Federal Regulations) is amended to read as follows:

ART. 274–2. *Immediate assessments in bankruptcy and receivership cases.*— If the Commissioner has determined that a deficiency is due in respect of income tax and the taxpayer has filed a petition with the Board of Tax Appeals prior to the adjudication of bankruptcy or the appointment of a receiver, the trustee, receiver, debtor in possession, or other person designated as in control of the assets of the debtor by the court in which the bankruptcy or receivership proceeding is pending, may prosecute the taxpayer's appeal before the Board as to that particular determination. No petition shall be filed with the Board for a redetermination of the deficiency after the adjudication of bankruptcy or the appointment of a receiver.

Claim for the amount of a deficiency, even though pending before the Board for consideration, may be filed with the court in which the bankruptcy or receivership proceeding is pending without awaiting final decision of the Board. In case of final decision of the Board before the termination of the bankruptcy, debtor, or receivership proceeding, a copy of the Board's decision may be filed by the Commissioner with the court in which such proceeding is pending.

While the Commissioner is required by section 274 to make immediate assessment of any deficiency, such assessment is not made as a jeopardy assessment within the meaning of section 273, as amended by section 819 (a) and (e) of the Revenue Act of 1938, and consequently the provisions of that section do not apply to any assessment made under section 274. Therefore, the notice of the deficiency provided for in section 273(b) will not be mailed. Although such notice will not be issued, nevertheless a letter will be sent to the taxpayer, or to the trustee, receiver, debtor in possession, or other person designated by the court in which the bankruptcy or receivership proceeding is pending as in control of the assets of the debtor, notifying him in detail how the deficiency was computed, that he may furnish evidence showing wherein the deficiency is incorrect, and that upon request he will be granted a hearing with respect to

such deficiency. If after such evidence is submitted and hearing held any adjustment appears necessary in the deficiency, appropriate action will be taken. A copy of the notification letter will be attached to the assessment list as the collector's authority for filing claim in any bankruptcy or receivership proceeding.

If any portion of the claim allowed by the court in a bankruptcy or receivership proceeding remains unpaid after the termination of such proceeding, the collector will send notice and demand for payment thereof to the taxpayer. Such unpaid portion with interest as provided in section 298 may be collected from the taxpayer by distraint or proceeding in court within six years after the termination of the bankruptcy, debtor, or receivership proceeding. Extensions of time for the payment of such unpaid amount may be granted in the same manner and subject to the same provisions and limitations as provided in sections 272(j), as amended by section 816 of the Revenue Act of 1938, and 297. (See article 272-3.)

This article deals only with immediate assessments provided for in section 274 and the procedure in connection with such assessments.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 274 and 62 of the Revenue Act of 1936 (49 Stat., 1725, 1673; 26 U. S. C., Sup. IV, 274, 62); sections 274 and 62 of the Revenue Act of 1934 (48 Stat., 744, 700; 26 U. S. C., 274, 62); sections 274 and 62 of the Revenue Act of 1932 (47 Stat., 237, 191); sections 274 and 62 of the Revenue Act of 1928 (45 Stat., 856, 810); and sections 282 and 1101 of the Revenue Act of 1926 (44 Stat., 62, 111).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 3, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register April 5, 1939, 12.14 p. m.)

SUPPLEMENT O.—OVERPAYMENTS.

SECTION 322.—REFUNDS AND CREDITS.

ARTICLE 322-1: Authority for abatement, credit, and refund of tax.

REVENUE ACT OF 1936.

Assigned claim executed by assignor and transmitted by assignee. (See G. C. M. 21058, page 280.)

TITLE VIII.—GENERAL PROVISIONS.

SECTION 1001.—DEFINITIONS.

ARTICLE 1001-5: Limited partnership as corporation.

REVENUE ACT OF 1936.

Amendment of Regulations 94, articles 1001-5 and 1001-6. (See T. D. 4894, page 79.)

INCOME TAX RULINGS.—PART III.

REVENUE ACTS OF 1935 AND 1934 OR PRIOR ACTS.

SUBTITLE B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 22(a)-1: What included in gross income.

REVENUE ACT OF 1934.

Amendment of article 22(a)-1. (See T. D. 4879, page 159.)

ARTICLE 22(a)-1: What included in gross income. 1939-9-9734
Ct. D. 1386

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. INCOME—OMISSION FROM RETURNS OF PROFITS ON SALES—FRAUD—TAX EVASION.

Decedent, an officer of a corporation, in 1922 and 1923 received bonds as profits from sales of oil negotiated by him for the corporation, but concealed the receipt thereof from the corporation and mingled the bonds and coupon proceeds with his own funds. A congressional committee having begun an investigation of this and other similar corporations in May, 1923, the decedent resigned his office in September, 1923, turned over certain bonds to his son for delivery to the corporation in case of his death or during his life upon his written order, and went abroad in December of that year. In 1925, while in Canada, the decedent disclosed the 1922 and 1923 transactions to certain officials of the corporation and gave an order upon his son for delivery of bonds to the corporation in an amount covering those received plus the coupons disposed of. *Held*, that the Board of Tax Appeals was amply justified in finding that the decedent took the bonds as his own, that he was therefore subject to tax thereon even though the corporation could have reclaimed them, and that he fraudulently omitted them from his 1922 and 1923 returns, with intent to evade tax.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (35 B. T. A., 975) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The National City Bank of New York, Executor, Estate of James E. O'Neil, Deceased, petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue, respondent.*

[98 Fed. (2d), 93.]

On petition for review of a decision of the Board of Tax Appeals, assessing the petitioner for income tax deficiencies for the years 1922 and 1923.

Before MANTON, L. HAND, and AUGUSTUS N. HAND, Circuit Judges.

[July 11, 1938.]

OPINION.

L. HAND, Circuit Judge: This case arises on a petition to review an order of the Board of Tax Appeals, assessing an income tax deficiency for each of the

years 1922 and 1923 against the petitioner, as executor of James E. O'Neil. The facts are as follows: During the years 1921, 1922, and 1923 O'Neil was president and general manager of the Prairie Oil & Gas Co. He resigned on September 11, 1923, left for France in December of that year, and so far as the record shows, did not return until some time during the year 1928; he died on August 21, 1931, a resident of the city of New York. In 1921 two Texas oil companies, controlled by one, Humphreys, owned large oil fields which Humphreys wished to exploit. O'Neil, one Blackmer, and Stewart, president of the Standard Oil Co. of Indiana, went over these fields, and about the middle of November, Blackmer brought in Sinclair, president of the Sinclair Refining Co., whom he told that he had already arranged to buy 30,000,000 barrels of oil from Humphreys. On the 16th and 17th, O'Neil, Stewart, Sinclair, Blackmer and Humphreys agreed upon a price of $1.75 to the Prairie, Sinclair and Standard Oil companies; and Blackmer and Humphreys agreed privately upon a price of $1.50 a barrel between themselves. Blackmer told the other three that their companies must buy from the Continental Trading Co., Ltd., a Canadian company, organized on the 16th by a Toronto barrister, named Osler. They agreed; one contract was made by which Humphreys's companies were to sell 33,000,000 barrels to the Continental company at $1.50 a barrel; another, by which the Continental company was to sell to the Prairie and Sinclair companies the same oil at $1.75. (The Standard Oil Co. shared in this contract with the Sinclair company.) These contracts were later ratified by the Standard Oil Co., the Prairie company and the Sinclair company, all of which knew of the difference in price between the two contracts. Apparently at about the same time Sinclair told Blackmer that he would expect some part of that difference for himself, and on the 26th, Osler told Stewart that he also might have a share. Stewart thereupon executed a declaration of trust to his company of any interest that he might receive; informed one of its officers, and put the instrument in his safe deposit box. It does not appear when O'Neil decided to take a part, but he must have done so, for he, Blackmer, Sinclair and Stewart divided the difference between themselves in substantially equal proportions, and all kept any knowledge of it from their companies, except as we have just stated as to Stewart. A pipe line was laid and the oil began to run in January of 1922; large profits resulted, amounting during the year 1922 and up to June, 1923, to over $3,000,000. As the money came in, Osler bought Liberty bonds with it which he distributed among the four: $727,000 each to O'Neil and Blackmer; $759,500 to Stewart; and $750,000 to Sinclair. (O'Neil received $441,000 in 1922 and $286,000 in 1923, the last delivery was probably on June 15.) It does not definitely appear what O'Neil did with his bonds until the end of 1923; except that he clipped all the coupons for 1922 and 1923; and in August, 1922, and June, 1923, cashed them on at least $162,000 of the bonds and deposited the proceeds in his bank. He apparently mixed them with a number of other bonds and may never have reduced the entire batch below those which he received; all we know is that he used at least $31,000 of those coming from the Continental company for his own purposes in 1924.

A committee of the Senate began to investigate the whole transaction in May of 1923; this apparently frightened those in control of the Continental company, for on May 26 they sold the contract to the Prairie and Sinclair companies for $400,000, although only one-third of the oil had at the time been delivered and the sum was totally inadequate. Shortly before O'Neil left for France in December, 1923, he delivered to his son three or four packages of bonds telling him that among them were $727,000, the property of the Prairie company, which his son was to deliver to it in case of his death, or during his life upon his written order. In May, 1925, while in Canada, he had an interview with his former secretary, Kountz, and Fitzpatrick, the chairman of the Prairie company's board of directors, and its attorney, Flannelly. He told them of the bonds and that he had always intended to keep them apart and give them to the Prairie company; that he had never returned them as part of his income, and had clipped the coupons by mistake. He gave no explanation of his failure to inform the company earlier, except that there were other persons concerned who might be injured by the disclosure. Thereupon he gave Kountz an order upon his son for $800,000 in Liberty bonds, adding $73,000 for the coupons he had disposed of, and on this order the son delivered that number to the Prairie company.

O'Neil filed income tax returns on June 8, 1923, and on June 9, 1924; neither one included the bonds, nor did Stewart, Blackmer or Sinclair include theirs in their returns. However, on February 23, 1928, Blackmer's attorney told the taxing officials of those which Blackmer had received, and the Commissioner thereupon assessed him; and on August 26, 1929, posted a letter to O'Neil proposing to assess him also. The deficiency notice was sent to his executor on July 11, 1934.

The taxpayer raises three objections: (1) that O'Neil never regarded the bonds as his own, but held them always as agent or trustee for his company; (2) that even though he had taken and held them as his own, they were not his property; and as constructive trustee he could not be taxed upon them; (3) that assuming that he could be taxed, he did not so understand it, and therefore did not file fraudulent returns within the meaning of the statute. As to the first point, if O'Neil always meant to hold the bonds as agent for his company, he went about it in a curiously indirect and covert way, for there was no apparent reason why he should not have turned them over at once. Stewart did mean to take them only as trustee, and he at once divested himself of any interest in them, while continuing to protect the others concerned. Why could not O'Neil have done the same thing? It was not even necessary to inform another officer of his company; an effective trust could have been set up through a third person who would have kept his confidence. The transaction on its face had every earmark of the usual illicit bonus or commission, and there is not a shred of evidence that he ever intended anything else until December, 1923: if there had been, it would be hard to reconcile it with clipping the coupons and depositing more than a fifth of them to his own account. The declaration and delivery to his son in December, 1923, had no legal effect, and nobody suggests that it had; it is put forward as evidence of the intent with which he had originally received the bonds, like the eventual restitution in May, 1925. There is however no reason so to construe it. In the first place it was altogether inadequate as restitution; he parted with no control, at most it was an expression of pious desire to be realized in the future. But even if it were more, it could hardly throw any light upon the intent with which he had received the bonds in 1922, because there was another adequate, and very different, motive for it. When the Senate committee began to unearth the affair in May, 1923, as we have said, all those concerned at once took fright and canceled the arrangement. Although the companies did not know till later of the distribution of the profits, they might find out and prudence dictated at least a gesture, looking towards restitution. We also think that the declaration ought not to relate back to O'Neil's intent when he received the bonds of May and June, 1923. If it did, why was it so long delayed? Although we do not know why he resigned in September and left for France in December for a four years' absence, and while perhaps we may not connect these events with the progress of the investigation, it would be at least gratuitous to assume that the declaration was in fact not actuated in any degree at all by disclosures made after June. It appears to us that the Board was amply justified in finding that he took all the bonds as his own.

It is another matter whether even so they were part of his taxable income. They were of course the property of the Prairie company in the sense that it could have reclaimed them: they were not therefore like the earnings of an illicit liquor seller, which belong to him, however acquired. (*United States* v. *Sullivan*, 274 U. S., 259 [T. D. 4028, C. B. VI-2, 177 (1927)]; *Steinberg* v. *United States*, 14 Fed. (2d), 564 (C. C. A. 2).) But there are several cases in which persons have been taxed upon property which could be recovered from them. For example, the lender upon usurious interest—if on an accrual basis—must include his apparent profit in his return, though possibly he may be allowed to deduct it as a loss if the borrower reclaims it. (*Barker* v. *Magruder*, 95 Fed. (2d), 122 (C. A. D. C.).) Again, when a railroad collects too large fares, the excess is income, though the passengers have a theoretical right of restitution. (*Chicago R. I. & P. Ry.* v. *Commissioner*, 47 Fed. (2d), 990 (C. C. A. 8).) In *Board* v. *Commissioner* (51 Fed. (2d), 73, 75 (C. C. A. 6)), an unlawful bonus obtained by a director at his company's expense was held to be income; and, although the taxpayer seeks to distinguish the decision because the company knew of the arrangement, that did not make it lawful. There

are indeed decisions to the contrary. *Commissioner* v. *Turney* (82 Fed. (2d), 661 (C. C. A. 5)) is one, but it was by a divided court. Our own decision in *Rau* v. *United States* (260 Fed. Rep., 131) is another, which *United States* v. *Commerford* (64 Fed. (2d), 28) can not be said to overrule. But in *Rau* v. *United States* the result did not turn on that point alone, and it probably did not receive the attention it otherwise would have had. At any rate we are disposed to overrule it, because, although the decisions are not, as we have shown, entirely harmonious, the weight of authority is against it, and it seems to us wrong in principle. Although taxes are public duties attached to the ownership of property, the State should be able to exact their performance without being compelled to take sides in private controversies. Possession is in general prima facie evidence of ownership, and is perhaps indeed the source of the concept itself, though the time is long past when it was synonymous with it. It would be intolerable that the tax must be assessed against both the putative tortfeasor and the claimant; collection of the revenue can not be delayed, nor should the Treasury be compelled to decide when a possessor's claims are without legal warrant. If he holds with claim of right, he should be taxable as an owner, regardless of any infirmity of his title; no other doctrine is practically possible, and no injustice can result. We think therefore that O'Neil was taxable upon the bonds for the years 1922 and 1923.

Whether he fraudulently omitted them from his returns on June 8, 1923, and June 9, 1924, is a more difficult question. It is not enough that he was defrauding his principal, or knew that he was; he must have meant also to defraud the Treasury. True, he knew that in one way or another he was doing just that, because the bonds were somebody's income, and nobody was paying a tax upon them; but it does not follow, because he was suppressing them so that the Prairie company could not declare them—though that may be an actionable wrong—that his return was fraudulent and made with an intent to evade his own tax. We shall assume arguendo, that the statute requires that intent. All things are possible and it may be that even while O'Neil held the bonds meaning to keep them, he thought that he was not taxable; but that is too extreme a conjecture to be seriously entertained. So far, therefore, as concerns his return on June 8, 1923, made at a time when he had not shown the least disposition towards restitution and while he was still busy taking bonds and holding them surreptitiously, the case is clear. The return of June 9, 1924, stands on a different footing, and if his declaration of December, 1923, and his subsequent conduct had been less equivocal, our doubts might prevail. On the whole we think that there was enough to justify the conclusion that he understood that he should have charged these as well against himself. We have already said that we believed that when he took his allotments in May and June, 1923, he meant to keep them for himself, and we have just held that as to such bonds it was absurd to suppose that he thought himself not taxable. Therefore, we have only to consider how far he might have supposed that the transaction with his son changed the situation. He is dead, and if he were alive, his testimony would not be conclusive; we can not *know* what he thought, but we do know what he did in the year before; we know that his declaration in fact related only to the future; and we know that in the spring of the year 1924 he was continuing to treat these bonds as his own. Although fraud must be well proved, the taxpayer has the burden of showing that the Commissioner was wrong and that the Board had no basis for its finding. When the situation as a whole is reconstructed, so far as the evidence allows, it appears to us that there is rational ground for saying that he knew that his return of 1924 should contain the bonds of 1923, just as the earlier return should have. And, indeed, although we recognize that the issues are different, we are not disposed to scrutinize with too jealous an eye whether he thought a fraud on the Treasury in which he was certainly engaged, would inure to his own advantage, or to that of a principal which he had so recently shown himself ready to despoil.

Order affirmed.

ARTICLE 22(a)-1: What included in gross income. 1939-13-9766
Ct. D. 1389

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

1. INCOME—SALE OF STOCK—ASSIGNMENT OF EMPLOYMENT CONTRACT—DEFLECTION OF INCOME TO BE EARNED—AVOIDANCE OF TAX.

The petitioner, after arriving at an understanding with the M Corporation for the sale at a certain price of all the common stock of the N Corporation, of which he was an employee and the majority of the stock of which he controlled, organized two new corporations, O and P, which he owned and controlled. He then acquired options on the balance of N's stock, and entered into a written contract with M for the sale of the stock at the price agreed upon, but which provided that part of the purchase price was to be paid for the stock and the balance for the employer interest in a personal service contract with O. Thereafter, petitioner offered to O an option on the stock of N which he controlled and an assignment of the options he held, which offers were accepted. O then assigned the options and employment contract to P, which exercised the options, sold to M the shares it had acquired, and transferred the employment contract to a subsidiary of M in exchange for stock of M, which was subsequently reacquired for a sum equal to that paid for the employment contract. *Held*, that the various transactions, intricate and involved as they were, were simply anticipatory arrangements for the deflection of income to be earned and must be disregarded for taxation purposes, and that the sum paid for the shares given in exchange for the employment contract was taxable as income of the petitioner.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (36 B. T. A., 14) affirmed.

3. REHEARING DENIED.

Petition for rehearing denied October 4, 1938.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Wallace Groves, petitioner, v. *Commissioner of Internal Revenue, respondent.*
[99 Fed. (2d), 179.]

On petition to review the decision of the United States Board of Tax Appeals.

Before PARKER and NORTHCOTT, Circuit Judges, and HAYES, District Judge.

[June 6, 1938.]

OPINION.

NORTHCOTT, Circuit Judge: This is a petition to review a decision of the United States Board of Tax Appeals involving income taxes of Wallace Groves, the petitioner, for the year 1930 in the amount of $137,449.57. The decision of the Board is reported in 36 B. T. A., 14.

The facts as found by the Board, about which there is no dispute, are as follows:

Petitioner, now a resident of New York, was in 1931 a resident of Baltimore, Md., where he filed his income tax return for 1930. In 1929 and into 1930 he was employed by First Industrial Bankers, Inc., engaged in the small loan business, at an annual salary of $12,000. That corporation was organized January 9, 1929, and its outstanding shares in 1930 were 54,000 common and 46,296 preferred. Of the 54,000 common, 18,000 were owned in equal shares by Belmont & Co., C. T. Williams & Co., and the Bankers Bond & Share Co., and 36,000 were owned by the First Industrial Corporation, of which petitioner was an officer and director. Petitioner controlled the 36,000 shares held by the First Indus-

trial Holding Corporation. In the hearing before the Board it was stated by petitioner's counsel that petitioner or his brother was the principal holder of the common shares of the First Industrial Holding Corporation.

In June, 1930, Arthur M. Greene, president of the Merchants & Manufacturers Securities Co., informally began negotiations with the petitioner looking to the acquisition of an interest in First Industrial Bankers, Inc., which resulted in an understanding that the Securities company should acquire the 54,000 common shares for $1,000,000 and that First Industrial Bankers, Inc., should be merged with the Domestic Finance Corporation, subsidiary of the Securities company. This understanding was then to be embodied in a written agreement, the mechanics and details of which were to be left entirely with the attorneys and accountants of Greene.

On June 20, 1930, petitioner caused the Firinbank Corporation to be organized, with an authorized capital stock of 5,000 shares of $10 par value.

On June 21, 1930, the Wagegro Corporation was organized with an authorized capital stock of $1,000,000, consisting of 5,000 class A and 5,000 class B shares, and petitioner and his brother immediately became directors. The petitioner owned and controlled both these companies.

On June 26, 1930, petitioner acquired options to purchase the 18,000 shares of First Industrial Bankers, Inc., from Belmont & Co., C. T. Williams & Co., and the Bankers Bond & Share Co., for $191,146.14.

The written agreement between Greene, representing the Securities company, and the petitioner is dated June 27, 1930. It provided for the efforts of both to accomplish the merger of Domestic Finance and First Industrial Bankers, Inc., and set forth the details of the contemplated method of accomplishing such merger, among which was the acquisition by Domestic Finance of the 54,000 common shares of First Industrial Bankers, Inc., in exchange for 18,000 common shares of Domestic Finance. It provided that upon such merger petitioner would cause the said 18,000 common shares of Domestic Finance to be delivered to the Securities company.

Petitioner agreed that on or prior to the date of closing the merger he would enter into an employment contract with the Securities company or such other company or corporation as should have authority to engage in the small loan business, agreeing to devote his entire time and services for a period beginning on the date of the closing of the merger and ending January 1, 1933, for an annual salary of $18,000 and binding himself not to engage directly or indirectly in any business in competition with his employment or through its subsidiary or affiliated companies in the so-called small loan business for a period of two years from and after the date of termination of the employment contract. The petitioner further agreed that upon the date of the closing of the contract and the payment of the consideration he would cause the employer interest in said contract to be vested in such corporation as the Securities company would designate.

The written agreement stipulated that as payment for said 18,000 shares of common capital stock of Domestic Finance Corporation there would be paid the sum of $425,000 in cash, and as payment for the assignment of the employment contract there would be transferred 23,000 shares of class A stock of the Securities company accompanied by the commitment of some person, firm or corporation to purchase said 23,000 shares for the sum of $575,000, the Securities company guaranteeing the performance of the obligations of said commitment.

On August 8, 1930, petitioner made an offer to the Firinbank Corporation of an option to purchase 36,000 shares of First Industrial Bankers, Inc., for $300,000, an assignment of options held by him for the purchase of 18,000 such shares, and $5,000 in cash, in exchange for the issuance to him by the Firinbank Corporation of its 5,000 shares of capital stock. On the same date, this offer was accepted and the option covering 36,000 shares controlled by the petitioner was executed, and those options covering the 18,000 shares were assigned. On the same date, petitioner and the Firinbank Corporation agreed that petitioner would be employed by the corporation for the period August 15, 1930, to January 1, 1933, and would receive compensation of $1,500 a month, and would refrain from the small loan business, except in New Mexico and Arizona, for two years after termination of the employment.

At the first meeting of the directors of Wagegro, on August 8, 1930, petitioner was elected president and treasurer. At the meeting consideration was given to an offer dated August 8, 1930, of Arthur Greene to purchase from the corporation

5,000 of its class A shares for $500,000 in cash, the shares to be issued in Greene's name. The offer was accepted. Thereupon the directors immediately resigned, and Greene, Dallstream, and Dixon were elected in their places. Dallstream and Dixon were associates of Greene. Greene was now the Wagegro Corporation's sole shareholder. On August 11, 1930, the charter of the Wagegro Corporation was amended as the result of a stockholders' meeting at which the petitioner voted all the shares under a proxy from Greene.

On August 12, 1930, the Firinbank Corporation made a written offer to the Wagegro Corporation, which was accepted by the Wagegro Corporation on August 13, 1930, to assign to Wagegro the four options for the purchase of 54,000 shares of First Industrial Bankers, Inc., and its employment contract with the petitioner, in exchange for 5,000 class B shares of Wagegro to be issued to it. On August 13, 1930, the four options and the employment contract were assigned by the Firinbank Corporation to the Wagegro Corporation, and the Wagegro Corporation resolved to exercise the options to purchase the 54,000 shares of First Industrial Bankers, Inc., for approximately $500,000. The options were exercised and the 54,000 shares purchased by the Wagegro Corporation. At the same meeting, an offer was received from the Securities company to issue to the Wagegro Corporation 23,000 shares of its class A stock "having a present fair market value of $575,000," in exchange for an assignment of the Firinbank-Groves employment contract; this offer was accepted, and the employment contract was assigned by the Wagegro Corporation to the Domestic Finance Corporation by direction of the Securities company. The fair market value of the 23,000 class A shares of Securities company was $575,000.

On August 15, 1930, Greene made an offer to Wagegro, which Wagegro accepted, to purchase 23,000 class A shares of the Securities company for $575,000, payable $75,000 in cash and $500.000 by the surrender for retirement of 5,000 class A shares of the Wagegro Corporation. On the same date, August 15, 1930, the Securities company made an offer to the Wagegro Corporation, which the Wagegro Corporation on that date accepted, to purchase the 54,000 common shares of First Industrial Bankers, Inc., for $425,000 cash. Thereupon all the directors and officers, viz, Greene, Dallstream, and Dixon resigned and Groves, Sommerwerck, and Taylor were elected to their places. Sommerwerck and Taylor were associates of Groves.

In January, 1931, the employment contract, which was then still held by Domestic Finance Corporation, was substantially modified by the parties by a reduction in the amount of compensation to $100 a year, a change in the services to be rendered by petitioner, and in the extent of the restrictions against engaging in the small loan business.

The 54,000 shares of First Industrial Bankers, Inc., were not transferred to or acquired by the Securities company in exchange for 18,000 shares of Domestic Finance Corporation as provided by the contract June 27, 1930, between the Securities company and the petitioner.

The Firinbank Corporation is still in existence and operates as a holding company. It still holds the Wagegro shares. The Wagegro Corporation is still in existence, having the same capital, and has been active as a finance company, buying securities, selling securities, and buying notes.

The Securities company, on its income tax return for the fiscal year ended March 31, 1931, took a deduction of $151,315.80 as amortization of the Firinbank-Groves employment contract, computed upon a cost basis of $575,000 amortized over the period August 15, 1930, to January 1, 1933.

Petitioner owned all the stock of the Firinbank Corporation which corporation in turn owned all the stock of the Wagegro Corporation.

The Commissioner of Internal Revenue, the respondent here, made a determination of petitioner's tax liability for the year 1930 fixing the deficiency at $173,699.57, based chiefly on the value as fixed by him of the 23,000 shares of the Securities company stock, and upon appeal to the Board of Tax Appeals this deficiency was reduced to $137,449.57, the Board finding the value of the 23,000 shares of the Securities company stock to be less than found by the respondent. The Board held that certain other items determined by the respondent were not correct charges but held that petitioner was properly chargeable with the tax on the $575,000 paid as consideration for the 23,000 shares turned over for petitioner's employment contract.

The sole question involved is whether the sum of $575,000 paid for the shares given in exchange for the employment contract, was taxable as income of the petitioner for the year 1930.

It is contended on behalf of the petitioner that the 23,000 shares of stock in question were not received by him personally but we fail to see what difference this would make. The shares were received by a corporation owned and controlled absolutely by the petitioner, and the petitioner alone. It would be hard to find a more intricate or involved financial transaction than the one conceived and carried out by the petitioner in the instant case. A study of the circumstances as shown by the record leads to the inevitable conclusion that the petitioner upon arriving at an agreement with Greene with regard to the sale of the Industrial company stock, realizing that he would have to pay a large income tax, set out to devise a scheme to escape at least a part of that tax. Shortly after negotiations were opened, and within the same month, he organized the Firinbank Corporation, in which he owned all the stock, and the next day he organized the Wagegro Corporation in which the Firinbank Corporation in turn held all the stock. In the same month (June 26, 1930) he acquired options on the rest of the stock in the Industrial company and the next day, June 27, 1930, he entered into a written contract for the sale of all the Industrial company stock for the price evidently already agreed upon but which provided that $425,000 of the $1,000,000 was to be paid for the stock and $575,000 the balance of the $1,000,000 was to be paid for the employer interest in a personal service contract which the petitioner entered into with the Firinbank Corporation, which was entirely owned by him. This personal service contract was assigned to another corporation, the Wagegro Corporation, also owned by the petitioner and was transferred for 23,000 shares of Securities company stock which was sold back to the purchasing company for a previously agreed upon price of $575,000.

This personal service contract which Groves made with himself, as owner of Firinbank and immediately transferred to himself as owner of Wagegro, was but another step in the deliberately conceived scheme to escape taxation. At the time it was made Groves was free to contract direct with the Securities company, if they wished to secure his services, and the contract entered into with so much formality was allowed to run only a short five months when it was set aside practically in its entirety.

There can be no doubt that the transactions shown here, intricate and involved as they were, were simply anticipatory arrangements for the deflection of income to be earned. Such arrangements must be disregarded for the purposes of taxation. As was said by the Supreme Court in *Stone* v. *White* (301 U. S., 532 [Ct. D. 1232, C. B. 1937–1, 224]):

"It is in the public interest that no one should be permitted to avoid his just share of the tax burden except by positive command of law, * * *."

The fact that petitioner organized the two corporations, owned and controlled entirely by him, in anticipation of diverting to them the income he knew he would earn, instead of receiving these earnings himself, can not avail him to escape a proper tax. A taxpayer can not enter into a contract under which he assigns to another income to be earned and thereby shift the tax on that income from himself. Here the assignment was made to a corporation the petitioner himself controlled. As was said by Mr. Justice Holmes in *Lucas* v. *Earl* (281 U. S., 111):

"But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing Act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

Again in *Corliss* v. *Bowers* (281 U. S., 376 [Ct. D. 188, C. B. IX–1, 254 (1930)]), Mr. Justice Holmes said:

"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."

The fact that petitioner left the money with his Wagegro Corporation, pending this litigation, can not operate to exempt him from the payment of the tax. In *Burnet* v. *Sanford & Brooks Co.* (282 U. S., 359 [Ct. D. 277, C. B. X-1, 363 (1931)]), opinion by Mr. Justice Stone, the Court said:

"It is the essence of any system of taxation that it should produce revenue ascertainable and payable to the Government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation."

As was decided in *Helvering* v. *Gordon* (87 Fed. (2d), 663):

"The Government can not be controlled by the manipulations of the taxpayer's accounts, nor by the shifting of funds from one personally dominated corporation to another, in the enforcement of the tax laws. It is the Commissioner's duty to look through forms to substance and to assess the earnings of corporations to their shareholders in the year such earnings are distributed."

It is contended on behalf of the petitioner that the making of the contract for personal services was a device planned by the attorneys and accountants in the employ of Greene to enable him (Greene) and his associates to escape taxation and that this contract was not what it purported to be; and that the $575,000 paid for the assignment of the employer interest in the contract was in reality a part of the agreed purchase price for the Industrial Bankers stock. The petitioner was a party to this contract, gave his full approval and his assent to the arrangement as conceived and carried out and will not now be heard to deny that the contract was what it purported to be. Having entered into a scheme concocted for the sole purpose of perpetrating a fraud upon the Government by the evasion of a proper tax, the petitioner is estopped from denying the bona fides of the contract, when it suits his purpose to do so, in seeking to evade taxation.

The various steps taken by the petitioner were anticipatory arrangements for the deflection of income. The Wagegro and Firinbank Corporations were not created by the petitioner for the purpose of carrying on any real or actual business in the ordinary way but only in furtherance of the scheme to evade taxation. The Board was justified in looking through the form to the substance of the various transactions arranged and carried out by the petitioner. The petitioner in effect received and still enjoys the possession of the proceeds of the sale of the 23,000 shares of the Securities stock and should be taxed for the $575,000 as income for the year 1930.

Affirmed.

ARTICLE 22(a)-2: Compensation for personal services.

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

Taxability of compensation received by Federal officers and employees and officers and employees of States or political subdivisions thereof. (See Mim. 4916, page 71.)

ARTICLE 22(a)-2: Compensation for personal services.

1939-25-9883
Ct. D 1404

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

INCOME—COMMISSIONS—TAXABLE WHEN RECEIVED THOUGH RESTORED IN LATER YEAR.

Money which officers of a building and loan association charged and received, under claim of right and without restriction as to use and disposition, as commissions on the sale of capital stock of the association, constituted taxable income for the years in which received, despite the fact that the officers subsequently restored the equivalent thereof (although without judgments determining their liability to make such restoration) in settlement of suits instituted against them by the receiver of the association.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1658. *Esther A. Saunders, Administratrix of the Estate of Miles G. Saunders, Deceased*, v. *Commissioner of Internal Revenue.*

No. 1662. *Esther A. Saunders, as Administratrix of the Estate of Miles G. Saunders, Deceased, appellant*, v. *United States, appellee.*

No. 1663. *Ethel L. Westcott, appellant*, v. *United States, appellee.*

No. 1664. *Thomas L. Lewis, appellant*, v. *United States, appellee.*

[101 F. (2d), 407.]

On petitions to review decisions of the United States Board of Tax Appeals (No. 1658).

Appeal from the District Court of the United States for the District of Colorado (Nos. 1662, 1663, and 1664).

Before PHILLIPS, BRATTON, and WILLIAMS, Circuit Judges.

[January 9, 1939.]

OPINION.

BRATTON, Circuit Judge, delivered the opinion of the court.

These are four separate cases. The first is on petitions to review decisions of the Board of Tax Appeals, and the other three are appeals from judgments of the District Court of Colorado; and the question common to all of them is whether money which officers of a building and loan association charged and received under claim of right on the sale of capital stock of the corporation and later returned to the corporation on the advice of counsel but without judgments determining their liability to make restoration, represents income subject to tax.

Miles G. Saunders, Ethel L. Westcott, and Thomas L. Lewis were officers of the Railway Savings and Building Association, a corporation engaged in business at Pueblo, Colo., during the years 1929, 1930, and 1931. In making their separate income tax returns for the years in question here they included large sums received as commissions on the sale of capital stock of the corporation. The corporation was placed in receivership in July, 1932, and soon thereafter the receiver instituted separate suits against such former officers to recover the respective sums which they had received as such commissions. Acting upon the advice of counsel that they were not entitled to keep and retain any of the sums of money thus received, the defendants settled the suits by delivery of personal property to the corporation. The property delivered was treated as full settlements, and the suits were dismissed with prejudice. The defendants did not file any pleadings, and their liability to the corporation was not determined by any judgment other than an order authorizing the receiver to make the settlements, the judgments of dismissal in the two cases, and the judgment for plaintiff for the conceded amount in the third. This litigation ensued for the purpose of bringing their income tax matters into conformity with the new situation brought about in that manner. In the first case, Saunders petitioned the Board of Tax Appeals for a redetermination of deficiencies in his income taxes for the years 1930 and 1931 in the respective amounts of $981.38 and $140.52; in the second, he brought suit against the United States to recover judgment for $3,688.54, with interest, as overpayment in income taxes for the year 1929; in the third, Ethel L. Westcott similarly brought suit to recover judgment for overpayment in income taxes for the years 1930 and 1931, in the respective amounts of $8,893.15 and $4,059; and in the fourth, Thomas L. Lewis sought in like manner to recover judgment for overpayment in income taxes for the years 1930 and 1931, in the respective amounts of $6,749.95 and $3,738.64, with interest. The court denied the right to recover for overpayments, and entered separate judgments against Saunders and Westcott and in favor of Lewis for $68.82 on account of an exemption which is not challenged here. (*Lewis* v. *United States*, 17 F. Supp., 543.) Resting its action upon that decision, the Board of Tax Appeals decided adversely to Saunders in respect to his asserted deficiencies for 1930 and 1931. Saunders, Westcott, and Lewis perfected separate appeals from the judgments of the court, and Saunders petitioned for review of the decision of the Board. Saunders subsequently died, and Esther A. Saunders, administratrix of his estate, was substituted in his stead.

Motions were filed in this court to strike the bills of exception in the cases appealed from the district court on the ground that they were settled after the expiration of the term at which the judgments were entered and the motions for new trial were denied, and that such term was not extended for that purpose. The terms of court in the District of Colorado begin at Denver on the first Tuesday in May and November, at Pueblo on the first Tuesday in April, at Grand Junction on the second Tuesday in September, at Montrose on the third Tuesday in September, at Durango on the fourth Tuesday in September, and at Sterling on the second Tuesday in June of each year. (28 U. S. C. A., 146.) Motions for new trial were denied during the May term at Denver. That term automatically expired at the time fixed by law for the convening of the next term at that place (*Continental Petroleum Co.* v. *United States*, 87 F. (2d), 91); and it was not extended for the purpose of settling these bills either by standing rule or by order entered before the term expired. Orders were entered after that term expired and the November term began, which purported to enlarge the time, but they were wholly ineffective for such purpose. (*Continental Petroleum Co.* v. *United States*, supra.) The court was without jurisdiction to settle the bills after the expiration of the term at which the motions for new trial were denied. (*Tramel* v. *United States*, 56 F. (2d), 142; *United States* v. *Jones*, 78 F. (2d), 1005; *Continental Petroleum Co.* v. *United States*, supra; *United States* v. *Rasmussen*, 95 F. (2d), 842.) The motions to strike are well taken and the bills are stricken.

Coming to the merits, the taxpayers received under claim of right and ownership the fund representing commissions on the sale of capital stock during the years 1929, 1930, and 1931, and retained the unrestricted control of it in respect to use and disposition until the receiver instituted the suits against them in 1932. That was the first time their right to the money was questioned. Revenue thus received under claim of right and without restriction as to use and disposition constitutes taxable income, even though the person receiving it may subsequently be adjudged liable to restore it or its equivalent. (*North American Oil Consolidated* v. *Burnet*, 286 U. S., 417 [Ct. D. 499, C. B. XI-1, 293 (1932)]; *Brown* v. *Helvering*, 291 U. S., 193 [Ct. D. 786, C. B. XIII-1, 223 (1934)]; *Ford* v. *Commissioner*, 51 F. (2d), 206.)

There was no judicial determination that these taxpayers were obligated to make restoration to the building and loan association. They acted upon the advice of counsel instead of litigating the question to judgment. But it is unnecessary to explore that feature of the situation further. The cases just cited seem to make it plain that when they received the fund under claim of right and ownership, and retained it without restriction as to use and disposition until the suits were filed, it was income subject to tax for the respective years in which it was received; despite the fact that they subsequently made restoration of its equivalent.

The orders of the Board of Tax Appeals and the judgments of the court are severally affirmed.

ARTICLE 22(a)-13: Improvements by lessees. 1939-1-9657 Ct. D. 1373

INCOME TAX—REVENUE ACT OF 1932—DECISION OF SUPREME COURT.

GROSS INCOME—LEASE—INCOME OF LESSOR—ESTIMATED DEPRECIATED VALUE OF IMPROVEMENTS.

Under a lease of certain property for use as a moving picture theater for a term of 10 years beginning upon completion of improvements some of which were to be made by the lessee and were to become the property of the lessor at the expiration or sooner termination of the lease, one-tenth of the estimated depreciated value, as of the end of the term of the lease, of the improvements made by the lessee was not income to the lessor in the first year of the term, in the absence of any finding that such value constituted additional rent for the use of the premises, or that the lessee's improvements resulted in increase in market value of the lessor's land in the taxable year. Assuming that, subject to the lease, the lessor became the owner of the improvements at the time they were made, mere acquisition of that sort did not amount to contemporaneous realization of gain within the meaning of section 22(a) of the Revenue Act of 1932.

SUPREME COURT OF THE UNITED STATES.

M. E. Blatt Co., petitioner, v. *United States.*

[305 U. S., 267.]

On writ of certiorari to the Court of Claims.

[December 5, 1938.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the Court.

Petitioner paid, and in this suit seeks to recover, an amount included in a deficiency assessment made by the Commissioner of Internal Revenue as additional income tax for the year ending January 31, 1932. The question is whether petitioner is liable under Revenue Act of 1932, section 22(a).[1]

The material substance of the findings follows:

For itself and a subsidiary corporation, petitioner made consolidated return. The Commissioner added to the income of the subsidiary on account of improvements made to its property by a lessee. He ruled the improvements were income to lessor in that year to the extent of their value at termination of the lease.

Lessor purchased the real estate in 1927, and September 13, 1930, leased it for use as a moving picture theater for a term of 10 years, beginning upon completion of improvements to be made. At its own cost and expense, lessor agreed to make alterations in accordance with plans and specifications prepared by an architect selected by the parties. Lessee agreed to install the latest type of moving picture and talking apparatus, theater seats and all other fixtures, furniture and equipment necessary for the successful operation of a modern theater to become the property of lessor at the expiration or sooner termination of the lease.

Lessor made a contract with the builder to make the contemplated improvements and agreed to pay, up to a specified limit, actual cost, plus builder's profit and architect's fee. Additional work ordered by lessee was to be paid for by it. Lessee consented to the terms of the contract and agreed to pay for work and materials ordered by it. All improvements were completed in January, 1931; lessee took possession of the property February 1 of that year.

The total cost of all improvements was $114,468.77; lessor paid $73,794.47; lessee paid the balance, $40,674.30. "The estimated depreciated value at the termination of the lease of the alterations and improvements paid for by the lessee was computed by the Commissioner and was agreed to by the plaintiff [petitioner], as follows:

	Cost.	Depreciated value at end of 10 years.
(1) Ventilating system	$3,959.75	$2,771.83
(2) Glazing, architect's fee and other items	10,366.37	7,256.46
(3) Painting	760.80	
(4) Other improvements	185.97	
(5) Chairs	9,167.24	3,055.75
(6) Booth	5,197.39	
(7) Draperies	7,075.42	2,358.47
(8) Elec. signs and marquee	3,961.36	1,980.63
Total	40,674.30	17,423.14

From these figures it appears that the calculations were based on annual depreciation of items (1) and (2) at 3 per cent, on (5) and (7), at 6⅔ per cent, on (8), at 5 per cent, and on (3), (4), and (6), at 10 per cent."

[1] "'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. * * *" (47 Stat., 178.) The regulation applied by the Commissioner (Regulations 77, article 63) has since been changed. (See Regulations 94 and 86, article 22(a)–13.)

For the year in question, the Commissioner added to income of lessor $1,742.31, one-tenth of the cost so depreciated. The resulting additional tax was $211.61. Petitioner paid it; the Commissioner disallowed claim for refund. The lower court held petitioner not entitled to recover; it sustained the tax on the ground that, immediately upon completion of the improvements made by lessee, they became the property of lessor, and constituted compensation paid by lessee as additional rental for the use of the leased premises.

Petitioner insists that where improvements are made by lessee, there is no realization of gain at the time the improvements are completed; that the accession of value to the property is not income but a capital addition. The United States says that, while the case presents the question whether depreciated value of improvements by lessee constitutes income to lessor in the taxable year, the "basic question is whether income is ever realized by the lessor in such cases, and if so, when." Assuming that improvements made by lessee and which will outlast the term constitute income to lessor at some time, its brief discusses the questions whether the income is realized upon (1) completion of the improvements, (2) termination of the lease, or (3) disposition of the improved property. It concludes that the "soundest theory seems to be that such income is taxable at the time the improvements are erected." And, without supporting the lower court's ruling that the estimated depreciated value at the end of the 10-year term constituted additional rent or compensation paid for the use of the premises, it asks that the judgment be upheld.

We are not called on to decide whether under any lease or in any circumstances, income is received by lessor by reason of improvements made by lessee, nor to choose, for general approval or condemnation, any of the theories expounded by the United States. Concretely, the question presented is whether, under the lease here involved, one-tenth of what the Commissioner and taxpayer call and agree to be "estimated depreciated value," as of the end of the term, was income to petitioner in the first year of the term. And that question is to be decided upon the lower court's special findings unaffected by any statement of fact, reasoning, or conclusion that may be found in its opinion.[2]

There is nothing in the findings to suggest that cost of any improvement made by lessee was rent or an expenditure not properly to be attributed to its capital or maintenance account as distinguished from operating expense. While the lease required it to make improvements necessary for successful operation, no item was specified, nor the time or amount of any expenditure. The requirement was one making for success of the business to be done on the leased premises. It well may have been deemed by lessor essential or appropriate to secure payment of the rent stipulated in the lease. Even when required, improvements by lessee will not be deemed rent unless intention that they shall be is plainly disclosed. Rent is "a fixed sum, or property amounting to a fixed sum, to be paid at stated times for the use of property * * *; * * * it does not include payments, uncertain both as to amount and time, made for the cost of improvements * * *."[3] The facts found are clearly not sufficient to sustain the lower court's holding to the effect that the making of improvements by lessee was payment of rent.

It remains to be considered whether the amount in question represented taxable income, other than rent, in the first year of the term.

The findings fail to disclose any basis of value on which to lay an income tax or the time of realization of taxable gain, if any there was. The figures made by the Commissioner are not defined. The findings do not show whether they are intended to represent value of improvements if removed or the amount attributable to them as a part of the building.

The figures themselves repel the suggestion that they were intended to represent amounts obtainable for the items if removed. We are not required to assume that the Commissioner intended his estimates to represent salvage, at the end of the term, of ventilating system, glazing, architect's fees and the like, draperies, chairs, electric signs, and marquee, the useful lives of which in place

[2] *Stone* v. *United States* (164 U. S., 380, 383); *Crocker* v. *United States* (240 U. S., 74, 78); *Brothers* v. *United States* (250 U. S., 88, 93); *United States* v. *Wells* (283 U. S., 102, 120 [Ct. D. 340, C. B. X–1, 475]); *United States* v. *Esnault-Pelterie* (299 U. S., 201, 206). And see *American Propeller Co.* v. *United States* (300 U. S., 475, 479–480 [Ct. D. 1218, C. B. 1937–1, 267]).

[3] *Duffy* v. *Central R. R.* (268 U. S., 55, 63 [T. D. 3704, C. B. IV–1, 143 (1925)]); *Dodge* v. *Hogan* (19 R. I., 4, 11); *Guild* v. *Sampson* (232 Mass., 509, 513); *Garner* v. *Hannah* (6 Duer, 262, 266); *Board of Commissioners of Caddo Levee District* v. *Pure Oil Co.* (167 La., 801, 811); 2 Blackstone, page 41.

have declined from 30 to 66⅔ per cent. It does not appear that if detached from the building they would then have any value, even as junk, over necessary cost of removal. It is clear that, if any value as of that time may be attributed to them, it is included in and not separable from that of the leased premises.

Equally conjectural would be assumption that the figures represent enhancement of value of the leased premises by reason of the improvements when new or as deteriorated at the end of the term. The leased property is capable of inventory and analysis for the purpose of ascertaining original and estimated present costs of its elements and other relevant facts as indications of worth to be taken into account in determining its value; i. e., the money equivalent of the property as a whole.[4] But present or future value, however ascertained, is single in substance; it can not be arrived at by mere summation of actual or estimated cost of constituent elements, new or depreciated.[5] The addition to value of the leased premises resulting from the lessee's improvements may not be arrived at by formula or arithmetically by merely setting against each item or element its cost less depreciation estimated to accrue during the term of the lease.[6] The amount included in the total value of the structure reasonably to be attributed to the improvements after use for 10 years is not ascertainable by the simple calculations employed by the Commissioner.

Granting that the improvements increased the value of the building, that enhancement is not realized income of lessor.[7] So far as concerns taxable income, the value of the improvements is not distinguishable from excess, if any there may be, of value over cost of improvements made by lessor. Each was an addition to capital; not income within the meaning of the statute.[8] Treasury regulations can add nothing to income as defined by Congress.[9]

But, assuming that at some time value of the improvements would be income of lessor, it can not be reasonably assigned to the year in which they were installed. The Commissioner found that at the end of the term some would be worthless and excluded them. He also excluded depreciation of other items. These exclusions imply that elements which will not outlast lessee's right to use are not at any time income of lessor. The inclusion of the remaining value is to hold that petitioner's right to have them as a part of the building at expiration of lease constitutes income in the first year of the term in an amount equal to their estimated value at the end of the term without any deduction to obtain present worth as of date of installation. It may be assumed that, subject to the lease, lessor became owner of the improvements at the time they were made. But it had no right to use or dispose of them during the term. Mere acquisition of that sort did not amount to contemporaneous realization of gain within the meaning of the statute.

Reversed.

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[4] *West* v. *C. & P. Tel. Co.* (295 U. S., 662, 671); *Olson* v. *United States* (292 U. S., 246, 255); *Standard Oil Co.* v. *So. Pacific Co.* (268 U. S., 146, 155).

[5] *Denver Stock Yard Co.* v. *United States* (304 U. S., 470, 479).

[6] *Minnesota Rate Cases* (230 U. S., 352, 434); *Bluefield Co.* v. *Pub. Serv. Comm.* (262 U. S., 679, 690); *Standard Oil Co.* v. *So. Pacific Co.* (268 U. S., 146, 157, 159); *McCardle* v. *Indianapolis Co.* (272 U. S., 400, 416).

[7] *Hewitt Realty Co.* v. *Commissioner* (C. C. A. 2) (76 F. (2d), 880, 884); *Eisner* v. *Macomber* (252 U. S., 189, 207 [T. D. 3010, C. B. 3, 25 (1920)]); *Lucas* v. *Alexander* (279 U. S., 573, 577 [Ct. D. 76, C. B. VIII–2, 273 (1929)]). Cf. *Bowers* v. *Kerbaugh-Empire Co.* (271 U. S., 170, 175 [T. D. 3881, C. B. V–1, 199 (1926)]).

[8] *United States* v. *Phellis* (257 U. S., 156, 169, 175 [T. D. 3270, C. B. 5, 37 (1921)]); *Merchants' L. & T. Co.* v. *Smietanka* (255 U. S., 509, 519–520 [T. D. 3173, C. B. 4, 34 (1921)]); *Taft* v. *Bowers* (278 U. S., 470, 480, et seq. [Ct. D. 49, C. B. VIII–1, 226 (1929)]); *Lucas* v. *American Code Co.* (280 U. S., 445, 449 [Ct. D. 168, C. B. IX–1, 314 (1930)]); *Eckert* v. *Burnet* (283 U. S., 138, 142 [Ct. D. 325, C. B. X–1, 241 (1931)]); *Burnet* v. *Logan* (283 U. S., 404, 412–413 [Ct. D. 351, C. B. X–1, 345 (1931)]); *United States* v. *Safety Car Heating Co.* (297 U. S., 88, 99 [Ct. D. 1073, C. B. XV–1, 294 (1936)]); *Koshland* v. *Helvering* (298 U. S., 441, 444–445 [Ct. D. 1124, C. B. XV–1, 219 (1936)]). Cf. *Commissioner* v. *Van Vorst* (C. C. A. 9) (59 F. (2d), 677, 680).

[9] *Koshland* v. *Helvering* (298 U. S., 441, 447).

ARTICLE 22(a)–16: Acquisition or disposition by a corporation of its own capital stock. 1939–17–9810 T. D. 4895

INCOME TAX.

Acquisition or disposition by a corporation of its own capital stock.—Treasury Decision 4430 [C. B. XIII–1, 36 (1934)], amending articles 543 and 563, Regulations 65 and 69, and articles 66 and 176, Regulations 74 and 77, revoked.

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

To Collectors of Internal Revenue and Others Concerned:

In view of the decision of the Supreme Court of the United States rendered on January 30, 1939, in the case of *Commissioner of Internal Revenue* v. *R. J. Reynolds Tobacco Co.* [Ct. D. 1383, below], Treasury Decision 4430, approved May 2, 1934 (C. B. XIII–1, 36), which amended articles 543 and 563 of Regulations 65 and 69 and articles 66 and 176 of Regulations 74 and 77, relating to gain or loss from the acquisition or disposition by a corporation of its own capital stock, is hereby revoked.

This Treasury decision is prescribed pursuant to the provisions of section 62 of the Revenue Acts of 1932 and 1928, section 1101 of the Revenue Act of 1926, and section 1001 of the Revenue Act of 1924.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 17, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register April 18, 1939, 3.56 p. m.)

ARTICLE 22(a)–16: Acquisition or disposition by a corporation of its own capital stock. 1939–7–9712 Ct. D. 1383

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

1. GROSS INCOME—PURCHASE AND RESALE BY CORPORATION OF ITS OWN STOCK—CONSTRUCTION OF STATUTE—REGULATIONS APPROVED BY REENACTMENT OF STATUTE WITHOUT ALTERATION.

Gain accruing to a corporation consequent on the purchase and resale of its own shares does not constitute gross income within the meaning of section 22(a) of the Revenue Act of 1928, as construed by article 66 of Regulations 74. That section is so general in its terms as to render an interpretative regulation appropriate; the administrative construction embodied in the regulation has, since at least 1920, been uniform with respect to each of the Revenue Acts from 1913 to 1932, and Congress must be taken to have approved such construction by its successive reenactments, without alteration, of the definition of gross income as it stood in the earlier Acts and thereby to have given it the force of law.

2. REGULATIONS—RETROACTIVE OPERATION.

The amendment of article 66 of Regulations 74 by Treasury Decision 4430 [C. B. XIII–1, 36(1934)], which was adopted on May 2, 1934, while this cause was pending before the Board of Tax Appeals, and which prescribed that gain realized by a corporation from purchase and resale of its own stock constitutes gross income, does not govern the ascertainment of the corporation's tax liability for the year 1929. The power to issue regulations with retroactive effect in an instance where, by repeated reenactment of the statute, Congress has given its sanction to the existing regulation, may not be exercised in such manner as to repeal the rule of law that existed during the period for which the tax is imposed. The reenactment of the definition of gross income in the 1936 and 1938 Acts following the amendment of the regulation does not, without more, amount to sanction of retroactive enforcement of such amendment.

SUPREME COURT OF THE UNITED STATES.

No. 328. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *R. J. Reynolds Tobacco Co.*

[306 U. S., 110.]

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 30, 1939.]

OPINION.

Mr. JUSTICE ROBERTS delivered the opinion of the Court.

The sole question for decision is whether gain accruing to a corporation consequent on the purchase and resale of its own shares constitutes gross income within the meaning of section 22(a) of the Revenue Act of 1928.[1]

The respondent, a New Jersey corporation, on occasions between 1921 and 1929, purchased its own class B common stock for reasons of policy, such as the elimination of a very large single holding, the broadening of the ownership of the stock, and the support of the market to protect the investments of employee shareholders. This stock was resold from time to time. While held it was treated as treasury stock and the cost of it was entered in the accounts as "Investments in noncompetitive companies." The books showed no increase or reduction of capital stock on account of purchases or sales. During 1929 the company sold shares acquired in that and prior years for a sum which exceeded cost by $286,581.21, which amount was entered in the books as a cash item and added to surplus. In its income tax return for 1929 the company listed this gain under the caption "Other items of nontaxable income," as "Profit R. J. R. stock."

The Commissioner determined a deficiency in the tax paid for 1929 involving items not here in controversy and the company appealed to the Board of Tax Appeals where those items were adjusted. Before the case was closed the Commissioner by amended answer alleged that the taxpayer's net income should be increased by the amount of the "net profit realized * * * through trafficking in class B common stock of the * * * company," and claimed a resulting deficiency. He based his claim upon Treasury Regulations 74, article 66, as amended by a Treasury decision of May 2, 1934,[2] which states "Where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another."

The Board, after finding the facts in detail, sustained the Commissioner.[3] The circuit court of appeals reversed the Board's ruling.[4] Because of asserted conflict we granted the writ of certiorari.[5]

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[1] Ch. 852, 45 Stat., 791.
[2] Treasury Decision 4430 (C. B. XIII–1, 36 [1934]).
[3] 35 B. T. A., 949.
[4] *R. J. Reynolds Tobacco Co.* v. *Commissioner of Internal Revenue* (97 F. (2d), 802).
[5] See *First Chrold Corporation* v. *Commissioner* (infra [Ct. D. 1384, page 228, this Bulletin]).

Section 22(a) is: "*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." Section 62 directs the Commissioner, "with the approval of the Secretary" of the Treasury, to "prescribe and publish all needful rules and regulations for the enforcement of this title." Article 66 of Treasury Regulations 74, promulgated under the Act of 1928, so far as material, is: "If * * * the corporation purchases any of its stock and holds it as treasury stock, the sale of such stock will be considered a capital transaction and the proceeds of such sale will be treated as capital and will not constitute income of the corporation. A corporation realizes no gain or loss from the purchase or sale of its own stock."

Petitioner contends that, as Congress must be taken to have exercised its constitutional power to the fullest extent in laying the tax, section 22(a) should be held to include the gain realized from sales of a corporation's own stock, and the quoted regulation can not restrict the scope of the statutory definition. The respondent replies that such gain is capital gain and not income, as is demonstrated by the theory and practice of accounting[6] and by court decisions.[7] The court below found it unnecessary to decide this issue, holding that whether the increment is income is at least a debatable question and the regulation was, therefore, proper as an interpretation of the meaning of the section. We agree that section 22(a) is so general in its terms as to render an interpretative regulation appropriate.[8]

The administrative construction embodied in the regulation has, since at least 1920, been uniform with respect to each of the Revenue Acts from that of 1913 to that of 1932, as evidenced by Treasury rulings and regulations, and decisions of the Board of Tax Appeals.[9] In the meantime successive Revenue Acts have reenacted, without alteration, the definition of gross income as it stood in the Acts of 1913, 1916, and 1918.[10] Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.

The petitioner concedes that if nothing further appeared he would be bound to apply the statute in conformity to the regulation. He asserts, however, that the amendment adopted by the Treasury May 2, 1934, while this cause was pending before the Board, is controlling. By the amendment article 66 is made to read: "Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. * * *

"But where a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. * * * Any gain derived from such transactions is subject to tax, and any loss sustained

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[6] See e. g. Dickinson, "Accounting Practice and Procedure," 130, 132; Sunley and Pinkerton, "Corporation Accounting," 121; Streightoff, "Advanced Accounting," 134–135.

[7] *Johnson* v. *Commissioner* (56 F. (2d), 58); *E. R. Squibb & Sons* v. *Helvering* (98 F. (2d), 69); compare *Borg* v. *International Silver Co.* (11 F. (2d), 143, 147); *Commissioner* v. *Inland Finance Co.* (63 F. (2d), 886); *Carter Hotel Co.* v. *Commissioner* (67 F. (2d), 642).

[8] *Morrissey* v. *Commissioner* (296 U. S., 344, 354 [Ct. D. 1064, C. B. XV–1, 264 (1936)]).

[9] See L. O. 1035 (C. B. 2, 132, C. B. 3, 160); L. O. 296 (C. B. 5, 210); L. O. 426 (C. B. 5, 210); A. R. R. 693 (C. B. 5, 207); I. T. 1198 (C. B. I–1, 275); A. R. R. 799 (C. B. I–1, 374); I. T. 1802 (C. B. II–2, 267). Regulations 45, articles 542 and 563; Regulations 62, articles 543 and 563; Regulations 65, articles 543 and 563; Regulations 69, articles 543 and 563; Regulations 74, articles 66 and 176; Regulations 77, articles 66 and 176. *Simmons & Hammond Mfg. Co.* (1 B. T. A., 803); *Cooperative Furniture Co.* (2 B. T. A., 165); *Atlantic Carton Corporation* (2 B. T. A., 380); *Hutchins Lumber & Storage Co.* (4 B. T. A., 705); *Farmers Deposit Nat. Bank* (5 B. T. A., 520); *H. S. Crocker Co.* (5 B. T. A., 537, 541); *Interurban Const. Co.* (5 B. T. A., 529); *Liberty Agency Co.* (5 B. T. A., 778); *Union Trust Co.* (12 B. T. A., 688, 690); *105 West 55th Street, Inc.* (15 B. T. A., 210, 213); *American Cigar Co.* (21 B. T. A., 464, 495); *Carter Hotel Co.* (25 B. T. A., 933).

[10] See Revenue Act of 1913, Section II, B (38 Stat., 167); Revenue Act of 1916, section 2(a) (39 Stat., 757); Revenue Act of 1918, section 213(a) (40 Stat., 1065); Revenue Act of 1921, section 213(a) (42 Stat., 238); Revenue Act of 1924, section 213(a) (43 Stat., 267); Revenue Act of 1926, section 213(a) (44 Stat., 23); Revenue Act of 1928, section 22(a) (45 Stat., 797); Revenue Act of 1932, section 22(a) (47 Stat., 178).

is allowable as a deduction where permitted by the provisions of applicable statutes."

Petitioner urges that the amendment operates retroactively and governs the ascertainment of gross income for taxable periods prior to the date of its promulgation, and, further, since Congress has reenacted section 22(a) in the Revenue Acts of 1936 and 1938, it has approved the regulation as amended. We hold that the respondent's tax liability for the year 1929 is to be determined in conformity to the regulation then in force.

Section 605 of the Revenue Act of 1928 provides that "In case a regulation or Treasury decision relating to the internal-revenue laws is amended by a subsequent regulation or Treasury decision made by the Secretary or by the Commissioner with the approval of the Secretary, such subsequent regulation or Treasury decision may, with the approval of the Secretary, be applied without retroactive effect." [11] It is clear from this provision that Congress intended to give to the Treasury power to correct misinterpretations, inaccuracies, or omissions in the regulations and thereby to affect cases in which the taxpayer's liability had not been finally determined, unless, in the judgment of the Treasury, some good reason required that such alterations operate only prospectively. The question is whether the granted power may be exercised in an instance where, by repeated reenactment of the statute, Congress has given its sanction to the existing regulation.

Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rule of law that existed during the period for which the tax is imposed. We need not now determine whether, as has been suggested,[12] the alteration of the existing rule, even for the future, requires a legislative declaration or may be shown by reenactment of the statutory provision unaltered after a change in the applicable regulation. As the petitioner points out, Congress has, in the Revenue Acts of 1936 and 1938, retained section 22(a) of the 1928 Act *in haec verba*. From this it is argued that Congress has approved the amended regulation. It may be that by the passage of the Revenue Act of 1936 the Treasury was authorized thereafter to apply the regulation in its amended form. But we have no occasion to decide this question since we are of opinion that the reenactment of the section, without more, does not amount to sanction of retroactive enforcement of the amendment, in the teeth of the former regulation which received congressional approval, by the passage of successive Revenue Acts including that of 1928.

The judgment is affirmed.

ARTICLE 22(a)–16: Acquisition or disposition by a corporation of its own capital stock. 1939–7–9713 Ct. D. 1384

INCOME TAX—REVENUE ACT OF 1932—DECISION OF SUPREME COURT.

1. GROSS INCOME—PURCHASE AND RESALE BY CORPORATION OF ITS OWN STOCK—CONSTRUCTION OF STATUTE—REGULATIONS APPROVED BY REENACTMENT OF STATUTE WITHOUT ALTERATION.

Gain accruing to a corporation consequent on the purchase and resale of its own shares does not constitute gross income within the meaning of section 22(a) of the Revenue Act of 1932, as construed by article 66 of Regulations 77. That section is so general in its terms as to render an interpretative regulation appropriate; the administrative construction embodied in the regulation has, since at least 1920, been uniform with respect to each of the Revenue Acts from 1913 to 1932, and Congress must be taken to have approved such construction by its successive reenactments, without alteration, of the definition of gross income as it stood in the earlier Acts and thereby to have given it the force of law.

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[11] 45 Stat., 874. Somewhat similar provisions were contained in earlier Acts. (See Revenue Act of 1921, section 1314, 42 Stat., 314; Revenue Act of 1926, section 1108(a), 44 Stat., 114.)

[12] *Squibb & Sons* v. *Helvering* (98 F. (2d), 69, 70).

2. REGULATIONS—RETROACTIVE OPERATION.

The amendment of article 66 of Regulations 77 by Treasury Decision 4430 [C. B. XIII–1, 36 (1934)], which was adopted on May 2, 1934, and which prescribed that gain realized by a corporation from purchase and resale of its own stock constitutes gross income, does not govern the ascertainment of the corporation's tax liability for the year 1933. The power to issue regulations with retroactive effect in an instance where, by repeated reenactment of the statute, Congress has given its sanction to the existing regulation, may not be exercised in such manner as to repeal the rule of law that existed during the period for which the tax is imposed. The reenactment of the definition of gross income in the 1936 and 1938 Acts following the amendment of the regulation does not, without more, amount to sanction of retroactive enforcement of such amendment.

SUPREME COURT OF THE UNITED STATES.

First Chrold Corporation, petitioner, v. *Commissioner of Internal Revenue.*
[306 U. S., 117.]

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 30, 1939.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the Court.

This case presents the same question as that involved in No. 328, decided this day [Ct. D. 1383, page 225, this Bulletin]. Certiorari was granted because of a conflict in the decisions below. The statutory provision under which this case arises is section 22(a) of the Revenue Act of 1932, which is the same as the corresponding section of the Revenue Act of 1928. The regulations, original and amended, have the same relation to this controversy as to that in No. 328. The Board of Tax Appeals sustained a determination of a deficiency in the petitioner's tax for the calendar year 1933 and the circuit court of appeals affirmed the Board's ruling.[1]

For the reasons given in No. 328 the judgment must be
Reversed.

ARTICLE 22(a)–18: Sale and purchase by corporation of its bonds. 1939–16–9795 Ct. D. 1392

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF SUPREME COURT.

DEDUCTION—MERGER OF CORPORATION AND SUBSIDIARY—REDEMPTION OF BONDS OF SUBSIDIARY—UNAMORTIZED BOND DISCOUNT AND EXPENSE.

Under the applicable provisions of the Revenue Acts of 1926 and 1928, the taxpayers, Pennsylvania corporations, were entitled to deduct unamortized bond discount and expense in connection with the redemption of bonds of wholly-owned subsidiaries, one corporation having previously acquired all the assets of its subsidiary subject to its liabilities (the subsidiary holding no public franchises), and the other corporation having previously acquired all of the assets and franchises of its subsidiary subject to its liabilities, pursuant to the Pennsylvania statutes. In the one case, the transaction constituted a *de facto* merger even though it did not comply with all the provisions of the State law, and in the other the transaction constituted a "short form" merger under such law. In neither case was the transfer a mere sale by one corporation of all its assets to another which assumed the liabilities of the former.

[1] 97 F. (2d), 22.

SUPREME COURT OF THE UNITED STATES.

486. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *Metropolitan Edison Co.*

487. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *Pennsylvania Water & Power Co.*

[59 S. Ct., 634.]

On writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 3, 1939.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the Court.

These cases present the question whether, under the Revenue Acts of 1926 and 1928,[1] a Pennsylvania corporation may deduct unamortized bond discount and expense in connection with redemption of the bonds of a subsidiary, all of whose assets it had previously acquired pursuant to local law. The court below answered this question in the affirmative.[2] By reason of a direct conflict of decision we granted the writ of certiorari.[3]

The respondent in No. 486 is a Pennsylvania corporation supplying electric light and power in that State and also operating, through subsidiaries, a system which serves communities in Pennsylvania and Maryland. It filed consolidated returns for itself and its subsidiaries for 1927 and 1928. During 1928 the company retired certain bonds of Pennsylvania corporations which were formerly subsidiaries whose obligations the taxpayer had assumed when it took over their assets by transfers effected pursuant to an act of the general assembly of April 29, 1874, as amended and supplemented.[4] When these obligations were redeemed there existed, with respect to them, unamortized discount and expense aggregating $752,481.26, which the company in its return deducted from gross income. The Commissioner ruled against the deduction and determined a deficiency. The Board of Tax Appeals sustained the Commissioner.[5] The circuit court of appeals reversed the Board holding that the transactions whereby the taxpayer acquired the assets and assumed the liabilities of its former subsidiaries, pursuant to the statute, constituted a merger, as a consequence of which the subsidiaries ceased to exist by operation of law whereas the taxpayer continued to exist and became liable for the subsidiaries' debts both under contract and by operation of law. The court, therefore, held that the unamortized discount and expense was deductible in respect of the subsidiary's bonds.

In 1923 the respondent in No. 486 desired to erect a generating plant for electric energy. Wishing to finance it by a separate bond issue the respondent organized Metropolitan Power Co., a Pennsylvania corporation, as a wholly owned subsidiary. The taxpayer purchased, guaranteed, and sold, at the same price it had purchased, $3,250,000 of bonds of the subsidiary; purchased all of its stock and loaned it on open account approximately $3,000,000. The Power company held no public franchises and, under a contract with the taxpayer, sold all of its electricity to the latter at a price sufficient to enable it merely to earn the costs of operation and other charges, including depreciation, taxes, and interest. In 1927, pursuant to State authority, the Power company sold all its assets subject to its liabilities to the taxpayer, a deficit from operations being charged against the taxpayer's surplus. At the time of the transfer the taxpayer surrendered the stock of the Power company for cancellation and the latter became inactive and was dissolved in 1928. The taxpayer assumed liability for the outstanding bonds of the Power company payment of which

[1] Revenue Act of 1926, sections 200(d), 212(b), 232, and 234(a) (1) (2) and (4) (44 Stat., 9, 10, 23, 41-42); Revenue Act of 1928, sections 23 (a) (b) and (f), 41, 42, 43, 48 (45 Stat., 791, 799-800, 805, 807).

[2] 98 F. (2d), 807, 812.

[3] See *General Gas & Electric Corporation* v. *Commissioner of Internal Revenue* (98 F. (2d), 561), in which certiorari was also granted [Ct. D. 1393, page 233, this Bulletin.]

[4] Act of April 29, 1874 (P. L., 73), section 23, amended by act of April 17, 1876 (P. L., 30), section 5, and act of June 2, 1915 (P. L., 724), section 1. Purdon's Pa. Stats., Title 15, section 595.

[5] 35 B. T. A., 1110.

it had originally guaranteed and, during 1927, called them for redemption and redeemed them. At the time of the redemption there remained unamortized discount and expense incurred in issuing the bonds aggregating $308,097.90 which the taxpayer deducted from its gross income. The Commissioner ruled against the deduction and the Board of Tax Appeals sustained him.[6] The court of appeals reversed the Board, holding that, while the transaction was not consummated under the State statute it nevertheless was under State law a *de facto* merger and, the taxpayer was accordingly entitled to the deduction.

The respondent in No. 487 is a Pennsylvania corporation operating a hydro-electric plant at Holtwood, Pa. In 1924 it desired to provide its customers with a more adequate supply by an auxiliary steam power plant. As its corporate powers did not permit steam generation of electricity it caused the incorporation of a Pennsylvania company, known as Holtwood Power Co., all of whose shares were purchased and owned by the respondent. With the proceeds of the sale of the Power company's stock and those of a bond issue the steam plant was erected. This plant sold all its output to the taxpayer which agreed, in return, to pay the Power company's costs and expenses and an allowance for depreciation, and to pay a sum to provide for amortization of debt, discount, and security issue expense, and the expenses attending the issue, registration and transfer of the capital stock and bonds, all interest on bonds and other indebtedness, and a sum sufficient to provide a net return of 8 per cent on the Power company's stock. The steam plant was managed by the taxpayer's officers and employees without compensation and was operated as a department of the taxpayer. In 1927 the taxpayer surrendered certain corporate powers so as to be in a position to effect a merger or consolidation with its subsidiary under the Pennsylvania statutes.[7] Thereupon the Power company conveyed all of its assets and franchises to the taxpayer pursuant to the Pennsylvania Act of 1874 as amended, the sole consideration being the delivery to the subsidiary of all its capital stock held by the taxpayer and the assumption by the taxpayer of the subsidiary's indebtedness. The subsidiary ceased to exist. In 1928 the taxpayer retired the bonds of its former subsidiary and charged off unamortized discount and expense in respect of them in the sum of $145,159.52 and, in its income tax return for that year, claimed a small deduction for amortization for a portion of the year prior to the retirement, and a deduction of the balance of the sum above mentioned as of the date when the retirement took place. The Commissioner disallowed the deduction and determined a deficiency. The Board of Tax Appeals sustained the ruling.[8] The circuit court of appeals reversed the Board.

