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Internal Revenue Bulletin

Cumulative Bulletin 1939-2

JULY-DECEMBER, 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

Treasury Department : : : : : Bureau of Internal Revenue

Internal Revenue Bulletin

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

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

In addition to publishing all Internal Revenue Treasury Decisions, it is the policy of the Bureau of Internal Revenue to publish all rulings and decisions, including opinions of the 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 : 1940

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The Internal Revenue Bulletin service for 1940 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 1939, 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
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1926	V–1	V–2	40, 30
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1928	VII–1	VII–2	35, 50
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1931	X–1	X–2	65, 30
1932	XI–1	XI–2	30, 30
1933	XII–1	XII–2	30, 50
1934	XIII–1	XIII–2	50, 60
1935	XIV–1	XIV–2	50, 50
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1939	1939–1—		
	Part 1	----------	50, —
	Part 2	----------	$1. 00, —
		1939–2	60

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 1939–2, 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, employment, and miscellaneous taxes, as indicated on the title page of this Bulletin, published in the weekly Bulletins (1939, Nos. 27 to 52, inclusive) for the period July 1 to December 31, 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 December 31, 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 Revenue Act of 1939) and "B" (Revenue Act of 1938), the section headings corresponding with the sections of the Code and the 1939 and 1938 Acts, 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 Revenue Act of 1934 and the article headings corresponding with the article headings of Regulations 86.

Rulings under Titles VIII and IX of the Social Security Act and under Subchapters A and C, Chapter 9, of the Internal Revenue Code are published under article headings of Regulations 91 and 90, respectively; rulings under the Carriers Taxing Act of 1937 and under Subchapter B, Chapter 9, of the Internal Revenue Code 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 others 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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July–December, 1925 (No. IV–2)	2252–2523
January–June, 1926 (No. V–1)	2524–2813
July–December, 1926 (No. V–2)	2814–3026
January–June, 1927 (No. VI–1)	3027–3291
July-December, 1927 (No. VI–2)	3292–3557
January–June, 1928 (No. VII–1)	3558–3784
July–December, 1928 (No. VII–2)	3785–4052
January–June, 1929 (No. VIII–1)	4053–4248
July–December, 1929 (No. VIII–2)	4249–4487
January–June, 1930 (No. IX–1)	4488–4683
July–December, 1930 (No. IX–2)	4684–4887
January–June, 1931 (No. X–1)	4888–5124
July–December, 1931 (No. X–2)	5125–5338
January–June, 1932 (No. XI–1)	5339–5531
July–December, 1932 (No. XI–2)	5532–5961
January–June, 1933 (No. XII–1)	5962–6262
July–December, 1933 (No. XII–2)	6263–6581
January–June, 1934 (No. XIII–1)	6582–6871
July–December, 1934 (No. XIII–2)	6872–7224
January–June, 1935 (No. XIV–1)	7225–7563
July–December, 1935 (No. XIV–2)	7564–7884
January–June, 1936 (No. XV–1)	7885–8149
July–December, 1936 (No. XV–2)	8150–8459
January–June, 1937 (1937–1)	8460–8792
July–December, 1937 (1937–2)	8793–9118
January–June, 1938 (1938–1)	9119–9424
July–December, 1938 (1938–2)	9425–9654
January–June, 1939 (1939–1—Part 1 and Part 2)	9655–9896
July–December, 1939 (1939–2)	9897–10126

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 DECEMBER 31, 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 December 31, 1939, inclusive.]

[a] 1939-52-10124

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
Agricultural Securities Corporation	87668	39	1103
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
Allen et al., George G., trustees of Doris Duke Trust	75945	40	351
Allied American Corporation	31704	25	1276

[1] Acquiescence relates to deduction for contributions.
[2] Estate tax decision; acquiescence relates to deduction of $133,000.
[a] Ruling No. 10124 includes all acquiescence and nonacquiescence notices published in the Internal Revenue Bulletin service from January 1, 1932, to December 31, 1939.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Alverson, L. T.	76130	35	482
Ambassador Petroleum Co.	40039	28	868
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 Foundation Co.	88664	40	541
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 et al., Clayton W., executors of the estate of E. V. Anderson	91453	39	676
Anderson, E. V., estate of	91453	39	676
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

[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 (Docket 61699, 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.
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
Atwater, David H.[1]	49066	34	845
Atwater, John J.[1]	49067	34	845
Atwater, Jr., William C.[1]	49065	34	845
Auto Interurban Co	94461	40	161
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
Beggs, John I., estate of	94213, 94214	40	165
Behoteguy et ux., Willis C	83820	36	1233
Behr, Charles B	39534	30	1290

[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.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Bell, Ivor B.[1]	22335	27	377
Bellows Falls Power Co	18592, 29104	25	195
Benedum, M. L.[2]	30990	28	917
Bent Co., R. G	57312, 59796	26	1369
Berdell, Jr., Charles P	70298	32	600
Bernstein, Isaac M	36729	28	744
Best, Frank E	36746	26	1070
Billings et al., May, executors [3]	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, Clark G	93055	39	1068
Black, E. E	86961	36	346
Black, Milton A	93056	39	1068
Blacksher, James Uriah, estate of [3] [4]	88453	38	998
Blacksher et al., D. W., executors of estate of James Uriah Blacksher [3] [4]	88453	38	998
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 [5]	49891	29	8
Boeing, William E.[6]	88167	37	178
Boos Bros. Cafeteria Co	39200	25	651
Borg & Beck Co	24223, 34964	24	995
Borland et al., Bruce, executors of estate of Harriet Blair Borland [3]	82722	38	598
Borland, Harriet Blair, estate of [3]	82722	38	598
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 [7]	81811	37	970
Bowden, Paul Akers	54923	26	1410
Bowen, Edwin L.[8]	62985	33	208

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

[3] Estate tax decision.

[4] Prior nonacquiescence published in Internal Revenue Bulletin 1939-25, page 1, revoked.

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

[6] 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.

[7] Estate tax decision. Acquiescence relates to exclusion of insurance proceeds payable to specific beneficiaries.

[8] Acquiescence relates to issue as to basic values of stock.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
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 [1]	82818	34	1089
Broderick, Emilie C., estate of [2]	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 [2]	72383	36	669
Buck, John A., estate of [3]	32584 44153 44684	25	780
Buck et al., Mary M., executors [3]	32584 44153 44684	25	780
Buena Vista Land & Development Co	2025	13	895
Buffalo Union Iron Furance Co.[4]	16075 16076	23	439
Bullington, Orville	69684	31	212
Bullington, Mrs. Sadie	69679	31	212
Bullis, Helen H	68164 73954	32	501
Bullock, George [5]	31209	23	710
Burdick, Ella P., trustee	46322	29	731
Burdick, Joel W., estate of	46322 61009	29	731
Burke Grain Co	81799	39	334
Burnham, Silas H	53795	29	605
Burroughs, Ambrose H., estate of	59797	29	190
Burrows, Waters F.[6]	87787	38	236
Burton, Benjamin T	61055	28	1241
Busche, F. C.[7]	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.[8]	75411	34	1155
Camp Manufacturing Co	35955	25	537

[1] Nonacquiescence published in Cumulative Bulletin 1937-1, page 30, withdrawn.
[2] Estate tax decision.
[3] Estate tax decision; acquiescence relates to value of certain real estate in San Francisco and value of stock of Langendorf Baking Co. for estate tax purposes; and reasonableness of Commissioner's allowance for support of the widow.
[4] Acquiescence relates to issue regarding deductions for obsolescence of blast furnaces.
[5] Acquiescence relates to issue 2 of decision.
[6] Acquiescence relates to issue as to deductions for expenses in connection with the practice of medicine.
[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 determination of fair market value of obligations received from purchasers of real estate lots.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Campau Realty Co., A. M	70340	35	687
Campbell, Marjorie K.[1]	84639	39	916
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
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 [2]	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 Hanover Bank & Trust Co., executor of estate of Edward L. Norton [2]	88451	40	268
Central Loan & Investment Co	82565	39	981
Central Market Street Co.[3]	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.[4]	55569 63818	27	1312
Champion, T. Pierre [4]	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 [2] [5]	79276	37	535
Chicago & Northwestern Ry. Co.[6]	36343	22	1407
Childs, Mary S	84497	35	1125
Chisholm, Archibald M., estate of [7]	85255	37	167

[1] Acquiescence relates only to the issue: Whether certain bonds sold one day and bonds purchased the following day were substantially identical securities.
[2] Estate tax decision.
[3] Acquiescence relates to issue regarding apportionment of taxes among affiliated corporations.
[4] Acquiescence relates to basis upon which gain or loss upon redemption of stock should be computed.
[5] Nonacquiescence as to one issue, published in Internal Revenue Bulletin 1938-31, page 1, withdrawn.
[6] Acquiescence relates to following issues: Material and supplies adjustment; amortization of bond premium; assessment of Association of Railway Executives; railroad Y. M. C. A.
[7] Estate tax decision; acquiescence relates to the following issue: Expenses incurred by the estate for office rent, salary of secretary, and accountant's fees.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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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.[2]	59391	35	424
Cleland Estate Co., Inc., Henry A.[3]	33585 40890 51197	29	436
Clements, W. L	46058	24	506
Cleveland Railway Co	84943	36	208
Cleveland Trinidad Paving Co.[4]	41962 46297	20	772
Clinchfield Securities Co	40554	25	446
Clinton Cotton Mills, Inc	54880	28	1311
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.[5]	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.[6]	21974	36	1248
Colorado & Utah Coal Co	53799	26	588
Columbian Carbon Co.[7]	42743	25	456
Columbus Brick & Tile Co.[8]	42707	26	794
Commercial Investment Trust Corporation [9]	43495 50051	28	143
Commercial National Bank [1]	66959	36	239
Community Mausoleum Co.[10]	70384	33	19
Cone, Emma S., executrix [1]	68034	31	515
Cone, Irving H., estate of [1]	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

[1] Estate tax decision.

[2] 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.

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

[4] Nonacquiescence notice published in Cumulative Bulletin X-2 (1931), revoked.

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

[6] 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.

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

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

[9] 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.

[10] 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.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Connelly, James A.[1]	44081, 45833, 46267, 51967, 60566, 66948	30	331
Connelly, L. B.[1]	44083, 45834	30	331
Connelly, Mary B.[1]	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
Consolidated Holdings Corporation, manager, Preferred Stock Trading Account	82584	38	74
Continental Legal and Protective Association	44859	30	636
Continental Oil Co.[2]	28427	34	29
Contractors Construction & Supply Co.[3]	41963	20	772
Cook Drilling Co.[4]	82231	38	291
Cook, Elizabeth E.[5]	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.[6]	44617	30	717
Costello, Joseph [7]	22640	27	377
Cotton, G. E	59655	25	866
Couchman, William Venning	67729, 70957	30	118
Coursey, Sarah A. W.[8]	71755	33	1068
Cox, Attilla	69698	31	819
Cox, Carrie G	69698	31	819
Cox, Edwin B.[9]	89292	38	865

[1] Acquiescence relates to question whether the value of rights to subscribe to certain bonds constitutes income.
[2] Acquiescence in Board's decision with respect to computation of income for period January 1 to March 15, 1920.
[3] Nonacquiescence notice published in Cumulative Bulletin X–2 (1931), revoked.
[4] Nonacquiescence published in Internal Revenue Bulletin 1939-8, page 1, withdrawn.
[5] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[6] Acquiescence relates to issue involving method of accounting used by taxpayer.
[7] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[8] 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.
[9] Gift tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Crane, Alexander B., estate of [1]	71718	30	29
Crane et al., Alexander M., executor [1]	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.[2]	66766	37	387
Crews, Everett	66767	33	36
Crews, Everett, J.[2]	66767	37	387
Crews, Ralph W	66701	30 31 33 [2] 37	615 187 441 387
Crews, Robert E	66702	30 31 33 [2] 37	615 187 441 387
Croker, Bula E	41121	27	588
Cromwell et al., William Nelson, executors [3]	42619	24	461
Cronan, Mr. and Mrs. Francis M	78185	33	668
Crouse, George N	43446 51419	26	477
Crowley, Joseph J., estate of [4]	35472	25	340
Crowninshield Shipbuilding Co	18987	24	925
Culver, Wilmer T	37574	24	1013
Cunard Coal Co.[5]	26874 26875 28792	26	234
Curtis, Laura M	56314	28	631
D.			
Dahl, Andrew H., estate of	44845	24	1167
Dahl et al., Julia, executors	44845	24	1167
Daley, Eugene S., executor	26645	25	949
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 [4]	70456	30	1277
Darol Trading Account	81519	34	837
Davidson, Edith L	72905	34	555
Davidson, James E	61741 72904	34	555
Davis, C. R.[6]	10299 32950	10 20	1233 931
Davis, John A	20703	24	36
Davis Regulator Co	72667	36	437

[1] Nonacquiescence published in Cumulative Bulletin XIII-1 (1934), withdrawn.
[2] Acquiescence relates to question whether deduction for depletion in connection with development expenses was properly before the Board under mandates of the court.
[3] Estate tax decision; nonacquiescence published in Cumulative Bulletin X-2 (1931), revoked.
[4] Estate tax decision.
[5] Acquiescence relates to deductions for additional royalties and officers' salaries and directors' fees.
[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.

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Day, Charles, estate of [1]	75103	34	11
Deeds, Charles W.[2]	84663 87383	37	293
De Forest, Kate R.[2]	37284	27	373
Delaware & Hudson Co.[3]	50553 50629	26	520
Delone, Charles J	77865	34	1139
de Mille, Cecil B.[4]	52995 61291 65122 71951	31	1161
Dennett, Carl P.[5]	71858	30	49
Dennett, Marie G.[5]	72023	30	49
Dennis, Frank H., estate of [6]	50263	26	1120
Dennis, Merry M., executrix [6]	50263	26	1120
Denny, Reginald [7]	49516	33	738
Derby Realty Corporation [8]	81213	35	335
Detroit Trust Co. et al., executors [6]	35472	25	340
Dickey, Walter S., estate of	51643	32	1283
Dickinson, Albert G	35015 43176	23	1211
Diescher et ux., Samuel E.[9]	85715	36	732
Diescher et ux., August P.[9]	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 [6]	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

[1] 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.
[2] Gift tax decision.
[3] Nonacquiescence published in Cumulative Bulletin XI-2 (1932), withdrawn.
[4] Nonacquiescence published in Cumulative Bulletin XV-2 (1936), page 31, withdrawn; acquiescence relates to community property agreement.
[5] Acquiescence relates to deductibility of losses sustained by petitioners upon alleged sales of stock to each other during the tax year.
[6] Estate tax decision.
[7] 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.
[8] Nonacquiescence published in Cumulative Bulletin 1937-1, page 33, withdrawn.
[9] Acquiescence relates to issue involving gain from inventions and patents exchanged for cash and stock.

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Dravo, Francis R., estate of [1] [2]	88094, 89366	40	309
Dravo, Ralph M., estate of [1] [2]	88094, 89366	40	309
Dravo et al., Fannie M., executors of the estate of Francis R. Dravo [1] [2]	88094, 89366	40	309
Dravo et al., Jane M., executors of the estate of Ralph M. Dravo [1] [2]	88094, 89366	40	309
Dresselhuys, Lorraine Manville Gould [3]	88887	40	30
Dresser Manufacturing Co	84795, 88294	40	341
Drexel Packing Co	20775	24	376
Droge, Christian H	79632	35	829
Duff, Robert C.[4]	37552	23	1342
Duke, Angier B	79942	38	1264
Duke, Anthony N	79943	38	1264
Duke Trust, Doris, established by James B. Duke	75945	40	351
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.[5]	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
Easterwood, Jr., Mrs. W. E	40182, 63417	28	1283
Eaton, Cyrus S.[6]	86942	37	715
Edwards, B. F	89944	39	735
Edwards Drilling Co.[7]	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.[8]	64779	30	1321
Eldridge, A. S.[8]	64778	30	1321
Electric Storage Battery Co	63010	39	121
Eleven Associates, Inc	60971	36	1168
Elgin Compress Co	49302	31	273

[1] Estate tax decision.
[2] Acquiescence relates only to the issue involving the deductibility from gross estate of the stipulated value of the remainder interest inuring to charitable organizations, of a certain trust.
[3] Gift tax decision.
[4] Acquiescence relates to issue 1 of decision.
[5] Nonacquiescence published in Cumulative Bulletin IX-2 (1930), revoked.
[6] 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.
[7] Nonacquiescence published in Cumulative Bulletin 1937-1, page 34, withdrawn.
[8] Acquiescence relates to issue whether dividends declared in 1929 constituted income to the petitioners in 1929 or 1930.

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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 [1]	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.[2]	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
Farmers Life Insurance Co.[3]	43317	27	423
Farmers' Loan & Trust Co., trustee	29465	26	1359
Farmers Union State Exchange	18105	30	1051
Fawsett, Charles F	64474	31	139
Fawsett, Charles F.[4]	72057	30	908
Federal Street & Pleasant Valley Passenger Ry. Co	29758	24	262
Fehrman, William H., estate of [5]	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 Trust Co., coexecutor of estate of Charles E. Golden	91452 92621	39	676
Fidelity Union Trust Co., executor	69193	33	304
Fifth Avenue Bank of New York, executor [6]	69166	32	208
Fincke, Reginald [7]	85679	39	510
First Citizens Bank & Trust Co	71599	32	335
First National Bank of Boston, administrator	36438 46583	25	252

[1] Acquiescence relates to market value of oil and gas leases on March 1, 1913.
[2] Nonacquiescence published in Cumulative Bulletin XV-2 (1936), page 33, withdrawn.
[3] Acquiescence relates to issue in connection with option payment received for purchase of land.
[4] Nonacquiescence published in Cumulative Bulletin XIII-2 (1934) withdrawn.
[5] Nonacquiescence notice published in Internal Revenue Bulletin 1938-36, 1, withdrawn.
[6] Estate tax decision.
[7] Prior nonacquiescence published in Internal Revenue Bulletin 1939-24, page 1, withdrawn.

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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 Portland, executor of estate of L. B. Stearns	92288	39	828
First National Bank of Skowhegan, Maine	77165	35	876
Fisher, Charles D., estate of	68338	32	82
Fisher, Miriam, estate of [1]	74826	36	534
Fitch, Florence H	51670	29	1299
Fleming, Lamar L.[2]	78362	34	384
Fleming, Margaret E. B.[3]	78416	36	773
Flinn et al., Clara Louise [4]	84483–84491	37	1085
Florence Manufacturing Co	15383 26079	25	676
Flower et al., Henry C. trustees	85649	37	473
Flye, Louise E. estate of [1 5]	84321	39	871
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.[6]	43086	26	1328
Foster, N. C., estate of [1]	32984	25	414
Foster et al., Willard, executor [1]	32984	25	414
Fox, Fontaine [7]	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.[8]	51947 60167 67805	32	266
Frischkorn Development Co.	30496 35170 42452	30	8
Frost, Joseph	73712	37	190
Fuhlage, Alfred E.[9]	61754	32	222

[1] Estate tax decision.

[2] 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.

[3] Acquiescence relates to valuation date for cost purposes of securities acquired by petitioner under will of her father.

[4] Acquiescence relates to all issues except whether petitioner-beneficiaries are taxable on distributions made on January 4, 1933.

[5] Acquiescence relates to all issues except that involving the application of section 302(g) of the Revenue Act of 1926 to a group life policy issued to the company of which the decedent was an employee.

[6] Acquiescence relates to issue regarding filing of separate return for 1925.

[7] 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.

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

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

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G.			
Gaffney, James E., estate of [1]	83151	36	610
Gallery et al., Daniel J., administrators of the estate of John J. McCarthy [1]	91196	38	1211
Gambill, A. A	47902	26	995
Gamble, Cecil H., executor [1]	60840	33	94
Gamble, James N., estate of	55595	32	892
Gamble, Mary H., estate of [1]	60840	33	94
Gamble & Stockton Co.[2]	42707	26	794
Gardner, Charles E.[3]	38575	25	1351
Garron et al., Isabel K. J., executors [1]	47705	26	292
Gassner, Louis [4]	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.[5]	66511	32	1011
George, Jerome R	45240	27	765
George Machinery Co., R. B	61218	26	594
Gessner, Herman [6]	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
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.[4]	5389	4	1073
Golden, Charles E., estate of	91452 92621	39	676
Golden, Delia B., executrix of the estate of Elizabeth B. Golden	91451	39	676
Golden, Edward A	27625	24	18

[1] Estate tax decision.
[2] Acquiescence relates to inclusion in consolidated invested capital of capital stock issued for a tile and brick manufacturing plant, etc.
[3] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[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] 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.
[6] Nonacquiescence published in Cumulative Bulletin XIV-2 (1935), page 31, withdrawn.

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Golden, Elizabeth B., estate of	91451	39	676
Goldman, Maxwell	30302	24	915
Goldring, John Ernest	87498	36	779
Goldsmith, Max	59722	29	804
Gordon, Alfred W	57483	29	275
Gordon, Kizzie [1]	22332	27	377
Gordon, Max L.[1]	22333	27	377
Gordon, Nathan H., estate of	82614	39	237
Gordon et al., Sarah A., executors of estate of Nathan H. Gordon	82614	39	237
Gordon, William S.[2]	81080	36	202
Gore Bros., Inc	39538	30	1290
Gottlieb Realty Co	42528	28	418
Gould, Jr., Albert J	91193	40	6
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.[3]	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
Griffiths, George W	42498 82624	25 [8] 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

[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 in issue involving loss on account of bad debt owing law firm.
[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] 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.
[8] Acquiescence relates to fraud issue.

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Guggenheim, Florence, executrix of estate of Daniel Guggenheim [1]	77675	39	251
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 [1]	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 [1]	44992	24	173
Hanscom et al., Melville, executors [1]	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 [1]	69636	31	224
Harnischfeger et al., Marie E., executors [1]	69636	31	224
Harper, H. T	62784	31	1126
Harrah, Marie E	25269	27	1305
Harrah, William F	21643	27	1305
Harris, Allen [5]	10980	10	1374
Harrison, Inc., J. M	50594	30	455
Hart, John H [6]	52795 60115	27	528
Hartford-Empire Co	29958 41736 53600	26	134
Hartzell, Elmer W	78769	40	491
Hastings, Clive, estate of	63789	29	163

[1] Estate tax decision.
[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] 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] Nonacquiescence published in Cumulative Bulletin XII-1 (1933), page 17, withdrawn.

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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
Hazard, Laura Pelton, estate of [2]	89684 89685	40	204
Hazard et al., William Tilden Pelton, executors of estate of Laura Pelton Hazard	89684 89685	40	204
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
Hibernia National Bank in New Orleans, The, executor of estate of Dr. Charles Jefferson Miller [2]	94006	40	138
Hickman, Fannie Snyder	16253	24	438

[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.

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Hickman, Howard C.[1]	37369	27	807
Hillman, F. D., estate of	62676	31	1126
Hillman et al., Judson McClintock, administrators	62676	31	1126
Himelhoch Bros. & Co	41728 42769 45663	26	541
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 [2]	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 [2]	83745	38	387
Hormel, George A.[3]	93571	39	244
Hormel, Jay C.[3]	93572	39	244
Hort, Walter M	89033	39	922
Houghton, Alanson B	29445	26	1359
Houghton, Jr., Amory, estate of	29444	26	1359
Houghton, Arthur A	29446	26	1359
Houghton, Charles F., estate of	29465	26	1359
Houston Bros.[4]	12052	22	51
Houston, George T.[4]	13104 22008	22	51
Houston, Horace K.[4]	22009	22	51
Houston Land & Trust Co., trustee	63321	33	73
Houston, Philip D.[4]	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, Henry	54774	39	1075
Hudson-Duncan & Co	85220	36	554
Huffman, Laura E	90801	39	880
Huffman, M. D	90802	39	880
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

[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] Estate tax decision.

[3] 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.

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Hunter, Jr., Thomas A.[1]	58490	33	941
Huntington, Henry E., estate of	[2] 45429	28	289
	[3] 47552	36	698
Huntington-Redondo Co	82366	36	116
Huntington, Samuel L	78916	35	835
Huntting, Henry R	75304	32	495
Hurlbut, E. M	71788	33	868
Hurt et al., Mrs. A. B., executors	28099	30	653
Hurt, Joel, estate of	28099	30	653
Hutchins, Charles P.[4]	49070	34	845
Hutchins, Lena C.[4]	49069	34	845
Huyler's, Inc	28369 29154 39841	24	425
Hyman, Arthur B.[5]	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 [6]	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.[7]	20664	17	1328
Ingalls, Charles C., estate of [3]	57835	25	773
Ink, Mary	75731	35	846
Inland Finance Co.[8]	29916 39686	23	199
Insull, Margaret A	68002	32	47
	68504		1070
Insull, Samuel	68003	32	47
	68503		1070
Insull, Jr., Samuel	68001	32	47
	68505		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

[1] 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.

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

[3] Estate tax decision.

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

[5] 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.

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

[7] Nonacquiescence published in Cumulative Bulletin IX-2 (1930), withdrawn.

[8] Nonacquiescence published in Cumulative Bulletin X-2 (1931), withdrawn.

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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.			
Jackson, G. M	89908	39	937
James, Arthur Curtiss	18395	31	712
James, William L	70278	30	491
Jamieson Associates, Inc	75717	37	92
Jens, Laura J	75492	36	791
Johnson, Christopher W	75493	36	791
Johnson, Jr., et al., F. Carter	89287	40	20
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

[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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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
Kibele, O. B.[1]	24882	27	377
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
Kirtland, Sidney Williamson	88600 88601	39	959
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
Kohlsaat, Edward C	91723 92169	40	527
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
Lambert, Elizabeth G., executrix of estate of Wilton J. Lambert	92119	40	801
Lambert, Wilton J., estate of	92119	40	801

[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 (Docket 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?

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Lambeth, Charles E	77989	38	351
Landers, Douglas J., estate of [1]	35443	21	1347
Lang et al., Florence O. R., executors [1]	71117	32	527
Lang, Henry, estate of [1]	71117	32	527
Lang, Julius C., estate of [2]	68316	34	337
Langworthy, Marjorie C.[3]	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
Leadbetter, Fred W.[4]	88588	39	629
Leamington Hotel Co	48413	26	1004
Lehman et al., Allan S., executors, estate of Harold M. Lehman [1]	86829	39	17
Lehman, Harold M., estate of [1]	86829	39	17
Leidesdorf, Samuel D	48305	26	881
Leonard Holding Corporation, George B., estate of	48871	26	46
Letts, Jr., Arthur	62106	30	800
Levin, Albert A	60969	36	1168
Levine, Hyman [5]	7435	8	298
Lewis, Sr., A. S	56163	32	613
Ley, George W.[6]	22336	27	377
Ley, Mary C.[6]	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 [1]	39167	24	334
Lippincott et al., J. Bertram, executors [1]	49233	27	735
Lippincott, Walter, estate of [1]	49233	27	735
Litchfield, Paul W	97169	39	1017
Littauer, Eugene, estate of [7]	51858	25	21
Littauer et al., Lucius N., executors [7]	51858	25	21
Little, C. B	61821	27	1022
Living Funded Trust of Harry E. Lyman	78200	36	161
Lloyd-Smith, Marjorie Fleming [8]	83575	40	214
Lloyd, S. Rose	75765	32	887
Lloyd, Walter [9]	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

[1] Estate tax decision.

[2] 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.

[3] Acquiescence relates to reorganization issue.

[4] Acquiescence relates only to the issue: Was the petitioner during the taxable years domiciled in the State of Oregon or the State of Washington?

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

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

[8] Acquiescence, which relates only to the issue involving a deduction of $6,969.92 for office expenses, is as to result only

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

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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 [1]	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 [2]	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.[3]	41344	24	958
Marlow et ux., Ernest W	87400, 87401	38	1061
Marsh et ux., John B	81527	38	878
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 [4]	22334	27	377
Marvin, Walter S.[5]	38578	25	351
Marx, Emily	83832, 88595	39	537
Marx, Joseph E., estate of	88594	39	537
Marx, Leonard	83831, 88593	39	537
Marx, et al., Leonard, trustees u/w Joseph E. Marx	88594	39	537
Marx, Regina	83833	39	537
Mason, Frank A	84780	39	50
Mason, Mary S., estate of [1 6]	84133	38	425
Masoni, Paul	58413	33	843
Matagarda Canal Co.[3]	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
May, Joe	91874	39	946
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 [1]	47702	26	292
McCarter, Uzal H	69193	33	304

[1] Estate tax decision.
[2] Nonacquiescence published in Cumulative Bulletin VIII-2 (1929), withdrawn.
[3] Acquiescence relates to all issues except affiliation issue.
[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 issues regarding allocation of total cost between common and preferred stocks purchased.
[6] Acquiescence relates to all issues except the issue, Did the decedent have more than a life interest in the estate of her mother?

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McCarthy et al., John J., estate of [1]	91196	38	1211
McClung, Louise Pepper, administratrix of Georgia Anna Pepper [1]	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 [1]	88951	38	308
McCoy, Elizabeth C., executrix of estate of George W. McCoy [1]	78952	39	822
McCoy, George W., estate of [1]	78952	39	822
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
McKeon, John	85516	39	813
McLaughlin, Thomas J	59788	29	247
McLennan, A. R	26730	25	1052
McMillan, William Northrup, estate of [2]	45966	27	318
McRae, Louise C., executrix [1]	32303	30	1087
McRae, Philip, estate of [1]	32303	30	1087
Mead Coal Co., C. H	42718 42719 54660	28	599
Mcherin, P. W.[3]	81035	35	472
Mellbank Corporation	80008	38	1108
Mellon, A. W.[4]	76499	36	977
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.[5]	82462	38	200
Mercantile-Commerce National Bank in St. Louis et al., executors and trustees [1]	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 [1]	42513	27	556
Metropolitan Edison Co	57869	35	1110
Metropolitan Properties Corporation	45032	24	220
Meyer Shoe Co., H. A	91260	39	444

[1] Estate tax decision.
[2] Estate tax decision; acquiescence, except in so far as concerns the question of situs.
[3] Acquiescence relates to dividend issue.
[4] 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."
[5] 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.

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Michigan Trust Co. et al., executors [2]	42513	27	556
Midfield Oil Co	93029	39	1154
Milby & Dow Coal & Mining Co	22021 22022 26259 42184	24	40
Miles Realty Co.[3]	51394	31	443
Milgrim & Bros., Inc., H.[4]	33177	24	853
Miller, Bavier C., estate of	84444	38	487
Miller, Dr. Charles Jefferson, estate of [2]	94006	40	138
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.[5]	58241 62386	29	401
Mitchell et ux., J. A	90710 90711	38	1336
Mitchell, John T. H., estate of [2]	74805	37	1
Mitchell, L. C	41610	28	767
Mitchell, Oscar [6]	41680 41874 54673	27	101
Mobile Bar Pilots Association	77016 81295	35	12
Mobile Light & Railroad Co.[7]	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 [8]	58720	33	108
Moore, Frank J	77485	37	378
Moore, Genevieve F	94648	39	808
Moore, Louise C., executrix [8]	58720	33	108
Moorehead, William A	25853	22	858
Moorshead, O	57045	28	253
Morgan, Jr., Edwin D	76660	35	230
Morgan, Frank V., estate of [2]	91048	40	128
Morgan, Katherine Huntington, estate of	79652	34	433
Morris, Sol H	85277	38	265
Morton, Mary, estate of [2]	82242	37	459
Mossman, B. Paul [2]	59747	32	596
Mossman, William E., estate of [2]	59747	32	596
Mountain View Cemetery Association	83757	35	893

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

[2] Estate tax decision.

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

[4] Acquiescence relates to issue 1 of decision.

[5] 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.

[6] 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.

[7] 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.

[8] 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.

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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 Bank of Commerce of Seattle [1]	89720	40	72
National Capital Insurance Co. of the District of Columbia	56748	28	1078
National Casket Co., Inc.[2]	50320	29	139
National Contracting Co	[3] 24520, 78882	25, 37	407, 689
National Mill Supply Co	37001	23	1362
National Packing Corporation	31668, 33971	24	952
National Tile Co	64013	30	32
Neill, James [4]	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 [5]	28045	26	696
Newbury, Mollie Netcher	38049	26	101
Newbury, Mollie Netcher, trustee	38052	26	101
Newcomb, Leonard M., estate of [6]	89283	39	343
Newell et al., Sterling, executors [6]	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

[1] Acquiescence relates only to the issue, Is the petitioner taxable in 1934 on recoveries of a portion of debts charged off in 1933, in which year there was a net loss in excess of the debts charged off?

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

[3] 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.

[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 18985), 39 (Docket 7435), 41 (Docket 9290), 45 (Dockets 45065, 3725, 12231), 46 (Dockets 61669, 68335), and 50 (Docket 7359), withdrawn.

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

[6] Estate tax decision.

ACQUIESCENCES—Continued.

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Newman et al., Rose, executors [1]	59598	31	772
Newman, Samuel, estate of [1]	59598	31	772
New Market Investment Co.[2]	35719	17	213
Newton, Elizabeth K.[1]	47703	26	292
Newton, Joseph R., estate of [1]	47705	26	292
New York Central R. R. Co.[3]	19932 34437 62040	28	43
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.[4]	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.[5]	34945	24	307
Norton, Edward L., estate of [1]	88451	40	268
Noyes, Jansen [6]	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
Oklahoma Contracting Corporation	77871	35	232
O'Laughlin, A. C., estate of	84319 86966	38	1120
Old Colony Trust Co., executor of Louis E. Flye [1] [7]	84321	39	871
Old Point National Bank, The, executor of estate of Leonard M. Newcomb [1]	89283	39	343
Olds, Margaret A.[8]	49068	34	845
Olmsted, George W.[9]	44090 45745 48121 54714 60746	30	331
Olmsted, Iva C.[9]	44089 45746 48143 54713 60745	30	331

[1] Estate tax decision.

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

[4] Nonacquiescence published in Cumulative Bulletin XI–2 (1932), withdrawn.

[5] Acquiescence relates to inventory issue.

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

[7] Acquiescence relates to all issues except that involving the application of section 302(g) of the Revenue Act of 1926 to a group life policy issued to the company of which the decedent was an employee.

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

[9] 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.
Olympia Harbor Lumber Co	64272	30	114
Ontario Realty Co.[1]	35721	17	213
O'Rear, E. C.[2]	32335	28	698
Oregon Casualty Association	86401	37	340
Ortiz Oil Co.[3]	86112	37	656
Osborne, Owen, estate of [4]	59957	29	374
P.			
Pacific & Atlantic Telegraph Co. of the United States	29586	26	914
Pacific Coast Biscuit Co. et al.[5]	71588	32	39
Pacific Employers Insurance Co	78000	36	585
Pacific National Bank of Seattle, The, executor of estate of Frank V. Morgan [6]	91048	40	128
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.[7]	62652	32	550
Pan American Life Insurance Co.[8]	84638	38	1430
Parke, Davis & Co	62717	31	427
Parker, Clara B., executrix [9]	58604	31	644
Parker, George D., estate of [9]	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.[10]	30989	28	917
Patterson, Elizabeth P	76058	33	57
Patterson, Frank H., estate of [11]	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

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

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

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

[4] Nonacquiescence published in Cumulative Bulletin XIII-1 (1934), withdrawn.

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

[6] Estate tax decision.

[7] 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.

[8] Acquiescence relates only to the issue involving the deductibility of $9,282.31 and $257.88 as interest in connection with certain life policies and trust agreements, respectively.

[9] 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.

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

[11] Estate tax decision; acquiescence relates to issue whether transfer was made in contemplation of death.

ACQUIESCENCES—Continued.

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Peck, Clara S., estate of	61520 61521	31	87
Peck et al., Fremont C., executors	61520 61521	31	87
Pegg, Albert O.[1]	22338	27	377
Penn, Blanche G.[2]	90760	39	787
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
Piggly Wiggly Corporation	25126 43860	28	412
Pitkin, George P	65173	31	403
Pittsburgh Athletic Co.[6]	60569 66964 67422	27	1074
Pittsburgh Brewing Co	83386 88626	37	439
Pittsburgh Melting Co	44858	30	636

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

[2] Acquiescence relates to all issues except that involving the effect of capital losses sustained by a trust upon that part of the income of the trust taxable to the grantor under section 167 of the Revenue Act of 1934.

[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
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 [1]	43889 48984 52094 55659 60923	30	133
P-M-K Petroleum Co.[2]	50576 54779	24	360
Polar Ice & Coal Co	67638	27	1346
Ponvert, Luisa Terry, estate of [3]	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 [4]	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.[5]	45896 54968	27	28
Prosser, Constance B	26752	25	513
Provident Trust Co. of Philadelphia, executor [6]	59957	29	374
Prudential Loan Co	78869	37	975
Putnam Trust Co	34743	26	655
Putty, Mrs. Malcolm	69683	31	212
Pyeatt, J. S	92125 93279	39	774
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
R.			
Rains, Ruth B	86469	38	1189
Ramish, Adolph	39568	30	1290
Ramish, Inc., Adolph	39569	30	1290
Rand, Frank C.[7]	91795	40	233
Rand, Jessie H., estate of [8]	81984	36	1160

[1] 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.
[2] Acquiescence relates to third issue of decision.
[3] Estate tax decision; nonacquiescence published in Cumulative Bulletin 1937-1, page 46, withdrawn.
[4] Nonacquiescence published in Cumulative Bulletin XII-1 (1933), withdrawn.
[5] Acquiescence relates to deduction of loss resulting from liquidation of one of its subsidiaries.
[6] Nonacquiescence published in Cumulative Bulletin XIII-1 (1934), withdrawn.
[7] Acquiescence is as to result only.
[8] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Randall, George W., estate of [1]	5850, 6765	4	679
Randall, Marjorie G.[2]	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.[3]	34332	28	1204
Raymond, Anna L.[4]	86709	40	244
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	1270
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 [7]	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 [7]	64023	31	245
Richardson, Charles W., estate of [7]	64023	31	245
Richmond, Fredericksburg & Potomac R. R. Co.[8]	68876	33	895
Ridgway, Robert	77666	35	122
Riggs National Bank [9]	30903	17	615
Ritter Lumber Co. et al., W. M	42833, 42834, 42835, 42836, 43604, 43605, 43606, 48749, 57319, 57320, 57321, 57322	30 33	231 117
Roach Studios, Inc., Hal	61750	31	828
Roberts et ux., E. A	80697	36	549

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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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 Development Co	83849	38	1303
Rocky Mountain Oil Co.[1]	79421	36	365
Rodeo-Vallejo Ferry Co.[2]	36411 48528	24	936
Rodewald, F. Kingsley	76659	35	230
Roelker, Millicent Turle	81230	39	967
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
St. Louis Union Trust Co. et al., trustees, u/w John I. Beggs	94213 94214	40	165

[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, 39250), 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.

ACQUIESCENCES—Continued.

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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 (Dockets 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] Acquiescence 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.

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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., Murrary, 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
Smith, William A [10]	90703	38	317
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, 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.
[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.
[10] Prior nonacquiescence published in Internal Revenue Bulletin 1939-3, page 1, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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
Stamler, John J., estate of	89134	40	56
Stamler, Rose K., individually and as executrix of estate of John J. Stamler	89134	40	56
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, L. B., estate of	92288	39	828
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

[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 during 1920?

[4] Acquiescence relates to inventory issue.

[5] Gift tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Stevens, John H	29685	24	52
Stevenson Consolidated Oil Co.[1]	43416	23	610
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.[2]	60738	29	1145
Stiefel, Edward W.[2]	60739	29	1145
Stiefel, Henry G.[2]	60740	29	1145
Stock Yards Bank of Cincinnati	41085	25	964
Stockhan, Elijah	22569	26	631
Stone et al., Irving K., executors and trustees[3]	43830	26	1
Stone, Irving Lee, estate of[3]	43830	26	1
Stoneman, David	27627	24	18
Storey, H. M	62813	31	1126
Story, Katherine F.[4]	66961	36	239
Story, Jr., Nelson, estate of[4]	66963	36	239
Story, Thomas B.[4]	66962	36	239
Story, Walter P.[4]	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.[5]	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[6 7]	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.[8]	36191	23	792
Tarafa y Armas, Jose M., estate of[4]	82656	37	19
Taylor Co., Inc., W. F	89597	38	551
Teague, E. B	73034	32	641
Terrill, Nina H	90803	39	880
Terry, Anna Davis, estate of[4]	89925	38	593

[1] 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 petitoner as a premium.

[2] Nonacquiescence published in Cumulative Bulletin XIII–1 (1934), page 30, withdrawn.

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

[4] Estate tax decision.

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

[6] Gift tax decision.

[7] 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?

[8] Acquiescence relates to loss incurred in sale of a boat.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Texas Irrigation Co.[1]	40083, 41346	24	958
Thacher et ux., Thomas C., Jr	84781	39	50
Thatcher Estate Co., the M. D.[2]	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.[3]	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.[4]	45320	23	892
Torrens, James H.[5]	53778	31	787
Tracy, David E., estate of	54828, 62982	30	1156
Tracy, William Lee	89304	39	578
Tracy, William R	45513	25	1055
Tracy et al., Gertrude Hemler, trustee	54828, 62982	30	1156
Transcalifornia Oil Co., Ltd	73111	37	119
Tresner, Amy	66703	30 31 33 [6] 37	615 187 441 387
Tricou, Sallie S	28093, 40258	25	713

[1] Acquiescence relates to all issues except affiliation issue.
[2] Gift tax decision.
[3] 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?
[4] Acquiescence relates to issue regarding deduction of loss sustained by petitioner during nonaffiliated period.
[5] Acquiescence in Board's decision in so far as it holds that petitioner was not taxable on any part of the proceeds of the 100 shares preferred stock given by him to his four sons in 1928.
[6] 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.
Trinity Drilling Co.[1]	61498	28	1106
Troll, Annie	61215	33	598
Trosk, George	76256 77204	35	681
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 [2]	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.[3]	51530 70183 70219	32	383
Union Pacific R. R. Co. et al.[4]	35639 35649 35684 35685 40060 40061 40062	26	1126
Union & Peoples National Bank of Jackson et al., administrators [5]	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 [5]	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.[6]	61378	28	702

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

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

[3] Acquiescence relates to issues 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.

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

[5] Estate tax decision.

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
W.			
Wagegro Corporation	82077	38	1225
Walker Products Corporation	44856	30	636
Walker, R. D	76762	34	983
Wall, Frank E.[1]	7359	4	915
Ward, Christopher L.[2]	92240	40	225
Ward Bros. Co	30992	24	989
Warner Co.[3]	53039 53040 59190	26	1225
Warner, Ralph C	62510	31	1126
Warren Service Corporation	87533	39	856
Washington, Sr., George	83712	36	74
Washington Market Co	43912	25	576
Waterbury, Charlotte M.[4]	73381	33	208
Waterbury, Donald N.[4]	73380	33	208
Waterbury, Eugene W.[4]	73383	33	208
Waterbury, Whitford N.[4]	73382	33	208
Watson, Jr., John H	53414 89671	27 38	463 1026
Wayne County & Home Savings Bank [5]	49144	26	761
Wedding, G. G	56442	32	613
Weeks, Alanson	63916	31	627
Weis, Samuel W	62126	30	478
Wells, Thomas E.[6]	78829	34	315
Welworth Realty Co	90897	40	97
Wheeler, Lena P. (formerly Curtiss)	84992	40	92
Wheelock, R. L	37806	28	611
Wheelock, Mrs. R. L	37805	28	611
Whitcomb, Anna S.[7]	80017 85219 87196	37	806
Whitcomb Coca-Cola Syndicate, N. B.[8]	76367	35	1031
Whitcomb, E. B.[7]	85218	37	806
White Oak Transportation Co.[9]	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
Willem, M. A	93626	39	898
Williams, Jr., Alford J	66915	29	892
Williams, Alma [10]	84001	36	934
Williams, Ella J	29273	25	1161
Williams, L. H	58789	31	580

[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 only to the issue involving the status of a certain trust, part of the income of which is required to be accumulated, the corpus of which may revert to the grantor during his lifetime upon action of adult beneficiaries of three-fifths interest.

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

[4] Acquiescence relates to issue as to basic values of stock.

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

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

[7] 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?

[8] Prior nonacquiescence published in Cumulative Bulletin 1938-1, page 60, revoked.

[9] Acquiescence relates to inventory issue.

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Williams, R. L.[1]	84000	36	934
Williams, W. W	46062	24	506
Williamson, Alexander B	40231 43972	25	154
Williamson, Archibald (Lord Forres)	40229 43973	25	154
Williamson, Bessie C.[2]	80545	34	668
Willis, Mary	66718	30 31 33 [3] 37	615 187 441 387
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 [4]	50828	30	1136
Wilson Shipbuilding Co.[5]	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.[6]	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] Acquiescence relates to issue involving accrual of interest.
[2] Acquiescence relates to capital net gain issue as to stock sold in 1933.
[3] Acquiescence relates to question whether deduction for depletion in connection with development expenses was properly before the Board under mandates of the court.
[4] Estate tax decision.
[5] Acquiescence does not relate to issue 5 of decision.
[6] 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, John D., estate of [1]	45008	22	1093
McIlhenny et al., Frances Plumer, executors [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
Alamitos Land Co	84807	40	353
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
Barbour, Frederick K	91943	39	910
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
Bedford, Edward T., estate of	90104	39	1039
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
Berolzheimer, Alfred C	89259	40	644
Berolzheimer, Edwin M	89267	40	644
Bigelow, Alice A., executrix of the estate of Herbert M. Bigelow [1]	82659	39	635
Bigelow, Herbert M., estate of [1]	82659	39	635
Bindley, Mary M., estate of	58871	28	113

[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.
Bingham et ux., Harry Payne	82160	38	913
Birkemier, Dan	89615	39	1072
Bismarck Tribune Co	59660	33	281
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
Boehringer, 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
Brokaw, George Tuttle, estate of [1]	90091	39	783
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

[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.
Buchsbaum, William	74886	36	21
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.			
Cabot, Inc., Godfrey L	91665	40	366
Cadwalader, Mary Helen	46327	27	1078
Cadwalader, Jr., Richard M	71800	32	1157
Cambria Development Co.[5]	75411	34	1155
Campbell, Marjorie K.[6]	84639	39	916
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

[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 all issues except the issue: Whether certain bonds sold one day and bonds purchased the following day were substantially the identical securities.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Cassels, Robert	58793	26	1401
Central Market Street Co.[1]	24837	25	499
Central Union Trust Co. of New York, executor	31736	25	757
Central United National Bank	69212 71063	33	588
Cereal Products Refining Corporation	86538	39	92
Champion, David J.[2]	55569 63818	27	1312
Champion, T. Pierre [2]	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.[3]	36343	22	1407
Chidlaw, Harry K	69782	29	1096
Chisholm, Archibald M., estate of [4]	85255	37	167
Christensen, Niels A	72424	33	79
Clark, Edward H	94259	40	333
Clark, Percy H	65177	31	1082
Clark Thread Co.[5]	38903 47974	28	1127
Claude Neon Lights, Inc.[6]	59391	35	424
Cleland Estate Co., Inc., Henry A.[7]	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 [8]	40765	24	176
Cochrane, David K.[9]	60428	26	1167
Colorado & Southern Ry. Co.[10]	21974	36	1248
Columbia Pacific Shipping Co	50968	29	964
Columbus Brick & Tile Co.[11]	42707	26	794

[1] Nonacquiescence relates to issue regarding Board's jurisdiction of subsidiaries.
[2] Nonacquiescence relates to issue whether redemption of stock was equivalent to taxable dividend.
[3] Nonacquiescence relates to following issues: Undermaintenance; profit and loss on bonds retired; amortization of bond discount.
[4] Nonacquiescence relates to 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.
[5] Nonacquiescence relates to issue respecting depreciation.
[6] 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.
[7] Nonacquiescence relates to basis for determination of gain or loss on the sale of property devised subject to a life estate.
[8] Estate tax decision.
[9] Acquiescence published in Cumulative Bulletin XII–1 (1933), revoked.
[10] 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.
[11] Nonacquiescence relates to inclusion in consolidated invested capital of capital stock issued for promissory notes.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Commercial Garage Co	41646	22	793
Commercial Investment Trust Corporation [1]	43495 50051	28	143
Commonwealth, Inc	88264	36	850
Community Bond & Mortgage Corporation	43784	27	480
Community Mausoleum Co.[2]	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.[3]	44081 45833 46267 51967 60566 66948	30	331
Connelly, L. B.[3]	44083 45834	30	331
Connelly, Mary B.[3]	44082	30	331
Conti, Luciana	79793	35	28
Continental Illinois National Bank & Trust Co. et al., trustees u/w Marshall Field, Two-Fifths Noncumulative Trust Fund	83341	40	25
Continental Insurance Co	92569	40	539
Cook, Elizabeth E.[4]	38579	25	1351
Cook, Sam	35014	25	92
Cooper, A. T.[5]	3144	7	798
Cosmopolitan Bond & Mortgage Co.[6]	44617	30	717
Coster, Emily Pell, estate of [7]	90915	39	570
Coughlin, R. Lawrence and Evelyn W	76106	32	1048
Coursey, Sarah A. W.[8]	71755	33	1068
Coward, Minnie M	87465	39	1158
Crews, Charles W.[9]	66766	37	387
Crews, Everett J.[9]	66767	37	387
Crews, Ralph W.[9]	66701	37	387
Crews, Robert E.[9]	66702	37	387
Crile, Grace McBride	43136	26	1020
Crispin, Mrs. Egerton	45267	28	236
Cronin, Ernest A.[10]	88279	37	914
Crosby, Oscar T	51317	27	1234
Cross, Maurice	32735	24	1079
Cunard Coal Co.[11]	26874 26875 28792	26	234
Cuppia, Jerome C	58545	26	1401
Curlee, Shelby H., trustee	48833	28	773

[1] Nonacquiescence relates to deduction in 1926 of excess of market value over sale price of stock sold to employees.