The petitioner concedes that if there has been a true merger or consolidation whereby the identity of the corporation issuing the bonds continues in the successor and the latter becomes liable for the debts of the former by operation of law, the successor may deduct amortization of discount and expense in respect of bonds issued by its predecessor as well as unamortized discount and expense on any of such bonds retired prior to maturity.[9] The rule is not applicable upon a mere sale by one corporation of all its assets to another which assumes the liabilities of the former.[10]

The contention of the petitioner is that the transactions in issue fall within the latter category. The respondents, on the other hand, insist that, in the light of the applicable statute of Pennsylvania and the decisions of her courts, the transactions constituted mergers in the proper acceptation of that term. The question, then, is solely one respecting the law of Pennsylvania.

Until the complete revision of the corporation laws of the Commonwealth in 1933 there were but two statutes available to corporations seeking to merge or consolidate. The act of April 29, 1874, section 23, supra, so far as material, provides that any corporation, with the consent of its stockholders, may "sell, assign, dispose of and convey to any corporation created under or accepting

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[6] 35 B. T. A., 1110.

[7] See *York Haven Water & Power Co.* v. *Public Service Commission* (287 Pa., 241, 249; 134 Atl., 419, 421).

[8] 36 B. T. A., 467.

[9] *American Gas & Electric Co.* v. *Commissioner* (85 F. (2d), 527); *American Gas & Electric Co.* v. *United States* (17 F. Supp., 151); *New York Cent. R. Co.* v. *Commissioner* (79 F. (2d), 247); *Western Maryland Ry. Co.* v. *Commissioner* (33 F. (2d), 695); *Illinois Power & Light Corporation* v. *Commissioner* (33 B. T. A., 1189); *Connecticut Electric Service Co.* v. *Commissioner* (35 B. T. A., 444).

[10] *Turner-Farber-Love Co.* v. *Helvering* (68 F. (2d), 416 [Ct. D. 827, C. B. XIII–1, 279 (1934)]); *American Gas & Electric Co.* v. *Commissioner*, supra; *American Gas & Electric Co.* v. *United States*, supra.

the provisions of this act, its franchises, and all its property, real, personal and mixed, and thereafter such corporation shall cease to exist, and the said property and franchises not inconsistent with this act, shall thereafter be vested in the corporation so purchasing as aforesaid. * * *." The act of May 3, 1909,[11] permits what it terms a merger but what is in truth a consolidation to be effected by a joint agreement of two or more corporations approved by the stockholders setting forth the terms and conditions of the merger and consolidation and providing for the organization of a new corporation to which the franchises and property of the consolidating corporations are to be transferred. This act contemplates the issue of letters patent to the consolidated corporation, and the issue of new stock by it, in lieu of that of the old. The procedure under the act of 1874 has repeatedly been referred to in the decisions of the Supreme Court of the Commonwealth as the "short form" and that under the act of 1909 as the "long form" of merger.[12]

Inasmuch as the transfer of the franchises and assets is authorized by statute, it seem reasonably clear that the transferee is, as matter of law, liable for the obligation of the transferor. The cases indicate that this is so.[13] The petitioner argues and the Circuit Court of Appeals for the Second Circuit has held to the contrary, in reliance on *Merwine* v. *Mt. Pocono Light & Imp. Co.* (304 Pa., 517, 156 Atl., 150). That court thought the case indicated that the liability, if any, of the transferee was not under the statute but was only that of a fraudulent transferee under 13 Eliz., chapter 5. Action for a tort had been brought against the transferor prior to a transfer under the act of 1874. After the conveyance the defendant filed a suggestion that the property had been conveyed in proceedings under the act, that the defendant had ceased to exist, and that the action should be abated. The plaintiff sought to substitute the transferee as defendant. The trial court denied substitution and abated the action. The Supreme Court held that the termination of corporate existence of the defendant under the act of 1874 did not abate the action, but that if the plaintiff recovered a judgment she could "levy wherever defendant's assets liable for the judgment may be found," which seems to us to mean no more than that the assets after the conveyance remained subject to the transferor's liabilities. A transfer fully authorized by statute can not be a fraudulent conveyance within the 13 Eliz.

We are of opinion that a transfer without valuable consideration, with the intent that the transferor shall, as the statute provides, cease to exist, made in accordance with the statute, has all the elements of a merger and comes within the principle that the corporate personality of the transferor is drowned in that of the transferee. It results that the continuing corporation may deduct unamortized bond discount and expense in respect of the obligations of the transferring affiliate.

A somewhat different question arises with respect to the transfer of assets of Metropolitan Power Co. It is admitted that this transfer was not made in accordance with the terms of the act of 1874. No franchises were transferred because the Metropolitan Power Co. held no public franchises of any kind. The transfer was merely of assets with the assumption of all the liabilities by the transferee. It is important to note, however, that amongst the liabilities assumed were bonds on which the parent company was already liable as guarantor. The court below has held, and we concur, that, under the law of Pennsylvania, the transfer in question constituted a *de facto* merger, even though the transfer did not comply with all the provisions of the act of 1874.[14] and that, as matter of law, the taxpayer would be liable for the debts of the transferor.

Judgments affirmed.

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[11] Purdon's Pa. Stats., Title 15, section 421, etc.

[12] See *York Haven Water & Power Co.* v. *Public Service Commission* (287 Pa., 241, 246, 134 Atl., 419, 420); *Buist's Estate* (297 Pa., 537, 541, 147 Atl., 606, 607); compare Stockley Penna. Corp. Laws, 1933, pages 39, 104; *Penna. Utilities Co.* v. *Public Service Commission* (69 Pa. Super. Ct. 612).

[13] *Berkovitz's Appeal* (319 Pa., 397, 407, 179 Atl., 746 at 751); *Commonwealth* v. *Merchants National Bank* (323 Pa., 145, 153, 185 Atl., 823, 827).

[14] *Commonwealth* v. *Merchants National Bank*, supra, page 152.

ARTICLE 22(a)-18: Sale and purchase by corporation of its bonds. 1939-16-9796 Ct. D. 1393

INCOME TAX—REVENUE ACT OF 1926—DECISION OF SUPREME COURT.

DEDUCTION—MERGER OF CORPORATION AND SUBSIDIARY—REDEMPTION OF BONDS OF SUBSIDIARY—UNAMORTIZED BOND DISCOUNT AND EXPENSE.

Conveyances by subsidiaries to the taxpayer corporation, consummated under the provisions of Pennsylvania statutes, constitute mergers so as to authorize the taxpayer to take a deduction for unamortized bond discount and expense in respect of bonds issued by the subsidiaries prior to the conveyance, for the reasons given in *Helvering* v. *Metropolitan Edison Co.* and *Helvering* v. *Pennsylvania Water & Power Co.* [Ct. D. 1392, page 229, this Bulletin.]

SUPREME COURT OF THE UNITED STATES.

General Gas & Electric Corporation, petitioner, v. *Commissioner of Internal Revenue.*

[59 S. Ct., 638.]

On writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 3, 1939.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the Court.

These are companion cases to Nos. 486 and 487 [Ct. D. 1392, page 229, this Bulletin] and involve the same question. The circuit court of appeals held that conveyances by subsidiaries to the taxpayer, consummated under the act of April 29, 1874, did not constitute mergers so as to authorize the taxpayer to take a deduction for unamortized bond discount and expense in respect of bonds issued by the subsidiaries prior to the conveyance.

For reasons given in Nos. 486 and 487 the judgments must be reversed.

So ordered.

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

ARTICLE 22(b)(4)-4: Interest upon United States obligations.

REVENUE ACT OF 1934.

Exemption of interest (increment in value) on United States savings bonds. (See I. T. 3262, page 96.)

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

ARTICLE 23(a)-1: Business expenses.

REVENUE ACT OF 1934.

Losses incurred in the operation of a farm and racing stable. (See G. C. M. 21103, page 164.)

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

ARTICLE 23(e)-1: Losses by individuals. 1939-3-9680
Ct. D. 1378

INCOME TAX—REVENUE ACTS OF 1932 AND 1934—DECISION OF SUPREME COURT.

DEDUCTION—LOSS BY INDIVIDUAL—CASUALTY—BASIS.

The amount of deduction allowable to an individual under sections 23(e)3 of the Revenue Acts of 1932 and 1934 on account of loss sustained during the taxable year through injury to depreciable nonbusiness property is limited by the provisions of sections 113(b)1(B) of those Acts so that it may not exceed the amount of the loss actually sustained in that year, measured by the then depreciated value of the property.

SUPREME COURT OF THE UNITED STATES.

No. 180. *Guy T. Helvering, Commissioner of Internal Revenue, petitioner,* v. *Donald H. Owens and Marion Haviland Owens.*

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

No. 318. *Amedeo Obici and Mrs. Amedeo Obici, petitioners,* v. *Guy T. Helvering, Commissioner of Internal Revenue.*

[305 U. S., 468.]

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 3, 1939.]

OPINION.

Mr. Justice ROBERTS delivered the opinion of the Court.

The courts below have given opposing answers to the question whether the basis for determining the amount of a loss sustained during the taxable year through injury to property not used in a trade or business, and therefore not the subject of an annual depreciation allowance, should be original cost or value immediately before the casualty.[1] To resolve this conflict we granted certiorari in both cases.

In No. 180 the facts are that the respondent Donald H. Owens purchased an automobile at a date subsequent to March 1, 1913, and prior to 1934, for $1,825, and used it for pleasure until June, 1934, when it was damaged in a collision. The car was not insured. Prior to the accident its fair market value was $225; after that event the fair market value was $190. The respondents filed a joint income tax return for the calendar year 1934 in which they claimed a deduction of $1,635, the difference between cost and fair market value after the casualty. The Commissioner reduced the deduction to $35, the difference in market value before and after the collision. The Board of Tax Appeals sustained the taxpayers' claim and the circuit court of appeals affirmed its ruling.

In No. 318 it appears that the taxpayers acquired a boat, boathouse, and pier in 1926 at a cost of $5,325. In August, 1933, the property, which had been used solely for pleasure, and was uninsured, was totally destroyed by a storm. Its actual value immediately prior to destruction was $3,905. The taxpayers claimed the right to deduct cost in the computation of taxable income. The Commissioner allowed only value at date of destruction. The Board of Tax Appeals held with the taxpayers but the circuit court of appeals reversed the Board's ruling.

Decision in No. 180 is governed by the Revenue Act of 1934;[2] in No. 318 by the Revenue Act of 1932.[3] The provisions of both statutes touching the question presented are substantially the same and we shall refer only to those of the 1934 Act. Section 23(e)3 permits deduction from gross income of losses "of property not connected with the trade or business" of the taxpayer, "if the

[1] *Helvering* v. *Owens* (95 F. (2d), 318); *Helvering* v. *Obici* (97 F. (2d), 431).
[2] Ch. 277 (48 Stat., 680), sections 23 (e), (f), (h), (l), 24(a) 1, 41, 113; 26 U. S. C., sections 23, 24, 41, 113.
[3] Ch. 209 (47 Stat., 169), sections 23 (e), (f), (g), (h), 24(a) 1, 113.

loss arises from * * * casualty." Subsection (h) declares that "The basis for determining the amount of the deduction for losses sustained, to be allowed under subsection (e) * * *, shall be the adjusted basis provided in section 113(b)." Section 113 is entitled "Adjusted basis for determining gain or loss"; in subsection (a) it provides that "The basis of property shall be the cost of such property," with exceptions not material. Subsection (b), to which 23(h) refers, is: "*Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided. (1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws."

The Income Tax Acts have consistently allowed deduction for exhaustion, wear and tear, or obsolescence only in the case of "property used in the trade or business." The taxpayers in these cases could not, therefore, have claimed any deduction on this account for years prior to that in which the casualty occurred. For this reason they claim they may deduct upon the unadjusted basis—that is, cost. As the income tax laws call for accounting on an annual basis; as they provide for deductions for "losses sustained during the taxable year"; as the taxpayer is not allowed annual deductions for depreciation of nonbusiness property; as section 23(e)3 requires that the deduction shall be on "the adjusted basis provided in section 113(b)," thus contemplating an adjustment of value consequent on depreciation; and as the property involved was subject to depreciation and of less value in the taxable year, than its original cost, we think section 113(b)1(B) must be read as a limitation upon the amount of the deduction so that it may not exceed cost, and in the case of depreciable nonbusiness property may not exceed the amount of the loss actually sustained in the taxable year, measured by the then depreciated value of the property. The Treasury rulings have not been consistent, but this construction is the one which has finally been adopted.[4]

In No. 180 judgment reversed.

In No. 318 judgment affirmed.

ARTICLE 23(e)–1: Losses by individuals.

REVENUE ACT OF 1928.

Loss in compromise settlement from values in original separation agreement. (See Ct. D. 1394, page 263.)

ARTICLE 23(e)–1: Losses by individuals. 1939–26–9892
Ct. D. 1405

INCOME TAX—REVENUE ACT OF 1932—DECISION OF COURT.

1. DEDUCTION—LOSS—INSOLVENCY OF INSURANCE COMPANY—IRREVOCABLE DESIGNATION OF BENEFICIARIES.

An insured who, after the payment of all premiums on his policies of life insurance, irrevocably designated his children as beneficiaries instead of exercising his option to surrender the policies for their cash values or to receive annuities thereunder, is not entitled to a deduction, under section 23(e) of the Revenue Act of 1932, for an alleged loss in the amount of their cash value due to the insolvency of the insurance company, since by such irrevocable designation he had terminated his right to cancellation and surrender and had divested himself of all control and dominion over the policies and all the rights and privileges appertaining thereto.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1938) (37 B. T. A., 399) affirmed.

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[4] Treasury Regulations 86, articles 23(e)–1, 23(h)1, 113(b)1; G. C. M. [16255] (C. B. XV–1, 115–118).

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Robert H. Morse, petitioner, v. *Commissioner of Internal Revenue, respondent.*
[100 Fed. (2d), 593.]

Petition for review of the decision of the United States Board of Tax Appeals.

Before EVANS, MAJOR, and TREANOR, Circuit Judges.

[November 28, 1938.]

OPINION.

MAJOR, Circuit Judge: We have before us a petition for review of a decision of the Board of Tax Appeals entered February 25, 1938, determining that the Commissioner correctly asserted an income tax deficiency for the calendar year 1932, in the amount of $5,982.24.

Petitioner was the insured in four 20-payment life insurance policies issued by the Commercial Life Insurance Co. of Chicago (later taken over by the Old Colony Life Insurance Co.), Nos. 2190 issued September 16, 1907, 4268, 4269, and 4270 issued January 26, 1910. Each of the policies was in the amount of $10,000 and provided that, after the payment of premiums for 20 years, the insured might either continue the contract in force without further payment of premiums, or exercise the option to surrender the policy for a stated cash value, or the option of receiving an annuity. Policy No. 2190 was fully paid up in 1927 and at that time had a cash surrender value of $4,980. Policy No. 4268 was fully paid up in 1929 and had a cash surrender value of $5,200. The other two policies, Nos. 4269 and 4270 were fully paid up in 1930 and had a cash surrender value of $5,200 each. The total amount of premiums paid upon such policies was $21,744.

All of the policies were originally payable to the petitioner's estate. On January 11, 1928, the petitioner, by causing proper indorsement on the policies, designated his son, John, as beneficiary under policies Nos. 4269 and 4270, and his daughter, Barbara Joan, as beneficiary under policies Nos. 2190 and 4268, reserving the power of revocation. On June 24, 1932, petitioner, by causing proper indorsement on the policies, irrevocably designated the same individuals as beneficiaries of the same policies.

In 1932, the Old Colony Life Insurance Co. became insolvent and on September 20, 1932, receivers were appointed by the Circuit Court of Cook County, Ill. On that date, the policies had a total cash value of $21,996.20, being the cash value of the respective policies at the end of 20 years, plus interest at 3½ per cent. November 7, 1932, the court approved the first report of the receivers and ordered the liquidation of the business of the company. November 10, 1932, the court approved and ordered the receivers to accept a proposed agreement of the Life & Casualty Insurance Co. of Chicago, which agreed to reinsure, under certain conditions (including a 100 per cent lien on reserves) the policies which had been written by the insolvent company.

In his income tax return for the year in question, petitioner claimed a loss of $21,996.20 (the cash value of the policies), as a deduction under section 23(e) of the Revenue Act of 1932. Said Act is as follows:

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

"(1) if incurred in trade or business; or

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

The Board of Tax Appeals based its decision upon the premise that because of the irrevocable designation by petitioner of his son and daughter as beneficiaries under the policies, no loss was sustained by petitioner. Respondent argues three propositions in support of the Board's decision. First, the loss, as claimed, was not one recognizable under the pertinent provision of the Revenue Act; second, the petitioner has sustained no deductible loss, and third, petitioner has not proved either the amount or the year of the alleged loss. As related, the Board disposed of the matter by deciding the second question adversely to petitioner. In view of our conclusions that the decision of the Board must be sustained, we shall likewise consider only the same question. In other words, assuming, but not deciding, that the alleged loss

is within the language of the Revenue Act in question, and also assuming, but likewise not deciding, that the time and amount of the alleged loss were properly fixed, we shall consider only the question as to whether the petitioner sustained a deductible loss. A determination of this question must depend upon the interest or property right, if any, retained by the petitioner in the policies after irrevocably designating his children as beneficiaries.

It seems to be the general rule, which, we gather from petitioner's brief, is not disputed, that the irrevocable designation of a beneficiary creates therein a vested right in the proceeds of the policy. (*Washington Central Bank* v. *Hume*, 128 U. S., 195, 206.) Petitioner, however, by some process not entirely clear to us, seeks to distinguish between the right acquired by the irrevocable beneficiary to the proceeds of an insurance policy having a cash surrender value, and one which does not. No case is cited, and our own investigation has failed to produce one, where the exact question here raised has been determined.

In *Morgan* v. *Penn Mutual Life Insurance Co.* (94 F. (2d), 129), we find a discussion which, though not entirely in point, furnishes some light on the question. There the action was by the beneficiary as plaintiff against the insurance company to recover on a policy which had been surrendered by the insured for the cash value without the consent or knowledge of the beneficiary. The court points out that the policy in suit reserved to the insured the right to change the beneficiary and also the right of assignment. In discussing the question, the court on page 130 said:

"Where no right is reserved in the policy to change the beneficiary without his consent, the policy confers immediately upon its issue a vested right in the beneficiary that can not be defeated by assignment or transfer without his consent, but it is equally well settled by controlling authority in the national courts that, where the policy by its terms gives the insured the right to change the beneficiary or assign the policy, the beneficiary takes only a contingent interest therein in the nature of an expectancy. [Citing cases.]"

The court reviewed the authorities and decided adversely to the contention there advanced by the plaintiff that, even though the insured had the power to change the beneficiary, this would not entitle him to surrender the policy without the consent of the beneficiary, on the ground that the policy reserved to the insured the absolute right to make such change. The court concluded that the beneficiary, under such circumstances, had no vested right in the policy. Again the court, page 131, said:

"The insured, under the terms of this policy, had complete control and dominion of it, and, under such circumstances, the beneficiary, having a mere expectancy, could have no interest nor concern in the method or means employed by the insured in making disposition of his own property."

The court, in this case, having stressed the reservation contained in the policy regarding the insured's right to change the beneficiary or assign, it seems certain, from the language used, would have held otherwise if confronted with a proposition such as we find here, wherein the insured made an irrevocable designation of beneficiaries.

In *Mutual Life Insurance Co. of New York* v. *Allen* (212 Ill., 134), the court seems to recognize the principle that the insured is precluded from taking action to the detriment of the beneficiary unless the power is expressly reserved by a provision of the policy. On page 138 it is said:

"But it was not shown that the assured had the power to cancel the policy. The appellee was named as beneficiary in the policy and had possession of the instrument. She had a vested right in the fund provided to be paid by the policy, unless power to divest that right was expressly reserved to the assured by a provision of the policy."

D'Arcy et al. v. *Conn. Mutual Life Insurance Co.* (69 S. W., 768) was a suit on a policy payable in 10 years and which, after said payments had been completed, was surrendered by the insured, without the consent of the beneficiary, for its cash surrender value. The opinion is silent concerning any provision in the policy as to the insured's right to change the beneficiary, but after disposing of other questions, the court, page 772, says:

"The insured, James Sweeney, had no authority to collect the cash surrender value of the policy in 1894, since his only daughter, Mrs. D'Arcy, as sole beneficiary, had a vested interest therein, which could not be effected by such a settlement."

In other words, notwithstanding the fact that the insured had surrendered the policy and obtained its cash surrender value, a recovery of the face value was had by the beneficiary.

In *Condon* v. *New York Life Insurance Co. of New York* (166 N. W., 452), the court, in discussing the rights of insured and beneficiary, on page 453 said:

"It is held by the great weight of authority that the interest of a designated beneficiary in an ordinary life policy vests upon the execution and delivery thereof, and, unless the same contains a provision authorizing a change of beneficiary without the consent thereof, the insured can not make such change. [Citing cases.]

"And this applies to a policy to which there are attached the incidents of a loan value, cash surrender value, and automatic extensions by premiums paid. [Citing cases.]"

It seems plain from this language that the beneficiary, irrevocably designated as such, has a vested right not subject to change at the hand of the insured, and this, irrespective of whether the policy is one of ordinary life or one providing for a cash surrender value.

Our attention is called to a class of cases which hold that, where an insured has irrevocably designated a beneficiary, the insured relinquishes all right to the cash surrender value. These cases arise, in determining for revenue purposes, the gross estate of a decedent and we find the position of the parties reversed to what they are here, the Government contending that the cash or surrender value of an insurance policy is a part of the decedent's estate, while the representatives of the decedent argue to the contrary. The courts have usually decided against the Government's contention. Typical of such cases is *Helvering* v. *Parker* (84 F. (2d), 838), wherein the court had under consideration policies in which the wife of the insured was designated as beneficiary with no right reserved on the part of the insured to change the same. The policies also provided for a cash or surrender value. The court on page 839 said:

"The New York Life policy was paid up March 7, 1913, and remained in force. After that date the insured had no right to surrender it or to borrow money upon it.

* * * * * * *

"Each of the Union Central policies contained a loan provision, but required the 'legal assignment of the policy to the company as collateral security.' Under the terms of these three policies the vested interest of the beneficiary could not be divested without her consent, hence there could be no legal assignment of the policies by anyone but herself. [Citing cases.]"

In discussing the situation where the insured reserves no right to change beneficiary, on the following page it is said:

"Where the insured reserves no rights incidental to ownership or control of the policies, so that death transfers nothing to the beneficiary and shifts no economic benefits, there is no transfer within the reach of the taxing power, and such policies are not covered by the statute. (*Industrial Trust Co. et al.* v. *United States*, 296 U. S., 220, 56 S. Ct., 182, 80 L. Ed., 191 [Ct. D. 1057, C. B. XV-1, 848 (1936)]; *Bingham* v. *United States*, 296 U. S., 211, 56 S. Ct., 180, 80 L. Ed., 160 [Ct. D. 1058, C. B. XV-1, 367 (1936)]; *Walker* v. *United States* (C. C. A. 8), 83 F. (2d), 103, 108, 110.)"

Other cases where the same conclusion has been reached are *Pennsylvania Company* v. *Commissioner* (79 F. (2d), 295) and *Levy's Estate* v. *Commissioner* (65 F. (2d), 412).

Notwithstanding petitioner's argument that there is no analogy between such cases and the instant one, it appears to us that they are of persuasive effect. Under such decisions, if petitioner had died in 1932, and the Government had sought to include the cash or surrender value of the policies in decedent's gross estate, it would have been unsuccessful for the reason that petitioner, during his lifetime, by his own act, had vested in the beneficiaries all interest, including the cash or surrender value. He would have had no right to surrender, borrow or assign.

The case of *Kyle* v. *McGuirk* (82 F. (2d), 212 [Ct. D. 1142, C. B. XV-2, 270 (1936)]) is stressed in support of petitioner's position. In that case it was

held that the insured, during his lifetime, had a property right in the insurance subject to distraint for income taxes owing by the insured. It is pointed out in that case, however, that the insured reserved the right to change the beneficiary, and that, of course, is the distinguishing feature. Under such a reservation, the insured, no doubt, had a right to change his beneficiary and retained a property interest in the policy, including, perhaps, the right of surrender for the cash value thereof.

In the instant case, the insured had a right, after making payment of 20 annual premiums as the policies provided, to the cash or surrender value thereof, but instead of exercising such right, he designated his children as irrevocable beneficiaries. By this act we think he terminated his right to cancellation and surrender and divested himself of all control and dominion over the policies and all the rights and privileges appertaining thereto. Petitioner's argument that such action could apply only to the proceeds of the policies, effective at petitioner's death, in contrast to the cash or surrender value of the same, is not tenable. To permit petitioner to exercise the option which he at one time had, of surrendering the policies and obtaining the cash value thereof, is to nullify his act in irrevocably designating his children as beneficiaries. This result is certain to follow for the reason that if, after making such designation, the insured had a right to surrender the policies and obtain the cash value thereof, he was enabled to destroy all the rights of the beneficiaries therein. Thus finis is written to a contract without the consent of the beneficiary, notwithstanding a vested right was created in the policy by the act of the insured himself.

The decision of the Board is affirmed.

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

ARTICLE 23(k)-1: Bad debts.

REVENUE ACT OF 1934 AND PRIOR REVENUE ACTS.

Recoveries of bad debts charged off in prior years. (See G. C. M. 20854, page 102.)

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

ARTICLE 23(o)-1: Contributions or gifts by individuals. 1939-3-9681 Ct. D. 1379

INCOME TAX—REVENUE ACT OF 1932—DECISION OF SUPREME COURT.

1. DEDUCTION—CHARITABLE CONTRIBUTIONS—NET INCOME—CAPITAL NET LOSS.

The 15 per cent allowed as a deduction for charitable contributions under section 23(n) of the Revenue Act of 1932 is to be calculated on net income computed without regard to capital net loss as to which special provision is made by section 101(b). The words "the taxpayer's net income" in section 23(n) refer to the net income which under the statutory scheme is actually subject to tax. It was the intention of Congress to make net income, ascertained irrespective of capital net loss, the subject of the tax, and the provision in section 23(n) allowing a deduction for charitable contributions is applicable to that taxable net income.

2. CASE DISTINGUISHED.

Helvering v. *Bliss* (293 U. S., 144 [Ct. D. 884, C. B. XIII-2, 191 (1934)]) distinguished.

SUPREME COURT OF THE UNITED STATES.

The United States, petitioner, v. *Frederick Pleasants.*
[305 U. S., 357.]

On writ of certiorari to the Court of Claims.

[January 3, 1939.]

OPINION.

Mr. Chief Justice HUGHES delivered the opinion of the Court.

The question is whether the 15 per cent allowed as a deduction for charitable contributions under section 23(n) of the Revenue Act of 1932 is to be calculated on the taxpayer's net income computed without regard to a capital net loss as to which special provision is made by section 101(b).

Section 23(n) provides that in computing net income there shall be allowed as a deduction from gross income—

"In the case of an individual, contributions or gifts made within the taxable year to or for the use of: * * * to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection."

Respondent in 1932 made charitable contributions to the amount of $3,496. His net income, irrespective of a capital net loss, was determined by the Commissioner to be $94,963.52. Upon that net income the Commissioner assessed the normal tax and surtax at the rates prescribed by sections 11 and 12.[1] Respondent contended that this was his net income as described in section 23(n) and that as his charitable contributions were less than 15 per cent of that amount they were deductible in full in determining his normal tax and surtax. The Commissioner refused to allow the deduction.

The taxpayer had sustained a "capital net loss," as defined in section 101(c)6, of $154,921.98. The Commissioner ruled that "Since the capital loss of $154,921.98 is in excess of adjusted ordinary net income of $94,963.52 (without contributions) there is no net income against which to make a deduction for contributions."

Having paid the tax assessed by the Commissioner upon that theory, respondent filed his claim for a refund and on its rejection brought this suit in the Court of Claims. Judgment was rendered in his favor. (22 F. Supp., 964.) Because of an asserted conflict with decisions of circuit courts of appeals[2] and with our ruling in *Helvering* v. *Bliss* (293 U. S., 144), certiorari was granted. October 10, 1938.

"Capital net gains" and "capital net losses" of individual taxpayers are the subject of special treatment under section 101. In the case of a "capital net gain," there is to be levied, at the election of the taxpayer, and in lieu of all other taxes imposed by the income tax title, a tax of 12½ per cent of the capital net gain, to be added to the tax computed upon the basis of the "ordinary net income." (Section 101(a).) In the case of a "capital net loss," section 101(b) provides for a tax to be determined, also in lieu of other income taxes but irrespective of any election by the taxpayer, as follows:

"a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section."

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[1] These sections provide:
SEC. 11. *Normal tax on individuals.*—
There shall be levied, collected and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following: * * *
SEC. 12. *Surtax on individuals.*—
(a) *Rates of surtax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *.

[2] *Avery* v. *Commissioner* (C. C. A. 7) (84 F. (2d), 905 [Ct. D. 1214, C. B. 1937–1, 167]); *Lockhart* v. *Commissioner* (C. C. A. 3) (89 F. (2d), 143); *Heinz* v. *Commissioner* (C. C. A. 8) (94 F. (2d), 832).

Section 101(c)6 defines "capital net loss" as "the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gains." Section 101(c)7 defines "ordinary net income" as "the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions."

There is no doubt as to the purpose of this provision as to capital net losses which was first introduced in the Revenue Act of 1924.[3] Prior to that time, and under the Revenue Act of 1921, capital losses were to be deducted from capital gains in the process of determining the "capital net gain."[4] If capital deductions and capital losses were in excess of the capital gain, or if there were capital losses in the absence of capital gain, such losses were deductible as ordinary losses. We are told that the opportunity to minimize taxes by the practice of taking capital losses to offset ordinary net income constituted a particularly serious problem after the Act of 1921, which reduced the rate of tax on capital net gains. The results to the Treasury of that method of treating capital losses led to the adoption in the Act of 1924 of the plan for subjecting capital net losses to a limited rate in order to protect the revenues,[5] a plan which was continued in the Revenue Acts of 1926, 1928, and 1932.[6]

It will be observed that the provision for the limitation with respect to a capital net loss under section 101(b) (unlike the provision in section 101(a) as to a capital net gain) gives no option to the taxpayer.[7] The limitation is explicit and must be followed as written. The limitation applies equally when there is no capital gain and hence nothing to be deducted from capital losses on that score.[8] The limitation is applicable unless, as stated in the last clause of section 101(b), a greater tax would result from not applying it.[9] In the instant case there is no question that the limitation does apply and the Commissioner has applied it.

In such a case the statute directs that a partial tax shall be first computed upon the basis of the "ordinary net income" and at the rates and in the manner provided in sections 11 and 12.[10] The total tax is then arrived at by deducting 12½ per cent of the capital net loss. That loss thus figures in the computation of the total tax only by the allowance of an offset to the specified extent against the tax determined apart from the capital losses. Thus where the limitation is applicable and the offset of 12½ per cent of the capital net loss is allowed accordingly, capital losses are not deductible in determining the taxpayer's net income for the purpose of the normal tax and surtax. And, as in such case there is no capital gain, the "ordinary net income" under section 101(b), that is, the net income computed after excluding capital loss and capital deductions, is the only net income upon which a tax is laid.

We have noted that the limitation of section 101(b) is not applicable if the tax, computed without regard to that section, would be greater. The latter method of computation brings out the distinction clearly. For in that method the capital net loss is deducted from the ordinary net income in order to arrive at the total net income for the purpose of applying the normal tax and surtax rates. See illustration in Regulations 77, article 503. But where the limitation of section 101(b) governs, because the tax as otherwise computed would not be greater, capital losses are not deducted in determining the net income which is to be taxed, but are used only for the purpose of determining the specified offset against the tax on that net income. (Id.)

We are not impressed with the argument based on the provisions of sections 21, 22, and 23. True, section 21 provides that "net income" means gross income computed under section 22 less the deductions allowed by section 23. Section 22 defines gross income and section 23 provides for deductions, including deductions for losses. But sections 21, 22, and 23 are not to be construed so as to derogate from the special and explicit provisions of section 101(b). Under the limitation of that section, as we have seen, the taxpayer is not permitted to deduct capital losses so as to reduce the net income subject to tax and his capital

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[3] Revenue Act of 1924, section 208(c).
[4] Revenue Act of 1921, section 206(a)4.
[5] *Piper* v. *Willcuts* (64 F. (2d), 813, 815, 816 [Ct. D. 710, C. B. XII–2, 164 (1933)]); Sixty-fifth Congresssional Record, 2428; House Report 179, Sixty-eighth Congress, first session, page 20.
[6] Revenue Act of 1926, section 208(c); 1928, section 101(b); 1932, section 101(b).
[7] Regulations 77, article 503.
[8] See *Piper* v. *Willcuts* (64 F. (2d), 813, 816); *Hoffman* v. *Commissioner* (71 F. (2d), 929).
[9] See illustration in Regulations 77, article 503.
[10] See note 1.

losses enter into the computation of his ultimate tax only through the deduction of 12½ per cent of the capital net loss from the tax which is computed upon the net income ascertained irrespective of that loss.

It is in this light that we must decide the particular question here presented as to the meaning of the words "the taxpayer's net income" in section 23(n) providing for a deduction of 15 per cent for charitable contributions. Do these words refer to the taxpayer's net income which under the statutory scheme is actually subject to tax? Or is that net income, although treated as subsisting for the purpose of being taxed, to be regarded as nonexistent for the purpose of admitting deductions for contributions? We think that Congress, in the application of the special provision of section 101(b) for an offset in case of a capital net loss, intended to make the taxpayer's net income, ascertained irrespective of that loss, the subject of the tax and that the provision in section 23(n) allowing a deduction for charitable contributions is applicable to that taxable net income.

There is nothing to the contrary in our decision in *Helvering* v. *Bliss*, supra. In that case there was a capital net gain. The net income of the taxpayer comprehended that net gain as well as his net income otherwise computed. We decided that it was his total net income which was to be regarded as the basis for the allowance under section 23(n). We found nothing in section 101, which in that application prescribed "merely a method for segregating a portion of that net income for taxation at a special rate," that in any wise altered the right of the taxpayer to take the deduction in accordance with section 23(n). (Id., 150, 151.) Here, instead of a capital net gain, we have a capital net loss. There is no gain to be added to the taxpayer's net income otherwise computed, and thus that is the only net income taxable under the statute. To that net income, the provision of section 23(n) appropriately applies. We observed in the Bliss case that the exemption of income devoted to charity and the reduction of the rate of tax on capital gains "were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed." That observation is equally pertinent here.

The administrative construction invoked by the Government has not been of a sufficiently consistent character to afford adequate support for its contention.[11]

We conclude that the Commissioner erred in refusing to permit the deduction sought by respondent for his charitable contributions and that the judgment of the Court of Claims should be affirmed.

Affirmed.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

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

ARTICLE 42-1: When included in gross income. 1939-10-9744
G. C. M. 21040

REVENUE ACT OF 1934.

Compensation received in 1935 by the executors of the estate of A for services rendered by him prior to his death in November, 1934, but not payable or determinable until after December 31, 1934, should not be included in his return for the taxable year 1934. G. C. M. 16121 (C. B. XV-1, 121 (1936)) revoked.

In G. C. M. 16121 (C. B. XV-1, 121 (1936)) it was held, syllabus:

Compensation received in 1935 by the executors of the estate of A for services rendered by him prior to his death in November, 1934, but not payable until after January 1, 1935, should be included in his return for the taxable year 1934 even though his books of account were kept on the cash receipts and disbursements basis.

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[11] See I. T. 2104 (C. B. III-2, 152 [1924]); *Elkins* v. *Commissioner*, 24 B. T. A. 572; *Livingood* v. *Commissioner*, 25 B. T. A., 585, 589 (C. B. XI-1, 9, 33 [1932]; C. B. XI-2, 3, 6, 29, 268 [1932]); *Straus* v. *Commissioner* (27 B. T. A., 1116, C. B. XIII-2, 25, 29, 135 [1934]).

In that case the compensation was received in 1935 by the executors of A's estate for services rendered by him prior to his death in November, 1934. Such compensation was not payable until after January 1, 1935, it being based on a percentage of the net profits derived from the sale of merchandise in the stores directly under A's control. The contract provided that final settlement could not be required until after the succeeding annual inventory was finished, not later, however, than March 1 of the succeeding year.

In *Fehrman, Executrix*, v. *Commissioner* (38 B. T. A., 37) the United States Board of Tax Appeals held to the contrary where the compensation of the decedent who died in August, 1934, was based on a percentage of net profits of certain stores and was not ascertainable until after December 31, 1934, after taking inventory as of the end of the year. In that case the compensation was paid in January, 1935. The Commissioner announced his nonacquiescence in that decision in Cumulative Bulletin 1938–2, page 43.

In view of the withdrawal by the Commissioner of his nonacquiescence in the Fehrman decision and announcement of his acquiescence therein (page 12, this Bulletin), G. C. M. 16121, supra, is hereby revoked.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 51.—INDIVIDUAL RETURNS.

ARTICLE 51–1: Individual returns. 1939–8–9720
G. C. M. 20995

REVENUE ACT OF 1934.

A and B, husband and wife, for more than 20 years prior to 1929 lived in California. In 1929 A was sent to New York by his employer in connection with the employer's business in that city. His family, consisting of his wife and two children, was with him in New York from 1929 to 1935, when they returned to California. *Held*, that A did not abandon his domicile in California, and that he and his wife are entitled to file Federal income tax returns for 1935 on the basis of the community property laws of that State.

An opinion is requested whether A and B are legal residents of New York or California for Federal income tax purposes for the calendar year 1935, and if they are legal residents of the latter State, whether they are entitled to file returns and report their income on the community property basis.

A and B are husband and wife, A being employed in an executive capacity with a large organization. They resided in the city of R, California, for more than 20 years prior to 1929 and had a domicile in that State during such time. In 1929 A's employer requested him to go to New York City and straighten out certain business situations there. A (hereinafter referred to as the taxpayer) was at that time of the opinion that this assignment would require about

three years and he signed a contract for that period. Soon thereafter he moved with his family to New York City. In 1930 he sold the house in California in which he and his family had resided for several years but retained, and still retains, ownership of both a summer home and a retail business in California. After coming to New York the taxpayer and his family lived in a rented apartment in New York City, his children attending school in that city. He states that his main purpose in bringing his family to New York was to furnish educational advantages for his children during their school years. In the spring of 1935 his wife and children returned to California and since their return have maintained a completely furnished home near the city of R. The taxpayer is still employed with the same organization in New York and it is not known when his services there will terminate. He has been returning to his family in California several times each year, and spends his summer vacation and Christmas holidays with his family there. The taxpayer never registered or voted in either California or New York. He had a bank account and some investments in New York and others in California. The taxpayer filed State income tax returns in New York from 1929 to 1936 as a resident of that State, but declares that he was ignorant of the fact, until some time in 1936, that the filing of returns as a nonresident was permissible under New York law.

The rule governing change of abode as affecting domicile is plainly set out as follows in *Williamson* v. *Osenton* (232 U. S., 619):

> The essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere (Storey on Conflict of Laws, section 43 —), or, as Mr. Dicey puts it in his admirable book, "the absence of any present intention of not residing permanently or indefinitely in" the new abode. (Conflict of Laws, 2d. ed., 111.) * * *

This same rule is set out in *Gilbert* v. *David* (235 U. S., 561). In that case there is a quotation from Storey, Conflict of Laws, 7th ed., section 46, page 41, which states that a mere floating intention to return to a former domicile is not sufficient to prevent the new place of abode from being a domicile if other requisites are present. However, "an indeterminate or floating intention" to return does *not* include an intention to return on the occurrence of some event which might reasonably be anticipated. (19 C. J., 408, section 20.) The intention to remain indefinitely in the new abode, which is necessary to acquire a domicile of choice, excludes any definite intention of returning to the place of previous domicile, and the original domicile is not changed even by a long absence if there is any definite intention of returning.

In *United States* v. *Knight* (291 Fed., 129) it was stated in part as follows:

> A change of abode with present intent to return to the former abode upon the contemplated happening of an event in the indefinite future, as business dispatched, health recovered, employment ended, employer's recall, is not a change of residence or domicile. (Aff'd. 299 Fed., 571.)

In that case the defendant, who was a naturalized citizen of the United States, lived in South Africa for over 20 years after naturalization as an agent for an American credit association and was held not to have abandoned his American domicile.

Beale, in his Treatise on the Conflict of Laws, chapter 2, section 18.1, states:

* * * It follows that no mere length of residence is sufficient to create a change of domicile in the absence of such an intention to make the new residence a home; nor is there a change if there is an *animus revertendi* to the old home.

The facts in the instant case do not reveal that the taxpayer had a present intent not to return to California during or before 1935, but rather indicate that the intent to return to California (the *animus revertendi*) continued to exist. The taxpayer kept a summer home in California and continued to own a retail business there which was operated at a loss in 1935, and which appears to be a business not suited to management from New York. The return of his wife and children to California early in 1935 and the setting up of a complete establishment there especially tend to indicate that California was, and continued to be, the domicile of the taxpayer. It is also well to note the continued existence of the California branch of the organization by which the taxpayer was employed where he could have reasonably anticipated continuance of his employment. Although the renting of an apartment by the taxpayer which he occupied with his family in New York might well indicate a change of domicile, his statement in regard to the educational demands of his children, the terms and nature of his employment, and most important of all the return of his family to California early in 1935 negative an intent to establish a domicile in New York. Also the facts show that the taxpayer remains in New York City only for the purpose of his employment, which now appears to be of an indefinite nature, and that he returns to California several times each year. Furthermore, the declarations of the taxpayer as to his constant intention to maintain his domicile in California are of some weight. (19 C. J., 438, section 76, No. 5.) The facts relating to the filing of State income tax returns in New York and the location of his bank account and certain investments there are not sufficient to counterbalance the indications of a California domicile.

In view of the facts as above presented in addition to the presumption that the former domicile continues until another domicile is obtained (*Desmare* v. *United States*, 93 U. S., 605; *Mitchell* v. *United States*, 21 Wall., 350), this office is of the opinion that the domicile, and thus the legal residence, of the taxpayer for income tax purposes in the year 1935 was in California. The taxpayer's wife is properly considered as having the same domicile as her husband. (*Anderson et al.* v. *United States*, 202 Fed., 200; *Prince* v. *New York Life Insurance Co.*, 24 Fed. Supp., 41; Beale, Treatise on the Conflict of Laws, chapter 2, section 27.2.)

The taxpayer and his wife being domiciled in, and thus legal residents of, California during 1935, their returns may be filed and income reported on a community property basis for that year. (*United States* v. *Malcolm*, 282 U. S., 792.)

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

ARTICLE 51-1: Individual returns. 1939-20-9834
Ct. D. 1398

INCOME TAX—REVENUE ACT OF 1932—DECISION OF COURT.

1. DEDUCTION—JOINT RETURN—SALES OF SECURITIES WHICH ARE NOT CAPITAL ASSETS—GAINS REALIZED BY ONE SPOUSE—LOSSES SUSTAINED BY THE OTHER — OFFSET — LIMITATION ON STOCK LOSSES.

In a joint return filed by a husband and wife as permitted by section 51(b) of the Revenue Act of 1932, losses sustained by one spouse from the sale of securities which are not capital assets may not be offset against gains realized by the other spouse in the same year from similar sales, under the provisions of section 23(r)1 of that Act.[1]

2. REGULATIONS SUSTAINED.

The provisions of article 381 of Regulations 77, relating to deductions in the case of the filing of a joint return, sustained.

3. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1938) (37 B. T. A., 225) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

H. Denny Pierce and Alma C. Pierce, petitioners, v. *Commissioner of Internal Revenue, respondent.*

[100 F. (2d), 397.]

Appeal from the United States Board of Tax Appeals.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

[December 12, 1938.]

OPINION.

The petitioners, husband and wife who filed a joint return for the year 1933, seek review of an order of the Board determining a deficiency in income tax for that year. Order affirmed.

SWAN, Circuit Judge: The petitioners, husband and wife, elected to file a single joint return for the year 1933, as they were privileged to do by virtue of section 51(b) of the Revenue Act of 1932. (47 Stat., 188.) Mr. Pierce realized a profit of nearly $55,000 from the sale during 1933 of securities which were not "capital assets" as defined in section 101 (47 Stat., 192); that is to say, the securities so sold had not been held by him for more than two years. During the same year Mrs. Pierce sustained a loss of $3,646.78 in selling securities which she had not held for more than two years. In their joint return Mrs. Pierce's loss was deducted from her husband's profit. The Commissioner's disallowance of the deduction resulted in a deficiency tax which the Board has confirmed. The question presented is whether, in a joint return of husband and wife, losses sustained by one spouse from the sale of securities which are not capital assets may be offset against gains realized by the other spouse from similar sales.

At least since the enactment of section 223 of the Act of 1918 (40 Stat., 1074) the revenue laws have always granted to a husband and wife who are living together the privilege of filing either separate returns or a single joint return. Regarding the latter alternative section 51(b)2 of the Revenue Act of 1932 (47 Stat., 188) provides:

"(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."

[1] The Supreme Court on May 1, 1939, denied petitions for certiorari in two cases involving a similar question, which were decided on the authority of the Pierce case, namely, *Demuth* v. *Commissioner*, No. 766 (C. C. A. 2d Cir., 100 F. (2d), 1012), and *Sweet* v. *Commissioner*, No. 876 (C. C. A. 1st Cir., 102 F. (2d), 103).

Although nothing is there said about deductions the Treasury regulations have for many years contained a provision to the following effect:

"* * * Where the income of each is included in a single joint return, the tax is computed on the aggregate income and all deductions or credits to which either is entitled shall be taken from such aggregate income." (Regulations 77, article 381; Regulations 74, article 381; Regulations 65, article 401.)

As long ago as 1921 it was ruled by the Solicitor of the Bureau of Internal Revenue that in cases in which the husband or wife has allowable deductions in excess of his or her gross income, such excess may, if a joint return is filed, be deducted from the net income of the other for the purpose of computing both the normal tax and the surtax. Solicitor's Opinion 90 (C. B. 4, 236 (1921)). Indeed, it is only when the allowable deductions of one spouse exceed his or her income, that any advantage can be derived from filing a joint return.

Most of the allowable deductions, for example, taxes, interest and ordinary losses, are not dependent upon the receipt by the taxpayer of a particular kind of income. But the 1932 Act introduced such a limitation with respect to losses sustained from the sale of securities which are not capital assets. Section 23 (47 Stat., 179) provides:

"In computing net income there shall be allowed as deductions:

* * * * * * *

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

* * * * * * *

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

* * * * * * *

"(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)."

Under the limitation imposed by section 23(r)1 it is obvious that, if separate returns had been filed, neither husband nor wife could take deduction of the loss in question. Mrs. Pierce could not deduct it from her gross income because such a loss is allowable only to the extent of her gains from sales of noncapital securities, and she had no such gains. Mr. Pierce could not deduct it from his gains from sales of noncapital securities because it was not his loss but was sustained by a different taxpayer. But the petitioners contend that when husband and wife file a joint return they become a taxable unit with the result that a loss of this character sustained by one spouse is an allowable deduction against gains of the same character received by the other. This contention can not be sustained in view of the Treasury regulations and judicial decisions in analogous cases. As already noted, the regulations provide that the deductions to be taken from the aggregate income of husband and wife shall be those "to which either is entitled." Here neither was entitled to the deduction in question. Nor have the cases relating to joint returns treated the two spouses as one. Thus, it has been held that where a husband has sold property to his wife at a loss, the loss he sustained may be deducted in the joint return. (*Commissioner* v. *Thomas*, 84 F. (2d), 562 (C. C. A. 5); *Commissioner* v. *Brunder*, 82 F. (2d), 944 (C. C. A. 7); *Hill* v. *United States*, 12 F. Supp., 798 (Ct. Cls.). See also *Gummey* v. *Commissioner*, 26 B. T. A., 894.) Another analogous ruling is our decision in *Van Vleck* v. *Commissioner* (80 F. (2d), 217 [Ct. D. 1116, C. B. XV-1, 232 (1936)]), holding that the husband's net loss of a previous year can not be applied against the wife's net income in a joint return. These cases contradict the petitioners' theory that husband and wife become a single taxable entity when they file a joint return; on the contrary each is treated as a separate individual who can carry deductions into the joint return only in his or her own right.

Order affirmed.

SECTION 55.—PUBLICITY OF RETURNS.

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

Use of original returns open to inspection in accordance with Treasury Decision 4873 (C. B. 1938-2, 261); furnishing copies of returns; inspection of returns of corporations by State officers and shareholders; and inspection of estate and gift tax returns. (See T. D. 4878, page 115.)

REVENUE ACTS OF 1926, 1932, AND 1934.

Regulations governing the inspection of income, excess-profits, and capital stock tax returns by the Special Committee on Un-American Activities, House of Representatives. (See T. D. 4900, page 119.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 112(g).—RECOGNITION OF GAIN OR LOSS: DEFINITION OF REORGANIZATION.

ARTICLE 112(g)-2: Definition of terms. 1939-8-9721
Ct. D. 1385

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GAIN OR LOSS—RECOGNITION—EXCHANGE OF PROPERTY—REORGANIZATION—SEPARATE TRANSACTIONS PARTS OF SINGLE PLAN—TAX AVOIDANCE.

The A Company, pursuant to a plan for transferring its mining property to B, caused the C Company to be organized early in December, 1925, and on December 18 transferred to C, in exchange for stock of the latter, all of its property which was not to be transferred to the B Company. The new stock was promptly distributed as a dividend to A's stockholders, and on December 31 the mining property was transferred to B in exchange for shares of its stock. On January 22, 1926, the C Company transferred certain shares of its stock to the stockholders of A, receiving in exchange B's stock held by A and all of A's outstanding stock. The A Company was thereafter dissolved. *Held*, the incorporation of and transfer to C did not constitute a bona fide "reorganization" within the meaning of section 203(h)1(A) of the Revenue Act of 1926. They were but parts of a single plan, having no purpose other than to give the subsequent transfer to B the appearance of a transfer of all the assets of A and thus bring it within the nonrecognition provisions of the statute. A single transaction may not be broken up into various elements to avoid a tax.

2. DECISION CONTROLLING.

Gregory v. *Helvering* (1935) (293 U. S., 465 [Ct. D. 911, C. B. XIV-1, 193 (1935)]) controlling.

3. CERTIORARI DENIED.

Petition for certiorari denied October 10, 1938.

4. REHEARING DENIED.

Petition for rehearing denied November 7, 1938.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. Elkhorn Coal Co., respondent.

[95 Fed. (2d), 732.]

On petition to review the decision of the United States Board of Tax Appeals.

Before PARKER and NORTHCOTT, Circuit Judges, and H. H. WATKINS, District Judge.

[October 18, 1937.]

OPINION.

PARKER, Circuit Judge: This is a petition to review a decision of the Board of Tax Appeals holding profit realized by the Elkhorn Coal & Coke Co. upon a transfer of certain mining properties to the Mill Creek Coal & Coke Co. to be nontaxable. The ground of the decision was that the transfer was made pursuant to a plan of reorganization within the meaning of 203(h)1(A) of the Revenue Act of 1926. The facts were stipulated and are set forth at length in the findings of the Board which are reported with its opinion in 34 B. T. A., 845. Those material to the question presented by the petition are in substance as follows:

Prior to December 18, 1925, the Elkhorn Coal & Coke Co., to which we shall hereafter refer as the old company, owned certain coal mining properties in West Virginia and certain stocks in other mining companies engaged in business in that State. It was closely associated with the Mill Creek Coal & Coke Co., which owned neighboring property; and a majority of the directorate of both corporations consisted of the same persons. Early in December, 1925, a plan was formed whereby the old company was to transfer its mine, mining plant and mining equipment at Maybeury, W. Va., to the Mill Creek Co. in exchange for 1,000 shares of the capital stock of that company. This exchange was accomplished on December 31, 1925, at which time, it is stipulated, the stock received by the old company had a fair market value of $550,000, which is in excess of the deficiency asserted by the Commissioner. There is no contention that the transfer by the old company was to a corporation controlled by it or by its stockholders and therefore within the nonrecognition provision of section 203(h)1(B) of the Act; but argument of the taxpayer is that the transfer was of all the properties of one corporation for the stock of another and therefore within the nonrecognition provision of section 203(h)1(A).

The contention that the transfer in question was of all the properties of the old company depends upon the legal conclusion to be drawn from certain evidentiary facts relating to the prior organization of another corporation and the transfer to it of all the property of the old company which was not to be transferred to the Mill Creek Co. These facts, which were found by the Board and are undisputed, are as follows: At the time that the transfer to the Mill Creek Co. was decided upon, the officers of the old company caused another corporation to be organized under the name of the Elkhorn Coal Co., which we shall refer to hereafter as the new company, and on December 18, 1925, transferred to it, in exchange for 6,100 shares of its stock, all of the property of the old company which was not to be transferred to the Mill Creek Co. except certain accounts, which were transferred to the new company on December 28, 1931 [1925], in consideration of its assuming the liabilities of the old company. The 6,100 shares of stock in the new company were promptly distributed by the old company as a dividend to its stockholders. This left the old company owning only the property which was to be transferred to the Mill Creek Co. under the plan and which was transferred to that company on December 31, as mentioned in the preceding paragraph. Following that transfer and the receipt by the old company of the 1,000 shares of the stock of the Mill Creek Co. pursuant thereto, the new company proceeded to place itself in the same position relative to the stockholders of the old company that the old company had occupied, and then to wind up its affairs. It accomplished that result in the following manner: On January 22, 1926, it exchanged 1,440 shares of its capital stock for the 7,540 shares of the outstanding capital stock of the old company, making the exchange with the stockholders of that company. This gave those who had been stock-

holders in the old company the same interest in the new company that they had had in the old, and gave to the new company the ownership of all of the stock in the old. The 1,000 shares of stock received from the Mill Creek Co. were then transferred to the new company and the old company was dissolved. No business whatever was done by the old company after the transfer of assets to the Mill Creek Co. on December 31; and no reason appears for the organization of the new company except to provide a transferee to take over and hold the assets which were not to be transferred to the Mill Creek Co. so that the transfer to that company when made would be a transfer of all the assets of the old company.

The Board was of opinion that all of these transactions were carried through pursuant to prearranged plan, saying: "We do not doubt that before a single step was taken a plan had been formulated for regrouping the corporate assets"; and "The stipulated facts justify the inference that one of the motives which the stockholders of Elkhorn had in organizing the new corporation and causing the three corporations to adopt the several steps or plans of reorganization which were adopted and carried out, was to make the transfer of the mining properties from Elkhorn to Mill Creek without resulting tax liability to Elkhorn or to themselves." The Board thought, however, with five members dissenting, that because the transfers from the old company to the new were genuine and were separate and distinct from the transfer to the Mill Creek Co., the latter must be treated as a transfer of substantially all of the properties of the corporation within the meaning of the reorganization statute, summing up its conclusions as follows: "In our opinion, the facts show affirmatively that the transfer to Mill Creek was completely separate and distinct from the earlier transfer by Elkhorn to the new corporation. The transfer made on December 18 was complete within itself, regardless of what Elkhorn planned to do later, or did subsequently do. It was not a sham or a device intended to obscure the character of the transaction of December 31. The stipulated facts do not suggest other than a bona fide business move. The transfer made on December 31 was also complete within itself, and was made for reasons germane to the business of both corporations. This transfer falls within the terms of clause (A) of section 203(h)1, whether or not Elkhorn was dissolved."

While we are bound by the Board's findings of evidentiary facts, we are not bound by the foregoing conclusion set forth in the opinion and embodying a mixed question of law and fact. As said by the Supreme Court in the recent case of *Helvering* v. *Tex-Penn Oil Co.* (300 U. S., 481, 57 S. Ct., 569, 574 [Ct. D. 1220, C. B. 1937-1, 236]): "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the Board."

A careful consideration of the evidentiary facts discloses no purpose which could have been served by the creation of the new company and the transfer of the assets to it, except to strip the old company of all of its properties which were not to be transferred to the Mill Creek Co., in anticipation of that transfer. The creation of the new company and its acquisition of the assets of the old was not a corporate reorganization, therefore, within the meaning of the statute or within any fair meaning of the term "reorganization." It did not involve any real transfer of assets by the business enterprise or any rearranging of corporate structure, but at most a mere shifting of charters, having no apparent purpose except the avoidance of taxes on the transfer to the Mill Creek Co. which was in contemplation. To use in part the language of the Supreme Court in *Gregory* v. *Helvering* (293 U. S., 465, 469), it was "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 give to the intended transfer to the Mill Creek Co. the appearance of a transfer of all the corporate assets so as to bring it within the nonrecognition provision of section 203(h)1(A).

Under such circumstances we think that the decision in *Gregory* v. *Helvering*, supra, is controlling. In that case, for the purpose of avoiding taxes on a liquidating dividend of shares of stock held by a corporation, a subsidiary was organized within the terms of the reorganization statute and the shares were transferred to it. The stock of the subsidiary was then delivered

to the sole stockholder of the original corporation and shortly thereafter the subsidiary was dissolved and the shares which had been transferred to it were delivered to the stockholder. The Court held that although the organization of the subsidiary came within the letter of the reorganization statute, such corporate manipulation would be ignored when it fulfilled no proper corporate function and was not in reality a reorganization within the meaning of the statute. The Court said: "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."

We do not see how that case can be distinguished from this. If the property which was to be transferred to Mill Creek had been transferred to a new company created for the purpose and had been by that company transferred to Mill Creek, no one would contend that there was a distinction; and certainly there is no difference in principle between creating a subsidiary to take and convey the property to the intended transferee and creating a subsidiary to take over the other assets and having the old company make the transfer. In either case, the apparent reorganization is a mere artifice; and it can make no difference which of the affiliated corporations makes the transfer of assets which it is desired to bring within the nonrecognition provisions of the statute.

It is suggested in the opinion of the Board that the case before us is analogous to that which would have been presented if the old company, prior to the transfer to Mill Creek, had distributed to its stockholders all of the assets except those destined for such transfer; but the distinction is obvious. In the case supposed, the business enterprise would have definitely divested itself of the property distributed. Here it did not divest itself of the property at all, but merely made certain changes in the legal papers under which it enjoyed corporate existence. No rule is better settled than that in tax matters we must look to substance and not to form; and no one who looks to substance can see in the mere change of charters, which is all that we have here, any reason for permitting a transfer of a part of the corporate assets to escape the taxation to which it is subject under the statute.

Congress has seen fit to grant nonrecognition of profit in sale or exchange of assets only under certain conditions, one of which is that one corporation shall transfer "substantially all" of its properties for stock in another. If nonrecognition of profit can be secured by the plan adopted in this case, the exemption is broadened to cover all transfers of assets for stock, whether "substantially all" or not, if only the transferor will go to the slight trouble and expense of getting a new charter for his corporation and making the transfer of assets to the new corporation thus created in such way as to leave in the old only the assets to be transferred at the time the transfer is to be made. We do not think the statutory exemption may be thus broadened by such an artifice.

Having reached this conclusion, it is unnecessary to decide whether the unity of the plan under which the transfer was made brings it, without a unifying contract, within the principles laid down in *Starr* v. *Commissioner* (C. C. A. 4) (82 Fed. (2d), 964 [Ct. D. 1147, C. B. XV-2, 229 (1936)]), wherein we said: "Where transfers are made pursuant to such a plan of reorganization, they are ordinarily parts of one transaction and should be so treated in application of the well-settled principle that, in applying income tax laws, the substance, and not the form, of the transaction shall control. (*First Seattle D. H. Nat. Bank* v. *Commissioner* (C. C. A. 9), 77 Fed. (2d), 45 [Ct. D. 1022, C. B. XIV-2, 267 (1935)]; *Prairie Oil & Gas Co.* v. *Motter* (C. C. A. 10), 66 Fed. (2d), 309 [Ct. D. 767, C. B. XIII-1, 183 (1934)]; *Howard* v. *Commissioner* (C. C. A. 6), 56 Fed. (2d), 781; *American Security & Trust Co.* v. *Tait* (D. C.), 5 Fed. Supp., 337.) This is demanded also by the principle, equally well settled, that a single transaction may not be broken up into various elements to avoid a tax. (*Ahles Realty Corporation* v. *Commissioner* (C. C. A. 2), 71 Fed. (2d), 150, 151 [Ct. D. 931, C. B. XIV-1, 245 (1935)]; *West Texas Refining & Development Co.* v. *Commissioner* (C. C. A. 10), 68 Fed. (2d), 77, 79, 80; *Prairie Oil & Gas Co.* v. *Motter*, supra (C. C. A. 10), 66 Fed. (2d), 309, 311; *Tulsa Tribune Co.* v. *Commissioner* (C. C. A. 10), 58 Fed. (2d), 937.)"

For the reasons stated, the decision of the Board will be reversed and the cause will be remanded to it for further proceedings in accordance with this opinion.

Reversed.

ON REHEARING.

Before PARKER and NORTHCUTT, Circuit Judges, and H. H. WATKINS, District Judge.

[April 5, 1938.]

PARKER, Circuit Judge: The rehearing granted in this case and careful consideration of the briefs filed and arguments made thereon have served only to strengthen the majority of the court in the opinion heretofore expressed; and we see no basis whatever for the contention that our former opinion was based on a ground not considered by the Board of Tax Appeals. The question before the Board was whether the transfer to Mill Creek was of all the assets of the old company; and that question must necessarily have been answered there as it must be here by a consideration of the real nature of the incorporation of the new company and the transfer made to it when viewed in relation to the plan for the transfer of assets to Mill Creek.

It was not intended by what was said in the original opinion, to the effect that the transfer of assets from the old company to the new did not constitute a bona fide reorganization, to suggest that the transfer was a taxable transaction, but to point out that the creation of the new company and the transfer of the assets to it was a mere shifting of charters having no purpose other than to give to the later transfer to Mill Creek the appearance of a transfer of the corporate assets so as to bring that transfer within the nonrecognition provisions of 203(h)1(A). The transfer to the new company was nontaxable whether it was a real reorganization or a mere shifting of charters, which would of course come within the terms of the reorganization statute. It is only in relation to the subsequent transfer to Mill Creek that it becomes important to determine whether the organization of the new company and its taking over of the assets was a genuine reorganization. If there was no real reorganization and transfer, but a mere shifting of charters, the subsequent transfer to Mill Creek was not within the terms of the nonrecognition provision of the statute.

We are confirmed in our original opinion by the recent decision of the Supreme Court in *Minnesota Tea Co.* v. *Helvering* (— U. S., —, 58 S. Ct., 393, 395 [Ct. D. 1305, C. B. 1938-1, 288]). In that case there was a reorganization in which stockholders paid the debts of a corporation from the cash distributed to them in the course of the reorganization. The question was whether the corporation was taxable on the amount of the debts thus paid on the theory that the cash used for that purpose was in reality received by the corporation, or whether it was nontaxable on the theory that the distribution to the stockholders was within the nonrecognition provisions of the statute. In holding the corporation taxable thereon the Court said: "The conclusion is inescapable, as the court below very clearly pointed out, that by this roundabout process petitioner received the same benefit 'as though it had retained that amount from distribution and applied it to the payment of such indebtedness.' Payment of indebtedness, and not distribution of dividends, was from the beginning, the aim of the understanding with the stockholders and was the end accomplished by carrying that understanding into effect. *A given result at the end of a straight path is not made a different result because reached by following a devious path.* The preliminary distribution to the stockholders was a meaningless and unnecessary incident in the transmission of the fund to the creditors, all along intended to come to their hands, so transparently artificial that further discussion would be a needless waste of time." [Italics ours.]

In the case at bar, the "aim" of the incorporation of the new company and the transfer made to it, was that the transfer to Mill Creek should appear to be a transfer of all of the assets of the company; and this was the end accomplished, and the only end accomplished so far as the record shows, by the incorporation and transfer. The incorporation of the new company and the transfer to it was a "meaningless and unnecessary incident." It is true that the new company was incorporated under the laws of a different State from the old; but it does not appear that any corporate purpose was served by this change of jurisdictions and certainly the integrity of the existing

business was not affected by the change. (Cf. *Braden Steel Corporation* v. *Commissioner* (C. C. A. 10), 78 Fed. (2d), 808, 810.) It is said that the transfer to Mill Creek had a real corporate purpose. This is true, but it was taxable unless constituting a transfer of all of the assets of the corporation. The incorporation of and transfer to the new company, which had no proper corporate purpose, were resorted to in order to give the transfer to Mill Creek the appearance of being a transfer of all the assets of the transferor and hence not taxable. All that was done by the complicated corporate maneuvering employed was the transfer of a part of the assets of the old company to Mill Creek in exchange for 1,000 shares of its stock, leaving the business of the old company in the hands of the old stockholders, with a new charter, but otherwise unaffected. This result is "not a different result because reached by following a devious path."

And we think it clear that the incorporation of the new company and the transfer made to it were but parts of a single plan under which the transfer was made to Mill Creek and that they should be treated as parts of one transaction. When this is done, there is no room for the contention that all of the assets of the corporation were transferred to Mill Creek. Even though there was no unifying contract, the unity of the plan brings the case within the rule applied in *Starr* v. *Commissioner* (C. C. A. 4) (82 Fed. (2d), 964).

For the reasons stated here and in our former opinion, the decision of the Board of Tax Appeals will be reversed.

Reversed.

H. H. WATKINS, District Judge, dissents.

ARTICLE 112(g)-4: Exchanges in reorganization for stock or securities and other property or money.

1939-19-9824
Ct. D. 1397

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

GAIN OR LOSS—RECOGNITION—EXCHANGE OF STOCK—REORGANIZATION—DIVIDEND.

Pursuant to resolutions passed by the X and Y Corporations, X transferred to Y miscellaneous assets and shares of common stock of Y which it held, receiving in exchange new common stock of Y, debentures, and cash, to be distributed to its stockholders. X's stockholders, of which the taxpayer corporation was one, surrendered their holdings in exchange for aliquot portions of new common stock of Y, debentures with interest thereon, and cash dividends on the new stock, and X was dissolved. Under the facts of the case, the surrender of the stock of X held by the taxpayer and receipt by it of the stock and debentures of Y was in law a nontaxable exchange made pursuant to a plan of reorganization within the meaning of section 112(i)1(B) of the Revenue Act of 1928, and the dividend received on the new stock of Y was taxable as an ordinary dividend.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Food Industries, Inc., respondent.*

[101 F. (2d), 748.]

On petition for review of decision of the United States Board of Tax Appeals.

Before BIGGS, MARIS, and CLARK, Circuit Judges.

[February 9, 1939.]

OPINION.

BIGGS, Circuit Judge: This proceeding comes before us upon the petition of the Commissioner of Internal Revenue to review a decision of the United States

Board of Tax Appeals finding no deficiency in income tax paid by the respondent for the calendar year 1931. Petitioner seeks to assess additional tax in the sum of $30,787.50. Briefly the facts are as follows:

At the beginning of the year 1931, General Baking Co., a New York corporation, operated a number of baking plants in various parts of the United States. The company had outstanding 90,775 shares of preferred stock and 429,719 shares of the common stock. Both classes of stock possessed equal voting rights.

General Baking Corporation, a corporation of the State of Maryland, was formed for the purpose of acquiring and holding the stock of the New York company. Of the 429,719 shares outstanding of the common stock of the New York company, the Maryland corporation in January, 1931, held 429,406 shares. The Maryland corporation did not own any of the preferred stock of the New York company.

In January, 1931, the officers and directors of both companies decided that there was no longer any sufficient reason for the continued existence of the Maryland corporation, and thereupon, upon the passage of appropriate resolutions by the directors and stockholders of the two companies and the making of contracts to such end, the Maryland corporation transferred to the New York company miscellaneous assets, having a total book value of $61,580.18, and the shares of common stock of the New York company held by it. Pursuant also to the joint plan of the two companies, the New York company then proceeded to issue to the Maryland corporation its new common stock, debentures and cash, to the end that the Maryland corporation might distribute these to its stockholders.

The respondent, which had possessed 50,000 shares of the preferred stock of the Maryland corporation, received 75,000 shares of the new common stock of the New York company, debentures of the New York company having a face value of $150,000 with interest on such debentures in cash in the sum of $2,062.50 and cash in the sum of $37,500 as a dividend at the rate of 50 cents per share upon the new common stock of the New York company. The other stockholders of the Maryland corporation also surrendered their stock in the Maryland corporation and received their aliquot portions of the new common stock of the New York company, its debentures and cash at about the same time. The Maryland corporation, as was contemplated in the joint plan of the two companies, was then dissolved in accordance with the laws of Maryland.

We should state that the New York company in order to effect the plan increased the number of shares of its common stock and changed the classification of these shares from no par value to $5 par value common stock. The $5 par value common stock is the "new" stock of the New York company referred to. The increase in number of shares and change in par value were made for the purpose of effecting the exchange of the stocks of the two companies in accordance with the plan and possess no other significance.

Two questions are presented by the appeal at bar. The first is whether or not the surrender of the stock of the Maryland corporation held by the respondent and the receipt by the respondent of the stock and securities of the New York company was in law a nontaxable exchange made pursuant to a plan of reorganization between the two companies or a taxable distribution in liquidation of the Maryland corporation. The second question presented is whether or not the dividend of 50 cents per share received by the respondent on its new stock of the New York company is taxable as an ordinary dividend or as a liquidating dividend.

The petitioner contends that the transaction here involved was not a reorganization within the meaning of section 112 of the Revenue Act of 1928 (Act of May 29, 1928, ch. 852, 45 Stat., 791) but was a mere liquidation of the Maryland corporation and a gain upon the common stock and debentures of the New York company received by the respondent upon the surrender of its stock in the Maryland corporation. The petitioner further argues that as such it is taxable in accordance with the provisions of section 115 of the 1928 Act.

Subsection (b)(3) of section 112 provided that upon the sale or exchange of property the entire amount of the gain or loss determined as provided under section 111 should be recognized, except that "no gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are,

in pursuance of a plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation, a party to the reorganization."