[2] 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.

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

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

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

[7] Estate tax decision.

[8] 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.

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

[10] Gift tax decision.

[11] Nonacquiescence relates to expenditures for mine equipment.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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 [1]	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
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 [2]	75102	34	11
Dean, Mason L	61205, 69832	35	839
Dearing, Roy E., estate of [3 4]	84195	36	843
Dearing, R. H., estate of [3 4]	84194	36	843
Dearing Trust Estate, R. H. [3 4]	84193	36	843
Dearing, Mrs. R. H. [3 4]	84196	36	843
Dearing, Willis R. [3 4]	84192	36	843
Dearing, Mrs. Willis R. [3 4]	84197	36	843
Degener, John F., estate of [1]	38500	26	185
Degener, Jr., et al., John F., executors [1]	38500	26	185
De Lisser, Horace, estate of [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
Dill Manufacturing Co., The	89583	39	1023
District Bond Co	88970, 94486	39	739
Dohrmann, Andrew B. C	20658, 23969	19	507, 466
Dolomite, Inc	60661	28	1270

[1] Estate tax decision.

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

[3] 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.

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

[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.
Donnelly, Paul F., estate of [1]	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 [1]	44735	26	1321
Douglas, D. W	87419	37	1122
Douglas, William E	87420	37	1122
Douglass, Howard W., estate of [1]	40031	30	1143
Dravo, Francis R., estate of [1 2]	88094 89366	40	309
Dravo, Ralph M., estate of [1 2]	88094 89366	40	309
Dravo et al., Fannie M., executors of the estate of Francis R. Dravo [1 2]	88094 89366	40	309
Dravo et al., Jane M., executors of the estate of Ralph M. Dravo [1 2]	88094 89366	40	309
Drawoh, Inc	45014	28	666
Driver, Sr., Frank L., estate of	70574	36	246
Drumheller, George	41515 45752	27	209
Duff, Robert C [3]	37552	23	1342
Dunning, Henry A. B	83459	36	1222
Dunham et al., Lucy Belle, executors [1]	46603	26	286
Dunham, Mary Virginia, estate of [1]			
Dye, Clarke E	74911	33	824
E.			
East Coast Oil Co., S. A	58180	31	558
Eaton, Cyrus S. [4]	86942	37	715
Eckhart, Bernard A., estate of [5]	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.[5]	64779	30	1321
Eldridge, A. S.[5]	64778	30	1321
Elkhorn Coal Co.[6]	49064	34	845
Elkins, Hallie D.[7]	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 [7]	40899	25	585

[1] Estate tax decision.

[2] Nonacquiescence relates only to the issue: Where two brothers and their wives transferred contemporaneously certain property in trust, and not in contemplation of death, should all or any part of the principal of the trusts be included in the respective gross estate of the brothers?

[3] Nonacquiescence relates to issue 2 of decision.

[4] 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.

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

[6] Nonacquiescence with respect to the holding that there was a reorganization.

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

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Equitable Life Assurance Society of the United States	31110, 33241, 57867	33	708
Equitable Trust Co., of New York, ancillary administrator [1]	67259	31	329
Erb et al., Ray L., executors [2]	29260	29	1315
Ethel D. Co	32032	27	25
Eustin, Augustus H.[3]	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
Farmers Life Insurance Co.[4]	43317	27	423
Feldman, Henry O	45359	28	236
Ferree, C. B	61542	32	725
Fidelity-Bankers Trust Co	83421	37	142
Fidelity & Casualty Co. of New York	92573	40	539
Fidelity & Columbia Trust Co., trustee	65041, 65042	30	562
Fidelity-Phenix Fire Insurance Co. of New York	92571	40	539
Fidelity Union Trust Co. et al., executors [1]	72236	31	171
Field, Marshall	36908	26	116
Field, Marshall, estate of, Two-Fifths Noncumulative Trust Fund	83341	40	25
Fifth Avenue Bank of New York, executor	69534	31 32	945 701
Fifth Street Building	16627, 29264, 45537	24	876
First-American Fire Insurance Co	92570	40	539
First National Bank in St. Louis [5]	44278, 48078	23	1124
First National Bank of Boston, administrator [1]	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
Fitzpatrick, William T., estate of [1]	90911	39	1144
Flaherty, William, estate of, and Ella	79397	35	1131
Fleitmann, William M., estate of [6]	28449	22	1291
Fleitmann, Jr., et al., William M., executors [6]	28449	22	1291
Fleming, Lamar L.[6]	78362	34	384

[1] Estate tax decision.

[2] Nonacquiescence relates to the following issues: Reduction of cost basis (March 1, 1913, value) of assets sold by a partnership in 1919 by depreciation allowed in computing income for period March 1, 1913, to December 1, 1915; computation of 1919 partnership profit on sale of assets by considering as part of the sale price taxes of the partners paid in 1920 by the vendee.

[3] Acquiescence published in Cumulative Bulletin XIII-2 (1934), withdrawn.

[4] Nonacquiescence does not relate to issue in connection with option payment received for purchase of land.

[5] Acquiescence notice published in Cumulative Bulletin X-2 (1931), recalled.

[6] 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.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Fleming, Margaret E. B.[1]	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 [2]	84483, 84491	37	1085
Flintermann, Carl H. L., estate of [3]	75516	32	996
Flomot Gin Co	93102	40	688
Flye, Louis E., estate [3 4]	84321	39	871
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 [3]	46672	26	708
Foster et al., Charles H. W., executors [3]	46672	26	708
Foster, L. B.[5]	43086	26	1328
Founders Associates	62684	29	326
Fox, Fontaine [6]	71084	30	451
Fox River Paper Co	20878	28	1183
Franklin Title & Trust Co.[7]	51947, 60167, 67805	32	266
Franks, Jack M	53685	32	260
Frost, Mary Ryerson	88981	38	1402
Fuhlage, Alfred E.[8]	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.[9]	42707	26	794
Gambrill, Richard Van Nest	81544	38	981
Ganopuls, C. G	87985	39	1120
Garcin, Edward H	21657	22	1027
Gardner, Charles E.[10]	38575	25	1351
Garrie, Daniel T., estate of	31736	25	757
Garvan, John Joseph, estate of [3]	44746	25	612
Gary, Virginia V., executrix [3]	40031	30	1143

[1] Nonacquiescence relates to valuation date for cost purposes of securities acquired by petitioner from a trust under her grandfather's will.

[2] Nonacquiescence relates to issue whether petitioner-beneficiaries are taxable on distributions made on January 4, 1933.

[3] Estate tax decision.

[4] Nonacquiescence relates only to the issue involving the application of section 302(g) of the Revenue Act of 1926 to a group life policy issued to the company of which the decedent was an employee.

[5] Nonacquiescence relates to deductions in 1924 and 1925 on account of losses resulting from alleged sales of securities.

[6] Nonacquiescence relates to inclusion in income of corporation for years ended March 31, 1930, and March 31, 1931, amounts representing rental of premises occupied by its president.

[7] 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.

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

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

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

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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General Motors Corporation	52824	35	523
General Outdoor Advertising Co., Inc.[1]	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.[2]	[3] 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 [4]	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.[5]	5389	4	1073
Goldschmidt, Henry P., estate of [6]	16138	14	1010
Goldschmidt et al., Georgette, executors [6]	16138	14	1010
Goodale, Walter S	78456	34	697
Goodan, May Chandler	67472	32	720
Goodman, Julius	87552	40	22
Gordon, Bertha M.[7]	81081	36	202
Goulder, Herbert G	87188	39	670
Graham, M. H	38335	26	301
Gransden & Co., C. L	90134	39	985
Gray, Ralph L	86940 86941	38	584
Great Southern Life Insurance Co.[8]	56540 64064 71114	33	512
Great Western Power Co. of California	48617	30	503
Green, H. A	74910	33	824
Green, Robert D.[9]	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 [10]	38577	25	1351
Griffiths, George W.[11]	82624	37	317

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

[2] 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?

[3] And 19 related dockets.

[4] Estate tax decision.

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

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

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

[8] 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?

[9] Nonacquiescence relates to transaction 5.

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

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

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Grosvenor, Theodore P.	60381	31	574
Guitar Trust Estate	35102	25	1213
Gulf Coast Irrigation Co.[1]	33694, 40081, 41343	24	958
Gulf, Mobile & Northern R. R. Co.[2 3]	24887, 42150	22	233
Gund, Karoline E., estate of	70891	34	540
H.			
Hackfeld, Johann Friedrich, estate of [4]	77997	33	1020
Hagerman, Stanley	78023	34	1158
Haines, Mary H.[5]	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 [4]	76802, 76803, 76927	34	575
Hancock, G. Allan	36867	25	607
Hanson, Charles C.	15398	23	590
Harbison, Ralph W. [6]	54346	26	896
Harbison, William Albert [6]	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
Harrison, Louis H.	87553	40	22
Hart, Julian B.	75030, 78877	37	360
Hart, William H.[5]	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

[1] Nonacquiescence relates to affiliation issue.
[2] 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.
[3] 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.
[4] Estate tax decision.
[5] Gift tax decision.
[6] Acquiescence published in Cumulative Bulletin XII-1 (1933), withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Hebert, Paul Octave, estate of [1]	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 [2]	38573	25	1351
Hendrickson, Joseph G., estate of	73029	32	449
Henn, A. W	37102	20	1133
Henritze, J. B	60609	28	1172
Henritze, Nell	60607	28	1172
Henritze, T. R	60608	28	1172
Henritze, T. W	60606	28	1172
Herder, George, estate of [3]	84051	36	934
Herder, Mary [3]	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
Highlands, Evanston-Lincolnwood Subdivision, Trust No. 1521, et al	74465	32	760
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, Sherwin A., administrator of estate of John R. McNaughton	92195	40	376
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

[1] Estate tax decision.

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

[3] Nonacquiescence in issue relating to involuntary conversion.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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.[1]	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.[2]	12052	22	51
Houston, George T.[2]	13104, 22008	22	51
Houston, Horace K.[2]	22009	22	51
Houston, Philip D.[2]	22007	22	51
Howard Hotel Corporation	87393	39	1147
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 [3]	33564	25	1078
Hunter, Jr., Thomas A.[4]	58490	33	941
Huntington, Henry E., estate of [3]	45429	28	289
Hutchison Coal Co	34939	24	973
Hyde, James H	65495, 69952	31	256
I.			
Illinois Life Insurance Co	67201	30	1160
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 [3]	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

[1] 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.

[2] 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.

[3] Estate tax decision.

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

[5] 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.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
J.			
Jackson & Eastern Ry. Co	38295 [1] 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.[2]	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 [3]	50206	31	55
Jones, Fred B., estate of [4 5]	87203	38	220
Jones, Lloyd	90323	39	531
Junge, Claus, transferee	64637	33	564
K.			
Kahn, Bella	73895	36	954
Kahn, Isidor	73891	36	954
Kahn, Lenora	73894	36	954
Kansas City Southern Ry. Co. and affiliated companies [6]	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
Keller, Anna M., estate of [4]	93221	39	1047
Keller et al., Pius P., executors of estate of Anna M. Keller [4]	93221	39	1047
Kelly, Francis J., executor [4]	70899	31	941
Kelly, Rose A., estate of [4]	70899	31	941

[1] Nonacquiescence relates to issue involving deduction for depreciation on ways and structures.
[2] Gift tax decision.
[3] Nonacquiescence as to issue regarding deduction for depletion.
[4] Estate tax decision.
[5] Acquiescence published in Internal Revenue Bulletin 1938-37, page 1, withdrawn.
[6] Nonacquiescence relates to the following issues: Deduction of amounts expended to restore petitioner's property notwithstanding the fact that the Director General of Railroads made payment to petitioner for his failure to maintain the property; exclusion from gross income of intercompany freight charges on material and supplies used in making additions and betterments to petitioner's property.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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.[1]	73753	35	578
Kirk et al., Elizabeth S., executrices and executor of the estate of C. Henderson Supplee [2] [3]	89363	39	902
Kirkpatrick, John L	67474	32	720
Kitselman, C. M., estate of	77812	33	494
Knapp, Kittie A.[4]	2775	7	790
Kneeland, Yale, estate of [5]	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 [6]	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 [5]	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 [5] [7]	51654	38	926
Lang, Julius C., estate of [8]	68316	34	337
Langford Investment Co., trustee	57203	28	222
Langford, Jr., et al., Pierce P	57203	28	222
Langworthy, Marjorie C.[9]	71961	30	1216
Lansburgh, Lester, estate of [5]	81480	35	928
Lashar, Walter B	37883	34	768
Laube, Justus	70007 71595	29	1255
Laughton, Charles	88104	40	101
Laun, Alfred A	45347	26	764
Laun, J. B	45348	26	764
Lazarus & Co., F. & R	69481 69750	32	633
Leadbetter, Fred W.[10]	88588	39	629
Le Gierse, Cecile, estate of [5]	92103	39	1134
Le Gierse et al., Edythe, executors of estate of Cecile Le Gierse [5]	92103	39	1134

[1] 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.

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

[5] Estate tax decision.

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

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

[8] Estate tax decision; nonacquiescence relates to deduction for funeral expenses including cost of crypt.

[9] Nonacquiescence relates to question whether distribution of stock had the effect of distribution of a taxable dividend.

[10] Nonacquiescence relates to all issues except the issue: Was the petitioner during the taxable years domiciled in the State of Oregon or the State of Washington?

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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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 [1]	51858	25	21
Littauer et al., Lucius N., executors [1]	51858	25	21
Livingood, Charles J., executor [2]	40899	25	585
Lloyd, J. Darsie	71445	33	903
Lloyd-Smith, Marjorie Fleming [3]	83575	40	214
Lloyd, Walter [4]	48120	30	331
Loffland, J. M.[5]	13425	10	14
Loffland, T. S.[5]	13426	10	14
Loughran, Annette	89464	40	252
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 [6]	70582	33	1225
M.			
Mack, Eleanor L	86856	37	1101
Mack, John S.[7]	89719	39	220
MacPherson, Mae Recor	92083	39	739
Madison Railways Co	85121	36	1106
Malernee, D. B	63553	31	662
Mallinckrodt, Jr., et al., Edward, trustees	79138, 87339	38	960
Mallery, Otto T.[7]	91535	40	777
Mallory, L. W., estate of	33231	27	750
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

[1] 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.

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

[3] Nonacquiescence relates only to the issue involving a deduction of $45,003.93 for legal and incidental expenses.

[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 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.

[6] Estate tax decision.

[7] Gift tax decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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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
Maryland Insurance Co	92574	40	539
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
McNaughton, John R., estate of	92195	40	376
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
Mercantile-Commerce Bank & Trust Co. et al., administrators of Paul F. Donnelly [3]	87103	38	1234
Merchants National Bank of Cedar Rapids, transferee and fiduciary of Higley Trusts [3]	78576	38	1343

[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.

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Merrell, Irving S	70103	33	1151
Metropolitan Ice Co.[1]	53936, 69525	32	587
Meyer, George L., transferee	64654	33	564
Meyer, Robert R	44032	27	44
Michigan Central R. R. Co.[2]	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
Mississippi River & Bonne Terre Ry	84282	39	995
Missouri State Life Insurance Co.[3]	58241, 62386	29	401
Mitchell, Charles E	74720	32	1093
Mitchell, J. F. B	65834	33	806
Mitchell, Oscar [4]	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 [5]	88944	39	147
Moore, Alma V	64790, 68219	30	1197
Moore, Edward W., estate of [6]	58720	33	108
Moore, G. H	38351	26	301
Moore, John R	64791, 68218	30	1197
Moore, Louise C., executrix [6]	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
Morris et al., Lewis Spencer, executors of estate of Emily Pell Coster [7]	90915	39	570
Morriss et al., Julia L	41023, 41024, 45863, 45864	23	1076

[1] Acquiescence published in Cumulative Bulletin XIV-2 (1935), withdrawn.
[2] Nonacquiescence relates to following issues: Whether mail pay received in 1921 constituted income in 1920; rental interest received on completed addition and betterments in final settlement with the Director General.
[3] Nonacquiescence relates to 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.
[4] Nonacquiescence relates to issue regarding deduction from income of sprinkling tax.
[5] Gift tax decision.
[6] Estate tax decision; nonacquiescence in the conclusions on the third group of policies that the proceeds thereof should be excluded from the gross estate.
[7] Estate tax decision.

NONACQUIESCENCES—Continued.

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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	55937	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 Bank of Commerce of Seattle [2]	89720	40	72
National Casket Co., Inc. [3]	50320	29	139
National Contracting Co. [4]	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. [5]	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
New Orleans Cold Storage & Warehouse Co., Ltd	94518	40	121
Newport Co	35431	24	1246
New York Central R. R. Co. [6]	19932 34437 62040	28	437
New York Life Insurance Co	38880	24	1217

[1] Estate tax decision.

[2] Nonacquiescence relates only to the issue, May the petitioner deduct in 1934 certain bad debts previously charged off by it in 1933 (a net-loss year exclusive of deductions for bad debts), but without orders from any banking authority, upon an alleged determination of worthlessness in 1934, but without making any charge-off in 1934?

[3] 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.

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

[5] 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.

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

NONACQUIESCENCES—Continued.

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New York, Ontario & Western Ry. Co	52693	30	408
Niagara Fire Insurance Co	92572	40	539
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., executor of Louis E. Flye[3 4]	84321	39	871
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.[5]	44090 45745 48121 54714 60746	30	331
Olmsted, Iva C.[5]	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.[6]	32335	28	698
Oregon Mesabi Corporation	90392	39	1033
Oregon Terminals Co	68893	29	1332
Ortiz Oil Co.[7]	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 only to the issue involving the application of section 302(g) of the Revenue Act of 1926 to a group life policy issued to the company of which the decedent was an employee.

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

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

[7] 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
Penn, Blanche G.[8]	90760	39	787
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.[9]	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 only to the issue involving the effect of capital losses sustained by a trust upon that part of the income of the trust taxable to the grantor under section 167 of the Revenue Act of 1934.

[9] 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.

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		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
Polin, Morris	87460	39	951
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

[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.
Q.			
Queen Insurance Co. of America	92996	40	483
Quinn, Porte F	67156	31	142
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

[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.

NONACQUIESCENCES—Continued.

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Rollandelli, Guiliano [1]	57479 67286	33	843
Rollins, Harry T	63954	34	319
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 [2]	35778 40903	24	763
Ross, Blanche S.[3]	51171	28	39
Ross, Walter L	73282	30	562
Rosser, E. M., executor [4]	40765	24	176
Rossheim, Irving D.[5]	57503	31	857
Rudman, I.[6]	85886	36	803
Rudman, Rose [6]	85887	36	803
Rust et ux., H. L	89171	38	910
Ruth, Frederick S., estate of [4]	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 [7]	45966	27	318
San Carlos Milling Co., Ltd.[8]	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
Saremal, William	89616	39	1072
Sather Lease—Thomas Sather & Co	31979	26	86
Sauk Investment Co	74642	34	732
Scatena, Elvira [9]	63920	32	675
Schiffer, Jack W	83249	39	161
Schimmel, Charles, estate of	81991	39	989
Schimmel et al., Mary, executors of estate of Charles Schimmel	81991	39	989
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

[1] Nonacquiescence as to issue regarding taxability in 1929 of dividends declared in stock in 1928, certificates for which were not delivered until 1929.
[2] Nonacquiescence does not relate to the Board's holding that distributions received from Joseph H. Finch & Co. were not partial liquidating dividends.
[3] Gift tax decision.
[4] Estate tax decision.
[5] Nonacquiescence relates to issue whether Commissioner is entitled to increased deficiency as raised by his amended answer filed with the Board.
[6] Nonacquiescence relates to deduction of drilling cost in computing allowable percentage depletion.
[7] Estate tax decision; nonacquiescence as to question of situs.
[8] Acquiescence as to issue 2 and nonacquiescence as to issue 1 published in Cumulative Bulletin XI-1 (1932), withdrawn.
[9] Nonacquiescence relates to dividend issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Scofield, Marion, estate of [1] [2]	80628	38	51
Scott, Thomas B., estate of [3]	50336	27	1224
Scott, Thomas S	70888	34	540
Scovell, Clinton H., estate of [1]	49272	30	679
Scripps, Robert P	77116	33	963
Scully, Enriqueta Angela [1]	80244	34	218
Seaconnet Coal Co.[4]	18089	24	307
Seatree, William Ernest	22094 33640	25	396
Security First National Bank of Los Angeles et al., executors [5]	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.[6]	29259	29	1315
Shaffer, John C	50086 59511	28	1293
Sharp et al., Edith Huggard, executors [1]	48317	30 33	532 290
Sharp, Walter P., estate of [1]	48317	30 33	532 290
Sheaffer Pen Co., W. A	36604	27	1056
Shepherd, Frederick R., estate of [1]	80961	39	38
Shepherd, Marjorie Bell, executrix of Frederick R. Shepherd [1]	80961	39	38
Shepherd Syndicate	48332 51327	26	1062
Shlenker, Simon J	58801	26	1401
Sibley et al., John R., executors [7]	24921	16	915
Sibley, Rufus A., estate of [7]	24921	16	915
Simms, E. F.[8]	19175 19791	28	988
Skaggs, L. L	90217	38	921
Skiff, Frank V.[9]	51173	28	39
Slack, A. B., estate of [10]	72404 78525	35	271
Small's, Inc	53791	24	686
Smathers, E. E., estate of [6]	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

[1] Estate tax decision.
[2] 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.
[3] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.
[4] Nonacquiescence relates to statute of limitations issue.
[5] 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.
[6] 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.
[7] Acquiescence published in Cumulative Bulletin VIII-2 (1929), withdrawn.
[8] Nonacquiescence relates to issues 1 and 4 set forth in syllabus of published decision.
[9] Gift tax decision.
[10] Nonacquiescence in issue involving question of taxable gain by reason of acquisition of possession of property leased by him.

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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 [1]	92177	38	1218
Smith, William Alden, estate of	56465	34	170
Sneed, Jr., J. T.[2]	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.[3]	21481 29951 37887 37898	27	673
Spang, Chalfant & Co.[4]	58790	31	721
Spencer, George Frinck, estate of [1]	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

[1] Estate tax decision.

[2] 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 not withstanding that the lands from which they arise may be the separate property of either spouse.

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

[4] Acquiescence published in Cumulative Bulletin XIV-2 (1935), withdrawn.

[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 with 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-7 (1935), withdrawn.

NONACQUIESCENCES—Continued.

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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 [1]	43830	26	1
Stone, Irving Lee, estate of [1]	43830	26	1
Straub, Tecla M	55935	29	216
Straus, Aaron	65091	27	1116
Strayer, Walter A	48564	27	155
Streefkerk, Mrs. S	45363	28	236
Strong, Harold C.[2]	38576	25	1351
Sturgeon-Hubbard Trust	37095	25	368
Sturgeon et al., Rollin S., trustees	37095	25	368
Suffolk Co., Ltd	81817	37	1156
Sullivan, Joseph J	56671	33	629
Suncrest Lumber Co	33244	25	375
Supplee, C. Henderson, estate of [3 4]	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 [5]	77923	33	671
Taft, Robert A., executor [5]	77923	33	671
Taft, Robert A., trustee	76813	34	603
Talbot, Frederick C., estate of	20411	27	829
Talbot, J. A.[6]	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 [5]	64444	27	220
Taylor, Jr., et al., H. Seldon, executors [5]	64444	27	220
Taylor, Jessie Carter	51891	27	65
Taylor, Judson L	51892	27	65
Ten Eyck, Peter G	68197	29	1113
Tennessee Co., The	91137	40	154
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

[1] Estate tax decision; nonacquiescence relates to issue involving property transferred by trust agreement.
[2] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[3] Gift tax decision.
[4] 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?
[5] Estate tax decision.
[6] Nonacquiescence relates to depreciation allowance in computing loss in sale of a boat.

NONACQUIESCENCES—Continued.

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Terre Haute, Indianapolis & Eastern Traction Co	33858	24	197
Terre Haute Traction & Light Co	33860	24	197
Terry, Anna Davis	45446	26	1418
Terry, Jr., J. T	65835	33	806
Texas Irrigation Co.[1]	40083 41346	24	958
Texas Pipe Line Co	59457	32	125
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 [2]	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 Guarantee & Trust Co., executor of estate of Edward T. Bedford	90104	39	1039
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 [3]	45320	23	892
Torrens, James H.[4]	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 [5]	66703	37	387
Trojan Oil Co	33757	26	659

[1] Nonacquiescence relates to affiliation issue.
[2] Nonacquiescence relates to the issue, Did the six trust instruments in the associated cases create a single trust or a multiple of trusts?
[3] 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.
[4] Nonacquiescence relates to the trust and dividend issues.
[5] Nonacquiescence relates to issue in respect of allowable deduction for depletion.

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Volunteer State Life Insurance Co	54176	27	1149
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[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.

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[1] Estate tax decision.

[2] Nonacquiescence relates only to the issue involving the status of a certain trust the corpus of which will, in any event, revert to the grantor at the end of 10 years.

[3] 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.

[4] 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?

[5] Nonacquiescence relates to statute of limitations issue.

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[1] Nonacquiescence relates to the trust and dividend issues.
[2] Nonacquiescence in issue relating to involuntary conversion.
[3] 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.
[4] Nonacquiescence relates to issue in respect of allowable deduction for depletion.
[5] Nonacquiescence relates to issue 5 of decision.
[6] Prior acquiescence published in Cumulative Bulletin XII-1, page 13 (1933), withdrawn.
[7] Nonacquiescence relates to question whether distribution of stock had the effect of distribution of a taxable dividend.
[8] Acquiescence published in Cumulative Bulletin X-2 (1931), withdrawn.
[9] Estate tax decision

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[1] Estate tax decision.

INCOME TAX RULINGS.—PART I.

A. INTERNAL REVENUE CODE AND REVENUE ACT OF 1938.

CHAPTER I.—INCOME TAX.

SUBCHAPTER 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. 1939-31-9929
(Also Section 22(b), Article 22(b)(4)-4.) I. T. 3301

INTERNAL REVENUE CODE.

Treatment for Federal income tax purposes of interest from United States savings bonds held by husband and wife as co-owners.

When United States savings bonds are registered in the names of two natural persons in the alternative as co-owners, for example, "Mr. John Jones or Mrs. Mary Jones," the interest therefrom is includible for Federal income tax purposes in the income of the person who contributed the purchase price of the bond. If the purchase price was contributed in part by both persons, the interest is includible in the income of such persons proportionately, provided that co-owners who are husband and wife domiciled in States having community property laws should ordinarily return one-half of the interest from the bonds in each spouse's income if the bonds are held as community property.

A husband and wife may, therefore, own as co-owners savings bonds having a maturity value of $10,000 issued in one calendar year, and, if the purchase price of $7,500 has been contributed equally, each spouse may claim exemption with respect to bonds having a maturity value of $5,000, the cost or principal amount of which, however, is only $3,750. Each spouse is not entitled to exemption on a *principal* amount of $5,000 with respect to savings bonds issued in one calendar year and held in co-ownership for the reason that a natural person must include any such bonds registered in his or her name as co-owner in determining whether the limitation has been exceeded, and such inclusion would result in each spouse owning bonds having a maturity value in excess of $10,000 issued in one calendar year.

ARTICLE 22(a)–14: Cancellation of indebtedness. (Also Section 22(a), Article 22(a)–18; Section 22(b), Articles 22(b)(9)–1 and 22(b)(9)–2; Section 113(b), Articles 113(b)–3, 113(b)(3)–1, 113(b)(3)–2.) 1939–48–10103 T. D. 4954

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

Regulations 101 as made applicable to the Internal Revenue Code amended.
Exclusion of income attributable to discharge of indebtedness.
Reduction of basis.

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, 1939 Sup.], as made applicable to the Internal Revenue Code (53 Stat., Part 1) by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939–1 (Part 1), 396] [Part 465, Subpart B, of such Title 26], to section 215 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session), approved June 29, 1939, such regulations are amended as follows:

(1) Article 22(a)–14 [section 9.22(a)–14, Title 26, Code of Federal Regulations, 1939 Sup.], as made applicable to the Internal Revenue Code, is amended by adding after the first paragraph thereof the following paragraph:

For exclusion from gross income of income attributable to discharge of indebtedness of a corporation in an unsound financial condition, see article 22(b)(9)–1 [section 9.22(b)(9)–1].

(2) Article 22(a)–18 [section 9.22(a)–18, Title 26, Code of Federal Regulations, 1939 Sup.], as made applicable to the Internal Revenue Code, is amended by adding at the end thereof the following new paragraph:

For exclusion from gross income of income attributable to discharge of indebtedness of a corporation in an unsound financial condition, see article 22(b)(9)–1 [section 9.22(b)(9)–1].

(3) Immediately preceding section 22(c), relating to inventories, which appears immediately preceding article 22(c)–1 [section 9.22(c)–1, Title 26, Code of Federal Regulations, 1939 Sup.], as made applicable to the Internal Revenue Code, insert the following:

Sections 215 (a) and (c) of the Revenue Act of 1939 provide:

SEC. 215. DISCHARGE OF INDEBTEDNESS.

(a) INCOME FROM DISCHARGE OF INDEBTEDNESS.—Section 22(b) of the Internal Revenue Code (relating to exclusions from gross income) is amended by adding at the end thereof the following new paragraph:

"(9) INCOME FROM DISCHARGE OF INDEBTEDNESS.—In the case of a corporation, the amount of any income of the taxpayer attributable to the discharge, within the taxable year, of any indebtedness of the taxpayer or for which the taxpayer is liable

evidenced by a security (as hereinafter in this paragraph defined) if—

"(A) it is established to the satisfaction of the Commissioner, or

"(B) it is certified to the Commissioner by any Federal agency authorized to make loans on behalf of the United States to such corporation or by any Federal agency authorized to exercise regulatory power over such corporation,

that at the time of such discharge the taxpayer was in an unsound financial condition, and if the taxpayer makes and files at the time of filing the return, in such manner as the Commissioner, with the approval of the Secretary, by regulations prescribes, its consent to the regulations prescribed under section 113(b)(3) then in effect. In such case the amount of any income of the taxpayer attributable to any unamortized premium (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be included in gross income and the amount of the deduction attributable to any unamortized discount (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be allowed as a deduction. As used in this paragraph the term "security" means any bond, debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation, in existence on June 1, 1939. This paragraph shall not apply to any discharge occurring before the date of the enactment of the Revenue Act of 1939, or in a taxable year beginning after December 31, 1942."

* * * * *

(c) TAXABLE YEARS TO WHICH APPLICABLE.—The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938.

ART. 22(b)(9)-1. [Section 9.22(b)(9)-1, Title 26, Code of Federal Regulations, 1939 Sup.] *Income from discharge of indebtedness.*—Section 22(b)(9) provides a method whereby a corporation may elect to have excluded from its gross income the amount of income attributable to a discharge, within the taxable year, of its indebtedness or of indebtedness for which it is liable as, for example, in the case of a debt arising from an assumption of liability of another corporation. To be entitled to the benefits of the provisions of section 22(b)(9) a corporation must (1) file with its return for the taxable year a consent to the provisions of the regulations, in effect at the time of the filing of the return, prescribed under section 113(b)(3) (see articles 113(b)(3)-1 and 113(b)(3)-2 [sections 9.113(b)(3)-1 and 9.113(b)(3)-2 of such Title 26], relating to adjustment of basis), and (2) establish that it was in an unsound financial condition immediately preceding the discharge of the indebtedness.

The existence of an unsound financial condition, for the purposes of section 22(b)(9), may be established (1) by satisfying the Commissioner of such condition upon a presentation to him of all facts pertinent to the financial condition of the corporation or (2) by having presented to the Commissioner a certification of such condition by any Federal agency (*e. g.*, the Reconstruction Finance Corporation) authorized to make loans to such taxpayer on behalf of the United States, or by any Federal agency (*e. g.*, the Interstate Commerce Commission) authorized to exercise regulatory power over the taxpayer. Such a certification will be deemed to be conclusive upon the Commissioner. The certification should accompany the return.

A corporation may be in an unsound financial condition, within the meaning of section 22(b)(9) and this article, even though the fair market value of its assets exceeds its liabilities or it is able to meet its current liabilities as they mature. Thus, highly indicative (but not conclusive) of an unsound financial condition would be the fact that bonds of the taxpayer are selling in a free market at prices substantially below their issue price and below the market price of similar issues of similar businesses.

As used in this article "indebtedness" means indebtedness evidenced by a bond, debenture, note, or certificate, or other evidence of indebtedness, in existence on June 1, 1939, and issued by either the taxpayer corporation or any other corporation. Thus, for example, if a corporation obtains a discharge of

its indebtedness represented only by open account book entries, section 22(b)(9) and this article are inapplicable. If, however, a corporation obtains a discharge of its liability (evidenced by its writing) arising from an assumption of a debt of an individual or a discharge of its liability (whether or not evidenced by a writing) arising from the assumption of the indebtedness of another corporation, section 22(b)(9) and this article are applicable.

If as a result of the discharge of indebtedness there remains unamortized premium or unamortized discount, the amount of the income attributable to such premium is to be excluded from gross income and the amount of the deduction attributable to such discount shall be disallowed as a deduction. The unamortized premium and unamortized discount, as the case may be, is in each instance to be computed as of the first day of the taxable year in which the discharge of indebtedness occurred.

The provisions of section 22(b)(9) and this article are inapplicable in the case of any discharge occurring—(1) in a taxable year beginning before January 1, 1939; (2) before June 29, 1939; (3) in a taxable year beginning after December 31, 1942; or (4) in any proceeding under section 77B of the Bankruptcy Act of 1898, as amended, or under Chapter X, XI, or XV of such Act.

ART. 22(b)(9)-2. [Section 9.22(b)(9)-2, Title 26, Code of Federal Regulations, 1939 Sup.] *Making and filing of consent.*—A consent to have the basis of its property adjusted in accordance with the provisions of the regulations, in effect at the time of filing of the return, prescribed under section 113(b)(3) (see articles 113(b)(3)-1 and 113(b)(3)-2) [sections 9.113(b)(3)-1 and 9.113(b)(3)-2 of such Title 26] shall be made by or on behalf of the taxpayer corporation in duplicate on Form 982, in accordance with these regulations and the instructions on the form or issued therewith. The original and duplicate shall be filed with the return.

(4) Immediately following article 113(b)-3 [section 9.113(b)-3, Title 26, Code of Federal Regulations, 1939 Sup.], as made applicable to the Internal Revenue Code, add the following:

Section 215 (b) and (c) of the Revenue Act of 1939 provides:

(b) BASIS REDUCED.—Section 113(b) of the Internal Revenue Code (relating to the adjusted basis of property) is amended by adding at the end thereof the following new paragraph:

"(3) DISCHARGE OF INDEBTEDNESS.—Where in the case of a corporation any amount is excluded from gross income under section 22(b)(9) on account of the discharge of indebtedness the whole or a part of the amount so excluded from gross income shall be applied in reduction of the basis of any property held (whether before or after the time of the discharge) by the taxpayer during any portion of the taxable year in which such discharge occurred. The amount to be so applied (not in excess of the amount so excluded from gross income, reduced by the amount of any deduction disallowed under section 22(b)(9)) and the particular properties to which the reduction shall be allocated, shall be determined under regulations (prescribed by the Commissioner with the approval of the Secretary) in effect at the time of the filing of the consent by the taxpayer referred to in section 22(b)(9). The reduction shall be made as of the first day of the taxable year in which the discharge occurred except in the case of property not held by the taxpayer on such first day, in which case it shall take effect as of the time the holding of the taxpayer began."

(c) TAXABLE YEARS TO WHICH APPLICABLE.—The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938.

ART. 113(b)(3)-1. [Section 113(b)(3)-1, Title 26, Code of Federal Regulations, 1939 Sup.] *Adjusted basis: Discharge of corporate indebtedness.—General rule.*—In addition to the adjustments provided in section 113(b)(1) and article 113(b)-1 [section 9.113(b)-1 of such Title 26], which are required to be made with respect to the cost or other basis of property, a further adjustment shall be made in any case in which there shall have been an exclusion from gross income under section 22(b)(9) on account of the discharge of indebtedness

of a corporation during the taxable year. Such further adjustment shall, except as otherwise provided in article 113(b)(3)-2 [section 9.113(b)(3)-2 of such Title 26], be made in the following manner and order:

(1) In the case of indebtedness incurred to purchase specific property (other than inventory or notes or accounts receivable), whether or not a lien is placed against such property securing the payment of all or part of such indebtedness, which indebtedness shall have been discharged, the cost or other basis of such property shall be decreased (but the amount of the decrease shall not be more than the amount of the adjusted basis without reference to this article) by an amount equal to the amount excluded from gross income under section 22(b)(9) and attributable to the discharge of the indebtedness so incurred with respect to such property;

(2) In the case of specific property (other than inventory or notes or accounts receivable) against which, at the time of the discharge of the indebtedness, there is a lien (other than a lien securing indebtedness incurred to purchase such property) the cost or other basis of such property shall be decreased (but the amount of the decrease shall not be more than the amount of the adjusted basis without reference to this article) by an amount equal to the amount excluded from gross income under section 22(b)(9) and attributable to the discharge of the indebtedness secured by such lien;

(3) Any excess of the total amount excluded from gross income under section 22(b)(9) over the sum of the adjustments made under (1) and (2) shall next be applied to reduce the cost or other basis of the property of the debtor (other than inventory and notes and accounts receivable, but including property covered by (1) and (2)) as follows: The cost or other basis of each unit of property shall be decreased (but the amount of the decrease shall not be more than the amount of the adjusted basis without reference to this article) in an amount equal to such proportion of such excess as the adjusted basis (without reference to this article) of each such unit of property bears to the sum of adjusted bases (without reference to this article) of all the property of the debtor other than inventory and notes and accounts receivable; and

(4) Any excess of the total amount excluded from gross income under section 22(b)(9) over the sum of the adjustments made under (1), (2), and (3) shall next be applied to reduce the cost or other basis of inventory and notes and accounts receivable, as follows: The cost or other basis of inventory or notes or accounts receivable, as the case may be, shall be decreased (but the amount of the decrease shall not be more than the amount of the adjusted basis without reference to this article) in an amount equal to such proportion of such excess as the adjusted basis of inventory, notes receivable or accounts receivable, as the case may be, bears to the sum of the adjusted bases of such inventory and notes and accounts receivable.

For the purposes of this article—

(A) Except where the context otherwise requires, property means all of the debtor's property, other than money;

(B) The phrase "indebtedness incurred to purchase" includes (i) indebtedness for money borrowed and applied in the purchase of property and (ii) an existing indebtedness secured by a lien against the property which the debtor, as purchaser of such property, has assumed to pay;

(C) The phrase "amount excluded from gross income under section 22(b)(9)" means the amount of income excluded under that section reduced by any deduction disallowed under that section for unamortized discount;

(D) Adjustments to basis shall be made—

(i) in the case of property owned on the first day of the taxable year, as of that day;

(ii) in the case of property acquired after the first day of the taxable year, as of the day so acquired—

regardless of the time such property was subsequently sold, exchanged, or otherwise disposed of by the taxpayer;

(E) Whenever a discharge of indebtedness is accomplished by a transfer of the taxpayer's property in kind the difference between the amount of the obligation discharged and the fair market value of the property transferred is the amount which may be applied in reduction of basis.

(F) Regardless of the amount excluded by the taxpayer from its gross income under section 22(b)(9) and so stated on Form 982, the maximum amount by which basis may be reduced in respect of the discharge of any indebtedness is the amount of income resulting from the discharge of such indebtedness.

Example (1): On January 1, 1939, the N Corporation owned an office building, which it sold in March, 1939. In June, 1939, it purchased a factory building. In October, 1939, the N Corporation bought in its outstanding bonds at less than their face value. Assuming that there is a proper exclusion from gross income under section 22(b)(9), the basis of each building shall be adjusted under section 113(b)(3) for the taxable year 1939. (But see article 113(b)(3)-2 [section 9.113(b)(3)-2, Title 26, Code of Federal Regulations, 1939 Sup.].)

Example (2): The M Corporation has outstanding an issue of A bonds which it had sold at a premium and an issue of B bonds which it had sold at a discount. In July, 1939, the M Corporation purchased such outstanding bonds for less than face value. The amount of income attributable to the discharge of the A bonds is $1,000 and the amount of unamortized premium is $200. The amount of income attributable to the discharge of the B bonds is $1,000 and the amount of unamortized discount is $50.

If the M Corporation under section 22(b)(9) elects to have excluded from gross income the amount of income attributable to the discharge of both bond issues, the total reduction in basis of the property of the M Corporation shall not exceed $2,150. If the M Corporation elects only with respect to the A bonds, the total reduction in basis shall not exceed $1,200 (or $950 if the election is with respect to the B bonds). If the M Corporation excludes only an amount of $500 with respect to the A bonds, the total reduction in basis may nevertheless be $1,200 (or $950 if the exclusion is with respect to the B bonds).

ART. 113(b)(3)-2. [Section 9.113(b)(3)-2, Title 26, Code of Federal Regulations, 1939 Sup.] *Adjusted basis: Discharge of indebtedness.—Special cases.*— Article 113(b)(3)-1 [section 9.113(b)(3)-1 of such Title 26] prescribes the general rule to be followed in adjusting basis of property where there is a proper exclusion from gross income under section 22(b)(9). The taxpayer may, however, have the basis of its property adjusted in a manner different from that set forth in article 113(b)(3)-1 [section 9.113(b)(3)-1 of such Title 26] upon a proper showing to the satisfaction of the Commissioner. Variations from such general rule may, for example, involve adjusting the basis of only part of the taxpayer's property or adjusting the basis of all the taxpayer's property, according to a fixed allocation.

A request for variations from the general rule prescribed in article 113(b)(3)-1 [section 9.113(b)(3)-1 of such Title 26] should be filed by the taxpayer with its return for the taxable year in which the discharge of indebtedness has occurred. Agreement between the taxpayer and the Commissioner as to any variations from such general rule shall be effected only by a closing agreement entered into under the provisions of section 3760 of the Internal Revenue Code. If no agreement is reached between the taxpayer and the Commissioner as to variations from the general rule prescribed in article 113(b)(3)-1 [section 9.113(b)(3)-1 of such Title 26] then the consent filed on Form 982 shall be deemed to be a consent to the application of such general rule and such general rule shall prevail in the determination of the basis of the taxpayer's property, unless the taxpayer specifically states on such form that it does not consent to the application of the general rule.

(5) The second sentence of article 113(b)-3 [section 9.113(b)-3, Title 26, Code of Federal Regulations, 1939 Sup.], as made applicable to the Internal Revenue Code, is amended to read as follows:

In addition, whenever it appears that the basis of property in the hands of the taxpayer is a substituted basis, as defined in section 113(b)(2)(A), the adjustments indicated in articles 113(b)-2, 113(b)(3)-1, and 113(b)(3)-2 [sections 9.113(b)-2, 9.113(b)(3)-1, and 9.113(b)(3)-2 of such Title 26] shall also be made, whenever necessary, after first making in respect of such substituted basis a proper adjustment of a similar nature in respect of the period during which the property was held by the transferor, donor, or grantor.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 22 and 113 of the Internal Revenue Code

(53 Stat., Part 1); section 215 of the Revenue Act of 1939 (Public, No. 155, 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 November 16, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register November 20, 1939, 10.09 a. m.)

ARTICLE 22(a)-18: Sale and purchase by corporation of its bonds.

INTERNAL REVENUE CODE.

Amendment of Regulations 101. (See T. D. 4954, page 76.)

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

ARTICLE 22(b)(4)-4: Interest upon United States obligations.

INTERNAL REVENUE CODE.

Exemption of interest from United States savings bonds held by husband and wife as co-owners. (See I. T. 3301, page 75.)

ARTICLE 22(b)(9)-1: Income from discharge of indebtedness.

INTERNAL REVENUE CODE.

Amendment of Regulations 101. (See T. D. 4954, page 76.)

ARTICLE 22(b)(9)-2: Making and filing of consent.

INTERNAL REVENUE CODE.

Amendment of Regulations 101. (See T. D. 4954, page 76.)

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

ARTICLE 23(a)-10: Rentals.

INTERNAL REVENUE CODE.

Spread of depreciation or amortization for improvements or cost of lease over term of original lease and renewals. (See T. D. 4957, page 87.)

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

ARTICLE 23(c)-1: Taxes. 1939-31-9930
G. C. M. 21373

INTERNAL REVENUE CODE AND REVENUE ACT OF 1938.

Accrual for Federal income tax purposes of real and personal property taxes in the States of Minnesota, Washington, and Wisconsin.

G. C. M. 6667 (C. B. VIII-2, 94 (1929)) modified. Recommended that I. T. 2633 (C. B. XI-2, 77 (1932)) and I. T. 2694 (C. B. XII-1, 107 (1933)) be revoked.

An opinion is requested as to the extent of the application of the decisions in *Lifson et al.* v. *Commissioner* (C. C. A. 8, 98 F. (2d), 508, page 198, this Bulletin, certiorari denied, 59 S. Ct., 364); *Commissioner* v. *Plestcheeff* (C. C. A. 9, 100 F. (2d), 62, page 260, this Bulletin), and *Commissioner* v. *Patrick Cudahy Family Co.* (C. C. A. 7, 102 F. (2d), 930, page 202, this Bulletin), in the determination of the accrual date of State property taxes for Federal income tax purposes.

In *Lifson et al.* v. *Commissioner*, supra, it was held that the date on which a lien attaches is the date of the accrual of Minnesota real property taxes and that under the statutes of Minnesota such lien specifically attaches on May 1 of each year (which is also the date as of which the tax is assessed). The Minnesota statute provides in part that "as between grantor and grantee, such lien shall not attach until the first Monday of January of the year next thereafter." The court, however, apparently did not consider that such provision had any effect upon the date of the accrual of the tax liability for purposes of the application of the Federal income tax statutes.

In *Commissioner* v. *Plestcheeff*, supra, it was held that the deduction for accrued real property taxes in the State of Washington is limited to the person who owns the realty at the time the lien for the taxes attaches, and that under the statutes of that State the lien for real property taxes attaches on March 1 of each year (which is also the date as of which the tax is assessed), *except* as between a grantor and a grantee, in which case it attaches the first Monday in February of the succeeding year. It was also held that a devisee is a grantee within the meaning of the Washington statute. The State of Washington statutory provision with regard to the lien as between a grantor and a grantee is practically identical with that of the State of Minnesota. Thus, the United States Circuit Court of Appeals for the Ninth Circuit differed with the United States Circuit Court of Appeals for the Eighth Circuit in its views as to the effect of such a statute.

In *Commissioner* v. *Patrick Cudahy Family Co.*, supra, it was held that real and personal property taxes in the State of Wisconsin do not accrue as liabilities, for purposes of the Federal income tax, on May 1 of each year (the date as of which Wisconsin real and personal property taxes are assessed). The court held that the liability for Wisconsin property taxes, both real and personal, does not accrue until all the events by which that liability is fixed have occurred, that the determination of the rate of tax is one of such events, and that, accordingly, not until the levy of the taxes in November

do such taxes accrue within the meaning of the Federal taxing statutes. The court by its language implied that tax upon real property in Wisconsin does not accrue until a lien upon the real estate attaches, and that this does not occur until the tax roll is completed and the taxes extended on such roll. The court also indicated that ownership of real property as of December 1 determines the incidence of the tax on real property as between a grantor and grantee in view of the provisions of section 74.62 of the Wisconsin statutes. In this respect, the views of the United States Circuit Court of Appeals for the Seventh Circuit are contrary to those of the United States Circuit Court of Appeals for the Eighth Circuit.