It is obvious that in the case at bar the stock of the Maryland corporation was exchanged "solely for stock or securities" in the New York company. The question presented for our determination is whether or not this exchange took place in pursuance of a plan of reorganization. Subsection (i) of section 112 provided that as used in sections 112, 113, and 115 "* * * 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, * * * (D) a mere change in identity, form or place of organization however effected."

In our opinion there was no formal merger or consolidation in the sense that these words are ordinarily used. Nor can the respondent avail itself of the clause in parentheses quoted above since it is apparent that the New York company did not acquire "all of the properties" of the Maryland corporation. The New York company did acquire the miscellaneous assets heretofore referred to of the value of $61,580.18, and received them with an indefeasible title, but the stock of the New York company held by the Maryland corporation was acquired by the New York company only to the end that it might be reissued, though in a new form, to the Maryland corporation. In our opinion this type of momentary acquisition is not the kind of acquisition referred to in the statute.

However, in accordance with the definition of reorganization supplied by the statute, the term "reorganization" includes a transfer by a corporation of a part of its assets to another corporation provided that immediately after the transfer the stockholders of the transferor are in control of the corporation to which the assets were transferred. It is apparent from an inspection of the record in the pending cause that the requirements of this definition are fulfilled literally by the transactions at bar. It follows therefore that if the statute be literally applied the respondent may avail itself of the exception supplied by subsection (b)(3) of section 112 and that no gain or loss may be recognized upon the stock and debentures of the New York company in its hands.

The petitioner points out, however, that the value of the miscellaneous assets of the Maryland corporation acquired by the New York company represented less than one-tenth of 1 per cent of the total value of the assets of the Maryland corporation, the stock of the New York company held by the Maryland corporation possessing a book value of $96,625,395.54. The petitioner argues that the value of the miscellaneous assets transferred was so small and unimportant that in fact the sum of all the transactions was nothing more than the surrender of the stock of the Maryland corporation by its stockholders and receipt by them of the assets of the Maryland corporation in liquidation. The petitioner contends that the various transactions between the companies pursuant to their plan must be viewed essentially as a single transaction leading to the liquidation of the Maryland corporation and the steps taken to that end will not be treated separately. In other words, the petitioner contends that the substance and not the form of the transaction controls, citing *Bassick* v. *Commissioner* (85 F. (2d), 8, 10, certiorari denied, 299 U. S., 592) and the cases cited therein, and that in substance the transactions resulted in liquidation of the Maryland corporation, not in the reorganization of the two companies.

In support of his position the petitioner cites the decision of the Supreme Court in *Minnesota Tea Co.* v. *Helvering* (302 U. S., 609 [Ct. D. 1305, C. B. 1938-1, 288]). In this case the taxpayer, a corporation, distributed its assets to its stockholders upon liquidation. Included in the assets so distributed was the sum of $106,471.73, the amount of the remaining debts of the corporation which the stockholders contracted to pay upon its dissolution. The question presented to the Supreme Court for its adjudication was whether or not this sum was taxable to the corporation or whether or not it had been distributed to the stockholders within the meaning of section 112(d) (1) and (2) of the Revenue Act of 1928 (26 U. S. C. A., 112(d) (1) and (2)), as part of a plan of reorganization. The Supreme Court held that the sum was taxable to the corporation, stating: "The conclusion is inescapable * * * that by this

roundabout process petitioner received the same benefit 'as though it had retained that amount from distribution and applied it to the payment of such indebtedness.' Payment of indebtedness, and not distribution of dividends, was, from the beginning, the aim of the understanding with the stockholders and was the end accomplished by carrying that understanding into effect. A given result at the end of a straight path is not made a different result because reached by following a devious path. The preliminary distribution to the stockholders was a meaningless and unnecessary incident in the transmission of the fund to the creditors, all along intended to come to their hands, so transparently artificial that further discussion would be a needless waste of time. The relation of the stockholders to the matter was that of a mere conduit. The controlling principle will be found in *Gregory* v. *Helvering* (293 U. S., 465, 469–470; * * *" [Ct. D. 911, C. B. XIV–1, 193 (1935)].)

Though the transactions between the two companies are literally within the provisions of section 112(i)1(B) we would not feel bound to hold that the surrender of the stock held by the respondent in the Maryland corporation and the receipt by it of the stock and debentures of the New York company was a nontaxable exchange if the net result to the respondent was that which would have come to pass had the Maryland corporation been dissolved with the consent of its stockholders in the ordinary way and without entering into any transactions or agreements with the New York company. In such a case the alleged reorganization might be a mere cloak for dissolution. (*Minnesota Tea Co.* v. *Helvering*, supra.)

Examining the case at bar in the light of the circumstances, however, we see that holders of the preferred stock of the Maryland corporation, of which the respondent was one, each received for every 100 shares of the Maryland corporation held by them, 150 shares of the new common stock of the New York company and "for all dividends * * * accrued and unpaid, * * * 5½ per cent sinking fund debentures (of the New York company) * * *, with interest thereon adjusted and accruing from January 1, 1931, * * *, at the rate of $300 principal amount thereof on each 100 shares of stock." This result to the stockholders of the Maryland corporation is a very different one than that which would have eventuated had the stock of the New York company held by the Maryland corporation been distributed on liquidation for the reason that the stockholders of the Maryland corporation received other and further rights than those which would have come to them upon the dissolution of their corporation. These rights were created and came to the stockholders of the Maryland corporation because of the consummation of the joint plan of the two companies whereby the obligations of the Maryland corporation were assumed by the New York company and the Maryland corporation was done away with.

We think therefore that a "reorganization" of the two companies did in fact take place not only within the literal language of the statute but also within its spirit.

It follows that the dividend paid by the New York company upon its new shares was an ordinary dividend and not a liquidating dividend.

The identical questions presented for our decision by the case at bar were adjudicated in favor of the taxpayer by the Circuit Court of Appeals for the Fourth Circuit in *Helvering* v. *Leary* (93 F. (2d), 826), by the Circuit Court of Appeals for the Second Circuit in *Helvering* v. *Schroellkopf, Jr.* (100 F. (2d), 415), by the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Whitaker* (101 F. (2d), 640), and by the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Kolb* (100 F. (2d), 920). In reaching the conclusions expressed in this opinion we have followed in part the reasoning of the decisions cited.

The decision of the Board of Tax Appeals is affirmed.

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 115–1: Dividends.

1939–21–9843
Ct. D. 1399

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

1. DISTRIBUTIONS BY CORPORATION—DIVIDEND—CORPORATE RESOLUTION CHARGING OFF CASH WITHDRAWALS BY STOCKHOLDERS—INCOME TO STOCKHOLDERS.

The directors of a family corporation, of which the taxpayer's deceased husband had been the majority stockholder, adopted a resolution on March 1, 1929, whereby the amount of cash withdrawals made by the decedent for a number of years prior to his death and by the administrator and distributees of his estate were charged off to surplus. *Held*, That such corporate action created a taxable dividend within the meaning of section 115(a) of the Revenue Act of 1928, notwithstanding a recital in the resolution that the accounts were not being forgiven; and that the taxpayer's share of the debts of the estate which were charged off and the crediting of withdrawals made by her individually therefore represented income to her in 1929.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1936) (34 B. T. A., 155) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied February 27, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Kate Hudson, petitioner, v. *Commissioner of Internal Revenue, respondent.*
[99 F. (2d), 630.]

Petition to review order of the United States Board of Tax Appeals.

Before HICKS, ALLEN, and HAMILTON, Circuit Judges.

[November 12, 1938.]

OPINION.

ALLEN, Circuit Judge: Petition to review an order of the Board of Tax Appeals determining a deficiency in income tax of $5,127.99 for the year 1929.[1] (34 B. T. A., 155.)

The facts, as stipulated, and found by the Board, are as follows:

Charles Hudson, deceased, was the president and principal stockholder of the Hudson & Dugger Co., a Tennessee corporation, owning 6,731¼ shares of the capital stock, the remaining shares, 768¾, being owned by his son, Galvin Hudson. Petitioner is the widow of Charles Hudson, and also is trustee for Marie Hudson, their daughter. At the death of Charles Hudson, on December 24, 1924, Galvin, Kate and Marie Hudson shared equally in his estate.

Charles Hudson for a number of years prior to his death had withdrawn from the corporation various sums of money which were charged to his personal account. At the time of his death his account was in debt to the corporation in the amount of $43,910.19. Charles Hudson died intestate, and Galvin Hudson was appointed administrator.

As administrator, Galvin Hudson withdrew from the corporation sufficient funds to pay funeral expenses and administration fees, and in general to wind up the estate. These amounts were charged on the books of the corporation to the account of Galvin Hudson, administrator, and after being reduced by certain credits which need not be itemized, the balance due the corporation was

[1] Deficiencies for the same year were determined against Kate Hudson, trustee for Marie Hudson, and against Galvin Hudson, respectively. By agreement the decision in this case will bind the other two parties.

$58,768.81. In 1926, by order of the Probate Court of Shelby County, Tenn., the administrator distributed the capital stock of the corporation belonging to the estate, one-third each to petitioner individually, and to her as trustee for Marie Hudson, and to himself individually.

During the period from January 1, 1925, to March 15, 1929, petitioner's withdrawals from the corporation left a balance due of $16,271.96. During practically the same period Marie Hudson withdrew certain amounts which left her aggregate debit balance as of March 15, 1929, $2,089.64. Upon March 1, 1929, as shown by the corporate minutes, the directors took up the question of the debit balances of the stockholders, and adopted the following resolution:

"Be it resolved that the overdrafts shown on the accounts of Charles Hudson, Galvin Hudson, administrator, Mrs. Charles Hudson and Miss Marie Hudson be cleared out of the assets of the Hudson & Dugger Co. by charging them and each of them to surplus, it being the sense of this resolution and so understood by all that the accounts above set out are not being forgiven and that Hudson & Dugger Co. still owns its equity therein; that at such time as may be convenient and appropriate proper settlement will be made to the company by the parties of such account."

The various overdrafts were charged on the books of the Hudson & Dugger Co. to undivided profits, and the accounts of the debtors were credited with amounts equal to the debt balances shown in their respective accounts. Petitioner does not contend that the corporate surplus was not at that time sufficient for the payment of dividends in the amounts of the overdraft. Neither does it appear that any of the items represented in the overdrafts was returned for taxation by the individual drawers in the respective years when the withdrawals were made. None of the amounts was taken as a deduction for income tax purposes by either the corporation or by the estate. In 1931, at a meeting of the stockholders, the president of the corporation suggested, since there was controversy between the stockholders and the corporation, and also with the Federal Government with reference to these accounts, that stock in the company be surrendered by each of the debtors, and canceled. The corporation approved this suggestion, and in 1932, such a surrender was actually made by petitioner, both in her own right and as trustee for her daughter.

In determining deficiencies against petitioner and Galvin Hudson and Marie Hudson, the Commissioner decided that each had received a dividend of $34 226.33, or one-third of $102,679.04, the latter sum being the aggregate of the debts of Charles Hudson and Galvin Hudson, administrator, owing to the corporation. He further determined that the sum of $16,271.96 credited to petitioner's account constituted a dividend to her, and that $2,089.64 credited to the account of Marie Hudson was a dividend to her. The Board of Tax Appeals sustained the Commissioner.

Petitioner contends:

1. That no dividend was declared by the corporation, and that the amount of the withdrawals does not constitute income.

2. That claims against the administrator and against Charles Hudson, when charged off, are not dividends to distributees of the estate; and

3. That the claim of the corporation against the estate had been outlawed at the time the account was charged off, and that therefore the amount of the debts, even if they were canceled, was not a dividend to the distributees. We do not consider this contention, because that question was not raised before the Board of Tax Appeals nor decided by it.

The main question presented is whether the action taken by the corporation in its resolution of March 1, 1929, created a taxable dividend within the definition in section 115(a) of the Revenue Act of 1928 (45 Stat., 791), which provides that "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."

Petitioner urges that as the corporation's resolution states that the debts are not to be forgiven, the charge-off did not constitute a dividend, especially as the debts are alleged to have been paid by transferring to the corporation some of the shares of capital stock which petitioner inherited. The fallacy of this argument is apparent from the nature of the acts done and the effects thereof.

This court has held in *Cohen* v. *Commissioner* (77 Fed. (2d), 184) that cash withdrawals from a corporation made by its stockholders constitute dividends

in the taxable year during which corporate action was taken canceling or charging off such accounts against surplus. The resolution of March 1, 1929, authorized just such action as that taken in the Cohen case. The accounts of the following persons were actually credited, in accordance with that action, with the following amounts:

Mrs. Charles Hudson	$16,271.96
Marie Hudson	2,089.64
Charles Hudson	43,910.19
Galvin Hudson, administrator	58,768.81

But the resolution introduced an element of ambiguity by specifying that the debts were not being forgiven. So far as we know, accounting practice provides no way in which items charged against surplus may be carried on the books as "not being forgiven." We are aware that certain decisions hold that book entries, while of evidential value, are not determinative of tax liability. (Cf. *Helvering* v. *Midland Mut. Life Ins. Co.*, 300 U. S., 216, 223 [Ct. D. 1206, C. B. 1937-1, 178].) But in this case book entries reflect the acts done by the corporation. The individuals were in fact given credit for payment of the debts, and they were charged off to surplus. The book entries clarify the vague and indefinite reservation of the resolution. The burden of proof was on the petitioner to show that the Commissioner erred in his determination. (*Cohen* v. *Commissioner*, supra.) This burden they did not sustain. While in the Cohen case the debt was charged off by formal resolution, in the instant case the same thing was accomplished by resolution and by book entries made in conformity to the resolution. (Cf. *Wiese* v. *Commissioner*, 93 Fed. (2d), 921 (C. C. A. 8).) We conclude that the principle announced in *Cohen* v. *Commissioner*, that there was a distribution of profits, and that income accrued at that time, controls.

The release to the corporation by petitioner of sufficient shares of stock at $100 par value to pay for her one-third of the estate debts does not affect the conclusion. The record does not show that these shares when released had any substantial value. The transaction resulted in no loss to her, and amounted to no more than a minor reallotment of shares among the shareholders. The corporation was a closed one, owned by three members of one family. The stock turned in was canceled and the book value of the outstanding shares was changed. In reality the so-called repayment of the withdrawals merely resulted in the fact that a fewer number of shares existed, but they were held in practically the same proportions as previously, and represented the same quantum of net worth.

The second principal question is whether the Commissioner was correct in his determination that one-third of the $102,679.04, constituting the aggregate sum of the deceased's withdrawals, and the estate expenses, represents income to the petitioner. Up to March 1, 1929, the amount had been carried on the books of the corporation as an asset in the form of accounts receivable.

Under section 8336 of the Code of Tennessee, 1932, petitioner was personally obligated for debts of the estate, in proportion to the value of her distributive share. (*American Surety Co.* v. *Grace*, 151 Tenn., 575.) The resolution of March 1, 1929, was the first corporate action taken with regard to the withdrawals. It provided for charging off the debts to undivided profits. When the accounts were credited with the amount of the debts and the charge-off was made in accordance with the resolution, the action was tantamount to cancellation. (*Weise* v. *Commissioner*, supra.) As to petitioner, the charge-off constituted either an increase in her inherited estate or the relinquishment of a lien on her inherited property.

We conclude that petitioner received in 1929, as dividends, one-third of the sum of $102,679.04. The additional withdrawals of $16,271.96 credited to petitioner's account must of course, in view of the above considerations and in view of our holding in *Cohen* v. *Commissioner*, supra, be regarded as income in 1929.

The order of the Board of Tax Appeals is affirmed.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 116–2: Compensation of State officers and employees.

REVENUE ACT OF 1934 AND PRIOR REVENUE ACTS.

(1) Taxation by State of salary of Federal employee; (2) *Collector* v. *Day* (11 Wall., 113), overruled. (See Ct. D. 1390, page 129.)

ARTICLE 116–2: Compensation of State officers and employees.

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

Taxability of compensation received by Federal officers and employees and officers and employees of States or political subdivisions thereof. (See Mim. 4916, page 71.)

SECTION 117.—CAPITAL GAINS AND LOSSES.

ARTICLE 117–1: Meaning of capital assets. 1939–15–9786
Ct. D. 1391

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF SUPREME COURT.

CAPITAL GAIN—REDEMPTION OF BONDS—SALE OR EXCHANGE OF CAPITAL ASSETS.

The redemption of bonds before maturity by the issuing corporation is not tantamount to a sale or exchange of capital assets within the meaning of section 208(a)1 of the Revenue Act of 1926 and section 101(c)1 of the Revenue Act of 1928, and gain from such redemption is not capital gain. By the enactment of section 117(f) of the Revenue Act of 1934, providing that amounts received upon the retirement of bonds shall be considered as amounts received in exchange therefor, Congress did not attempt to construe the prior Acts but purposely made a material addition thereto.

SUPREME COURT OF THE UNITED STATES.

Douglas Fairbanks, petitioner, v. *The United States of America.*
[59 S. Ct., 607.]

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 27, 1939.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the Court.

Both courts below ruled that gain derived by the petitioner from redemption of bonds during 1927, 1928 and 1929 was not "capital gain" within the meaning of the controlling statutes.

No contest now exists concerning the facts. The narrow point as counsel agree is this—Must the redemption of bonds before maturity by the issuing corporation be treated as tantamount to a sale or exchange of capital assets within the meaning of section 208(a)1, Revenue Act of 1926, and section 101(c)1, Revenue Act 1928.[1]

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[1] Revenue Act 1921 (November 23, 1921, ch. 136, 42 Stat., 227, 232) provides—

"SEC. 206. (a) That for the purpose of this title:

"(1) The term 'capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;"

This provision without material change was reenacted by Revenue Act 1924 (June 2, 1924, ch. 234, section 208(a)1, 43 Stat., 253, 262); Revenue Act 1926 (February 26, 1926, ch. 27, section 208(a)1, 44 Stat., 9, 19); Revenue Act 1928 (May 29, 1928, ch. 852, section 101(c)1, 45 Stat., 791, 811); Revenue Act of 1932 (June 6, 1932, ch. 209, section 101(c)1, 47 Stat., 169, 191).

If redemption amounts to sale or exchange, the petitioner's gain was subject to taxation at the 12½ per cent rate; otherwise, under normal and surtax rates.

Payment and discharge of a bond is neither sale nor exchange within the commonly accepted meaning of the words. The courts below found no sufficient reason for disregarding this and rightly applied the statutes under that view.

The Tax Acts of 1921, 1924, 1926, 1928, and 1932 contain like definitions of capital gain. From 1921 to 1929 the Commissioner held that such gain did not arise from redemption. In 1929 the Board of Tax Appeals held otherwise. (*Werner* v. *Commissioner*, 15 B. T. A., 482.) But in 1932 it definitely overruled that determination. (*Watson* v. *Commissioner*, 27 B. T. A., 463.)

The Revenue Act 1934 (May 10, 1934, ch. 277, 48 Stat., 680, 714–715) 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: * * *.

"(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."

What we regard as the correct meaning of the definition of capital gain in the Revenue Act 1921 and its four successors is accentuated by long-continued executive construction, also the last conclusion of the Board of Tax Appeals.

The circuit court of appeals below was right in holding that by the Act 1934 Congress did not attempt to construe the prior Acts and purposely made a material addition thereto. In *Averill* v. *Commissioner of Internal Revenue* (decided December 28, 1938), the Circuit Court of Appeals First Circuit acted upon a different view. This conflict caused us to bring up the present cause notwithstanding the application for certiorari had been denied earlier in the term.

The challenged judgment must be affirmed.

SECTION 119.—INCOME FROM SOURCES WITHIN UNITED STATES.

ARTICLE 119–14: Telegraph and cable service.

REVENUE ACT OF 1934.

Amendment of Regulations 86. (See T. D. 4877, page 190.)

ARTICLE 119–15: Computation of income.

REVENUE ACT OF 1934.

Article 119–14, Regulations 86, redesignated. (See T. D. 4877, page 190.)

SUPPLEMENT C.—CREDITS AGAINST TAX.

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

ARTICLE 131–1: Analysis of credit for taxes.

1939–2–9666
Ct. D. 1375

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

1. CREDIT—STATE INCOME TAXES PAID BY DOMESTIC CORPORATION—CONSTITUTIONALITY OF STATUTE.

A New Jersey corporation carrying on business in New York and Virginia but not doing business in any foreign country is not entitled to credit taxes paid to such States on income earned therein against taxes due the United States, since it does not come within the classification of corporations which section 131 of the Revenue Act of 1928 provides shall be entitled to such credit. There is nothing so unreasonable, arbitrary, or capricious in the classification fixed by Congress as to be violative of the Constitution.

2. CERTIORARI DENIED.

Petition for certiorari denied November 7, 1938.

3. REHEARING DENIED.

Petition for rehearing denied December 12, 1938.

COURT OF CLAIMS OF THE UNITED STATES.

George W. Helme Co. v. *The United States.*

[23 F. Supp., 787.]

[July 5, 1938.]

OPINION.

Per curiam: Plaintiff is a New Jersey corporation which during the taxable years here involved carried on business in New York and Virginia and paid an income tax to those States on account of income earned therein. Pursuant to the Revenue Act of 1928 it filed Federal income tax returns for 1929, 1930, and 1931, and claimed and was allowed deductions from gross income for the income taxes paid in those years to New York and Virginia. Thereafter it filed claims for refund in which it contended in substance, as it now contends here, that a refund should be granted because citizens and domestic corporations carrying on business in foreign countries were entitled under section 131 of the Revenue Act of 1928 to credit against the taxes due the United States a certain proportion of the taxes paid to foreign countries, whereas, as indicated above, it was only entitled to a deduction from its gross income (and not to a credit against its tax due the United States) for the taxes which it paid to New York and Virginia. The Commissioner rejected the claims, and, we think, rightly so.

Plaintiff was not carrying on any business in a foreign country, paid no income taxes to a foreign country, and therefore did not come within the classification of corporations which Congress provided in section 131 should be entitled to the credit. Plaintiff's income was derived solely from sources within the United States. Its complaint is that instead of having been granted a right of deduction from gross income for these State income taxes, it should have been granted a right of credit against the tax otherwise due the United States. Suffice it to say that Congress did not grant such a right and certainly it does not lie within the power of this court to so amend the statute. And being without such power, it would avail nothing to plaintiff if this court should say, as plaintiff contends, that the statutes granting the credits are unconstitutional, because this court has jurisdiction only to render money judgments (*United States* v. *Jones*, 131 U. S., 1), and no money judgment could result to plaintiff if we were to say that some other taxpayer has received a benefit to which that taxpayer was not entitled. At best the issue is moot or academic as now presented by this plaintiff.

Aside from the fact that no money judgment could result to plaintiff from a finding that credits should not have been granted on account of foreign taxes

paid, the contention that section 131 of the Revenue Act of 1928 is violative of the Constitution is without merit. The granting or denying of credits and deductions is a matter of legislative grace and is left to the sound discretion of Congress. Such provisions may be held invalid only when shown to be arbitrary and capricious or to result in gross and patent inequalities. (*Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S., 1.) The same is true with respect to the selection and classification of citizens and corporations for taxing purposes. (*Denman* v. *Slayton*, 282 U. S., 514 [Ct. D. 318, C. B. X–1, 380 (1931)].) Certain deductions were granted to taxpayers in plaintiff's classification, including a deduction for income tax paid to a State other than that in which it was incorporated, whereas certain credits were granted to other corporations on account of income taxes paid to foreign countries on income earned in those countries. These two classes are so dissimilarly situated, both as to the source of income and the economic considerations surrounding the earning of that income, that we can find nothing unreasonable in the classifications deliberately fixed, nor can we say that there was anything arbitrary or capricious in such action.

Plaintiff presents a similar argument with respect to credits allowed on account of income derived from foreign possessions as distinguished from foreign countries, but we are convinced that a like answer must be given to that contention. In short, we are of the opinion that all the considerations advanced are without merit and accordingly the petition should be dismissed. It is so ordered.

SUPPLEMENT E.—ESTATES AND TRUSTS.

SECTION 162.—NET INCOME.

ARTICLE 162–1: Income of estates and trusts. 1939–17–9804
(Also Section 23, Article 23(e)–1.) Ct. D. 1394

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

1. INCOME—TRUSTS CREATED PURSUANT TO SEPARATION AND COMPROMISE AGREEMENTS—TAXABLE TO BENEFICIARY.

Income received by the taxpayer in 1930 from two trusts, one created by her husband in 1924 pursuant to a separation agreement, and the other created in 1930 (subsequent to the divorced husband's death) pursuant to a compromise settlement of unfulfilled obligations under the separation agreement, was properly taxable to her.

2. DEDUCTION—BAD DEBT—LOSS.

The taxpayer was not entitled to a deduction in 1930 for bad debts or losses as a result of the compromise settlement of the obligations which her husband had entered into under the separation agreement and had not performed prior to his death.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Elisabeth R. Thomas, petitioner, v. *Commissioner of Internal Revenue, respondent.*

[100 Fed. (2d), 408.]

Appeal from the United States Board of Tax Appeals.

Before MANTON, L. HAND, and AUGUSTUS N. HAND, Circuit Judges.

[December 5, 1938.]

OPINION.

From an order of the Board determining that there was a deficiency in the income tax of the petitioner Elisabeth R. Thomas for the year 1930 in the amount of $21,183.54, the latter appeals. Affirmed.

AUGUSTUS N. HAND, Circuit Judge: The Board of Tax Appeals determined a deficiency in the income tax of the petitioner Elisabeth R. Thomas for the year 1930 amounting to $21,183.54, the correctness of which is disputed by her on the present appeal.

The taxpayer married Edward R. Thomas on November 5, 1912, and their son and only child was born on October 2, 1913. On May 8, 1924, the couple having already separated, entered into a contract for the settlement of property rights and claims arising out of the marital relation. This was followed by a decree of divorce rendered on June 27, 1924, by the Circuit Court of Florida, where the parties were domiciled. The decree of divorce awarded to the taxpayer the custody of her son.

In the contract of May 8, 1924, the taxpayer relinquished all her rights of dower, inheritance and descent in the property of her husband, renounced any right to administer his estate, released all claims for future maintenance and support, and assumed liability for the support of the child. The husband on his part agreed to pay his wife various amounts in cash, to convey to her certain real estate and to create a trust fund of $200,000 on her behalf. In addition to these undertakings which were to be performed at once, he also agreed (*a*) to pay the taxpayer specified sums annually during their joint lives; (*b*) to create within five years (that is, by May 8, 1929) an additional trust fund of $100,000; (*c*) to charge his estate with a loan of $93,400 on certain insurance policies on his own life of the face amount of $425,000 payable to her, and to pay premiums upon such policies when due; (*d*) to assign to her his interest to the extent of $300,000 in the remainder of an estate created by his father's will, such $300,000 to become payable upon the death of the life tenant, who was Ann Augusta Thomas, his mother, on condition, however, that the taxpayer should not have remarried; (*e*) to create upon the mother's death a trust fund of $200,000, the income of which should be paid to the taxpayer for life or until remarriage; (*f*) to guarantee performance by the Morning Telegraph Co. of its contract with the taxpayer whereby she was to receive $10,400 annually for 15 years for writing articles.

The husband died on July 6, 1926. At the time of his death he had fully performed all the obligations of the separation agreeement which had become due. There remained unperformed: (1) The creation of the $100,000 trust by May 8, 1929, (2) the repayment by his estate of the $93,400 loan upon the life insurance policies; (3) the creation of a $200,000 trust upon his mother's death; (4) the payment of $300,000 to the taxpayer out of his father's estate after the death of his mother.

In addition, the taxpayer had not received payment from the Morning Telegraph Co. for her articles since September 27, 1926.

A compromise agreement was executed in 1930 by the taxpayer, by the second wife of Edward R. Thomas, by the executors of his will and by the trustee named in the contract of May 8, 1924. Under this agreement the $100,000 trust was created for the taxpayer; the $93,400 loan on the insurance policies, together with interest, was paid in full, and the executors agreed to establish the $200,000 trust upon the death of the mother, and $125,000 in cash plus interest of $12,304.17 were paid directly to her in consideration of her release of her rights under the separation agreement.

During the year 1930 the taxpayer received $8,552.86 as her distributable share of the income from the trust of $200,000 created in 1924, and likewise $6,858.73 from the trust of $100,000 set up in 1930. The returns of the taxpayer were on a cash basis, but she failed to report either of these two receipts of income in her tax returns, regarding them as only payments in exchange for her relinquishment of personal rights growing out of the marital status. The Commissioner assessed them against her for that year. From the income returned for 1930 she claimed a bad debt deduction of $232,322.67 on the theory that the various obligations under the separation agreement of May 8, 1924, were debts and that the deduction was allowable since the unperformed obligations valued as of a given date exceeded the aggregate of the items in the compromise agreement as then valued. The Commissioner rejected the deduction. His rulings against the taxpayer in assessing both items of income derived from the trusts and in rejecting the bad debt deduction she had claimed were sustained by the Board of Tax Appeals.

The questions presented on this appeal are: (1) whether the income from the trusts, paid over to the taxpayer in 1930, was properly taxable against her, and (2) whether she was entitled to a bad debt deduction as a result of the settlement of the obligations which her husband had entered into under the separation agreement of May 8, 1934, and not fulfilled prior to his death.

The question whether the income from the trusts was taxable against the taxpayer or her husband's estate is not on its face a simple one. It would have been taxable against the husband during his lifetime, even though a part of the consideration was in lieu of the dower rights or statutory interests in his estate to which she would be entitled upon his death. (*Douglas* v. *Willcuts*, 296 U. S., 1 [Ct. D. 1041, C. B. XIV-2, 250 (1935)].) Hughes, C. J., there said (at page 8):

"However designated, it was a provision for annual payments to serve the purpose of alimony, that is, to assure to the wife suitable support. The fact that the provision was to be in lieu of any other interest in the husband's property did not affect the essential quality of these payments."

There is, however, authority for holding that the wife is liable for the tax after the legal obligations of the husband to support her in settlement of which a trust was created, had ceased. In *Commissioner* v. *Harry S. Blumenthal* (91 F. (2d), 1009 (C. C. A. 2), affirming 34 B. T. A., 994, per curiam), we held that the income of a trust set up for support and maintenance of a divorced wife was taxable to her upon her remarriage. In *Robert Glendinning* (36 B. T. A., 486, affirmed in 97 F. (2d), 51 (C. C. A. 3)), the opposite result was reached. In neither of the last two cases cited were the courts confronted with the difficulty that exists here of apportioning the consideration between the wife's right to support and her statutory rights in her husband's property; nor were they confronted with the administrative difficulty of taxing his estate after he had died.

In *Helvering* v. *Brooks* (82 F. (2d), 173 (C. C. A. 2) [Ct. D. 1158, C. B. XV-2, 242 (1936)]), where a trust settlement had been made in exchange both for relinquishment of the divorced wife's right to support and for her statutory rights in her husband's property, we held that the husband alone was subject to the tax saying:

"Whether the trust income is used to discharge the husband's duty made specific by agreement, to support the wife, or to discharge an obligation to pay her agreed sums for a release of rights in his property, can not be material in determining the taxability of the husband."

The same result was reached by the Supreme Court under similar circumstances in *Douglas* v. *Willcuts* (296 U. S., 1).

In *Helvering* v. *Butterworth* (290 U. S., 365 [Ct. D. 769, C. B. XIII-1, 151 (1934)]), the Supreme Court held that the income from a testamentary trust accepted by a wife in lieu of dower was taxable to her. From *Helvering* v *Brooks* (82 F. (2d), 173 (C. C. A. 2)) and *Helvering* v. *Butterworth* (290 U. S., 365) it may be inferred that the income in the case at bar should for reasons of practical administration be treated as paid by the husband for support and maintenance of the wife while he is alive and received by her for her dower or other statutory rights after he has died. Such a ruling avoids subjecting the husband's estate to administrative burdens after his death and also avoids attempting to discover what portion of the consideration was furnished for support and maintenance of the wife and what portion for her statutory interests in her husband's property. In *Helvering* v. *Brooks* (82 F. (2d), 173 (C. C. A.)), such a determination was held to be impracticable during the life of the husband and would be equally so after his death.

Apportioning the consideration would be impossible in the present case. Accordingly the taxpayer has not sustained the burden of overcoming the decisions of the Commissioner and the Board.

We hold that the income received from the trusts in 1930 was properly assessed to the taxpayer.

The final question is whether the bad debt deduction of $232,322.67 was available to the taxpayer as claimed in her income tax report. We think it was properly disallowed by the Board.

Under the compromise agreement the obligations to create the trust fund of $100,000 and to pay off the loan on the insurance policies were carried out. The executors of the will of the taxpayer's deceased husband also entered into an agreement to establish the $200,000 trust fund on the death of his mother as he had himself done in the separation agreement. The only remaining obligations were the guarantee of payment of $300,000 out of the estate of the husband's father upon the death of Ann Augusta Thomas and the guarantee that the Morning Telegraph Co. would pay the taxpayer $10,400 annually for 15 years for writing articles. These obligations were extinguished by the payment of $125,000 and $12,304 interest under the compromise. The payment of $300,000 was only to be made if the taxpayer did not remarry. The amount due the taxpayer from the Morning Telegraph Co. at the time of the compromise amounted with interest to $42,619.72 and the value of the balance to be paid her in annual installments during the remaining life of the contract had a value of $71,167.20, but was dependent upon her writing articles. There was no proof that the Morning Telegraph was unable to pay the $42,619.72 that was due.

We think there has been no showing that either of these items gave rise to bad debts or losses. In respect to the $300,000 item the taxpayer received an assignment of a remainder interest in property held in trust for the life of Ann Augusta Thomas which was guaranteed to yield $300,000 when the remainder fell in. But no proof was adduced that it would not then yield $300,000 and by the terms of the separation agreement the guarantee would cease to operate if the taxpayer remarried. It seems impossible to treat such a guarantee either as a bad debt or a loss whatever may have been the financial condition of the estate of the guarantor prior to the compromise. The same considerations apply to the obligations of the Morning Telegraph Co. for there was no proof that it was necessary to resort to the guarantee to secure full payment of the claims against the primary obligor. There was, therefore, neither a bad debt nor a loss.

For the reasons we have already given there was no bad debt which might be deducted. But even if the obligations running to the taxpayer under the separation agreement had not been performed, the nonperformance would not, in our opinion, have resulted in "bad debts" within the statutory meaning of the term, but rather in losses arising from breaches of contract. (*Lewellyn* v. *Elec. Reduction Co.*, 275 U. S., 243; *Wadsworth Mfg. Co.* v. *Commissioner*, 44 F. (2d), 762 (C. C. A. 6).) The provisions in the income tax laws allowing deductions for "bad debts" and for losses sustained during the taxable year are mutually exclusive. (*Spring City Foundry* v. *Commissioner*, 292 U. S., 182 [Ct. D. 829, C. B. XIII-1, 281 (1934)].)

The best that the taxpayer can claim is that if her rights under the separation agreement be taken as a whole she was forced to compromise them for less than their value assuming that the obligor was solvent. But we are not persuaded that the taxpayer has proved any deductible loss even on that assumption. Had there been a loss it would not be deductible under the income tax Acts because it did not arise "in any transaction entered into for profit."

Order affirmed.

L. HAND, CIRCUIT JUDGE (concurring):

I concur, but I wish to state some doubts, which seem to me substantial, as to the propriety of taxing a widow upon the income of a trust fund, accepted by her during her husband's life, in exchange for alimony. The husband is confessedly taxable upon that income while he lives, and the wife is not; we are holding that the reverse is true after his death. In principle I find it very hard to support this change, because the income during the later period seems to me equally with that during the earlier part of a single consideration. The husband's liability is only for their joint lives, which is always actuarially a shorter period than the life of either one. Ordinarily, therefore, the annual income will be less than what she would have accepted, if she were confined to the period during which he is liable. If it were practicable to continue the tax upon his estate after his death, I should therefore think that that was the proper way—he has given a quid pro quo measured by a less sum for a longer period. But I can not see how this could be administered in practice. The income of the trust must be calculated as part of the husband's income, which, being dead, he can not have; and it would not be possible even by impounding some part of his estate to provide for it. True, one could in

that way secure the normal tax, but that is not enough; the actual tax could not even be calculated. I know that it is not a very good reason for taxing one person that it is impossible to collect the tax out of another, but we are continually admonished that the taxation is a practical matter, and here I am disposed to accept that as an adequate excuse. The result may be somewhat unfair before the law becomes fixed, but thereafter women who accept such settlements will be apt to take into consideration the fact that if their husbands die first, the tax will shift to them.

SUPPLEMENT L.—ASSESSMENT AND COLLECTION OF DEFICIENCIES.

SECTION 274.—BANKRUPTCY AND RECEIVERSHIPS.

ARTICLE 274–1: Bankruptcy, proceedings for the relief of debtors, and receiverships.

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

Articles 274–1 and 274–2 of Regulations 86, articles 1191 and 1192 of Regulations 78 and 74, and articles 1293 and 1294 of Regulations 69, amended. (See T. D. 4892, page 203.)

SUPPLEMENT N.—CLAIMS AGAINST TRANSFEREES AND FIDUCIARIES.

SECTION 311.—TRANSFERRED ASSETS.

ARTICLE 311–1: Claims in cases of transferred assets. 1939–4–9686 Ct. D. 1380

INCOME AND PROFITS TAX—REVENUE ACT OF 1926, AS AMENDED—DECISION OF SUPREME COURT.

1. SUIT—JEOPARDY ASSESSMENT—TESTAMENTARY TRANSFEREES OF DECEASED TRANSFEREE—STATUTE OF LIMITATIONS.

Suit brought May 6, 1932, by the United States against transferees under the will of a transferee of property of a corporation dissolved in 1921, based on a jeopardy assessment made against the deceased transferee on February 14, 1931, after a redetermination by the Board of Tax Appeals of a deficiency in 1920 income and profits taxes assessed against the corporation is barred by the statute of limitations contained in sections 277, 278, and 280 of the Revenue Act of 1926, as amended. No assessment was made against the testamentary transferees, and sections 278(d) and 280 are not broad enough to impose upon them any liability on account of assessment against the testator.

2. SAME—PROCEEDING BEFORE BOARD OF TAX APPEALS—EFFECT OF FAILURE TO SUBSTITUTE PARTY OR TO OBTAIN DISMISSAL.

The assessment sued on was out of time. The testator died while the petition to the Board of Tax Appeals was pending and more than 23 months before the jeopardy assessment was made; no substitution of a party to carry on the proceeding was applied for or ordered; and the Commissioner failed to seek or obtain dismissal for lack of a necessary party or want of prosecution. Suspension of the Commissioner's authority to assess the asserted transferee liability does not continue for more than a reasonable time after the testator's death.

SUPREME COURT OF THE UNITED STATES.

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

United States, petitioner, v. *Continental National Bank & Trust Co., Trustee Under the Last Will and Testament of James Duggan, Deceased, et al.*

[305 U. S., 398.]

[January 3, 1939.]

OPINION.

Mr. Justice BUTLER delivered the opinion of the Court.

May 6, 1932, petitioner sued respondents in the Federal Court for the Northern District of Illinois to enforce a claim for part of income and profits taxes for 1920 assessed against an Illinois corporation dissolved in December, 1921. The question for decision is whether the suit is barred by lapse of time.

The pertinent substance of the complaint, as amended February 14, 1937, follows:

In 1919 and 1920, James Duggan, hereafter called the testator, was the principal stockholder of the Johnson City & Big Muddy Coal & Mining Co., which owned a subsidiary corporation. May 16, 1921, these corporations made consolidated income and profits tax returns for 1920, showing a tax of $5,269.21, which was paid. During 1920 and 1921 the mining company was being dissolved; it converted its assets into cash and securities and transferred $295,331.64 to testator; he appropriated it to his own use. Having determined deficiency of $316,620.61 against the company, the Commissioner of Internal Revenue December 6, 1924, sent notice to it by 60-day letter. The taxpayer having failed to petition the Board of Tax Appeals for redetermination, assessment was made against it for that amount.

April 15, 1926, the Commissioner notified testator that there was proposed for assessment against him the amount of $295,331.64, constituting his liability, as transferee of taxpayer's assets, on account of the unpaid balance of its 1920 taxes. June 11, 1926, testator filed with the Board of Tax Appeals his petition for redetermination. In March, 1929, he died. January 27, 1931, the Board made an order of redetermination in the amount proposed by the Commissioner, with interest from December 6, 1924. The order was not reviewed. February 14, 1931, the Commissioner made a jeopardy assessment against the deceased in the amount fixed by the Board as his liability as transferee.

His will was admitted to probate; a trust company it named was appointed executor; and, the executor having been dismissed, one Robinson was, on September 15, 1930, appointed administrator. Before settlement of the estate, plaintiff, April 24, 1931, filed its claim with the administrator. But he paid nothing on account of it and, making distribution in accordance with the will, transferred to defendant Henry Duggan $50,000 and to defendant trustee the rest of the estate, about $1,500,000. Plaintiff alleged that the assets so distributed had become impressed with a trust for the payment of its claim against testator and prayed decree enforcing it against trustee and beneficiaries under the will to the extent of assets transferred by the taxpayer to testator with interest.

Defendants, June 6, 1933, moved to dismiss the complaint on the ground that the suit was barred by sections 277, 278, 280, Revenue Act, 1926, as amended, and section 311(b), Revenue Act, 1928. Plaintiff, January 11, 1937, confessed defendants' motion to dismiss. Then, applying for leave to amend the complaint, it represented to the court that amendment was necessary because the allegation that an assessment was made against testator was omitted from the original bill and was an important fact in determining whether the present action was timely brought. Leave having been granted, it immediately amended by adding the allegation that, February 14, 1931, the Commissioner made against testator the jeopardy assessment above referred to. The complaint was not otherwise changed. March 22, 1937, the court sustained defendants' motion and entered decree dismissing the amended bill of complaint. The circuit court of appeals affirmed. (94 F. (2d), 81.) This Court granted a writ of certiorari. (304 U. S., 554.)

The question is whether the suit is barred by the statutory provisions on which the motion to dismiss was based. First to be considered are sections 277, 278,

and 280, read in connection with applicable provisions of sections 274 and 279 of the Revenue Act of 1926.[1]

The pertinent substance of these follows:

Within 60 days after notice of the Commissioner's determination of deficiency, the taxpayer may file petition with the Board of Tax Appeals for redetermination; no assessment or proceeding in court for collection shall be made or begun until the Board's decision has become final. (Section 274(a).[2]) The amount redetermined by decision that has become final shall be assessed and upon his demand shall be paid to the collector. (Section 274(b).)

Assessment shall be made within five years after the return; "no proceeding in court without assessment for the collection of taxes shall be begun after the expiration of that period." (Section 277(a).) The running of the statute of limitations on assessment or proceeding in court for collection of deficiency shall be suspended for the period during which the Commissioner is prohibited from making assessment or bringing suit and for 60 days thereafter. (Section 277(b).) Where the assessment has been made within the period properly applicable thereto, the tax may be collected by distraint or proceeding in court "but only if begun * * * within six years after assessment of the tax." (Section 278(d).) If the Commissioner believes that assessment or collection of deficiency will be jeopardized by delay, he shall immediately assess the deficiency and "notice and demand shall be made by the collector for the payment thereof." (Section 279(a).) Jeopardy assessment may be made whether or not the taxpayer has filed petition with the Board. (Section 279(c).) If it is made after the Board's decision it may be only for the deficiency determined by the decision. (Section 279(d).) The taxpayer may obtain stay of collection of the jeopardy assessment. (Section 279(f)-(h).)

The liability at law or in equity of "a transferee of property of a taxpayer in respect of the tax" shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in case of a deficiency in a tax. (Section 280(a).) Transferee liability must be assessed within one year from expiration of the period of limitation for assessment against the taxpayer. (Section 280(b)1.) The running of the period of limitation on transferee liability shall, after notice to transferee under section 274(a), be suspended for the period during which the Commissioner is prohibited from making assessment of that liability and for 60 days thereafter. (Section 280(d).)

This is not a suit upon assessment of deficiency against the taxpayer on account of the Commissioner's determination as shown in his letter of December 6, 1924. The time for such a suit, six years after assessment, expired long before the commencement of this suit. (Section 278(d).) (*United States* v. Updike, 281 U. S., 480, 494 [Ct. D. 192, C. B. IX-1, 228 (1930)].)

Nor is it a suit authorized to be brought, in absence of assessment, to enforce liability of a transferee of the taxpayer's property. The time for bringing such a suit is six years, made up of five years after return allowed for assessment against taxpayer (section 277(a)) and one year thereafter for assessment against transferee. (Section 280(b)1.) The taxpayer having made its return on May 16, 1921, the six years expired May 16, 1927.

This suit is against transferees under the will of a transferee of the property of the taxpayer; it is based on the jeopardy assessment made against testator.

Plaintiff asserts that it had six years after that assessment, or until February 14, 1937, within which to bring this suit. Its reasoning is that section 280, specifying no period of limitation for collection of liability of a transferee after it has been assessed, and providing that it shall be collected subject to the same limitations as in the case of deficiency in a tax, makes applicable the period of limitation upon collection defined in section 278(d).

But no assessment was made against any of the defendants. None of them is a transferee of the property of the taxpayer; all are testamentary transferees of the estate of testator. It is clear that sections 278(d) and 280 upon which plaintiff relies are not broad enough to impose on defendants any lia-

[1] 44 Stat., 55 et seq.

[2] The Board's decision becomes final upon expiration of the time (six months after it renders decision) allowed for filing petition for review by a circuit court of appeals or the Court of Appeals of the District of Columbia. (Sections 1001, 1005.)

bility on account of the assessment against the testator.[3] And, as already shown, suit on assessment against the taxpayer, or suit in absence of assessment of tranferee liability, was by the applicable statutes of limitations barred long before this suit was brought.

Moreover, the assessment sued on was out of time. Plaintiff cites section 280(d) and seeks to apply to the facts of this case the rule that assessment against transferee is required to be made within six years after return (sections 277(a), 280(d)1), as follows: The taxpayer made its return May 16, 1921. When, on April 15, 1926, the Commissioner notified testator that he proposed to assess transferee liability against him, there remained 13 months and a day of the period allowed for making that assessment; the Commissioner was prohibited from making the proposed assessment for the 60-day period within which testator was permitted to petition for redetermination by the Board and until its decision, January 27, 1931, became final, June 27, 1931, and for 60 days thereafter, September 25, 1931. (Sections 278(d), 280(d).) Taking in the 13 months and a day, plaintiff had until October 25, 1932, within which to assess testator.

But that calculation is defective for it fails to take into account any part of the period after appeal to the Board that elapsed between the death of petitioner in March, 1929, and the assessment, more than 23 months later, February 14, 1931. Redetermination is granted to safeguard against erroneous exactions by the Commissioner. Suspension of his authority to assess or collect is protection against compulsory payment pending final decision upon objections interposed by petitioner. The proceeding is an adversary one in which the party praying relief by redetermination is petitioner and the Commissioner is respondent. The controversy is brought to issue by petition, answer, and reply that are by the Board required to be definite and certain. (Rules 6, 14, 15.[4]) Before its decision either party, for cause shown, may have the proceeding dismissed.[5] (Rule 31.) And in case of petitioner's death, the Board may order substitution of proper parties. (Rule 37.)

No personal representative of testator nor any other person applied for substitution of a party to carry on the proceeding in the place of the deceased testator, and none was ordered. The Commissioner failed to obtain or seek dismissal for lack of a necessary party or want of prosecution. (Cf. *Rusk* v. *Commissioner* (C. C. A. 7), 53 F. (2d), 428, 430.) Plaintiff does not contend that, no substitution having been applied for or made, the Commissioner was not entitled to an order of dismissal. Nor does it suggest anything to support the

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[3] Cf. section 311, Revenue Act of 1928. It provides:

(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. * * * (1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax * * * imposed upon the taxpayer by this title. * * *

(b) "The period of limitation for assessment of any such liability of a transferee * * * shall be as follows: (1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the taxpayer; (2) In the case of the liability of a transferee of a transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the preceding transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—

except that if before the expiration of the period of limitations for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the taxpayer or last preceding transferee, respectively,—then the period of limitation for assessment of the liability of the transferee shall expire one year after the return of execution in the court proceeding."

The report of the Senate Committee on Finance states: "Section 280 of the Revenue Act of 1926 does not specifically provide any limitation period in the case of a transferee of a transferee of the taxpayer. Section 311(b)2 of the House bill provides, with specific exceptions, that the period for assessment in such case shall be one year after the expiration of the period of limitation for assessment against the preceding transferee. It seemed to the committee that this would unduly prolong litigation and that there should be a time when the transferee may know that he is no longer liable to be proceeded against. A committee amendment therefore provides that in all cases the tax must be assessed within three years after the expiration of the period of limitation for assessment against the taxpayer." (Senate Report No. 960, Seventieth Congress, first session, page 32.)

[4] Revised to November 1, 1929. Rules 31 and 37 are numbered 21 and 23 in the present edition of the rules.

[5] Section 906(c), Revenue Act of 1926, provides: "If a petition for redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall * * * be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the pleadings." (44 Stat., 107.)

assumption, made in its calculation of time and throughout its argument, that suspension of Commissioner's authority to assess continued through the period of more than 23 months between testator's death and the assessment. There is no ground on which it may be held that Congress intended in case of death of petitioner, where no application for or order of substitution is made, indefinitely to continue suspension of the Commissioner's authority to assess. Equally unreasonable would it be to hold that suspension of the Commissioner's authority to assess the asserted transferee liability continued after testator's death for more than a reasonable time within which, no substitution having been applied for or made, to obtain dismissal. Unquestionably that time and more had expired long before the assessment was made.

As the suit is barred by provisions of the Revenue Act of 1926, we need not consider section 311(b) of the Revenue Act of 1928, upon which defendants also relied.

Judgment affirmed.

SUPPLEMENT O.—OVERPAYMENTS.

SECTION 322.—REFUNDS AND CREDITS.

ARTICLE 322–1: Authority for abatement, credit, and refund of tax. 1939–11–9752 Ct. D. 1387

INCOME TAX—REVENUE ACTS OF 1926 AND 1932—JUDICIAL CODE—DECISION OF SUPREME COURT.

1. SUIT—RECOVERY OF OVERPAYMENTS OF TAX—CREDIT AGAINST DEFICIENCIES—JURISDICTION OF COURT.

The district court has jurisdiction, under section 24(20) of the Judicial Code, as amended, of suits brought against the United States based on claims for the refund of amounts in excess of $10,000 arising from an admitted overpayment of tax for 1917 applied by the Commissioner against a barred deficiency for 1918, and admitted overpayments of taxes for the years 1922 to 1925 applied against deficiencies for 1926, 1927, and 1928, the overpayments having been wrongfully received by collectors who were either dead or out of office when the suits were commenced. The crediting of the overpayments by the Commissioner against taxes due for other years did not destroy the taxpayers' cause of action nor oust the courts of jurisdiction.

2. CASE DISTINGUISHED.

Lowe Bros. Co. v. *United States* (1938) (304 U. S., 302 [Ct. D. 1347, C. B. 1938–1, 327]) distinguished.

SUPREME COURT OF THE UNITED STATES.

No. 416. *The United States of America, petitioner,* v. *Bertelsen & Petersen Engineering Co.*

[59 S. Ct., 541.]

On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

No. 437. *The United States of America, petitioner,* v. *C. T. Jaffray, R. H. M. Robinson and Sm. M. Archer, as Trustees of the Estate of Minnesota & Ontario Paper Co.*

On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 27, 1939.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the Court.

In each of these causes counsel for the United States maintain the district court was without jurisdiction to determine the issues. The circuit courts

of appeal ruled otherwise and approved judgments for respondents. The collectors who received the excess taxes in question were either dead or out of office when the proceedings to recover were commenced. The question of jurisdiction only is open for our consideration.

Section 145 Judicial Code[1] empowers the Court of Claims to hear and determine claims against the United States arising out of contract, express or implied. Prior to 1921 section 24(20) Judicial Code gave district courts concurrent jurisdiction when the claim did not exceed $10.000.[2]

The Acts of 1921, 1924, 1925, and 1926[3] enlarged the jurisdiction of district courts by adding the following to section 24(20) Judicial Code:

"Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

Section 3226 Revised Statutes as amended and reenacted by Revenue Act 1926 (ch. 27, section 1113(a), 44 Stat., 9, 116), provides—

"No suit or proceding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, * * *. No such suit or proceeding shall be begun * * * after the expiration of five years from the date of the 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 such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 3226 was further amended by Act June 6, 1932 (ch. 209, section 1103(a), 47 Stat., 169, 286), so as to read as shown in the margin.[4]

No. 416.

The Commissioner of Internal Revenue undertook to deduct more than $10,000 from an admitted overpayment by respondent upon 1917 taxes and to apply this to a declared deficiency for 1918 taxes then barred by the statute of limitations. By this suit respondent seeks a judgment for the amount so deducted.

The circuit court of appeals properly held "this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly applying it to an invalid assessment of a deficiency tax for 1918." Also, rightly we think, that timely and proper claim for the overpayment for 1917 had been made as required by section 3226 Revised Statutes as reenacted 1926.

And we accept the conclusions stated in the following excerpt from its opinion—

"The certificate of overassessment issued by the Commissioner on July 27, 1926, disclosed an overpayment by the taxpayer of the 1917 tax of $91,570.34,

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[1] Tucker Act March 3, 1887 (ch. 359, 24 Stat., 505); Act June 27, 1898 (ch. 503, 30 Stat., 494); July 1, 1898 (ch. 546, 30 Stat., 597, 649); February 26, 1900 (ch. 25, 31 Stat., 33); March 3, 1911 (36 Stat., 1087, 1136); U. S. C. A., Title 28, section 250(1).

[2] The district courts shall have original jurisdiction as follows: * * *

"Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, * * *." (Act March 3, 1911, 36 Stat., 1087, 1091, 1093; U. S. C. A., Title 28, section 41(20).)

[3] See Act November 23, 1921 (ch. 136, 42 Stat., 227, 311); June 2, 1924 (ch. 234, 43 Stat., 253, 348); February 24, 1925 (ch. 309, 43 Stat., 972); February 26, 1926 (ch. 27, 44 Stat., 9, 121). U. S. C. A., Title 28, section 41(20).

[4] Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, * * *. No such suit or proceeding shall be begun * * * after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates." (U. S. C. A., Title 26, sections 1672–1673.)

of which the Commissioner ordered refunded to the taxpayer approximately $55,000, and on July 27, 1926, credited $34,555.68 to a deficiency tax for 1918. It can not be said that the certificate of overassessment constituted an account stated between the Government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. (*Goodrich, Admr.*, v. *Coffin*, 83 Maine, 324.) That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the Government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. The application by the Commissioner on July 27, 1926, of a part of the overpayment for 1917 to a deficiency tax for 1918, against the protest of the taxpayer, constituted a disallowance of so much of the petitioner's original claim for refund. * * * The suit was one which could have been brought against a collector, if living, but who is now dead or out of office."

Lowe Bros. Co. v. *United States* (304 U. S., 302, 303) is not controlling. There the suit was begun in the district court to recover an overpayment of 1917 taxes the alleged result of a credit made by the Commissioner from an admitted overpayment for 1918. For this no action could have been maintained against the collector—he did not make or authorize the credit. Therefore, the amendment to section 24(20) Judicial Code (28 U. S. C. A., section 41(20)) enlarging the jurisdiction of the district court had no application. Here the collector might have been sued since he wrongly received payment on account of 1917 taxes. The present cause falls within the very words of the amendment.

No. 437.

Respondents overpaid internal revenue taxes in sums exceeding $10,000 for 1922, 1923, and 1924; and for 1925, $7,800. The Commissioner issued certificates to that effect August 16, 1933. He refused to repay these sums but undertook to credit them to deficiencies which he assessed against respondents for 1926, 1927, 1928.

Thereupon this suit was brought to recover the overpayments for 1922 to 1925 under section 24(20) Judicial Code as amended (U. S. C. A., Title 28, section 41(20)) which gives district courts jurisdiction in respect of taxes erroneously received by a collector out of office. Respondents maintain that, in fact, there were no deficiencies for 1926, 1927, 1928, and that by attempting to credit overpayments for 1922 to 1925 against nonexisting deficiencies the Commissioner in effect denied their claims for refund.

On the other hand petitioner insists, the Commissioner's action in allowing the overpayments and crediting them against alleged deficiencies amounted to payments on account of taxes assessed for 1926 to 1928. And, as it was the Commissioner and not the collector who caused such credit of overpayments to deficiencies, the district court was without jurisdiction.

The circuit court of appeals held the suit was one to recover overpayments admittedly made to the collector and in respect of which timely claims for refund had been filed.

It said—

"The crediting of the overpayments, by the Commissioner, against taxes due from the taxpayer for other years was a matter of defense, a justification for the failure to refund, and not a matter which destroyed the taxpayer's cause of action or ousted the court of jurisdiction."

This conclusion we think is correct. Other points suggested, so far as presently important, are sufficiently answered by what has been said in No. 416.

Both of the challenged judgments must be affirmed.

Mr. Justice REED took no part in the consideration or decision of either of these causes.

TITLE VI.—GENERAL PROVISIONS.

SECTION 801.—DEFINITIONS.

ARTICLE 801–3: Association distinguished from trust. 1939–24–9873
Ct. D. 1403

INCOME TAX—REVENUE ACTS OF 1928 AND 1932—DECISION OF COURT.

1. TRUST—TAXABLE AS ASSOCIATION—OIL AND GAS LEASE.

A business enterprise engaged in the development of an oil and gas lease for profit was managed by two individual shareholders, transferable beneficial percentage interests being assigned to various persons by contracts purporting to limit the liability of such assignees, and the title to the property, so far as the percentage shareholders were concerned, being in one of the managers, denominated a trustee. Under the provisions of the Revenue Acts of 1928 and 1932 such an organization constitutes an "association" and not an ordinary trust, and is therefore taxable as a corporation.

2. DECISIONS CONTROLLING.

Morrissey v. *Commissioner* (1935) (296 U. S., 344 [Ct. D. 1064, C. B. XV–1, 264 (1936)]); *Helvering* v. *Combs* (1935) (296 U. S., 365 [Ct. D. 1066, C. B. XV–1, 272 (1936)]); *Helvering* v. *Coleman-Gilbert Associates* (1935) (296 U. S., 369 [Ct. D. 1067, C. B. XV–1, 261 (1936)]); and *Swanson* v. *Commissioner* (1935) (296 U. S., 362 [Ct. D. 1065, C. B. XV–1, 270 (1936)]), controlling.

3. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (36 B. T. A., 444) affirmed.

4. CERTIORARI DENIED.

Petition for certiorari denied March 27, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Thrash Lease Trust, petitioner, v. *Commissioner of Internal Revenue, respondent.*
[99 F. (2d), 925.]

Upon petition to review a decision of the United States Board of Tax Appeals.

Before WILBUR and GARRECHT, Circuit Judges, and ST. SURE, District Judge.

[November 15, 1938.]

OPINION.

GARRECHT, Circuit Judge: This is a petition to review a decision of the Board of Tax Appeals. The question presented is whether the Board erred in sustaining the Commissioner's determination that the petitioner was an association taxable as a corporation.

The case arises under the Revenue Act of 1928 (ch. 852, 45 Stat., 791) and the Revenue Act of 1932 (ch. 209, 47 Stat., 169).

The tax rate imposed under section 13 of each of these Acts is not in question. The issue here involves the application of the following language found in both statutes: "(a) When used in this Act—* * * (2) The term 'corpora-

tion' includes associations, joint-stock companies, and insurance companies." and the Treasury regulations applicable thereto which are found in the margin.[1]

The facts are substantially as follows:

On October 17, 1930, a tract of 12 acres in Smith County, Tex., was leased by J. E. Thrash and J. S. Rushing for 3 years and, as long thereafter as oil and gas should be produced, the lessor to receive one-eighth of the oil produced and payment of the market value of one-eighth of the gas. On May 25, 1931, this lease was assigned by Rushing to "Gordon Macmillan, Trustee, his heirs, successors and assigns." The assignment agreement was signed "Gordon Macmillan, Assignee." Herbert R. Macmillan, Gordon's father, was at this time acquiring oil leases and distinguishing them by various designations, and this lease was taken in the name of Gordon Macmillan, trustee, as a matter of convenience for the purpose of separating the identity of this lease from other leases. At the time of acquiring the lease and to within a few days before a well was placed on production, Herbert R. Macmillan was the only one who had put any money into the property. In June, 1931, he expended between $2,500 and $3,000, for the drilling of a well and sent Gordon to Texas to take charge of operations for which he received a monthly salary and was to have an interest in the venture.

In taking the assignment of the lease Gordon Macmillan personally bound himself to pay to his assignor, Dr. J. S. Rushing, $48,000 out of seven thirty-seconds of the first oil and gas produced; to begin the drilling of a well on the property and thereafter to proceed therewith in a diligent and workmanlike manner until the well had been drilled to a depth from which oil was then being produced in the vicinity. In the event oil was struck, Gordon Macmillan was further obligated to develop the property with due diligence so the assignor should receive the full consideration payable out of oil with reasonable dispatch. Gordon Macmillan entered into a drilling contract with one, Kolp, whereby the former agreed to pay the latter $19,000 for drilling a well on the property. This contract was made in June, 1931, and was signed, "Gordon Macmillan, Trustee."

Percentage interests were assigned to many persons, sometimes of interests in the oil and gas and sometimes of interests in the lease. The total of the former was 24 plus per cent and of the latter, 42 plus per cent. Oil was struck in commercial quantities on July 31, 1931. For interests assigned before production began the aggregate consideration was $8,000, and for those assigned later the aggregate consideration was $18,000. There were some variations in the terms of the different assignments of interests. All were transferable and some have been transferred. Herbert R. Macmillan conducted all business transactions except the actual operations of the well, which were carried on

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[1] Treasury Regulations 74:

"ART. 1312. *Association.*—Association and joint-stock companies include associations, common law trusts, and organizations by whatever name known which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. * * *

"ART. 1314. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged either by themselves or in connection with the beneficiaries, in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by sections 161–170 and by articles 861–891. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 701. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act."

Treasury Regulations 77:

"ART. 1314. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by sections 161–170 and by articles 861–891. Where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but have similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act."

under his direction by Gordon Macmillan, who exercised his own judgment almost exclusively, but at times he consulted with his father. None of the persons who acquired percentage interests ever participated in any way in the production operations or in any respect concerning the lease or the operations of the property. Whenever there were funds available for the purpose, Gordon Macmillan distributed them to the persons interested. After expenses of operations were paid and the 12½ per cent to the original lessor, the surplus money was distributed to the percentage assignees, according to their interests, the remainder, about 20 per cent, being equally divided between Herbert R. and Gordon Macmillan. No meeting of the owners of percentage interests has ever occurred; no officers were ever elected; no rules, regulations or by-laws adopted. There was no written agreement between Herbert R. Macmillan and Gordon Macmillan; neither was there any trust instrument defining the rights and interests of the percentage owners among themselves or in relation to the Macmillans, who acted as managers by common consent. For the fiscal year ending July 31, 1932, the net income of the venture was $13,044.03; for the fiscal year ending July 31, 1933, the net income was $10,168.72. Fiduciary income tax returns were filed in the name of Gordon Macmillan, trustee. The Commissioner determined that the petitioner was taxable as an association and assessed deficiency accordingly. Upon review by the Board of Tax Appeals, the Commissioner's action was sustained.

As supporting its decision the Board of Tax Appeals cited *Morrissey* v. *Commissioner* (296 U. S., 344); *Helvering* v. *Combs* (296 U. S., 365); *Helvering* v. *Coleman-Gilbert Associates* (296 U. S., 369), and *Swanson* v. *Commissioner* (296 U. S., 362). Petitioner points out that in each of those cases a formal trust agreement was entered into; trustees were appointed to conduct the business; the duties of the trustees and the rights of the beneficiaries were also specified; that in the case at bar there was no trust agreement and no duties were defined for the self-styled trustee. There was no meeting of the beneficiaries and no appointments of agents or representatives, the Macmillans acting by common consent.

While the Board made no specific findings to that effect, the testimony indicates that it was not expected that the unit holders would be liable for obligations incurred other than as covered by the paragraph in the assigned contract which reads as follows: "The interest hereby assigned shall bear its proportionate share of the cost of drilling the second well on said premises, deduction therefor to be made from the proceeds derived from the sale of the products produced from the first well drilled on said premises, as and when such cost is incurred." It might well be said that this was a further resemblance to a corporation in that there was a purpose to limit the liabilities of the shareholders.

The facts here would indicate that those percentage holders were engaged in an enterprise for the transaction of business and that the property was held and operated as a venture for profit as distinguished from the traditional type of trust, the only object of which is to hold and conserve particular property, with incidental powers, and not for the purpose of conducting a business and sharing its gains. In *Morrissey* v. *Commissioner*, supra, the Court stated: "'Association' implies associates. It implies the entering into a joint enterprise, and, as the applicable regulation imports, an enterprise for the transaction of business. * * *" As the courts have repeatedly pointed out each case must be determined upon its own facts. As the Morrissey case, supra, said: "* * * it is impossible in the nature of things to translate the statutory concept of 'association' into a particularity of detail that would fix the status of every sort of enterprise * * *." In this case, as in the Morrissey case, the percentage holders were united for the purpose of carrying on a business enterprise for their own benefit. Although there was no definite trust agreement or any writing expressing the purposes and limitations of the enterprise, it is apparent that the Macmillans were impliedly given extensive powers of management and control of the business which was definitely carried on for profit.

The entity, whatever it may be called, was operating as a continuing business enterprise and intended to reap a profit from the production and sale of oil and gas produced by the lessee on premises held under a lease in which all the percentage shareholders had an interest. This was not any ordinary trust. The title to the property, as far as the percentage shareholders were concerned, was in a single person denominated trustee. The respective interests

of the several percentage holders were subject to transfer; the management, so far as appears, was centered in the Macmillans, who conducted the business much after the manner of directors of a corporation.

This is a border line case. The entity here, the Thrash Lease Trust petitioner, in its general structure and method of operation, is sufficiently analogous to a corporate organization to justify the action of the Commissioner in determining that the income of the enterprise should be taxed in the same manner as that of a corporation. This holding is in harmony with the cases from the Supreme Court above noted and with the previous decisions of this court. (*Commissioner* v. *Vandergrift Realty & Investment Co.*, 82 F. (2d), 387; *Monrovia Oil Co.* v. *Commissioner*, 83 F. (2d), 417; *Bert* v. *Helvering*, 92 F. (2d), 491; *Kilgallon* v. *Commissioner*, 96 F. (2d), 337.)

Affirmed.

ARTICLE 801–5: Limited partnership as corporation.

REVENUE ACT OF 1934.

Amendment of Regulations 86, articles 801–5 and 801–6. (See T. D. 4894, page 79.)

SECTION 1104.—EXAMINATION OF BOOKS AND WITNESSES.

(Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928.)

1939–18–9815
Ct. D. 1395

FEDERAL TAXES—UNITED STATES CODE—DECISION OF SUPREME COURT.

JURISDICTION OF COURT—CONTEMPT PROCEEDING—FAILURE TO TESTIFY BEFORE INTERNAL REVENUE AGENT—CIVIL PROCEEDING.

A contempt proceeding for failure to obey a district court's order to testify before an internal revenue agent, acting under Title 26, U. S. C., sections 1514 and 1523, in connection with the tax liability of another is a civil proceeding, and the circuit court of appeals was not in error in dismissing petitioner's appeal from the judgment of the lower court, since he had not complied with the statutory requirements governing civil appeals.

SUPREME COURT OF THE UNITED STATES.

William McCrone, petitioner, v. *United States of America.*

[59 S. Ct., 685.]

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 17, 1939.]

OPINION.

Mr. Justice BLACK delivered the opinion of the Court.

The court of appeals dismissed the petitioner's appeal from a judgment of contempt for failure to obey a district court's order to testify before an internal revenue official.[1] This dismissal was proper if the contempt proceeding was civil and not criminal. A notice of appeal was filed and a bill of exceptions signed. But petitioner's appeal was not, as appeals from civil judgments were required to be, applied for or allowed by the trial judge or a judge of the court of appeals.[2]

[1] 100 Fed. (2d), 322.
[2] 28 U. S. C., section 230; *Alaska Packers Association* v. *Pillsbury* (301 U. S., 174).

The facts disclose:

On April 21, 1938, an internal revenue agent, acting under 26 U. S. C., section 1514 (copied in the margin),[3] served petitioner with summons to appear before him and testify in connection with the tax liability of another. Petitioner responded to the summons, but declined to give any statement or information as to the matter under inquiry. Thereupon, both the agent and the assistant United States attorney for the district appeared before the district court, and the agent filed an affidavit of facts and prayed that petitioner be ordered to submit to such questions "as may be propounded to him * * * that are material and pertinent to the subject matter" of the investigation. After hearing, in which petitioner appeared, the district court ordered him to appear before the agent and testify upon "all matters and facts within * * * [his] knowledge and concerning the subject matter of the inquiry and investigation, * * *." Petitioner did so appear but again declined to answer the agent's questions. After a second hearing by the district court, petitioner was found in contempt for failure to obey the court's previous order to testify before the agent and was ordered "held in * * * jail * * * until * * * [he] purges himself of * * * contempt by obeying the order" to testify.

Petitioner insists that no civil action was involved here and that proceedings to which the United States and its agents are parties can not be civil.[4] However, Article III, section 2, of the Constitution, expressly contemplates the United States as a party to civil proceedings by extending the jurisdiction of the Federal judiciary "to Controversies to which the United States shall be a Party." An action by the Interstate Commerce Commission to compel a witness to testify is "a direct civil proceeding, expressly authorized by an Act of Congress, in the name of the Commission, and under the direction of the Attorney General of the United States, against the witness * * * refusing to testify, * * *."[5] So here, the mere presence of the United States as a party, acting through its agents, does not impress upon the controversy the elements of a criminal proceeding.[6] In accordance with its constitutional authority to do so, Congress has expressly authorized such a proceeding by an agent of the United States in the Federal courts "to compel * * * attendance, testimony, or production of books, papers, or other data." (26 U. S. C., section 1523.)[7]

While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public.[8] Here, the summons served on petitioner required only that he testify in a tax inquiry properly conducted by an agent of the Bureau of Internal Revenue. And the agent's petition to the district court, to which we may look in determining the nature of the proceeding,[9] invoked judicial assistance solely in obtaining petitioner's testimony. Authority of the court was sought to buttress the procedure for collection of taxes and not in "vindication of the public justice,"[10] as in criminal cases.

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[3] "The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

[4] Petitioner relies on *Federal Trade Commission* v. *A. McLean & Son* (94 Fed. (2d), 802, 804). There the Court of Appeals for the Seventh Circuit said, "we became convinced that the [Federal Trade] Commission, an agency of the Government, representing no private interest of its own, but acting solely in the public interest, had no such standing as a private party that it could utilize procedure [civil contempt] intended to safeguard the rights and interests of private parties." Because of the conflict on this point in the judgment below, we granted certiorari. (— U. S., —.)

[5] *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447, 470).

[6] Cf. *Helvering* v. *Mitchell* (303 U. S., 391, 402 [Ct. D. 1320, C. B. 1938–1, 317]).

[7] Cf. *Brownson* v. *United States* (32 Fed. (2d), 844, 848, 849 [Ct. D. 64, C. B. VIII–1, 192 (1929)]); *United States* v. *First Nat. Bank* (295 Fed., 142, affirmed 267 U. S., 576 [T. D. 3546, C. B. III–1, 422 (1924)]).

[8] *Gompers* v. *Bucks Stove & Range Co.* (221 U. S. 418, 441); *Fox* v. *Capital Co.* (299 U. S., 105); *Lamb* v. *Cramer* (285 U. S., 217, 220, 221); *Oriel* v. *Russell* (278 U. S., 358, 363; *Ex parte Grossman* (267 U. S., 87, 111); *Union Tool Co.* v. *Wilson* (259 U. S., 107); *In re Merchants' Stock Co., petitioner* (223 U. S., 639); *Matter of Christensen Engineering Co.* (194 U. S., 458); *Bessette* v. *W. B. Conkey Co.* (294 U. S., 324).

[9] Cf. *Lamb* v. *Cramer*, supra, 220; *Gompers* v. *Bucks Stove & Range Co.*, supra, 448.

[10] Cf. *Fox* v. *Capital Co.*, supra, 108.

The judgment of contempt was civil, and appeal from it was governed by the statutory rules of civil appeals.

There remains the suggestion that the appeal in question can be considered a civil appeal properly taken under rule 73 of the new Federal Rules of Civil Procedure which became effective September 16, 1938.[11] However, petitioner's notice of appeal was filed May 2, 1938. The controlling statute required application for allowance of a civil appeal within three months after judgment from which appeal was sought. The three months expired July 28, 1938, and the contempt judgment had become unappealable well before the effective date of the new rules. Therefore, petitioner is not aided by the provision of rule 86 that the new rules shall "govern all * * * actions then pending [September 16, 1938], * * *." This action—from which there was then no right of appeal—was not pending within the meaning of the rule.

The court of appeals was not in error in dismissing petitioner's appeal for failure to comply with the statutory requirements governing civil appeals. Its judgment is affirmed.

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[11] Rule 73. Appeal to a Circuit Court of Appeals.

How taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

TITLE VII.—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

SECTION 903.—FILING OF CLAIMS.

REGULATIONS 96, ARTICLE 201: Claims—Form and where to file. 1939–15–9788 G. C. M. 21058
(Also Section 322, Regulations 94, Article 322–1.)

REVENUE ACT OF 1936.

Section 3477 of the Revised Statutes, prescribing certain requirements with respect to assignment of claims against the United States, applies only to voluntary assignments and not to assignments by operation of law such as by decree in bankruptcy. Claim for refund in the instant case was properly filed.

An opinion is requested whether the claim for refund of processing taxes paid by the M Company, filed under the circumstances herein set forth, has been properly filed, and whether such claim is governed by section 3477 of the Revised Statutes prescribing certain requirements with respect to assignment of claims against the United States.

Processing taxes in the amount of $11x$ dollars were paid by the M Company under the provisions of the Agricultural Adjustment Act. In January, 1936, trustees were appointed by a district court, in pursuance of a petition filed under section 77B of the Bankruptcy Act, to take over and operate the business of the M Company. A plan of reorganization was approved by the court in November, 1936. The plan provided for the organization of a new corporation to which all the assets of the M Company were to be transferred. In consideration of such transfer, the new corporation was to pay all valid indebtedness existing against the M Company, including all claims that might have priority by virtue of law at the date of the institution of the bankruptcy proceedings. The N Company was thereupon incorporated. In January, 1937, the trustees of the M Company, under the authority and direction of the court, deeded to the N Company the real estate, machinery, fixtures, stock in process, choses in action, and all personal property of every description belonging to the M Company. The trustees were discharged by the court in January, 1937.

In June, 1937, a claim for refund was filed on Form P. T. 79 for the refund of $11x$ dollars of processing taxes paid by the M Company. This form was signed "M Company, by A, Secretary and Treasurer." The refund form was transmitted with a letter dated June —, 1937, signed by A, as secretary and treasurer of the N Company, with a note to the effect that the claim was signed by the M Company but that the N Company had purchased all the properties of the M Company and that the refund would go to the N Company.

As above noted, all property of the M Company has been assigned and transferred to the N Company by order of the United States district court. The question arises whether the rights of the M Company, if any, for refund of processing taxes were successfully transferred by this court order.

Section 3477 of the United States Revised Statutes (U. S. C. A., Title 31, section 203) provides that all transfers and assignments made of any claim upon the United States shall be null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amounts due, and the issuing of a warrant for the payment thereof. The claim here in question has not been allowed.

Section 3477 of the Revised Statutes has been considered by the courts and it has been held that the statute applies only to cases of voluntary assignment and not to instances where title is transferred by operation of law. In *Erwin* v. *United States* (97 U. S., 392), the following statement was made with respect to section 3477:

> It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy are not within the evil at which the statute is aimed * * *.

The provisions of section 3477 of the Revised Statutes were considered in *Western Pacific Railroad Co.* v. *United States* (268 U. S., 271). The petition in that case covered claims for transportation services furnished the United States between September 24, 1914, and June 18, 1916, (1) by the Western Pacific Railway, a predecessor in title of the claimant, (2) by the receivers of the property of the Western Pacific Railway appointed in a Federal district court in California, and (3) by the claimant, the Western Pacific Railroad Co., which purchased the property of the railroad under a sale made by the receiver. By the sale made under decree in the Federal District Court of California, the claimant, the Western Pacific Railroad Co., acquired by a special master's deed all the property, assets, and choses in action belonging to the Western Pacific Railway or to its receivers. The Government in this case contended that as to the claims for transportation furnished by the Western Pacific Railway and its receivers, which were acquired by claimant under the special master's deed, a recovery was precluded by section 3477 of the Revised Statutes. The court stated that the object of that section was to protect the Government and to prevent frauds upon the Treasury. It was held that such section applied only to cases of voluntary assignment of demands against the Government and not to cases involving a transfer of title by operation of law. The court stated that "the sale to the claimant of so much of the claims as had accrued to the receivers for transportation furnished by them, was clearly a transfer by operation of law and did not come within the prohibition of the statute." The court held with respect to the claims for transportation furnished by the Western Pacific Railway that such claims were transferred by operation of law.

It is held, therefore, that title to the claim in the present case was obtained by the N Company by operation of law and that the provisions of section 3477 did not preclude its transfer.

The question remains as to whether a proper claim for refund has been filed in this case.

Section 903 of the Revenue Act of 1936 provides that "No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless,

after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person * * *." The person who paid the tax in this case was the M Company. However, that company, if still in existence, has neither interest nor title to the claim for refund. The N Company "stands in the shoes" of the M Company, having acquired all right, title, and interest in the claim against the Government. In *National Foods, Inc.*, v. *United States* (82 Ct. Cl., 627, 13 Fed. Supp., 364, certiorari denied October 12, 1936) it was held that the assignor of a claim against the Government (which claim had been transferred by operation of law) was not the proper party to maintain a suit to recover on the claim. It is held in the present case that the N Company is the proper party to file the refund claim.

The claim was signed by the M Company but the letter of transmittal reveals that it was filed by the assignee. The facts relating to the transfer were mentioned in the letter of transmittal. It is held that this claim should be considered as properly filed upon behalf of the N Company, the successor in interest.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

EMPLOYMENT TAXES.

SOCIAL SECURITY ACT.

TITLE VIII.—TAXES WITH RESPECT TO EMPLOYMENT.

SECTION 804: Excise tax on employers. 1939–10–9745
REGULATIONS 91, ARTICLE 304: Liability for employers' tax. Mim. 4882
(Also Section 901; Regulations 90, Article 200.)

Collectibility of social security taxes from certain insolvent banks and trust companies.

Provisions of section 22 of the Act of March 1, 1879 (20 Stat., 351; 12 U. S. C., 570), as amended by section 818 of the Revenue Act of 1938, not applicable with respect to employers' excise taxes imposed under Titles VIII and IX of the Social Security Act. (S. S. T. 37 (C. B. XV–2, 380 (1936)) modified.)

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 14, 1939.

Collectors of Internal Revenue and Others Concerned:

1. Section 818 of the Revenue Act of 1938, enacted May 28, 1938 (Public, No. 554, Seventy-fifth Congress), provides:

SEC. 818. TAXES OF INSOLVENT BANKS.

Section 22 of the Act of March 1, 1879 (20 Stat. 351; 12 U. S. C. 570), is amended to read as follows:

"SEC. 22. (a) Whenever and after any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall appear to him, is authorized to remit so much of the said tax against any such insolvent banks and trust companies organized under State law as shall be found to affect the claims of their depositors.

"(b) Whenever any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has been released or discharged from its liability to its depositors for any part of their claims against it, and such depositors have accepted, in lieu thereof, a lien upon subsequent earnings of such bank or trust company, or claims against assets segregated by such bank or trust company or against assets transferred from it to an individual or corporate trustee or agent, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, such individual or corporate trustee or such agent, which shall diminish the assets thereof which are available for the payment of such depositor claims and which are necessary for the full payment thereof.

"(c) Any such tax so collected shall be deemed to be erroneously collected, and shall be refunded subject to all provisions and limitations of law, so far as

applicable, relating to the refunding of taxes, but tax so abated or refunded after the date of the enactment of the Revenue Act of 1938 shall be reassessed whenever it shall appear that payment of the tax will not diminish the assets as aforesaid. The running of the statute of limitations on the making of assessment and collection shall be suspended during, and for 90 days beyond, the period for which, pursuant to this section, assessment or collection may not be made, and a tax which has been abated may be reassessed and collected during the time within which, had there been no abatement, collection might have been made.

"(d) This section shall not apply to any tax imposed by the Social Security Act."

2. Attention is invited to paragraph (d) of the foregoing provisions of law, to the effect that section 22 of the Act of March 1, 1879 (20 Stat., 351; 12 U. S. C., 570), as amended by section 818 of the Revenue Act of 1938, is not applicable with respect to the employers' excise taxes imposed by section 804 and section 901 of the Social Security Act. Accordingly, banks or trust companies, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, which have ceased to do business by reason of insolvency or bankruptcy and whose assets are insufficient to pay their depositors in full, if not otherwise exempt from social security taxes, may not be relieved from payment of such taxes by virtue of the provisions of section 22 of the Act of March 1, 1879, as amended.

3. Payment of the employers' excise taxes for which such banks and trust companies are liable under Titles VIII and IX of the Social Security Act, and which are required to be reported on any return due under those titles on a date subsequent to May 27, 1938, should be made to collectors' offices without regard to affidavits of insolvency which may have been filed, or which may be filed, by such banks and trust companies for the purpose of securing relief from such payment.

4. Attention is invited to the fact that the provisions of section 22 of the Act of March 1, 1879, both prior and subsequent to amendment, are inapplicable with respect to the tax on employees imposed by section 801 of the Social Security Act.

5. The ruling published as S. S. T. 37 (C. B. XV-2, 380 (1936)) and all subsequent published rulings in which reference is made thereto are modified accordingly. (See S. S. T. 135, C. B. 1937-1, 365; S. S. T. 164, C. B. 1937-1, 432; S. S. T. 186, C. B. 1937-2, 371.)

6. Any correspondence relating to the contents of this mimeograph should refer to the number thereof and to the symbols A&C.

GUY T. HELVERING,
Commissioner.

SECTION 807: Collection and payment of taxes. 1939-6-9705
REGULATIONS 91, ARTICLE 402: Returns for periods within the calendar year 1938 and subsequent years. (Also Article 410.) S. S. T. 352

The separation date to be shown on an employer's tax return, Form SS-1a, under Title VIII of the Social Security Act in the case of a released employee who continues to receive dismissal pay for a certain period after his release is the date on which the employee was actually released from active service. S. S. T. 300 (C. B. 1938-1, 387) amplified.

Advice is requested relative to the separation date to be shown on an employer's tax return, Form SS–1a, under Title VIII of the Social Security Act in the case of a released employee who continues to receive monthly payments of dismissal pay for a certain period after his release.

It is stated that many employers when they release an employee continue to make payments to him as dismissal pay for several months after his release. The question arises as to the date to be entered in item 20 of Schedule A, Form SS–1a, as the separation date. The instructions on the reverse side of Form SS–1a provide in part as follows:

Item 20. *Separation date.*—Enter in this column for each employee who received taxable wages during the quarter, but who was not in your employ at the end of the quarter, the month and day upon which such employee left your service. * * *

For the purpose of this item, the date on which the employee was actually released from active service should be entered in item 20 of Form SS–1a as the "separation date." For example, where an employee was released by his employer on September 15, 1938, but will receive monthly payments of dismissal pay through March 15, 1939, the month and day, "9–15," should be entered in item 20 of the return for the period ended September 30, 1938, as the date the employee left the employer's service. That date ("9–15") should also be entered in item 20 of each subsequent return on which dismissal payments to the individual are reported.

SECTION 807: Collection and payment of taxes.
REGULATIONS 91, ARTICLE 410: Payment of tax.

Separation date to be shown on return, Form SS–1a, in the case of a released employee. (See S. S. T. 352, page 284.)

SECTION 811: Definitions. 1939–4–9687
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 350
(Also Section 907; Regulations 90, Article 205.)

Individuals engaged by the M Theater Association to perform services for the O Theater are employees of that theater for the purpose of Titles VIII and IX of the Social Security Act.

Advice is requested whether individuals engaged by the M Theater Association to perform services for the O Theater are employees of that theater for the purpose of Titles VIII and IX of the Social Security Act.

It is stated that the O Theater is one of a group of theaters which are members of the M Theater Association. The O Theater (hereinafter called the owner) in joining the circuit entered into an agreement appointing the M Theater Association as its agent. Under such agreement, the M Theater Association (hereinafter called the agent) is authorized to engage and fix the compensation of the members of the cast of each production appearing at the O Theater. The members of the chorus are engaged for the duration of the show at a fixed salary. The agent receives from the owner a list of names of the indi-

viduals who are to be engaged by him on behalf of the owner. All of those whose names are submitted are hired by the agent. Each of the completed choruses has 14 members. A member of the chorus may be discharged by either the agent or the owner for cause. This is equally true with respect to other stage performers. During their stay at the O Theater, the members of the cast are subject to the rules and regulations established by such theater. Immediately following the final performance, the performers are paid by the owner of the theater.

Under Titles VIII and IX of the Social Security Act, the employer-employee relationship exists when the person for whom services are performed has the right to direct and control the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. (Article 3, Regulations 91; article 205, Regulations 90.)

Under the facts presented in this case, it is held that the O Theater exercises, or has the right to exercise, over the members of the cast the degree of direction and control contemplated by the regulations as necessary to establish the legal relationship of employer and employee. Accordingly, such individuals, with respect to the services they perform at the O Theater, are its employees for the purpose of Titles VIII and IX of the Social Security Act.

SECTION 811: Definitions. 1939-5-9695
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 351
(Also Regulations 91, Article 6; Section 907;
Regulations 90, Articles 205 and 206(1).)

Truckers and individuals engaged by them to harvest vegetables for the M Company are employees of that company for the purpose of Titles VIII and IX of the Social Security Act, and their services do not constitute "agricultural labor" within the meaning of those titles.

Advice is requested whether truckers and individuals engaged by them to harvest vegetables for the M Company are employees of that company for the purpose of Titles VIII and IX of the Social Security Act; and whether the services of the truckers and the other individuals in question constitute "agricultural labor" within the meaning of the above-mentioned titles.

The M Company, a shipper of vegetables, furnishes various farmers with seeds, for which it receives in return shares in the crops raised. The company subsequently purchases the farmers' shares of the crops. The company then enters into written contracts with individuals known as truckers, who in turn engage others to harvest the entire crop of vegetables. The M Company is neither the owner nor tenant of the farms on which the crops are produced. The agreement between the trucker and the company provides in part as follows:

Trucker agrees to harvest vegetables for shipper at such time and place and at such price as shall be verbally agreed upon daily by both parties before trucker leaves for fields; to deliver such vegetables to loading platform as

shall be also verbally agreed upon daily and return all unused containers to shipper's warehouse daily; to deliver such vegetables according to specifications agreed upon and set out herein; and to accept the pack-out count of shipper at loading platform as basis for settlement. Such settlement shall be made weekly.

Trucker agrees to provide, transport, and pay his own labor and pay all his own expenses incident to such harvesting and transporting of vegetables and employees of trucker and to perform the work according to the plans and specifications set out in this contract.

Shipper agrees to notify trucker when he wants him to harvest vegetables and at what price, show trucker where to harvest, specifications for pack, etc., and to pay trucker weekly for total accepted pack-out count at prices agreed upon.

Shipper agrees to furnish containers to trucker at his warehouse for such vegetables as require containers for harvesting and transporting.

It is mutually understood and agreed that shipper may have a field inspector advise with trucker at any time regarding quality, specifications, and when to stop harvesting.

It is also mutually understood and agreed that if shipper's daily harvesting price is not satisfactory to trucker that he is not bound to go to the field and harvest that day but if he does harvest he must accept the daily price agreed upon.

It is also mutually understood and agreed that shipper is not bound to provide any harvesting for trucker and that this contract is in force only in so far as daily agreed on between trucker and shipper.

The company's field supervisor gives detailed instructions to the trucker as to the size, quality, and quantity of vegetables to pick and prescribes the method and manner in which the vegetables are to be tied and packed in the crates. The trucker obtains a harvesting crew and the supervisor leads or directs the trucker to the particular field to be harvested. The company's field supervisor has the right to go into the fields at any time to advise the trucker as to the quality and other specifications of vegetables to pick. He may direct the trucker at any hour during the day to stop work without regard to whether the assigned fields have been completely harvested. The field supervisor inspects the field after the vegetables have been harvested, and, if the trucker and crew did not harvest the crops satisfactorily, they are required to return and complete the work. The trucker owns the trucks with which he transports the harvesting crew to and from the field and the harvested crops to the company's packing shed. He pays the expense of operating the trucks, makes agreements with the laborers as to what remuneration they shall receive, and pays them for their services. It is customary for the company to make advances for expenses to truckers with whom it has contracts and who are in good standing. Containers for the vegetables are supplied by the company and picked up by the trucker at the company's packing shed, and the company requires the trucker to return the containers to the sheds. The company pays the trucker on a "pack-out" basis, i. e., a flat rate for each container of vegetables delivered to the packing shed and found to be acceptable by the company as meeting the specifications previously given the trucker. If certain vegetables are found to be unsatisfactory, as, for instance, not properly tied or not of the prescribed size, the company may refuse to accept them and is not required to pay the trucker for gathering them. Although the M Company pays the farmers for the vegetables also on the "pack-out" basis, it is understood that the company will have complete control of harvesting the crops.

Article 3 of Regulations 91, applicable to Title VIII of the Social Security Act, reads in part as follows:

* * * Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in section 811(b) (see article 2).

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. * * *

In the present case, the M Company fixes the time for harvesting the vegetables, designates the fields from which they are to be gathered, prescribes the size, quality, etc., of the vegetables to be harvested, directs the trucker at any time to stop work, and in general retains the right to control the trucker and the harvesting crew with respect to the manner in which the work shall be done. The services performed do not require a high degree of skill and the cumulative effect of the facts presented is that the control of the shipper is actual and complete from the standpoint of practical management.

Under the facts presented, it is held that the M Company retains the right of direction and control over the truckers to an extent sufficient to establish the legal relationship of employer and employee. Accordingly, such individuals are, for the purpose of Titles VIII and IX of the Social Security Act, employees of that company. Since the harvesting crew members, who assist the truckers in harvesting the crops, are engaged with the express consent of the M Company and are, in effect, subject to control by that company, they are also its employees within the meaning of the taxing provisions of the Act. (See generally S. S. T. 336, C. B. 1938-2, 295.)

In view of the fact that the M Company is neither owner nor tenant of the farms on which the vegetables are produced, it follows that the services performed by the truckers and the other individuals in question do not constitute "agricultural labor" within the meaning of Titles VIII and IX of the Social Security Act. (See article 206(1), Regulations 90; article 6, Regulations 91; S. S. T. 125, C. B. 1937-1, 397.)

SECTION 811: Definitions.
REGULATIONS 91, ARTICLE 3: Who are employees.

Status of ritualistic officers of fraternal organizations. (See Mim. 4880, page 312.)

SECTION 811: Definitions. 1939-12-9762
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 356
(Also Section 907; Regulations 90, Article 205.)

Students of the N High School who are placed in vocational training pursuant to the North Carolina State plan for vocational education are employees of the agencies training them. Amounts paid to the students by such agencies constitute taxable "wages" under Titles VIII and IX of the Social Security Act.

Advice is requested whether the students of the N High School who are placed in vocational training pursuant to the North Carolina State plan for vocational education are employees of the agencies training them, and, if so, whether amounts paid to them by such agencies constitute taxable "wages" under Titles VIII and IX of the Social Security Act.

It is stated that the N High School has formulated a diversified occupational program under which certain of its students are placed in the occupation or industry of their choice for training. This procedure is in accordance with the North Carolina State plan approved by the Federal Board for Vocational Education, pursuant to the provisions of the Smith-Hughes Act of February 23, 1917 (39 Stat., 929), and the Act of June 8, 1936 (49 Stat., 1488). The types of training include salesmanship, office practice, printing, photography, mechanics, etc.

The agreement form used by the N High School in placing students with agencies for vocational training provides as follows:

1. The _____ will permit _____
(Training agency.) (Student.)
to enter their establishment for the purpose of gaining practical knowledge and experience as (a) (an) _____.

2. The course of training is designed to run for _____ semesters in practical work. The training will be in accordance with the general outline arranged for _____.
(Occupation.)

3. The * * * High School will make provision for the student to receive information and technical instruction related to the occupation.

4. The status of the student, while in training, shall be that of an apprentice.

5. The student, while in training, shall progress from job to job in order to gain experience in all phases of operations and duties and shall be kept on one operation only long enough to become proficient.

6. The schedule of compensation shall be fixed by the training agency, the student, and the coordinator of the high school in accordance with existing labor laws and recommendations of the local advisory committee.

7. The student agrees to observe the rules and regulations of the training agency and to abide by all implied and stated terms included in this memorandum.

8. The student agrees further to make every effort to attend regularly and to notify (his) (her) employer, and the coordinator, of any unavoidable absence from employment training.

The agreement form is signed by the coordinator of the high school, employer, parent or guardian, and student, and is dated as of the beginning of training.

The coordinator of the high school states that the training agency is a corporation, partnership, or individual engaged in the line of business with which the student desires to become familiar; that the students are considered as employees by the training agencies; that they must be compensated by the agency which trains them and that they are paid directly by such agency; that their compensation does not equal the regular rates received by those permanently employed in the same industries or trades; that there is no fixed basis for determining the compensation; that the students must devote certain hours to the work and are constantly under the supervision of the agencies training them and the school coordinator; that the agencies make reports to the coordinator at the time of the latter's regular visits to the places where the students are engaged as to their work, attitude, and

regularity of attendance; and that the high school may allow credit toward graduation from the hours spent by the students in such work.

Under Titles VIII and IX of the Social Security Act, the relationship of employer and employee exists when the person for whom services are performed has the right to direct and control the person who performs the services not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. (Article 3, Regulations 91; article 205, Regulations 90.) The term "wages" is defined under Titles VIII and IX of the Social Security Act as "all remuneration for employment" subject to a limitation under Title VIII not here material.

Based on the facts presented, it is apparent that the students of the N High School participating in the cooperative vocational training plan in question perform services for the agencies training them, which services are subject to the supervision and control of the training agencies for which performed. The fact that such students are also subject to some extent to the supervision of the school coordinator does not affect the training agencies' right to control the services performed for such agencies by the students in their status as apprentices. Although the students may perform such services for the purpose of gaining practical knowledge and experience, it is clear that the training plan requires that the work be done under regular employment conditions and that the students be compensated therefor. Accordingly, it is held, for purposes of Titles VIII and IX of the Social Security Act, that the students of the N High School placed in vocational training under the plan herein outlined are employees of the training agencies with respect to the services performed for the agencies, and that the amounts paid to such students by the agencies constitute taxable "wages."

SECTION 811: Definitions. 1939-16-9797
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 360
(Also Section 907; Regulations 90, Article 205.)

Individuals comprising "shearing crews" engaged by B, a sheep shearing contractor, to perform services in connection with the shearing of sheep for wool growers are employees of B for the purpose of Titles VIII and IX of the Social Security Act.

Advice is requested whether individuals comprising "shearing crews" engaged by B, a sheep shearing contractor, to perform services in connection with the shearing of sheep for wool growers are employees of B or of the wool growers for the purpose of Titles VIII and IX of the Social Security Act.

It is stated that B is engaged in the shearing of sheep on a contract basis. Oral contracts are entered into with wool growers and either provide that (1) for a stipulated rate per head, B will furnish the individuals and machinery for the shearing and the grower will furnish the labor necessary for the handling of the wool; or (2) for a stipulated rate per head, B will furnish all the machinery and labor necessary for the shearing and handling of the wool. B maintains a somewhat permanent shearing crew which accompanies him from ranch to ranch. He has complete supervision over the members of his crew and is responsible for their work. The shearers are paid by him for their services at a specific rate per head.

Article 3 of Regulations 91, applicable to Title VIII of the Social Security Act, reads in part as follows:

* * * Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in section 811(b) * * *.

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. * * *

Article 205 of Regulations 90, applicable to the tax imposed under Title IX, contains substantially the same provisions.

Under the facts presented, it is held that B exercises over the individuals comprising the "shearing crews" the degree of direction and control contemplated by the regulations as necessary to establish the legal relationship of employer and employee. Accordingly, such individuals are employees of B for the purpose of Titles VIII and IX of the Social Security Act.

SECTION 811: Definitions. 1939-19-9825
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 363
(Also Section 907; Regulations 90, Article 205.)

Associate physicians engaged by the O Clinic, who are required to devote their full time to the practice of medicine at the clinic and to promote the interests of the clinic in preference to the private interests of each individual, are employees of that clinic for the purpose of Titles VIII and IX of the Social Security Act.

Advice is requested whether associate physicians rendering services to the O Clinic under conditions hereinafter set forth are employees of the clinic for the purpose of Titles VIII and IX of the Social Security Act.

The O Clinic is a partnership operated by three physicians. Five associate physicians are engaged to perform services in the clinic. Under the terms of the agreements between the clinic and the associate physicians, the clinic agrees to place them on its staff, to furnish private quarters in the clinic office building, to place their names on the office register and on all stationery, and to furnish such instruments, medicines, and supplies, as may be necessary in the practice of their specialties, which equipment and supplies are to be the property of the clinic. The associate physicians agree to devote their full time to the clinic, to observe certain office hours, not to carry on any outside business for gain, to endeavor diligently to build up a practice for the clinic in their specialties, to take care of such general work as other members of the clinic may call upon them to handle, i. e., general surgical work, anesthetics, etc., and to cooperate with the other physicians in every way for the general benefit of the clinic. The earnings of the three partners are pooled and divided according to an agreed ratio. Ten per cent of the income of the clinic is set aside in a savings ac-

count to be shared by the eight physicians. The five associate physicians receive a certain interest in the savings account and a guaranteed minimum compensation ranging from x dollars to $4x$ dollars per month. They purchase no interest in the good will, office equipment, library, or other property. The income of each of the associate physicians is based in part upon the length of service, professional qualifications, and aptitude for advancement in the practice of medicine and surgery. All financial obligations of the clinic are incurred by the three partners. All of the physicians pass on qualifications of physicians applying for affiliation with the clinic and on laboratory technicians, clerks, etc., employed by the clinic. Each physician determines the amount of fees for services rendered by him, which fees are collected by the clinic bookkeeper and belong to the clinic.

Article 3, Regulations 91, and article 205, Regulations 90, relating to Titles VIII and IX, respectively, of the Social Security Act, state that physicians, lawyers, dentists, and others who follow an independent trade, business, or profession, in which they offer their services to the public, generally are independent contractors and not employees. However, this is not to say that such persons are in all situations to be classified as independent contractors as distinguished from employees for the purpose of the taxing provisions of the Social Security Act. The tests for determining whether an individual is an employee are set forth in articles 3 and 205, supra, and if such individual is subject to the necessary control and direction, he is an employee regardless of the fact that he may be a physician, lawyer, dentist, or other professional man.

In the present case, the O Clinic engages the associate physicians in question to perform services in the clinic and to endeavor primarily to promote the interests of the clinic in preference to the private interests of the individual doctors. The associate physicians agree to devote all of their professional time in the interests of the clinic, to observe certain office hours, and to cooperate in every way possible for its general benefit. Under the financial arrangement between the clinic and the associate physicians a certain compensation is guaranteed and it is understood that the service of a new man coming into the clinic staff shall yield to the clinic some profit over and above his share of office overhead. It is the opinion of the Bureau that the O Clinic has the right to exercise, and does exercise, such control and direction over the manner and means in which the associate physicians perform their duties as establishes the relationship of employer and employee. Such control and direction, although not as detailed perhaps as in the case of other employees performing services of a different character, requiring detailed control, is such as is necessary in view of the character of the work. It is accordingly held that the five associate physicians performing services under the stated circumstances are employees of the O Clinic for the purpose of Titles VIII and IX of the Social Security Act.

SECTION 811: Definitions. 1939-23-9864
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 367
(Also Section 907; Regulations 90, Article 205.)

B, a golf professional, and the individuals whom he engages to assist him in operating the golf shop of the Y Country Club are employees of that club for the purpose of Titles VIII and IX of the Social Security Act.

Advice is requested whether B, a golf professional, and the persons whom he engages to assist him in performing services are employees of the Y Country Club within the meaning of Titles VIII and IX of the Social Security Act, and, if so, the manner in which B's wages should be computed.

B is employed at the Y Country Club and receives a salary of $10x$ dollars per month. He also receives the proceeds from the operation of the golf shop, which consist of $1x$ dollars per month for each bag of clubs cleaned and kept in the shop, and the profits from the sale of golf balls, bags, and supplies. In addition he instructs club members at the rate of $2x$ dollars per hour, which rate is established by the club. The club has the right to direct and control the manner in which he manages the golf shop, his books are open to club inspection at all times, he must be available for, and is required to keep, lesson appointments, and he may engage such further help as the needs of the business require.

In S. S. T. 238 (C. B. 1937-2, 401) it was held that a golf professional engaged in selling golf clubs and lessons on the grounds of the M Golf Club is not an employee of that club for the purpose of Titles VIII and IX of the Social Security Act. In that case the golf professional was clearly not under the control of the club. He fixed his own prices, made his appointments, and carried on his activities without orders of any nature from members or officials of the club. Although under articles 3 and 205 of Regulations 91 and 90, respectively, it is stated that individuals who follow an independent profession are generally independent contractors and not employees, it does not follow that such individuals are in all situations independent contractors instead of employees for the purpose of the taxing provisions of the Social Security Act. If an individual is subject to the control of the person for whom he performs services not only as to the result to be accomplished by his work but also as to the details of accomplishing the result, he is an employee regardless of whether he is a golf professional or other professional man.

In the present case, it is apparent from the facts presented that B and the individuals whom he engages to assist him are subject to the supervision and control of the Y Country Club. Accordingly, it is held that B and his assistants are employees of that club for purposes of Titles VIII and IX of the Social Security Act. B's monthly salary, plus the proceeds derived from the golf shop and lessons given to members, minus the wages paid to his assistants and any expenses incurred in connection with the operation of the golf shop, constitutes his taxable " wages " for the purpose of the above-mentioned titles.

SECTION 811: Definitions. 1939–10–9746
REGULATIONS 91, ARTICLE 4: Who are employers. S. S. T. 354
(Also Section 907; Regulations 90, Article 204.)

Where a partnership is dissolved by the death or retirement of one of its members, the employing unit continues for purposes of Titles VIII and IX of the Social Security Act until the winding up of the partnership affairs is completed. A new employment begins, however, upon the resumption of business by the surviving partners. S. S. T. 199 (C. B. 1937–2, 405), amplified.

Advice is requested whether, for the purpose of Titles VIII and IX of the Social Security Act, the employing unit is considered to continue where, upon the dissolution of a partnership by the death or retirement of one of its members, the remaining members engage in the winding up of the partnership affairs.

In S. S. T. 199 (C. B. 1937–2, 405) it was held that where a partnership business continues after the death or retirement of a partner a new employment begins, the surviving partner being the employer. This ruling, however, applies only where the business of the partnership is continued and the liquidation of the deceased partner's interest is incidental.

It is held that where a partnership is dissolved by the death or retirement of a member, the employing unit continues for purposes of Titles VIII and IX of the Social Security Act until the winding up of the partnership affairs is completed. The continuation of the partnership during the period required to wind up its affairs is provided for in the Uniform Partnership Act (see section 30), and the same rule has been enacted into the law of a number of States. (See section 2424, Deering's Civil Code of California (1937); chapter 40, section 61, Cahill's Consolidated Laws of New York (1930); Title 59, section 92, Purdon's Penna. Statutes Annotated (1930).) Even under the common law, the same rule obtains. (See *Rossmoore* v. *Commissioner*, 76 Fed. (2d), 520; 20 R. C. L., 968–969.) Services performed in winding up the partnership affairs should not be regarded as being performed in a new employment. Services performed in carrying on the business of the new partnership, however, or in carrying on the business on behalf of a remaining partner, are to be regarded as services performed in a new employment.

SECTION 811: Definitions.
REGULATIONS 91, ARTICLE 6: Agricultural labor.

Services performed in harvesting vegetables. (See S. S. T. 351, page 286.)

SECTION 811: Definitions. 1939–13–9767
REGULATIONS 91, ARTICLE 6: Agricultural labor. S. S. T. 357
(Also Section 907; Regulations 90, Article 206(1).)

Services performed for the M Dairy Farm in connection with the processing, packing, packaging, transporting, marketing, and delivery of milk and other dairy products, and in cleaning the processing rooms and equipment, are not excepted from "employment" as "agricultural labor" for the purpose of Titles VIII and IX of the Social Security Act.

Advice is requested whether services performed by the employees of the M Dairy Farm in connection with the processing, packing, packaging, transportation, marketing, and delivery of milk and other dairy products, and in cleaning the processing rooms and equipment, are excepted from "employment" as "agricultural labor" under sections 811(b)1 and 907(c)1 of the Social Security Act.

It is stated that B owns and operates the M Dairy Farm of approximately y acres and that he utilizes the crops grown and harvested thereon to feed his dairy cattle. The milk produced from the dairy herd is processed into pasteurized milk, cream, buttermilk, and butter, which products are then sold. Retail routes are owned and maintained for the purpose of marketing the milk and other dairy products. The duties of the employees embrace the various types of services performed in connection with the preparation and distribution of the products of the dairy and in cleaning the processing rooms and equipment. Products of the dairy are sold both at retail and at wholesale.

The exception accorded to "agricultural labor" under the provisions of sections 811(b)1 and 907(c)1 of the Social Security Act, as set forth in articles 6 and 206(1) of Regulations 91 and 90, respectively, does not include services performed by an employee in connection with the processing of articles from materials which were produced on a farm, or in connection with the packaging, transportation, or marketing of those materials or articles, unless such processing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

The Bureau has consistently held that the exception accorded to "agricultural labor" in the taxing provisions of the Social Security Act does not extend to services performed in the employ of a dairy farmer in connection with the preparation of milk and other dairy products for market when such activities are not merely incidental to farming operations but are clearly commercial activities. (See generally S. S. T. 125, C. B. 1937–1, 397; S. S. T. 158, C. B. 1937–1, 404.)

Under the facts presented, it is apparent that the operation of the M Dairy Farm is more appropriately described as a commercial operation than as a mere incident to ordinary farming operations. Accordingly, it is held that the services performed by employees of the M Dairy Farm in connection with the processing, packing, packaging, transporting, marketing, and delivering of milk and other dairy products, and in cleaning the processing rooms and equipment, are not excepted from "employment" as "agricultural labor" for the purpose of Titles VIII and IX of the Social Security Act.

SECTION 811: Definitions. 1939–14–9775
REGULATIONS 91, ARTICLE 6: Agricultural labor. S. S. T. 358
(Also Section 907; Regulations 90, Article 206(1).)

Circumstances under which services performed in connection with the threshing of grain constitute "agricultural labor" within the meaning of Titles VIII and IX of the Social Security Act.

Advice is requested whether services performed in connection with the threshing of grain constitute "agricultural labor" within the meaning of sections 811(b)1 and 907(c)1, Titles VIII and IX, respectively, of the Social Security Act.

It is stated that in the threshing of grain the threshing machines, which are set up temporarily in grain fields, are usually owned and operated by persons other than the owners or tenants of the farms on which the grain is produced, and the services performed in connection with the threshing operations in such cases are rendered by employees of the owner of the threshing machine who contracts with the farmers to thresh the grain for a fixed fee. In other situations the threshing machines are owned and operated by a cooperative group or association of farmers, while in a few instances the machine is owned by the owner or tenant of the farm on which the grain is produced. Although arrangements made by farmers with respect to the threshing of grain vary widely from case to case, it may be stated generally that in some instances services performed in connection with threshing operations are rendered by employees of the owner or tenant of the farm on which the grain is produced, whereas in other cases such services are performed by individuals who are not in his employ.

"Agricultural labor," which is excepted from "employment" under Titles VIII and IX of the Act, includes all services performed by an employee on a farm of which the employer is owner or tenant in connection with the cultivation of the soil and the raising and harvesting of crops, and also includes services performed by an employee in connection with the processing of articles from materials which were produced on a farm owned or tenanted by the employer, provided such processing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations (article 6, Regulations 91; article 206(1), Regulations 90).

A review of court decisions dealing with the threshing of grain reveals that in some cases this process has been considered as essentially industrial, being the first operation which changes the form of the product in the manufacture of flour and other grain derivatives. Other decisions have considered the operation as essentially agricultural since it is usually the last operation on the farm where the grain was produced and is essential to marketing and shipping the product. However, the classification depends upon the conditions under which the threshing takes place. It may be stated as a general rule that the threshing of grain is an agricultural process when it is carried on by the farmer on whose farm the grain is produced and when the services performed in connection therewith are rendered by employees of such farmer. On the other hand, when such services are performed by individuals who are not in the employ of the owner or tenant of the farm upon which the grain is produced, the threshing process is to be regarded as essentially commercial.

Accordingly, where services are performed in connection with the threshing of grain by employees of the owner or tenant of the farm on which the grain is produced, such services constitute "agricultural labor" within the meaning of sections 811(b)1 and 907(c)1 of the Social Security Act and are, therefore, excepted from "employment" under Titles VIII and IX thereof. However, where the individuals performing such services are employees of an association of farmers or of any person other than the owner or tenant of the farm on which the grain is produced, such services are not so excepted.

SECTION 811: Definitions. 1939-20-9835
REGULATIONS 91. ARTICLE 6: Agricultural labor. S. S. T. 364
(Also Section 907; Regulations 90, Article 206(1).)

Services performed by employees of the M Company on farms owned or tenanted by that company in the raising, harvesting, packing, and transporting of water cress constitute "agricultural labor" within the meaning of sections 811(b)1 and 907(c)1 of the Social Security Act.

Advice is requested whether services performed by employees of the M Company on farms owned or tenanted by that company in the raising, harvesting, packing, and transporting of water cress constitute "agricultural labor" within the meaning of sections 811(b)1 and 907(c)1 of the Social Security Act.

It is stated that the M Company produces water cress in beds, varying in size from 1 to 10 acres, which are situated in agricultural sections. The sod is removed from the beds by means of ordinary spades and shovels and the soil is pulverized in preparation for the planting of the water cress seed After the seeds have been planted, the beds are flooded with fresh spring water. The water is kept at a uniform flow and depth by means of dams. Weeds are removed from the beds by hand during the growing season, fertilizer added from time to time, and bare spots covered with transplanted cress. The water cress is harvested by cutters, who wade in the water and cut and tie the cress into small bunches. The cress is removed to packing sheds adjacent to the beds where it is packed in wooden barrels. Ice is placed between layers of cress as a preservative and holes are bored in the bottom of the barrels to drain water formed by the melting ice The barrels of water cress are then transported to the nearest express station for shipment to wholesale brokers.

Sections 811(b)1 and 907(c)1 of the Social Security Act provide in part as follows:

* * * The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—
(1) Agricultural labor * * *.

The term "agricultural labor" includes (*a*) all services performed by an employee, on a farm of which the employer is owner or tenant, in connection with the cultivation of the soil and the raising and harvesting of crops, and (*b*) services performed by an employee in connection with the processing, packing, packaging, transporting, or marketing of articles which were produced in their raw or natural state on a farm of which the employer is owner or tenant. The services referred to under (*b*) do not constitute "agricultural labor," however, unless the processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. (Regulations 91, article 6; Regulations 90, article 206(1).)

It is held that services performed by employees of the M Company on farms owned or tenanted by that company in the raising, harvesting, and packing of water cress, and also services performed by such employees in transporting the water cress to the express station, constitute "agricultural labor" within the meaning of sections 811(b)1 and 907(c)1 of the Social Security Act.

SECTION 811: Definitions. 1939–24–9874
REGULATIONS 91, ARTICLE 6: Agricultural labor. S. S. T. 368
(Also Section 907; Regulations 90, Article 206(1).)

Status under Titles VIII and IX of the Social Security Act of services performed in connection with repair and maintenance activities by employees of the M Company on a farm owned and operated by that company.

Advice is requested whether services performed in connection with repair and maintenance activities by employees of the M Company on a farm owned and operated by that company constitute "agricultural labor" within the meaning of that term as used in Titles VIII and IX of the Social Security Act.

The M Company owns and operates a large farm which is used solely for agricultural purposes. A number of employees are engaged in specialized repair and maintenance activities which, although necessary and essential to the proper operation of the farm, are nevertheless not exclusively agricultural in character. Whether such services are excepted from the taxing provisions of the Social Security Act as "agricultural labor" is the question presented.

"Agricultural labor," which is excepted from "employment" under Titles VIII and IX of the Act, includes all services performed by an employee on a farm of which the employer is owner or tenant in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising, feeding, or management of live stock, bees, and poultry, and also includes services performed by an employee in connection with the processing, packing, packaging, transportation, or marketing of materials which were produced on a farm owned or tenanted by the employer, provided such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. (Article 6, Regulations 91; article 206(1), Regulations 90.)

As stated in S. S. T. 125 (C. B. 1937–1, 397), where the nature of the service is such that it might properly be said of the individual performing it that he is pursuing a special trade, calling, or occupation not closely connected with agriculture, the service does not constitute "agricultural labor" even though the service may be performed on a farm by an employee of the owner or tenant thereof. Accordingly, it is held that services performed in the employ of the M Company by engineers, carpenters, plumbers, cement finishers, painters, brick masons, welders, surveyors, and electricians, who may be said to be engaged in a special trade, calling, or occupation not closely connected with agriculture, in connection with maintenance and operation of its farm properties constitute "employment" within the meaning of that term as defined in Titles VIII and IX of the Social Security Act. On the other hand, services performed by ordinary farm laborers employed by the M Company in connection with such repair and maintenance of its farm properties constitute "agricultural labor" for purposes of the taxing provisions of the Social Security Act.

SECTION 811: Definitions. 1939-17-9805
REGULATIONS 91, ARTICLE 10: Officers and members of crews. S. S. T. 361
(Also Section 907; Regulations 90, Article 206(3).)

Where officers and members of the regular crew of a vessel owned by the O Company and documented under the laws of the United States perform services in connection with the laying-up of such vessel for the winter months and the conditioning of it for use during the following sailing season, such services are excepted from "employment" by section 811(b)5, Title VIII, of the Social Security Act.

Advice is requested whether services performed on a vessel owned by the O Company during the "lay-up" and "fit-out" seasons are excepted from "employment" under section 811(b)5, Title VIII, of the Social Security Act where such services are performed by officers and members of the vessel's regular crew.

The vessel in question is a passenger boat operated on the Great Lakes by the O Company and is documented under the laws of the United States. In September of each year it is withdrawn from navigation for the winter months. The number of crew members retained after the vessel ceases to operate is dependent upon the type of services which they perform and the number is decreased gradually as the different classes of employees complete their assignments. By the month of November, the only remaining members of the crew are the captain, the chief engineer, and the assistant engineers. The engineers perform services until the 1st of December, while the captain of the vessel is engaged for the entire year and is granted a vacation during the months of December and January. In February the engineers report back to the vessel for the purpose of conditioning the ship prior to its being put into operation. Other members of the crew are called back as the work progresses and the ordinary seamen return to the vessel immediately prior to the sailing season. The captain of the vessel supervises the individuals during the "lay-up" and "fit-out" seasons. It is his duty to maintain proper discipline among the crew members and to see that the work is completed in accordance with the rules and regulations issued by the Bureau of Marine Inspection and Navigation. The compensation of the crew members during the "lay-up" and "fit-out" seasons remains the same as during the navigation season.

Section 811(b)5, Title VIII, of the Social Security Act excepts from "employment"—

* * * Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country * * *.

The expression "officers and members of the crew" includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. (Regulations 91, article 10.)

It was held in S. S. T. 221 (C. B. 1937-2, 430) that where a documented vessel is temporarily withdrawn from navigation in order to effect repairs or because of changes in schedule or other similar

reasons, services performed as watchmen by members of the crew of such vessel are excepted from employment under sections 811(b)5 and 907(c)3 of the Act.

In S. S. T. 283 (C. B. 1938–1, 437) an individual was employed during the "lay-up" season to act as watchman over the ship and its cargo. The vessel was temporarily withdrawn from navigation by reason of unfavorable weather conditions on the Great Lakes during the winter season. However, since it appeared that the regular crew had been disbanded (as distinguished from the facts in that portion of S. S. T. 221, supra, dealing with temporary withdrawal of the vessel from navigation), it was held that the individual was not a "member of a crew" within the meaning of article 10 of Regulations 91.

In the instant case the vessel is temporarily withdrawn from navigation. While certain members of the crew are dismissed from time to time during the "lay-up" season, disbandment of the crew is not accomplished until the services of the engineers terminate at the end of November. During the "fit-out" season beginning in February, the members of the regular crew of the former sailing season are reassembled and the new crew to operate the vessel is formed. Furthermore, the subordinate officers and the members of the crew are under the supervision of the captain of the vessel during the "lay-up" and "fit-out" seasons. Applying the conclusion reached in S. S. T. 221, as set out above, to the facts of the instant case, it is concluded that services performed during the "lay-up" and "fit-out" seasons by subordinate officers and members of the regular crew of the vessel are excepted from "employment" under section 811(b)5 of the Social Security Act.

In view of the fact that the captain is engaged on an annual basis, his status during his vacation period, the months of December and January, remains that of an officer of a vessel, and, therefore, remuneration paid to him in that capacity does not constitute "wages" within the meaning of Title VIII of the Social Security Act.

The conclusion reached herein also applies to such services performed by an officer or member of the regular crew of a vessel on the navigable waters of the United States as provided in section 907(c)3, Title IX, of the Act.

SECTION 811: Definitions. 1939–22–9851
REGULATIONS 91, ARTICLE 10: Officers and members of crews. S. S. T. 366
(Also Section 907; Regulations 90, Article 206(3).)

Lighter captains, scow captains, bargemen, and other individuals performing services on board nonself-propelled lighters and barges owned and operated by the M Company are not officers or members of the crew within the meaning of sections 811(b)5 and 907(c)3 of the Social Security Act.

Advice is requested whether services performed by certain individuals in the operation of lighters and barges owned by the M Company are excepted from employment under sections 811(b)5 and 907(c)3 of the Social Security Act.

In connection with the transportation of its products between certain points in and near a harbor, the M Company owns and op-

erates nonself-propelled lighters and barges which are towed from place to place by tugboats. The lighters and barges are documented under the laws of the United States and operated upon the navigable waters of the United States. Usually one person, referred to as a lighter captain, scow captain, or bargeman, is placed in full charge of the craft and its cargo. The M Company sets forth specific and detailed instructions as to how the services aboard the lighter or barge are to be performed. It is the duty of such person to supervise the loading and unloading of the lighter or barge, to examine it for needed repairs, to cast off and tie up during voyages, to look after the general welfare of the craft, and to perform all services incidental to the operation of the craft except the actual loading and unloading operations. Such individual holds a seaman's certificate. The lighters and barges are equipped with living quarters in order that the individuals may remain aboard when necessary. Monthly food allowances are made to the individuals operating the lighters and barges since none of such craft has facilities for serving meals.

Section 811(b)5, Title VIII, of the Act excepts from the term "employment":

(5) Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country * * *.

Section 907(c)3, Title IX, of the Act excepts:

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States * * *.

In S. S. T. 210 (C. B. 1937-2, 429) it was held that barges, usually nonself-propelled but towed by a tugboat, used in the transportation of cargoes between various points in and near a harbor are "vessels" within the meaning of the above-quoted provisions of the Act. It is accordingly held that the lighters, scows, and barges operated by the M Company are "vessels" within the meaning of sections 811(b)5 and 907(c)3 of the Social Security Act.

It does not follow, however, from a holding that the watercraft operated by the M Company are "vessels" that services performed aboard such "vessels" are such as to bring the individuals involved within the category of officers or members of the crew. The fact that the individuals serving on board may hold seamen's certificates is not determinative of the question; the nature of the particular services involved and the circumstances under which they are performed are the determining factors.

In *Diomede et al.* v. *Lowe et al.* (87 Fed. (2d), 296), the court held, under facts very similar to those in the instant case, that the sole employee in charge of a dump scow which had no means of self-propulsion, whose duties were to supervise the loading and unloading thereof, and who was subject to the order of the captain of the tug which towed the scow, is neither a master nor a member of the crew within the clause excluding such persons from the provisions of the Longshoremen's and Harbor Workers' Compensation Act, notwithstanding the fact that the employee lived aboard the scow and made trips beyond the harbor limits. The pertinent provisions of that Act are not materially different from the provisions of sections 811(b)5 and 907(c)3 of the Social Security Act. (See also *Jones* v. *International Mercantile Marine Co. et al.*, 252 App. Div., 347, 300 N. Y. S.,

238.) The principles applied by the court in determining whether an individual was a master or member of the crew of a scow, under circumstances basically similar to those in the instant case, are considered to be equally applicable to the question here involved. Under the facts presented, it is accordingly held that where an individual is engaged in performing services aboard a lighter or barge of the M Company, such individual is not "an officer or member of the crew" within the meaning of sections 811(b)5 and 907(c)3, supra.

If an individual is not "an officer or member of the crew" when he performs his duties on board a vessel alone, he does not become such merely by the presence of other employees on board, and the similar services of additional employees would not be entitled to be classified as services performed by officers or members of the crew. (See *Moore Dry Dock Co.* v. *Pillsbury et al.*, 100 Fed. (2d), 245.) On some of the lighters and barges operated by the M Company, from one to three individuals are employed aboard each vessel to perform services similar to those set forth above. It is held that the individuals performing such services for the M Company are not performing services as "officers or members of the crew" within the meaning of sections 811(b)5 and 907(c)3 of the Social Security Act, and their services are not excepted from "employment" under Titles VIII and IX of the Act by reason of those sections.

SECTION 811: Definitions. 1939–18–9816
REGULATIONS 91, ARTICLE 11: Government employees. S. S. T. 362
(Also Section 907; Regulations 90, Article 206(5)–(6).)

Services performed by instructors engaged by the N City Board of Education pursuant to the provisions of the Ohio State plan for vocational education to conduct enrolled training classes in the plant of the O Company are excepted from "employment" under sections 811(b)7 and 907(c)6 of the Social Security Act. Amounts paid by the O Company to the board of education as donations toward the instructors' remuneration do not constitute "wages" under Titles VIII and IX of the Act.

Inquiry is made whether services performed by instructors engaged by the N City Board of Education to conduct training classes in the plant of the O Company constitute "employment" under the Social Security Act, and whether amounts paid by that company to the N City Board of Education as donations toward the remuneration of instructors conducting such training classes constitute taxable "wages" under Titles VIII and IX of the Social Security Act.

A contract has been entered into between the N City Board of Education and the Ohio State Board for Vocational Education in which the local board agrees to establish and maintain courses of instruction in trade and industrial subjects which will meet the requirements of the Ohio State plan for vocational education formulated pursuant to the provisions of the Smith-Hughes Act of February 23, 1917 (39 Stat., 929), and the Act of June 8, 1936 (49 Stat., 1488). The State board agrees to reimburse the local board of education for one-half of the salaries paid to instructors engaged to conduct such courses.

The individuals to whom payments for services were made were in the employ of the O Company when the program was initiated by the N City Board of Education and were recommended by that company to the local board of education after conferences with the district coordinator for the State board for vocational education. When the instructors had qualified for and obtained teaching certificates from the State of Ohio, they were engaged by the local board and placed on its pay roll, the amounts of their salaries being determined by that board. The instructors are required to conduct classes in the plant of the O Company and must teach their classes in accordance with the program adopted for the particular plant. The local board has the right to discharge the instructors and, in the event the company is dissatisfied with the results of the work of any instructor, its only recourse is to advise the board of its dissatisfaction. The instructors, in the performance of their duties in the O Company plant, are responsible only to the local superintendent of schools and the State board for vocational education. Certain supplies are furnished by the local board of education and the O Company provides the premises, tools, equipment, and a part of the supplies and educational material. The remainder of the educational material is furnished by the State board for vocational education. The instructors participate in the State teachers' retirement fund. The O Company donates directly to the local board of education an amount equal to 50 per cent of the instructors' remuneration. The O Company also pays to the instructors amounts in addition to their regular remuneration for part-time services performed in advising and instructing employees of the company who are not enrolled in the employee training groups.

Section 3 of the Smith-Hughes Act of February 23, 1917 (39 Stat., 929), provides for the appropriation of amounts for use of the States in paying the salaries of teachers of trade, home economics, and industrial subjects. Section 8 of that Act reads in part as follows:

SEC. 8. That in order to secure the benefits of the appropriation for any purpose specified in this Act, the State board shall prepare plans, showing the kinds of vocational education for which it is proposed that the appropriation shall be used; the kinds of schools and equipment; courses of study; methods of instruction; qualifications of teachers * * *. Such plans shall be submitted by the State board to the Federal Board for Vocational Education, and if the Federal board finds the same to be in conformity with the provisions and purposes of this Act, the same shall be approved. * * *

Under section 367–1 of the Ohio General Code, the State accepts the provisions of the Smith–Hughes Act and, pursuant to this action, has prepared plans as required by section 8, supra. The Ohio State plan for vocational education provides for the type of instruction here involved and prescribes how it shall be conducted.

Under the taxing provisions of the Social Security Act, the term "wages" is defined as "all remuneration for employment" with an exception under Title VIII not here material. Sections 811(b)7 and 907(c)6 of the Social Security Act provide in part as follows:

* * * The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * * * * * *

* * * Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions.

The instructors engaged to conduct enrolled training classes in the plant of the O Company are employed pursuant to the provisions of the Ohio State plan for vocational education. They are under the control of, and are paid by, the N City Board of Education. It is held that in so far as such instructors perform services in conducting the enrolled training classes, they are employees of the N City Board of Education, an instrumentality of the State of Ohio. Therefore, such services are excepted from "employment" under the provisions of sections 811(b)7 and 907(c)6 of the Social Security Act, and amounts paid by the company to the local board of education as a donation toward the instructors' remuneration do not constitute "wages" under Titles VIII and IX of the Act. However, with respect to part-time services performed by the instructors for the O Company in supervising and instructing employees other than those enrolled in the training classes, the instructors are employees of the company and remuneration received by them for such services constitutes "wages" subject to the taxes imposed under Titles VIII and IX of the Act.

SECTION 811: Definitions. 1939-1-9662
REGULATIONS 91, ARTICLE 14: Wages. S. S. T. 348
(Also Section 907; Regulations 90, Article 207.)

Cash allowances for lunches paid by the O Company to its employees constitute wages within the meaning of Titles VIII and IX of the Social Security Act.

Advice is requested whether cash allowances for lunches paid by the O Company to its employees constitute wages within the meaning of Titles VIII and IX of the Social Security Act.

The O Company pays to each of its employees a cash allowance for lunches in the amount of $4x$ dollars a month. This amount is paid to all employees regardless of the importance of the positions occupied or the value of the services rendered by those to whom the payments are made, but the employees are not required to use the allowances for the purchase of lunches. It is stated that the O Company has always adhered to the practice of paying its employees the prevailing wage for work of the same character and the furnishing of lunches or the payment of cash allowances is not a part of the contract of employment. The company states that experience has shown that furnishing lunch money promotes efficiency, reduces the loss of working time, and assures to each employee a wholesome lunch every business day which he otherwise might be either unwilling or unable to obtain; that it makes it possible for the employees to have their lunches in groups in restaurants where a wholesome atmosphere prevails, which results in increased efficiency; and that it is a practical business policy which produces substantial benefits to the company as well as to the employees.

Sections 811(a), Title VIII, and 907(b), Title IX, of the Social Security Act, define the term "wages" as follows:

* * * The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *.

(Section 811(a) contains an exception not material here.)

Article 207, Regulations 90, promulgated under Title IX, contains the following provisions:

> Ordinarily, facilities or privileges (such as entertainment, cafeterias, restaurants, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a convenience to the employer or as a means of promoting the health, good will, contentment, or efficiency of his employees.

Article 14, Regulations 91, promulgated under Title VIII of the Act, contains provisions which, while not identical, have been given a like interpretation.

In S. S. T. 302 (C. B. 1938–1, 456) it was held that the *cash value* of lunches served by the M Company to its employees did not constitute wages because in that case it was established that such practice was for the company's benefit and convenience rather than for the benefit of its employees; and that such practice reduced the duration of the midday lunch period, made it possible to transact more business during the noon hour, and avoided lessened efficiency due to procuring unwholesome and improperly prepared lunches elsewhere.

In the present case, however, these purposes are not served by the mere making of cash allowances to the employees to cover the cost of their lunches. While the practice of furnishing cash allowances for lunches promotes the good will, contentment, and efficiency of the employees and thus results in a benefit to the employer, yet the same result would be obtained from a corresponding increase in wages. It is clear in this case that it can not properly be said that the payments in question are made solely to promote the interests of the O Company, as in S. S. T. 302, supra. The real effect of the allowance is merely to increase by $4x$ dollars a month the amount of compensation paid to each employee.

Under the facts presented, it is held that the cash allowances for lunches paid by the O Company to its employees constitute "wages" within the meaning of sections 811(a) and 907(b) of the Social Security Act.

SECTION 811: Definitions.
REGULATIONS 91, ARTICLE 14: Wages.

"Shortages" and "overages" in accounts of milk deliverymen. (See S. S. T. 355, page 315.)

SECTION 811: Definitions. 1939–14–9776
REGULATIONS 91, ARTICLE 14: Wages. S. S. T. 359
(Also Section 907; Regulations 90, Article 207.)

> Payments made to discharged employees of the M Company upon their reinstatement pursuant to an order of the National Labor Relations Board do not constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.

Advice is requested whether payments made to employees of the M Company, who had been discharged and who were reinstated pursuant to an order issued by the National Labor Relations Board, constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.

In accordance with the terms of an agreement entered into by the M Company, the O Union, and the National Labor Relations Board in connection with a dispute as to certain unfair labor practices of the company, the Board issued an order requiring, among other things, that the company make payment of stated amounts to certain of its employees approximating the loss of pay suffered by them by reason of their discharge, and, with respect to certain other employees, payment of a sum equal to that which they normally would have earned from the date of their discharge to the date of their reinstatement computed at their regular weekly rate of pay.

With certain exceptions not here material, sections 811(a) and 907(b) of the Social Security Act define the term "wages" as "all remuneration for employment," and sections 811(b) and 907(c) define the term "employment" as "any service, of whatever nature, performed within the United States by an employee for his employer."

Section 1 of the National Labor Relations Act (49 Stat., 449) provides in part:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

The term "employee" is defined as follows in section 2 of that Act:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.

In section 8 certain practices of an employer are designated as "unfair labor practices," and in section 10(c) the Board is given authority to issue orders requiring employers to cease and desist from unfair labor practices, and "to take such affirmative action, including *reinstatement* of employees *with or without back pay*, as will effectuate the policies" of the Act. [Italics supplied.]

As indicated above, for purposes of the National Labor Relations Act, the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." However, it does not follow that the sum of money paid to that individual upon reinstatement pursuant to an order of the Board constitutes *remuneration for services performed by an employee for his employer* for the purpose of the taxing provisions of the Social Security Act. Such employee has actually performed no services for which such payments are made, and the employer has done all within his power to terminate the employment relation, at least temporarily. Furthermore, the individual has no right to demand any compensation from the employer for that period, and it is within the discretion of the Board to decide whether reinstatement shall be with or

without back pay, depending on the circumstances in the particular case.

In *Agwilines, Inc.*, v. *National Labor Relations Board* (87 Fed. (2d), 146) the court discussed the nature of such payments as follows in passing on the question of whether such an award by order of the Board constituted an award of damages without a jury trial:

> A short and simple answer to this contention is found in the fact that as between employer and employee the statute confers no right of action triable by jury or otherwise. No provision in it authorizes an employee to make claim. The Act does not purport to confer, it does not confer, private rights. * * * The procedure the statute outlines is not designed to award, the orders it authorizes do not award, damages as such. The proceeding is not, it can not be made, a private one to enforce a private right. It is a public procedure looking only to public ends. The statute has in mind the maintenance of industrial amity, and therefore peace, the prevention of industrial war. * * *
>
> The statute authorizes reparation orders not in the interest of the employee, but in the interest of the public. A cease and desist order operating retrospectively is not a private award, operating by way of penalty or of damages. It is a public reparation order, operating retrospectively by way of an order to cease and desist as to unfair practices from their beginning; practices as to which, because forbidden in the interest of industrial amity, and therefore peace, Congress has the right to eradicate them as from the beginning.

It is held that the payments in question made to employees of the M Company do not constitute *remuneration for services performed by an employee for his employer*, but are payments to the employees on account of unemployment caused by an unfair labor practice of the employer, which amounts were not awarded to the employees because they rendered services to the M Company. Accordingly, such payments do not constitute "wages" within the meaning of Titles VIII and IX of the Social Security Act.

SECTION 811: Definitions. 1939-21-9844
REGULATIONS 91, ARTICLE 14: Wages. S. S. T. 365

> Computation of wages under Title VIII of the Social Security Act in the case of a salesman whose expenses exceed his commissions during the last quarter of a calendar year or during a quarter within which he attains the age of 65. S. S. T. 84 (C. B. 1937-1, 438) amplified.

Advice is requested whether in cases where the expenses of a salesman exceed his commissions during the last quarter of a calendar year it is permissible to deduct such excess expenses from the commissions paid to such salesman for services performed in the first quarter of the succeeding calendar year in computing taxable wages under Title VIII of the Social Security Act. Inquiry is also made as to the method of computing the wages of a salesman who attains the age of 65 and whose expenses incurred during the quarter within which he attains that age exceed his commissions.

In S. S. T. 84 (C. B. 1937-1, 438) it was held that where, in any calendar month after December 31, 1936, the amount of expenses incurred by a salesman in his employer's business and properly accounted for to his employer exceeds the commissions actually or constructively paid to the salesman for that month, the amount of such excess should be carried over to the following month, and that procedure continued until such time as the total commissions paid exceed the total expenses reported. The excess (so computed) of commissions over expenses

was held to constitute wages subject to the taxes imposed under Title VIII of the Social Security Act.

The principle stated in that ruling applies also in the case of quarterly return periods which, under Treasury Decision 4778 (C. B. 1937-2, 374), were provided for in lieu of monthly return periods.

Section 811(a) of the Social Security Act provides as follows:

> The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment *during any calendar year*, is paid to such individual by such employer with respect to employment during *such calendar year*. [Italics supplied.]

The taxes imposed by Title VIII of the Act are based upon wages with respect to employment *during each calendar year* beginning with the calendar year 1937. The $3,000 limitation placed upon the amount of remuneration to be included as wages of an employee applies only when remuneration received by an employee from the same employer for employment during any one calendar year exceeds $3,000. The limitation relates to remuneration for employment *during any one calendar year* and not to the amount of remuneration (irrespective of the year of employment) which is paid and received in any one calendar year. (Article 14, Regulations 91.) In determining the amount of wages subject to tax, the law and regulations contemplate that *each calendar year* is to be treated as a unit, and that any expenses incurred by an employee in the business of his employer which are properly deductible from wages paid to or received by the employee with respect to services performed in a particular calendar year must also have been incurred in connection with the services performed during that year.

Accordingly, it is held that where in any quarter, except the last quarter of a calendar year, the amount of expenses incurred by a salesman in his employer's business and properly accounted for to his employer exceeds the total remuneration actually or constructively paid to such salesman for that quarter, the amount of such excess may be carried over to the following quarter and added to the expenses incurred during that quarter in computing the salesman's wages under Title VIII of the Act. This procedure may be continued until such time as the total remuneration paid exceeds the total expenses so accumulated, or until the last quarter of the calendar year, whichever first occurs; but the expenses incurred in one year may not be carried forward to the succeeding year. It is further held that where in the last quarter of a calendar year the total amount of expenses so accumulated exceeds the amount of remuneration actually or constructively paid to the salesman by his employer for that quarter, the salesman's wages for the entire year may be recomputed by deducting the total expenses incurred by such salesman within the calendar year and properly accounted for to his employer from the total remuneration paid for services performed within such year. The overpayment of tax, if any, found to have been made may be adjusted in accordance with the provisions of articles 502(b) and 503(b) of Regulations 91. If no adjustment can be made, a claim for credit or refund of the amount of overpayment may be filed in accordance with the provisions of article 504 of Regulations 91.

It is further held that where a salesman attains the age of 65, the amount of expenses incurred by him during the quarter within which he attains that age should be deducted from the commissions actually or constructively paid to him for services performed during that period in computing his wages for the quarter. If the total of such expenses exceeds the commissions paid, a claim for credit or refund of any overpayment of tax found to have been made with respect to the individual's remuneration for the calendar year may be filed in accordance with the provisions of article 504 of Regulations 91.

SECTION 811: Definitions. 1939-2-9667
REGULATIONS 91, ARTICLE 16: Items included as wages. S. S. T. 349
(Also Section 907; Regulations 90, Article 209.)

Where an employee of the M Company receives a United States savings bond as a bonus, the value of the bond when received constitutes wages for the purpose of Titles VIII and IX of the Social Security Act.

Advice is requested whether bonuses in the form of United States savings bonds paid to certain employees by the M Company constitute wages within the meaning of Titles VIII and IX of the Social Security Act, and, if so, the amount to be included in computing the employees' wages for the purpose of the taxes imposed by those titles.

Section 801, Title VIII, of the Social Security Act provides that there shall be levied, collected, and paid upon the income of every individual a tax equal to a specified percentage of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date. Section 804 levies an excise tax on every employer with respect to having individuals in his employ, which is measured by the amount of wages paid by him after December 31, 1936, with respect to employment after that date. Section 901 of the Social Security Act imposes an excise tax on employers with respect to having individuals in their employ. The measure of the tax imposed by that section is the total amount of wages payable by an employer with respect to employment during the calendar year regardless of the time of actual payment.

The employees' tax imposed by section 801 attaches at the time the wages are either actually or constructively received, and the employers' tax imposed by section 804 attaches at the time such wages are either actually or constructively paid. The term "wages" means all remuneration for "employment" subject to a limitation not here applicable. The medium in which the remuneration is paid is immaterial. (Regulations 91, article 14.) Where paid as an item other than money, the wages are computed on the basis of the fair value of such item at the time of payment. (Regulations 91, article 16.)

It is held that the bonuses paid by the M Company in United States savings bonds constitute wages within the meaning of Titles VIII and IX of the Social Security Act, and that the amount to be included in computing the total wages for the purpose of the taxes imposed by those titles is the value of the bonds at the time they are received by the employees and/or become their unrestricted property.

TITLE IX.—TAX ON EMPLOYERS OF EIGHT OR MORE.

SECTION 901: Imposition of tax.
REGULATIONS 90, ARTICLE 200: Nature of tax.

Collectibility of social security taxes from certain insolvent banks and trust companies. (See Mim. 4882, page 283.)

SECTION 902: Credit against tax. 1939-8-9724
REGULATIONS 90, ARTICLE 211: Credit of contributions against tax. S. S. T. 353

> Contributions required of employees under section 7(d)1 of the Kentucky Unemployment Compensation Law of 1938, when timely paid by the employer into the unemployment compensation fund of that State without deduction from the wages of his employees, are subject to credit under section 902, Title IX, of the Social Security Act.

Advice is requested whether contributions required of employees under section 7(d)1 of the Kentucky Unemployment Compensation Law of 1938, when timely paid by the employer into the unemployment compensation fund of that State without deduction from the wages of his employees, are subject to credit by the employer under section 902, Title IX, of the Social Security Act against the tax imposed by section 901 thereof.

It is stated that A, the employer, made payments of wages to certain of his employees with respect to employment during the calendar year 1938 without withholding from such payments or the next succeeding payment the amount of the employees' contributions required under the provisions of the Kentucky Unemployment Compensation Law of 1938. The amount of such contribution, in addition to other contributions required from the employer, was paid by the employer into the State fund prior to the date on which the return (Form 940) for the calendar year 1938 was required to be filed under the provisions of Title IX of the Social Security Act.

The Kentucky Unemployment Compensation Law of 1938 requires contributions to the State fund by employees in addition to contributions by employers. The employer is made liable for such employees' contributions and may withhold the amount thereof from the wages of his employees at the time such wages are paid, or at the time wages for the next pay roll period are paid, but thereafter he alone is liable for payment. Section 7(d)1 of the Kentucky Unemployment Compensation Law of 1938 provides in part as follows:

> Each worker shall contribute to the pooled account one (1) per centum of his wages paid by a subject employer with respect to his covered employment which occurs after December 31, 1937 * * *. Each subject employer shall be liable for his worker's contributions and may, notwithstanding any provision of the law in this State to the contrary, withhold in trust the amount of his workers' contributions from their wages at the time such wages are paid * * *. If any subject employer fails to deduct the contributions of any of his workers at the time their wages are paid, or fails to make a deduction therefor at the time wages are paid for the next succeeding payroll period, he alone shall thereafter be liable for such contributions, but for the purpose of section 8 hereof, such contributions shall be treated as a subject employer's contributions required from him. * * *

Section 8 of that act provides for the imposition of penalties on past due contributions, for the collection thereof by civil action, for priorities in any distribution of a subject employer's assets, and for the procedure as regards adjustment and refunds.

Section 902, Title IX, of the Social Security Act provides as follows:

> The taxpayer may credit against the tax imposed by section 901 the amount of *contributions, with respect to employment* during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited * * *. [Italics supplied.]