The question of when State property taxes accrue necessarily involves a reference to the law of the particular State involved and the decisions of its courts. Hence, it is impossible to lay down a general rule applicable to the accrual date of taxes in each and every State. It has been the Bureau's position that generally State property taxes accrue on the date as of which the assessment of the tax is made (frequently referred to as the assessment date) even though the amount of the tax is not ascertainable on that date. That is, when State statutes have fixed the time for determination of the taxable status of property, it is taxed to the owner as of that time. (See G. C. M. 15305 [C. B. XIV–2, 80 (1935)] and rulings cited therein.) Rulings upon this basis have been issued involving many States and such rulings are still in effect. G. C. M. 15305, supra, also holds that a method prescribed by State statutes for determining who, as between a vendor and a vendee, shall pay the taxes may be designed to apply to the successive owners *inter sese* and does not necessarily disturb the general rule that ownership of property on the date as of which the assessment is made is the event which establishes the accrual of taxes.

The decisions in the Plestcheeff and Cudahy cases are contrary to the general rule heretofore followed by the Bureau, and the Lifson case, while reaching a correct result, contains reasoning contrary to the Bureau position that a tax on real property may accrue prior to the date a lien attaches under State law. Accordingly, the Plestcheeff and Cudahy decisions will not be given general application but will be applied only in cases involving, respectively, Washington real property taxes and Wisconsin real and personal property taxes. Nor will the reasoning employed by the court in the Lifson case be applied with respect to the accrual date of real property taxes of other States. Those decisions will now be followed with respect to the types of taxes of the particular States which were involved therein. In determining the accrual date of property taxes of other States, existing Bureau rulings with regard thereto are not to be considered as affected by the court decisions herein discussed.

In view of the foregoing, G. C. M. 6667 (C. B. VIII–2, 94 (1929)), to the extent that it involves real property taxes in the State of Washington and is inconsistent with the decision in the Plestcheeff case, is modified, and it is recommended that I. T. 2633 (C. B. XI–2, 77 (1932)) and I. T. 2694 (C. B. XII–1, 107 (1933)), both involving the accrual date of real property taxes in the State of Wisconsin, be revoked.

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

ARTICLE 23(c)-1: Taxes. 1939-41-10051
I. T. 3328

INTERNAL REVENUE CODE.

Under the general laws of the State of New York, real property taxes accrue, for Federal income tax purposes, as of July 1 of each year. (This does not necessarily apply to taxes imposed by local jurisdictions.) New York City real estate taxes, under the charter of the city of New York effective January 1, 1938, accrued for the fiscal period January 1, 1939, to June 30, 1939, on April 1, 1939, and for the fiscal year beginning July 1, 1939, and subsequent fiscal years, one-half of such taxes accrues on October 1 and one-half accrues on April 1.

Advice is requested as to the accrual date of real property taxes in the State of New York generally. Advice is also requested as to the accrual date of real property taxes in New York City for the interim period from January 1 to June 30, 1939, resulting from the change to a fiscal year basis commencing July 1, 1939, pursuant to the provisions of the charter of the city of New York, effective January 1, 1938, and as to the accrual date of New York City real property taxes falling due after July 1, 1939.

Provisions of the law pertinent to the question of the accrual date of real property taxes in the State of New York are contained in McKinney's Consolidated Laws of New York, Book 59, entitled "Tax Law." The State law provides that the tax district means a city or town in the State (section 2). All real property within the State is taxable unless exempt from taxation by law (section 3). Real property is assessed as of July 1 in the tax district in which it is situated and in all cases the assessment is deemed to be against the real property itself, and the property is liable to sale for any tax levied upon it (section 9). If the owner of a parcel or a portion of real property is a resident of the tax district in which such parcel or portion of real property is assessed, and his name is correctly entered on the assessment roll, he shall be personally liable for the tax assessed against such parcel or portion of real property (section 71). (It is deemed unnecessary to state here the various provisions of law leading up to the completion of the tax rolls.)

It has been the Bureau's position that, generally, State property taxes accrue, for Federal income tax purposes, on the date as of which the assessment of the tax is made, although the amount of the tax is not ascertainable on that date. That is, when State statutes have fixed the time for determination of the taxable status of property, the tax is considered to have accrued as of that time. (See G. C. M. 15305, C. B. XIV-2, 80 (1935), and cases cited therein, and G. C. M. 21373, page 82, this Bulletin.)

The courts of New York in construing the general tax law have held that the taxable status of persons and property becomes fixed on the 1st day of July in each year.

In *Mygatt* v. *Washburn* (15 N. Y., 316) it was stated in part:

* * * Evidently there must be some day, in the course of the proceeding, on which the assessment may be said to be made. * * * In my opinion the assessment should be considered as made at the expiration of the time for making the inquiry, namely, on the 1st day of July. If there is any change, of residence or in the ownership of the property, after that day, it does not affect the assessment roll. The inquiries are then complete. Any

changes which the assessors are authorized to make after that time, are such as may be required to correct mistakes. * * * When the statute speaks of the time "when the assessment is made" it refers to the binding and conclusive act which designates the taxpayers and the amount of taxable property. If I am correct, in what has been said, it follows that the time, referred to in the statute, is the 1st day of July.

In *Clark* v. *Norton et al.* (49 N. Y., 243) it was stated in part:

* * * The assessment must be made by the 1st of July, and of property and persons in respect to the liability as it exists on that day. * * * An individual not liable to taxation on the 1st of July could not be placed upon the assessment roll after that time; neither could a person whose name was properly on the assessment roll be assessed for property acquired by him after that day. * * *

In *Overing* v. *Foote* (65 N. Y., 263) it was stated in part:

* * * It is probably the rule of the statute that the determination of the names of the persons who are to be assessed, and the property to be assessed, must be made on or before the 1st day of July, and on that day the assessment roll for the year must be regarded as completed in the sense that no additional names or property can thereafter be added.

In *People ex rel. 23rd St. R. Co.* v. *Commissioners of Taxes, etc.* (91 N. Y., 593) it was stated in part:

* * * Under these statutes, it has been held in this court, that the taxable status of persons and property becomes fixed on the 1st day of July in each year, and that no power exists to enter property thereafter acquired upon the roll or to change an assessment theretofore made on account of any transfers of title.

In *People ex rel. Luther* v. *McDermott* (265 N. Y., 47, 191 N. E., 770) it was stated in part:

* * * The procedure under the tax law is that July 1st of each year fixes the date at which status of the property and its ownership shall be taken for the purposes of assessment and taxation.

In view of the foregoing, it is held that under the general laws of the State of New York, real property taxes accrue, for Federal income tax purposes, as of July 1 of each year. It appears, however, that the procedure for tax collection in some villages, towns, and cities is governed by special legislation or by charter. The principles set forth above do not necessarily apply in such cases. The determination of the accrual date of taxes, for Federal income tax purposes, in such cases will depend upon the particular circumstances involved.

With respect to the remaining questions, the following provisions of the New York City charter, adopted at the general election of November 3, 1936, and effective January 1, 1938, are pertinent:

SEC. 111. Fiscal year.

The fiscal year of the city shall commence on the 1st day of July in each year and shall terminate at midnight of the ensuing 30th day of June.

* * * * * * *

SEC. 157. Taxable status of property.

The taxable status of all real property assessable for taxation in the city of New York shall be fixed for the succeeding fiscal year on the 25th day of January in each year.

* * * * * * *

SEC. 172. Taxes due and payable.

* * * * * * *

All taxes upon real estate for each fiscal year shall be due and payable in two equal installments, the first of which shall be due and payable on

the 1st day of October in such year, the second of which shall be due and payable on the 1st day of April in such year. * * *

All taxes shall be and become liens on the real estate affected thereby and shall be construed as and deemed to be charged thereon on the respective days when they become due and payable, and not earlier, and shall remain such liens until paid.

* * * * * * *

SEC. 952. Budget: capital outlay budget.

a. The first fiscal year as established by section 111 shall commence on the 1st day of July, 1939. * * *

* * * * * * *

d. The council shall cause to be raised by tax so much of the expense budget for the period commencing on the 1st day of January, 1939, and ending on the 30th day of June, 1939, as exceeds the total amount of receipts estimated by the comptroller. The tax rate therefor shall be fixed and the taxes shall be collected and paid in accordance with the provisions of this charter, with the following exceptions:

The tax rate shall be fixed upon the assessed valuations as they appear upon the assessment rolls delivered to the council in March, 1938. * * * The tax for said six months' period shall be due and payable in a single payment on the 1st day of April, 1939. * * *

In the Laws of New York, Administrative Code, City of New York, 1937, page 1501, the following provision is made:

SEC. J41–4.0. *Taxable status of property for six months' fiscal period commencing on the 1st day of January, 1939.*—a. The taxable status of real estate for the fiscal period commencing on the 1st day of January, 1939, and ending on the 30th day of June, 1939, shall be fixed on the 1st day of October, 1938 * * *.

In I. T. 2834 (C. B. XIII–2, 189 (1934)) it was held that under the provisions of the charter of the city of New York as it existed in 1930, ownership of real property on May 1 and November 1 of each calendar year is the "event" which determines the liability for taxes thereon and that the taxes accrued, for Federal income tax purposes, on these dates. The charter which was there considered provided that all taxes should become liens on real property and should be deemed to be charges thereon on the respective dates when they became due and payable "and not earlier."

Likewise, the charter of the city of New York now under consideration provides that taxes on real estate shall be construed as and deemed to be charged on the real estate on the respective days when they become due and payable "and not earlier." The charter specifically provides that the tax for the six months' period, January 1 to June 30, 1939, shall be due and payable on the 1st day of April, 1939. Accordingly, it is held that the taxes for such period accrued, for Federal income tax purposes, on April 1, 1939. The charter provides generally that taxes upon real estate for each fiscal year shall be due and payable in two equal installments, the first due and payable on October 1, and the second due and payable on April 1. Accordingly, it is held, with respect to the fiscal year beginning July 1, 1939, and subsequent fiscal years, that one-half of the real estate taxes accrues on October 1 and one-half accrues on April 1.

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

ARTICLE 23(l)-5: Method of computing depreciation allowance. 1939-50-10120
T. D. 4957
(Also Section 23(a), Article 23(a)-10.)

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 24.—INCOME TAX.

Spread of depreciation or amortization for improvements or cost of lease over term of original lease and renewals.

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

To Collectors of Internal Revenue and Others Concerned:

In determining deductions from gross income of items in respect of depreciation or amortization of the cost of improvements erected upon leased premises or the cost or other basis of a lease, including all capital expenditures in connection therewith, in cases in which the lease contains an unexercised option of renewal, the matter of spreading such depreciation or amortization over the term of the original lease, together with the renewal period or periods, depends upon the facts in the particular case. As a general rule, unless the lease has been renewed or the facts show with reasonable certainty that the lease will be renewed, the cost or other basis of the lease or the cost of improvements shall be spread only over the number of years the lease has to run, without taking into account any right of renewal. However, pursuant to the discretion vested in the Commissioner, with the approval of the Secretary, by section 3791(b) of the Internal Revenue Code, if the taxpayer for any taxable year ending prior to December 31, 1939, has been allowed such depreciation or amortization on the basis of spreading the cost or other basis of such lease or improvements over the number of years the lease has to run, including any exercised or unexercised renewal period or periods, and such taxable year has been closed on that basis and the tax for that year can not be redetermined, then the taxpayer may for subsequent taxable years take deductions on such basis if within 90 days after the approval of this Treasury decision or within such later period as may be specified by the Commissioner of Internal Revenue he files Form 969, in duplicate, with the Commissioner of Internal Revenue, Washington, D. C., attention of the Income Tax Unit, Records Division, signifying his election to have deductions in respect of such items determined upon such basis, and expressly waives his right to claim or receive the benefits of any reduction in his tax liability which would result from the allowance of deductions for such items on the basis of only the number of years the lease has to run, without taking into account any right of renewal, or on any basis other than that set forth in his election. If, in any case, the life of the improvements is less than the number of years the lease has to run, including the renewal period if properly to be considered,

the deduction for depreciation with respect to such improvements shall be spread only over such life.

(This Treasury decision is issued under the authority contained in section 3791, Internal Revenue Code (53 Stat., 467).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved December 6, 1939.

HERBERT E. GASTON,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register December 8, 1939, 11.44 a. m.)

SECTION 24.—ITEMS NOT DEDUCTIBLE.

ARTICLE 24-4: Amounts allocable to exempt income, other than interest.

INTERNAL REVENUE CODE.

Tax-exempt interest, and expenses allocable thereto, in cases of resident foreign insurance companies. (See I. T. 3297, page 137.)

SECTION 27(a).—CORPORATION DIVIDENDS PAID CREDIT: DEFINITION IN GENERAL.

ARTICLE 27(a)-3: Amounts used or irrevocably set aside to pay or to retire indebtedness. 1939-41-10052 T. D. 4948

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

Amending article 27(a)-3(*a*) of Regulations 101, and such article as made applicable to the Internal Revenue Code, to provide that a renewal will not prevent an indebtedness from being within section 27(a)4 of the Internal Revenue Code and the Revenue Act of 1938.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Regulations 101 as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] (Part 465, Subpart B, of Title 26, Code of Federal Regulations), are hereby amended by inserting immediately preceding article 27(a)-1 (section 9.27(a)-1 of such Title 26) the following:

SEC. 222 (Revenue Act of 1939). RENEWAL OF INDEBTEDNESS.

(a) Section 27(a)(4) of the Internal Revenue Code (relating to corporation credit for amounts used or set aside to pay indebtedness) is amended by inserting at the end thereof the following new sentence: "A renewal (however evidenced) of an indebtedness shall be considered an indebtedness."

(b) The amendment made by subsection (a) shall be applicable to taxable years beginning after December 31, 1938.

* * * * * * *

PAR. B. Regulations 101 are hereby amended by inserting immediately preceding article 27(a)-1 (section 9.27(a)-1 of Title 26, Code of Federal Regulations) the following:

SEC. 222 (Revenue Act of 1939). RENEWAL OF INDEBTEDNESS.

* * * * * * *

(c) Section 27(a)(4) of the Revenue Act of 1938 (relating to corporation credit for amounts used or set aside to pay indebtedness) is amended by inserting at the end thereof the following new sentence: "A renewal (however evidenced) of an indebtedness shall be considered an indebtedness."

(d) The amendment made by subsection (c) shall be applicable to taxable years beginning after December 31, 1937.

PAR. C. Article 27(a)-3(*a*) of Regulations 101 (section 9.27(a)-3(a) of Title 26, Code of Federal Regulations) and the same article of Regulations 101 as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26) are hereby amended by striking out the last paragraph thereof and by amending the first paragraph to read as follows:

(*a*) *Indebtedness.*—The term "indebtedness" means an obligation of the corporation, absolute and not contingent, to pay, on demand or within a given time, in cash or other medium, a fixed amount, existing at the close of business on December 31, 1937, and evidenced by a bond, note, debenture, certificate of indebtedness, mortgage, or deed of trust, issued by the corporation and in existence at the close of business on December 31, 1937, or by a bill of exchange accepted by the corporation prior to, and in existence at, the close of business on December 31, 1937. If the indebtedness was so evidenced at the close of business on December 31, 1937, it is still an indebtedness within the meaning of section 27(a)(4) though, prior to the time payment is made or amounts are irrevocably set aside, it has been renewed. Such renewal need not be evidenced by one of the types of instruments enumerated in section 27(a)(4), but it is sufficient if the debtor-creditor relationship evidenced by one of such instruments at the close of business on December 31, 1937, continues. An indebtedness once so renewed may be again renewed without depriving the corporation of the benefits of section 27(a)(4). Indebtedness incurred after December 31, 1937, is not indebtedness within the meaning of section 27(a)(4) even though the proceeds of the loan are used to discharge an indebtedness falling within the provisions of that section, as, for example, where money is borrowed from A to pay B, but, if the creditor remains the same and the transaction is in effect a renewal, the mere fact that it takes the form of a new borrowing, the proceeds of which are simultaneously used to discharge the prior obligation, will not of itself prevent the transaction from being a renewal within the meaning of section 27(a)(4) and this article.

The mere substitution, after December 31, 1937, of several instruments for one instrument, or one instrument for several instruments, existing at the close of business on such date, where there is no change in terms except the substitution of a series of different amounts equal in the aggregate to the total principal amount of the instrument or instruments surrendered (as, for example, where two $50,000 bonds are issued in exchange for one $100,000 bond, or where one $100,000 bond is issued in exchange for two $50,000 bonds), or the reissue of a lost or destroyed instrument, or the issue of a new instrument to a transferee, will not deprive a corporation of the benefits of section 27(a)(4).

Indebtedness incurred through the assumption of the liabilities of another is not indebtedness within the meaning of section 27(a)(4) unless such assump-

tion took place prior to January 1, 1938, and such indebtedness was evidenced at the close of business on December 31, 1937, by one or more of the instruments enumerated in such section, issued by the taxpayer prior to, and in existence at, the close of business on such date.

(This Treasury decision is prescribed pursuant to section 222 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session), section 62 of the Internal Revenue Code (53 Stat., Part 1), and section 62 of the Revenue Act of 1938 (52 Stat., 480, 26 U. S. C., Sup. IV, 62).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 28, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 30, 1939, 11.28 a. m.)

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. 1939–40–10037
I. T. 3323

INTERNAL REVENUE CODE.

The rule laid lown in G. C. M. 21503 (page 205, this Bulletin), that where a contract to sell stock on a stock exchange for less than the basis thereof was entered into on the last day of a taxable year and delivery of the stock was made in the regular way on January 2 of the following year the loss on the transaction was incurred in the earlier year, is equally applicable to such a transaction in which a gain is realized. Such a gain is returnable for Federal income tax purposes for the year in which the transaction was consummated except for delivery of the stock.

Advice is requested whether G. C. M. 21503 (page 205, this Bulletin) is applicable to a gain as well as a loss from the sale of stock.

In G. C. M. 21503, supra, it was held that where a contract to sell stock on a stock exchange for less than the basis thereof was entered into on December 31, 1930, and delivery of the stock was made in the regular way on January 2, 1931, the loss on the transaction was incurred in the year 1930 and constitutes a proper deduction for that year.

It is held that the rule laid down in G. C. M. 21503, supra, with respect to a loss applies equally to a similar transaction in which a gain is realized. Such a gain is returnable for Federal income tax purposes for the year in which the transaction was consummated except for delivery of the stock.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 55.—PUBLICITY OF RETURNS.

1939–36–10003
T. D. 4929

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 463C.—INSPECTION OF RETURNS.

Regulations governing the inspection of certain returns under the Internal Revenue Code.[1]

TREASURY DEPARTMENT,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

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[1] Sections 463C.0 to 463C.38 are issued under authority contained in sections 55(a), 508, 603, 702(a), 1204, and 1604(c) of the Internal Revenue Code (53 Stat., 29, 111, 111, 116, 171, 186).

SUBPART A.—INTRODUCTORY.

SEC. 463C.0. *Introductory.*—Section 55(a)(1) of the Internal Revenue Code provides:

> (1) Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.

Section 55(a)(2) of the Internal Revenue Code provides:

> (2) And all returns made under this chapter, Subchapters A, B, and D of Chapter 2, Subchapter B of Chapter 3, Chapters 4, * * * shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

Section 508 of the Internal Revenue Code (relating to surtax on personal holding companies) provides:

> All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter, except that the provisions of section 131 shall not be applicable.

Section 603 of the Internal Revenue Code (relating to excess-profits tax) provides:

> All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by section 600, except that the provisions of section 131 of that chapter shall not be applicable.

Section 702(a) of the Internal Revenue Code (relating to unjust enrichment tax) provides:

> (a) All provisions of law (including penalties) applicable with respect to taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable with respect to the taxes imposed by this subchapter, except that the provisions of sections 101, 131, 251, and 252 shall not be applicable.

Section 1204 of the Internal Revenue Code (relating to capital stock tax) provides:

> Returns required to be filed for the purpose of the tax imposed by section 1200 shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Chapter 1, except that paragraph (2) of subsections (b) and (f) of section 55 shall not apply.

Section 1604(c) of the Internal Revenue Code (relating to employment tax on employers) provides:

> (c) PUBLICITY.—Returns filed under this subchapter shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Chapter 1, except that paragraph (2) of subsections (a), (b) and (f) of section 55 shall not apply.

Section 55(f)(1) of the Internal Revenue Code (relating to income tax) provides:

> It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular

thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

Pursuant to the above-quoted provisions of law, it is hereby ordered that certain returns of individuals, partnerships, estates, trusts, corporations, associations, joint-stock companies, and insurance companies made pursuant to the requirements of the Internal Revenue Code, shall be open to inspection in accordance and upon compliance with the following rules and regulations:

SUBPART B.—INCOME RETURNS (INCLUDING PERSONAL HOLDING COMPANY AND UNJUST ENRICHMENT RETURNS), AND EXCESS-PROFITS AND CAPITAL STOCK TAX RETURNS, AND RETURNS OF EMPLOYMENT TAX ON EMPLOYERS UNDER SUBCHAPTER C OF CHAPTER 9 OF THE INTERNAL REVENUE CODE.

SEC. 463C.1. *Terms used.*—The word "return" when used in Subpart B of these regulations shall include only income returns (including personal holding company and unjust enrichment returns), and excess-profits and capital stock tax returns; and returns of employment tax on employers under Subchapter C of Chapter 9 of the Internal Revenue Code. Any other word or term used in these regulations which is defined in any chapter of the Internal Revenue Code shall be given the definition contained in the chapter which is applicable with respect to the particular return made.

SEC. 463C.2. *Return of individual.*—The return of an individual shall be open to inspection (*a*) by the person who made the return, or by his duly constituted attorney in fact; (*b*) if the maker of the return has died, or become legally incompetent, by the administrator, executor, trustee, or guardian of his estate, or by the duly constituted attorney in fact of such administrator, executor, trustee, or guardian; (*c*) in the discretion of the Commissioner, by any heir at law, next of kin, or beneficiary under the will, of such deceased person, or by the duly constituted attorney in fact of such heir at law, next of kin, or beneficiary, upon a showing that such heir at law, next of kin, or beneficiary has a material interest which will be affected by information contained in the return; and (*d*) as to returns under Subchapter C of Chapter 9 of the Internal Revenue Code (relating to employment tax on employers), in the discretion of the Commissioner and at such time and in such manner as the Commissioner may prescribe for the inspection, by an officer of any State having a law certified to the Secretary of the Treasury by the Social Security Board as having been approved in accordance with section 1603 of the Internal Revenue Code, upon written application signed by the governor of such State under the seal of the State, designating the officer to make the inspection and showing that such inspection is solely for purposes of administering such State law. With respect to inspection on behalf of States or political subdivisions thereof, see further section 55 of the Internal Revenue Code.

SEC. 463C.3. *Joint return of husband and wife.*—A joint return of a husband and wife shall be open to inspection (*a*) by either spouse for whom the return was made, upon satisfactory evidence of such relationship being furnished, or by his or her duly constituted attorney in fact; (*b*) if either spouse has died, or become legally incompetent, by the administrator, executor, trustee, or guardian of his or her estate, or by the duly constituted attorney in fact of such administrator, executor, trustee, or guardian; and (*c*) in the discretion of the Commissioner by any heir at law, next of kin, or beneficiary under the will, of such deceased spouse, or by the duly constituted attorney in fact of such heir at law, next of kin, or beneficiary, upon a showing that such heir at law, next of kin, or beneficiary has a material interest which will be affected

by information contained in the return. With respect to inspection on behalf of States or political subdivisions thereof, see section 55 of the Internal Revenue Code.

SEC. 463C.4. *Partnership return.*—The return of a partnership shall be open to inspection (*a*) by any individual who was a member of such partnership during any part of the time covered by the return, or by his duly constituted attorney in fact, upon satisfactory evidence of such membership in the partnership being furnished; (*b*) if a member of such partnership during any part of the time covered by the return has died, or become legally incompetent, by the administrator, executor, trustee, or guardian, of his estate, or by the duly constituted attorney in fact of such administrator, executor, trustee, or guardian; (*c*) in the discretion of the Commissioner, by any heir at law, next of kin, or beneficiary under the will, of such deceased person, or by the duly constituted attorney in fact of such heir at law, next of kin, or beneficiary, upon a showing that such heir at law, next of kin, or beneficiary has a material interest which will be affected by information contained in the return; and (*d*) as to returns under Subchapter C of Chapter 9 of the Internal Revenue Code (relating to employment tax on employers), in the discretion of the Commissioner and at such time and in such manner as the Commissioner may prescribe for the inspection, by an officer of any State having a law certified to the Secretary of the Treasury by the Social Security Board as having been approved in accordance with section 1603 of the Internal Revenue Code, upon written application signed by the governor of such State under the seal of the State, designating the officer to make the inspection and showing that such inspection is solely for purposes of administering such State law. With respect to inspection on behalf of States or political subdivisions thereof, see further section 55 of the Internal Revenue Code.