Section 907(f) of the same Act defines "contributions" as follows:

> The term "contributions" means payments *required* by a State law to be made by an employer into an unemployment fund, to the extent that such payments are made by him without any part thereof being *deducted or deductible* from the wages of individuals in his employ. [Italics supplied.]

It is clear from the provisions of the Kentucky law quoted above that the employer's payment of the amount of any employee's contributions not deducted from such employee's wages within the time provided therein is thereafter a "payment required" by the Kentucky law. By the terms of the statute the employer alone is thereafter liable for such contributions. Thereafter, too, it is solely against him that penalties for delinquent payment will be assessed and suits for collection directed; and it is solely by him that any claims for adjustment or refund will be instituted and to him that any payment thereon will be made. For all of these purposes such contributions, by the terms of the statute, are to be treated "as a subject employer's contributions required from him." Furthermore, these payments are not voluntary contributions within the meaning of S. S. T. 323 (C. B. 1938-2, 327), merely because the employer has waived the right he had in the first instance of deducting the amount of such payments from the wages of his employee. Moreover, no payment by the employer of the amount of an employee's contribution at any time after the liability therefor has become the sole liability of such employer (and thus under the terms of the Kentucky act a "required" payment) is, according to the provisions of that act, "deductible from the wages" of such employee. Inasmuch as payments by the employer of the type here under consideration are "payments required" to be made by the employer by the Kentucky Unemployment Compensation Law of 1938, and inasmuch as such payments are made without being "deducted or deductible" from the wages of his employees, it is concluded that these payments are "contributions" as defined in section 907(f) of the Social Security Act for the purpose of the credit allowed under section 902 of the Act.

Accordingly, employee contributions when paid under section 7(d)1, supra, by an employer subject to the Kentucky Unemployment Compensation Law of 1938 into the unemployment compensation fund of that State (before the date of filing his return for the taxable year), no deduction being made from the wages of his employees, are subject to credit by the employer under section 902, Title IX, of the Social Security Act against the tax imposed by section 901 thereof.

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 204: Who are employers.

Services performed in winding up affairs of dissolved partnership. (See S. S. T. 354, page 294.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Individuals performing services for the O Theater. (See S. S. T. 350, page 285.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Truckers and individuals engaged by them to harvest vegetables for M Company. (See S. S. T. 351, page 286.)

SECTION 907: Definitions. 1939-8-9722
REGULATIONS 90, ARTICLE 205: Employed individuals. Mim. 4880
(Also Section 811; Regulations 91, Article 3.)

Status under Title IX of the Social Security Act of honorary officers of corporations. S. S. T. 150 (C. B. 1937-1, 460) revoked; also status of ritualistic officers of fraternal organizations under Titles VIII and IX.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 4, 1939.

Collectors of Internal Revenue and Others Concerned:

The Bureau has had occasion to reconsider the ruling published as S. S. T. 150 (C. B. 1937-1, 460) which holds that in determining the total number of employees for purposes of the tax imposed by Title IX of the Social Security Act, honorary officers of a corporation, who function only as directors and receive no compensation as officers or directors, should be included. (The question of the status of uncompensated honorary officers is of no importance in connection with Title VIII of the Act since the taxes imposed by that title are measured by the amount of "wages" paid and received, either actually or constructively, and are applicable to employers of one or more and to their employees.)

Section 901, Title IX, of the Social Security Act provides in part:

On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year: * * *.

Section 907, Title IX, of the Social Security Act provides in part:

(a) The term "employer" does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was 8 or more.

* * * * * * *

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, * * *.

Section 1101(a) of the Act provides in part:

(4) The term "corporation" includes associations, * * *.

* * * * * * *

(6) The term "employee" includes an officer of a corporation.

It has been concluded after further consideration of the matter that an honorary officer of a corporation may not, in any real sense, be regarded as an officer within the contemplation of section 1101(a)6 of the Act. In determining whether this conclusion applies in any particular instance, however, it is necessary first to decide whether the individual involved is in fact an "honorary" officer. While this decision must in turn rest upon a consideration of the facts in each specific case with respect to which the question arises, in general it will be considered that an officer of a corporation is an "honorary" officer within the meaning of the foregoing rule if (1) he is specifically designated an honorary officer; (2) such designation is solely to do him honor or to have him included in the organization because of his name, prominence, or standing in the community; (3) it would not ordinarily be necessary to fill his office should he die or resign; (4) as such officer, he does not actually perform any service and is not required or expected to perform any; and (5) as such officer, he does not receive, and is not entitled to receive, remuneration. If it is determined, upon a consideration of these factors, that an individual's relationship to a corporation is in fact solely that of an honorary officer, he is not an employee of the corporation for purposes of Title IX of the Social Security Act and should not be included in determining whether the corporation is an employer of eight or more so as to be subject to the tax imposed under that title.

Reconsideration of the ruling published in Cumulative Bulletin 1937-1, 460, as S. S. T. 150, results in a determination, on the basis of the conclusions stated above, that such ruling is erroneous. Accordingly, S. S. T. 150 is hereby revoked.

RITUALISTIC OFFICERS OF FRATERNAL ORGANIZATIONS.

The Bureau has also given consideration to the question of whether officers of fraternal organizations, whose duties are exclusively ritualistic, are to be considered "employees" for purposes of Titles VIII and IX of the Social Security Act.

The conclusion has been reached in these cases that ritualistic services, as such, do not constitute "service" within the meaning of that term as used in sections 811(b) and 907(c) of the Act and accordingly that those officers whose duties and activities are exclusively ritualistic are not, in the performance of such duties and activities, to be considered as being in an "employment" for purposes of Titles VIII and IX of the Act. In determining whether or not services are exclusively ritualistic within the meaning and intent of the foregoing rule, incidental *noncompensated* administrative services may be ignored. Under this rule the taxes imposed under Titles VIII and IX of the Act attach only with respect to the compensation of those officers whose services are not exclusively ritualistic and only such officers are to be counted for the purpose of determining whether the organization is an employer of eight or more individuals so as to be subject to the tax imposed under Title IX of the Act.

Correspondence and inquiries in regard to the contents of this mimeograph should refer to its number and to the symbols A&C:RR.

GUY T. HELVERING,
Commissioner.

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

High school students placed in vocational training. (See S. S. T. 356, page 288.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

"Shearing crews." (See S. S. T. 360, page 290.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Associate physicians rendering services in clinic. (See S. S. T. 363, page 291.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Gold professional. (See S. S. T. 367, page 293.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 206(1): Agricultural labor.

Services performed in harvesting vegetables. (See S. S. T. 351, page 286.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 206(1): Agricultural labor.

Services performed in the operation of a dairy. (See S. S. T. 357, page 294.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 206(1): Agricultural labor.

Threshing of grain. (See S. S. T. 358, page 295.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 206(1): Agricultural labor.

Services performed in raising, harvesting, packing, and transporting water cress. (See S. S. T. 364, page 297.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 206(1): Agricultural labor.

Services performed in connection with the repair and maintenance of farm properties. (See S. S. T. 368, page 298.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 206(3): Officers and members of crews.

Officers and members of the crew on vessel during "lay-up" and "fit-out" seasons. (See S. S. T. 361, page 299.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 206(3): Officers and members of crews.

Individuals performing services on board nonself-propelled lighters and barges. (See S. S. T. 366, page 300.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 206(5)–(6): Government employees.

Instructors conducting training classes organized pursuant to the Ohio State plan for vocational education. (See S. S. T. 362, page 302.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 207: Wages.

Cash allowances for lunches paid by the O Company to its employees. (See S. S. T. 348, page 304.)

SECTION 907: Definitions. 1939–11–9754
REGULATIONS 90, ARTICLE 207: Wages. S. S. T. 355
(Also Section 811; Regulations 91, Article 14.)

Computation of "wages" under Title IX of the Social Security Act in the case of milk deliverymen where deductions from, or additions to, their regular remuneration are made due to "shortages" or "overages" in their accounts.

Advice is requested whether "shortages" or "overages" in the accounts of milk deliverymen should be taken into consideration in the computation of "wages" payable to such deliverymen for the purpose of Title IX of the Social Security Act.

It is stated that a certain creamery is engaged in the retailing of dairy products and employs a number of milk deliverymen. The deliverymen frequently have "shortages" or "overages" in their accounts due to errors in making change and similar reasons. Pursuant to an agreement, which forms an integral part of the contract of employment, such "shortages" or "overages" are charged or credited to the account of the individual deliveryman and are deducted from, or added to, his regular pay. For example, a certain deliveryman may receive a salary of $10x$ dollars per month and be charged during a given month with a shortage of x dollars in his account. The net amount received by him for such month would, therefore, be $9x$ dollars. Or, in another month, there may be an "overage" of x dollars and the amount paid to him would be $11x$ dollars. The question for determination is the basis to be used in computing the "wages" of such deliverymen.

The term "wages" as defined under section 907(b) of the Social Security Act includes "all remuneration for employment." Article

207 of Regulations 90, applicable to Title IX, provides that the basis upon which the remuneration is payable, the amount of remuneration, and the time of payment, are immaterial in determining whether the remuneration constitutes "wages."

Where under the contract of employment between the employer and the deliverymen it is provided that deductions from, or additions to, the regular remuneration of such deliverymen will be made in cases of "shortages" or "overages" in their accounts, it is held in computing the taxable "wages" of the deliverymen, for the purpose of Title IX of the Social Security Act, that only the amount actually payable to such employee during the calendar year should be included (that is, salary minus "shortages," plus "overages"). Thus, in the example above outlined, it is held where a net amount of $9x$ dollars is payable to a deliveryman for one month and $11x$ dollars for another month, his regular remuneration being $10x$ dollars per month, and where the deficiency and excess are due, respectively, to a "shortage" and an "overage" in his account, the taxable "wages" of such employee are $9x$ dollars and $11x$ dollars, respectively, for those months. This conclusion is equally applicable under Title VIII of the Act.

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 207: Wages.

Payments made to discharged employees upon reinstatement by order of the National Labor Relations Board. (See S. S. T. 359, page 305.)

SECTION 907: Definitions.
REGULATIONS 90, ARTICLE 209: Items included as wages.

Payment of bonuses in United States savings bonds. (See S. S. T. 349, page 309.)

CARRIERS TAXING ACT OF 1937.

SECTION 1: Definitions. 1939–9–9735
REGULATIONS 100, ARTICLE 2: Who are employers. C. T. 16

The M Hospital Association, which is maintained by the O Railroad Co., a "carrier" as defined in section 1(i) of the Carriers Taxing Act of 1937, and which was incorporated to supply hospitalization and treatment to employees of the railroad, is an "employer" within the meaning of section 1(a) of that Act.

Advice is requested whether the M Hospital Association is an "employer" within the meaning of section 1(a) of the Carriers Taxing Act of 1937.

The M Hospital Association (hereinafter called the association) was incorporated to supply hospitalization and treatment for employees of the O Railroad Co. (hereinafter called the railroad) and a number of its subsidiaries. The association is governed by a board of trustees consisting of six members, all of whom are employees of the railroad and four of whom are officials of the railroad. The four railroad officials became members of the board by reason of their positions with the railroad, while the other two trustees are elected by members of the association. Five of the eight officers of the association are railroad officials. The association maintains hospitals and staffs of surgeons and physicians at various points on the lines of the railroad system. The hospital lands and buildings are owned by the railroad and medical services and treatment at such hospitals are confined to employees of the railroad. Funds for carrying on the activities of the association are derived from contributions by the railroad employees. The railroad does not contribute any definite sum to the association but has furnished and equipped some of the hospitals and has hauled materials and supplies without charge. It provides free transportation for employees of the association.

Article 2 of Regulations 100, promulgated under section 1(a) of the Carriers Taxing Act of 1937, provides in part as follows:

Each of the following persons is an employer within the meaning of the Act—

(*a*) Any carrier, that is, any express company, sleeping-car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act.

(*b*) Any company which

(1) is directly or indirectly owned or controlled by one or more employers as defined in paragraph (*a*) of this article, or under common control therewith, *and*

(2) operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with

(A) the transportation of passengers or property by railroad, *or*

(B) the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

As used above in this article—

The term "controlled" includes direct or indirect control, whether legally enforceable and however exercisable or exercised. The control may be by means of stock ownership, or by agreements, licenses, or any other devices which insure that the operation of the company is in the interests of one or more carriers. It is the reality of the control, however, which is decisive, not its form nor the mode of its exercise.

It appears that the O Railroad Co., which is a carrier as defined in section 1(i) of the Carriers Taxing Act of 1937, has a majority

membership on the association's board of trustees, and that, of the eight officers of the association, five are officials of the railroad. These factors, together with the fact that the railroad owns the hospital buildings and the land on which they are located, indicate that the association is "controlled" by a carrier (i. e., the O Railroad Co.) within the meaning of the above-quoted provisions of the regulations.

It remains to be determined whether the association is operating any equipment or facility or performing any service (which is of the type not excepted by the Act) in connection with the transportation of passengers or property by railroad.

The Interstate Commerce Commission has held that properties owned by railways and used for hospitals for their employees are used "for common-carrier purposes." Under section 19(a) of the Interstate Commerce Act, the Commission is directed, in evaluating railway properties for rate-making and recapture purposes, to investigate and report separately property "owned or used by said common carrier for its purposes as a common carrier" and property "held for purposes other than those of a common carrier." (Cf. section 19a(b), First and Third, Interstate Commerce Act.) Under that section, the Commission pointed out in the case of the Pennsylvania Railroad Co. et al. (1929) (22 I. C. C. Val. Rep., 1), that lands owned and used by carriers for hospitals are classified as carrier lands. While it may be argued that the words "for common-carrier purposes" do not have the same meaning as the words "In connection with the transportation of passengers or property by railroad," nevertheless the decided cases furnish persuasive authority for the view that under the circumstances stated, the association in question is performing services *in connection with the transportation of passengers or property by railroad.* Furthermore, it is obvious that the health and well-being of railway employees bear a fairly close relationship to the safety and efficiency of railway transportation. Low cost treatment, such as that afforded by the association, tends to insure immediate disclosure of illnesses and injuries which may result in general transportation inefficiency; and proper hospitalization helps to promote the early return of incapacitated employees to their posts of duty.

In view of the foregoing, it is held that the furnishing of hospitalization and treatment for the injuries and sickness of railway employees under the circumstances above described constitutes the performance of a service in connection with the transportation of passengers or property by railroad within the meaning of the Act. Accordingly, the M Hospital Association is an "employer" within the meaning of section 1(a) of the Carriers Taxing Act of 1937.

SECTION 1: Definitions. 1939–7–9717
REGULATIONS 100, ARTICLE 3: Who are employees. C. T. 15

B, an attorney engaged by the M Railway Co. and paid a retainer fee to serve as counsel for the company in the State of R, is not an employee of that company within the meaning of the Carriers Taxing Act of 1937.

Advice is requested whether B, an attorney who renders services to the M Railway Co., is an employee of that company under the Carriers Taxing Act of 1937.

The attorney is engaged in the practice of law in the State of R, maintaining his own office and supplying it with all necessary equipment at his own expense. Under a written contract with the M Railway Co. (hereinafter called the company), he agrees to serve as counsel for the company in all its matters in the State of R as and when required by any executive officer of the company and subject to the general direction of its general counsel. He receives the amount of x dollars a month to cover retainer, assistance in making settlements, drawing contracts and other documents, and for other services except those in connection with the prosecution or defense of litigation. For such services he is paid reasonable fees to be approved by the company's general counsel, consideration being given to the fact that he receives a retainer fee. B informs the general counsel of the company as to matters handled by him, keeping a list of all litigation entered into, and must, as and when requested, furnish the general counsel information showing the status of the same. He is not required to give preference to the work of the company over the work handled by him for others, and is not required to devote any particular amount of time to the service of the company, nor is he required to conform to fixed hours of employment. The contract is subject to termination at any time by either of the parties giving to the other 10 days' written notice.

Section 1 of the Carriers Taxing Act of 1937 provides in part as follows: "(b) The term 'employee' means any person in the service of one or more employers for compensation * * *." Section 1(d) of the Act provides in part that, "An individual is in the service of an employer whether his service is rendered within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation * * *."

Article 3(*a*) of Regulations 100 reads in part as follows:

> * * * It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right of an employer to discharge an individual is also an important factor indicating that the individual is an employee. Other factors indicating that an individual is an employee are the furnishing of tools and the furnishing of a place to work by the employer to the individual who performs the services. In general, if an individual is subject to the control or direction of an employer merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not, as to such services, an employee within the meaning of the Act.
>
> Generally, an individual performing services for an employer as defined in section 1(a) as a physician, lawyer, dentist, veterinarian, contractor, subcontractor, public stenographer, or auctioneer, who follows an independent profession, trade, or business, in which he offers his services to the public, is an independent contractor. Individuals following the callings mentioned may, however, be employees.
>
> Whether or not an individual is an employee will be determined upon an examination of the particular facts of the case.

In the present case it appears that the attorney in question maintains his own office and pays all expenses incident thereto. The company has no authority to regulate his hours of work or to require that he devote a certain amount of time to the company's business.

He carries on his own private practice in addition to services rendered by him for the company, and the company has no authority to require him to give preference to the work done for it. It is stated that the stipulation in the contract that he is to work subject to the direction of the general counsel merely means that the general counsel will direct him as to what cases he will handle and advise him when the company is willing to compromise in order to avoid a suit and as to other general questions of policy. The retention of this measure of control does not substantially diminish his authority to work according to his own methods, using his discretion and exercising his professional judgment. It thus appears that the company has not retained control over the manner and method to be employed by him in doing his work but the control retained relates only to *what* shall be done.

Under the facts presented, it is held that the M Railway Co. neither exercises, nor has the right to exercise, the degree of control over the activities of B which would constitute him an employee under the provisions of section 1(d) of the Carriers Taxing Act of 1937 and article 3 of Regulations 100. Accordingly, B is not an employee of the M Railway Co. for the purpose of that Act. (Cf. S. S. T. 86, C. B. 1937–1, 462; S. S. T. 240, C. B. 1937–2, 403; S. S. T. 271, C. B. 1938–1, 409; S. S. T. 291, C. B. 1938–1, 416.)

SECTION 1: Definitions. 1939–3–9677
REGULATIONS 100, ARTICLE 6: Items included as compensation. C. T. 14

Amounts deducted from the remuneration of the employees of the M Company to pay for switchmen's lanterns and hand tools purchased by the employees and used in performing their services for the company do not constitute "compensation" within the meaning of section 1(e) of the Carriers Taxing Act of 1937.

Advice is requested whether amounts deducted from the remuneration of employees of the M Company to pay for switchmen's lanterns and hand tools constitute taxable "compensation" within the meaning of section 1(e) of the Carriers Taxing Act of 1937.

The employees of the M Company obtain from, and pay the company for, switchmen's lanterns and hand tools for use in the performance of their services. The cost of these items is deducted from the employee's remuneration. The tools generally used by the employees are hammers, chisels, wrenches, etc. The total value of such equipment used by each employee is approximately $12x$ dollars, and the equipment is used about five years before replacement is necessary. The majority of the tools are used by the employee exclusively in the performance of his services for the M Company. These items are the property of the employee and are retained by him upon the termination of his employment.

Section 1(e) of the Carriers Taxing Act of 1937 provides in part as follows:

* * * The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, * * *.

Article 6 of Regulations 100 provides in part as follows:

* * * The following items are included in compensation with respect to employees and in analogous situations with respect to employee representatives—

* * * * * * *

(c) Allowance or reimbursement for traveling or other expenses incurred in the business of the employer to the extent of the excess of such amount, if any, over such expenses actually incurred and accounted for by the employee.

It is held that amounts deducted by the M Company from the remuneration of its employees to pay for the switchmen's lanterns and hand tools in question, used in connection with their employment with that company, do not constitute "compensation" within the meaning of section 1(e) of the Carriers Taxing Act of 1937.

SECTION 7: Collection and payment of taxes. 1939-2-9668
REGULATIONS 100, ARTICLE 506: Payment of tax. Ct. D. 1376

TAX ON CARRIERS—CARRIERS TAXING ACT OF 1937—RAILROAD RETIREMENT ACTS OF 1935 AND 1937—DECISION OF SUPREME COURT.

INJUNCTION—BILL IN EQUITY—ENFORCEMENT AGAINST RAILROAD OF RAILROAD RETIREMENT ACTS AND CARRIERS TAXING ACT.

The State of California is not entitled to an injunction to restrain the enforcement of the Railroad Retirement Acts of 1935 and 1937 and the Carriers Taxing Act of 1937 against a railroad owned and operated by the State in interstate commerce. There was adequate opportunity to test at law the applicability and constitutionality of these Acts of Congress, no danger is shown of irreparable injury if that course is pursued, and the bill is without equity.

SUPREME COURT OF THE UNITED STATES.

The State of California v. *Murray H. Latimer et al.*

[305 U. S., 255.]

[December 5, 1938.]

OPINION.

Mr. Justice BRANDEIS delivered the opinion of the Court.

California owns the railroad along the San Francisco water front known as State Belt Railroad, and operates it in interstate commerce. (*Sherman* v. *United States*, 282 U. S., 25; *United States* v. *California*, 297 U. S., 175.) On leave granted (304 U. S., —), the State filed in this Court this bill against the members of the Railroad Retirement Board and the Commissioner of Internal Revenue, individually and in their official capacities, to enjoin them from enforcing against that railroad provisions of the Acts of Congress known as the Railroad Retirement Acts of 1935 and 1937[1] and of the Carriers Taxing Act of 1937.[2]

The bill recites that California has a State employees' retirement system sustained by a fund to which the State and its employees contribute; and that all the persons employed in the operation of State Belt Railroad are members of that retirement system and are entitled to pensions thereunder, unless they are members of a retirement system supported wholly, or in part, by funds of the United States; that the three Acts of Congress named have for their sole purpose the establishment of a pension system of annuities and other benefits for employees of interstate railroads; and that the Federal system is sustained by taxes imposed by the Carriers Taxing Act. The bill asserts, apparently, that as a matter of statutory construction, the Federal system is not applicable to the employees of State Belt Railroad; and apparently that if construed as applicable to them, the legislation is unconstitutional. The bill charges that the Railroad Retirement Board has threatened to require the complainant to

[1] Act of August 29, 1935 (ch. 812, 49 Stat., 967), as amended June 24, 1937 (ch. 382, Part I, 50 Stat., 307, 45 U. S. C., section 228a–r (1937 Supp.)).
[2] Act of June 29, 1937 (ch. 405, 50 Stat., 435, 45 U. S. C., sections 261–273 (1937 Supp.)).

gather and keep records concerning the employees of the State Belt Railroad, which would subject it "to great expense"; and that the Board "will enforce against the complainant, its officers, agents, and employees certain penalties if it refuses" to do so. The bill charges, also, that the Commissioner of Internal Revenue has threatened to enforce taxes, under the Carriers Taxing Act, and will subject it to heavy fines and penalties if it fails to pay the same. The relief prayed is that the three Acts of Congress be declared inapplicable to State Belt Railroad; that the members of the Railroad Retirement Board be enjoined, among other things, from requiring the railroad to assemble and furnish the information requested; and that the Commissioner of Internal Revenue be enjoined from enforcing collection of the taxes claimed.

The defendants moved to dismiss the bill, assigning therefor nine grounds. We need consider only the objection that the bill is without equity.[3] For we are of opinion that there was adequate opportunity to test at law the applicability and constitutionality of the Acts of Congress; and that no danger is shown of irreparable injury if that course is pursued.

First. The alleged threat of the Railroad Retirement Board to require State Belt Railroad to gather and keep records of its employees does not expose it to irreparable injury. The Railroad Retirement Act of 1937 provides:

"SEC. 8. Employers shall file with the Board, in such manner and form and at such times as the Board by rules and regulations may prescribe, returns under oath of monthly compensation of employees, and, if the Board shall so require, shall furnish employees with statements of their monthly compensation as reported to the Board. * * *

"SEC. 10(b)4. * * * The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of such Acts. The several district courts of the United States and the District Court of the United States for the District of Columbia shall have jurisdiction upon suit by the Board to compel obedience to any order of the Board issued pursuant to this section * * *.

"SEC. 13. Any officer or agent of an employer * * * who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of section 10(b)4, by the Board * * * shall be punished by a fine of not more than $10,000 or by imprisonment not exceeding one year."

The only "threats" made against the complainant in connection with these sections is a ruling by the Railroad Retirement Board that the State Belt Railroad is subject to the Railroad Retirement Acts. No specific action in relation to that railroad appears to have been taken by the Board.[4] Regulations have been prescribed under sections 8 and 10 which are simple and of a type which can be complied with largely by transcriptions from pay rolls.[5] The bill alleges that compliance with the regulations would subject the State "to great expense." No supporting detail or specification is given. Such a general statement is not an adequate basis for relief on the ground of irreparable

[3] This objection was the basis of two of the reasons given in support of the motion to dismiss. The other seven are: (1) The individual citizenship of defendants can form no basis for the original jurisdiction of the Court. The defendants can and will act only as officials of the United States; and as officials they are citizens of no State. (2) The collector of internal revenue for the first district of California and the employees of the State Belt Railroad have not been joined as defendants. They are indispensable parties in whose absence the Court should not proceed. (3) The cause is not maintainable in this Court, since the collector of internal revenue for the first district of California, a citizen of California, should be made a party, and to join him would deprive the Court of original jurisdiction. (4) The cause is not maintainable in this Court, since the employees of the State Belt Railroad, citizens of California, should be made parties, and to join any of them would deprive the Court of original jurisdiction. (5) Maintenance of the suit is prohibited by section 3224 of the Revised Statutes. (6) The United States is the real party in interest and hence an indispensable party. (7) The issues presented by complainant have been clearly decided against it by previous decisions of this Court, and a reexamination of those contentions would serve no useful purpose.

[4] Compare *Dalton Adding Machine Co.* v. *State Corporation Commission of the Commonwealth of Virginia* (236 U. S., 699, 701); *Continental Baking Co.* v. *Woodring* (286 U. S., 352, 367–368); *State Corporation Commission of Kansas* v. *Wichita Gas Co.* (290 U. S., 561, 568–569).

[5] 3 Federal Register, page 22 et seq. (promulgated December 31, 1937), 3 Federal Register, page 218 (promulgated January 17, 1938), in effect at the time leave to file the bill of complaint was granted, May 16, 1938, later superseded by 3 Federal Register, pages 1478, 1493 et seq., part 50 (promulgated May 31, 1938).

damages.[6] The trifling expense of temporarily complying with the regulation until the applicability of the Act shall have been judicially determined, like the expense of the administrative hearings complained of in *Myers* v. *Bethlehem Shipping Corporation* (303 U. S., 41, 50, 51), and *Petroleum Exploration, Inc.*, v. *Public Service Commission* (304 U. S., 209, 220, 221), is not sufficient to support the claim of irreparable injury indispensable to interposition by injunction. (Compare *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S., 89, 95, 96.)

Moreover, the Board is without power to enforce its regulations except by resort to legal proceedings, as provided in section 10(b)4; and in any suit which it may institute to enforce the regulations[7] ample opportunity is afforded to defend, on the ground that State Belt Railroad is not subject to the Railroad Retirement Acts. It is contended that the possible penalty, in case of a prosecution under section 13, is so serious as to prevent the opportunity to defend from being an adequate remedy. (Compare *Ex parte Young*, 209 U. S., 123, 165.) No prosecution has been instituted or threatened. And authority to institute such a proceeding rests not with the Railroad Retirement Board, but with the United States attorney for the northern district of California, who is not made defendant in this suit.[8] Furthermore, it may be doubted whether a refusal to comply with the regulation would be deemed willful, if based on an honest belief that the Act is not applicable to a railroad operated by the State. (Compare *United States* v. *Murdock*, 290 U. S., 389, 394–396.)

Second. The alleged threat of the Commissioner of Internal Revenue to require payment of the tax does not show danger of irreparable injury. The only threat alleged is the ruling that the Carriers Taxing Act is applicable to this railroad—a ruling made in answer to an inquiry by the attorney general of the State. The tax for the year is $7,862.32 payable by the State Belt Railroad; and an equal amount payable by the employees to be deducted by it from their compensation. Payment of the tax would not expose the State to irreparable injury,[9] since the amount paid with interest could be recovered if not due. Payment followed by proceedings to recover the amount would involve some delay, as an action at law to recover the sum paid could not be instituted until six months after making the claim for refund, if the Commissioner should fail to act earlier upon it.[10] Such possible delay, it is urged, is a special circumstance which justifies resort to a suit for an injunction in order that the question of liability may be promptly determined. If the delay incident to such proceedings justified refusal to pay a tax, the Federal rule that a suit in equity will not lie to restrain collection on the sole ground that the tax is illegal,[11] could have little application. For possible delay of that character is the common incident of practically every contest over the validity of a Federal tax.

It is urged that in order to raise the money with which to pay the State's portion of the tax, it would be necessary to readjust the tariffs of State Belt Railroad; and that the deduction of the employees' portion from the pay roll would result in a multiplicity of suits by employees to recover the amounts and to reestablish their rights and privileges under the laws of the State. The meager statements of the bill do not convince us that the apprehension alleged is well founded. The State Employees Retirement Act also requires the State Belt Railroad to make deductions from the salaries of its employees. The bill does not show the precise relationship between the amounts required to be deducted by the State and Federal Acts, or even, if the amount of the Federal deduction is greater, that it is impossible for the State Belt Railroad to work out with its employees a way of adjusting its affairs during the period of uncertainty as to which Act is applicable. Mere inconvenience to the taxpayer in raising the money with which to pay taxes is not uncommon, and is not a special circumstance which entitles one to resort to a suit for an injunction in order to test the validity or applicability of the tax. For aught that appears prompt payment of the tax and claim of refund would have led to an early determination of the liability here contested.

Bill dismissed.

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[6] Compare *Shelton* v. *Platt* (139 U. S., 591, 596); *Cruickshank* v. *Bidwell* (176 U. S., 73, 81); *Indiana Mfg. Co.* v. *Koehne* (188 U. S., 681, 690); *Boise Artesian Water Co.* v. *Boise City* (213 U. S., 276, 285).

[7] Compare *Cavanaugh* v. *Looney* (248 U. S., 453); *Fenner* v. *Boykin* (271 U. S., 240); *Hurley* v. *Kincaid* (285 U. S., 95).

[8] Compare *Federal Trade Commission* v. *Claire Furnace Co.* (274 U. S., 160, 173–174); *Philadelphia Co.* v. *Stimson* (223 U. S., 605, 620–622).

[9] *Dows* v. *Chicago* (11 Wall., 108). See also cases in note 6.

[10] R. S. section 3220, as amended by section 1103, Revenue Act of 1932.

[11] See cases under note 6.

INTERNAL REVENUE CODE.

CHAPTER 9, SUBCHAPTER B.—EMPLOYMENT BY CARRIERS.

SECTION 1530: Collection and payment of taxes. 1939–14–9780
REGULATIONS 100, ARTICLE 502: Final returns. T. D. 4891
ARTICLE 505: Place and time for filing returns.

TITLE 26—INTERNAL REVENUE—CHAPTER I—BUREAU OF INTERNAL REVENUE—PARTS 410 AND 465.

Amending articles 502 and 505 of Regulations 100, as amended, relating to the employers' tax, employees' tax, and employee representatives' tax under the Carriers Taxing Act of 1937, and such articles as made applicable to the Internal Revenue Code by Treasury Decision 4885 [page 396, this Bulletin].

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 100, relating to the employers' tax, employees' tax, and employee representatives' tax under the Carriers Taxing Act of 1937 (Part 410 of Title 26, Code of Federal Regulations), and those regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [page 396, this Bulletin] (Part 465, Subpart B, of such Title 26), are amended as follows:

(1) The second sentence of article 502 (section 410.502 of such Title 26), relating to final returns, is amended to read as follows:

Such return shall be filed with the collector on or before the sixtieth day after the date of the final payment of compensation with respect to which the tax is imposed, except that if such final payment was made prior to April 1, 1939, the return shall be filed on or before the thirtieth day after the date of such payment.

(2) The first sentence of the second paragraph of article 505 (section 410.505 of such Title 26), relating to the place and time for filing returns, is amended to read as follows:

The return for the period January 1, 1937, to September 30, 1937, inclusive, shall be filed on or before November 30, 1937; the return for each quarterly period thereafter up to and including the period ended December 31, 1938, shall be filed on or before the last day of the first calendar month following the period for which it is made; and the return for each quarterly period subsequent to December 31, 1938, shall be filed on or before the last day of the second calendar month following the period for which it is made.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 1530(b), 1536, 2701, 2709, 1535, and 3791 of the Internal Revenue Code (53 Stat., Part 1); sections 7(b), 7(c), and 12 of the Carriers Taxing Act of 1937 (50 Stat., 439, 440; 45 U. S. C., Sup. IV, 267, 272); and sections 602 and 1102 of the Revenue Act of 1926 (44 Stat., 94, 112; 26 U. S. C., 1121, 1129).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 29, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register March 31, 1939, 12.27 p. m.)

MISCELLANEOUS TAX RULINGS.

TITLE III, AS AMENDED.—ESTATE TAX. (1926)

SECTION 302, AS AMENDED.

REGULATIONS 80 (1937), ARTICLE 10: Valuation of property. 1939–22–9852 T. D. 4902

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 80—ESTATE TAX.

Article 10 of Regulation 80 (1937 edition) amended.—Valuation of stocks and bonds.

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

To Collectors of Internal Revenue and Others Concerned:

Subdivision (*a*) of article 10 of Regulations 80, 1937 edition (section 80.10 of Title 26, Code of Federal Regulations), and that article as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26 [page 396, this Bulletin]), is amended to read as follows:

(*a*) *General.*—The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; or, if the executor elects in accordance with the provisions of article 11, it is the fair market value thereof at the date therein prescribed or such value adjusted as therein set forth. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The fair market value of a particular kind of property includible in the gross estate is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the applicable valuation date should be considered in every case.

Subdivision (*c*) of article 10 of Regulations 80, 1937 edition (section 80.10 of Title 26, Code of Federal Regulations), and that article as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26), is amended to read as follows:

(*c*) *Stocks and bonds.*—The value of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on the applicable valuation date.

In the case of stocks and bonds listed on a stock exchange the mean between the highest and lowest quoted selling prices on the valuation date shall be considered as the fair market value per share or bond. If there were no sales on the valuation date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the valuation date (both such nearest dates being within a reasonable

period), and by prorating the difference between such mean prices to the valuation date, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the valuation date. For example, assume that sales of stock nearest the valuation date (June 15) occurred two days before (June 13) and three days after (June 18) and that on such days the mean sale prices per share were $10 and $15, respectively. The price of $12 shall be taken as representing the fair market value of a share of such stock as of the valuation date. If, however, on June 13 and June 18 the mean sale prices per share were $15 and $10, respectively, the price of $13 shall be taken as representing the fair market value of a share of such stock as of the valuation date. If the security was listed on more than one exchange, the records of the exchange where the security is principally dealt in should be employed. In valuing listed stocks and bonds the executor should observe care to consult accurate records to obtain values as of the applicable valuation date.

In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling prices as of the valuation date; or, if there were no sales on that date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the valuation date (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the valuation date, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the valuation date. If quotations are obtained from brokers, or evidence as to the sale of securities is obtained from the officers of the issuing companies, the executor should preserve in his files the letters furnishing such quotations or evidence of sale for inspection when the return is verified by an investigating officer.

If actual sales are not available during a reasonable period beginning before and ending after the valuation date, the fair market value may be determined by taking the mean between the bona fide bid and asked prices on the nearest date before and the nearest date after the valuation date (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the valuation date, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the valuation date.

If actual sale prices or quoted bona fide bid and asked prices are available on a date within a reasonable period prior to the valuation date, but if no actual sale prices or bona fide bid and asked prices are available on a date within a reasonable period after the valuation date, or vice versa, then the mean between such highest and lowest available sale prices or bid and asked prices may be taken as the value.

If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon which the valuation is based should be submitted with the return.

In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value.

The full value of securities pledged to secure an indebtedness of the decedent should be included in the gross estate. If the decedent had a trading account with the broker, all securities belonging to the decedent and held by the broker at the date of death must be included at their fair market value as of the applicable valuation date. Securities purchased on margin for the decedent's account and held by the broker should also be returned at their fair market value as of the applicable valuation date. The amount of the decedent's indebtedness to the broker or other person with whom securities were pledged will be allowed as a deduction from the gross estate in accordance with articles 29, 36, and 52. (See article 12 for manner of listing and describing stocks and bonds.)

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 811, 937, and 3791(a)1 of the Internal Revenue Code (53 Stat., Part 1); section 302 of the Revenue Act of 1926 (44 Stat., 70), as amended by section 404 of the Revenue Act of 1934 (48 Stat., 754; 26 U. S. C., 411) and section 202 of the Revenue Act of 1935 (49 Stat., 1022; 26 U. S. C., Sup. IV, 411(j)); section 1101 of the Revenue Act of 1926 (44 Stat., 111; 26 U. S. C., 1691); and section 403 of the Revenue Act of 1932 (47 Stat., 245), as amended by section 403(f) of the Revenue Act of 1934 (48 Stat., 753; 26 U. S. C., 537).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 18, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register May 20, 1939, 11.28 a. m.)

TITLE III.—ESTATE TAX. (1926)

SECTION 302.

REGULATIONS 80(1934), ARTICLE 25: Taxable insurance. 1939-5-9696 Ct. D. 1381

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GROSS ESTATE—LIFE INSURANCE—TAKEN OUT ON LIFE OF STOCKHOLDER FOR BENEFIT OF CORPORATION—CHANGE OF BENEFICIARY.

The decedent, an officer and stockholder of a corporation, was a party to a contract by which the corporation agreed to purchase at a stipulated price the stock of any stockholder who might die, insurance policies having been taken out on the lives of the stockholders, with the corporation as beneficiary, for the purpose of enabling it to make such purchases with the proceeds of the insurance. By later agreements the corporation relinquished its right to death benefits under the policies, and the decedent named his wife as beneficiary, reserving the right to change the beneficiary. Thereafter the corporation continued to pay the premiums, treating the payments as additional compensation for services rendered and to be rendered by the decedent. Under these facts, the proceeds of the policies were properly included in the decedent's gross estate pursuant to the provisions of section 302(g) of the Revenue Act of 1926.

2. CERTIORARI DENIED.

Petition for certiorari denied November 7, 1938.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Millie Belle Brown, Executrix of the Will of Guy C. Brown, Deceased, petitioner, v. *Commissioner of Internal Revenue, respondent.*

[95 F. (2d), 184.]

Petition to review an order of the United States Board of Tax Appeals.

Before HICKS and SIMONS, Circuit Judges, and RAYMOND, District Judge.

[March 11, 1938.]

OPINION.

HICKS, Circuit Judge: Petitioner is the widow of Guy C. Brown and the executrix of his estate. She is also the beneficiary of the proceeds of 11 insurance

policies written upon his life and amounting to $326,648.11. She seeks a review of the decision of the Board of Tax Appeals affirming the action of the Commissioner of Internal Revenue in assessing estate taxes of $17,050.80 upon the proceeds of these policies. The question is, whether the proceeds of the policies were properly included in decedent's gross estate under the provisions of Title 26, section 411(g) (U. S. C., section 302(g)) of the Revenue Act of 1926, and regulations thereunder. The statute includes as one element of the taxable gross estate of the decedent "the amount receivable by all other beneficiaries as insurance under policies *taken out* by the decedent *upon his own life.* * * *" [Italics ours.]

Pertinent parts of Treasury Regulations 80, article 25, are quoted:

"* * * Insurance is considered to be taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy. * * *"

For a number of years before his death on January 6, 1931, decedent had been an officer and stockholder of Campbell-Ewald Co., an advertising firm. In February, 1924, the stock of the corporation was held by a few persons actively engaged in the business. On that date the stockholders made a contract with the corporation whereby it agreed to purchase the stock of any stockholder who might die. One clause of the agreement pointed out that policies of insurance had been "taken out" on the lives of most of the stockholders including decedent, with the corporation as the beneficiary, for the purpose of enabling it to purchase the stock in the event of the death of any of the insured stockholders. This contract was superseded by another in 1925, which contained modifications unimportant here, but both the 1924, and 1925, contracts provided that the price to be paid for the stock should be book value plus a good will value to be determined by arbitration.

A third contract dated June 26, 1929, did away with the provisions for the ascertainment of good will value, a clause therein reading—"* * * the price at which said stock shall be sold to said company shall be determined by the company's auditors at the book value thereof, without taking into consideration anything for good will and without any further appraisal of the properties or assets of the company than as shown upon the books of the company at the date of death of such deceased. * * *"

Clause 2 provided the method of payment for the stock. The amount payable therefor was reduced by the value of the insurance carried by the company on the life of the stockholder to which it was beneficiary and which it agreed to turn over to deceased's executor. In clause 3 the amount of insurance that the company agreed to carry on the lives of the class "A" stockholders was listed, including $325,000 on that of Brown, the premiums for which "shall be deemed to be additional compensation to said class 'A' stockholders for services rendered and to be rendered." It was also provided that said insurance should be paid to deceased's executors or otherwise and "shall not inure to the benefit of said Campbell-Ewald Co. in any way."

In the fifteenth clause was an engagement by class "A" stockholders not to dispose of, nor pledge their stock or otherwise place it beyond their control without the written consent of the board of directors. In the sixteenth they agreed to make a last will and testament providing for the disposal of the stock according to the terms of the contract; and in the seventeenth they likewise bound their estates.

The eighteenth clause provided that the cash surrender values of the policies transferred to the individuals by the company should follow the policies, *except that $56,961.30 accrued to Guy C. Brown should not be so transferred.* It was provided that this sum should be reduced from time to time, until liquidated, by any dividends accumulating on the policies after the expiration of the necessity for the payment of premiums; *and in the event of his death prior to the liquidation, that it should be canceled.*

All other dividends and accrued interest allowed to accumulate on the policies prior to the transfer were assigned by the policy holders to the company for credit against future premiums which it agreed to pay.

This contract was made binding upon the heirs, executors, etc., of the parties and petitioner joined therein as the wife of Brown.

After the contract of June 26, 1929, and pursuant thereto and prior to December 10, 1930, the company in one form or another relinquished its right to death benefits under the policies.

The third contract was followed by another executed on December 10, 1930. Many of its provisions were similar to those of the third. Two of the wives, including petitioner, had by that time become owners of class "A" stock, and they, joining in the contract, agreed to dispose of their stock to the company in case their husbands died before them.

Clause 2 set forth the method to be used by the company in paying for stock out of insurance on the lives of deceased stockholders, of which it was the beneficiary. Clause 5 was the same as clause 3 in the third contract.

Clause 18 read:

"Each of * * * parties agrees that he will not at any time sell or dispose of any of his class 'A' stock in said company, except as herein provided, and that he will not pledge the same as collateral or place it beyond his control without written consent of said company acting through its board of directors."

Clause 21 is the same as the eighteenth in the third contract, with the additional provisos—that Brown would transfer to the company all dividends and interest accruing on the endowment policies and left with the insurance companies until his death; that on his death the face amount of the policies *should be paid to the beneficiaries as provided therein* and further that Brown would not accept any cash surrender value for the endowment policies prior to his death or borrow on same without the written consent of the company.

It was stipulated that the books of the company disclosed the payment of $72,976.35 in premiums on the policies here in controversy, prior to June 26, 1929, the date of the third agreement, no portion of which amount was credited or charged to the decedent as additional compensation; and that subsequent to that date its books showed the payment of $27,668.06 in premiums; the entire amount of which was credited to decedent as additional compensation, in accordance with the language of the agreement of that date and of the subsequent agreement of December 10, 1930.

Construing these contracts in relation to each other, it seems clear enough that decedent possessed all of the legal incidents of ownership in the policies at the time of his death. It was he to whom the company assigned its interest and it was he who was vested with the power to name the beneficiary. This he did, naming the petitioner, but in every instance he retained the privilege of changing it. It is true that the cash surrender value of the policies was not transferred to decedent by the contracts but was retained by the company as a sort of charge which Brown had the right to liquidate by the payment to it of certain accumulated dividends and interest, but the obligation to pay any remaining balance was automatically discharged by the event of his death.

There is no record evidence that the decedent repaid in cash the $72,976.35 in premiums which the company had paid prior to the date of the third contract but the petitioner was unsuccessful in showing that he did not. Upon the other hand there is a clear inference that he did, because by the terms of the third and fourth contracts the decedent relinquished any consideration for the good will values of the stock sold to the company. We can conceive of no consideration for this except a relinquishment to the decedent of any obligation to repay these premiums. (See *Yuengling* v. *Commissioner*, 69 Fed. (2d), 971 (C. C. A. 3).)

It is apparent, therefore, that when tested by Treasury Regulations 80, article 25, it was not error to include the proceeds of the policies in the decedent's gross estate.

But petitioner insists that article 25 of Treasury Regulations 80 is invalid; that it makes the possession by decedent of any of the legal incidents of ownership in the policies a test of whether the policies were taken out by the decedent upon his own life; that article 25 of Regulations 70 is the proper one to be applied because after the promulgation of Regulations 70 the statute was reenacted without substantial change and that the courts must therefore adopt

the construction of the statute placed upon it by article 25 of Treasury Regulations 70. (See *Walker* v. *United States*, 83 Fed. (2d), 103, 106 (C. C. A. 8).)

But the facts here involved do not call for a construction of article 25, Regulations 80. This article specifically defines what is included in the term "legal incidents of ownership in the policy." Petitioner has not placed herself beyond the scope of this definition, as in the Walker case, where the premiums or at least a portion of them had been paid by the beneficiary. In this case she paid no premiums. We see no reason for striking down Regulations 80, article 25, as a whole because one element of it has been found inapplicable to an entirely different state of facts.

Petitioner admits that the decedent had the power to change the beneficiaries in the policies (one of the legal incidents of ownership) but maintains that he deprived himself of the right to exercise that power by agreeing in the fourth contract to transfer the interest and dividends on the proceeds of the policies to the company as they accrued. We concur in the conclusion of the Board that there was nothing in these collateral agreements that would restrict the right which decedent had reserved for himself to change the name of the beneficiary. (See *Helvering, Commissioner*, v. *Reybine*, 83 Fed. (2d), 215 (C. C. A. 2).)

Petitioner next says that she had an equitable interest in the policies which negatives the decedent's right to change the beneficiaries. This claim is based upon the fact that after the execution of the third contract there had been transferred to her one thousand of the twenty-four hundred and fifty shares of class "A" stock of decedent and that she joined in the fourth contract to the end that all class "A" stock should vest in the company. But there is nothing in the fourth contract to indicate that her rights as beneficiary in the policies became "fixed" because she joined in the contract. She knew that even by the third contract the power to change the beneficiary was reserved to the decedent and that he had exercised that power in her behalf. She acquired that status because she had been designated as such by decedent and not because of any equitable interest she may have had in the policies.

But laying aside Treasury Regulations 80, article 25, and testing the case by the Act itself as interpreted by *Igleheart* v. *Commissioner* (77 Fed. (2d), 704 (C. C. A. 5) [Ct. D. 1089, C. B. XV–1, 351 (1936)]), the proceeds of the policies were subject to the tax. In that case the court said (page 711):

"The manifest purpose of that provision" (section 302(g) of the Revenue Act of 1926) "is to include in the decedent's estate for purposes of the tax the proceeds of all insurance on his life receivable under policies acquired through expenditure by him. (*Chase National Bank* v. *United States*, supra [Ct. D. 40, C. B. VIII–1, 308 (1929)]; *Scott* v. *Commissioner* (C. C. A.), 69 F. (2d), 444, 92 A. L. R., 531.) The policies, under which the right to change the beneficiaries was reserved, having originally been taken out, for its own benefit, by a corporation of which the decedent was an officer, the applications for which were signed by the decedent, are to be regarded as having been taken out by the decedent, within the meaning of the statute, when he bought those policies from that corporation, and had new beneficiaries, chosen by himself, designated, he retaining the right under each policy further to change the beneficiary."

In recognition of a stipulation between the parties the deficiency is fixed at $17,050.80 instead of $27,162.91 as determined by the Board, and with this modification the decision of the Board of Tax Appeals is affirmed.

REGULATIONS 80 (1934), ARTICLE 25: Taxable insurance. 1939–18–9817 Ct. D. 1396

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF SUPREME COURT.

GROSS ESTATE—INSURANCE—PROCEEDS OF WAR RISK INSURANCE POLICY PAYABLE TO DECEASED VETERAN'S WIDOW.

The proceeds of a war risk insurance policy payable to a deceased veteran's widow are properly included in his gross estate for Federal estate tax purposes, under the provisions of section 302 (g) of the Revenue Act of 1926.

SUPREME COURT OF THE UNITED STATES.

United States Trust Co. of New York, as Executor u/w of George H. Bunker, Deceased, petitioner, v. Guy T. Helvering, Commissioner of Internal Revenue.

[59 S. Ct., 692.]

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 17, 1939.]

OPINION.

Mr. Justice BLACK delivered the opinion of the Court.

The sole question is whether proceeds of a war risk insurance policy payable to a deceased veteran's widow were properly included in his gross estate under a Federal estate tax.

The Federal estate tax in question[1] included in a decedent's gross estate the amount in excess of $40,000 received by "beneficiaries [other than his estate] as insurance under policies taken out by the decedent upon his own life." This veteran's total life insurance for beneficiaries other than his estate exceeded at death the statutory exemption of $40,000, if his war risk insurance policy payable to his widow in the sum of $10,000 is included. The Commissioner assessed an estate tax measured by this excess. As decedent's executor, petitioner claimed that proceeds of the war risk insurance policy could not be included in the estate because of section 22 of the World War Veterans' Act, 1924, providing that such "insurance * * * shall be exempt from all taxation."[2] The Board of Tax Appeals upheld the determination of the Commissioner, and the circuit court of appeals affirmed.[3]

Congress has manifested a consistent policy in the Revenue Acts from 1918 to 1934, when the veteran died, by impositions of estate taxes upon transfers at death of proceeds of all life insurance (not payable to an insured's estate) in excess of $40,000. This has been in harmony with a general plan of graduating income and inheritance taxes to accord with respective sizes of incomes and estates.[4] And the Treasury regulations have stated that "The statute provides for the inclusion in the gross estate of * * *: All insurance [not for the benefit of an estate] * * * to the extent that it exceeds * * * $40,000 * * *. The term 'insurance' refers to life insurance of every description, * * *."[5]

But petitioner invokes the provision of the World War Veterans' Act, 1924, that insurance thereunder "shall be exempt from all taxation." An amendment to that Act of August 12, 1935,[6] provides that "Payments of benefits due or to become due * * * shall be exempt from taxation * * *." However, this amendment served only to clarify the original provision for exemption, without more.[7] Unless resort is had to enlargement by implication, this exemption means only that the proceeds or benefits of a war risk policy are exempt from taxation. Exemptions from taxation do not rest upon implication.[8]

An estate tax is not levied upon the property of which an estate is composed. It is an excise imposed upon the transfer of or shifting in relationships to property at death.[9] The tax here is no less an estate tax because the proceeds

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[1] Section 302(g), Revenue Act of 1926, as amended.

[2] 43 Stat., 607, 613.

[3] 98 Fed. (2d), 734. State courts have differed as to whether proceeds of war risk insurance are subject to death duties imposed by the States. See, for example, *In re Estate of Harris* (179 Minn., 450), *Tax Commission* v. *Rife* (119 Oh. St., 83), *Wanzell's Estate* (295 Pa., 419), *Watkins* v. *Hall* (107 W. Va., 202) (holding these proceeds not subject to such excises); *and Matter of Sabin* (224 Ap. Div., 702), *Matter of Dean* (131 Misc., 125) (contra). In view of this fact and the importance of an authoritative interpretation of the Federal statutes involved, we granted certiorari. (— U. S., —.)

[4] See 44 Stat., 9, 21, 22; 48 Stat., 680, 684, 754.

[5] Treasury Regulations No. 70 (1929 edition), articles 25 and 27; Treasury Regulations No. 80 (1934 edition), articles 25 and 27.

[6] 49 Stat., 607, 609.

[7] *Lawrence* v. *Shaw* (300 U. S., 245, 249).

[8] *Rapid Transit Corporation* v. *New York* (303 U. S., 573, 592, 593); *Trotter* v. *Tennessee* (290 U. S., 354, 356, 357); *J. W. Perry Co.* v. *Norfolk* (220 U. S., 472, 480); *Theological Seminary* v. *Illinois* (188 U. S., 662, 672).

[9] *Reinecke* v. *Northern Trust Co.* (278 U. S., 339, 347 [T. D. 4261, C. B. VIII–1, 305 (1929)]); *Chase National Bank* v. *United States* (278 U. S., 327, 334 [Ct. D. 40, C. B. VIII–1, 308 (1929)]); *United States* v. *Jacobs* (—U. S., — [Ct. D. 1888, page 336, this Bulletin]).

of the policy were paid by the Government directly to the beneficiary; the taxing power was nevertheless exercised upon "the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."[10] In an analogous situation, Federal bonds exempt by statute from all taxation have been held subject to a Federal inheritance tax.[11] And State inheritance taxes can be measured by the value of Federal bonds exempted by statute from State taxation in any form.[12] Similarly, the statutory immunity of war risk insurance from taxation does not include an immunity from excises upon the occasion of shifts of economic interests brought about by the death of an insured.

Petitioner makes the further point that the inclusion of proceeds of the war risk policy for purposes of an estate tax amounts to an impairment of the Government's contract with the insured veteran, in violation of the fifth amendment to the Constitution. But neither the Act of 1924, as amended, nor any of the provisions of the War Risk Insurance Act purported to exempt war risk insurance from death duties. Therefore, no statutory exemption which could be considered a provision of the insurance contract has been affected by the imposition of the estate tax in this case. The judgment is affirmed.

SECTION 303.

REGULATIONS 70(1929), ARTICLE 36: Claims against the estate. 1939-6-9706 Ct. D. 1382

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTION—CLAIMS AGAINST THE ESTATE—NOTES EVIDENCING LOANS FROM TRUSTS SET UP BY DECEDENT'S WIFE OUT OF FUNDS RECEIVED FROM DECEDENT—ESTOPPEL.

On July 17, 1924, the decedent gave to his wife a substantial sum of money, which on the next day she placed in trust with herself as trustee. At the same time it was arranged between them that the money should be loaned by the trustee to the decedent, who in return was to execute notes payable in 10 years, with interest. On July 25 this plan was carried out, and similar transactions took place in May and June, 1926, and in April, 1928. The husband paid gift taxes on the amounts given to his wife in 1924. *Held*, That there was substantial basis for the finding of the Board of Tax Appeals that the notes were not given for full consideration in money or money's worth and that the amounts thereof were not deductible as claims against the estate under the provisions of section 303(a)1 of the Revenue Act of 1926. Acceptance of the gift taxes and allowance of interest payments on the notes as deductions for income tax purposes did not estop the Government from questioning the reality of the gifts.

2. DECISIONS AFFIRMED.

Decisions of the United States Board of Tax Appeals (1937) (35 B. T. A., 916, and 36 B. T. A., 597) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Guaranty Trust Co. of New York and J. Whitney Peterson, Executors of the Last Will and Testament of Jonathan Peterson, Deceased, petitioners, v. *Commissioner of Internal Revenue, respondent.*

[98 Fed. (2d), 62.]

Appeal from the Board of Tax Appeals.

Before MANTON, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

Petition by the executors of the will of Jonathan Peterson, deceased, for a review of an order of the Board of Tax Appeals entered October 5, 1937, determining a deficiency in the estate tax of Jonathan Peterson to the amount of $127,436.06. Affirmed.

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[10] *Chase National Bank* v. *United States*, supra, 337.
[11] *Murdock* v. *Ward* (178 U. S., 139).
[12] *Plummer* v. *Coler* (178 U. S., 115).

[July 5, 1938.]

OPINION.

AUGUSTUS N. HAND, Circuit Judge: The Commissioner of Internal Revenue determined a deficiency in the estate tax of Jonathan Peterson, deceased, in the sum of $127,436.06 which was affirmed by the Board of Tax Appeals. The sole issue presented on the appeal to this court from the order of the Board is whether the Commissioner erred in refusing to allow as a deduction from the decedent's gross estate an item of $1,048,000 evidenced by 12 promissory notes executed by the decedent and payable to Henrietta J. Peterson, trustee. The petitioners, who are the executors of decedent's will, contend that the notes represented debts of the latter which were enforceable claims against his estate deductible under the provisions of section 303(a)1 of the Revenue Act of 1926. Those provisions allow as deductions in computing net taxable estate "* * * claims against the estate * * * to the extent that such claims, * * * were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth * * *."

The deduction represented by the notes was disallowed by the Commissioner on the ground that the petitioners had failed to show that the obligations represented by the notes were contracted bona fide and for an adequate and full consideration in money or money's worth. After the decedent's death the 12 notes were paid by his executors and the payments were allowed by the Probate Court of Connecticut in their accounts. The decedent had regularly paid interest on the notes during his lifetime and claimed and was allowed the interest payments as deductions in his income tax returns.

The history of the notes is as follows:

On July 17, 1924, when coming to dinner, Jonathan Peterson, who was president of and a large stockholder in the United States Tobacco Co., said to his wife: "My dear, I have a gift for you." She said: "I don't want it. What will I do with it?" They then talked a little about it and he said, to use his own words: "Go out and treat yourself. It is yours. Blow it. Do what you want to do with it." She testified that there were no strings tied to the gift, that her husband did not require her to do anything with it, but said "it was for me to do with it as I pleased"; that, in connection with her remark: "I don't know what to do with it. How shall I invest it," there was talk about his sisters and he said: "You can make a trust to provide for them, as I have been doing," and added that Mrs. Peterson could create one for herself. Some time during the evening he delivered to his wife two checks, one for $225,000 and one for $15,000. She testified that during the same evening it was arranged between her husband and herself that two trusts should be set up with the proceeds of the checks, one for $200,000 for the benefit of Mrs. Peterson, to whom he had been generous in his gifts and allowance, and who had no income from any other source, and one for $40,000 for the benefit of Mr. Peterson's two sisters, to whom he had previously been making regular contributions. It was also arranged that the money was to be loaned back by the trustee to Mr. Peterson, who, in return for the loan, was to give notes payable in 10 years with interest at the rate of 6 per cent. He said to Mrs. Peterson: "I will give you as much as you can get anywhere else on the money as an investment."

On July 18, 1924, Mrs. Peterson deposited two checks in her personal account in the Guaranty Trust Co. and the checks were credited to her account that day and were duly paid. The check for $15,000 was drawn by Mr. Peterson on July 17, 1924, on the Guaranty Trust Co. against a balance of $31,428.31 and the check for $225,000 was drawn on the National City Bank composed of a previous balance of $5,366.31 and the proceeds of a demand loan made from that bank on the same day of $225,000. This last check was certified on July 17, 1924. He paid gift taxes on the amount of the checks delivered to his wife.

On July 18 Mrs. Peterson executed a formal trust instrument with elaborate provisions covering eight printed pages in the record in which she granted to herself as trustee $40,000 for the life use of Mr. Peterson's sisters and $200,000 for her own life use with certain remainders over. On the same day Mrs. Peterson drew her own checks for $40,000 and $200,000 to her order as trustee and deposited them in the trustee account. It was provided in the trust instrument that in making investments the trustee should not be confined to the usual legal investments for trustees, but was to be at liberty to make other investments and "to lend the whole or any part of the funds of said trust estate to any person or

persons upon such terms and conditions and either with or without security as the * * * trustee shall in her * * * discretion determine and the said trustee * * * shall not be liable or accountable for any depreciation in the value thereof."

On July 25, 1924, Mrs. Peterson as trustee issued her checks to Mr. Peterson in the respective sums of $40,000 and $200,000 and received from him two notes for like amounts due July 25, 1934. On July 26, 1924, he deposited the trustee checks aggregating $240,000 to his own credit and on July 26, 1924, paid off his demand note to the National City Bank plus interest.

There were three other transactions similar to the one above outlined.

THE MAY, 1926, TRANSACTION.

On May 14, 1926, Mr. Peterson issued his check to his wife for $200,000 drawn on the National City Bank against a balance of $202,151.86 composed of a previously existing balance of $2,151.86 and the proceeds of a demand loan from the bank made on the same date of $200,000. This check was deposited in Mrs. Peterson's personal account on May 17, 1926, and paid on that date. On May 21, 1926, she executed two trust instruments similar in form to the one involved in the transaction of July 18, 1924, in favor of each of her two children and conveyed to herself as trustee thereunder moneys derived from the transfer to her by her husband of $200,000. On May 21 as trustee she issued to her husband a check for $200,000 and received from him his two notes for $100,000 each due May 21, 1936. He deposited this check to his own credit on May 22, 1926, and on that day paid off the demand loan of $200,000 plus interest to the National City Bank.

THE JUNE, 1926, TRANSACTION.

On May 25, 1926, Mr. Peterson issued his check to his wife for $200,000 drawn on the National City Bank against a previous existing balance of $602.26 and a demand loan made on the same date of $200,000. The check was deposited to the personal credit of Mrs. Peterson in the Guaranty Trust Co. on May 27, 1926, and was paid on that date. On June 2, 1926, Mrs. Peterson executed two instruments similar in form to the trust instrument of July 18, 1924, granting to herself as trustee two trust funds of $100,000 each in favor of each of her two children. These funds were paid from her account out of the $200,000 transferred to her by her husband by his check of May 25, 1926. On June 2, 1926, Mr. Peterson gave his two notes to his wife as trustee, each for $100,000 dated June 2, 1926, and due June 2, 1936, and received from her out of her trustee account two checks to his order in the sum of $100,000 each which he deposited to his own credit. With the proceeds he paid off the demand loan, plus interest, on June 3, 1926.

THE APRIL, 1928, TRANSACTION.

On April 13, 1928, Mr. Peterson issued his check on the National City Bank to his wife for $408,000. The balance in bank to his credit on that date was $411,399.28. He had a previously existing balance of $6,399.28 and added to it $340,000 from the proceeds of sale of 4,000 shares of United States Tobacco Co. and also a check on his account with the Guaranty Trust Co. of $15,000 and the proceeds of a demand loan from the National City Bank of $50,000. The check for $408,000 was deposited in Mrs. Peterson's personal account in the Guaranty Trust Co. on April 16, 1928. On April 23, 1928, she executed an instrument similar in form to the prior trust instruments whereby she granted to herself as trustee funds aggregating $408,000 and created trusts as follows: One in her own favor for $100,000; one in favor of her daughter for $100,000; one in favor of her son for $100,000; one in favor of one of Mr. Peterson's sisters for $40,000; one in favor of his other sister for $48,000, and one in favor of his cousin for $20,000. In order to create the trust funds she deposited $408,000 on April 23, 1928, in her trustee account. On the same date she gave her check as trustee to her husband for that amount and he delivered to her his six notes dated April 23, 1928, due April 23, 1938, and corresponding in their several amounts with the respective trust funds. On April 25, 1928, Mr. Peterson paid off the $50,000 demand note and interest to the National City Bank.

At each time notes were delivered Mr. Peterson assigned stock of the United States Tobacco Co. as collateral thereto in sufficient amounts to protect the notes, and notes and collateral were kept by Mrs. Peterson in her individual safe deposit box and were held for her account as trustee.

The case was reviewed by the whole Board of Tax Appeals. The majority reached the conclusion that the evidence showed lack of intention on Mr. Peterson's part to divest himself of complete dominion over the funds transferred to his wife and that the deposit of them in the trusts and their subsequent return to him in the form of loans was pursuant to an agreement between himself and his wife that the funds were to be used in only one way, i. e., to set up trusts and then to be returned to him. The prevailing opinion added that the transaction of July 17, 1924, was a pattern for the subsequent transactions which on three later occasions—two in the same year—were carried out under the same terms and pursuant to like agreement. Accordingly, it was held that the notes were not given for full consideration in money or money's worth and the claims based upon them were not deductible under section 303(a)1 of the Revenue Act of 1926.

Six members of the Board dissented on the ground that Mr. Peterson gave his wife the gifts unconditionally relying on the return of them to him as loans, not upon any agreement on her part, but wholly upon her lending in the exercise of her absolute discretion.

The question is whether gifts were completed before the agreements that the moneys should be loaned to Mr. Peterson were made. If such was the case, and full legal and equitable rights in the moneys passed to Mrs. Peterson individually and thereafter to her as trustee of the various trusts, the trust estate furnished "full consideration in money or money's worth" for the notes upon which the claims which the taxpayer seeks to deduct rest. (*Judson* v. *Hatch*, 171 App. Div., 246; *Matter of Hendricks*, 163 App. Div., 413; *Stewart* v. *Whittemore*, 84 Pac., 841 (Cal.).) On the other hand, if the checks and proceeds reached Mrs. Peterson upon the condition or under the agreement that there should be loans of identical amounts to her husband by the trusts which she was to set up there were not completed gifts but only a circulation of funds from Mr. Peterson, or his banks, to his wife, from her individually to herself as trustee, from her as trustee to him, and from him back to his banks to restore his accounts and wipe out his borrowings in cases where he borrowed in order to carry out the various transactions. If, because the transfers to Mrs. Peterson were conditioned upon loans to her husband, the trusts were not in fact furnishing the moneys, which came only from his own funds, the corpus of each trust would consist wholly of a note of Peterson that was no more than an unenforceable gratuitous "promise to make a gift," based upon neither money nor money's worth. (*Johnson* v. *Commissioner*, 86 F. (2d), 710, 713 (C. C. A. 2) [Ct. D. 1228, C. B. 1937-1, 187]; *Holmes* v. *Roper*, 141 N. Y., 64. American Law Institute, Restatement Trusts, section 26.)

Counsel for the taxpayer argue that the husband first made a completed gift and only afterwards was it arranged that trusts should be set up and loans made to him out of the proceeds of the checks. We think, however, that the Board was justified in finding that all the steps taken were component parts of single transactions. They followed one another closely and the entire arrangement was agreed upon. The more Mrs. Peterson's testimony is read the more apparent it becomes that there was no clear separation of the discussion culminating in the alleged gift and the discussion about setting up the trusts and lending the money back to her husband. In the first place "when he came in to dinner" he only told her that he had a gift for her. It does not appear whether he turned over the checks to her then or later in the evening. Both the suggestion that she set up the trusts and the suggestion that she lend the corpus to her husband were made that evening and each suggestion came from him. Moreover, he must have made all the plans and arranged for the drafting of the trust deed previously, for the deed was executed the day following the conversation, was of considerable length and contained elaborate provisions. It is most unlikely that a lawyer would have been employed to draft the deed, would have drafted such an instrument and would have had it executed in a single day without any previous notice. Such trusts require consideration and revision and are not likely to be ordered, completed and executed within so short a period and there is no proof of urgency or haste.

In addition to all this the numerous subsequent alleged gifts and loans made in the following years where the funds of the husband were transferred to his wife and used shortly afterwards for advances to himself deprive the transactions of reality. Such a succession of events indicates strongly that the transfers were never intended to be gifts but were mechanisms to serve as a means of giving the husband tax deductions without really parting with the control of his money. While he doubtless believed that he successfully avoided liability and that his position was immune, his belief depended on a mistake of law and did not furnish a basis for a deduction of the amount of his notes in computing estate taxes, because the only consideration for the notes was his own money.

The taxpayer had the burden of proof and the questions before the Board were questions of fact. For the reasons we have stated we are of the opinion that there was a substantial basis for the finding that the alleged gifts had no reality and for treating the decision as coming within *Johnson* v. *Commissioner* (86 F. (2d), 710 (C. C. A. 2)). That decision, upon the facts found, governed the result reached.

Counsel for the taxpayer further contend that the acceptance by the Government of the gift taxes and its allowance of interest payments on the notes as deductions in Mr. Peterson's income tax return estopped it from questioning the reality of the gifts. There could be no estoppel in the present case even if one were ever possible against the Government because it had accepted payment of taxes that were theoretically inconsistent with a liability for others. Here there is no reason to suppose that the Government officials knew anything about the circumstances under which the alleged gifts were made or that they did more than take the representations of the taxpayer that he had made gifts and was liable for taxes thereon, at their face value. (*Utah Power & Light Co.* v. *United States*, 243 U. S., 389, 409. See also 49 Harv. L. Rev., 1281, at 1299 et seq.)

Order affirmed.

REGULATIONS 68 (1924), ARTICLE 22: Property held jointly or as tenants by the entirety. (Also Article 22, Regulations 70 (1929).)

1939-11-9753
Ct. D. 1388

ESTATE TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF SUPREME COURT.

GROSS ESTATE—JOINT TENANCY—CREATION OF TENANCY PRIOR TO ADOPTION OF A SYSTEM OF ESTATE TAXATION—RETROACTIVITY—CONSTITUTIONALITY.

No. 391. The entire value of real property purchased by the decedent with his own funds and held at his death, on June 17, 1924, by his wife and himself in a joint tenancy set up prior to the enactment of the Revenue Act of 1916, is includible in the decedent's gross estate under the provisions of section 302 of the Revenue Act of 1924. The tax was not retroactively applied in violation of the due process clause of the fifth amendment.

No. 482. The entire value of personal property held by the decedent and his wife in a joint tenancy created prior to 1916, a portion of which property had been contributed by the wife from property previously transferred to her by the decedent without consideration, is constitutionally includible in the decedent's gross estate under the provisions of section 302 of the Revenue Act of 1926.

SUPREME COURT OF THE UNITED STATES.

No. 391. *The United States of America, petitioner*, v. *Elizabeth C. Jacobs, Executrix of the Last Will and Testament of W. Francis Jacobs, Deceased.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

No. 482. *Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, Deceased, etc., petitioner*, v. *Walter C. Corwin, Late Collector of Internal Revenue, First District of New York.*

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[59 S. C., 551.]

[February 27, 1939.]

OPINION.

Mr. Justice BLACK delivered the opinion of the Court.

No. 391.

The question is whether the entire value or only one-half the value of real property—purchased by a decedent with his own funds and held at his death by his wife and himself under a joint tenancy set up prior to 1916—may be included in the decedent's gross estate under the 1924 Revenue Act.

In 1909, real estate in Illinois was conveyed to W Francis Jacobs, the decedent, and Elizabeth C. Jacobs, his wife, "as joint tenants" and this joint tenancy continued until decedent's death; the wife never contributed any part of, or consideration for, the joint property; decedent died June 17, 1924 (after the effective date of the 1924 Revenue Act), and as survivor the wife became sole owner in fee of the whole of the joint property.

The Commissioner included the full value of the property in decedent's gross estate for taxation under the 1924 Act. As executrix, respondent paid the tax, and sought recovery in the district court which held that the estate tax could be imposed only upon one-half of the joint property's total value. The circuit court of appeals affirmed.[1]

Respondent construes the 1924 Revenue Act as taxing—by its terms—only one-half the value of the joint property, and contends that inclusion of the property's entire value for estate tax purposes would as retroactive taxation violate the due process clause of the fifth amendment.

First. It is clear that Congress intended, by section 302 of the 1924 Act,[2] to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety—irrespective of the date of the tenancy's creation—in so far as the property or consideration therefor is traceable to the decedent. Subdivision (h) of section 302 specifically provided that the provisions of 302 relating to joint tenancies should "apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as * * * described therein, whether made, created, arising, existing, exercised, or relinquished *before or after the enactment of this Act.*" [Italics supplied.] Section 302(h) was enacted in the 1924 Act after this Court, on May 1, 1922, had decided that the 1916 Act did not purport to impose an estate tax measured by the value of property held in joint tenancies created prior to the

[1] 97 F. (2d), 784.

[2] The 1924 Act imposed a tax (section 301, Act of 1924, 43 Stat., 253, 303) "upon the transfer of the net estate of every decedent dying after" the Act's enactment, and included (section 302) in each gross estate the value of "the interest * * * [in property] held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, * * * 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 a fair 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 person from the decedent for less than a fair 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 * * *."

1916 Act.[3] "The clear language of the 1924 statute repels the notion that it has no application to joint tenancies created prior to September 8, 1916."[4]

Second. Here, decedent paid the entire purchase price of the joint property with his own individual funds and, therefore, the 1924 statute required the inclusion of the full value of the joint property in his gross estate. Contending that the tax as so applied is retroactive, respondent insists that the due process clause of the fifth amendment forbids such taxation. The reasoning is that a one-half interest in the joint property was transferred to, and vested in the wife in 1909; that the tax in question only applies to transfers; and that the one-half interest transferred to the wife in 1909 could not thereafter (1924) be taxed as a part of decedent's gross estate without retroactively applying the tax to the 1909 transfer.

But the tax was not levied on the 1909 transfer and was not retroactive. At decedent's death in 1924, ownership and beneficial rights in the property which had existed in both tenants jointly changed into the single ownership of the survivor. This change in ownership, attributable to the special character of joint tenancies, was made the occasion for an excise, to be measured by the value of the property in which the change of ownership occurred. Had the tenancy not been created, this survivorship and change of ownership would not have taken place, but the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.[5]

Death duties or excises imposed upon the occasion of change in legal relationships to property brought about by death are ancient in origin.[6] Congress has the power to levy a tax upon the occasion of a joint tenant's acquiring the status of survivor at the death of a co-tenant. In holding that the full value of an estate by the entirety may constitutionally be included in a decedent's gross estate for estate tax purposes, this Court said: "The question * * * is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights * * *.

"At * * * [the co-tenant's] death, however, and because of it, * * * [the survivor] 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."[7]

Thereafter, it was further decided that the full value of the property passing to a survivor under a tenancy by the entirety created prior to the estate tax of 1916 could be included in the gross estate.[8] Congress—it has been held—may also constitutionally apply an estate tax to the whole of a joint tenancy created after the 1916 Act,[9] and to half of a joint tenancy created prior to the

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[3] *Shwab* v. *Doyle* (258 U. S., 529, 535 [T. D. 3339, C. B. I–2, 312 (1922)]); *Know* v. *McElligott* (258 U. S., 546, 549). Respondent relies upon language of the Knox case to support the contention that section 302 of the 1924 Act is retroactive in its effect on joint tenancies such as the one here. However, the actual judgment of the Court in that case went no further than to hold that the terms of the 1916 Act there considered did not require the inclusion—in gross estates—of the value of property held in joint tenancies created prior to the enactment of that particular law.

[4] *Gwinn* v. *Commissioner* (287 U. S., 224, 226); cf. *Phillips* v. *Dime Trust & S. D. Co.* (284 U. S., 160, 166 [Ct. D. 426, C. B. X–2, 420 (1931)]).

[5] Cf. *Reynolds* v. *United States* (292 U. S., 443, 449); *Cox.* v. *Hart* (260 U. S., 427, 435).

[6] See *Knowlton* v. *Moore* (178 U. S., 41, 47), 1 Cooley, "Taxation," section 48 (4th ed.), Seligman, "Essays in Taxation," Ch. V (9th ed., 1921).

[7] *Tyler* v. *United States* (281 U. S., 497, 503, 504 [Ct. D. 190, C. B. IX–1, 383 (1930)]).

[8] *Third National Bank & Trust Co.* v. *White* (45 F. (2d), 911 [Ct. D. 312, C. B. X–1, 457 (1931)], affirmed 287 U. S., 577); *Helvering, Commissioner,* v. *Bowers* (303 U. S., 618).

[9] *Foster* v. *Commissioner* (303 U. S., 618).

1916 Act, where the decedent alone had furnished consideration for the joint property.[10]

It is urged that these decisions do not support the tax here upon the full value of the joint property, because this tenancy was created prior to the estate tax law of 1916. Respondent relies upon differences in the nature of tenancies by the entirety and joint tenancies in order to remove the present case from the application of these prior adjudications. Since a joint tenant's interest in realty is severable and subject to sale, the argument is that upon the death of a co-tenant the survivor actually receives nothing more than the decedent's one-half interest and therefore no more can be subjected to a death duty. On the other hand, respondent explains the permissible taxation of the whole of a tenancy by the entirety by reference to the "amiable fiction"[11] of the common law, under which ownership of a husband and wife in tenancy by the entirety is deemed a single individual unity and each owns all and every part of the property so held. By virtue of this feudal fiction of complete ownership in each of two persons, the surviving tenant by the entirety is conceived to be the recipient of all the property upon the death of the co-tenant, and therefore—it is said—all the property can be taxed.

The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions.[12] The Constitution grants Congress the "Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare." No more essential or important power has been conferred upon the Congress and the presumption that an Act of Congress is valid applies with added force and weight to a levy of public revenue.[13]

In addition, there is sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation. Practical necessities—and taxation is "eminently practical"[14]—may well have led Congress to group different types of joint ownership together for taxation rather than to afford different treatment to each varying shade of such ownership. A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person."[15] Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each. The "grand incident of joint estate is the doctrine of *survivorship*, 'by which, when two or more persons are seized of a joint estate, * * * the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be.'"[16]

While it is true that until the death of decedent here each joint tenant possessed the right to sever the joint tenancy, each was nevertheless subjected to the hazard of losing the complete estate to the other as survivor. Prior to decedent's death, his wife had no right to dispose of her interest by will, nor could it pass to her legal heirs. She might survive and thereby obtain a complete fee to the property with attendant rights of possession and disposition by will or otherwise. Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains. Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale

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[10] *Gwinn* v. *Commissioner*, supra; *Griswold* v. *Helvering* (290 U. S., 56, 58). In the Griswold case this Court said: "Whether this application of the statute gives it a retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at an earlier date, which furnishes the basis for the tax."

[11] Cf. *Tyler* v. *United States*, supra, at 503.

[12] A joint tenancy in Illinois—where the property involved here is located—is described by that State's highest court (as in the common law) as follows: "The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession." (*Deslauriers* v. *Senesac*, 331 Ill., 437, 440.) The "learning in the books merely shows that in case of a conveyance to husband and wife, there is a *fifth unity*, to wit: that of person * * *." (*Topping* v. *Sadler*, *V Jones* (No. Car.), 357, 360.) See note, 80 L. R. A., 305.

[13] *Nicol* v. *Ames* (173 U. S., 509, 515).

[14] Id., 516.

[15] 1 Tiffany, "Real Property" (1920), section 194; see Littleton's "Tenures," section 291 (Wambaugh, ed., 1903).

[16] Freeman, "Cotenancy and Partition," 2nd ed., section 12.

of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest,[17] a decided change for the survivor's benefit. This termination of a joint tenancy marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax. Neither the amount of the tax nor its application to the survivor's change of status and ownership, was in any manner dependent upon the date of the joint tenancy's creation, whether before, or after, 1916. It is immaterial that Congress chose to measure the amount of the tax by a percentage of the total value of the property, rather than by a part, or by a set sum for each such change. The wisdom both of the tax and of its measurement was for Congress to determine.

No. 482.

No. 482 involves provisions of the 1926 Revenue Act (44 Stat., 9) substantially identical to those of the 1924 Act considered above. Here, also, a joint tenancy (in personal property) was created by man and wife prior to 1916. However, not all of the joint property was contributed by the decedent, but a portion was contributed to the tenancy by the wife who survived. This property which she transferred to the tenancy had in turn been previously given to her—without consideration—by decedent before the creation of the joint tenancy. At decedent's death in 1930, an estate tax was assessed and paid upon the full value of the joint property, including that part contributed by the survivor but ultimately traceable to the decedent.

The district court held that the full value of the joint property was taxable,[18] and the Circuit Court of Appeals affirmed.[19]

The contention that the 1926 tax is unconstitutional under the fifth amendment because imposed upon the total value of the joint tenancy at decedent's death is without merit, for reasons stated in No. 391.

However, there is here the further argument that the courts below erred in construing the 1926 Act to require the inclusion in the gross estate of that part of the joint property (shares of stock) contributed to the joint tenancy by the survivor, but which had been paid for and given to her by decedent prior to the creation of the tenancy.

Although subdivision (h) of section 302 of the 1926 Act specifically required inclusion in the gross estate of the full value of the joint property at death in proportion to the decedent's contribution to the purchase price, petitioner relies upon that part of subdivision (e) which excepts "such part [of the joint property] * * * as may be shown to have originally belonged to * * * [the survivor] 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." Petitioner insists that this exception should be read "except such parts thereof as may be shown to have originally belonged to [the survivor] and never *after the passage of this Act* 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."

The surviving joint tenant in this case comes squarely within the governing statutory provision because she "received" and "acquired" all of the property contributed by her to the joint tenancy "from the decedent for less than an adequate and full consideration in money or money's worth." This language adopted by Congress clearly and unambiguously indicates the purpose to tax the entire value of a joint tenancy under circumstances shown by this record. We are without authority to add language to the statute directly contrary to such a clearly expressed purpose.

The judgment in No. 391 is reversed and that in No. 482 is affirmed.

Mr. Justice STONE took no part in the consideration or decision of these cases.

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[17] Cf. *Chase Nat. Bank* v. *United States* (278 U. S., 327, 338 [Ct. D. 40, C. B. VIII–1, 308 (1929)]); *Saltonstall* v. *Saltonstall* (276 U. S., 260, 271).

[18] 19 F. Supp., 56.

[19] 99 F. (2d), 799.

TITLE III.—GIFT TAX. (1932)

SECTION 506.

REGULATIONS 79 (1936), ARTICLE 19: Valuation of property. 1939-22-9853 T. D. 4901

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 85—GIFT TAX.

Article 19 of Regulations 79 (1936 edition) amended.—Valuation of stocks and bonds.

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

To Collectors of Internal Revenue and Others Concerned:

Subdivision (1) of article 19 of Regulations 79, 1936 edition (section 85.19 of Title 26, Code of Federal Regulations), and that article as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26 [page 396, this Bulletin]), is amended to read as follows:

(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

Subdivision (3) of article 19 of Regulations 79, 1936 edition (section 85.19 of Title 26, Code of Federal Regulations), and that article as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26), is amended to read as follows:

(3) *Stocks and bonds.*—The value at the date of the gift in the case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on such date.

In the case of stocks and bonds listed on a stock exchange the mean between the highest and lowest quoted selling prices on the date of the gift shall be considered as the fair market value per share or bond. If there were no sales on the date of the gift, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift. For example, assume that sales of stock nearest the date of the gift (June 15) occurred two days before (June 13) and three days after (June 18) and that on such days the mean sale prices per share were $10 and $15, respectively. The price of $12 shall be taken as representing the fair market value of a share of such stock as of the date of the gift. If, however, on June 13 and June 18 the mean sale prices per share were $15 and $10, respectively, the price of $13 shall be taken as representing the fair market value of a share of such stock as of the date of the gift. If the security was listed on more than one exchange, the records of the exchange where the security is principally dealt in should be

employed. In valuing listed stocks and bonds the donor should observe care to consult accurate records to obtain values as of the date of the gift.

In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling prices as of the date of the gift; or, if there were no sales on that date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift. If quotations are obtained from brokers, or evidence as to the sale of securities is obtained from the officers of the issuing companies, the donor should preserve in his files the letters furnishing such quotations or evidence of sale for inspection when the return is verified by an investigating officer.

If actual sales are not available during a reasonable period beginning before and ending after the date of the gift, the fair market value may be determined by taking the mean between the bona fide bid and asked prices on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift.

If actual sale prices or quoted bona fide bid and asked prices are available on a date within a reasonable period prior to the date of the gift, and if no actual sale prices or bona fide bid and asked prices are available on a date within a reasonable period after the date of the gift, or vice versa, then the mean between such highest and lowest available sale prices or bid and asked prices may be taken as the value.

If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon which the donor bases his valuation should be submitted with the return.

In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 1005 and 1029 of the Internal Revenue Code (53 Stat., Part 1); and sections 506 and 530 of the Revenue Act of 1932 (47 Stat., 248, 259; 26 U. S. C., 555, 579).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved May 18, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register May 20, 1939, 11.28 a. m.)

TITLE I.—INCOME AND EXCESS-PROFITS [AND CAPITAL STOCK] TAXES. (1935)

SECTION 105 OF THE REVENUE ACT OF 1935, AS AMENDED BY SECTION 401 OF THE REVENUE ACT OF 1936.—CAPITAL STOCK TAX.

REGULATIONS 64 (1936), ARTICLE 35: Return by custodian. 1939-21-9845 G. C. M. 21208

The M Corporation, operated by its officers pursuant to an order of a Federal court entered in proceedings for reorganization under section 77B of the Bankruptcy Act, as amended, was "carrying on or doing business" within the meaning of section 105(a) of the Revenue Act of 1935, as amended, and was therefore subject to capital stock tax.

S. T. 702 (C. B. XII-2, 405 (1933)) distinguished.

An opinion is requested whether the M Corporation, which, during the entire taxable year ended June 30, 1936, was operated by its officers under an order of a Federal court entered pursuant to a petition for reorganization under section 77B of the Bankruptcy Act, as amended, was subject to capital stock tax for that taxable year under section 105 of the Revenue Act of 1935, as amended by section 401 of the Revenue Act of 1936.

Section 105, as amended, imposes upon every domestic corporation, with respect to carrying on or doing business for any part of each year ending June 30, beginning with the year ended June 30, 1936, an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

The M Corporation and certain other corporations on February —, 1935, filed petitions for reorganization under section 77B of the Bankruptcy Act, as amended. Pursuant to such petitions, the District Court of the United States for the District of Massachusetts on February —, 1935, entered an order providing in part as follows:

1. That the debtor and other debtors be and they hereby are temporarily continued in possession of their respective estates.

2. That the debtor and other debtors be and they hereby are authorized to conduct and carry on their respective businesses as an entirety until the further order of this court in the premises and the debtor and other debtors shall have all the title to and shall exercise, consistently with the provisions of said section 77B, all the powers of a trustee appointed pursuant to said section, subject at all times to the control of this court and to such limitations, restrictions, terms and conditions as this court may from time to time impose and prescribe and, without limiting the generality of the foregoing, the debtor and other debtors shall have full power and authority to do all things necessary or convenient to conduct and carry on their respective businesses as an entirety and to maintain and preserve their respective estates; * * * to collect and receive all the rents, issues, income, tolls and profits and all outstanding accrued or accruing accounts, things in action and credits due or owing to the debtor and other debtors and to hold and retain all moneys received to the end that the same may be applied under this or the further orders of this court.

The order further authorized the debtor and other debtors in their discretion to pay all expenses "incurred in the operation of the respective businesses hereby authorized and in preserving and maintaining the estates of the debtor and other debtors," and gave such debtor and other debtors power in their discretion to sue and defend in the name of such corporations. Books of account were to be kept and statements filed as required by section 77B or as directed from

time to time by the court. All persons, including stockholders and creditors, were enjoined from instituting or prosecuting suit against the debtor or other debtors and from disposing of any of the property or assets of the debtor or other debtors during the pendency of the proceedings. The court further reserved the full right and jurisdiction to appoint a trustee with the same powers as those exercised by an equity receiver to the extent consistent with section 77B. On March —, 1935, the court entered an order permanently continuing the debtor and other debtors in possession of their respective estates and authorizing them to continue the operations of their respective businesses to the same extent as set out in the order dated February —, 1935, referred to above. The final decree in the proceedings was entered by the court on December —, 1937.

The M Company contends that during the entire taxable year ended June 30, 1936, its property and business were under the control and supervision of the court and that it was not carrying on or doing business during that year within the meaning of the law and regulations. The decision of the United States Supreme Court in *United States* v. *Whitridge* (231 U. S., 144) is cited in support of such contention. It was held in that case that a corporation, the business of which was carried on during the pendency of an equity receivership, was not "carrying on or doing business" within the meaning of the Corporation Excise Tax Act of 1909.

Article 35 of Regulations 64 (1936) provides in part as follows:

* * * If, at the close of the taxable year, all of the property of a corporation is in the custody of and being administered by a receiver or a trustee in bankruptcy, or is in the custody of a Federal or State officer pending the appointment of a receiver or trustee in bankruptcy, there shall be attached to the return a statement showing the date on which the property was placed in the custody of such officer and whether his custody has been continuous since that date. * * * If, during any entire year ending June 30, all of the property of a corporation is in the hands of such public official, the corporation is not subject to the tax for such year, but in order that its exempt status may be known to the Commissioner such custodian shall file with the collector of internal revenue an information return on Form 707, attaching thereto an affidavit showing the date on which the property came into his custody and the fact that his custody was continuous throughout such entire year.

It was held in S. T. 702 (C. B. XII–2, 405 (1933)) that—

Where a corporation is in the hands of a receiver, the receiver and not the corporation is carrying on the business. This is true with respect to both operating receivers and liquidating receivers.

This office is of the opinion that the instant case is distinguishable on its facts from the Whitridge case. In the Whitridge case, the Third Avenue System of Street Railways in the City of New York was, during the taxable year, in the hands of one, Whitridge, as receiver under an order of the Federal circuit court. In the order appointing him, the receiver was given full authority to operate the said railways and properties subject to the supervision of the court. By the same order, the officers, agents, and employees of the railway company were required to turn over to him all of the property in their hands or under their control and the company was enjoined from interfering in any way with his possession or management. The theory of the Supreme Court in the Whitridge case was that, since the corporation excise tax in question was imposed on the privilege of doing business in a corporate capacity, the tax had no application to a situation

where the corporation had been ousted from the management and control of its business and was deprived of the privilege of exercising its normal functions as a corporation. The taxpayer has assumed that the order of February —, 1935, continuing the debtor in possession subject to the supervision of the court has the same effect as the appointment of an equity receiver or a trustee in bankruptcy. In this regard, it may be well to consider just what was the policy of Congress behind this provision under section 77B of the Bankruptcy Act that the court may continue the debtor in possession. Subsection 7 of the report of the Judiciary Committee of the House of Representatives (H. R. 5884) reads as follows:

> The court is authorized to continue the debtor in possession and in such case the salaries of officers must be reasonable and approved by the judge. Salaries of officers will likely be less than fees of trustees. In some cases officers will be willing to work for nothing in order to preserve the situation and their stock interest therein. Company officers will also keep down company counsel fees to a point lower than counsel fees of a trustee. (House Report No. 194, Seventy-third Congress, first session.)

The report of the counsel to the special committee to investigate receivership and bankruptcy proceedings which led up to the Chandler Act of June 22, 1938, Public, No. 696, Seventy-fifth Congress (52 Stat., 840) (which Act now expressly imposes on a debtor in possession all the duties of a trustee (see section 188) and further provides that a debtor may no longer be continued in possession unless the estate is under $250,000 (see section 156)), states in part that—

> * * * Under section 77B, the option is given to retain the debtor in possession. The argument for the retention of the debtor is that proper administration in 77B will not result in an inordinately long proceeding, that liquidation is not contemplated, and that continuation of business must be encouraged and liberally permitted in the interests of reorganization; that the interposition of a trustee is ordinarily unnecessary; that a trustee is not skilled in the business and if he is, he could only be taken from the ranks of competitors and may profit from the information thus gained. The thought underlying 77B is the retention by the debtor of its business while it negotiates with its creditors; and the contention that the appointment of a trustee merely increases the expense. The force of this argument can not be denied. (Senate Document 268, Seventy-fourth Congress, second session, page 48.)

Assuming this to be a fair statement of the policy of Congress in providing under section 77B that the court may permit the debtor to continue in possession, it seems clear that this purpose was not to oust the debtor and to replace corporate management by an outsider as trustee or receiver, but rather to continue such corporation in the control of its business, subject of course to the supervision of the court.

For the reasons above set forth, this office is of the opinion that the Whitridge case has no application to the situation presented in the instant case where the activities of the corporation and its management, as authorized by the court, include the normal functions of the corporation, and this notwithstanding the fact that the corporation during the taxable year in question was under the direct supervision and control of the Federal court and was limited and restricted in certain respects in the conduct of this business. Accordingly, it is concluded that the M Corporation during the capital stock tax taxable year ended June 30, 1936, was "carrying on or doing business"

within the meaning of section 105(a) of the Revenue Act of 1935, as amended, and is, therefore, subject to capital stock tax.

The ruling published as S. T. 702 (C. B. XII–2, 405 (1933)) providing for an exemption from liability for the capital stock tax is limited to those cases where a corporation has been ousted from the management and control of its business and has been deprived of the privilege of exercising its normal functions as a corporation, but has no application where a debtor is continued in possession under the provisions of section 77B of the Bankruptcy Act and where the activities of the corporation and its management as authorized by the court include the normal functions of that corporation.

This opinion is equally applicable under section 601 of the Revenue Act of 1938 and Chapter 6 of the Internal Revenue Code. Under the provisions of section 601(f)6 of the Revenue Act of 1938 and section 1202(c) of the Internal Revenue Code, a corporation, in its capital stock tax return for a year beginning with or within an income-tax taxable year within which reorganization proceedings under section 77B of the Bankruptcy Act, as amended, are terminated, shall make a declaration of value for its capital stock even though a value might have been declared for a prior year of the same 3-year period. (See article 45, Regulations 64 (1938).)

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

TITLE III.—CAPITAL STOCK AND EXCESS-PROFITS TAXES. (1938)

SECTION 601.—CAPITAL STOCK TAX.

REGULATIONS 64(1938), ARTICLE 21: Definitions. 1939-20-9836
(Also Articles 44 and 74.) C. S. T. 9

The "3-year periods" beginning July 1, 1937, and ending June 30, 1940, and continuing during each succeeding period of three years thereafter, prescribed by section 601(f) of the Revenue Act of 1938 for capital stock tax purposes, are the same for all corporations.

Advice is requested whether, under the provisions of section 601(f)1 of the Revenue Act of 1938 (section 1202, Internal Revenue Code), the phrase "3-year periods" therein mentioned means in all cases the period beginning July 1, 1937, and ending June 30, 1940, and each period of three years thereafter, or whether, where corporations are not subject to the tax for the first year of a 3-year period, either because of not having been in existence during that year or because of exemption from the tax, the 3-year period begins with the year for which the corporation is first subject to the tax.

Section 601(f) of the Revenue Act of 1938 provides in part as follows:

(1) The adjusted declared value shall be determined with respect to 3-year periods beginning with the year ending June 30, 1938, and each third year thereafter. The first year of each *such* 3-year period, or, in case of a corporation not subject for such year to the tax imposed by this section, the first year of *such* 3-year period for which the corporation is subject to the tax, shall constitute a "declaration year." [Italics supplied.]

Article 21 of Regulations 64 (1938) defines the term "3-year period" and "declaration year" as follows:

(l) The term "3-year period" means the period beginning July 1, 1937, and ending June 30, 1940, and each period of three years thereafter.
(m) The term "declaration year" means (1) the first year of each 3-year period for which a corporation, whether domestic or foreign, is subject to the tax * * *.

It is clear that under the provisions of the law and regulations the phrase "3-year periods" means in all cases a uniform statutory period beginning July 1, 1937, and ending June 30, 1940, and continuing during each period of three years thereafter, regardless of whether for any reason a corporation may not be subject to the tax for the first or any other year of such 3-year period. This construction of the statute conforms with the intent of Congress as expressed in the report (No. 1860) dated March 1, 1938, of the Ways and Means Committee of the House of Representatives, in which the statement is made that "The 3-year periods are the same for all corporations."

In some cases, a declaration of value will be made by corporations in years other than the first year of a statutory 3-year period. In such cases, the "3-year period" will not consist of three successive taxable years. If for any reason a corporation is not subject to the capital stock tax for the year 1938, but is subject thereto for the years 1939 and 1940, the corporation will, nevertheless, make a declaration of value in 1939, adjust such value in 1940, and make a new declaration of value in 1941 for the succeeding 3-year period. Similarly, if for any reason a corporation is not subject to the capital stock tax for the years 1938 and 1939, but is subject thereto for the year 1940, the corporation will, nevertheless, make a declaration of value in 1940, and will then make a new declaration of value in 1941 for the succeeding 3-year period. Thus, the 3-year periods prescribed by law are the same for all corporations subject to tax.

REGULATIONS 64(1938), ARTICLE 35: Return of corporation in receivership. 1939-7-9716 C. S. T. 8

A receiver, trustee in bankruptcy, or other like representative, who is administering the business of a corporation and is in charge of all its property at the time for filing a capital stock tax return under the Revenue Act of 1938 must file such return.

Advice is requested whether, under the circumstances hereinafter stated, the capital stock tax returns under section 601(d) of the Revenue Act of 1938 should be filed for the M, N, O, and P Corporations by the receivers or by the responsible officers of the respective corporations. Advice is also requested with respect to the proper application of section 601(f)6 of that Act to the four situations presented.

Section 601(a) of the Revenue Act of 1938 imposes a capital stock tax upon every domestic corporation for each year ending June 30, beginning with the year ending June 30, 1938, with respect to carrying on or doing business for any part of such year. The tax is measured by the adjusted declared value of the capital stock of the corporation.

Section 601(d) provides that the return shall be filed under oath within one month after the close of the year with respect to which the tax is imposed.

Section 601(f) provides in part as follows:

(1) The adjusted declared value shall be determined with respect to 3-year periods beginning with the year ending June 30, 1938, and each third year thereafter. The first year of each such 3-year period, or, in case of a corporation not subject for such year to the tax imposed by this section, the first year of such 3-year period for which the corporation is subject to the tax, shall constitute a "declaration year."

(2) For each declaration year the adjusted declared value shall be the value, as declared by the corporation in its return for such declaration year (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending with or prior to the close of such declaration year (or as of the date of organization in the case of a corporation having no income-tax taxable year ending with or prior to the close of such declaration year).

* * * * * * *

(6) The capital-stock tax year beginning with or within an income-tax taxable year within which bankruptcy or receivership, due to insolvency, of a domestic corporation, is terminated shall constitute a declaration year. In such case the adjusted declared value for any subsequent year of the 3-year period shall be determined on the basis of the value declared in the return for such declaration year.

The following situations are presented:

(*a*) The M Corporation, due to insolvency, was in receivership from February 1, 1938, to September 30, 1938. The corporation files its income tax returns on a calendar year basis.

(*b*) The N Corporation, due to insolvency, was placed in receivership on November 1, 1938. It is contemplated that the receivership will terminate on October 31, 1939. The corporation files its income tax returns on a calendar year basis.

(*c*) The O Corporation, due to insolvency, was placed in receivership on September 1, 1937. It is contemplated that the receivership will terminate on March 31, 1939. The corporation files its income tax returns on a calendar year basis.

(*d*) The P Corporation, due to insolvency, went into receivership on February 1, 1938. It is contemplated that the receivership will terminate on March 31, 1939. The corporation files its returns on the basis of a fiscal year ending April 30.

If at the time for filing a capital stock tax return the administration of the business of a corporation and all its property are in charge of a receiver, the return should be filed by such receiver. Where the business was operated by the corporation itself for any part of the capital stock tax taxable year, the return so filed shall nevertheless be complete, including (1) a declared value for the capital stock if the return is made for a declaration year, or (2) an adjusted value for the capital stock if the return is made for an adjustment year. If a receiver's administration and custody have been continuous throughout the entire capital stock tax taxable year, so that the corporation itself did not operate the business for any part of the year, no statement of declared value or adjusted value is required because no tax is due, but in lieu thereof, the receiver must attach a statement to the return showing the date on which the property came into his custody and whether his custody was continuous thereafter.

In the case of the M Corporation, the receiver administering its business was in charge of its property at the time for filing the capital stock tax return for the taxable year ended June 30, 1938, and was, therefore, required to file such return. Since the corporation operated the business for a part of such taxable year, namely, from July 1, 1937, to January 31, 1938, the return filed by the receiver should be complete for the entire year, including a declaration of the value of the capital stock. Under the provisions of section 601(f)6, the corporation will be entitled to make a new declaration of value for its capital stock for the taxable year ending June 30, 1939.

With respect to the N Corporation, the return for the capital stock tax taxable year ending June 30, 1939, should be filed by the receiver since he was in charge of the corporate affairs at the time for filing the return, even though the business was operated by the corporation for a part of the taxable year, namely, from July 1, 1938, to October 31, 1938. The return by the receiver should be complete for the entire year and should include the value declared by the corporation for the year ended June 30, 1938, adjusted as required by section 601(f)3. The return for the capital stock tax taxable year ending June 30, 1940, should be filed by the responsible officers of the corporation. Under the provisions of section 601(f)6, a new declaration of value for the corporation's capital stock should be made in the return for the taxable year ending June 30, 1940.

In the case of the O Corporation, the receiver was administering the corporate affairs and was in custody of its books and property at the time for filing the return for the taxable year ended June 30, 1938. He was, therefore, required to file the return for that taxable year. The business was operated by the corporation for a part of the taxable year, namely, from July 1, 1937, to August 31, 1937, but the return should cover the entire year, including a declaration of the value of the capital stock. The capital stock tax return for the taxable year ending June 30, 1939, should be filed by the responsible officers in charge of the corporation at the time when the return is due, and should show an adjusted declared value for the capital stock, that is, the value declared for the year ended June 30, 1938, adjusted as required by section 601(f)3, for the reason that the capital stock tax taxable year ending June 30, 1939, did not begin with or within the income-tax taxable year in which the receivership will be terminated. The capital stock tax taxable year ending June 30, 1940, will begin within the income-tax taxable year ending on December 31, 1939. Consequently, since the receivership will terminate within such year, the corporation will be entitled under the provisions of section 601(f)6 to make a new declaration of value for its capital stock in its return for the year ending June 30, 1940.

The receiver of the P Corporation was in charge of the corporate affairs and had custody of its property at the time for filing the return for the capital stock tax taxable year ended June 30, 1938, and was, therefore, required to file the capital stock tax return for that year. Since the business was operated by the corporation for a part of such taxable year, namely, from July 1, 1937, to January 31, 1938, the return filed by the receiver should cover the entire year, including a declaration of the value of the capital stock. The return for the capital stock tax

taxable year ending June 30, 1939, should be filed by the responsible officers in charge of the corporate affairs at the time when the return is due. In view of the fact that the receivership will terminate on March 31, 1939, a date within the income-tax fiscal year ending April 30, 1939, the corporation will be entitled under the provisions of section 601(f)6 to make a new declaration of value for its capital stock in its capital stock tax return for the capital stock tax taxable year ending June 30, 1939.

The statements made herein relative to a receiver are equally applicable to a trustee in bankruptcy or a like representative.

TITLE IV.—MANUFACTURERS' EXCISE TAXES. (1932)

SECTION 619.—SALE PRICE.

REGULATIONS 46, ARTICLE 12: Exclusion of charges for transportation, delivery, etc. (Also Article 8.) 1939-17-9806 G. C. M. 21114

Rules governing the inclusion or exclusion of cost of transportation, delivery, insurance, installation, or other charges in determining the prices for which certain articles taxable under Title IV of the Revenue Act of 1932, as amended, are sold by the manufacturer, producer, or importer.

Advice is requested whether, in the situations hereinafter described, transportation, delivery, insurance, installation, or other charges should be included or excluded in fixing the prices for which certain articles subject to tax under Title IV of the Revenue Act of 1932, as amended, are sold by the manufacturer, producer, or importer.

Section 619 of the Revenue Act of 1932 provides in part as follows:

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment * * *. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;

(2) sold on consignment, or

(3) sold (otherwise than through an arm's-length transaction) at less than the fair market price;

the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

The taxes under consideration are those imposed under Title IV of the Revenue Act of 1932, as amended, which are based upon the price for which the articles specified are sold by the manufacturer, producer, or importer. Inasmuch as such taxes are based upon the price for which an article is sold, and since section 619 specifies the charges which shall be included and those which shall be excluded in determining such price, it is evident that there can be no inclusion or exclusion of any charge unless and until a sale is made. In fact, some of the charges specified in section 619—charges for transportation, delivery, and installation—can not be definitely ascertained until the sale is made and the articles are delivered to the purchaser. Many different items enter into the cost of manufactured articles. There are not only manufacturing costs but also items of local taxes, insurance, overhead, cost of handling, and even transportation charges under certain conditions—all attributable to the manufacturer and having no close relation to sales of manufactured articles. Only in respect of *bona fide* sales may the charges specified in section 619 be excluded. The evident purpose of section 619 is to authorize the inclusion in the selling price of certain charges so closely connected with the cost of manufacture or production of taxable articles as to

constitute a part of the price for which they are sold, and to exclude from the selling price certain other charges which, though they increase the cost to the customer of securing the articles, yet form no integral part of their selling price.

The questions presented and the answers thereto are as follows:

Question (1): If the articles are shipped in case lots from the factory to the warehouse and are shipped in less than case lots from the warehouse to the customer, are the articles in condition "packed ready for shipment," within the meaning of section 619, at the time they leave the factory or not until they are packed in the smaller quantity to fill the customer's order?

Answer: Inasmuch as the tax becomes due upon the sale of a taxable article and is measured by the selling price thereof, the provisions of section 619 prescribing the basis for determining such price in respect of the charges specified therein must be considered as having some relation to, or being connected with, the sale of the article. Taxable articles are frequently shipped by a manufacturer from a factory to a warehouse in bulk or in larger quantities than are normally sold to customers. These shipments are made solely for the benefit or convenience of the manufacturer before the sale is made. It is the opinion of this office that the term "packed ready for shipment," embodied in section 619, means the condition which exists when an article taxable under the law is inclosed in a covering or container ready for delivery to a customer upon a *bona fide* sale thereof made by the manufacturer, producer, or importer.

Question (2): A manufacturer makes no sales from the factory, all deliveries being made from branch warehouses in various cities, the price to the customer being the same at all the warehouses. May he exclude the freight charges incurred in shipping his products to the branch warehouse?

Answer: A distinction should be drawn in considering the exclusion of freight charges from the selling price between shipments of goods for the sole benefit and convenience of the manufacturer and other shipments constituting the delivery of articles in connection with their sale. Only such charges as are connected with the delivery of articles to a customer pursuant to a sale are to be excluded. Freight charges incurred in moving goods from a factory to a warehouse before a sale is made pertain more closely to expenses attributable to the manufacturer than to deliveries made upon a sale to a customer. Under this rule freight charges incurred in shipping products from a factory to a warehouse before a sale is made may not be excluded.

Question (3): A manufacturer has warehouses in various cities. Having a surplus stock in one warehouse, he reships to another warehouse to increase a depleted stock. May the freight charges so incurred be excluded?

Answer: For the reasons indicated in the answer to question (2), freight charges incurred by a manufacturer in reshipping goods from one of his warehouses to another before a sale of the articles is made may not be excluded.

Question (4): A manufacturer has a local warehouse in the city where the factory is located, the warehouse being some distance from the factory. May the expense of delivery to the warehouse be ex-

cluded (*a*) if an outside transfer company is employed, and (*b*) if the manufacturer maintains his own trucks for this specific purpose?

Answer: It seems immaterial to this office, in considering the exclusion of an expense incurred for transportation or delivery, whether such expense represents a specific charge made by a transfer company or whether the expense arises from the use of trucks maintained by the manufacturer in accomplishing the same purpose. In either event, if the delivery is made in completion of a sale to a customer, the item represents the cost or charge for transportation or delivery such as are to be excluded from the selling price under the law. If, however, the delivery is solely for the benefit or convenience of the manufacturer, such cost may not be excluded.

Question (5): A manufacturer receives an order from a customer in another city. His warehouse near the customer has not enough goods on hand to fill the order. Part of the goods ordered is shipped from the factory and part from the warehouse. What freight or transportation charges may be excluded?

Answer: Bearing in mind that the test of exclusion is whether or not the shipping cost is incurred in connection with the movement of goods in completion of a *bona fide* sale to a customer, it follows that the freight or transportation charges to be excluded in the example given are only those which are actually incurred in the shipment of the goods to the customer, irrespective of whether the shipment is made from the factory, from the warehouse, or in part from both.

Question (6): If the transportation cost from factory to warehouse is to be excluded, does the statute contemplate the exclusion of other costs incurred after the goods are packed ready for shipment, namely, insurance at the warehouse, handling and other expenses at the warehouse, etc.?

Answer: The items of "transportation, delivery, insurance, installation, or other charge" are evidently used in section 619 as belonging to the same general class of deductions. Under the rule of construction of statutes *noscitur ex sociis*, all the items must therefore be treated alike. Certainly the items of transportation, delivery, and installation have relation to events occurring after the goods leave the factory or the warehouse. A manufacturer may protect himself from loss at factory or warehouse by insurance and inevitably incurs expense for handling goods at both places. But, as viewed by this office, those items may be excluded only when connected with a sale and may not be excluded when incurred by the manufacturer for his own use or benefit before a sale is made. For example, the cost of insuring goods at the factory or warehouse is attributable to the manufacturer and should be reflected in the selling price. The cost of insuring goods after a sale is made and while en route to a customer forms no part of the selling price and may properly be excluded in determining the amount of tax due.

Question (7): Where the Commissioner, for the purpose of computing tax, determines the fair market price of a taxpayer's product under the authority granted him by section 619(b) of the Revenue Act of 1932, may any exclusion be allowed from such fair market price for transportation charges or any other of the items enumerated in section 619(a)?

Answer: There is a close relation between the terms of section 619 (a) and (b) of the law. Under (a) the Commissioner is authorized to determine the selling price by including or excluding certain specified items. Under (b) the Commissioner is authorized to determine the fair market price in transactions where the prices at which articles are sold are below the normal selling prices.

In making a determination of fair market price under section 619(b), the Commissioner must necessarily take into consideration all elements, including the same items which would be included or excluded under authority of section 619(a), but once the fair market price under (b) is finally determined, the tax must be based on that price and the statute does not contemplate any further adjustments.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

SECTION 630 OF THE REVENUE ACT OF 1932, AS ADDED BY SECTION 5 OF THE ACT OF JUNE 16, 1933 (48 STAT., 254), AND AS AMENDED BY SECTION 705 OF THE REVENUE ACT OF 1938.—EXEMPTION FROM TAX OF CERTAIN SUPPLIES FOR VESSELS.

REGULATIONS 44, ARTICLE 28: Exemption of certain supplies for certain vessels. (Also Article 76½, Regulations 46.) 1939-14-9777 S. T. 879

Foreign countries which allow, and those which do not allow, privileges, with respect to exemption from excise tax, which are substantially reciprocal to those specified in section 630 of the Revenue Act of 1932, as amended, on articles sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on civil aircraft.

Advice is requested as to the foreign countries which either allow or do not allow substantially reciprocal privileges with respect to the exemption from excise tax provided in section 630 of the Revenue Act of 1932, as added by section 5 of the Act of June 16, 1933 (48 Stat., 254), and as amended by section 705 of the Revenue Act of 1938, on articles sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on civil aircraft.

Section 630 of the Revenue Act of 1932, as amended, provides 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 or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this title, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 601(b). The term "vessels" as used in this section includes civil aircraft employed in foreign trade or trade between the United States and any of its possessions, and the term "vessels of war of the United States or of any foreign nation" includes aircraft owned by the United States or by any foreign nation and constituting a part of the armed forces thereof. The privileges granted under this section in respect of civil aircraft employed in foreign trade or trade between the United States and any of its possessions, in respect of aircraft registered in a foreign country,

shall be allowed only if the Secretary of the Treasury has been advised by the Secretary of Commerce that he has found that such foreign country allows, or will allow, substantially reciprocal privileges in respect of aircraft registered in the United States. If the Secretary of the Treasury is advised by the Secretary of Commerce that he has found that a foreign country has discontinued or will discontinue the allowance of such privileges, the privileges granted under this section shall not apply thereafter in respect of civil aircraft registered in that foreign country and employed in foreign trade or trade between the United States and any of its possessions.

The Secretary of Commerce has advised the Secretary of the Treasury that the following foreign countries allow privileges which are substantially reciprocal to those specified in section 630 of the Revenue Act of 1932, as amended, with respect to tax exemption on articles sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on civil aircraft: Belgium, Canada, Chile, Colombia, Denmark, Eire, France, Germany, Netherlands, Netherlands Indies, New Zealand, Norway, Sweden, Switzerland, United Kingdom, Uruguay; and that the following foreign countries do not allow such reciprocal tax exemption privileges: Argentina, Australia, Brazil, Cuba, Italy, Mexico, Panama.

Exemption under section 630, as amended, will be allowed in respect of aircraft registered in the foreign countries mentioned hereinbefore which allow substantially reciprocal tax privileges so long as they continue to allow such privileges, but only upon compliance with the provisions of article 28 of Regulations 44 (1934), as amended by Treasury Decision 4604 (C. B. XIV–2, 376 (1935)) and Treasury Decision 4833 (C. B. 1938–2, 379), and article 76½ of Regulations 46 (1932), as added by Treasury Decision 4387 (C. B. XII–2, 347 (1933)) and as amended by Treasury Decision 4605 (C. B. XIV–2, 388 (1935)) and Treasury Decision 4853 (C. B. 1938–2, 383).

TITLE V.—MISCELLANEOUS TAXES. (1932)

SECTION 741.—LEASES OF SAFE DEPOSIT BOXES.

REGULATIONS 42. 1939–18–9818
S. T. 880

Federal credit unions are exempt from the tax imposed by section 741 of the Revenue Act of 1932 on the amount paid for the use of a safe deposit box.

Advice is requested whether Federal credit unions are exempt from the tax imposed by section 741 of the Revenue Act of 1932 on the amount paid for the use of a safe deposit box.

Section 741(a) of the Revenue Act of 1932 imposes a tax equivalent to 10 per cent of the amount collected for the use of any safe deposit box, such tax to be paid by the person paying for the use of the box.

Section 18 of the Federal Credit Union Act, approved June 26, 1934 (48 Stat., 1216), as amended by section 4 of the Act of December 6, 1937 (51 Stat., 4), provides in part as follows:

SEC. 18. The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. * * *

In view of the foregoing provisions of the Federal Credit Union Act, as amended, it is held that those credit unions which are organized and operated under the terms of that law are exempt from the tax imposed by section 741 of the Revenue Act of 1932 on the amount paid for the use of a safe deposit box.

INTERNAL REVENUE CODE.

CHAPTER 11.—DOCUMENTS, OTHER INSTRUMENTS, AND PLAYING CARDS.

SECTION 1802.—CAPITAL STOCK (AND SIMILAR INTERESTS).

REGULATIONS 71 (1932), ARTICLE 35: Sales or transfers not subject to tax. 1939–11–9755 T. D. 4888

Regulations 71, relating to stamp taxes imposed by the Internal Revenue Code.—Article 35, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 71, approved July 16, 1932, as amended, but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [page 396, this Bulletin], under the authority contained in section 3791 of the Internal Revenue Code, are amended as follows:

Subparagraph (*v*) as added to article 35 by Treasury Decision 4824, approved July 5, 1938 [C. B. 1938–2, 405], is changed to read as follows:

(*v*) (1) The delivery or transfer after February 10, 1939, of shares or certificates from the owner thereof to a custodian, if under a written agreement between the owner and the custodian, the shares or certificates so delivered or transferred are to be held or disposed of by such custodian for, and subject at all times to the instructions of, the owner; also from such custodian to such owner.

(2) The delivery or transfer after February 10, 1939, from such custodian to a registered nominee of such custodian, or from the owner direct to such registered nominee, or from one such nominee to another such nominee, if the shares or certificates continue to be held by the nominee for the same purpose for which they would be held if retained by such custodian; also from such nominee to such custodian or the owner. No exemption shall be granted unless the nominee is registered in the manner provided for the registration of nominees of persons conducting a stock brokerage business as specified in subparagraph (*h*) added to article 126 by Treasury Decision 4701 [C. B. XV–2, 362 (1936)].

(3) The delivery or transfer after February 10, 1939, of shares or certificates from a custodian of the owner to another custodian of the owner, or from the registered nominee of the first custodian to the second custodian or the registered nominee of the latter, provided that on the facts of the case the transfer would have been exempt under (1) or (2) if made by the owner direct to the second custodian or the registered nominee of the latter.

(4) The exemptions specified in (1), (2), and (3) shall not be granted in any case unless the delivery or transfer is accompanied by a certificate, signed by the custodian, in substantially the following form:

> "We hereby certify that the transfer of the attached shares is exempt from the transfer tax under the provisions of section 1802 of the Internal Revenue Code, that evidence in proof of the exemption is maintained by us and is available for inspection by internal revenue officers.
>
> ---
> Signature of Custodian."

(5) The custodian contemplated by this subparagraph (*v*) is a mere custodian and does not include a trustee. A mere custodian is a person to whom there are delivered or transferred shares or certificates of stock to be held or disposed of by the custodian for, and subject at all times to the instructions of, the owner and not otherwise.

This Treasury decision is issued under authority contained in section 3791 of the Internal Revenue Code.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 9, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register March 9, 1939, 12.57 p. m.)

TITLE VIII.—STAMP TAXES. (1926 ACT)

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. 1939–21–9846 S. T. 881

An oil and gas lease for an indefinite period and a "mineral deed," both covering land in Illinois, constitute conveyances of realty subject to stamp tax.

An instrument designated "Assignment and conveyance of oil and gas royalty," which conveys a royalty interest in an oil and gas lease covering lands in Arizona, Nebraska, and South Dakota, and also an interest in all of the oil and gas in or under such lands, constitutes a conveyance of realty subject to stamp tax.

Advice is requested whether an oil and gas lease for an indefinite period and a "mineral deed," both covering land in Illinois, and an instrument, designated "Assignment and conveyance of oil and gas royalty," which conveys a royalty interest in an oil and gas lease covering lands in Arizona, Nebraska, and South Dakota, and also an interest in all of the oil and gas in or under such lands, constitute conveyances of realty subject to stamp tax under Schedule A–8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932.

That law imposes a stamp tax on any "* * * Deed, instrument, or writing * * * whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers * * * when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 * * *." What constitutes "lands, tenements, or other realty" is determinable by the law of the State in which the property is situated. (Article 84, Regulations 71.)

Under the terms of the oil and gas lease covering lands in Illinois, the lessor "granted, demised, leased and let" unto the lessee certain land for the sole purpose of mining and operating for oil and gas and laying pipe lines for a term of 10 years, and as long thereafter as oil or gas is produced from the land by the lessee. The lessor receives a specified portion of the oil and gas produced. Under the "mineral deed" the grantor conveys to the grantee forever an undivided "interest in and to all of the oil and gas, together with the right of ingress, egress and regress for the full development of the premises herein conveyed, in, under and upon" certain land situated in Illinois, subject to an existing oil and gas lease covering the land. The grantor grants and conveys to the grantee, his heirs, and assigns "the right to collect and receive" the royalties payable under the lease.

In *Guffey* v. *James A. Smith* (237 U. S., 101 (1915)), which was a suit in equity brought by the holders of an oil and gas lease covering a tract of land in Illinois to enjoin mining operations under a later and similar lease on the same property, the court used the following language on pages 112 and 113:

It is settled by the decisions of the Supreme Court of Illinois that an oil and gas lease like that of the complainants passes to the lessee, his heirs and

assigns, a present vested right—"a freehold interest"—in the premises, that this interest is taxable as real property, and that the clause giving the lessee an option to surrender the lease at any time is valid, does not create a tenancy at will or give the lesser an option to compel a surrender, and does not make the lease void as wanting in mutuality. (*Bruner* v. *Hicks*, 230 Illinois, 536, 540, 542; *Watford Oil & Gas Co.* v. *Shipman*, 233 Illinois, 9, 13, 14; *Poe* v. *Ulrey*, id., 55, 62, 64; *Ulrey* v. *Keith*, 237 Illinois, 284, 298; *People* v. *Bell*, id., 332, 339; *Daughetee* v. *Ohio Oil Co.*, 263 Illinois, 518, 524.) * * *

Since the court had before it in that case an oil and gas lease covering a period of five years from the date of its execution "and as long thereafter as oil or gas or either of them is produced" from the premises, and since all the Illinois cases cited concern oil and gas leases with "thereafter" clauses, the above-quoted language must be interpreted as relating only to leases with similar clauses.

The reason for holding an oil and gas lease with a "thereafter" clause to be "a freehold interest" is set forth by the Supreme Court of Illinois in *Transcontinental Oil Co.* v. *Emmerson* (298 Ill., 394, 131 N. E., 645) wherein that court used the following language:

> We have held * * * in accordance with what we regard as the better reason as well as the weight of authority, that an instrument of the character of that in question here [containing a "thereafter" clause], which is a form of oil and gas lease in common use in this State, conveys a freehold interest in the real estate to which it applies, and is, in effect, a sale of a part of the land. Oil and gas in the earth can not be the subject of an ownership distinct from the soil. They belong to the owner of the land only so long as they remain under the land, and his grant of them to another is a grant only of such oil and gas as the grantee may find, and no title to it vests in the grantee until it is actually found. The conveyance, however, of the right to enter upon the land for the purpose of prospecting and operating for oil and gas, laying pipe lines, and building powers, stations, and structures to produce, save, and care for the products is a conveyance of an interest in the land itself, which, if of indefinite duration, is a freehold estate in the land. * * *

It follows that in Illinois an oil or gas lease with a "thereafter" clause, creating an interest in land of indefinite duration, conveys a freehold estate in land. A mineral deed like that in the instant case covering property located in that State also creates a freehold interest in the land since it grants a permanent right of entry upon the land for the purpose of prospecting and operating for oil and gas, a right not ordinarily subject to forfeiture. Such a deed, even though it is subject to a prior oil and gas lease for a term of years, or one with a "thereafter" clause, conveys the reversionary interest of the lessor (grantor), and also grants the right to unaccrued royalties during the remaining term of the lease. Hence, it is a conveyance of realty (Mills and Willingham, Oil and Gas, section 138.)

Under an instrument covering lands in Arizona, Nebraska, and South Dakota, designated "Assignment and conveyance of oil and gas royalty," the grantor "quit-claimed, granted, bargained, sold, conveyed and set over unto" the grantee, his heirs and assigns forever, an undivided interest in all of the rents and royalties payable under an existing oil and gas lease, or which became payable under any subsequent lease covering such lands. The grantor also conveyed to the grantee and his heirs and assigns forever an undivided interest in "all of the oil, gas, coal and other minerals now, or at any time hereafter, lying in or under" the foregoing lands.

The instrument in question is not merely a conveyance of a royalty interest. By it the grantor also conveys to the grantee an "undivided interest in all of the oil, gas, coal and other minerals" in or under

the particular tracts of land. The highest courts of Arizona, Nebraska, and South Dakota have not as yet had occasion to pass upon the nature of the interest conveyed by such an instrument. However, it is the well-settled general rule that a deed which conveys an interest in fee in minerals in place is a conveyance of real estate. (*Dabney-Johnston Oil Corporation* v. *Walden*, 4 Calif. (2d), 637, 52 P. (2d), 237; *In re Colby*, 184 Iowa, 1104, 169 N. W., 443; *Richards* v. *Shearer*, 145 Kansas, 88, 64 P. (2d), 56; *Beulah Coal Mining Co.* v. *Heihn et ux.*, 46 N. D., 646, 180 N. W., 787; *Cuff* v. *Koslosky*, 165 Okla., 135, 25 P. (2d), 290; *Stephens County et al.* v. *Mid-Kansas Oil & Gas Co.*, 113 Texas, 160, 254 S. W., 290; *Summers*, *Oil & Gas* (1938), sections 131, 133, 600–606.) (See a so section 76–101, chapter 76, Compiled Statutes of Nebraska (1929), defining the term "real estate"; sections 256 and 257, Compiled Laws of South Dakota (1929), defining the terms "real property" and "land"; and sections 3040 and 3067, Revised Code of Arizona (1928), relating to the terms "real property" and "real estate.")

In view of the foregoing, it is held that the oil and gas lease and "mineral deed," both covering land in Illinois, and the instrument designated "Assignment and conveyance of oil and gas royalty," covering lands in Arizona, Nebraska, and South Dakota, constitute conveyances of realty subject to stamp tax under Schedule A–8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932.

TITLE 18 OF THE UNITED STATES CODE.

SECTION 261 (CRIMINAL CODE, SECTION 147.—"OBLIGATION OR OTHER SECURITY OF THE UNITED STATES" DEFINED. ALSO SECTION 264 (CRIMINAL CODE, SECTION 150).

1939–22–9854
S. T. 882

The reproduction of canceled or uncanceled United States revenue stamps, in whole or in part, by photographic or photostatic process is prohibited by section 150 of the Criminal Code, and is not permissible under the Act of January 27, 1938 (52 Stat., 6).

Advice is requested whether it is permissible to reproduce canceled or uncanceled United States revenue stamps by photographic or photostatic process.

Section 264 of Title 18 of the United States Code (section 150 of the Criminal Code) provides that—

* * * whoever shall print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making, or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security [obligation or other security of the United States] or any part thereof * * * shall be fined not more than $5,000, or imprisoned not more than 15 years, or both.

Section 261 of Title 18 of the United States Code (section 147 of the Criminal Code) defines the term "obligation or other security of the United States" as follows:

The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, * * * stamps and other representatives of value, * * * which have been or may be issued under any Act of Congress.

Section 3 of the Act of January 27, 1938 (52 Stat., 6), amends section 147 of the Criminal Code and provides as follows:

* * * Section 147 of the Criminal Code is hereby amended by striking out the period at the end thereof and adding a comma and the following: "and canceled United States stamps."

The effect of the foregoing amendment is to make canceled United States revenue stamps obligations of the United States.

The Attorney General has held that the word "stamps," as used in section 261, supra (section 147 of the Criminal Code, prior to the amendment above indicated), includes internal revenue documentary stamps. (14 Opin. Atty. Genl., 528.) Under that opinion and for the purposes of the Act, a revenue stamp is an obligation or other security of the United States, and since the effective date of the Act of January 27, 1938, supra, both canceled and uncanceled Federal revenue stamps are obligations of the United States.

Section 2 of the Act of January 27, 1938, amends the Criminal Code to permit the *printing or publishing* for philatelic purposes—

of black and white illustrations of—

"(1) foreign revenue stamps if from plates so defaced as to indicate that the illustrations are not adapted or intended for use as stamps;

"(2) foreign postage stamps; or

"(3) such portion of the border of a stamp of the United States as may be necessary to show minor distinctive features of the stamp so illustrated, but all such illustrations shall be at least four times as large as the portion of the original United States stamp so illustrated."

The question arises whether the word "printing," as used in section 2 of the Act of January 27, 1938, may be construed as including "photographing" or "photostating." The wording of section 150 of the Criminal Code making it an offense to reproduce obligations of the United States is comprehensive in its scope. It prohibits "printing, photographing, making, or executing" any such obligation. The wording of the Act of January 27, 1938, is much less comprehensive. It permits the "printing, publishing, or importation" of the black and white illustrations specified in section 2 without constituting a violation of the Criminal Code. In that Act the word "photographing" is absent from the specification of acts not subject to the terms of the said Code. In the case of *Wood* v. *Abbott* (30 Fed. Cases, 424) the question was considered whether a picture made by the art of photography was a print, cut, or engraving, within the meaning of the Copyright Act of February 3, 1831 (4 Stat., 436). In referring to the photographic process, the court said:

* * * It is an entirely original and independent method of producing and multiplying pictures—an art, not of printing or engraving, but of securing the delineation of pictures by light operating on sensitive surfaces. * * *

In the reproduction of pictures or engravings by the process of printing, the art of photography is sometimes used as one function of such process. The photograph is merely a single step in that process. This incidental use of photography is not deemed to be sufficient to constitute a violation of section 150 of the Criminal Code.

It is held that the reproduction of canceled or uncanceled United States revenue stamps, in whole or in part, by the photographic or photostatic process (except as used incidentally as a step in the reproduction of stamps by printing) is prohibited by section 150 of the Criminal Code and is not permissible under the provisions of the Act of January 27, 1938.

FEDERAL FIREARMS ACT. (1938)

1939-19-9829
T. D. 4898

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 315.

Regulations relating to the licensing under the Federal Firearms Act of manufacturers of, and dealers in, firearms or ammunition.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 1, 1939.

To Collectors of Internal Revenue and Others Concerned:

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SUBPART A.—FEDERAL FIREARMS ACT.

SEC. 315.0 *Introductory.*—The Federal Firearms Act (52 Stat., 1250; 15 U. S. C., Sup. IV, 901-909), provides:

* * * That as used in this Act—

(1) The term "person" includes an individual, partnership, association, or corporation.

(2) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession (including the Philippine Islands but not including the Canal Zone), or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession (including the Philippine Islands but not including the Canal Zone), or the District of Columbia, but through any place outside thereof; or within any Territory or possession or the District of Columbia.

(3) The term "firearm" means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon.

(4) The term "manufacturer" means any person engaged in the manufacture or importation of firearms, or ammunition or cartridge cases, primers, bullets, or propellent powder for purposes of sale or distribution; and the term "licensed manufacturer" means any such person licensed under the provisions of this Act.

(5) The term "dealer" means any person engaged in the business of selling firearms or ammunition or cartridge cases, primers, bullets or propellent powder, at wholesale or retail, or any person engaged in the business of repairing such firearms or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breach mechanisms to firearms, and the term "licensed dealer" means any such person licensed under the provisions of this Act.

(6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

(7) The term "fugitive from justice" means any person who has fled from any State, Territory, the District of Columbia, or possession of the United States to avoid prosecution for a crime of violence or to avoid giving testimony in any criminal proceeding.

(8) The term "ammunition" shall include all pistol or revolver ammunition except .22-caliber rim-fire ammunition.

SEC. 2. (a) It shall be unlawful for any manufacturer or dealer, except a manufacturer or dealer having a license issued under the provisions of this Act, to transport, ship, or receive any firearm or ammunition in interstate or foreign commerce.

(b) It shall be unlawful for any person to receive any firearm or ammunition transported or shipped in interstate or foreign commerce in violation of subdivision (a) of this section, knowing or having reasonable cause to believe such firearms or ammunition to have been transported or shipped in violation of subdivision (a) of this section.

(c) It shall be unlawful for any licensed manufacturer or dealer to transport or ship any firearm in interstate or foreign commerce to any person other than a licensed manufacturer or dealer in any State the laws of which require that a license be obtained for the purchase of such firearm, unless such license is exhibited to such manufacturer or dealer by the prospective purchaser.

(d) It shall be unlawful for any person to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is under indictment or has been convicted in any court of the United States, the several States, Territories, possessions (including the Philippine Islands), or the District of Columbia of a crime of violence or is a fugutive[1] from justice.

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugutive[1] from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugutive[1] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

(g) It shall be unlawful for any person to transport or ship or cause to be transported or shipped in interstate or foreign commerce any stolen firearm or ammunition, knowing, or having reasonable cause to believe, same to have been stolen.

(h) It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any firearm or ammunition or to pledge or accept as security for a loan any firearm or ammunition moving in or which is a part of interstate or foreign commerce, and which while so moving or constituting such part has been stolen, knowing, or having reasonable cause to believe the same to have been stolen.

[1] So in original.

(i) It shall be unlawful for any person to transport, ship, or knowingly receive in interstate or foreign commerce any firearm from which the manufacturer's serial number has been removed, obliterated, or altered, and the possession of any such firearm shall be presumptive evidence that such firearm was transported, shipped, or received, as the case may be, by the possessor in violation of this Act.

SEC. 3. (a) Any manufacturer or dealer desiring a license to transport, ship, or receive firearms or ammunition in interstate or foreign commerce shall make application to the Secretary of the Treasury, who shall prescribe by rules and regulations the information to be contained in such application. The applicant shall, if a manufacturer, pay a fee of $25 per annum and, if a dealer, shall pay a fee of $1 per annum.

(b) Upon payment of the prescribed fee, the Secretary of the Treasury shall issue to such applicant a license which shall entitle the licensee to transport, ship, and receive firearms and ammunition in interstate and foreign commerce unless and until the license is suspended or revoked in accordance with the provisions of this Act: *Provided*, That no license shall be issued to any applicant within two years after the revocation of a previous license.

(c) Whenever any licensee is convicted of a violation of any of the provisions of this Act, it shall be the duty of the clerk of the court to notify the Secretary of the Treasury within 48 hours after such conviction and said Secretary shall revoke such license: *Provided*, That in the case of appeal from such conviction the licensee may furnish a bond in the amount of $1,000, and upon receipt of such bond acceptable to the Secretary of the Treasury he may permit the licensee to continue business during the period of the appeal, or should the licensee refuse or neglect to furnish such bond, the Secretary of the Treasury shall suspend such license until he is notified by the clerk of the court of last appeal as to the final disposition of the case.

(d) Licensed dealers shall maintain such permanent records of importation, shipment, and other disposal of firearms and ammunition as the Secretary of the Treasury shall prescribe.

SEC. 4. The provisions of this Act shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm, or ammunition, sold or shipped to, or issued for the use of, (1) the United States or any department, independent establishment, or agency thereof; (2) any State, Territory, or possession, or the District of Columbia, or any department, independent establishment, agency, or any political subdivision thereof; (3) any duly commissioned officer or agent of the United States, a State, Territory, or possession, or the District of Columbia, or any political subdivision thereof; (4) or to any bank, public carrier, express, or armored-truck company organized and operating in good faith for the transportation of money and valuables; (5) or to any research laboratory designated by the Secretary of the Treasury: *Provided*, That such bank, public carriers, express, and armored-truck companies are granted exemption by the Secretary of the Treasury; nor to the transportation, shipment, or receipt of any antique or unserviceable firearms, or ammunition, possessed and held as curios or museum pieces: *Provided*, That nothing herein contained shall be construed to prevent shipments of firearms and ammunition to institutions, organizations, or persons to whom such firearms and ammunition may be lawfully delivered by the Secretary of War, nor to prevent the transportation of such firearms and ammunition so delivered by their lawful possessors while they are engaged in military training or in competitions.

SEC. 5. Any person violating any of the provisions of this Act or any rules and regulations promulgated hereunder, or who makes any statement in applying for the license or exemption provided for in this Act, knowing such statement to be false, shall, upon conviction thereof, be fined not more than $2,000, or imprisoned for not more than five years, or both.

SEC. 6. This Act shall take effect 30 days after its enactment.

SEC. 7. The Secretary of the Treasury may prescribe such rules and regulations as he deems necessary to carry out the provisions of this Act.

SEC. 8. Should any section or subsection of this Act be declared unconstitutional, the remaining portion of the Act shall remain in full force and effect.

SEC. 9. This Act may be cited as the Federal Firearms Act.

The following regulations are hereby prescribed under the Federal Firearms Act, relative to the licensing of manufacturers of, and dealers in, firearms or ammunition; to the records to be maintained by licensed manufacturers and dealers; and to transactions and dealings in firearms or ammunition specifically exempted from the provisions of the Act:

SUBPART B.—DEFINITIONS.

SEC. 315.1. *Definitions.*—As used in these regulations—

(*a*) The term "Act" means the Federal Firearms Act.

(*b*) The term "firearm" means (1) any weapon, by whatever name known, which is designed to expel a projectile or projectiles by action of an explosive, (2) any part or parts of such weapon, and (3) a firearm muffler or firearm silencer.

(*c*) The term "ammunition" includes all ammunition for firearms, including cartridge cases, primers, bullets, and propellent powder, but does not include .22-caliber rim-fire ammunition.

(*d*) The term "interstate or foreign commerce" means—

(1) Commerce between any State, Territory, or possession of the United States (including the Philippine Islands, but not including the Canal Zone), or the District of Columbia, and any place outside thereof;

(2) Commerce between points within the same State, Territory, or possession of the United States (including the Philippine Islands, but not including the Canal Zone), or the District of Columbia, but through any place outside thereof; or

(3) Commerce within any Territory, or possession of the United States (including the Canal Zone, but not including the Philippine Islands), or the District of Columbia.

(*e*) The term "person" includes an individual, partnership, association, or corporation.

(*f*) The term "manufacturer" means any person engaged in the manufacture or importation of firearms, or ammunition, for purposes of sale or distribution.

(*g*) The term "licensed manufacturer" means a manufacturer licensed under section 3 of the Act.

(*h*) The term "dealer" means any person engaged in the business of selling firearms or ammunition at wholesale or retail, or any person engaged in the business of repairing such firearms or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breech mechanisms to firearms.

(*i*) The term "licensed dealer" means a dealer licensed under section 3 of the Act.

(*j*) The term "license" means a license issued under authority of section 3(b) of the Act.

(*k*) The term "license fee" means the annual fee payable by a manufacturer of, or dealer in, firearms or ammunition.

(*l*) The term "Secretary" means the Secretary of the Treasury.

(*m*) The term "Commissioner" means the Commissioner of Internal Revenue.

(*n*) The term "collector" means collector of internal revenue.

(*o*) The terms "includes" and "including" when used in a definition or statement in these regulations shall not be deemed to exclude other things otherwise within the scope thereof.

SUBPART C.—LICENSES.

SEC. 315.2 *Persons required to procure licenses.*—Under section 2(a) of the Act, it is unlawful for any manufacturer or dealer, except a manufacturer or dealer having a license issued under the provisions of the Act, to transport, ship, or receive any firearms or ammunition in interstate or foreign commerce. Therefore, every manufacturer or dealer within the meaning of the Act and these regulations (see section 315.1 (*f*) and (*h*)) must first procure a license under section 3 of the Act before he may, on or after July 30, 1938, lawfully

transport, ship, or receive any firearms or ammunition in interstate or foreign commerce.

It is not necessary in any case for a person licensed as a manufacturer also to procure a license as a dealer. The license as manufacturer entitles the licensee, within the limitations of the Act, to transport, ship, or receive, in interstate or foreign commerce, firearms or ammunition, whether of his own production or produced by another. However, a person required to be licensed as a manufacturer does not comply with the provisions of the Act by procuring a license as dealer.

A person engaged in the importation of firearms or ammunition for sale or distribution is required to be licensed as a manufacturer even though he may not perform any manufacturing operations.

A person engaged in the business of repairing firearms, or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breach mechanisms to firearms, if not otherwise required to be licensed as a manufacturer, must be licensed as a dealer before he may, on or after July 30, 1938, lawfully transport, ship, or receive any firearm, including any part of a weapon (see section 315.1 (*b*)), or ammunition in interstate or foreign commerce.

SEC. 315.3. *Persons not entitled to a license.*—A license shall not be issued to any person who is under indictment for, or has been convicted of, a "crime of violence" as defined in section 1(6) of the Act, or who is a "fugitive from justice" as defined in section 1(7) of the Act. Nor shall a license be issued to any applicant within two years after the revocation of a previous license.

SEC. 315.4. *Application for a license.*—The application for a license shall be made on Form 7 (Firearms), copies of which may be procured from collectors. The application shall be filed with the collector for the district within which the principal place of business of the applicant is located. The application must be under oath and contain all the information required by the form.

SEC. 315.5. *License fees.*—In the case of a manufacturer the license fee is $25 per annum, and in the case of a dealer the license fee is $1 per annum.

SEC. 315.6. *Issuance of license.*—If an application on Form 7 (Firearms) has been filed with the collector, properly executed by a person lawfully entitled to a license and accompanied by the required license fee, there shall be issued to the applicant a license on Form 8 (Firearms).

SEC. 315.7. *Scope and duration of license.*—The license shall entitle the person to whom issued to transport, ship, or receive firearms or ammunition in interstate or foreign commerce for a period of one year from the date of issuance, subject, however, to suspension or revocation of the license at any time if the licensee is convicted of violation of any of the provisions of the Act. (See section 315.9.)

A license shall not be issued in any case for a period of less than one year. No refund of any part of the amount paid as a license fee shall be made where, for any reason, a licensee discontinues operations prior to the expiration of the period covered by the license. Nor shall any refund be made if the license is suspended or revoked because of violation by the licensee of any provision of the Act.

When a license has expired, or is about to expire, a new license, if desired, may be obtained by filing with the collector an application on Form 7 (Firearms), accompanied by the required license fee, provided the applicant is otherwise entitled to a license (see section 315.3).

The license under section 3 of the Act is not assignable or transferable under any circumstances and is valid only with respect to the operations of the person to whom issued.

The license applies to the operations of the licensee and not to any particular place at which business is carried on. Accordingly, only one license is required, regardless of the number of places at which the licensee operates. If the business is carried on at more than one location, the license shall be held available for inspection at the principal place of business and an appropriate record maintained at all other locations showing where the license is so held.

The license confers no right or privilege to conduct business contrary to State or other law. The holder of a license is not, by reason of such license, immune from punishment for dealing in firearms or ammunition in violation of the provisions of any State or other law. Similarly, compliance with the provisions of any other law affords no immunity under the Act. (See section 315.12.)

SEC. 315.8. *Removal of licensee.*—A licensee may remove his business to a new location without procuring a new license. However, in every case, whether or not the removal is from one district to another, prompt notification of the new location of the business must be given to—

(1) the collector for the district where the license was issued;

(2) the collector for the district from which or within which the removal is made; and

(3) the collector for the district to which the removal is made.

SEC. 315.9. *Suspension and revocation of license.*—Section 3(c) of the Act provides in part that the license of any person convicted of violation of any provision of the Act shall be suspended until final disposition of the case, at which time, if the conviction has not been set aside, the license shall be revoked. Section 3(c) further provides that a licensee convicted of violation of any provision of the Act may be permitted to continue in business during the pendency of an appeal from such conviction upon furnishing a bond of $1,000 acceptable to the Secretary

Upon receipt by the Secretary of notice of the conviction of a licensee of violation of any provision of the Act, the license of such person shall be immediately suspended in accordance with the provisions of section 3(c) of the Act, and the Commissioner shall immediately notify such person thereof by registered letter addressed to his last known address.

A person whose license is suspended on account of a conviction of violation of any provision of the Act and who desires permission to continue in business during the pendency of an appeal from such conviction shall file an application with the Commissioner for such permission. The application shall be under oath and fully set forth the grounds on which the application is based. The application shall be accompanied by a bond, running to the United States, in the penal sum of $1,000. The condition of the bond shall be that, until final disposition of the appeal, the licensee will comply in every respect with all the provisions of the Act. As soon as possible after the receipt of the application and bond, the Commissioner shall notify the applicant that, by direction of the Secretary, his application has been granted or denied, as the case may be.