SEC. 463C.5. *Estates.*—The return of an estate shall be open to inspection (*a*) by the administrator, executor, or trustee of such estate, or by his duly constituted attorney in fact; (*b*) in the discretion of the Commissioner, by any heir at law, next of kin, or beneficiary under the will, of the deceased person for whose estate the return is made, or by the duly constituted attorney in fact of such heir at law, next of kin, or beneficiary, or if any such heir at law, next of kin, or beneficiary has died or become legally incompetent, by his administrator, executor, trustee, or guardian of his estate, or by the duly constituted attorney in fact of such administrator, executor, trustee, or guardian, upon a showing of material interest which will be affected by information contained in the return; and (*c*) as to returns under Subchapter C of Chapter 9 of the Internal Revenue Code (relating to employment tax on employers), in the discretion of the Commissioner and at such time and in such manner as the Commissioner may prescribe for inspection, by an officer of any State having a law certified to the Secretary of the Treasury by the Social Security Board as having been approved in accordance with section 1603 of the Internal Revenue Code, upon written application signed by the governor of such State under the seal of the State, designating the officer to make the inspection and showing that such inspection is solely for purposes of administering such State law. With respect to inspection on behalf of States or political subdivisions thereof, see further section 55 of the Internal Revenue Code.

SEC. 463C.6. *Trusts.*—The return of a trust shall be open to inspection (*a*) by the trustee or trustees, jointly or severally, or the duly constituted attorney in fact of such trustee or trustees; (*b*) by any individual who was a beneficiary of such trust during any part of the time covered by the return, or by his duly constituted attorney in fact, upon satisfactory evidence being furnished that the individual was such beneficiary; (*c*) if any individual who was a beneficiary of such trust during any part of the time covered by the return has died, or become legally incompetent, by the administrator, executor, trustee, or guardian, of his estate, or by the duly constituted attorney in fact of such administrator, executor, trustee, or guardian; (*d*) in the discretion of the Commissioner, by any heir at law, next of kin, or beneficiary under the will, of such deceased person, or by the duly constituted attorney in fact of such heir at law, next of kin, or beneficiary, upon a showing that such heir at law, next of kin, or beneficiary has a material interest which will be affected by information contained in the return; and (*e*) as to returns under Subchapter C of Chapter 9 of the Internal Revenue Code (relating to employment tax on employers), in the discretion of the Commissioner and at such time and in such manner as the Commissioner

may prescribe for the inspection, by an officer of any State having a law certified to the Secretary of the Treasury by the Social Security Board as having been approved in accordance with section 1603 of the Internal Revenue Code, upon written application signed by the governor of such State under the seal of the State, designating the officer to make the inspection and showing that such inspection is solely for purposes of administering such State law. With respect to inspection on behalf of States or political subdivisions thereof, see further section 55 of the Internal Revenue Code.

SEC. 463C.7. *Corporations.*—The return of a corporation shall be open to inspection (*a*) by any person designated by action of its board of directors, or other similar governing body, upon submission of satisfactory evidence of such action, or (*b*) by any officer or employee of such corporation upon written request to the Commissioner signed by any principal officer and attested by the secretary, or other officer under the corporate seal, if any, or (*c*) by the duly constituted attorney in fact of such corporation. The return of a corporation which has since been dissolved, shall, in the discretion of the Commissioner, be open to inspection by any person who under these regulations might have inspected the return at the date of dissolution. Returns of corporations under Subchapter C of Chapter 9 of the Internal Revenue Code (relating to employment tax on employers), in the discretion of the Commissioner, and at such time and in such manner as the Commissioner may prescribe, shall be open to inspection by an officer of any State having a law certified to the Secretary of the Treasury by the Social Security Board as having been approved in accordance with section 1603 of the Internal Revenue Code, upon written application signed by the governor of such State under the seal of the State, designating the officer to make the inspection and showing that such inspection is solely for purposes of administering such State law. With respect to inspection on behalf of States or political subdivisions thereof, see further section 55 of the Internal Revenue Code.

SUBPART C.—ESTATE AND GIFT TAX RETURNS UNDER THE INTERNAL REVENUE CODE.

SEC. 463C.20. *General.*—Estate tax returns and notices and gift tax returns, filed under the Internal Revenue Code, shall be treated as privileged communications and shall not be inspected nor their contents disclosed except as hereinafter provided.

SEC. 463C.21. *Application for inspection.*—Upon application to the collector, internal revenue agent in charge, or 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 his duly authorized attorney in fact.

SEC. 463C.22. *Disclosures for investigation purposes.*—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.

SEC. 463C.23. *Inspection by State officials.*—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 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.

SEC. 463C.24. *Inspection discretionary with Commissioner in certain cases.*—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 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.

SUBPART D.—GENERAL PROVISIONS.

SEC. 463C.30. *Scope.*—The following provisions, unless otherwise stated, are applicable to all returns referred to in Subparts B and C of these regulations.

SEC. 463C.31. *Permission to inspect.*—The Commissioner, upon written application setting forth fully the reason for the request, may grant permission for the inspection of returns in accordance with these regulations.

SEC. 463C.32. *Treasury Department officials and employees.*—The officers and employees of the Treasury Department whose official duties require inspection of returns may inspect any such returns without making such written application. If the head of a bureau or office in the Treasury Department, not a part of the Internal Revenue Bureau, desires to inspect, or to have an employee in his bureau or office inspect a return, in connection with some matter officially before him, for reasons other than tax administration purposes, the inspection may, in the discretion of the Secretary, be permitted upon written application to him by the head of such bureau or office, showing in detail why the inspection is desired.

SEC. 463C.33. *Inspection by branch of Government other than Treasury Department.*—Except as provided in section 463C.34, if the head of an executive department (other than the Treasury Department), or of any other establishment of the United States Government, desires to inspect or to have some other officer or employee of his branch of the service inspect a return in connection with some matter officially before him, the inspection may, in the discretion of the Secretary of the Treasury, be permitted upon written application to him by the head of such executive department or other Government establishment. The application shall be signed by such head and shall show in detail why the inspection is desired, the name and address of the taxpayer who made the return, and the name and official designation of the person it is desired shall inspect the return. The information obtained under this section and section 463C.32 may be used as evidence in any proceeding, conducted by or before any department or establishment of the United States, or to which the United States is a party.

SEC. 463C.34. *Inspection by Government attorneys.*—Any return shall be open to inspection by a United States attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in section 463C.37, 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.

SEC. 463C.35. *Information returns.*—Information returns, schedules, lists, and other statements designed to be supplemental to, or to become a part of, the returns shall be subject to the same rules and regulations as to inspection as are the returns themselves. In any case where inspection of the return is authorized by these regulations, the Commissioner may, in his discretion, permit inspection of other records and reports which contain information included or required by statute to be included in the return.

SEC. 463C.36. *Place of inspection.*—Generally, returns may be inspected only in the Bureau of Internal Revenue, Washington, D. C., unless such returns are in the custody of a collector of internal revenue or internal revenue agent in charge or the head of a field division of the Technical Staff, in which event the returns may be inspected in the office of such collector or agent in charge or head of division, but only in the presence of an internal revenue officer, designated by the collector or agent or head of division for that purpose.

SEC. 463C.37. *Applications for inspection.*—Except as provided in section 463C.33, and as hereinafter provided, all applications for permission to inspect returns must be made in writing to the Commissioner of Internal Revenue. When a return is in the custody of a collector of internal revenue or internal revenue agent in charge or the head of a field division of the Technical Staff, such collector or revenue agent in charge or head of division, upon written application to him, is authorized to permit the inspection of such return by a United States attorney, or an attorney in the Department of Justice, or by the taxpayer or his duly authorized attorney in fact, in accordance with these regulations.

SEC. 463C.38. *Penalties.*—Section 55(f)(1) of the Internal Revenue Code 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 55(f)(1) of the Internal Revenue Code are applicable also to disclosure of information contained in excess-profits, unjust enrichment, and capital stock tax returns and returns made under Subchapter C of Chapter 9 of the Internal Revenue Code.

HERBERT E. GASTON,
Acting Secretary of the Treasury.

Approved August 28, 1939.
FRANKLIN D. ROOSEVELT,
The White House.

EXECUTIVE ORDER—AUTHORIZING THE INSPECTION OF CERTAIN RETURNS MADE UNDER THE INTERNAL REVENUE CODE.

By virtue of the authority vested in me by section 55(a) of the Internal Revenue Code (53 Stat., 29), it is hereby ordered that the following designated returns made under the said Code shall be open to inspection 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 such returns, approved by me this date.

Income (including income of personal holding companies and unjust enrichment income), excess-profits, capital stock, estate, and gift tax returns, and returns of employment tax on employers under Subchapter C of Chapter 9 of the Internal Revenue Code.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
August 28, 1939.

(8230)

(Filed with the Division of the Federal Register August 29, 1939, 3.23 p. m.)

1939-39-10030
T. D. 4945

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER D, PART 463, SUBPART D.

Use of original returns open to inspection in accordance with Treasury Decision 4929 [page 91, this Bulletin]; furnishing of copies of returns; and inspection of returns of corporations by State officers and shareholders.[1]

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

Collectors of Internal Revenue and Others Concerned:

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463D.0. Introductory.

[1] Sections 463D.0 to 463D.9 are issued under authority contained in sections 55, 62, 508, 603, 702(a), 1204, 1207, 1604(c), and 3791 of the Internal Revenue Code (53 Stat., 29, 32, 111, 111, 116, 171, 171, 186, 467).

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SEC. 463D.0. *Introductory.*—By Executive order dated August 28, 1939, the President ordered that returns made under Chapter 1, Subchapters A, B, and D of Chapter 2, Chapters 3, 4, and 6, and Subchapter C of Chapter 9 of the Internal Revenue Code, shall be open to inspection in accordance and upon compliance with the rules and regulations promulgated in Treasury Decision 4929 approved by the President on the same date [page 91, this Bulletin]. 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 under Chapter 1 (income tax), Subchapters A (surtax on personal holding companies), B (excess-profits tax), and D (unjust enrichment tax), of Chapter 2, Chapter 6 (capital stock tax), and Subchapter C of Chapter 9 (employment tax on employers), of the Internal Revenue Code, are open to inspection by the proper officers of any State; all returns under Chapter 1, and Subchapters A, B, and D of Chapter 2 of the Internal Revenue Code (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; and all returns of corporations are open to inspection by bona fide shareholders of record owning 1 per cent or more of the outstanding stock.

Pursuant to sections 55, 62, 508, 603, 702(a), 1204, 1207, 1604(c), and 3791 of the Internal Revenue Code, the following rules and 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 4929, or otherwise; with respect to examinations by shareholders of the returns of corporations; with respect to inspection of returns of corporations under Chapter 1, Subchapters A, B, and D of Chapter 2, Chapter 6, and Subchapter C of Chapter 9 of the Internal Revenue Code, by the proper officers of any State; and with respect to the inspection of returns under Chapter 1, and Subchapters B and D of Chapter 2 of the Internal Revenue Code by any official, body, or commission, lawfully charged with the administration of any State tax law. For inspection by State taxing officials of income returns other than returns under Subchapters B and D of Chapter 2 of the Internal Revenue Code, see section 55(b) of the Internal Revenue Code and the regulations with respect thereto.

SPECIAL PROVISIONS.

SEC. 463D.1. *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 following returns of a corporation (or abstracts thereof): Income returns (including personal holding company and unjust enrichment returns), and excess-profits and capital stock tax returns, and returns of employment tax by employers under Subchapter C of Chapter 9 of the Internal Revenue Code.

(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 an internal revenue agent in charge or the head of a field division of the Technical Staff, in which event the return may be inspected in the office of such collector or agent or head of division, but only in the presence of an internal revenue officer designated by such collector or agent or head of division for that purpose.

SEC. 463D.2. *Inspection of returns by State taxing officials.*—Original returns of taxes imposed by Subchapters B and D of Chapter 2 of the Internal Revenue Code 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)2 of the Internal Revenue Code. 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.

SEC. 463D.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 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 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.

GENERAL PROVISIONS.

SEC. 463D.4. *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.

SEC. 463D.5. *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 an internal revenue agent in charge or the head of a field division of the Technical Staff, such collector or agent in charge or head of division 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.

SEC. 463D.6. *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.

SEC. 463D.7. *Penalties for disclosure of returns.*—Section 55(f)1 of the Internal Revenue Code 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 55(f)1 of the Internal Revenue Code are applicable also to disclosure of information contained in excess-profits, unjust enrichment, and capital stock tax returns, and returns made under Subchapter C of Chapter 9 of the Internal Revenue Code.

SEC. 463D.8. *Terms used.*—Any word or term used in these regulations which is defined in any chapter of the Internal Revenue Code shall be given the definition contained in the chapter which is applicable with respect to the particular return made.

SEC. 463D.9. *Prior regulations under Code superseded.*—This Treasury decision supersedes Treasury Decision 4878, approved January 4, 1939 [C. B. 1939-1 (Part 1), 115], only insofar as such Treasury decision was made applicable by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396], to returns made under the Internal Revenue Code.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 20, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 22, 1939, 12.53 p. m.)

ARTICLE 55(b)-5: Inspection of original returns. 1939-37-10017
T. D. 4936

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER E, PART 463, SUBPART E.—INSPECTION OF INCOME TAX WITHHOLDING RETURNS.

Regulations governing the inspection of income tax returns, Form 1042B, by the Department of National Revenue, Ottawa, Canada.

TREASURY DEPARTMENT.
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

SECTION 463E.0. *Introductory.*—Section 55(a) of the Revenue Act of 1938 provides:

> Returns made under this title shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Title II of the Revenue Act of 1926; and all returns made under this Act shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

Section 55(a)1 of the Internal Revenue Code provides:

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

Section 55(a)2 of the Internal Revenue Code provides:

> And all returns made under this chapter, Subchapters A, B, and D of Chapter 2, Subchapter B of Chapter 3, Chapters 4, 7, 12, and 21, Subchapter A of Chapter 29, and Subchapters A and B of Chapter 30, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

Pursuant to the above-quoted provisions of law the President orders that income tax withholding returns, Form 1042B, filed under the provisions of Title I of the Revenue Act of 1938, or Chapter 1 of the Internal Revenue Code, shall be open to inspection by the Department of National Revenue, Ottawa, Canada, for the purpose of enabling the United States Treasury Department to administer effectively the provisions of the tax convention, dated December 30, 1936, between the United States and Canada which was ratified August 13, 1937 [C. B. 1937-2, 539]. (Section 55(a), 52 Stat., 478, 26 U. S. C., Sup. IV, 55(a); section 55(a) (1) and (2), 53 Stat., 29.)

SEC. 463E.1. *Procedure for inspection.*—Upon receipt by the Commissioner of Internal Revenue of income tax withholding returns, Form 1042B, duplicate copies thereof shall be forwarded to the Department of National Revenue, Ottawa, Canada. (Section 55(a), 52 Stat., 478, 26 U. S. C., Sup. IV, 55(a); section 55(a) (1) and (2), 53 Stat., 29.)

JOHN W. HANES,
Acting Secretary of the Treasury.

Approved September 6, 1939.

FRANKLIN D. ROOSEVELT,
The White House.

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EXECUTIVE ORDER—AUTHORIZING THE INSPECTION OF CERTAIN INCOME TAX WITHHOLDING RETURNS BY THE DEPARTMENT OF NATIONAL REVENUE, OTTAWA, CANADA.

By virtue of the authority vested in me by section 55(a) of the Revenue Act of 1938 (52 Stat., 447, 478) and section 55(a) (1) and (2) of the Internal Revenue Code (53 Stat., 1, 29), it is hereby

ordered that income tax withholding returns, Form 1042B, filed under the provisions of Title I of the Revenue Act of 1938 (52 Stat., 447, 452), or Chapter 1 of the Internal Revenue Code (53 Stat., 1, 4), shall be open to inspection by the Department of National Revenue, Ottawa, Canada, for the purpose of enabling the United States Treasury Department to administer effectively the provisions of the tax convention, dated December 30, 1936, between the United States and Canada which was ratified August 13, 1937. Such inspection shall be in accordance with the rules and regulations prescribed by the Secretary of the Treasury in the Treasury decision relating to the inspection of returns by the Department of National Revenue, Ottawa, Canada, approved by me this date.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
September 6, 1939.

(8236)

(Filed with the Division of the Federal Register September 7, 1939, 10.48 a. m.)

SUBCHAPTER 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. 1939-41-10053 G. C. M. 21610

INTERNAL REVENUE CODE, REVENUE ACT OF 1938, AND PRIOR REVENUE ACTS.

As a general rule, in determining whether an organization is exempt from Federal income tax, the purpose of the organization should be determined from the instrument creating it. This rule is subject to the exception that where the net income of an organization is required by some other binding instrument to be used for charitable purposes its exemption will not be defeated by the fact that its charter or other instrument under which it exists does not indicate an exclusively charitable purpose. The exception to the general rule does not include cases where there is no binding instrument requiring the income to be devoted to charity even though the income is so devoted, and should be confined to cases where the intent prompting the original organization was to create an organization to be operated exclusively for charitable purposes.

An opinion is requested whether the purposes of an organization as set forth in the instrument creating it are determinative of its status for Federal income tax purposes or whether its actual activities should be the basis for determining its status. It is stated that there is an apparent conflict upon this subject between *Roche's Beach, Inc.*, v. *Commissioner* (96 Fed. (2d), 776, Ct. D. 1359, C. B. 1938-2, 230) and *Northwestern Municipal Ass'n, Inc.*, v. *United States* (99 Fed. (2d), 460, Ct. D. 1419, page 224, this Bulletin).

In *Roche's Beach, Inc.*, v. *Commissioner*, supra, the corporation was formed under the stock corporation law of New York by an individual shortly before his death for the purpose of being the medium through which a charitable foundation created by his will could operate his property and collect the income therefrom after his death. The individual transferred to the corporation various operating business properties in exchange for its stock on the date the individual executed his will. However, the individual continued to operate the property until his death, receiving all the income therefrom. By the will of the individual, the capital stock of the corporation was bequeathed to testamentary trustees for the purpose of establishing the charitable foundation. The will referred to the corporation and made manifest that the income produced by it could not be used for other than charitable purposes without a perversion of the testamentary trust. After the death of the individual the trustees operated the property through the medium of the corporation, which remitted any excess of income over expenses to the foundation for charitable purposes. The certificate of incorporation of the corporation gave it broad powers relative to carrying on various kinds of businesses and said nothing of the charitable purposes which it was to serve. The court there held that the corporation was exempt from tax under the provisions of section 103(6) of the Revenue Act of 1928. The court pointed out that the exemption provision does not mean that a corporation may not conduct business activities for profit, stating that the destination of the income is more significant than its source, citing *Trinidad* v. *Sagrada Orden* (263 U. S., 578, T. D. 3548, C. B. III-1, 270 (1924)); *Sand Springs Home* v. *Commissioner* (6 B. T. A., 198, acquiescence, C. B. VI-1, 5 (1927)); and *Appeal of Unity School of Christianity* (4 B. T. A., 61, acquiescence, C. B. VI-1, 6 (1927)). The court also held that the charter provisions of a corporation are not conclusive in determining the purpose for which it was organized and that extrinsic evidence may be considered in determining the actual purpose for which it was organized. The court further held that the exemption granted to charitable organizations is not limited to those which directly dispense charity, but includes those which merely produce income for a charity administered by another tax-exempt organization on the ground that exemptions of income devoted to charity are begotten from motives of public policy and are not to be narrowly construed.

In *Northwestern Municipal Ass'n, Inc.*, v. *United States*, supra, the organization there involved was alleged to be a business league exempt from tax under section 101(7) of the Revenue Act of 1934, which exempts certain stated organizations "not organized for profit." The court held that the organization was not entitled to exemption partly because it did not meet this requirement of the statute. In that case the corporation was organized under the Minnesota Business Corporation Act and its articles of incorporation disclosed the purpose of engaging in a regular business of a kind ordinarily carried on for profit. The court held that the purpose of the organization must be determined by the purpose declared in the instrument creating it, citing, among other cases, *Helvering* v.

Coleman-Gilbert Associates (296 U. S., 369, Ct. D. 1067, C. B. XV-1, 261 (1936)), wherein the Court stated in part that "The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted."

It is the opinion of this office that, as a general rule, the purpose of an organization should be determined from the instrument creating it. However, this rule is subject to the exception that where (as in Roche's Beach) the net income of an organization is required by some other binding instrument to be used for charitable purposes, its exemption will not be defeated by the fact that its charter or other instrument under which it exists does not indicate an exclusively charitable purpose. This exception to the general rule is required by the principle that statutes exempting income devoted to charity are not to be narrowly construed since they are begotten from motives of public policy. (Cf. *Helvering* v. *Bliss*, 293 U. S., 144, Ct. D. 884, C. B. XIII-2, 191 (1934), and *Lederer* v. *Stockton*, 260 U. S., 3.) This exception to the general rule should not be extended to cases in which there is no such binding instrument requiring that the income be devoted to charity, even though the income is in fact devoted to charity. The exception to the general rule is also confined to cases in which (as in Roche's Beach) the intent which prompted the original organization was an intent to set up an organization to be operated exclusively for charitable purposes.

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

ARTICLE 101(9)-1: Social clubs. 1939-31-9931
I. T. 3302

INTERNAL REVENUE CODE AND REVENUE ACT OF 1938.

The M Club's right to exemption under section 101(9) of the Revenue Act of 1938 and the Internal Revenue Code, as a nonprofit-making social club, is not affected by the fact that for the time being a substantial part of its income is derived from interest, such income being incidental to the investment of the proceeds of sale of its former clubhouse pending the acquisition of a new home for the club.

Advice is requested whether the M Club is entitled to exemption from Federal income tax under section 101 (6) or (9) of the Revenue Act of 1938 and the Internal Revenue Code.

The M Club was incorporated without capital stock under the laws of the State of R. Its objects are "the promotion of artistic taste in general, and vocal music in particular, by the practice and performance of sacred and secular music and by the establishment of a school for gratuitous instruction in singing and music, with power to take by purchase, devise or otherwise, and to hold, transfer, mortgage and convey such real and personal estate as shall be necessary for the purpose of the corporation." It maintains a free school for instruction in music and singing. It also maintains a clubhouse with the usual club facilities, including a restaurant, billiard tables, and bowling alleys for the use of its members and their guests.

The club's income, as shown by its financial statement, is derived from membership dues, interest on investments, and receipts from club facilities. It holds investments in a substantial amount, approximately $176,000, representing proceeds from the sale of its clubhouse, which amount is to be used for the purchase of a new home for the club. For the present the club is occupying rented quarters. Approximately 20 per cent of its income is derived from investments. The officers and members receive no gains or profits from the organization. The statements of receipts and expenditures indicate that the principal activity of the organization is the maintenance and operation of a social club.

Section 101(6) of the Revenue Act of 1938 and of the Internal Revenue Code provides for the exemption of:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

An association claiming exemption under the provisions of law quoted above must be organized and operated exclusively for one or more of the specific purposes. It is clear from the activities of the organization under consideration that it is not operated exclusively for educational purposes, as contended by the club, within the meaning of section 101(6) and is not entitled to exemption under that section.

Section 101(9) of the Revenue Act of 1938 and of the Internal Revenue Code provides for the exemption of:

> 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;

Article 101(9)–1 of Regulations 101 provides in part as follows:

> The exemption granted by section 101(9) applies to practically all social and recreation clubs which are supported by membership fees, dues, and assessments. * * *

While a substantial part of the income of the M Club is derived from interest, such income is incidental to the investment of the proceeds from the sale of the clubhouse. The purpose of such sale was not for profit. In other words, the income in question does not arise out of any activity entered into for profit or from engaging in business. It is, therefore, held that the receipt of such income does not preclude exemption under section 101(9) of the Revenue Act of 1938 and the Internal Revenue Code. (See G. C. M. 19465, C. B. 1938–1, 172.)

ARTICLE 101(9)–1: Social clubs. 1939–50–10117
I. T. 3339

INTERNAL REVENUE CODE AND REVENUE ACTS OF 1936 AND 1938.

The M Club leased its physical property to another club and discontinued operations. It is not supported by membership dues, fees, and assessments and is deriving all of its income from its lease. *Held*, the M Club is not entitled to exemption from Federal income taxation under section 101(9) of the Internal Revenue Code and similar provisions of the Revenue Acts of 1936 and 1938.