An application for permision to continue in business during the pendency of an appeal from a conviction of violation of any provision of the Act shall not be granted if on the facts of the case the applicant would not then be entitled to a license were he applying for a license. (See section 315.3.)

In every case, the suspension of a license shall remain in effect until final action is taken upon the application, if made, for permission to continue in business during the pendency of an appeal from the conviction. If such application is granted, the suspension is set aside until final action upon the appeal from the conviction, at which time the case will be disposed of according to the outcome of the appeal. If the application for permission to continue in business is denied, or if no such application is made, the suspension of the license remains in effect throughout the pendency of the appeal and final action will then be taken in the case as may be required by the outcome of the appeal.

The granting of an application to continue in business during the pendency of an appeal from a conviction of violation of any provision of the Act does not extend the term of the license. If a license expires by lapse of time before the appeal is decided, the licensee must procure a new license if he desires to continue to transport, ship, or receive firearms or ammunition in interstate or foreign commerce. The new license shall stand in place of, and be subject to the same conditions as, the old license, that is, the new license shall be subject to revocation if the conviction is not set aside.

If upon appeal the conviction of a licensee of violation of any provisions of the Act is not set aside, or if no appeal is filed, his license shall be immediately revoked pursuant to the provisions of section 3(c) of the Act, and the Commissioner shall immediately notify such person thereof by registered letter addressed to his last known address.

The forfeiture of a license for violation of any provision of the Act is a separate and distinct penalty in addition to any other penalties which may apply in the case, whether imposed under section 5 of the Act or under any other provision of law.

A person whose license has been revoked for violation of any provision of the Act may, if otherwise entitled to a license (see section 315.3), again be licensed to transport, ship, or receive firearms or ammunition in interstate

or foreign commerce, but not until the expiration of two years from the date of the revocation of the previous license. In such case, the application for the new license shall be filed with the collector in accordance with the provisions of section 315.4.

SUBPART D.—RECORDS.

SEC. 315.10. *Records.*—(*a*) *Manufacturers.*—Each licensed manufacturer shall maintain complete and adequate records of all firearms and ammunition disposed of in the course of his business, including any firearms or ammunition acquired from other manufacturers or dealers. The records shall show and include:

(1) the number of the firearms of each type, together with a full and adequate description thereof, including the serial numbers if such weapons are numbered;

(2) the types, and quantity of each type, of ammunition;

(3) the name and address of each person from whom the firearms or ammunition, if not the manufacturer's own product, was acquired, and the date of acquisition; and

(4) the disposition made of the firearms or ammunition, including the name and principal address of each transferee, the address to which delivered, and date of disposition.

(*b*) *Dealers.*—Each licensed dealer shall maintain complete and adequate records of all firearms acquired or disposed of in the course of his business. The records shall show and include:

(1) the number of the firearms of each type, together with a full and adequate description thereof, including the serial numbers if such weapons are numbered;

(2) the name and address of each person from whom firearms are acquired, and the date of acquisition;

(3) the disposition made of the firearms, including the name and principal address of each transferee, the address to which delivered, and date of disposition.

(*c*) *General.*—The records prescribed by this section shall be in permanent form and shall be retained for a period of not less than six years from the date of the transactions to which the records relate. Such records must be held available for inspection during business hours by any authorized officer or agent of the United States engaged in the performance of his duties under the Act.

SUBPART E.—EXEMPTIONS.

SEC. 315.11. *Exemptions.*—(*a*) *General.*—Under section 4 of the Act, the provisions of the Act do not apply with respect to the transportation, shipment, receipt, or importation of any firearm, or ammunition, sold or shipped to, or issued for the use of—

(1) the United States or any department, independent establishment, or agency thereof;

(2) any State, Territory, or possession, or the District of Columbia, or any department, independent establishment, agency, or any political subdivision thereof;

(3) any duly commissioned officer or agent of the United States, a State, Territory, or possession, or the District of Columbia, or any political subdivision thereof;

(4) any bank, public carrier, express, or armored-truck company organized and operating in good faith for the transportation of money and valuables, provided exemption is granted as prescribed in subdivision (*b*) of this section; and

(5) any research laboratory designated under subdivision (*c*) of this section and granted exemption thereunder.

Section 4 of the Act further exempts from the provisions of the Act—

(6) the transportation, shipment, or receipt of any antique or unserviceable firearms, or ammunition, possessed and held as curios or museum pieces; and

(7) shipment of firearms and ammunition to institutions, organizations, or persons to whom such firearms and ammunition may be lawfully delivered by the Secretary of War, and the transportation of such firearms and ammunition by their lawful possessors while they are engaged in military training or in competitions.

(*b*) *Bank, public carrier, express, or armored-truck company.*—Any bank, public carrier, express, or armored-truck company organized and operating in good faith for the transportation of money and valuables, may procure an exemption under section 4 of the Act upon application to the collector for the district within which the principal place of business is located. Such application shall be submitted under oath and show the character of the business of the applicant and the purposes for which the exemption is requested. If the application and the purposes stated are bona fide, the exemption shall be granted. In all cases, as soon as possible after the receipt of the application, the collector shall notify the applicant by letter that, by direction of the Secretary, the exemption is granted or denied, as the case may be.

(*c*) *Research laboratory.*—A research laboratory desiring to procure an exemption under section 4 of the Act shall file an application with the Commissioner. The application shall be under oath and shall show (1) by whom and the purpose for which the laboratory was organized, (2) the source of the funds expended for the maintenance and operations of the laboratory, (3) the services performed by, and operations of, the laboratory, and (4) the purposes for which the exemption is requested. The Commissioner shall notify the applicant that, by direction of the Secretary, the application is granted, or denied, as the case may be.

SUBPART F.—MISCELLANEOUS PROVISIONS.

SEC. 315.12. *Relation to other provisions of law.*—The provisions of the Act and of these regulations are in addition to, and not in lieu of, any other provision of law, or regulations, respecting the manufacture or importation of, or dealing in, firearms or ammunition.

SEC. 315.13. *Penalties.*—Section 5 of the Act provides certain penalties for violation of the provisions of the Act or these regulations, and for knowingly making any false statement in applying for a license or exemption. With respect to transactions and dealings declared unlawful and in violation of the Act, see section 2 of the Act.

SEC. 315.14. *Effective date.*—These regulations, with the exception of Subpart D which relates to records, shall take effect upon the date approved; Subpart D shall take effect 30 days after the date of approval. Effective as of the date approved, these regulations supersede the provisions of Treasury Decision 4834, approved July 25, 1938 [C. B. 1938–2, 465].

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register May 3, 1939, 12.01 p. m.)

FEDERAL FIREARMS ACT, APPROVED JUNE 30, 1938 (PUBLIC, NO. 785, SEVENTY-FIFTH CONGRESS).

SECTION 2(c)

1939–4–9688
S. T. 878

City ordinances are not "State" laws within the meaning of section 2(c) of the Federal Firearms Act.

Advice is requested whether the words "any State the laws of which require," as used in section 2(c) of the Federal Firearms Act (Public, No. 785, Seventy-fifth Congress), include city ordinances.

Section 2(c) of the Act provides as follows:

It shall be unlawful for any licensed manufacturer or dealer to transport or ship any firearm in interstate or foreign commerce to any person other than a licensed manufacturer or dealer in any State the laws of which require that a license be obtained for the purchase of such firearm, unless such license is exhibited to such manufacturer or dealer by the prospective purchaser.

It is held that the word "State" is used in that section in contradistinction to the words "city," "county," and other "political subdivisions" of a State. This view is supported by the fact that in section 2(c) the word "State" is not used in conjunction with the words "or any political subdivision thereof," as appear in section 4 of the Act. Furthermore, the statute is in effect a penal statute, and should, therefore, be strictly construed. Accordingly, the words "any State the laws of which require," as used in section 2(c), are held to mean only those laws enacted by the State legislature (or by State commissions, etc., which are legislative in their nature), the efficacy of which is, as a general rule, coextensive with the boundaries of the State.

In view of the foregoing, it is held that city ordinances are not "State" laws within the meaning of section 2(c) of the Federal Firearms Act.

NATIONAL FIREARMS ACT. (1934)

SECTION 11.

REGULATIONS 88. 1939-22-9855
Ct. D. 1400

TAXES ON CERTAIN FIREARMS AND MACHINE GUNS—NATIONAL FIREARMS ACT—DECISION OF SUPREME COURT.

TRANSPORTING OF FIREARMS IN INTERSTATE COMMERCE—CONSTITUTIONALITY OF STATUTE.

Section 11 of the National Firearms Act, approved June 26, 1934, which makes it unlawful to transport in interstate commerce any firearm as defined in section 1(a) of the Act without having registered such firearm or without possessing a stamp-affixed order therefor, as provided in sections 5 and 4, respectively, of the Act, does not violate the second amendment dealing with the right to keep and bear arms; nor is the Act unconstitutional as an attempt to usurp the police power reserved to the States.

SUPREME COURT OF THE UNITED STATES.

The United States of America, appellant, v. *Jack Miller and Frank Layton.*
[59 S. Ct., 816.]

Appeal from the District Court of the United States for the Western District of Arkansas.

[May 15, 1939.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the Court.

An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton

"did unlawfully, knowingly, wilfully, and feloniously transport in interstate commerce from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to-wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length, bearing identification number 76230, said defendants, at the time of so transporting said firearm in interstate commerce as aforesaid, not having registered said firearm as required by section 1132d of Title 26, United States Code (Act of June 26, 1934, ch. 737, section 5, 48 Stat., 1237), and not having in their possession a stamp-affixed written order for said firearm as provided by section 1132c, Title 26, United States Code (June 26, 1934, ch. 737, section 4, 48 Stat., 1237), and the regulations issued under authority of the said Act of Congress known as the 'National Firearms Act' approved June 26, 1934, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."[1]

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[1] Act of June 26, 1934 (ch. 757, 48 Stat., 1236–1240, 26 U. S. C. A., section 1132).
That for the purposes of this Act—
(a) The term "firearm" means a shotgun or rifle having a barrel of less than 18 inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition. [The Act of April 10 1936, ch. 169, 49 Stat., 1102, added the words] but does not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel if the caliber of such rifle is .22 or smaller and if its barrel is 16 inches or more in length.
SEC. 3. (a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of the Secretary; and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.
SEC. 4. (a) It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Commissioner. Such order

A duly interposed demurrer alleged: The National Firearms Act is not a revenue measure but an attempt to usurp police power reserved to the States, and is therefore unconstitutional. Also, it offends the inhibition of the second amendment to the Constitution—"A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed."

The district court held that section 11 of the Act violates the second amendment. It accordingly sustained the demurrer and quashed the indictment.

The cause is here by direct appeal.

Considering *Sonzinsky* v. *United States* (1937) (300 U. S., 506, 513) and what was ruled in sundry causes arising under the Harrison Narcotic Act[2] (*United States* v. *Jin Fuey Moy* (1916), 241 U. S., 394; *United States* v. *Doremus* (1919), 249 U. S., 86, 94; *Linder* v. *United States* (1925), 268 U. S., 5; *Alston* v. *United States* (1927), 274 U. S., 289; *Nigro* v. *United States* (1928), 276 U. S., 332) the objection that the Act usurps police power reserved to the States is plainly untenable.

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than 18 inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we can not say that the second amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. (*Aymette* v. *The State*, 2 Humphreys (Tenn.), 154, 158.)

The Constitution as originally adopted granted to the Congress power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the second amendment were made. It must be interpreted and applied with that end in view.

The militia which the States were expected to maintain and train is set in contrast with troops which they were forbidden to keep without the consent of

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shall identify the applicant by such means of identification as may be prescribed by regulations under this Act: *Provided*, That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(c) Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Commissioner. The original thereof with stamps affixed, shall be returned to the applicant.

(d) No person shall transfer a firearm which has previously been transferred on or after the effective date of this Act, unless such person, in addition to complying with subsection (c), transfers therewith the stamp-affixed order provided for in this section for each such prior transfer, in compliance with such regulations as may be prescribed under this Act for proof of payment of all taxes on such firearms.

SEC. 5. (a) Within 60 days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided*, That no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act.

SEC. 6. It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 3 or 4 of this Act.

SEC. 11. It shall be unlawful for any person who is required to register as provided in section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.

SEC. 12. The Commissioner, with the approval of the Secretary, shall prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.

SEC. 14. Any person who violates or fails to comply with any of the requirements of this Act shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.

SEC. 16. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SEC. 18. This Act may be cited as the "National Firearms Act."

[2] Act December 17, 1914 (ch. 1, 38 Stat., 785); February 24, 1919 (ch. 18, 40 Stat., 1057).

Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the militia—civilians primarily, soldiers on occasion.

The signification attributed to the term militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Blackstone's Commentaries, volume 2, chapter 13, page 409 points out "that King Alfred first settled a national militia in this kingdom" and traces the subsequent development and use of such forces.

Adam Smith's Wealth of Nations, Book V, chapter 1, contains an extended account of the militia. It is there said: "Men of republican principles have been jealous of a standing army as dangerous to liberty." "In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force."

"The American Colonies in The 17th Century," Osgood, Volume 1, Chapter XIII, affirms in reference to the early system of defense in New England—

"In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." "The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former." "A year later [1632] it was ordered that any single man who had not furnished himself with arms might be put out to service, and this became a permanent part of the legislation of the colony [Massachusetts]."

Also "Clauses intended to insure the possession of arms and ammunition by all who were subject to military service appear in all the important enactments concerning military affairs. Fines were the penalty for delinquency, whether of towns or individuals. According to the usage of the times, the infantry of Massachusetts consisted of pikemen and musketeers. The law, as enacted in 1649 and thereafter, provided that each of the former should be armed with a pike, corselet, head-piece, sword, and knapsack. The musketeer should carry a 'good fixed musket,' not under bastard musket bore, not less than three feet, nine inches, nor more than four feet three inches in length, a priming wire, scourer, and mould, a sword, rest, bandoleers, one pound of powder, twenty bullets, and two fathoms of match. The law also required that two-thirds of each company should be musketeers."

The General Court of Massachusetts, January session 1784, provided for the organization and government of the militia. It directed that the train band should "contain all able-bodied men, from sixteen to forty years of age, and the alarm list, all other men under sixty years of age, * * *." Also, "That every noncommissioned officer and private soldier of the said militia not under the controul of parents, masters or guardians, and being of sufficient ability therefor in the judgment of the selectmen of the town in which he shall dwell, shall equip himself, and be constantly provided with a good firearm, &c."

By an act passed April 4, 1786, the New York Legislature directed: "That every able-bodied male person, being a citizen of this State, or of any of the United States, and residing in this State (except such persons as are herein after excepted), and who are of the age of sixteen, and under the age of forty-five years, shall, by the captain or commanding officer of the beat in which such citizen shall reside, within four months after the passing of this act, be enrolled in the company of such beat. * * * That every citizen so enrolled and notified, shall, within three months thereafter, provide himself, at his own expense, with a good musket or firelock, a sufficient bayonet and belt, a pouch with a box therein to contain not less than twenty-four cartridges suited to the bore of his musket or firelock, each cartridge containing a proper quantity of powder and ball, two spare flints, a blanket and knapsack; * * *."

The General Assembly of Virginia, October, 1785 (12 Hening's Statutes), declared, "The defense and safety of the Commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty."

It further provided for organization and control of the militia and directed that "All free male persons between the ages of eighteen and fifty years," with certain exceptions, "shall be inrolled or formed into companies." "There shall be a private muster of every company once in two months."

Also that "Every officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o'clock in the forenoon, armed, equipped, and accoutred, as follows: * * * every noncommissioned officer and private with a good, clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket, a good knapsack and canteen, and moreover, each noncommissioned officer and private shall have at every muster one pound of good powder, and four pounds of lead, including twenty blind cartridges; and each serjeant shall have a pair of moulds fit to cast balls for their respective companies, to be purchased by the commanding officer out of the monies arising on delinquencies. *Provided*, That the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements, in lieu thereof. And every of the said officers, noncommissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer. If any private shall make it appear to the satisfaction of the court hereafter to be appointed for trying delinquencies under this act that he is so poor that he can not purchase the arms herein required, such court shall cause them to be purchased out of the money arising from delinquents."

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.

In the margin some of the more important opinions and comments by writers are cited.[8]

We are unable to accept the conclusion of the court below and the challenged judgment must be reversed. The cause will be remanded for further proceedings.

Mr. Justice DOUGLAS took no part in the consideration or decision of this cause.

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[8] Concerning The Militia—*Presser* v. *Illinois* (116 U. S., 252); *Robertson* v. *Baldwin* (165 U. S., 275); *Fife* v. *State* (31 Ark., 455); *Jeffers* v. *Fair* (33 Georgia, 347); *Salina* v. *Blaksley* (72 Kan., 230); *People* v. *Brown* (253 Mich., 537); *Aymette* v. *State* (2 Humphr. (Tenn.), 154); *State* v. *Duke* (42 Texas, 455); *State* v. *Workman* (35 W. Va., 367); Cooley's Constitutional Limitations, volume 1, page 729; Story on The Constitution, 5th Ed., Volume 2, page 646; Encyclopaedia of the Social Sciences, Volume X, pages 471, 474.

DISTILLED SPIRITS.

REGULATIONS 6 (1938), SECTIONS 19, 28, 30(a), AND 44.

1939–14–9774
T. D. 4890

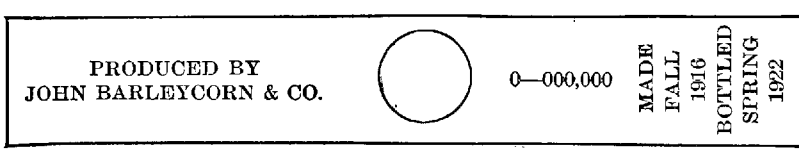
Amending Regulations No. 6.

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

To District Supervisors and Others Concerned:

Sections 19, 28 (third paragraph), and 30(a), of Regulations No. 6, Bottling of Distilled Spirits in Bond, are hereby amended, and section 44 added to the end thereof, to read as follows:

SEC. 19. (*a*) *Overprinting of stamps.*—Bottled-in-bond stamps must be overprinted, such overprinting to be in the blank spaces provided therefor. At such time as the proprietor of the warehouse desires to have stamps overprinted and cut the storekeeper-gauger will deliver the stamps to him. The overprinting of stamps may be done by any printer selected by the proprietor of the warehouse and approved by the supervisor. Overprinting will be done in red ink with not less than 8-point type. The season when the spirits were made and the season when bottled will be overprinted in the blank spaces on the end of the stamp bearing the serial number, except in the case of stamps of "Less than ½ Pint" denomination, which do not have serial numbers, the season when made and the season when bottled will be placed on the right-hand end of the stamp. In the blank space on the other end of the stamp will be placed the name of the actual bona fide distiller, or the name of the individual, firm, partnership, corporation, or association in whose name the spirits were produced and warehoused. Overprinting of the stamp will be in the following form:



(*b*) Stamps for distilled spirits bottled in bond, which the proprietor can not use in the season for which they were overprinted, or on which an error was made in overprinting the season of production or bottling, may be again overprinted. The season when "made" or when "bottled," or both, overprinted on the stamps may be obliterated and the desired seasons of production and bottling substituted. One overprinting only will be permitted after the first or original overprinting. The name of the distiller or any data other than the season of production or bottling may not be changed after the first or original overprinting.

SEC. 28 (third paragraph). The manufacturer's joint of the case shall be secured by adhesive cloth tape or reinforced paper tape, metal fastenings of staples, or stitching wire made of steel, treated to resist rust, and not less than one-half an inch long. The staples or stitches shall be spaced not more than 2 inches apart, shall pass through all the pieces to be fastened, and shall be clinched on the inside.

SEC. 30. (*a*) *Marks and brands.*—On the Government side of cases of distilled spirits bottled in bond there shall be plainly burned, embossed, or printed, in letters and figures not less than one-half of an inch in height, the number and State of the warehouse at which the spirits are bottled, and the quantity and proof of the spirits. There shall also be plainly burned, embossed, printed, or stenciled on the Government side of each case, in letters and figures not less than one-half inch in height, the real name of the actual bona fide distiller or of the individual, firm, partnership, corporation or association in whose

name the spirits were produced and warehoused, the number and location (city or town and State) of the distillery at which the spirits were produced, and the season and year of production and bottling. The serial number of the case and the date of bottling (inspection) shall also be marked on each case. All marks on cases, whether embossed, printed or stenciled, must be made with permanent black ink. No marks, brands, labels, caution notices, or other devices whatever, other than those required by law and regulations, will be permitted on the Government side of the case.

SEC. 44. *Rebottling, relabeling, and restamping of bottled spirits.*—Warehousemen desiring to rebottle, relabel, and restamp spirits bottled in bond will make application to the district supervisor of the district in which the work is to be performed. The application will state specifically the reasons why such is necessary, giving the serial numbers of the cases, the name of the distiller producing the spirits, date of production, by whom the spirits were originally bottled, date of original bottling and whether or not the spirits have been continuously in possession of the applicant. If the spirits were originally bottled by a distiller or warehouseman other than the applicant, the application must be accompanied by a statement from the original bottler consenting to the reconditioning thereof by the applicant.

Upon receipt of such application, the district supervisor will have the storekeeper-gauger in charge at the warehouse, or an inspector, or other Government officer, examine the condition of the spirits and verify the data contained in the application. The officer will make a full report of his inspection to the district supervisor. If the district supervisor finds that the reconditioning, rebottling, relabeling, or restamping of the spirits is necessary, he will approve the application.

Cases of tax-paid bottled-in-bond spirits which have left the premises of the warehouseman, but have never been opened, may be rebottled, restamped, or relabeled, provided the district supervisor is satisfied, upon investigation, that the spirits have not been tampered with in any manner and are of the required proof for bottled-in-bond spirits. Where tax-paid bottled-in-bond spirits have left the premises of the warehouseman and investigation discloses that the cases have been opened, or where the district supervisor is doubtful as to the proper action to be taken, rebottling, relabeling, or restamping should not be authorized until the matter has been referred to the Commissioner for consideration and advice.

New bottled-in-bond strip stamps will be required whenever spirits are rebottled. The new stamps will bear the same data as to seasons when produced and bottled, the name of the distiller or the name of the individual, firm, partnership, corporation, or association in whose name the spirits were produced and warehoused. The registered distillery number, and the number and district of the warehouse at which originally bottled will not be printed on new stamps where stamps of prior issues bearing such data are affixed to the bottles. The bottles must bear the indicia, and conform to the standards of fill, required by Regulations 13. The reconditioned spirits may be rebottled in the same bottles from which removed if such bottles containing the spirits originally bear the proper indicia and have not been offered for sale at retail.

If the spirits are to be relabeled and have not left the possession of the original bottler, the new label to be used must be covered by an appropriate certificate of label approval, issued by the Federal Alcohol Administration, or a certificate of exemption from label approval, procured from that Administration. Authorization to relabel spirits which have left the possession of the original bottler must be obtained from the Federal Alcohol Administration and must be submitted to the supervisor with the application to rebottle or relabel.

All rebottling, relabeling, and restamping of spirits must be conducted in a bottling-in-bond warehouse under the supervision of a Government officer. Spirits of two or more distillers or of different seasons' production or bottling may not be reconditioned at the same time and rebottling operations must be conducted at a time when no other spirits are in the process of bottling. Warehousemen may remove by straining through cloth, felt, or other like material, any charcoal, sediment, or other like substances found in the spirits. In the process of rebottling, the spirits may not be subjected to any treatment deemed to be rectification as defined in Regulations 15.

Application will be made on Form 1518 for the removal of bottled spirits from an internal revenue bonded warehouse for rebottling. Entries will be

made in the proper columns of the Storekeeper-Gauger's Monthly Return, Form 1513, showing the removal of the cases for rebottling and, after rebottling, the return of the cases filled to the bonded warehouse. Application will be made on Form 1515 (Part I) to the storekeeper-gauger in charge of the warehouse for strip stamps sufficient to cover the quantity of spirits bottled. Entries for rebottling untax-paid spirits will be made on Forms 1516 and 1517 in the same manner as spirits are entered for original bottling before tax payment. Tax will be paid on all losses sustained in rebottling untax-paid spirits in accordance with section 39.

Spirits rebottled, relabeled, or restamped after tax payment will not be entered on Forms 1515, 1516, or 1517.

Warehousemen and supervisors will bear in mind that the rebottling, relabeling, and restamping of bottled-in-bond spirits may be done only when necessary. The work must be done at such time and in such manner as will require no unnecessary supervision or assignment of additional officers for that purpose.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved March 29, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register March 30, 1939, 1.52 p. m.)

TRAFFIC IN CONTAINERS OF DISTILLED SPIRITS.

REGULATIONS 13, ARTICLE 7: Purchase, sale, and possession of used bottles. 1939-16-9794
T. D. 4893

Amendment of Regulations 13.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, D. C.

To District Supervisors and Others Concerned:

Pursuant to the authority in section 2871, Internal Revenue Code, paragraph (1) of article 7, Regulations 13, approved May 24, 1937, is hereby amended to read as follows:

(*a*) The purchase or sale of used liquor bottles, except as provided in these regulations, is prohibited.

(*b*) No liquor bottle shall be reused for the packaging of distilled spirits, nor shall the original contents, or any portion of such original contents, remaining in a liquor bottle be increased by the addition of any substance.

Approved April 7, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register April 10, 1939, 12.45 p. m.)

LIQUOR LAW REPEAL AND ENFORCEMENT ACT. (1935)

1939–23–9865
Ct. D. 1402

TAX ON DISTILLED SPIRITS—LIQUOR LAW REPEAL AND ENFORCEMENT ACT—DECISION OF SUPREME COURT.

FORFEITURE OF AUTOMOBILE FOR UNLAWFUL TRANSPORTATION OF LIQUOR—REMISSION OF FORFEITURE—REQUIREMENTS OF STATUTE.

In a proceeding under section 204 of the "Liquor Law Repeal and Enforcement Act" of August 27, 1935, for mitigation of the forfeiture of an automobile seized for unlawful transportation of distilled spirits upon which the Federal tax had not been paid, an automobile financing company is not required to prove that in accepting assignment of a conditional sales contract it made actual inquiry concerning the record or reputation for violating the liquor laws of a person whose name did not appear in connection with the conditional sales contract or to determine whether the ostensible purchaser under such contract was in reality a "straw" purchaser.

SUPREME COURT OF THE UNITED STATES.

United States of America v. *One 1936 Model Ford V–8 De Luxe Coach, Motor No. 18–3306511, Commercial Credit Co., Claimant.*

Writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

United States of America v. *Automobile Financing, Inc.*
[59 S. Ct., 861.]

Writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 22, 1939.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the Court.

In each of these causes the district court, proceeding under the "Liquor Law Repeal and Enforcement Act" of August 27, 1935 (ch. 740, 49 Stat., 872, 878, Title 27, U. S. C. A., section 40a), mitigated the forfeiture of an automobile seized for unlawful transportation of distilled spirits upon which the Federal tax had not been paid. (One was seized December 3, 1936; the other, March 15, 1937.) The forfeiture was decreed in a proceeding based upon section 3450 R. S. (Title 26, U. S. C. A., section 1441). The circuit courts of appeals rightly approved and their judgments must be affirmed.

The facts, undispute, are essentially alike in both causes. The points of law are the same. A statement based on record No. 10 will suffice.

The repeal enforcement Act provides—

"SEC. 204. (a) Whenever, in any proceeding in court for the forfeiture, under the internal-revenue laws, of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquors, such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

"(b) In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any State relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent,

was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation."

The following findings by the district court, it is agreed, correctly set out "the facts in this case"—

The Ford automobile in question was sold by the Greenville Auto Sales, Inc. (the dealer), October 3, 1936, through its agent, Elrod, to Guy Walker, who in part payment exchanged an old car paid for by him, but registered in his wife's name. He was given terms for payment under a conditional sales contract, drawn by an agent of the dealer, in the name of his brother, Paul Walker, who formally executed the agreement. Guy Walker had the conditional sales contract drawn and executed in the name of his brother in order to place the title "where his wife could not reach it." Paul Walker had no interest in the transaction except to comply with his brother's request. Guy Walker made the transaction with the dealer. He selected the car, made the agreement and handled the transaction himself. Paul Walker drove the car from the dealer's place of business. Guy Walker at the time, and for two or three weeks after the purchase, was living at his brother's house. Only one payment was made on the conditional sales contract before the seizure, and that by Guy Walker to the dealer.

It was admitted that Guy Walker had a previous record and reputation for violating both State and Federal laws relating to liquor. Paul Walker was convicted of violating the National Prohibition Act in 1929, and was duly sentenced therefor, but his record and reputation since serving the sentence were good.

On the date when the sale was consummated the dealer submitted the contract to the Commercial Credit Co., the claimant here, who accepted by telephone, and subsequently on October 5, in the usual course of business the dealer assigned the contract to the claimant and received a check therefor.

The claimant before accepting assignment of the sales contract made an investigation of Paul Walker by inquiring at the headquarters of the sheriff of Greenville County, and at the headquarters of the chief of police of Greenville, the county and city where the interest was acquired and the locality where Paul Walker resided, as to his record and reputation for violation of the liquor law. Information was received from these offices that he had no such record or reputation. Information was given, however, from the sheriff's office that Guy Walker had both record and reputation as violator of State and Federal laws relating to liquor. No inquiry or investigation was made at the headquarters of the principal Federal internal-revenue officer engaged in the enforcement of the liquor laws in that locality, or at the headquarters of any other principal local or Federal law enforcement officer of the locality as to Paul Walker, and no inquiry or investigation whatsoever was made of Guy Walker, the admitted real owner and purchaser of the automobile.

The claimant had Paul Walker investigated in August, 1936, by the Business Service Bureau of Greenville, S. C., in connection with the purchase of a refrigerator. No investigation at that time was made as to his reputation or record for violating the liquor laws; the investigation did disclose that he had a good reputation in the community where he lived, and this was the reputation given him by his employer at that time.

The claimant purchased the conditional sales contract in good faith, believing that Paul Walker was the purchaser and owner of the automobile. It had no knowledge, information or suspicion of the true facts until after the automobile had been seized by Federal officers.

Petitioner challenges the judgment below because of claimant's failure to establish compliance with the conditions imposed by subsection (b) section 204. Especially because claimant failed to show that it had no reason to believe the automobile was being used or would be used to violate the liquor laws; also because it made no adequate inquiry concerning the record and reputation of the real purchaser—Guy Walker.

Respondent's interest in the automobile is not questioned. It "purchased the conditional sales contract in good faith, believing that Paul Walker was the purchaser and owner of the automobile. It had no knowledge, information

or suspicion of the true facts until after the automobile had been seized." This is enough to show compliance with subsection (b)(1). There was an interest acquired in good faith.

After investigation of the record and reputation of Paul Walker, followed by favorable reports, and believing him to be purchaser and owner of the automobile, claimant in good faith acquired the sales contract. It had no knowledge, information or suspicion that Paul Walker was only a "straw" purchaser. This is enough to show compliance with subsection (b)(2). The suggestion that since respondent knew automobiles were frequently used for violation of liquor laws it therefore had reason to believe that the one in question would be so used is not well founded. The findings positively affirm that it entertained no such belief or suspicion.

The difficult phrasing of subsection (b)(3) has produced divergent views concerning its meaning.

In *Federal Motor Finance* v. *United States* (88 F. (2d), 90, 93), the Circuit Court of Appeals Eighth Circuit said—

"We think the fair intendment of the language of subsection (3) concerning remission of forfeiture is that the appellant could not rely entirely upon a course of business whereby it acquired an interest in the car so nearly approximating the total value thereof without taking care to ascertain who the real owner was in possession of and using the car."

In the causes now before us (93 F. (2d), 771, 773; 99 F. (2d), 498, 500), the circuit court of appeals accepted the view that—

"The involved language of subsection (b)(3) of the Act does permit the possible interpretation that the lienor is charged with the duty of making inquiry as to everyone, bearing a bad reputation or record, who may have a right under the contract of sale, whether or not it appears on the face of the instrument. (See *Federal Motor Finance* v. *United States*, 8 Cir., 88 F. (2d), 90.) But in our view Congress did not intend to impose upon the lienor the obligation to ascertain at his peril the identity of every person having an interest in the property and to make inquiry of the law enforcement officers as to the previous record and reputation of every such person, unless from the documents themselves or other surrounding circumstances the lienor possesses information which would lead a reasonably prudent and law-abiding person to make a further investigation."

(See also *C. I. T. Corporation* v. *United States* (Fourth Circuit), 86 F. (2d), 311, and *United States* v. *C. I. T. Corporation* (Second Circuit), 93 F. (2d), 469.)

Counsel for petitioner now maintain: "That under the language of the statute [(b)(3)] the claimant is required to investigate the real purchaser at its peril and that if it fails to do so, as between it and the Government, the claimant assumes the risk of fraud perpetrated upon it by the dealer and the bootlegger. In any event, the claimant should have been required to show that it at least made a reasonable effort to ascertain who the real purchaser and user of the car was so that he could be investigated as required by the statute."

Manifestly, section 204 is a remedial measure. It empowers the courts, exercising sound discretion, to afford relief to innocent parties having interests in condemned property where the claim is reasonable and just. Its primary purpose is not to protect the revenues; but this is proper matter for consideration whenever remission is sought. The section must be liberally construed to carry out the objective. The point to be sought is the intent of the law-making powers. Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law. (*Farmers', etc., National Bank* v. *Dearing*, 91 U. S., 29, 33–35.) If any claimant has been negligent or in good conscience ought not be relieved, the court should deny his application.

Consideration of the statutory provisions relative to remissions prior to section 204 and the circumstances of its adoption will enlighten the purpose entertained by Congress.

Sections 3450 and 3453, Revised Statutes (Title 26, U. S. C. A., sections 1441, 1620–1621)—derived from Acts June 30, 1864, and July 13, 1866—provide that whenever any commodity in respect of which a tax is imposed, is removed with intent to defraud the United States, it shall be forfeited "and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited." "The proceedings to enforce such forfeitures

shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made."[1]

Sections 3460 and 3461 (Title 26, U. S. C. A., section 1624)—derived from Acts July 13, 1866, and June 6, 1872—provide that when goods, wares, or merchandise seized as subjects of forefeiture, do not exceed $500 in value, they may be restored to the claimant upon the execution of a bond and this shall be delivered to the district attorney for proper proceedings; if no bond, the articles shall be sold and the proceeds paid into the Treasury. Within a year any claimant may apply to the Secretary for remission which may be granted "upon satisfactory proof, to be furnished in such manner as he shall prescribe: *Provided*, That it shall be satisfactorily shown * * * that the said forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of said property."[2]

Where the value exceeds $500 or bond is given, forfeiture must be sought in court through a libel in rem. (*United States* v. *Two Bay Mules, Etc.*, 36 Fed., 84; *United States* v. *Mincey*, 254 Fed., 287; *Logan* v. *United States*, 260 Fed., 746; *United States* v. *One Bay Horse*, 270 Fed., 590.)

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[1] R. S., section 3450 (Act July 13, 1866, ch. 184, section 14, 14 Stat., 98, 151; 26 U. S. C. A., section 1441)—

(a) Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is imposed, with intent to defraud the United States of such tax on any part thereof, shall be liable to a fine or penalty or not more than $500.

* * * * * * *

(3) Every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited.

[This section was amended by Act June 26, 1936 (ch. 830, Title III, section 325, 49 Stat., 1939, 1955), which changed the provision for $500 penalty to a "fine of not more than $5,000 or be imprisoned for not more than three years, or both."]

Revised Statutes section 3453 (Act June 30, 1864, ch. 173, section 48, 13 Stat., 223, 240; Act July 13, 1866, ch. 184, section 9, 14 Stat., 98, 111; 26 U. S. C. A., sections 1620–1621)—

All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made.

[2] Revised Statutes sections 3460 and 3461 (Act July 13, 1866, ch. 184, section 63, 14 Stat., 98, 169; Act June 6, 1872, ch. 315, section 40, 17 Stat., 230, 257; 26 U. S. C. A., section 1624—

SEC. 3460. In all cases of seizure of any goods, wares, or merchandise, as being subject to forfeiture under any provision of the internal-revenue laws, which, in the opinion of the collector or deputy collector making the seizure, are of the appraised value of $500 or less, the said collector or deputy collector shall, except in cases otherwise provided, proceed as follows:

* * * * * * *

Second. If the said goods are found by the said appraisers to be of the value of $500 or less, the said collector or deputy collector shall publish a notice, for three weeks, in some newspaper of the district where the seizure was made, describing the articles, and stating the time, place, and cause of their seizure, and requiring any person claiming them to appear and make such claim within 30 days from the date of the first publication of such notice.

Third. Any person claiming the goods, wares, or merchandise so seized, within the time specified in the notice, may file with the said collector or deputy collector a claim, stating his interest in the articles seized and may execute a bond to the United States in the penal sum of $250, with sureties to be approved by the said collector or deputy collector, conditioned that, in case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon delivery of such bond to the collector or deputy collector, he shall transmit the same, with the duplicate list or description of the goods seized, to the United States district attorney for the district, and said attorney shall proceed thereon in the ordinary manner prescribed by law.

Fourth. If no claim is interposed and no bond is given within the time above specified, the collector or deputy collector, as the case may be, shall give 10 days' notice of the sale of the goods, wares, or merchandise by publication, and, at the time and place specified in the notice, shall sell the articles so seized at public auction, and after deducting the expense of appraisement and sale, he shall deposit the proceeds to the credit of the Secretary of the Treasury.

Section 3229 Revised Statutes (Act July 20, 1868, ch. 186, section 102, 15 Stat., 125, 166; 26 U. S. C. A., section 1661) provides—

"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."

(Amended, Acts February 26, 1926, ch. 27, section 1201, 44 Stat., 9, 126; May 10, 1934, ch. 277, section 512(b), 48 Stat., 680, 759; May 28, 1938, ch. 289, section 815, 52 Stat., 447, 578.)

Wilson Motor Co. v. *United States* (Ninth Circuit) (84 F. (2d), 630, 632), states—"The Government's brief advises that prior to the Act of August 27, 1935, the procedure of the Government to afford relief to these innocent owners was under the provisions of compromise powers given the Attorney General and the Treasury under section 1661, 26 U. S. C. A."

In connection with the sections referred to above the United States Code Annotated points to their origin and history.

The National Prohibition Act (October 28, 1919, ch. 85, Title II, section 26, 41 Stat., 305, 315, Title 27, U. S. C. A., section 40) provided that "whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof." The person arrested shall be proceeded against but the vehicle or conveyance shall be returned upon execution of a bond. Upon his conviction the court shall order the liquor destroyed "and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized,"[8] (See *Richbourg Motor Co.* v. *United States*, 281 U. S., 528.) This was repealed by The Repeal and Enforcement Act, supra.

SEC. 3461. Within one year after the sale of any goods, wares, or merchandise, as provided in the preceding section, any person claiming to be interested in the property sold may apply to the Secretary of the Treasury for a remission of the forfeiture thereof, or any part thereof, and a restoration of the proceeds of the sale; and the said Secretary may grant the same upon satisfactory proof, to be furnished in such manner as he shall prescribe: *Provided*, That it shall be satisfactorily shown that the applicant, at the time of the seizure and sale of the said property, and during the intervening time, was absent, out of the United States, or in such circumstances as prevented him from knowing of the seizure and that he did not know of the same: and also that the said forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of said property. If no application for such restoration is made within one year, as hereinbefore prescribed, the Secretary of the Treasury shall, at the expiration of the said time, cause the proceeds of the sale of the said property to be distributed according to law, as in the case of goods, wares, or merchandise condemned and sold pursuant to the decree of a competent court.

[8] When the Commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property.

The Act of September 21, 1922 (ch. 356, section 618, 42 Stat., 858, 987) provides—

"Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this Act, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws, and with the Secretary of Commerce if under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, or the Secretary of Commerce, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto."

[Reenacted by Act July 17, 1930, ch. 497, section 618, 46 Stat., 590, 757; 19 U. S. C. A., section 1618.]

The Act May 29, 1928 (ch. 852, section 709, 45 Stat., 791, 882, 26 U. S. C. A., section 1626), extended "the provisions of law applicable to the remission or mitigation by the Secretary of the Treasury of forfeitures under the customs laws * * * to forfeitures incurred or alleged to have been incurred, before or after the enactment of this Act, under the internal-revenue laws."

In the situation disclosed by the foregoing summary, Congress came to consider the Act of August 27, 1935. The Judiciary Committees of Senate and House made reports (Senate Report No. 1330, House Report No. 1601, Seventy-fourth Congress, first session). In each the paragraphs relative to section 204 (a) and (b) are the same in substance.[4]

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[4] House Reports, Volume 4, Seventy-fourth Congress, First Session, 1935, Report No. 1601, page 6—

Section 204(a) of section 204 provides that in any court proceeding for the forfeiture under the internal-revenue laws of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquor, the court shall, upon decree of forfeiture, have exclusive jurisdiction to remit or mitigate the forfeiture. At the present time, the court has authority only to decree the forfeiture, and remission or mitigation is dependent upon administrative action. Section 204 extends to the court which determines whether the vehicle or aircraft shall be forfeited by reason of having been used in the violation of internal-revenue laws relating to liquor, the power to determine whether the claim of any person having an interest in the vehicle or aircraft should be allowed after forfeiture. Thus, in all cases where the value of the seized property exceeds $500, and in all cases where the value is $500 or less, but a bond is posted in order to bring the forfeiture proceeding into court, the court will have exclusive jurisdiction to remit or mitigate the forfeiture. In the event that a bond is not filed in cases where the property is of the value of $500 or less, the power to remit or mitigate will remain in the Secretary of the Treasury.

Certain standards are given to the court to guide it in this determination. Thus, under subsection (b), the claimant must prove that he acquired his interest in good faith, that he had no knowledge or reason to believe that the vehicle or aircraft was being or would be used in violating Federal or State liquor laws and that, if his interest arises out of, or is subject to, any agreement under which any person having a record or reputation for violating Federal or State liquor laws has a right with respect to the vehicle or aircraft, the claimant, before he acquired his interest, or before the other person acquired his right, whichever of these events occurred later, inquired of the law enforcement officers in the locality where such other person acquired his right, of the locality in which such other person then resided, and of each locality where the claimant made inquiry as to the character or credit standing of such other person, whether the other person had such a record or reputation, and was informed he had not. This last requirement is predicated upon the recognition of the "bootleg hazard" as an element to be considered in investigating a person as a credit risk. As a matter of sound business practice, automobile dealers, finance companies, and prospective lienholders on automobiles examine records, and make inquiry of references and credit rating agencies as to the owner's or prospective purchaser's reputation for paying his debts and his ability to do so. This subsection merely requires that in the making of such inquiry, the "bootleg hazard" also be examined as one aspect of the credit risk.

A representative of the Treasury Department made a statement to the Senate Judiciary Committee. An extract from this appears in the margin.[5]

A rearrangement of the words of subsection (b)(3) will enlighten its meaning—

"The court shall not allow the [request]—claim—of any claimant for remission or mitigation, if it appears that the interest asserted by [him]—the claimant—arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, *unless and until* he [the claimant] proves that before [he]—such claimant—acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, [he]—the claimant—his officer or agent, was informed in answer to his inquiry, at [certain headquarters specified in the alternative] as to the character or financial standing of such other person, that such other person had no such record or reputation.

If the words of section 204(b)3 be taken literally, without regard to history or purpose of the enactment, they inhibit remission by the court unless one who claims an interest made actual inquiry concerning every person with record or reputation for violating the liquor laws who in fact (although wholly unsuspected) had acquired some right to the vehicle. There would be absolute forfeiture although the claimant acquired his interest in the utmost good faith and without suspicion of any undisclosed interest; although indeed, he had diligently but unsuccessfully sought information concerning all the facts from every person connected with the transaction. Thus construed the provision would require absolute forfeiture notwithstanding the claimant could not by the utmost diligence ascertain the true situation. No greater reason exists for saying a claimant should be relieved if he made unsuccessful inquiry of the seller concerning undisclosed matters than there is for relief when he had no cause to suspect the existence of an undisclosed interest—no cause to question appearances. A measure requiring absolute forfeiture under such circumstances probably would be expressed in language sufficiently plain to admit no reasonable doubt.

During many years innocent claimants had a clear remedy either by appeal to the discretion of the Secretary of the Treasury or by application for compromise addressed to the Attorney General and Treasury officials (*Wilson Motor Co.* v. *United States*, supra); or under the Prohibition Act, to the court (*Richbourg Motor Co.* v. *United States*, supra). This situation was called to the attention of the Senate Committee by the representative of the Treasury. He also pointed out that before restoring a car the Secretary required that the claimant "must prove that he made an investigation as to whether or not the purchaser

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[5] Senate Committee Hearings, 1935, Volume 495, No. 4, page 13—

Section 204 * * * relates to proceedings in court for the forfeiture of vehicles or aircraft seized for violations of internal-revenue laws. At the present time, claimants of interests in vehicles or aircraft that have been seized and forfeited for violation of internal-revenue laws, petition the Secretary of the Treasury for the remission or mitigation of the forfeiture, and the Secretary, under the law, requires the person claiming to have an innocent interest to show that he had no knowledge of the unlawful use of the vehicle or aircraft. What this section will do, in the case of any court proceeding for the forfeiture of vehicles or aircraft, is to give the court jurisdiction to determine whether or not the person claiming to have an innocent interest actually had such an interest. Under the present practice the Secretary of the Treasury requires such a showing. * * * This section is of particular importance in connection with the discounting by a finance company of an automobile dealer's paper.

At the present time, the Secretary of the Treasury considers that the bootleg hazard is an element involved in the credit risk, and is just as much a part of the investigation by the finance company of a person as a credit risk as is his financial standing in the community. He requires that before a car be returned to the person claiming an innocent interest, the latter must prove that he made an investigation as to whether or not the purchaser had a bootlegger record, and found that he had none.

had a bootlegger record and found that he had none." The Secretary "considers that the bootleg hazard is an element involved in the credit risk, and is just as much a part of the investigation by the finance company of a person as a credit risk as is his financial standing in the community." The committee reported in respect of 204(b)3—"This last requirement is predicated upon the recognition of the 'bootleg hazard' as an element to be considered in investigating a person as a credit risk."

These facts indicate that Congress intended a reasonable inquiry concerning the bootleg risk should be made in connection with the investigation of financial responsibility. They negative the notion that wholly innocent claimant at his peril must show inquiry concerning something unknown and of which he had no suspicion. Dealers do not investigate what they have no cause to suspect.

The forfeiture Acts are exceedingly drastic. They were intended for protection of the revenues, not to punish without fault. It would require unclouded language to compel the conclusion that Congress abandoned the equitable policy, observed for a very long time, of relieving those who act in good faith and without negligence, and adopted an oppressive amendment not demanded by the tax officials or pointed out in the reports of its committees.

Subsection (b)(3) was intended to prevent remission to a claimant who had failed to inquire when he should have done so, to one chargeable with willful negligence or purpose of fraud. It would be excessively harsh, unreasonable indeed, to say that one dealing in entire good faith must, at his peril, first discover and then make inquiry concerning somebody of whose existence he has no knowledge or suspicion. We can not think Congress intended thus to burden dealing in all vehicles capable of transporting liquor.

It should be observed that the following things are possible subjects of seizure and forfeiture because of liquor law violations: "Every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment, etc." "Vehicle" is thus defined—"That in or on which a person or thing is or may be carried from one place to another." A wheelbarrow, a covered wagon, a "Rolls-Royce," the patient mule, a "Man of War," and possibly a Pullman car or ocean liner is a vehicle. (*Goldsmith-Grant Co.* v. *United States*, 254 U. S., 505; *United States* v. *Two Bay Mules*, supra; *United States* v. *One Bay Horse*, supra.)

Subsection (b)(3) applies not only to transactions by financial concerns like respondent but to those of individuals and corporations great or small. It contemplates an investigation and this presupposes some reason at least to suspect the existence of the subject of investigation. Congress took away from executive officers the power to mitigate forfeitures where the property exceeds $500 in value, and gave this to the court familiar with the circumstances; but it left with the Secretary of the Treasury discretion to remit when the value was below $500. The intent was to require the courts to exact proof of inquiries like those demanded by the Treasury Department practice, and disclosed by its representative before the Senate committee. The petitioner's view, if adopted, would sanction one standard of remission for a vehicle worth $500, another when appraised at a dollar more.

The challenged decrees must be affirmed.

Mr. Justice BUTLER and Mr. Justice STONE took no part in the consideration or decision of these causes.

LIQUOR TAXING ACT OF 1934.

SECTION 201.

1939–1–9658
Ct. D. 1374

LIQUOR TAX—LIQUOR TAXING ACT OF JANUARY 11, 1934—DECISION OF SUPREME COURT.

INDICTMENT—POSSESSION AND TRANSPORTATION OF DISTILLED SPIRITS WITHOUT REVENUE STAMPS—SEARCH AND ARREST.

Petitioner was found guilty under an indictment which charged violations of section 201, Title II, Liquor Taxing Act of January 11, 1934, by possessing and transporting distilled spirits in containers wanting requisite revenue stamps. Federal officers, relying upon confidential information that liquor would be transported in a designated automobile from a certain dwelling at a certain day and hour, kept the dwelling under observation, saw and heard the movements of the described car and the loading of heavy parcels, and followed the car into an open garage upon petitioner's premises, where they found a quantity of distilled spirits in unstamped containers in the trunk of the car, and arrested the petitioner. The trial court did not err in sustaining objections to the questioning of the officers relative to the source of the information which led them to observe the petitioner's actions. In the circumstances, the source of the information was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Moreover, public policy forbids disclosure of an informer's identity unless essential to the defense. Passage of the car into the garage did not destroy the right to search and arrest. No search was made of the garage, examination of the car accompanied an arrest without objection and upon admission of probable guilt, and the officers did nothing either unreasonable or oppressive.

SUPREME COURT OF THE UNITED STATES.

Hyman Scher, alias William Scher, petitioner, v. *The United States.*
[305 U. S., 251.]

Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 5, 1938.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the Court.

Petitioner Scher was found guilty under two counts of an indictment which charged violations of section 201 Title II Liquor Taxing Act, January 11, 1934, by possessing and transporting distilled spirits in containers [1] wanting requisite revenue stamps. He was sentenced for a year and a day, etc. The circuit court of appeals affirmed the judgment.

No objections to the judge's charge is urged and the evidence submitted to the jury is adequate to support the verdict.

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[1] Ch. 1, section 201 (48 Stat., 313, 316 (U. S. C., Title 26, section 1152a, 1152g))—

"No person shall * * * transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this title shall not apply to—

* * * * * * *

"(f) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; * * *"

Section 207: "Any person who violates any provision of this title, * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both."

The material facts are not in serious dispute. A brief summation will suffice for the points to be considered.

Federal officers received confidential information thought to be reliable that about midnight, December 30, 1935, a Dodge automobile with specified license plate would transport "phony" whisky from a specified dwelling in Cleveland, Ohio. About 9.30 officers posted near by saw the described automobile stop in front of the house and remain there for an hour. A man with three women and a package then entered the car and drove away. It returned shortly before midnight, stopped at the rear of the house and remained for half an hour. The headlights were extinguished; the officers heard what seemed to be heavy paper packages passing over wood. Doors slammed; petitioner drove the car away, apparently heavily loaded. The officers followed in another car. After going a few blocks petitioner stopped briefly at a filling station; then he drove towards his own residence two or three blocks farther along. The officers followed. He turned into a garage a few feet back of his residence and within the curtilage. One of the pursuing officers left their car and followed. As petitioner was getting out of his car this officer approached, announced his official character, and stated he was informed that the car was hauling bootleg liquor. Petitioner replied, "just a little for a party." Asked whether the liquor was tax-paid, he replied that it was Canadian whisky; also, he said it was in the trunk at the rear of the car. The officer opened the trunk and found 88 bottles of distilled spirits in unstamped containers. He arrested petitioner and seized both car and liquor. The officer had no search warrant.

At the trial counsel undertook to question the arresting officers relative to the source of the information which led them to observe petitioner's actions. Objections to these questions were sustained and this is now assigned as error.

Before trial petitioner's counsel moved "to suppress all of the evidence obtained by the search made by the revenue agents in the above entitled cause, together with all information obtained by reason of such search, and to grant an order requiring the agents to return all articles seized by reason of said search * * *." In support of this he relied upon the facts above stated. Denial of this motion is said to be error.

The exception in respect of transporting liquor not intended for sale found in the statute affords matter for affirmative defense. (*Queen* v. *United*, 77 F. (2d), 780.)

In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information as in *United States* v. *Blich* (45 F. (2d), 627).

Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense as for example where this turns upon an officer's good faith. (*Segurola* v. *United States*, 16 F. (2d), 563, 565; *Shore* v. *United States*, 49 F. (2d), 519, 522; *McInes* v. *United States*, 62 F. (2d), 180.)

Considering the doctrine of *Carroll et al.* v. *United States* (267 U. S., 132) (see *Husty* v. *United States*, 282 U. S., 694), and the application of this to the facts there disclosed, it seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest. So much was not seriously controverted at the argument.

Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt. The officers did nothing either unreasonable or oppressive. (*Agnello* v. *United States*, 269 U. S., 20, 30; *Wisniewski* v. *United States*, 47 F. (2d), 825, 826.)

The challenged judgment is affirmed.

MISCELLANEOUS RULINGS.

INTERNAL REVENUE CODE.

1939–19–9826
Mim. 4906

Internal Revenue Code.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 18, 1939.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, Heads of Field Divisions of the Technical Staff, and Other Officers and Employees of the Bureau of Internal Revenue Concerned:

Reference is made to the Internal Revenue Code (53 Stat., Part 1) which was approved by the President on February 10, 1939.

The internal revenue title of the Code is divided into 46 chapters (numbered 1 to 48, with no chapters numbered 19 or 20), and contains all of the laws of a general and permanent character relating exclusively to internal revenue in force on January 2, 1939, and in addition it contains the internal revenue laws relating to certain temporary taxes.

Section 4(a) of the enacting clauses of the Code provides that all laws and parts of laws included in the internal revenue title of the Code, to the extent that they relate exclusively to internal revenue, are repealed, effective, except as provided in section 5 of such clauses, on the day following the date of the enactment of the Code. Section 4(b) provides that such repeal shall not affect any act done or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before such repeal, but that all rights and liabilities under the Acts repealed shall continue and may be enforced in the same manner as if such repeal had not been made. Section 5 provides that any provision of law in force on January 2, 1939, corresponding to a provision contained in the internal revenue title shall remain in force until the corresponding provision of the internal revenue title takes effect.

The application of the Code, in general, is prospective only. Section 3 of the enacting clauses of the Code provides that except as otherwise provided therein the Code shall take effect on the day following the date of its enactment. Such exceptions are contained in certain chapters of the internal revenue title as will be shown hereinafter. For example, in the case of the income tax, chapter 1 of the internal revenue title applies only to taxable years beginning after December 31, 1938, and has no application to taxable years beginning prior to January 1, 1939. As to such prior taxable years

the applicable provisions of the Revenue Act of 1938 and prior Revenue Acts govern, except as such provisions may be modified by legislation enacted subsequent to the Revenue Act of 1938. In the case of the estate tax, subchapter A of chapter 3, relating to the estate tax, applies only to estates of decedents dying after February 10, 1939, the applicable provisions of the Revenue Acts in force on February 10, 1939, continuing to apply to estates of decedents dying on or prior to that date. Chapter 4, relating to the gift tax, applies only to gifts made during the calendar year 1940 and subsequent calendar years. The gift tax for prior calendar years is governed by the applicable provisions of the Revenue Act of 1932, or by that Act, as amended. Subchapter A of chapter 9, relating to employment by other than carriers, and subchapter B, relating to employment by carriers, are effective on the first day of the quarter of the calendar year occurring next after February 10, 1939. The tax on employers of eight or more under subchapter C is effective on and after January 1, 1939.

With respect to the temporary taxes hereinbefore referred to, the Code applies only to transactions occurring after the effective date specified in the Code. (See the table below.) For instance, it does not impose a tax with respect to automobiles sold before March 1, 1939. The tax on automobiles sold prior to that date is governed by the provisions of the Revenue Act of 1932, as amended. Likewise, the Code imposes a tax on manufactured sugar manufactured on and after March 1, 1939, but in the case of such sugar manufactured prior to that date, the law applicable at the time of the manufacture governs.

The following table shows the subject matter and the effective date of the several chapters of the Code:

Table showing subject matter and effective date of chapters of Internal Revenue Code.

Chapter	Subject matter.	Application or effective date.
1	Income tax	Taxable years beginning after December 31, 1938.
2	Additional income taxes:	
	Personal holding companies	Do.
	Excess-profits tax	Income-tax taxable years ending after June 30, 1939.
	Excess profits on Navy contracts	Contracts completed within income-tax taxable years beginning after December 31, 1938.
	Unjust enrichment	Taxable years ending during the calendar year 1939, and subsequent taxable years.
3	Estate tax	Estates of decedents dying after February 10, 1939.
4	Gift tax	Calendar year 1940 and subsequent calendar years.
5	Board of Tax Appeals	February 11, 1939.
6	Capital stock tax	Year ending June 30, 1939, and subsequent years.
7	Tax on transfers to avoid income tax	February 11, 1939.
8	Alaskan railroads tax	Taxable years beginning after December 31, 1938.
9	Employment taxes	Subchapters A and B, on April 1, 1939. Subchapter C, on January 1, 1939.
10	Admissions and dues	March 1, 1939.
11	Documents, other instruments, and playing cards	February 11, 1939.
12	Safe deposit boxes	March 1, 1939.
13	Circulation other than of national banks	June 1, 1939.

Table showing subject matter and effective date of chapters of Internal Revenue Code—Continued.

Chapter.	Subject matter.	Application or effective date.
14	Cotton futures	February 11, 1939.
15	Tobacco, snuff, cigars, and cigarettes	Do.
16	Oleomargarine, adulterated butter, and process or renovated butter.	Do.
17	Filled cheese	Do.
18	Mixed flour	Do.
21	Coconut and other vegetable oils	March 1, 1939.
22	Fish, animal, and vegetable oils	February 11, 1939.
23	Narcotics	Do.
24	White phosphorus matches	Do.
25	Firearms:	
	Pistols and revolvers	March 1, 1939.
	Machine guns and short-barreled firearms	February 11, 1939.
26	Liquor	Do.
27	Occupational taxes	Taxable periods beginning on or after February 11, 1939.
28	Provisions common to miscellaneous taxes	February 11 and March 1, 1939.
29	Manufacturers' excise and import taxes:	
	Excise taxes	March 1, 1939.
	Import taxes	February 11, 1939.
30	Transportation and communication	March 1, 1939.
31	Documents and other instruments	February 11, 1939.
32	Sugar:	
	Manufacture	March 1, 1939.
	Importation	February 11, 1939.
33	Bituminous coal	March 1, 1939.
34	Information and returns	February 11, 1939.
35	Assessment	Do.
36	Collection	Do.
37	Abatements, credits, and refunds	Do.
38	Miscellaneous provisions	Do.
39	The Office of the Commissioner of Internal Revenue	Do.
40	The Offices of the General Counsel for the Department of the Treasury and Assistant General Counsel for the Bureau of Internal Revenue	Do.
41	Collectors of internal revenue	Do.
42	Deputy collectors of internal revenue	Do.
43	Internal revenue agents	Do.
44	Storekeeper-gaugers	Do.
45	Internal revenue inspectors	Do.
46	Miscellaneous provisions	Do.
47	Organization and membership of the Joint Committee	Do.
48	Powers and duties of the Joint Committee	Do.

Under many of the laws included in the Code, regulations had been issued and were in force on the date of its enactment. In order that the provisions of such regulations might be made applicable to the corresponding provisions of the Code without the preparation of new regulations under the Code governing each particular subject, Treasury Decisions 4884, 4885, 4886, 4887, approved February 11, 1939 (pages 395, 396, and 397, this Bulletin), and Treasury Decision 4889, approved March 8, 1939 (page 395, this Bulletin), were issued. By those Treasury decisions, regulations (including all Treasury decisions) applicable under any provision of law on the date of the enactment of the Code, to the extent such provision of law is superseded by the Code, were prescribed under, and made applicable to, the provisions of the Code corresponding to the provision of law so superseded in so far as any such regulations are not inconsistent with the Code.

Forms prescribed by the Commissioner (and not required to be approved by the Secretary of the Treasury) under the laws included in the Code are now in use. In order that such forms may be used under the corresponding provisions of the Code pending preparation of new forms under the Code, all internal revenue forms prescribed by the Commissioner of Internal Revenue and not required to be approved

by the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the Internal Revenue Code, to the extent such provision is superseded by the Code, are hereby prescribed and made applicable under the provisions of the Code corresponding to the provision of law so superseded in so far as any such form is not inconsistent with the Code.

Correspondence regarding this mimeograph should refer to the number thereof and to the symbols IT:JRK.

GUY T. HELVERING,
Commissioner.

1939–26–9893
T. D. 4905

Amending the Gauging Manual.

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

To District Supervisors and Others Concerned:

Pursuant to the authority in sections 2808(a) and 3176(a), Internal Revenue Code, paragraph 100 of the Gauging Manual, approved November 21, 1938, is hereby amended to read as follows:

PAR. 100. When determining the increase in tare on reused packages selected for the purpose of ascertaining the average, if it is found that the increase in tare varies more than six pounds as between any two packages weighed, average increase in tare will not be allowed on the packages to be regauged, and actual tare must be taken on all such packages.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved June 16, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register June 19, 1939, 10.40 a. m.)

1939–17–9811
T. D. 4896

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 465, SUBPART F.

Making certain internal revenue forms applicable under the Internal Revenue Code.

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

To Collectors of Internal Revenue and Others Concerned:

Internal revenue forms prescribed by the Commissioner of Internal Revenue and specifically approved by the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the Internal Revenue Code (February 10, 1939), to the extent such provision of law is superseded by the Code, are hereby prescribed and made applicable under the provisions of the Code corresponding to the provision of law superseded, in so far as any such form is not inconsistent with the Code.

This Treasury decision is issued under authority of the provisions of section 3791 of the Internal Revenue Code (53 Stat., Part 1) and

under such other provisions of the Code as correspond with the several provisions of law under which any form hereby prescribed and made applicable was issued.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 17, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register April 18, 1939, 3.56 p. m.)

1939–11–9756
T. D. 4889

Prescribing regulations under the Internal Revenue Code.

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

To Collectors of Internal Revenue and Others Concerned:

All regulations (including all Treasury decisions), prescribed jointly by the Commissioner of Internal Revenue and the Commissioner of Customs and approved by the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the Internal Revenue Code, to the extent such provision of law is superseded by the Code, are hereby prescribed under, and made applicable to, the provisions of the Code corresponding to the provision of law so superseded, in so far as any such regulation is not inconsistent with the Code.

These regulations are issued under authority of the provisions of section 3791 of the Internal Revenue Code and under such other provisions of the Code as correspond with the several provisions of law under which any regulation or Treasury decision hereby prescribed and made applicable was issued.

GUY T. HELVERING,
Commissioner of Internal Revenue.

JAMES H. MOYLE,
Commissioner of Customs.

Approved March 8, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register March 10, 1939, 12.07 p. m.)

1939–8–9725
T. D. 4884

Prescribing regulations under the Internal Revenue Code.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., February 11, 1939.

To Collectors of Internal Revenue and Others Concerned:

All regulations (including all Treasury decisions), prescribed by, or under authority duly delegated by, the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the Internal Revenue Code, to the extent such provision of law is

superseded by the Code, are hereby prescribed under, and made applicable to, the provisions of the Code corresponding to the provision of law so superseded, in so far as any such regulation is not inconsistent with the Code.

These regulations are issued under authority of the provisions of sections 1928, 2559, and 2606 of the Internal Revenue Code and under such other provisions of the Code as correspond with the several provisions of law under which any regulation or Treasury decision hereby prescribed and made applicable was issued.

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

(Filed with the Division of the Federal Register February 11, 1939, 1.53 p. m.)

1939–8–9726
T. D. 4885

Prescribing regulations under the Internal Revenue Code.

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

To Collectors of Internal Revenue and Others Concerned:

All regulations (including all Treasury decisions), prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the Internal Revenue Code, to the extent such provision of law is superseded by the Code, are hereby prescribed under, and made applicable to, the provisions of the Code corresponding to the provision of law so superseded, in so far as any such regulation is not inconsistent with the Code.

These regulations are issued under authority of the provisions of section 3791 of the Internal Revenue Code and under such other provisions of the Code as correspond with the several provisions of law under which any regulation or Treasury decision hereby prescribed and made applicable was issued.

GUY T. HELVERING,
Commissioner.

Approved February 11, 1939.

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

(Filed with the Division of the Federal Register February 11, 1939, 1.53 p. m.)

1939–8–9727
T. D. 4886

Prescribing regulations relating to taxes on oleomargarine, adulterated butter, and process or renovated butter, under the Internal Revenue Code.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 9, revised April, 1936, as amended, relating to the taxes on oleomargarine, adulterated butter, and process or renovated

butter, prescribed by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury and the Secretary of Agriculture, are hereby prescribed under, and made applicable to, chapter 16, subchapter A and subchapter B, and chapter 27, subchapter A, Parts I and II, of the Internal Revenue Code in so far as such regulations are not inconsistent with the Code.

This Treasury decision is issued under authority of the provisions of sections 2325 and 3791 of the Internal Revenue Code and under such other provisions of the Code as correspond with the several provisions of law under which any regulation or Treasury decision hereby prescribed and made applicable was issued.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved as to Treasury Department February 11, 1939.

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

Approved as to Department of Agriculture February 11, 1939.

H. A. WALLACE,
Secretary of Agriculture.

(Filed with the Division of the Federal Register February 11, 1939, 2.11 p. m.)

1939-8-9728
T. D. 4887

Prescribing regulations under the Internal Revenue Code.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Regulations 85, as amended, issued under the provisions of section 8 of the Silver Purchase Act of 1934, are hereby prescribed under, and made applicable to, the provisions of the Internal Revenue Code corresponding to the provisions of said section of the Silver Purchase Act of 1934 superseded by the Code, namely section 1805 of the Code, in so far as such regulations are not inconsistent with the Code.

These regulations are issued under authority of the provisions of section 1805 of the Internal Revenue Code and under such other provisions of the Code as correspond with the several provisions of law under which any regulation or Treasury decision hereby prescribed and made applicable was issued.

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

Approved February 11, 1939.

FRANKLIN D. ROOSEVELT.

(Filed with the Division of the Federal Register February 13, 1939, 12.55 p. m.)

UNITED STATES BOARD OF TAX APPEALS.

1939-7-9715

WASHINGTON, *January 30, 1939.*

The United States Board of Tax Appeals announces the following amendments to the rules of practice, fourteenth edition, dated July 1, 1938 [C. B. 1938-1, 596] to become effective on and after February 1, 1939:

RULE 6. INITIATION OF A PROCEEDING—PETITION.

(Paragraph (*h*), as amended.)

(*h*) A verification by the petitioner; provided that where the petitioner is sojourning outside the United States or is a nonresident alien, the petition may be verified by a duly appointed attorney in fact, who shall attach to the petition a copy of the power of attorney under which he acts and who shall state in his verification that he acts pursuant to such power, that such power has not been revoked; that petitioner is absent from the United States, and the grounds of his knowledge of the facts alleged in the petition. As used herein the term "United States" includes only the States and the District of Columbia. A notary public is not authorized to administer oaths, etc., in matters in which he is employed as counsel. (See Title 4, ch. 2, D. C. Code, and 26 Op. A. G., 236.)

The verification shall contain a statement that the fiduciaries signing and verifying have authority to act for the taxpayer.

Where the petitioner is a corporation, the person verifying shall state in his verification that he has authority to act for the corporation.

The signature and the verification to the petition shall be considered the certificate of those performing these acts that there is good ground for the petition, the proceeding has not been instituted merely for delay, and it is not frivolous.

RULE 7. FILING OF PETITION.

(As amended.)

An original and four clear copies of the petition, either printed or typewritten as provided by rule 4, shall be filed with the Board. (See rule 9.) The copies of the petition shall be conformed to the original by the petitioner.

Failure to file a sufficient number of copies, as provided in this rule, or to conform to the requirements of rules 4, 5, and 8, shall be ground for the dismissal of the proceeding.

RULE 9. FILING.

(New.)

Any document to be filed with the Board, must be filed at the office of the Board in Washington, D. C., during business hours; provided, that a division hearing a proceeding may permit documents pertaining thereto to be filed at the hearing.

RULE 35. BRIEFS.

(First paragraph, as amended.)

The parties should be prepared to make oral arguments at the conclusion of the hearing or to file written citations of authorities at that time if the case is one in which the presiding member might reasonably call for such. The filing of briefs and the making of oral arguments shall be in accordance with the directions of the member presiding at the hearing. If the member does not direct otherwise, each party shall have 45 days after the day on which the hearing was concluded within which to file a brief and either party may file a reply brief within 15 days after the filing of the original brief by his opponent. After a brief has been filed, the clerk will serve a copy upon the opposite party, unless the brief bears a notation that a copy has already been served.

PUBLIC SALARY TAX ACT OF 1939.

1939-25-9887
T. D. 4904

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 18.—INCOME TAX.

Refunds under section 203 of the Public Salary Tax Act of 1939.[1]

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

To Collectors of Internal Revenue and Others Concerned:

SECTION 18.0. *Introductory.*—(*a*) Sections 203, 204, 205, 206, and 210 of the Public Salary Tax Act of 1939 (Public, No. 32, Seventy-sixth Congress, first session; I. R. B. 1939-17, 18), which was approved by the President on April 12, 1939, provide:

SEC. 203. Any amount of income tax (including interest, additions to tax, and additional amounts) collected on, before, or after the date of the enactment of this Act for any taxable year beginning prior to January 1, 1939, to the extent attributable to compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, shall be credited or refunded in the same manner as in the case of an income tax erroneously collected, if claim for refund with respect thereto is filed after January 18, 1939, and the Commissioner of Internal Revenue, under regulations prescribed by him with the approval of the Secretary of the Treasury, finds that disallowance of such claim would result in the application of the doctrines in the cases of Helvering against Therrell (303 U. S. 218), Helvering against Gerhardt (304 U. S. 405), and Graves et al. against New York ex rel. O'Keefe, decided March 27, 1939, extending the classes of officers and employees subject to Federal taxation.

SEC. 204. Neither section 201 nor section 203 shall apply in any case where the claim for refund, of the institution of the suit, or the filing of the petition with the Board, was, at the time filed or begun, barred by the statute of limitations properly applicable thereto.

SEC. 205. Compensation shall not be considered as compensation within the meaning of sections 201, 202, and 203 to the extent that it is paid directly or indirectly by the United States or any agency or instrumentality thereof.