Advice is requested whether the M Club is entitled to exemption from Federal income taxation under the provisions of section 101(9) of the Internal Revenue Code and similar provisions of the Revenue Acts of 1936 and 1938.

In December, 1936, the M Club leased its physical property to the N Club and discontinued its active operations. However, members of the M Club retained the right to use the club facilities. The M Club states that the purpose of leasing its property to the N Club was and is to continue the M Club in existence and to provide facilities for its members which could not have been furnished had there not been a consolidation with the N Club. It is contended that the M Club is still operated exclusively for pleasure, recreation, and other nonprofitable purposes, and no part of its income inures to the benefit of any private stockholder. In support of its claim for exemption, the club cites *Santee Club* v. *White* (87 Fed. (2d), 5) and G. C. M. 19465 (C. B. 1938–1, 172).

In *Santee Club* v. *White*, supra, the taxpayer was a social club organized to acquire and obtain land as a hunting and fishing preserve for its members. It had sold part of its land, which had become valueless for its purposes, and had used the profit therefrom for the improvement of other parts of its property and for general purposes. The court held that the club had not lost its exemption since this was merely an incidental sale of property. The Santee Club continued to operate as a club for the benefit of its members and was supported by membership fees, dues, and assessments levied upon its members.

G. C. M. 19465, supra, refers to a club which for several years occupied a building under a lease and thereafter purchased the building. Within a year or two the members realized the impracticability of continuing to own the property, as the club's income was not sufficient to finance the activities and defray the heavy carrying charges. The property was, therefore, sold at a profit, the payments on the sale price being received annually for 10 years. The proceeds from the sale were not distributed to the members but were used to create a surplus which was gradually being absorbed by operating losses. After the sale the club continued to occupy the premises under a lease from the purchaser and continued to operate in the same manner. It was held that the sale did not deprive the club of exemption from Federal income taxation under section 101(9) of the Revenue Act of 1936.

In the instant case, the M Club, after leasing all of its property to the N Club, has not been supported by membership fees, dues, and assessments as required by article 101(9)–1 of Regulations 101. In an affidavit submitted by the president of the M Club it is stated that "The only income of the club is from the lease, and this income is equal to the interest and amortization on the bond issue, the taxes, the insurance, and the expense of maintaining, replacing, and operating the building."

Inasmuch as the club is not supported by membership fees, dues, and assessments, but merely leases its property and derives all its income from the lease, it is not entitled to exemption under the provisions of section 101(9) of the Revenue Act of 1936 and should be required to file an income tax return for 1937. Inasmuch as section

101(9) of the Revenue Act of 1938 and section 101(9) of the Internal Revenue Code are similar to section 101(9) of the Revenue Act of 1936, it is also required to file income tax returns for subsequent years.

SECTION 102.—SURTAX ON CORPORATIONS IMPROPERLY ACCUMULATING SURPLUS.

ARTICLE 102-2: Purpose to avoid surtax; evidence; burden of proof; definition of holding or investment company. 1939-31-9943 T. D. 4914

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 22.—INCOME TAX.

Corporate income tax returns to be given particular attention to determine the application of the provisions of section 102 of the Internal Revenue Code, and the corresponding section of the Revenue Act of 1938, relating to unreasonable accumulation of earnings or profits to avoid surtax.[1]

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

To Collectors of Internal Revenue and Other Officers and Employees of the Bureau of Internal Revenue Concerned:

SECTION 22. 0. *Introductory.*—(*a*) Attention is directed to the provisions of section 102 of the Internal Revenue Code (53 Stat., Part 1) which imposes a surtax on corporations improperly accumulating surplus, particularly section 102(c), which provides as follows:

(c) *Evidence determinative of purpose.*—The fact that the earnings or profits of a corporation are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid surtax upon shareholders unless the corporation by the clear preponderance of the evidence shall prove to the contrary.

The above-quoted provisions first appeared in the Revenue Act of 1938 (52 Stat., 483).

(*b*) Attention is also directed to the following provisions of article 102-2 of Regulations 101 issued under the Revenue Act of 1938, and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), page 396] (Part 465, Subpart B, Title 26, Code of Federal Regulations):

If the Commissioner determines that the corporation was formed or availed of for the purpose of avoiding the individual surtax through the medium of permitting earnings or profits to accumulate, and the taxpayer contests such determination of fact by litigation, the burden of proving the determination wrong by a preponderance of evidence, together with the corresponding burden of first going forward with evidence, is on the taxpayer under principles applicable to income tax cases generally, and this is so even though the corporation is not a mere holding or investment company and does not have an unreasonable accumulation of earnings or profits. However, if the corporation is a mere holding or investment company, then the Act gives further weight to the presumption of correctness already arising from the Commissioner's deter-

[1] Sections 22.0 and 22.1 issued under the authority contained in sections 62 and 102 of the Internal Revenue Code (53 Stat., Part 1) and of the Revenue Act of 1938 (52 Stat., 480, 483; 26 U. S. C., Sup. IV, 62, 102).

mination by expressly providing an additional presumption of the existence of a purpose to avoid surtax upon shareholders, while if earnings or profits are permitted to accumulate beyond the reasonable needs of the business, then the Act adds still more weight to the Commissioner's determination by providing that irrespective of whether or not the corporation is a mere holding or investment company, the existence of such an accumulation is determinative of the purpose to avoid surtax upon shareholders unless the taxpayer proves the contrary by such a clear preponderance of all the evidence that the absence of such a purpose is unmistakable.

(*c*) It is to be remembered that personal holding companies are now taxed under section 351 of the Revenue Act of 1934 (48 Stat., 751, 26 U. S. C., 331) and the corresponding sections of the Revenue Acts of 1936 (49 Stat., 1732, 26 U. S. C., Sup. 2, 331) and 1938 (52 Stat., 557, 26 U. S. C., Sup. 4, 331) and the Internal Revenue Code. The provisions of law establishing high tax rates on earnings held in such corporations have eliminated the largest group of cases which previously fell within the provisions of section 102, and that section now has application only to corporations other than personal holding companies.

SEC. 22.1. *Instructions.*—(*a*) Returns filed by the following classes of corporations will be given close attention to determine whether section 102 is applicable:

(1) Corporations which have not distributed at least 70 per cent of their earnings as taxable dividends.

(2) Corporations which have invested earnings in securities or other properties unrelated to their normal business activities.

(3) Corporations which have advanced sums to officers or shareholders in the form of loans out of undistributed profits or surplus from which taxable dividends might have been declared.

(4) Corporations, a majority of whose stock is held by a family group or other small group of individuals, or by a trust or trusts for the benefit of such groups.

(5) Corporations the distributions of which, while exceeding 70 per cent of their earnings, appear to be inadequate when considered in connection with the nature of the business or the financial position of the corporation or corporations with accumulations of cash or other quick assets which appear to be beyond the reasonable needs of the business.

(*b*) In so far as the classes of cases referred to in (1), (2), (3), and (4) are concerned, the examining officer's report in every instance shall contain a specific recommendation for the application or nonapplication of section 102.

(*c*) Each internal revenue agent in charge and each head of a field division of the Technical Staff will designate a qualified employee in his office, whose responsibility it will be to pass personally upon each case in which a recommendation has been made by an examining or reviewing officer with respect to the application or nonapplication of section 102. The internal revenue agent in charge or head of the field division of the Technical Staff will advise the Commissioner of the names and titles of such employees.

(*d*) There will be maintained currently in Washington, D. C., detailed data regarding cases in which recommendations have been made with respect to the application or nonapplication of section

102, in order that the officers of the Department may be kept appropriately informed. To this end, there will be forwarded to this office by internal revenue agents in charge or heads of field divisions of the Technical Staff, as the case may be, immediately upon preparation thereof, a copy of each examining officer's report, revenue agent's report, field conference memorandum, or action memorandum in cases referred to in (1), (2), (3), and (4) of paragraph (*a*) of this section, in which a recommendation has been made with respect to the application or nonapplication of section 102, and a copy of each examining officer's report, revenue agent's report, field conference memorandum, or action memorandum in cases referred to in (5) of paragraph (*a*) of this section in which a recommendation has been made for the application of section 102.

(*e*) In the review of income-tax cases by the Bureau, the returns of corporations of the classes enumerated in paragraph (*a*) of this section will be given special consideration to determine whether field officers have complied fully with these instructions.

(*f*) Correspondence, reports, and memorandums from internal revenue agents in charge in regard to this Treasury decision should refer to the number thereof and the symbols IT:F. Correspondence, reports, and memorandums from heads of the field divisions of the Technical Staff in regard to this Treasury decision should refer to the number thereof and the symbols C:TS.

HAROLD N. GRAVES,
Acting Commissioner.

Approved July 26, 1939.

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

(Filed with the Division of the Federal Register July 27, 1939. 12.47 p. m.)

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 112(f).—RECOGNITION OF GAIN OR LOSS: INVOLUNTARY CONVERSIONS.

ARTICLE 112(f)-1: Reinvestment of proceeds of involuntary conversion. 1939-42-10061 T. D. 4951

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 3 AND PART 9, SUBPART H; SUBCHAPTER E, PART 465, SUBPART B.—INCOME TAX.

Article 112(f)-1 of Regulations 86, 94, 101, and 101 as made applicable to the Internal Revenue Code, relating to reinvestment of proceeds of involuntary conversions, amended.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Article 112(f)-1 of Regulations 86, as amended by Treasury Decision 4698 (1936) (C. B. XV-2, 159), article 112(f)-1

of Regulations 94 [section 3.112(f)-1, Title 26, Code of Federal Regulations], 101 [section 9.112(f)-1 of such Title 26], and 101 as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] [Part 465, Subpart B, of such Title 26], are each amended by substituting for the first sentence of the second paragraph thereof, reading as follows:

If, in a condemnation proceeding, the Government retains out of the award sufficient funds to satisfy liens and mortgages against the property and itself pays the same, the amount so retained should be included in determining the amount of the net award.—

the following sentence:

If, in a condemnation proceeding, the Government retains out of the award sufficient funds to satisfy liens (other than liens due to special assessments levied against the remaining portion of the plot or parcel of real estate affected for benefits accruing in connection with the condemnation) and mortgages against the property and itself pays the same, the amount so retained shall not be deducted from the gross award in determining the amount of the net award.

PAR. B. The fifth paragraph of said article 112(f)-1 of Regulations 86, as amended, 94, 101, and 101 as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939, reading in part as follows:

There is no investment in property similar in character and devoted to a similar use if—

* * * * * *

(4) An award for property taken for street widening is applied toward payment of special assessments for benefits accruing to the remaining property.—

is amended by striking therefrom the clause designated (4), which reads as follows:

(4) An award for property taken for street widening is applied toward payment of special assessments for benefits accruing to the remaining property.

(This Treasury decision is prescribed pursuant to the provisions of section 62 of the Revenue Act of 1934 (48 Stat., 700; 26 U. S. C., 62), the Revenue Act of 1936 (49 Stat., 1673; 26 U. S. C., Sup. IV, 62), the Revenue Act of 1938 (52 Stat., 480; 26 U. S. C., Sup. IV, 62), and the Internal Revenue Code (53 Stat., Part 1).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved October 5, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register October 7, 1939, 9.29 a. m.)

SECTION 112(k) (ADDED BY SECTION 213, REVENUE ACT OF 1939).—ASSUMPTION OF LIABILITY NOT RECOGNIZED.

1939–39–10029
T. D. 4939

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 20, SUBPART A.—INCOME TAX.

Regulations under section 213 of the Revenue Act of 1939 relating to the recognition of gain or loss and the basis of property acquired in certain exchanges involving the assumption of liabilities or the acquisition of property subject to a liability.[1]

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

To Collectors of Internal Revenue and Others Concerned:

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20A.7. Modification of prior regulations.

SECTION 20A.0. *Introductory.*—(*a*) Section 213 of the Revenue Act of 1939, approved June 29, 1939 (Public, No. 155, Seventy-sixth Congress, first session), provides:

SEC. 213. ASSUMPTION OF INDEBTEDNESS.

(a) ASSUMPTION OF LIABILITY NOT RECOGNIZED.—Section 112 of the Internal Revenue Code (relating to recognition of gain or loss) is amended by adding at the end thereof the following new subsection:

"(k) ASSUMPTION OF LIABILITY NOT RECOGNIZED.—Where upon an exchange the taxpayer receives as part of the consideration property which would be permitted by subsection (b) (4) or (5) of this section to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumes a liability of the taxpayer or acquires from the taxpayer property subject to a liability, such assumption or acquisition

[1] Section 20A.0 to section 20A.7 are issued under the authority contained in section 62 of the Internal Revenue Code (53 Stat., Part 1), section 62 of the Revenue Act of 1938 (52 Stat., 480, 26 U. S. C., Sup. IV, 62), section 62 of the Revenue Act of 1936 (49 Stat., 1673, 26 U. S. C., Sup. IV, 62), section 62 of the Revenue Act of 1934 (48 Stat., 700, 26 U. S. C., 62), section 62 of the Revenue Act of 1932 (47 Stat., 191), section 62 of the Revenue Act of 1928 (45 Stat., 810), section 1101 of the Revenue Act of 1926 (44 Stat., 111, 26 U. S. C., 1691), section 1001 of the Revenue Act of 1924 (43 Stat., 339) and other provisions of the income tax laws, and interpret section 213 of the Revenue Act of 1939 (Public, No. 165, Seventy-sixth Congress, first session).

shall not be considered as 'other property or money' received by the taxpayer within the meaning of subsection (c), (d), or (e) of this section and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5); except that if, taking into consideration the nature of the liability and the circumstances in the light of which the arrangement for the assumption or acquisition was made, it appears that the principal purpose of the taxpayer with respect to the assumption or acquisition was a purpose to avoid Federal income tax on the exchange, or, if not such purpose, was not a bona fide business purpose, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this section, be considered as money received by the taxpayer upon the exchange. In any suit or proceeding where the burden is on the taxpayer to prove that such assumption or acquisition is not to be considered as money received by the taxpayer, such burden shall not be considered as sustained unless the taxpayer sustains such burden by the clear preponderance of the evidence."

(b) AMENDMENT TO DEFINITION OF REORGANIZATION.—Section 112(g)(1) of the Internal Revenue Code (relating to definition of reorganization) is amended to read as follows:

"(1) The term 'reorganization' means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded, or (D) 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 shareholders or both are in control of the corporation to which the assets are transferred, or (E) a recapitalization, or (F) a mere change in identity, form, or place of organization, however effected."

(c) REQUIREMENT OF SUBSTANTIALLY PROPORTIONATE INTERESTS.—Section 112(b)(5) of the Internal Revenue Code (relating to requirement of substantially proportionate interests) is amended by adding at the end thereof the following new sentence: "Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under subsection (k) it is not to be considered as 'other property or money') shall be considered as stock or securities received by such transferor."

(d) BASIS OF PROPERTY.—Section 113(a)(6) of the Internal Revenue Code (relating to basis of property) is amended by inserting before the last sentence thereof the following: "Where as part of the consideration to the taxpayer another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this paragraph, be considered as money received by the taxpayer upon the exchange."

(e) TAXABLE YEARS TO WHICH APPLICABLE.—The amendments made by subsections (a), (b), (c), and (d) shall be applicable to taxable years beginning after December 31, 1938.

(f) ASSUMPTION OF LIABILITY NOT RECOGNIZED UNDER PRIOR ACT.—(1) Where upon an exchange occurring in a taxable year ending after December 31, 1923, and beginning before January 1, 1939, the taxpayer received as part of the consideration property which would be permitted by subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent Revenue Acts, to be received without the recognition of

gain if it were the sole consideration, and as part of the consideration another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as "other property or money" received by the taxpayer within the meaning of subsection (c), (d), or (e) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent Revenue Acts, and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5) of section 112 of the Revenue Act of 1935, or the corresponding provisions of the Revenue Act of 1924 or subsequent Revenue Acts; except that if, in the determination of the tax liability of such taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of enactment of the Revenue Act of 1939, or by a closing agreement, gain was recognized to such taxpayer by reason of such assumption or acquisition of property, then for the purposes of section 112 of the Revenue Act of 1938, and corresponding provisions of the Revenue Act of 1924 or subsequent Revenue Acts, such assumption or acquisition (in the amount of the liability considered in computing the gain) shall be considered as money received by the taxpayer upon the exchange.

(2) Paragraph (1) shall be effective with respect to the Revenue Act of 1924 and subsequent Revenue Acts as of the date of enactment of each such Act.

(g) DEFINITION OF REORGANIZATION UNDER PRIOR ACTS.—

(1) Section 112(g)(1) of the Revenue Acts of 1938, 1936, and 1934 are amended to read as follows:

> "(1) The term 'reorganization' means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded; or the acquisition by one corporation in exchange solely for all or a part of its voting stock of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) 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 shareholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected."

(2) The amendments made by paragraph (1) to the respective Acts amended shall be effective as to each of such Acts as of the date of enactment of such Act.

(h) SUBSTANTIALLY PROPORTIONATE INTERESTS UNDER PRIOR ACTS.—

(1) Section 112(b)(5) of the Revenue Acts of 1938, 1936, 1934, 1932, and 1928, and section 203(b)(4) of the Revenue Acts of 1926 and 1924 are amended by inserting at the end thereof the following: "Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under section 213 of the Revenue Act of 1939 it is not considered as 'other property or money') shall be considered as stock or securities received by such transferor. If, as the result of a determination of the tax liability of the taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of the enactment of the Revenue Act of 1939, or by a closing agreement, the treatment of the amount of such liability was different from the treatment which would result from the application of the preceding sentence, such sentence shall not apply and the result of such determination shall be deemed proper."

(2) The amendments made by paragraph (1) to the respective Acts amended shall be effective as to each of such Acts as of the date of enactment of such Act.

(i) BASIS UNDER PRIOR ACTS.—

(1) Section 113(a)(6) of the Revenue Acts of 1938, 1936, 1934, 1932, and 1928, and section 204(a)(6) of the Revenue Acts of 1926 and 1924 are amended by inserting before the last sentence thereof the following: "Where as part of the consideration to the taxpayer another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this paragraph, be considered as money received by the taxpayer upon the exchange."

(2) The amendments made by paragraph (1) to the respective Acts amended shall be effective as to each of such Acts as of the date of enactment of such Act.

(*b*) Section 910 of the Social Security Act Amendments of 1939, approved August 10, 1939 (Public, No. 379, Seventy-sixth Congress, first session), provides:

SEC. 910. (a) The provisions of section 213(f) of the Revenue Act of 1939 shall apply without regard to the exception therein provided, if (1) the taxpayer in the determination referred to in such exception is a corporation, (2) such determination is by a decision of the Board of Tax Appeals or of a court, (3) under the law applicable to the taxable year in which the exchange occurred, the basis of the property, acquired upon the exchange from the taxpayer by the party assuming a liability of the taxpayer or acquiring the property subject to a liability, is the cost to such party of the property acquired upon the exchange, and (4) the taxpayer in pursuance of the plan of reorganization effected a complete liquidation immediately subsequent to the exchange.

(b) No overpayment determined to have been made for any taxable year by reason of the provisions of paragraph (a) of this section shall be refunded or credited unless a claim for refund is filed within the period of limitations otherwise provided by law for filing a claim for refund for such taxable year, or within one year from the date of enactment of the Revenue Act of 1939, whichever of such periods expires the later. No interest shall be allowed or paid on the amount of any overpayment refunded or credited by reason of the provisions of this section.

Pursuant to section 213 of the Revenue Act of 1939 and other provisions of the internal revenue laws, the following regulations are hereby prescribed:

SEC. 20A.1. *General.*—(*a*) *Use of term "assumption of liabilities."*—When used in these regulations, the terms "assumption of liabilities," "liabilities assumed," or similar expressions include, in addition to cases where personal liabilities of the taxpayer are assumed by another party to the exchange, cases (1) where property of the taxpayer is acquired by another party to the exchange subject to a liability, whether or not the taxpayer was himself personally liable, and (2) where, though the property transferred was held by the taxpayer merely subject to a liability, the liability is assumed by another party to the exchange.

(*b*) *References to sections of law.*—Unless otherwise specified, all references to sections of law in these regulations are to sections of the Internal Revenue Code and the corresponding provisions, if any, of Revenue Acts prior thereto, to and including the Revenue Act of 1924.

(*c*) *References to the "Act."*—References to the "Act" in these regulations are to the Revenue Act of 1939.

(*d*) *Date Board or court decision becomes final.*—The date upon which a decision by the Board of Tax Appeals becomes final is prescribed in section 1140 of the Internal Revenue Code.

The date upon which a judgment of a court becomes final must be determined upon the basis of the facts in the particular case. Ordinarily, a judgment of a United States district court becomes final upon the expiration of the time allowed for taking an appeal, if no such appeal is duly taken within such time; and a judgment of the United States Court of Claims becomes final upon the expiration of the time allowed for filing a petition for certiorari if no such petition is duly filed within such time.

SEC. 20A.2. *Purpose and scope of special treatment accorded assumption of liabilities in certain cases.*—Section 213 of the Act makes specific provision relative to the proper treatment of assumptions of liabilities in connection with the definition of the term "reorganization" and certain types of reorganization exchanges and transfers to controlled corporations. The transactions directly affected by section 213 of the Act are those described in section 112(b) (4) and (5), including those described in section 112 (c), (d), and (e) which would have been within section 112(b) (4) or (5) if it had not been for the receipt of "other property or money." Though section 213 of the Act does not extend to the transactions described in section 112(b), (1), (2), or (3) or so much of section 112 (c) and (e) as refers to section 112(b) (1), (2), or (3), it does, because of the amendment to section 112(g)(1) relative to the definition of the term "reorganization," make section 112 (b) (3), (c), and (e) applicable to exchanges which might otherwise be outside the scope of such provisions. In addition to the exceptions and limitations contained in the specific provisions of section 213 of the Act, transactions involving assumptions of liabilities are subject to all the exceptions and limitations generally applicable in the determination of whether an exchange is within the nonrecognition provisions of section 112, including satisfaction of the underlying purposes and assumptions of the reorganization provisions. See articles 112(a)–1 and 112(g)–1 of Regulations 101 (sections 9.112(a)–1 and 9.112(g)–1 of Title 26 of the Code of Federal Regulations). The effect of section 213 of the Act is to prevent certain types of assumptions of liabilities from resulting in a denial of nonrecognition of gain or loss in whole or in part in cases where, but for such assumption of liabilities, gain or loss would have been unrecognized in whole or in part under the sections affected. It does not add to the exceptions now contained in section 112. It merely implements them.

By retroactively providing that an assumption of liabilities does not prevent a transaction from constituting a reorganization, if otherwise qualified, by similarly providing that an assumption of liabilities in connection with certain reorganization exchanges and transfers to controlled corporations does not prevent a transaction from being within section 112(b) (4) or (5) and does not constitute a measure of the amount of gain to be recognized, and by amending section 113(a)(6), section 213 of the Act in general confirms the Bureau practice with respect to the recognition of gain or loss and the determination of basis of property acquired in the cases covered thereby.

SEC. 20A.3. *Assumption of liability not to be taken into account for purpose of recognizing gain or loss.*—(*a*) *General rule.*—Section 213 of the Act does not affect the rule that liabilities assumed are to be taken into account for the purpose of computing the amount of gain or loss realized upon an exchange. Such section provides, however, that liabilities assumed are not to be treated as "other property or money" under section 112(e) or for the purpose of determining the amount of the realized gain which is to be recognized under section 112 (c) or (d), if the transactions involved would, but for the receipt of "other property or money," have been exchanges of the type described in section 112(b) (4) or (5). The section also provides that if the only type of consideration received by the transferor in addition to that permitted to be received by section 112(b) (4) or (5) consists of an assumption of liabilities, the transaction, if otherwise qualified, shall be deemed to be within the provisions of section 112(b) (4) or (5). The above rules are applicable to all transactions of the character described occurring at any time in the past or the future in a taxable year ending after December 31, 1923, of the transferor whose liabilities are assumed, with the exceptions and limitations specified in paragraphs (b) and (c) of this section of the regulations.