SEC. 206. The terms used in this Act shall have the same meaning as when used in Chapter I of the Internal Revenue Code.

SEC. 210. For the purposes of this Act, the term "officer or employee" includes a member of a legislative body and a judge or officer of a court.

(*b*) In *Helvering* v. *Therrell* (1938) (303 U. S., 218) (Ct. D. 1316, C. B. 1938-1, 243), the Supreme Court held that compensation paid to individuals acting as liquidators and attorneys for insolvent State banking and insurance corporations was subject to Federal income tax where such compensation was paid from corporate assets and not from funds belonging to the State. In *Helvering* v. *Gerhardt* (1938) (304 U. S., 405) (Ct. D. 1343, C. B. 1938-1, 246), the Court held that compensation of employees of the Port of New York Authority, a bi-State corporation created by a compact between New York and New Jersey and approved by Congress, was subject to Federal income

[1] Section 18.0 to section 18.8 issued under the authority contained in section 203 of the Public Salary Tax Act of 1939 (Public, No. 32, Seventy-sixth Congress, first session).

tax. In *Graves et al.* v. *New York ex rel. O'Keefe* (1939) (59 S. Ct., 595) (Ct. D. 1390, page 129, this Bulletin), the Court overruled *Collector* v. *Day* (11 Wall., 113), in so far as that case recognized an implied constitutional immunity from Federal income taxation of the compensation of officers and employees of State and local governments or their instrumentalities. Each of those decisions extended the classes of State and local officers and employees subject to Federal income taxation on their compensation. Under prior Supreme Court decisions the taxability of compensation of a State or local officer or employee depended upon the nature of his office or employment, *i. e.*, whether he was engaged in the exercise of an essential governmental function or a proprietary function. (See *Helvering* v. *Powers et al.* (1934) (293 U. S., 214, Ct. D. 900, C. B. XIII-2, 213) and *Brush* v. *Commissioner* (1937) (300 U. S., 352, Ct. D. 1212, C. B. 1937-1, 217).)

Pursuant to the authority contained in the above-quoted provisions of the Public Salary Tax Act of 1939, the following regulations are prescribed:

SECTION 18.1. *Definitions.*—As used in these regulations—

(1) The term "Act" means the Public Salary Tax Act of 1939.

(2) The term "State employee" means an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of one or more States or political subdivisions; and includes a member of a State or local legislative body and a judge or officer of a State or local court.

(3) The term "compensation" does not include any amount paid directly or indirectly by the United States or any agency or instrumentality thereof.

(4) The term "claim" means a claim for refund timely filed within the period of limitations provided by the applicable revenue law.

SEC. 18.2. *Claims filed after January 18, 1939.*—Section 203 of the Act describes the circumstances under which a claim filed after January 18, 1939, by a State employee for refund of tax attributable to his compensation for personal services as a State employee for any taxable year beginning prior to January 1, 1939, shall be allowed. If, under these regulations, the Commissioner of Internal Revenue finds that a disallowance of such claim would result in the application of the doctrines announced in *Helvering* v. *Therrell* (1938) (303 U. S., 218) (Ct. D. 1316, C. B. 1938-1, 243), *Helvering* v. *Gerhardt* (1938) (304 U. S., 405) (Ct. D. 1343, C. B. 1938-1, 246), and *Graves et al.* v. *New York ex rel. O'Keefe* (1939) (59 S. Ct., 595) (Ct. D. 1390, page 129, this Bulletin), extending the classes of State employees subject to Federal income tax, then such claim shall be allowed. If, under Supreme Court decisions rendered prior to 1938 on the question of the constitutional immunity of compensation of State employees from Federal income taxation, a disallowance of such claim would be proper, then the claim shall be disallowed; but if under such decisions a disallowance of such claim would not be proper, then the claim shall be allowed. The allowance of a claim under section 203 of the Act will, therefore, be made if, under these regulations, the Commissioner of Internal Revenue finds that such compensation was for personal services rendered in the exercise of an essential governmental function as distinguished from a proprietary function.

A claim under section 203 of the Act shall not be disallowed solely because of the provisions of section 322(c) of the Revenue Act of 1938 and corresponding sections of prior Revenue Acts relating to the prohibition against the allowance of a credit or refund.

Amounts properly refundable under section 203 of the Act include interest, additions to tax, and additional amounts paid with respect to the tax. Such amounts shall be credited or refunded in the same manner as in the case of an erroneously collected income tax.

Section 203 of the Act has no application to a case in which a State employee files a claim prior to January 19, 1939, for refund of tax attributable to his compensation for any taxable year beginning prior to January 1, 1939.

SEC. 18.3. *Application of section 203.*—The application of section 203 of the Act may be illustrated as follows:

Claims shall be allowed if filed, for example, by State public-school teachers, receivers and masters appointed by State courts, liquidators of banks and insurance companies taken over by a State, and officers and employees of a city engaged in maintenance, operation or regulation of public parks and playgrounds, or of water supply.

Claims shall not be allowed if filed, for example, by State liquor store employees or municipal railway employees.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved June 13, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register June 15, 1939, 10.07 a. m.)

SECTION 3 OF THE VINSON ACT (48 STAT., 503), AS AMENDED BY THE ACT OF JUNE 25, 1936 (49 STAT., 1926).

1939–9–9736
I. T. 3257

Deduction of discounts in determining the true total contract price and the cost of performing a contract or subcontract subject to the provisions of section 3 of the Vinson Act.

Advice is requested with respect to the meaning of certain provisions of article 7 of Treasury Decision 4723 (C. B. 1937–1, 519) and article 8(*g*) of that Treasury decision, as amended by Treasury Decision 4741 (C. B. 1937–1, 531) and Treasury Decision 4861 (C. B. 1938–2, 480), promulgated under section 3 of the Vinson Act, as amended.

The provisions in question pertain to the deduction of discounts in determining (1) the true total contract price of a particular contract or subcontract under the Act, and (2) in determining the cost of performing such a contract or subcontract. The pertinent provisions of the regulations and the meaning thereof as interpreted by the Bureau are set forth below.

Article 7, Treasury Decision 4723, supra, provides in part:

* * * Trade or other discounts are also to be deducted in determining the true total contract price.

Any discount which is allowed (from the price stated in the contract) in the payment of the contract price must be deducted from the stated contract price in determining the true total contract price (to be used in computing profit and/or excess profit for the purposes of section 3 of the Vinson Act). This is true regardless of whether such discount is allowed by virtue of trade practice or otherwise.

Article 8(*g*), Treasury Decision 4723, supra, as amended by Treasury Decision 4741, supra, and Treasury Decision 4861, supra, provides in part:

Among the items which shall not be included as a part of the cost of performing a contract or subcontract or considered in determining such cost, are the following: * * * cash discount earned up to 1 per cent of the amount of the purchase, except that all discounts on subcontracts subject to the Act will be considered * * *.

Cash discounts which do not exceed 1 per cent of the invoice or purchase price which are allowed to the contractor or subcontractor in connection with a purchase or purchases for the purposes of the contract or subcontract will not be taken into consideration in determining the cost of performing the contract or subcontract *provided*, however, that such purchase or purchases do not themselves constitute a subcontract which is subject to section 3 of the Vinson Act. In other words, in the case of a purchase of supplies needed in connection with the performance of a contract or subcontract, but which does not itself constitute a subcontract subject to section 3 of the Vinson Act, only cash discount, if any, which exceeds 1 per cent of the purchase price of the supplies will be taken into consideration in computing profit and/or excess profit on the contract or subcontract, whereas in the case of a similar purchase which constitutes a subcontract subject to section

8 of the Vinson Act, any discount (i. e., regardless of whether or not in excess of 1 per cent) will be taken into consideration in computing profit and/or excess profit by the contractor or subcontractor who made the purchase.

1939–17–9807
I. T. 3275

EXCESS PROFITS ON NAVY CONTRACTS.

The term "completion of the contract" as used in section 3 of the Vinson Act, as amended, means the date of delivery of the vessel, aircraft or portion thereof covered by the contract or subcontract, even though the contract contains a clause providing that for the purpose of the Act the contract shall be considered complete upon final payment.

Advice is requested as to what constitutes "date of completion" of a Navy contract subject to section 3 of the Vinson Act, as amended, for the purpose of making annual reports, Form 949, of profit and excess profit on such contracts completed within the income-taxable year of the contractor.

The Navy contracts subject to section 3 of the Vinson Act, as amended, which were awarded to the M Company, herein referred to as the contractor, during 1934 and the early part of 1935 contained no special clause dealing with the date of completion, whereupon the contractor assumed that the date of delivery established the date of their completion for the purpose of preparing the reports of profit and/or excess profit required by the Act.

Later in 1935 and in subsequent years contracts were awarded to the contractor by the Navy Department which contained a clause providing substantially as follows: "For the purpose of this Act (Vinson) the contract shall be considered complete upon final payment." A statement is submitted covering a number of representative Vinson Act contracts awarded the contractor, showing with respect to each, the amount of the contract, unpaid balance (if any), date of final invoice, and date of final payment. Those contracts which contain the clause referred to in the previous paragraph and those which do not contain such clause are indicated.

In connection with the foregoing, the contractor states that in preparing the annual report of contracts completed by it during the income-taxable years 1936 and 1937, it followed a literal interpretation of the language of the contracts which, in its opinion, appeared to be justified by article 5 of Treasury Decision 4723 (C. B. 1937–1, 519), but that if such treatment is erroneous, it desires to correct the annual reports filed for previous years and be prepared to file a correct annual report covering contracts completed during the current year. The contractor points out that in an opinion rendered by the Acting Comptroller General of the United States to the Secretary of the Navy on July 25, 1938 (18 Comp. Gen., 84), the view was expressed that "There appears no reason to suppose that the Congress used the term 'completion of the contract' in any other than its usual sense of completion by the contractor of the contract work, whereupon the cost of performance could be ascertained. * * * the matter is governed by the time the particular contracting party completes the contract

work, and not by the time, possibly much later, when final payment is made by the Government."

Such opinion, after quoting in full article 5(*a*) of Treasury Decision 4723 (supra), continues: "Thus, the administrative regulations under the Act define 'completion of the contract' for the purposes of the legislation as meaning primarily 'the date of delivery of the vessel, aircraft, or portion thereof covered by the contract or subcontract,' which is generally tantamount to completion by the contractor of the contract work. Regulations no more than contracts may modify a statute, but where, as here, the regulations appear to set forth the correct interpretation of the statutory purpose, there would be no authority to vary that purpose by contract or by an administrative determination otherwise in individual cases. That is, * * * no administrative action is authorized which purports to extend the time * * * to a later and different date or which puts the obligation on a different basis, and any purported agreement or administrative determination to such effect must be viewed as invalid because contrary to the statute. See by analogy *Globe Indemnity Co.* v. *United States* (291 U. S., 476, 483)."

It is held that all of the contracts, the data on which were submitted, are to be considered as completed for the purpose of section 3 of the Vinson Act, as amended, as of the date of the delivery of the articles specified in the contracts. This conclusion coincides with the opinion expressed in I. T. 3089 (C. B. 1937–1, 529) as well as with the above-mentioned opinion of the Acting Comptroller General of the United States.

Under the circumstances described above, amended annual reports, Form 949, together with supporting schedules on Form 937, should be filed by contractors who filed original reports on the basis of a literal interpretation of such a clause in their contracts as is hereinbefore quoted and showed a different excess profit liability.

1939–18–9814
T. D. 4897

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 5.

Excess profits on Navy contracts.—Amending Treasury Decision 4723 [C. B. 1937–1, 519], as amended.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, D. C.

NAVY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE NAVY,
Washington, D. C.

To Officers and Employees of the Treasury Department, the Navy Department, and Others Concerned:

Treasury Decision 4723, approved December 31, 1936, by the Acting Secretary of the Treasury and approved January 6, 1937, by the Acting Secretary of the Navy (C. B. 1937–1, 519), as amended by Treasury Decision 4741, approved June 1, 1937, by the Acting Sec-

retary of the Treasury and approved June 3, 1937, by the Secretary of the Navy (C. B. 1937–1, 531), and as further amended by Treasury Decision 4861, approved September 16, 1938, by the Acting Secretary of the Treasury and approved September 19, 1938, by the Acting Secretary of the Navy (C. B. 1938–2, 480) (Part 5 of Title 26, Code of Federal Regulations), is further amended as follows:

(1) Article 10 (section 5.10 of Title 26, Code of Federal Regulations), relating to credit for Federal income taxes, is amended to read as follows:

Credit for Federal income taxes.—For the purpose of computing the amount of excess profit to be paid to the United States, a credit is allowable against the excess profit for the amount of Federal income taxes paid or remaining to be paid on the amount of such excess profit. The "Federal income taxes" in respect of which this credit is allowable include the income taxes imposed by Titles I and IA of the Revenue Act of 1934, Titles I and IA of the Revenue Act of 1936, and Titles I and IA of the Revenue Act of 1938, and the excess-profits taxes imposed by section 702 of the Revenue Act of 1934, section 106 of the Revenue Act of 1935, as amended by section 402 of the Revenue Act of 1936, and section 602 of the Revenue Act of 1938. This credit is allowable for these taxes only to the extent that it is affirmatively shown that they have been finally determined and paid or remain to be paid and that they were imposed upon the excess profit against which the credit is to be made. In case such a credit has been allowed and the amount of Federal income taxes imposed upon the excess profit is redetermined, the credit previously allowed shall be adjusted accordingly.

(2) Article 13 (section 5.13 of Title 26, Code of Federal Regulations) is amended by adding at the end thereof a new paragraph reading as follows:

All books, records, and original evidences of costs (including, among other things, production orders, bills or schedules of materials, purchase requisitions, purchase orders, vouchers, requisitions for materials, standing expense orders, inventories, labor time cards, pay rolls, cost distribution sheets) pertinent to the determination of the true profit, excess profit or net loss from the performance of a contract or subcontract shall be kept at all times available for inspection by internal-revenue officers, and shall be carefully preserved and retained so long as the contents thereof may become material in the administration of the Act. This provision is not confined to books, records, and original evidences pertaining to items which may be considered to be a part of the cost of performing a contract or subcontract. It is applicable to all books, records, and original evidences of costs of each plant, branch or department involved in the performance of a contract or subcontract or in the allocation or distribution of costs to the contract or subcontract.

(This Treasury decision is prescribed pursuant to section 3 of the Act of March 27, 1934 (48 Stat., 505; 34 U. S. C., 496), as amended by the Act of June 25, 1936 (49 Stat., 1926; 34 U. S. C., Sup. IV, 496).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved April 5, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

Approved April 24, 1939.

J. O. RICHARDSON,
Acting Secretary of the Navy.

(Filed with the Division of the Federal Register April 25, 1939, 12.29 p. m.)

1939-22-9856
I. T. 3282

Where the award of a contract under the Vinson Act exceeds $10,000, the contract is and remains subject to section 3 of the Act (as amended), even though by virtue of deductions, provided for in the contract, for cash discounts and late delivery damages the net amount ultimately received thereunder does not exceed $10,000.

Advice is requested whether a certain Navy contract, wherein the contractor expressly agreed to make a report and pay into the Treasury excess profit as provided in section 3 of the Vinson Act, is and/or remains subject to such section (as amended) where, although the award thereof exceeded $10,000, the net amount ultimately received thereunder was less than $10,000 by virtue of deductions, provided for therein, for cash discounts and late delivery damages.

The contract was awarded in 1935 by the Navy Department under the Vinson Act of March 27, 1934 (48 Stat., 503), to the M Company for the supplying of certain naval vessel instrument material, and the amount of the award was $10,175. Accordingly, the company expressly agreed therein to make a report and pay into the Treasury excess profit as provided in section 3 of the Act. The contract contained certain provisions for cash discounts and for liquidated damages in the event the material was not delivered within specified time. The cash discounts provided for, if all taken, would have made the net amount to which the company would have been entitled upon completion of the contract $9,975. Because of delay in checking material delivered to one navy yard, cash discounts were actually taken in the amount of only $75. But, because of failure of the company to deliver some of the material within the time specified in the contract, liquidated damages were incurred by it in the amount of $105. Accordingly, the net amount ultimately received by the company under the contract, which was completed in 1936, was $9,995 ($10,175 less $75 and $105).

It is contended that inasmuch as the net amount received thereunder did not exceed $10,000, the contract is not subject to the limitation on profit prescribed by section 3, supra (as amended). Such section, as amended by the Act of June 25, 1936 (49 Stat., 1926), provides in part:

* * * That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

(a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.

(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices, of such contracts within the scope of this section as are completed by the particular contracting party within the income taxable year, such amount to become the property of the United States * * *.

* * * * * * *

The contract or subcontracts referred to herein are limited to those *where the award exceeds $10,000.* [Italics supplied.]

Article 2 of regulations prescribed by Treasury Decision 4723 (C. B. 1937–1, 519) under section 3 of the Act, as amended, provides in part:

ART. 2. *Contracts and subcontracts under which excess profit liability may be incurred.*—Except as otherwise provided with respect to contracts * * * for certain scientific equipment (see article 3 of these regulations), every contract awarded for an amount exceeding $10,000 and entered into after the enactment of the Act of March 27, 1934, for the construction or manufacture of any complete naval vessel or aircraft, or any portion thereof, is subject to the provisions of the Act relating to excess profits liability. * * *

In view of the foregoing, it is held that inasmuch as the award involved in the contract of the M Company with the Navy Department exceeded $10,000, such contract is and remains subject to the provisions of section 3, supra (as amended). Accordingly, the M Company is required to pay into the Treasury the amount, if any, of excess profit realized thereon.

Attention is invited to the fact that the provisions of article 7 of Treasury Decision 4723 (C. B. 1937–1, 519), relative to certain adjustments of the original contract price, is in connection with the computation of excess-profit liability on contracts which are subject to the provisions of section 3 of the Act, as amended.

1939–23–9866
I. T. 3284

A Navy contract awarded after March 27, 1934, the date of the enactment of the Vinson Act, is subject to section 3 of that Act even though no provision was included in the contract for agreement by the contractor to the limitation on profit provided in that section.

Advice is requested whether a certain contract for the construction of four airplanes for the Navy Department is subject to section 3 of the Vinson Act (48 Stat., 503).

A schedule calling for bids for the construction of four naval airplanes was issued by the Navy Department prior to the date of the enactment of the Vinson Act on March 27, 1934. The bids were opened on April —, 1934. The bid of the M Company was accepted and on April —, 1934, it was awarded a contract for the construction of four airplanes, the total contract price being $10x$ dollars. Although the contract was made after the enactment of the Vinson Act, no provision was included in the contract for agreement by the contractor to the limitation on profit provided in section 3 of that Act. The contract was completed on February —, 1935, and full payment of the total contract price of $10x$ dollars was made by the Government to the contractor on May —, 1935. The M Company derived a profit of $3x$ dollars on the performance of the contract, which is $2x$ dollars in excess of 10 per cent of the contract price.

Section 3 of the Vinson Act of March 27, 1934, provides in part as follows:

* * * That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

(a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.

(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract price, such amount to become the property of the United States: *Provided*, That if such amount is not voluntarily paid the Secretary of the Treasury may collect the same under the usual methods employed under the internal revenue laws to collect Federal income taxes.

(c) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of this Act, but any subdivision of any contract or subcontract involving an amount in excess of $10,000 shall be subject to the conditions herein prescribed.

(d) That the manufacturing spaces and books of its own plant, affiliates, and subdivisions shall at all times be subject to inspection and audit by any person designated by the Secretary of the Navy, the Secretary of the Treasury, and/or by a duly authorized committee of Congress.

(e) To make no subcontract unless the subcontractor agrees to the foregoing conditions.

The report shall be in form prescribed by the Secretary of the Navy and shall state the total contract price, the cost of performing the contract, the net income, and the per centum such net income bears to the contract price. A copy of such report shall be transmitted to the Secretary of the Treasury for consideration in connection with the Federal income tax returns of the contractor for the taxable year or years concerned.

The method of ascertaining the amount of excess profit to be paid into the Treasury shall be determined by the Secretary of the Treasury in agreement with the Secretary of the Navy and made available to the public. The method initially fixed upon shall be so determined on or before June 30, 1934: *Provided*, That in any case where an excess profit may be found to be owing to the United States in consequence hereof, the Secretary of the Treasury shall allow credit for any Federal income taxes paid or remaining to be paid upon the amount of such excess profit.

The contract or subcontracts referred to herein are limited to those where the award exceeds $10,000.

Since the contract involved in this case was made subsequent to the passage of the Vinson Act of March 27, 1934, the M Company can not avoid liability under the provisions of that Act merely on the ground that provision for payment of the excess profit under such Act was not included in the contract in question. It is stated that the omission of such provision was an inadvertence by the parties. It is a well-established principle that the laws subsisting at the time and place of making a contract enter into and form a part of it, the same as if they were expressly referred to or incorporated in its terms. (Hammon on Contracts, section 398.) It is commonly said that existing laws form part of a contract and are incorporated in it. (Williston on Contracts, section 615, revised edition, 1936, Volume III.)

It is held, therefore, that the present contract is subject to the limitation on profit prescribed by section 3 of the Vinson Act, and that the M Company is required to pay into the Treasury the amount of profit realized by it on such contract in excess of 10 per cent of the total contract price, less the amount of income taxes paid or remaining to be paid on such excess profit.

SECTION 3 OF THE VINSON ACT (48 STAT., 503), AS AMENDED BY ACT OF JUNE 25, 1936 (49 STAT., 1926), AND BY ACT OF APRIL 3, 1939 (PUBLIC, NO. 18, SEVENTY-SIXTH CONGRESS).

1939-24-9875
I. T. 3289

Procedure in connection with determining the allowance for obsolescence of special facilities as part of the cost of performing a contract or subcontract subject to the provisions of section 3 of the Vinson Act of March 27, 1934 (48 Stat., 503), as amended by the Act of June 25, 1936 (49 Stat., 1926), and as further amended by the Act of April 3, 1939 (Public, No. 18, Seventy-sixth Congress).

The regulations issued under section 3 of the Vinson Act contain a general provision for the allowance of recurring charges with respect to property used for manufacturing purposes under a contract or subcontract coming within the scope of such section. (Article 8(*c*)5(D) of the regulations in Treasury Decision 4723, C. B. 1937–1, 519.) This provision is sufficiently broad to permit proper allowance for depreciation and obsolescence of such property. The determination of an allowance under such provision will be made by the Commissioner of Internal Revenue pursuant to his duty of determining the correct amount of excess profit liability on contracts and subcontracts coming within the scope of section 3 of the Vinson Act. (Article 19 of the regulations, Treasury Decision 4723, supra.)

With respect to special facilities, inasmuch as it is not reasonably certain until a Navy contract is completed or otherwise terminated whether such special facilities 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 and general wear and tear of such facilities in connection with a particular contract) must await the completion or other termination of the contract and be based upon relevant conditions then extant. (I. T. 2861, C. B. XIV–1, 530 (1935).) If upon the completion of a contract or subcontract subject to the provisions of section 3 of the Vinson Act, the Commissioner of Internal Revenue determines that additional and/or special facilities were necessarily required in the performance of the particular contract or subcontract, that such facilities are not then being used in connection with any other operations, and that there is no prospective further use for such facilities either for Government contracts or for any other operations, then—

(1) If the Commissioner determines that such facilities were used solely in the performance of the particular contract or subcontract, their entire and reasonable cost, less salvage value, will be generally accepted as part of the cost of performing the particular contract or subcontract; or

(2) If the Commissioner determines that such facilities were not used solely in performance of the particular contract or subcontract, allowances for exhaustion, wear and tear, and obsolescence shall be made in accordance with a reasonably consistent plan, on a basis which will return to the contracting party the reasonable cost of such

facilities at the end of their expected economic term of usefulness, and shall be included as a part of the indirect factory expense allocable to all operations in connection with which such facilities are used. The part of the cost, if any, remaining after deducting such allowances and the salvage value of such facilities will be generally accepted as a part of the cost of performing the particular contract or subcontract.

MISCELLANEOUS.

1939–3–9678
Ct. D. 1377

STATE INCOME TAX—ACT OF WISCONSIN LEGISLATURE—DECISION OF SUPREME COURT.

1. CONSTITUTIONALITY—CLASSIFICATION—RETROACTIVITY — GRADUATED INCOME TAX ON DIVIDENDS.

The act of the Wisconsin Legislature of March 27, 1935, imposing an emergency tax for relief purposes upon dividends received in 1933 from Wisconsin corporations at different rates and with different deductions from those applied in that year to other types of income, does not infringe the equal protection and due process clauses of the fourteenth amendment. The selection of such income for taxation at rates and with deductions not shown to be unrelated to an equitable distribution of the tax burden is not a denial of the equal protection commanded by the fourteenth amendment, and the retroactive imposition of the tax is not a denial of due process where the statute was enacted at the first opportunity after the tax year in which the receipt of income occurred.

2. REHEARING DENIED.

Rehearing denied December 19, 1938.

(NOTE.—While this decision involves the validity of a State taxing statute, it is published because the discussion relating to classification and to retroactivity is equally applicable to Federal income taxation and is therefore of general interest.)

SUPREME COURT OF THE UNITED STATES.

Earle S. Welch, appellant, v. *Robert K. Henry and Solomon Levitan, State Treasurer of the State of Wisconsin.*

[59 S. Ct., 121.]

Appeal from the Supreme Court of the State of Wisconsin.

[November 21, 1938.]

OPINION.

Mr. Justice STONE delivered the opinion of the Court.

This appeal presents the question whether the act of the Wisconsin Legislature of March 27, 1935, which imposed a tax on corporate dividends received by appellant in 1933 at rates different from those applicable in that year to other types of income and without deductions which were allowed in computing the tax on other income infringes the equal protection and due process clauses of the fourteenth amendment.

The statute of Wisconsin in force in 1933 and since imposes a tax on net income at graduated rates. (Wisconsin Stat., 1933, ch. 71.) Appellant, a resident of Wisconsin, received in 1933 gross income of $13,383.26, of which $12,156.10 was dividends received from corporations whose "principal business" was "attributable to Wisconsin" within the meaning of the taxing statute. By section 71.04(4), Wisconsin Stat., 1933,[1] such dividends were deductible from gross income in computing net taxable income, together with other items, including taxes, interest paid, business expenses, losses from the sale of securities, and donations, aggregating, in the case of appellant, $11,161.97, so that he had no taxable net income for the year 1933.

[1] Section 71.04(4) permits the deduction from gross income of dividends received from corporations whose principal business is attributable to Wisconsin; "* * * any corporation shall be considered as having its principal business attributable to Wisconsin if 50 per cent or more of the entire net income or loss of such corporation. * * * (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by chapter 71. * * *"

Petitioner's income tax return was due and filed March 15, 1934. A year later chapter 15 of the Laws of Wisconsin for 1935, effective March 27, 1935, laid new taxes for the years 1933 and 1934 upon various taxable subjects. Section 6, with which we are alone concerned, imposed a graduated tax, with no deduction except the sum of $750, on all dividends received in 1933 which, when received, were deductible from gross income under section 71.04(4). The statute declared that the levy was an emergency tax to provide revenue for relief purposes and directed that the proceeds should be paid into the State treasury to be used for "unemployment relief purposes." Appellant paid the tax, amounting to $545.71, under protest, on May 13, 1935, and brought the present suit to compel its restitution as exacted in violation of the State constitution and the equal protection and due process clauses of the fourteenth amendment. From the judgment of the Supreme Court of Wisconsin sustaining the tax (226 Wis., 595), the case comes here on appeal. (Section 237 of the Judicial Code, 28 U. S. C., section 344.)

First. Appellant assails the statute as a denial of equal protection because the dividends which it selected for taxation as a special class were subjected ratably to a tax burden different from that borne by other types of income for the same year by reason of the fact that the dividends were taxed at a different rate from that applied to other income and were given the benefit of but a single deduction of $750, while recipients of other types of income in that year were permitted to deduct specified items of interest, taxes, business losses and donations. It is not contended that the receipt of dividends from corporations is not subject to tax, or that apart from the retroactive application of the tax they could not be included in gross income for the purpose of arriving at net taxable income, but it is insisted that disparities in the tax burdens which may result from the different rates and deductions infringe the constitutional immunity.

Wisconsin income tax legislation has from the beginning treated dividends received from corporations deriving a substantial part of their income from business carried on within the State, on which the corporations have paid a tax to the State, as a distinct class of income for tax purposes. At first complete tax immunity was granted to them. (Section 1, ch. 658, Laws of Wisconsin, 1911.) Later the immunity was allowed ratably in the same proportion that the income of the corporation had been subjected to State income tax. (Section 1, ch. 318, Laws of Wisconsin, 1923.) And, finally, by amendment adopted in 1927[2] and in force in 1933 complete immunity of dividends from income tax was allowed if 50 per cent or more of the total net income of the corporation paying them was included in the computation of the Wisconsin tax on corporate income.[3]

When in 1935 the State was confronted with the necessity of raising revenue to meet the demand for unemployment relief, and of distributing the cost among its taxpayers, the legislature found one class of untaxed income, dividends received from a specified category of corporations. It also could have concluded that a substantial part of this income had borne no tax burden at its source in the earnings of the corporations, since, by section 71.02(3)(d), corporations are not required to pay a tax on that part of their income allocable to business carried on or property located without the State.

We think that the selection of such income for taxation at rates and with deductions not shown to be unrelated to an equitable distribution of the tax burden is not a denial of the equal protection commanded by the fourteenth amendment. It can not be doubted that the receipt of dividends from a corporation is an event which may constitutionally be taxed either with or without deductions (*Lynch* v. *Hornby*, 247 U. S., 339; see *Helvering* v. *Independent Life Ins. Co.*, 292 U. S., 371, 381 [Ct. D. 839, C. B. XIII-1, 302 (1934)]), even though the corporate income which is their source has also been taxed. (See *Tennessee* v. *Whitworth*, 117 U. S., 129, 136; *Klein* v. *Board of Tax Supervisors*, 282 U. S., 19, 23; *Colgate* v. *Harvey*, 296 U. S., 404, 420.) The fact that the dividends of corporations which have to some extent borne the burden of State taxation constitute a distinct class for purposes of tax exemption (*Colgate* v. *Harvey*, supra; compare *Travellers Insurance Co.* v. *Connecticut*, 185 U. S., 364, 367; *Kidd* v. *Alabama*, 188 U. S., 730; *Darnell* v. *Indiana*, 226 U. S., 390, 398),

[2] Chapter 539, section 4, Laws of Wisconsin of 1927.
[3] See note 1, supra.

and that in consequence such dividends have borne no tax burden, is equally a basis for their selection for taxation. (*Watson* v. *State Comptroller*, 254 U. S., 122, 124, 125; *Klein* v. *Board of Tax Supervisors*, supra.) Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action. Taxation is but the means by which government distributes the burdens of its cost among those who enjoy its benefits. And the distribution of a tax burden by placing it in part on a special class which by reason of the taxing policy of the State has escaped all tax during the taxable period is not a denial of equal protection. (See *Watson* v. *Comptroller*, supra, 125.) Nor is the tax any more a denial of equal protection because retroactive. If the 1933 dividends differed sufficiently from other classes of income to admit of the taxation, in that year, of one without the other, lapse of time did not remove that difference so as to compel equality of treatment when the income was taxed at a later date. Selection then of the dividends for the new taxation can hardly be thought to be hostile or invidious when the basis of selection is the fact that the taxed income is of the class which has borne no tax burden. The equal protection clause does not preclude the legislature from changing its mind in making an otherwise permissible choice of subjects of taxation. The very fact that the dividends were relieved of tax, when the need for revenue was less, is basis for the legislative judgment that they should bear some of the added burden when the need is greater.

Numerous retroactive revisions of the Federal revenue laws, presently to be discussed, have imposed taxes on subjects previously untaxed and shifted the burden of old taxes by changes in rates, exemptions and deductions. It has never been thought that the equal protection clause precludes such changes if the new taxes could have been included in the earlier act when adopted. If some retroactive alteration in the scheme of a tax act is permissible, as is conceded, it seems plain that validity, so far as equal protection is concerned, must be determined, as in the case of any other tax, by ascertaining whether the thing taxed falls within a distinct class which may rationally be treated differently from other classes. If such changes are forbidden in the name of equal protection, legislatures in laying new taxes would be left powerless to rectify to any extent a previous distribution of tax burdens which experience had shown to be inequitable, even though constitutional.

The bare fact that the present tax is imposed at different rates and with different deductions from those applied to other types of income does not establish unconstitutionality. It is a commonplace that the equal protection clause does not require a State to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition. (*Lawrence* v. *State Tax Commission*, 286 U. S., 276, 284, 285, and cases cited.)

Just what the differences are in the tax burdens cast upon the two types of income by the divergence in rates and deductions applied to them does not appear. The burden placed on dividends by the taxing act might have been greater if they had been included in gross income and taxed on the same basis as other income since, in that case, the resulting increase in net income would be taxed at the rates applicable to the higher brackets. When the challenged statute was enacted there were available to the legislature the returns for the taxable year showing the different classes of income, the application to them of the existing law, and the effect of existing rates and deductions. There were also data to be derived from the corporation tax returns showing what part of the exempted dividends had their source in corporate income which had been taxed to the corporation and what part was attributable to corporate income not similarly taxed. The legislature was free to take into account all these factors in prescribing rates and deductions to be applied to the newly taxed dividends so as to arrive at an equitable distribution of the added tax burden. In the absence of any facts tending to show that the taxing act, in its purpose or effect, is a hostile or oppressive discrimination against the recipients of dividends who have been hitherto fortunate enough to escape all taxation we can not say the taxing statute denies equal protection.

Second. The objection chiefly urged to the taxing statute is that it is a denial of due process of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. (*Milli-*

ken v. *United States*, 283 U. S., 15, 21 [Ct. D. 320, C. B. X–1, 472 (1931)]; and cases cited.) Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.

In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. (*Nichols* v. *Coolidge*, 274 U. S., 531, 542 [T. D. 4072, C. B. VI–2, 351 (1927)]; *Untermyer* v. *Anderson*, 276 U. S., 440, 445 [T. D. 4157, C. B. VII–1, 326 (1928)] (citing *Blodgett* v. *Holden*, 275 U. S., 142, 147 [T. D. 4117, C. B. VII–1, 324 (1928)]); *Coolidge* v. *Long*, 282 U. S., 582.) Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition can not be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forwarned by the statute books of the possibility of such a levy (*Milliken* v. *United States*, supra). In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases. (See *Wagner* v. *Baltimore*, 239 U. S., 207; *Seattle* v. *Kelleher*, 195 U. S., 351; compare *Citizens National Bank* v. *Kentucky*, 217 U. S., 443, 454; *Billings* v. *United States*, 232 U. S., 261, 282.) Similarly, a tax on the receipt of income is not comparable to a gift tax. We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one. The objection to the present tax is of a different character and is addressed only to the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate.

Assuming that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here. For more than 75 years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session. (See *Untermyer* v. *Anderson*, supra, footnote 1.) These statutes not only increased the tax burden by laying new taxes and increasing the rates of old ones or both, but they redistributed retroactively the tax burdens imposed by preexisting laws. This was notably the case with the "Revenue Act of 1918," enacted February 24, 1919 (40 Stat., 1057), and made applicable to the calendar year 1918, which cut down exemptions and deductions, increased, in varying degrees, income, excess profits and capital stock taxes, altered the basis of surtaxes, and increased in progressive ratio the rates applicable to the higher brackets. Similarly the special munition manufacturer's tax, imposed on profits derived from sales of munitions, Act of September 8, 1916 (ch. 463, 39 Stat., 756, 780), was applied to the 12 months ending December 31, 1916. (Cf. *Carbon Steel Co.* v. *Lewellyn*, 251 U. S., 501; *United States* v. *Anderson*, 269 U. S., 422, 435 [T. D. 3839, C. B. V–1, 179 (1926)].) The contention that the retroactive application of the Revenue Acts is a denial of the due process guaranteed by the fifth amendment has been uniformly rejected. (*Stockdale* v. *Insurance Companies*, 20 Wall., 323; *Railroad Co.* v. *Rose*, 95 U. S., 78, 80; *Flint* v. *Stone Tracy Co.*, 220 U. S., 107; *Billings* v. *United States*, 232 U. S., 261, 282; *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S., 1, 20; *Lynch* v. *Hornby*, 247 U. S., 339, 343; *LaBelle Iron Works* v. *United States*, 256 U. S., 377 [T. D. 3181, C. B. 4, 873 (1921)].)

The like practice of the Legislature of Wisconsin has been approved by its courts.[4]

The equitable distribution of the costs of government through the medium of an income tax is a delicate and difficult task. In its performance experience has shown the importance of reasonable opportunity for the legislative body, in the revision of tax laws, to distribute increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision. Without that opportunity accommodation of the legislative purpose to the need may be seriously obstructed if not defeated. We can not say that the due process which the Constitution exacts denies that opportunity to legislatures; that it withholds from them, more than in the case of a prospective tax, authority to distribute the increased tax burden in the light of experience and in conformity with accepted notions of the requirements of equal protection; or that in view of well established legislative practice, both State and National, taxpayers can justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income at the first opportunity after knowledge of the nature and amount of the income is available. And we think that the "recent transactions" to which this Court has declared a tax law may be retroactively applied (*Cooper* v. *United States*, 280 U. S., 409, 411 [Ct. D. 163, C. B. IX–1, 272 (1930)]) must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment.

The joint resolution of Congress of July 4, 1864, No. 77 (13 Stat., 417), imposed an additional tax on incomes earned during the calendar year 1863, this tax being imposed after the taxes for the year had been paid. In *Stockdale* v. *Insurance Companies*, supra, 331, Mr. Justice Miller said of it: "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, can not be doubted. * * * no one doubted the validity of the tax or attempted to resist it." The Act of February 24, 1919 (ch. 18, Title 2, 40 Stat., 1057, 1058–1088), which taxed incomes for the calendar year 1918, was applied without question as to its constitutionality in *United States* v. *Robbins* (269 U. S., 315 [T. D. 3817, C. B. V–1, 188 (1926)]) and in other cases.

In the present case the returns of income received in 1933 were filed and became available in March, 1934. (Wisconsin Stat., 1933, section 71.09(4).) The next succeeding session of the legislature at which tax legislation could be considered was in 1935, when the challenged statute was passed. By section 4, Article V, of the Wisconsin Constitution, and section 13.02 Wisconsin Statutes, 1935, regular sessions of the legislature are held in each odd-numbered year. Special sessions of the legislature may be held on call of the governor, at which no business can be transacted "except as shall be necessary to accomplish the special purposes for which it was convened." (Section 11, Article IV, Wisconsin Constitution.) A special session was called by the governor in 1934, but for purposes unrelated to taxation. (Proclamations of the Governor of Wisconsin December 2, 28, 1933, January 18, 22, 30, 1934.) Thus the legislature in 1935, at the first opportunity after the tax year in which the income was received, made its revision of the tax laws applicable to 1933 income, as did Congress in the joint resolution of July 4, 1864, commented on in *Stockdale* v. *Insurance Companies*, supra.

While the Supreme Court of Wisconsin thought that the present tax might "approach or reach the limit of permissible retroactivity," we can not say that it exceeds it.

Affirmed.

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[4] Income Tax Cases (1912) (148 Wis., 456, 514); *State ex rel. Globe Tubes Co.* v. *Lyons* (1924) (183 Wis., 107, 124); *Cliffs Chemical Co.* v. *Wisconsin Tax Comm.* (1927) (193 Wis., 295, 302); *West* v. *Tax Comm.* (1932) (207 Wis., 557, 562); *VanDyke* v. *Tax Comm.* (1935) (217 Wis., 528).

OLEOMARGARINE.

1939–1–9660
MS. 208

Schedule of oleomargarine produced and materials used during the month of November, 1938, as compared with November, 1937.

	November, 1938.	November, 1937.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 30,098,029	[2] 37,361,016
Total withdrawn tax-paid	29,778,769	38,007,265
Ingredient schedule of uncolored oleomargarine:		
Babassue oil	642,668	499,989
Coconut oil	6,976,189	5,601,308
Corn oil	113,343	108,816
Cottonseed oil	10,793,497	20,287,384
Derivative of glycerine	73,790	116,001
Lecithin	8,782	5,176
Milk	5,809,056	7,009,137
Neutral lard	108,282	156,261
Oleo oil	922,302	628,895
Oleo stearine	260,927	307,689
Oleo stock	107,983	58,190
Palm kernel oil	18,234	381,755
Peanut oil	245,582	239,753
Salt	1,264,551	1,731,173
Soda (benzoate of)	11,616	16,332
Soya bean oil	4,284,522	2,177,161
Soya bean stearine	7,349	----------
Vitamin concentrate	1,215	----------
Total	31,649,868	39,325,020
Total production of colored oleomargarine	[3] 122,850	[4] 113,887
Total withdrawn tax-paid	32,948	61,354
Ingredient schedule of colored oleomargarine:		
Babassue oil	----------	874
Coconut oil	46,929	10,311
Color	141	102
Corn oil	136	2
Cottonseed oil	13,356	51,336
Derivative of glycerine	261	232
Lecithin	6	----------
Milk	29,131	27,421
Neutral lard	3,962	3,733
Oleo oil	17,959	20,917
Oleo stearine	490	1,200
Oleo stock	1,164	1,012
Palm kernel oil	66	925
Peanut oil	85	58
Salt	6,131	8,934
Soda (benzoate of)	49	43
Soya bean oil	18,557	9,415
Soya bean stearine	27	----------
Vitamin concentrate	1	----------
Total	138,451	136,515

[1] Of the amount produced, 24,163 pounds were reworked.
[2] Of the amount produced, 18,339 pounds were reworked.
[3] Of the amount produced, 77 pounds were reworked.
[4] Of the amount produced, 32 pounds were reworked.

1939–5–9699
MS. 209

Schedule of oleomargarine produced and materials used during the month of December, 1938, as compared with December, 1937.

	December, 1938.	December, 1937.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 30,252,565	[2] 37,273,984
Total withdrawn tax-paid	29,956,607	36,388,855
Ingredient schedule of uncolored oleomargarine:		
Babassue oil	614,791	664,345
Coconut oil	7,160,309	6,218,179
Corn oil	134,763	161,167
Cottonseed oil	10,563,893	18,915,006
Derivative of glycerine	74,890	110,039
Lecithin	9,714	6,092
Milk	5,804,222	6,652,630
Neutral lard	100,952	186,928
Oleo oil	994,400	682,490
Oleo stearine	233,979	254,778
Oleo stock	116,609	44,608
Palm kernel oil	98,472	515,277
Peanut oil	231,826	145,188
Salt	1,238,503	1,720,459
Soda (benzoate of)	12,488	13,694
Soya bean oil	4,174,633	2,725,995
Vitamin concentrate	1,282	331
Total	31,568,739	39,017,236
Total production of colored oleomargarine	[3] 120,858	117,213
Total withdrawn tax-paid	34,358	57,126
Ingredient schedule of colored oleomargarine:		
Coconut oil	43,663	6,722
Color	153	117
Corn oil	54	12
Cottonseed oil	12,855	54,589
Derivative of glycerine	380	271
Lecithin	3	
Milk	25,978	28,808
Neutral lard	3,624	4,335
Oleo oil	14,936	20,246
Oleo stearine		1,002
Oleo stock	719	514
Palm kernel oil	218	975
Peanut oil	37	7
Salt	6,921	8,735
Soda (benzoate of)	55	27
Soya bean oil	23,785	9,575
Vitamin concentrate	3	
Total	133,385	135,935

[1] Of the amount produced, 40,316 pounds were reworked.
[2] Of the amount produced, 25,335 pounds were reworked.
[3] Of the amount produced, 1,696 pounds were reworked.

1939-9-9738
MS. 210

Schedule of oleomargarine produced and materials used during the month of January, 1939, as compared with January, 1938.

	January, 1939.	January, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 30,199,609	[2] 40,325,000
Total withdrawn tax-paid	30,315,940	40,740,751
Ingredient schedule of uncolored oleomargarine:		
Babassue oil	712,285	2,137,677
Coconut oil	7,207,087	4,383,110
Corn oil	138,954	208,727
Cottonseed oil	9,871,489	19,510,605
Derivative of glycerine	75,562	108,913
Lecithin	8,438	6,440
Milk	5,828,765	7,314,838
Neutral lard	102,766	143,938
Oleo oil	1,166,224	771,634
Oleo stearine	232,079	282,859
Oleo stock	128,809	55,516
Palm kernel oil	121,434	917,026
Peanut oil	218,940	236,031
Salt	1,289,047	1,847,403
Soda (benzoate of)	13,082	16,158
Soya bean oil	4,793,826	4,200,314
Vitamin concentrate	1,173	546
Total	31,889,910	42,141,785
Total production of colored oleomargarine	[3] 119,563	[4] 150,959
Total withdrawn tax-paid	34,058	61,150
Ingredient schedule of colored oleomargarine:		
Babassue oil	2	126
Coconut oil	37,205	7,325
Color	118	164
Corn oil	63	2
Cottonseed oil	18,008	69,644
Derivative of glycerine	320	466
Lecithin	9	
Milk	27,634	35,109
Neutral lard	3,852	5,220
Oleo oil	21,042	22,586
Oleo stearine	125	600
Oleo stock	1,909	1,559
Palm kernel oil	628	1,649
Peanut oil	38	45
Salt	6,199	10,213
Soda (benzoate of)	81	48
Soya bean oil	17,257	16,171
Vitamin concentrate	3	
Total	129,561	170,927

[1] Of the amount produced, 29,307 pounds were reworked.
[2] Of the amount produced, 20,155 pounds were reworked.
[3] Of the amount produced, 320 pounds were reworked.
[4] Of the amount produced, 160 pounds were reworked.

1939-9-9739
MS. 211

Amended schedule of oleomargarine produced and materials used during the month of December, 1938, as compared with December, 1937.

	December, 1938.	December, 1937.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 30,252,565	[2] 40,595,550
Total withdrawn tax-paid	29,956,607	39,658,189
Ingredient schedule of uncolored oleomargarine:		
Babassue oil	614,791	664,345
Coconut oil	7,160,309	6,587,168
Corn oil	134,763	213,194
Cottonseed oil	10,563,896	20,857,046
Derivative of glycerine	74,890	111,993
Lecithin	9,714	6,092
Milk	5,804,222	7,235,506
Neutral lard	100,962	186,928
Oleo oil	994,400	717,050
Oleo stearine	236,979	284,668
Oleo stock	116,609	59,103
Palm kernel oil	98,472	515,277
Peanut oil	231,826	227,356
Salt	1,238,503	1,843,702
Soda (benzoate of)	12,488	16,739
Soya bean oil	4,174,633	2,938,395
Vitamin concentrate	1,282	498
Total	31,568,739	42,465,060
Total production of colored oleomargarine	[3] 120,858	[4] 132,493
Total withdrawn tax-paid	34,358	59,688
Ingredient schedule of colored oleomargarine:		
Coconut oil	43,663	6,722
Color	153	133
Corn oil	54	15
Cottonseed oil	12,856	63,214
Derivative of glycerine	380	295
Lecithin	3	
Milk	25,978	32,066
Neutral lard	3,624	4,335
Oleo oil	14,936	23,621
Oleo stearine		1,002
Oleo stock	719	1,189
Palm kernel oil	218	975
Peanut oil	37	11
Salt	6,921	9,498
Soda (benzoate of)	55	40
Soya bean oil	23,785	9,575
Vitamin concentrate	3	
Total	133,385	152,691

[1] Of the amount produced, 40,316 pounds were reworked.
[2] Of the amount produced, 29,545 pounds were reworked.
[3] Of the amount produced, 1,696 pounds were reworked.
[4] Of the amount produced, 58 pounds were reworked.

1939–14–9779
MS. 212

Schedule of oleomargarine produced and materials used during the month of February, 1939, as compared with February, 1938.

	February, 1939	February, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 27,574,196	[2] 36,059,365
Total withdrawn tax-paid	27,744,210	36,222,643
Ingredient schedule of uncolored oleomargarine:		
Babassue oil	1,164,916	1,098,719
Coconut oil	5,262,189	6,410,597
Corn oil	61,505	40,802
Cottonseed oil	9,397,515	16,746,072
Derivative of glycerine	77,635	100,422
Lecithin	7,059	7,748
Milk	5,395,467	6,910,842
Neutral lard	110,218	139,740
Oleo oil	1,270,172	886,321
Oleo stearine	228,563	248,053
Oleo stock	130,881	70,352
Palm kernel oil	43,980	527,316
Peanut oil	193,885	318,422
Salt	1,150,819	1,509,102
Soda (benzoate of)	11,133	13,842
Soya bean oil	4,365,905	2,737,432
Vitamin concentrate	1,724	4,920
Total	28,873,368	37,770,702
Total production of colored oleomargarine	126,602	[3] 142,031
Total withdrawn tax-paid	30,230	65,848
Ingredient schedule of colored oleomargarine:		
Babassue oil	2,822	432
Coconut oil	82,707	20,681
Color	132	164
Corn oil	69	
Cottonseed oil	14,490	45,715
Derivative of glycerine	349	392
Lecithin	6	1
Milk	26,988	38,213
Neutral lard	4,379	5,921
Oleo oil	18,752	24,563
Oleo stearine		109
Oleo stock	1,409	1,633
Palm kernel oil	178	520
Peanut oil	77	53
Salt	6,691	7,506
Soda (benzoate of)	69	41
Soya bean oil	29,255	18,230
Vitamin concentrate	2	
Total	138,173	164,165

[1] Of the amount produced, 14,747 pounds were reworked.
[2] Of the amount produced, 60,396 pounds were reworked.
[3] Of the amount produced, 96 pounds were reworked.

1939–18–9820
MS. 213

Schedule of oleomargarine produced and materials used during the month of March, 1939, as compared with March, 1938.

	March, 1939.	March, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 29,279,377	[2] 40,799,998
Total withdrawn tax-paid	28,999,585	39,621,927
Ingredient schedule of uncolored oleomargarine:		
Babassue oil	1,589,377	1,129,602
Coconut oil	4,702,759	9,532,894
Corn oil	51,431	4,150
Cottonseed oil	9,663,677	16,286,048
Derivative of glycerine	73,385	118,933
Lecithin	7,274	9,709
Milk	5,827,131	7,567,479
Neutral lard	108,615	147,764
Oleo oil	1,367,170	1,324,603
Oleo stearine	270,334	262,994
Oleo stock	93,787	107,374
Palm kernel oil	171,522	1,236,740
Peanut oil	202,511	525,342
Rice oil		17,420
Salt	1,213,216	1,617,480
Soda (benzoate of)	11,603	15,775
Soya bean oil	5,411,040	2,496,550
Vitamin concentrate	1,289	1,732
Total	30,706,121	42,402,589
Total production of colored oleomargarine	[3] 137,202	160,872
Total withdrawn tax-paid	32,693	62,292
Ingredient schedule of colored oleomargarine:		
Babassue oil	7,103	15,065
Coconut oil	25,881	22,344
Color	137	189
Corn oil	98	3
Cottonseed oil	14,541	40,647
Cottonseed oil stearine	60	
Derivative of glycerine	303	379
Lecithin	7	14
Milk	83,465	37,600
Neutral lard	3,638	7,236
Oleo oil	18,431	28,443
Oleo stearine	1,100	552
Oleo stock	1,287	1,585
Palm kernel oil	1,123	1,263
Peanut oil	107	80
Salt	8,612	9,018
Soda (benzoate of)	63	33
Soya bean oil	40,956	16,948
Vitamin concentrate	3	2
Total	156,915	181,401

[1] Of the amount produced, 19,106 pounds were reworked.
[2] Of the amount produced, 72,140 pounds were reworked.
[3] Of the amount produced, 64 pounds were reworked.

1939-22-9858
MS. 214

Schedule of oleomargarine produced and materials used during the month of April, 1939, as compared with April, 1938.

	April, 1939.	April, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 23,229,375	[2] 32,506,686
Total withdrawn tax-paid	23,595,417	33,086,598
Ingredient schedule of uncolored oleomargarine:		
Babassue oil	1,246,331	969,721
Coconut oil	3,407,487	8,955,180
Corn oil	27,239	46,166
Cottonseed oil	7,472,545	11,380,518
Derivative of glycerine	59,774	98,812
Lecithin	5,911	6,817
Milk	4,541,279	6,030,975
Neutral lard	90,965	131,356
Oleo oil	1,017,622	1,386,609
Oleo stearine	235,979	239,274
Oleo stock	80,149	162,601
Palm kernel oil	125,756	559,514
Peanut oil	177,709	275,462
Rice oil		33,978
Salt	995,007	1,318,704
Soda (benzoate of)	9,323	11,792
Soya bean oil	4,895,876	2,347,155
Vitamin concentrate	1,311	1,376
Total	24,390,263	33,956,010
Total production of colored oleomargarine	95,870	134,152
Total withdrawn tax-paid	27,051	49,930
Ingredient schedule of colored oleomargarine:		
Babassue oil	473	1,184
Coconut oil	20,260	25,545
Color	90	167
Corn oil	4	
Cottonseed oil	10,992	41,208
Derivative of glycerine	291	335
Lecithin	3	1
Milk	19,346	32,357
Neutral lard	3,554	6,890
Oleo oil	14,204	24,953
Oleo stearine	900	500
Oleo stock	806	417
Palm kernel oil	468	495
Peanut oil	34	28
Salt	6,616	8,011
Soda (benzoate of)	33	34
Soya bean oil	28,961	8,800
Vitamin concentrate	1	1
Total	107,036	150,926

[1] Of the amount produced, 32,112 pounds were reworked.
[2] Of the amount produced, 52,141 pounds were reworked.

TOBACCO.

REGULATIONS 8, ARTICLE 24: Form 774, tobacco invoice or notice of shipment. 1939–3–9682 T. D. 4881

FORM 774, TOBACCO INVOICE OR NOTICE OF SHIPMENT, BY DEALERS IN LEAF TOBACCO.

Regulations No. 8, relating to the taxes on tobacco, snuff, cigars, and cigarettes, also on cigarette papers and tubes and purchase and sale of leaf tobacco, amended.

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

To Collectors of Internal Revenue and Others Concerned:

The first paragraph of subdivision (4) (a) of article 24 of Regulations No. 8, as revised and approved November 12, 1934, is amended to read as follows:

(*a*) *Exports.*—In the case of exports, the dealer shall show on both the original (white) and duplicate (yellow) Form 774 under appropriate heading, the type number of the tobacco to be exported according to the official classification of leaf tobacco by the United States Department of Agriculture, Bulletin S. R. A.—B. A. E. No. 118, issued November, 1929.

The original (white) Form 774 shall be attached to a copy of "Shipper's Export Declaration" on Customs or Commerce Form 7525. This copy shall be marked, "For internal revenue purposes," and with original (white) invoices on Form 774 attached shall be forwarded at the close of each month by the collector of customs, at the port of exportation, to the Commissioner of Internal Revenue, Tobacco Division, Washington, D. C.

This Treasury decision is promulgated under the authority contained in section 1101 of the Revenue Act of 1926.

MILTON E. CARTER,
Acting Commissioner of Internal Revenue.

Approved January 11, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register January 13, 1939, 11.09 a. m.)

1939–2–9670
T. 54

Statement of manufactured tobacco produced, by classes, during the month of October, 1938, as compared with October, 1937.[1]

	October, 1938.	October, 1937.
	Pounds.	*Pounds.*
Plug	4,344,306	4,767,893
Twist	444,336	591,009
Fine-cut chewing	358,365	384,865
Scrap chewing	2,151,438	3,854,922
Smoking	17,670,745	16,412,747
Total	24,969,190	26,011,436

[1] These figures are subject to revision until published in the Commissioner's annual report.

1939–6–9707
T. 55

Statement of manufactured tobacco produced, by classes, during the month of November, 1938, as compared with November, 1937.[1]

	November, 1938.	November, 1937.
	Pounds.	*Pounds.*
Plug	4, 266, 312	4, 460, 106
Twist	414, 774	492, 937
Fine-cut chewing	362, 835	481, 632
Scrap chewing	4, 663, 403	3, 223, 545
Smoking	18, 503, 408	15, 856, 156
Total	28, 110, 732	24, 514, 376

1939–10–9747
T. 56

Statement of manufactured tobacco produced, by classes, during the month of December, 1938, as compared with December, 1937.[1]

	December, 1938.	December, 1937.
	Pounds.	*Pounds.*
Plug	4, 289, 930	3, 840, 618
Twist	440, 335	452, 126
Fine-cut chewing	382, 042	372, 434
Scrap chewing	4, 132, 533	3, 350, 267
Smoking	15, 580, 293	14, 465, 190
Total	24, 825, 133	22, 480, 635

1939–15–9789
T. 57

Statement of manufactured tobacco produced, by classes, during the month of January, 1939, as compared with January, 1938.[1]

	January, 1939.	January, 1938.
	Pounds.	*Pounds.*
Plug	3, 418, 751	3, 726, 620
Twist	399, 664	437, 425
Fine-cut chewing	371, 902	351, 062
Scrap chewing	3, 419, 480	3, 153, 132
Smoking	15, 650, 411	14, 726, 063
Total	23, 260, 208	22, 394, 302

[1]These figures are subject to revision until published in the Commissioner's annual report.

1939-19-9827
T. 58

Statement of manufactured tobacco produced, by classes, during the month of February, 1939, as compared with February, 1938.[1]

	February, 1939.	February, 1938.
	Pounds.	*Pounds.*
Plug	4,145,496	4,587,323
Twist	470,912	450,620
Fine-cut chewing	319,040	335,200
Scrap chewing	2,923,992	3,104,550
Smoking	14,711,479	14,261,942
Total	22,570,919	22,739,635

1939-22-9859
T. 59

Statement of manufactured tobacco produced, by classes, during the month of March, 1939, as compared with March, 1938.[1]

	March, 1939.	March, 1938.
	Pounds.	*Pounds.*
Plug	4,321,519	4,806,006
Twist	491,139	411,557
Fine-cut chewing	423,113	501,925
Scrap chewing	3,365,273	3,373,315
Smoking	17,451,168	18,155,475
Total	26,052,212	27,248,278

[1] These figures are subject to revision until published in the Commissioner's annual report.

MISCELLANEOUS.

1939–24–9876
D. C. 230 (Rev.)

LAWS AND REGULATIONS GOVERNING THE RECOGNITION OF AGENTS, ATTORNEYS, AND OTHER PERSONS REPRESENTING CLAIMANTS BEFORE THE TREASURY DEPARTMENT AND OFFICES THEREOF.

[1939 Amendment. Department Circular No. 230 of 1936 (revised). Committee on Enrollment and Disbarment.]

WASHINGTON, *May 11, 1939.*

Section 3 of Department Circular No. 230 (revised) of October 1, 1936, is revised to read as follows:

SEC. 10.3. *Qualifications for enrollment.*—(*a*) Persons of the following classes who are found, upon consideration of their applications, to possess the qualifications required by these regulations may be admitted to practice before the Treasury Department as attorneys or agents respectively:

1. Attorneys at law who have been admitted to practice before the courts of the States, Territories, or District of Columbia, in which they maintain offices, and who are lawfully engaged in the active practice of their profession.

2. Certified public accountants who have duly qualified to practice as certified public accountants in their own names, under the laws and regulations of the States, Territories, or District of Columbia, in which they maintain offices, and who are lawfully engaged in active practice as certified public accountants.

Applicants who are employed by corporations on a full-time basis and who do not maintain offices apart from such employment with their services available to the general public will not be considered to be in active practice within the meaning of the term as used above.

Applicants for enrollment to practice before the Treasury Department are required by statute to "show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases." (Title 5, section 261, United States Code.) The burden is upon applicants to establish clearly their right to enrollment by showing that they possess (1) a good character and reputation, (2) an adequate education, and (3) a knowledge of the laws and regulations relating to tax matters and other subjects which they expect to handle before the Department and of the rules and regulations governing practice before the Department.

Good character and good reputation are not identical requirements. The former is determined by the applicant's actual qualities; the latter depends upon the opinion entertained of the applicant by those who have had the opportunity of knowing him in the community in which he resides or in which he practices his profession. It follows that evidence of any act or omission which tends to establish lack of integrity or untrustworthiness or other qualities reprehensible in a professional man, is material as bearing upon the character of the applicant, notwithstanding there is clear proof that his reputation is good. An applicant must furnish as references the names and addresses of at least six persons who are acquainted with his reputation and with whom the applicant has come in contact in his profession or business.

(*b*) Among the causes sufficient to justify denial of an application for enrollment are: Any conduct, or practices, or proposed practices, which would constitute a violation of any of the provisions of these regulations if the applicant were enrolled or any other conduct which would be a ground for suspension or disbarment under the applicable law or laws; any conduct which would be deemed grossly unfair in commercial transactions by accepted standards; or a bad reputation imputing to an applicant conduct of a criminal, dishonest, or unethical kind.

The Committee on Enrollment and Disbarment will endeavor to ascertain all the facts deemed necessary by it to pass upon any application without expense or undue inconvenience to the applicant. In the event, however, that the Committee is not satisfied with the information received, it may require the applicant to appear in person before the Committee or before some person or persons designated by it for the purpose of undergoing additional written or

oral examination as to his fitness for enrollment. The Committee may grant a hearing on an application at the applicant's request.

(c) Application for enrollment may be denied in any case in which it appears that the applicant has terminated his employment with the Treasury Department in violation of an obligation assumed as a condition of such employment to remain in the service of the Department for a specified period or for a reasonable time.

(d) Only citizens of the United States over the age of 21 years are eligible for enrollment. A person who is unable for any reason to take the oath of allegiance, and to support the Constitution of the United States, as required of persons prosecuting claims against the United States by Title 31, section 204, United States Code, can not be enrolled.

(e) Corporations and partnerships are ineligible for enrollment.

(f) Officers and employees of any State, or subdivision thereof, whose duties require them to pass upon, investigate, or deal with tax matters of such State or subdivision, shall be ineligible for enrollment, provided such employment may disclose facts or information applicable to Federal tax matters.

(g) Judges of courts of record shall be ineligible for enrollment.

(h) All persons to whom section 198 or section 203 of Title 18 of the United States Code applies, all persons prohibited by other law from representing claimants against the United States, all persons regularly employed by corporations owned wholly by the United States, and all persons regularly employed by the District of Columbia shall be ineligible for enrollment." [1]

JOHN W. HANES,
Acting Secretary of the Treasury.

MAY 11, 1939.

1939–5–9698

The symbols to be used on letters originating in the Practice and Procedure Division of the Income Tax Unit will be as follows:

IT: P—Head of division.
IT: P: IR—Bureau Information and Rulings Section.
IT: P: CA—Coordinating and Advisory Section.
IT: P: T—Taxpayers' Rulings Section.
IT: P: T: 1—Group 1.
IT: P: T: 2—Group 2.
IT: P: T: 3—Group 3.

1939–15–9787

Symbols to be used on letters originating in the Clearing Division of the Income Tax Unit will be as follows:

IT: Cl—Head of division.
IT: Cl: CC—Claims Control Section.
IT: Cl: D—Returns Distribution Section.
IT: Cl: P—Proving Section.
IT: Cl: St—Statistical Section.

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[1] These regulations supersede section 10.3, Chapter 1, Title 31 of the Code of Federal Regulations issued under authority contained in section 3, 23 Stat., 258, Title 5, U. S. C., 261 (Circ. 230, Sec. Treas., Sept. 15, 1936).

LEGISLATION.

1939-17-9809

H. R. 3790. PUBLIC, NO. 32, SEVENTY-SIXTH CONGRESS. [CHAPTER 59, FIRST SESSION.]

An Act relating to the taxation of the compensation of public officers and employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Salary Tax Act of 1939."

TITLE I.

SECTION 1. Section 22(a) of the Internal Revenue Code (relating to the definition of "gross income") is amended by inserting after the words "compensation for personal service" the following: ("including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing)".

SEC. 2. Section 116(b) of the Internal Revenue Code (exempting compensation of teachers in Alaska and Hawaii from income tax) is repealed.

SEC. 3. Section 22(a) of the Internal Revenue Code is amended by adding at the end thereof a new sentence to read as follows: "In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income."

SEC. 4. The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

TITLE II.

SEC. 201. Any amount of income tax (including interest, additions to tax, and additional amounts) for any taxable year beginning prior to January 1, 1938, to the extent attributable to compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing—

(a) shall not be assessed, and no proceeding in court for the collection thereof shall be begun or prosecuted (unless pursuant to an assessment made prior to January 1, 1939);

(b) if assessed after December 31, 1938, the assessment shall be abated, and any amount collected in pursuance of such assessment shall be credited or refunded in the same manner as in the case of an income tax erroneously collected; and

(c) shall, if collected on or before the date of the enactment of this Act, be credited or refunded in the same manner as in the case of an income tax erroneously collected, in the following cases—

(1) Where a claim for refund of such amount was filed before January 19, 1939, and was not disallowed on or before the date of the enactment of this Act;

(2) Where such claim was so filed but has been disallowed and the time for beginning suit with respect thereto has not expired on the date of the enactment of this Act;

(3) Where a suit for the recovery of such amount is pending on the date of the enactment of this Act; and

(4) Where a petition to the Board of Tax Appeals has been filed with respect to such amount and the Board's decision has not become final before the date of the enactment of this Act.

SEC. 202. In the case of any taxable year beginning after December 31, 1937, and before January 1, 1939, compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, shall not be included in the gross income of any individual under Title I of the Revenue Act of 1938 and shall be exempt from taxation under such title, if such individual either—

(a) did not include in his return for a taxable year beginning after December 31, 1936, and before January 1, 1938, any amount as compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing; or

(b) did include any such amount in such return, but is entitled under section 201 of this Act to have the tax attributable thereto credited or refunded.

SEC. 203. Any amount of income tax (including interest, additions to tax, and additional amounts) collected on, before, or after the date of the enactment of this Act for any taxable year beginning prior to January 1, 1939, to the extent attributable to compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, shall be credited or refunded in the same manner as in the case of an income tax erroneously collected, if claim for refund with respect thereto is filed after January 18, 1939, and the Commissioner of Internal Revenue, under regulations prescribed by him with the approval of the Secretary of the Treasury, finds that disallowance of such claim would result in the application of the doctrines in the cases of Helvering against Therrell (303 U. S. 218), Helvering against Gerhardt (304 U. S. 405), and Graves et al. against New York ex rel. O'Keefe, decided March 27, 1939, extending the classes of officers and employees subject to Federal taxation.

SEC. 204. Neither section 201 nor section 203 shall apply in any case where the claim for refund, or the institution of the suit, or the filing of the petition with the Board, was, at the time filed or begun, barred by the statute of limitations properly applicable thereto.

SEC. 205. Compensation shall not be considered as compensation within the meaning of sections 201, 202, and 203 to the extent that it is paid directly or indirectly by the United States or any agency or instrumentality thereof.

SEC. 206. The terms used in this Act shall have the same meaning as when used in Chapter I of the Internal Revenue Code.

SEC. 207. No collection of any tax (including interest, additions to tax, and penalties) imposed by any State, Territory, possession, or local taxing authority on the compensation, received before January 1, 1939, for personal service as an officer or employee of the United States or any agency or instrumentality thereof which is exempt from Federal income taxation and, if a corporate agency or instrumentality, is one (a) a majority of the stock of which is owned by or on behalf of the United States, or (b) the power to appoint or select a majority of the board of directors of which is exercisable by or on behalf of the United States, shall be made after the date of the enactment of this Act.

SEC. 208. This title shall not apply with respect to any officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, after the Secretary of the Treasury has determined and proclaimed that it is the policy of such State to collect from any individual any tax, interest, additions to tax, or penalties, on account of compensation received by such individual prior to January 1, 1939, for personal service as an officer or employee of the United States or any agency or instrumentality thereof. In making such determination the Secretary of the Treasury shall disregard the taxation of officers and employees of any corporate agency or instrumentality which is not exempt from Federal income taxation, or which if so exempt is one (a) a majority of the stock of which is not owned by or on behalf of the United States and (b) the power to appoint or select a majority of the board of directors of which is not exercisable by or on behalf of the United States.

SEC. 209. In the case of the judges of the Supreme Court, and of the inferior courts of the United States created under Article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior Revenue Act.

SEC. 210. For the purposes of this Act, the term "officer or employee" includes a member of a legislative body and a judge or officer of a court.

SEC. 211. If either title of this Act, or the application thereof to any person or circumstances, is held invalid, the other title of the Act shall not be affected thereby.

Approved, April 12, 1939.

1939–20–9837

H. R. 3791. PUBLIC, NO. 18, SEVENTY-SIXTH CONGRESS. [CHAPTER 35, FIRST SESSION.]

An Act to provide more effectively for the national defense by carrying out the recommendations of the President in his message of January 12, 1939, to the Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

* * * * * * *

SEC. 14. All the provisions of section 3 of the Act of March 27, 1934, as amended (48 Stat., 505; 49 Stat., 1926), and as amended by

this section shall be applicable with respect to contracts for aircraft or any portion thereof for the Army to the same extent and in the same manner that such provisions are applicable with respect to contracts for aircraft, or any portion thereof for the Navy: *Provided*, That the Secretary of War shall exercise all functions under such section with respect to aircraft for the Army which are exercised by the Secretary of the Navy with respect to aircraft for the Navy: *Provided further*, That section 3b of the Act of March 27, 1934 (48 Stat., 505), as amended (49 Stat., 1926; 34 U. S. C. Supp. IV, 496), is hereby further amended by inserting in the first sentence after the words "in excess of 10 per centum of the total contract prices" the words "for the construction and/or manufacture of any complete naval vessel or portion thereof, and in excess of 12 per centum of the total contract prices for the construction and/or manufacture of any complete aircraft or portion thereof"; by inserting in the first proviso after the words "That if there is a net loss on all such contracts or subcontracts" the words "for the construction and/or manufacture of any complete naval vessel or portion thereof"; and by inserting at the end of the first proviso after the words "income taxable year" a comma and the words "and that if there is a net loss, or a net profit less than 12 per centum, as aforesaid on all such contracts or subcontracts for the construction and/or manufacture of any complete aircraft or portion thereof completed by the particular contractor or subcontractor within any income taxable year, such net loss or deficiency in profit shall be allowed as a credit in determining the excess profit, if any, during the next succeeding four income taxable years, and that the method of ascertaining the amount of excess profit, initially fixed upon shall be determined on or before June 30, 1939": *Provided further*, That when aircraft are procured by the Secretary of War as a result of competitive bids requiring the submission of sample aircraft with bid, the Secretary is authorized, in his discretion, to purchase sample aircraft of competitors to whom an award is not made, not more than one each from not more than three such competitors, in order of merit, at prices not exceeding 75, 60, and 50 per centum, respectively, of the cost applicable in the opinion of the Secretary to the development and manufacture of such sample aircraft.

Approved April 3, 1939.

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