The application of this paragraph may be illustrated by the following example:

Example: A, an individual, transfers to a controlled corporation property with an adjusted basis of $10,000 in exchange for stock of the corporation with a fair market value of $8,000, cash in the amount of $3,000, and the assumption by the

corporation of indebtedness of A amounting to $4,000. A's gain is $5,000, computed as follows:

Stock received	$8,000
Cash received	3,000
Liabilities assumed by transferee	4,000
Total consideration received	$15,000
Less: Adjusted basis of property transferred	10,000
Gain realized	5,000

Assuming that the transaction falls within section 112(c) as a transaction which would have been within section 112(b)(5) but for the receipt of "other property or money," only so much of such $5,000 gain will be recognized as does not exceed the "other property or money" received. Since section 213 of the Act provides that an assumption of liabilities shall not constitute "other property or money" for this purpose, the only "other property or money" received is the $3,000 cash, and the $5,000 realized gain will be recognized only to that extent.

(*b*) *Exceptions and limitations relative to transactions taking place in a taxable year beginning after December 31, 1938.*—The benefits of section 112(k), added to the Internal Revenue Code by section 213(a) of the Act, do not extend to any exchange involving an assumption of liabilities where it appears that the principal purpose of the taxpayer with respect to such assumption was a purpose to avoid Federal income tax on the exchange, or, if not such purpose, was not a bona fide business purpose. In such cases, the amount of the liabilities assumed shall, for the purpose of determining the amount of gain to be recognized upon the exchange in which the liabilities are assumed, be treated as money received by the taxpayer upon the exchange. In any suit or proceeding where the burden is on the taxpayer to prove that an assumption of liabilities is not to be considered as "other property or money" under section 112(k), which is the case if the Commissioner determines that the taxpayer's purpose with respect to the assumption was a purpose to avoid Federal income tax on the exchange or was not a bona fide business purpose and the taxpayer contests such determination by litigation, the taxpayer must sustain such burden by the clear preponderance of the evidence. Thus, the taxpayer must prove his case by such a clear preponderance of all the evidence that the absence of a purpose to avoid Federal income tax on the exchange, or the presence of a bona fide business purpose, is unmistakable.

(*c*) *Exceptions and limitations relative to transactions taking place in a taxable year beginning prior to January 1, 1939.*—Except as provided in section 910 of the Social Security Act Amendments of 1939 (quoted in section 20A.0(*b*) of these regulations), there are excepted from the rule provided by section 213(f) of the Act cases involving taxpayers in the determination of whose tax liability for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final on or before September 26, 1939, or by a closing agreement under section 3760, gain was recognized to such taxpayer by reason of the assumption of liabilities in question. It is provided that under the applicable provision of the law such an assumption of liabilities shall be treated as money received by the taxpayer upon the exchange to the extent such assumption of liabilities was considered in computing the amount of gain to be recognized.

SEC. 20A.4. *Assumption of liabilities to be disregarded in determining whether transaction is a reorganization under clause requiring acquisition of properties of a corporation solely for transferee's voting stock.*—The nonrecognition of gain or loss accorded by section 112(b) (3) and (4), and so much of section 112 (c), (d), and (e) as refers to section 112(b) (3) and (4), applies only to exchanges made in connection with a reorganization. Among the types of transactions defined as a reorganization by section 112(g)(1) of the Internal Revenue Code and the Revenue Acts of 1934, 1936, and 1938 is the acquisition by one corporation, in exchange *solely* for all or part of its voting stock, of substantially all the properties of another corporation. Section 213 (b) and (g) of the Act amends such section 112(g)(1) to provide that in determining whether an exchange is solely for voting stock for the purposes of such definition any assumption by the acquiring corporation of the liabilities of the other shall be

disregarded. The effect of such provision may be illustrated in the operation of section 112(b) (3) and (4) by the following examples:

Example (1): The only assets of the X Corporation consist of property with an adjusted basis of $1,000,000. The X Corporation also has indebtedness outstanding of $50,000. On July 1, 1939, pursuant to a plan of reorganization, the X Corporation transfers all its property to the Y Corporation in exchange for voting stock of the Y Corporation with a fair market value of $900,000 and an assumption by the Y Corporation of the X Corporation's indebtedness. The transaction being a reorganization pursuant to the terms of section 112(g)(1) as amended by section 213 of the Act, the exchange is governed by section 112(b)(4) and though the X Corporation realized a loss of $50,000 on the exchange, such loss will not be recognized.

Example (2): Assume the same facts as in example (1), plus the fact that, pursuant to the plan of reorganization, the X Corporation immediately distributes the Y Corporation's stock to its shareholders in complete liquidation. A, one of the shareholders of the X Corporation, receives stock of the Y Corporation with a fair market value of $5,000 in exchange for stock of the X Corporation with an adjusted basis in his hands of $4,000. The transaction between the X Corporation and the Y Corporation being a reorganization pursuant to the terms of section 112(g)(1) as amended by section 213 of the Act, the exchange by A of his X Corporation stock for Y Corporation stock is governed by the provisions of section 112(b)(3) and the $1,000 gain realized by A in such exchange will not be recognized. If in connection with such exchange indebtedness of A had been assumed, the amount of the liabilities so assumed would have been treated as "other property or money" for the purposes of section 112(c), since the provisions of section 213 (a) and (f) of the Act do not extend to section 112(b)(3), and so much of A's gain would have been recognized as did not exceed such "other property or money."

Though an assumption of liabilities does not prevent an exchange from being solely for voting stock for the purposes of the definition of a reorganization, an assumption of liabilities in some cases may so alter the character of the transaction as to place it outside the underlying purposes and assumptions of the reorganization provisions. The amendments made by section 213 (b) and (g) of the Act do not prevent consideration of the effect of an assumption of liabilities on the general character of the transaction, but merely provide that the requirement that the exchange be solely for voting stock is satisfied if the only additional consideration is an assumption of liabilities.

SEC. 20A.5. *Effect of assumption of liabilities on computation of proportionate interests required by section 112(b)(5).—(a) General rule.*—Subject to the limitations and exceptions specified in paragraph (*b*) of this section of the regulations, in any case where an assumption of liabilities is not to be treated as "other property or money" under section 213(f) of the Act or section 112(k), added to the Internal Revenue Code by section 213(a) of the Act, the amount of the liabilities so assumed is to be treated as stock or securities received by the transferor whose indebtedness is assumed, for the purpose of determining whether the stock or securities received by the transferors are substantially in proportion to their interests in the properties transferred, as required by section 112(b)(5). The application of this paragraph may be illustrated by the following example:

Example: A and B, individuals, each own property with a fair market value of $100,000 on July 1, 1939. There is a purchase money mortgage on A's property of $50,000. On July 1, 1939, A and B organize the X Corporation, to which they transfer the property above described for the entire capital stock of the X Corporation and the assumption by the X Corporation of A's purchase money mortgage. The X Corporation's capital stock is divided as follows: $50,000 to A and $100,000 to B. Nevertheless, for the purposes of determining whether the transferors received stock or securities substantially in proportion to their interests in the properties transferred, as required by section 112(b)(5), A is deemed to have received stock or securities to the extent of $100,000, since his $50,000 purchase money mortgage, assumed by the X Corporation, is also to be treated as stock or securities received by him. Accordingly, under the facts as stated, the proportions required by section 112(b)(5) exist.

(*b*) *Exceptions and limitations in the case of transactions taking place in a taxable year beginning prior to January 1, 1939.*—Paragraph (*a*) of this section of the regulations shall not apply if the exchange took place in a taxable year

beginning prior to January 1, 1939, and, as the result of a determination of the tax liability of the taxpayer for such taxable year, by a decision of the Board of Tax Appeals or of a court which became final on or before September 26, 1939, or by a closing agreement under section 3760, the treatment of the amount of such liability was different from the treatment which would result from the application of paragraph (*a*) of this section of the regulations. In such case the result of such determination shall be deemed proper.

SEC. 20A.6. *Effect of assumption of liabilities on basis of property acquired by person whose liabilities are assumed.*—Section 113(a)(6) provides that the basis of property acquired upon certain tax-free exchanges shall be the same as the adjusted basis of the property transferred, decreased in the amount of any money received by the taxpayer and increased in the amount of gain or decreased in the amount of loss to the taxpayer that was recognized upon the exchange under the law applicable to the year in which the exchange was made. For the purpose of this provision, the amount of any liabilities of the taxpayer assumed by the other party to the exchange is to be treated as money received by the taxpayer upon the exchange, whether or not the assumption of liabilities resulted in a recognition of gain or loss to the taxpayer. Such treatment of an assumption of liabilities may be illustrated by the following examples:

Example (1): A, an individual, owns property having an adjusted basis of $100,000 and on which there is a purchase money mortgage of $25,000. On September 1, 1939, A organizes the X Corporation to which he transfers the property above described in exchange for all the capital stock of the X Corporation and the assumption of the $25,000 mortgage. The capital stock of the X Corporation has a fair market value of $150,000. Under section 112(b)(5), no gain is recognized. The basis of such stock in A's hands is $75,000, computed as follows:

Adjusted basis of property transferred	$100,000
Less: Amount of money received (amount of liabilities assumed by X Corporation)	25,000
Basis of stock of the X Corporation in A's hands	75,000

Example (2): B, an individual, owns an apartment house which has an adjusted basis in his hands of $500,000, but which is subject to a mortgage of $150,000. On September 1, 1939, he transfers such apartment house to C, receiving in exchange therefor $50,000 in cash and another apartment house with a fair market value on that date of $600,000. The transfer to C is made subject to the $150,000 mortgage, but C does not assume such mortgage. B realizes a gain of $300,000 on the exchange, computed as follows:

Value of property received	$600,000
Cash	50,000
Liabilities subject to which old property was transfered	150,000
Total consideration received	800,000
Adjusted basis of property transferred	500,000
Gain realized	300,000

Since section 213 of the Act does not apply to section 112(b)(1) or so much of section 112(c) as relates to section 112(b)(1), $200,000 of such $300,000 gain is recognized. The basis of the apartment house acquired by B upon the exchange is $500,000, computed as follows:

Adjusted basis of property transferred		$500,000
Less: Amount of money received:		
Cash	$50,000	
Amount of liabilities subject to which property was transferred	150,000	
		200,000
Difference		300,000
Plus: Amount of gain recognized upon the exchange		200,000
Basis of property acquired upon the exchange		500,000

SEC. 20A.7. *Modification of prior regulations.*—Prior Treasury regulations are hereby modified to the extent that they may be inconsistent with these regulations.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 16, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 19, 1939, 11.29 a. m.)

SECTION 113(a) (AMENDED BY SECTION 214, REVENUE ACT OF 1939).—ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS: BASIS (UNADJUSTED) OF PROPERTY.

1939-39-10025
T. D. 4938

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 20, SUBPART B.—INCOME TAX.

Regulations relating to the basis for determining gain or loss and holding period upon the sale or other disposition of stock dividends or stock rights and the basis of the shares with respect to which stock dividends or stock rights have been issued.[1]

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

To Collectors of Internal Revenue and Others Concerned:

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SECTION 20B.0. *Introductory.*—Section 214 of the Revenue Act of 1939, approved June 29, 1939 (Public, No. 155, Seventy-sixth Congress, first session), provides:

SEC. 214. BASIS OF STOCK DIVIDENDS AND STOCK RIGHTS.

(a) BASIS UNDER INTERNAL REVENUE CODE.—Section 113(a) of the Internal Revenue Code (relating to the unadjusted basis of property) is amended by inserting at the end thereof the following new paragraph:

"(19) (A) If the property was acquired by a shareholder in a corporation and consists of stock in such corporation, or rights to acquire such stock, acquired by him after February 28, 1913, in a distribution by such corporation (hereinafter in this paragraph

[1] Sections 20B.0 to 20B.8 are issued under authority contained in section 214 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and section 62 of the Internal Revenue Code (53 Stat., Part 1), and interpret section 214 of said Revenue Act of 1939.

called 'new stock'), or consists of stock in respect of which such distribution was made (hereinafter in this paragraph called 'old stock') and

"(i) the new stock was acquired in a taxable year beginning before January 1, 1936; or

"(ii) the new stock was acquired in a taxable year beginning after December 31, 1935, and its distribution did not constitute income to the shareholder within the meaning of the sixteenth amendment to the Constitution;

then the basis of the new stock and of the old stock, respectively, shall, in the shareholder's hands, be determined by allocating between the old stock and the new stock the adjusted basis of the old stock; such allocation to be made under regulations which shall be prescribed by the Commissioner with the approval of the Secretary.

"(B) Where the new stock consisted of rights to acquire stock and such rights were sold in a taxable year beginning before January 1, 1939, and there was included in the gross income for such year the entire amount of the proceeds of such sale, then, if before the date of the enactment of the Revenue Act of 1939 the taxpayer has not asserted (by claim for a refund or credit or otherwise) that any part of the proceeds of the sale of such new stock should be excluded from gross income for the year of its sale, the basis of the old stock shall be determined without regard to subparagraph (A); and no part of the proceeds of the sale of such new stock shall ever be excluded from the gross income of the year of such sale.

"(C) Subparagraph (A) shall not apply if the new stock was acquired in a taxable year beginning before January 1, 1936, and there was included, as a dividend, in gross income for such year an amount on account of such stock, and after such inclusion such amount was not (before the date of the enactment of the Revenue Act of 1939) excluded from gross income for such year.

"(D) Subparagraph (A) shall not apply if the new stock or the old stock was sold or otherwise disposed of in a taxable year beginning prior to January 1, 1936, and the basis (determined by a decision of a court or the Board of Tax Appeals, or a closing agreement, and the decision or agreement became final before the ninetieth day after the date of the enactment of the Revenue Act of 1939) for determining gain or loss on such sale or other disposition was ascertained by a method other than that of allocation of the basis of the old stock."

(b) DISTRIBUTIONS NOT TREATED AS DIVIDENDS.—Section 115(d) of the Internal Revenue Code (relating to distributions applied in reduction of basis) is amended to read as follows:

"(d) OTHER DISTRIBUTIONS FROM CAPITAL.—If any distribution made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not a dividend, then the amount of such distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. This subsection shall not apply to a distribution in partial or complete liquidation or to a distribution which, under subsection (f)(1), is not treated as a dividend, whether or not otherwise a dividend."

(c) DETERMINATION OF PERIOD FOR WHICH HELD.—Section 117(h) of the Internal Revenue Code (relating to determination of period for which property is held) is amended by adding at the end thereof the following new paragraph:

"(5) In determining the period for which the taxpayer has held stock or rights to acquire stock received upon a distribution, if the basis of such stock or rights is determined under section 113(a)(19)(A), there shall (under regulations prescribed by the Commissioner with the approval of the Secretary) be included the period for which he held the stock in the distributing corporation prior to the receipt of such stock or rights upon such distribution."

(d) TAXABLE YEARS TO WHICH APPLICABLE.—The amendments made by subsections (a), (b), and (c) shall be applicable to taxable years beginning after December 31, 1938.

(e) BASIS UNDER PRIOR ACTS.—The following rules shall be applied, for the purposes of the Revenue Act of 1938 or any prior Revenue Act as if such rules were a part of each such Act when it was enacted, in determining the basis of property acquired by a shareholder in a corporation which consists of stock in such corporation, or rights to acquire such stock, acquired by him after February 28, 1913, in a distribution by such corporation (hereinafter in this subsection called "new stock"), or consisting of stock in respect of which such distribution was made (hereinafter in this subsection called "old stock") if the new stock was acquired in a taxable year beginning before January 1, 1936, or acquired in a taxable year beginning after December 31, 1935, and its distribution did not constitute income to the shareholder within the meaning of the sixteenth amendment to the Constitution:

(1) The basis of the new stock and of the old stock, respectively, shall, in the shareholder's hands, be determined by allocating between the old stock and the new stock the adjusted basis of the old stock; such allocation to be made under regulations which shall be prescribed by the Commissioner with the approval of the Secretary.

(2) Where the new stock consisted of rights to acquire stock and such rights were sold and there was included in the gross income for the taxable year of the sale the entire amount of the proceeds of such sale, then, if before the date of the enactment of this Act the taxpayer has not asserted (by claim for a refund or credit or otherwise) that any part of the proceeds of the sale of such new stock should be excluded from gross income for the year of its sale, the basis of the old stock shall be determined without regard to paragraph (1) and no part of the proceeds of the sale of such new stock shall ever be excluded from the gross income of the year of such sale.

(3) Paragraph (1) shall not apply if the new stock was acquired in a taxable year beginning before January 1, 1936, and there was included, as a dividend, in gross income for such year an amount on account of such stock, and after such inclusion such amount was not (before the date of the enactment of this Act) excluded from gross income for such year.

(4) Paragraph (1) shall not apply if the new stock or the old stock was sold or otherwise disposed of in a taxable year beginning before January 1, 1936, and the basis (determined by a decision of a court or the Board of Tax Appeals, or a closing agreement, and the decision or agreement became final before the ninetieth day after the date of the enactment of this Act) for determining gain or loss on such sale or other disposition was ascertained by a method other than that of allocation of the basis of the old stock.

(f) DETERMINATION UNDER PRIOR ACTS OF PERIOD FOR WHICH HELD.—For the purposes of the Revenue Act of 1938 or any prior Revenue Act, in determining the period for which the taxpayer has held stock or rights to acquire stock, received upon a distribution, if the basis of such stock or rights is determined under section 214(e)(1) of the Revenue Act of 1939, there shall (under regulations which shall be prescribed by the Commissioner with the approval of the Secretary) be included the period for which he held the stock in the distributing corporation prior to the receipt of such stock or rights upon such distribution. This subsection shall be applicable as if it were a part of each such Act when such Act was enacted.

Pursuant to the authority granted by the foregoing provisions and by the provisions of section 62 of the Internal Revenue Code, the following regulations are prescribed with respect to the foregoing section:

SEC. 20B.1. *General rule.*—The statutory rule quoted above is, in general, the rule of apportionment prescribed by Treasury regulations with respect to all stock dividends and stock rights issued throughout the period intervening be-

tween the date of the decision of the Supreme Court in *Eisner* v. *Macomber* (1920) (252 U. S., 189 [T. D. 3010, C. B. 3, 25 (1920)]), and the effective date of the Revenue Act of 1936, and with respect to stock dividends and stock rights acquired in a taxable year beginning after December 31, 1935, in a distribution of such a character that it does not constitute income to the shareholder within the meaning of the sixteenth amendment to the Constitution. This statutory rule applies generally to all stock, old and new, involved in an issue of stock dividends or stock rights acquired in a taxable year beginning prior to January 1, 1936, and to those later issues constitutionally exempt from tax, such exemption being recognized by section 115(f)1 of the Code or the corresponding provisions of the Revenue Acts of 1936 and 1938. Section 214 of the Revenue Act of 1939 provides, however, certain specific exceptions to such general application (see section 20B.7 of these regulations).

SEC. 20B.2. *Form in which rule is stated.*—The rule for apportioning bases between the old and the new property interests contemplated in prior regulations and here prescribed differs slightly in its mechanics depending upon whether the new issue constitutes a stock dividend on the one hand or a stock right on the other hand (the stock right being referred to in the Act equally with the stock dividend as "new stock"), and, if a stock right, whether acquired before January 1, 1925, or on or after that date. Accordingly the rule as developed in these regulations is separately stated.

SEC. 20B.3. *Stock dividend, basis for determining gain or loss.*—In the case of stock in respect of which was acquired a stock dividend of any character in a taxable year beginning before January 1, 1936, or in respect of which was acquired in a taxable year beginning after December 31, 1935, a stock dividend which did not constitute income to the shareholder within the meaning of the sixteenth amendment to the Constitution, the basis for determining gain or loss from a sale or other disposition of either the stock in respect of which the distribution was made or the stock dividend shall (except as otherwise prescribed in section 20B.7 of these regulations) be ascertained by apportioning the adjusted basis of the old stock between such old stock and the new stock distributed to the shareholder in accordance with the following rules:

(1) If the new stock is of substantially the same character and preference as the old stock, the basis of each share will be the quotient of the cost or other basis of the old shares, properly adjusted, divided by the total number of the old and the new shares.

(2) If the new stock is in whole or in part stock of a character or preference materially different from the old stock, the cost or other basis of the old stock, properly adjusted, shall be apportioned between such old stock and the new stock in proportion, as nearly as may be, to the respective values of each class of stock, old and new, at the time of such distribution, and the basis of each share of stock will be the quotient of the cost or other basis, properly adjusted, of the class of stock to which such share belongs, divided by the number of shares in the class. In general, any material difference in character or preference or terms sufficient to distinguish one stock from another so that different values may properly be assigned thereto will constitute a difference in class.

(3) If the old stock was purchased at different times or at different prices, and the identity of the lots can not be determined, any sale of the old stock will be charged to the earliest purchases of such stock, and any sale of the new stock will be presumed to have been made from the stock distributed in respect of the earliest purchased stock.

(4) If the old stock was purchased at different times or at different prices, and the new stock can not be identified as having been distributed in respect of any particular lot of such stock, then any sale of the new stock will be presumed to have been made from the stock distributed in respect of the earliest purchased stock.

SEC. 20B.4. *Stock rights, basis for determining gain or loss.*—(*a*) In the case of stock in respect of which were acquired after December 31, 1924 (see T. D. 4018, C. B. VI–1, 36 [1927], as amended by T. D. 4145, C. B. VII–1, 59 [1928]), and before the 1st day of the first taxable year beginning after December 31, 1935, stock subscription rights (whether or not constituting income to the shareholder within the meaning of the sixteenth amendment to the Constitution) or in respect of which were acquired in a taxable year beginning after December 31, 1935, stock subscription rights which did not constitute income to the shareholder within the meaning of the sixteenth amendment to the Constitution, and in the

case of such rights, the following rules are to be applied (except as otherwise prescribed in section 20B.7 of these regulations):

(1) If the shareholder does not exercise, but sells, his rights to subscribe, the cost or other basis, properly adjusted, of the stock in respect of which the rights are acquired shall be apportioned between the rights and the stock in proportion to the respective values thereof at the time the rights are issued, and the basis for determining gain or loss from the sale of a right on one hand or a share of stock on the other will be the quotient of the cost or other basis, properly adjusted, assigned to the rights or the stock, divided, as the case may be, by the number of rights acquired or by the number of shares held.

Example: A taxpayer in 1933 purchased 500 shares of common stock at $125 a share, and in 1938, by reason of the ownership of such stock, acquired 500 rights entitling him to subscribe to 100 additional shares of such stock at $100 a share. Upon the issuance of the rights each of the shares of stock in respect of which the rights were acquired had a fair market value of $120, and the rights had a fair market value of $3 each. Instead of subscribing to the additional shares, he sold the rights at $4 each. The profit is computed as follows:

500 (shares) × $125 = $62,500, cost of old stock (stock in respect of which the rights were acquired).

500 (shares) × $120 = $60,000, market value of old stock.

500 (rights) × $3 = $1,500, market value of rights.

$\frac{60,000}{61,500}$ of $62,500 = $60,975.61, cost of old stock apportioned to such stock.

$\frac{1,500}{61,500}$ of $62,500 = $1,524.39, cost of old stock apportioned to rights.

$2,000 (proceeds of sale of rights) less $1,524.39 (cost of old stock apportioned to rights) = $475.61, profit.

For the purpose of determining the gain or loss from the subsequent sale of the stock in respect of which the rights were acquired, the adjusted cost of each share is $121.95—that is, $60,975.61 divided by 500.

(2) If the shareholder exercises his rights to subscribe, the basis for determining gain or loss from a subsequent sale of a share of the stock in respect of which the rights were acquired shall be determined as in paragraph (a)(1) of this section. The basis for determining gain or loss from a subsequent sale of a share of the stock obtained through exercising the rights shall be determined by dividing the part of the cost or other basis, properly adjusted, of the old shares assigned to the rights, plus the subscription price of the new shares, by the number of new shares acquired.

Example: A taxpayer in 1935 purchased 500 shares of common stock at $125 a share, and in 1938, by reason of the ownership of such stock, acquired 500 rights entitling him to subscribe to 100 additional shares of such stock at $100 a share. Upon the issuance of the rights each of the shares of stock in respect of which the rights were acquired had a fair market value of $120, and the rights had a fair market value of $3 each. The taxpayer exercised his rights to subscribe to the additional shares and later sold one of such shares for $140. The profit is computed as follows:

$1,524.39 (cost of old stock apportioned to rights pursuant to the computation in the example under paragraph (a)(1) of this section) plus $10,000 (subscription price of additional shares) = $11,524.39, basis for determining gain or loss from sale of additional shares.

$11,524.39 divided by 100 = $115.24, basis for determining gain or loss from sale of each share of additional stock.

$140 (proceeds of sale of share of additional stock) less $115.24 = $24.76, profit.

The basis for determining the gain or loss from subsequent sale of the stock in respect of which the rights were acquired is $60,975.61 divided by 500, or $121.95 a share.

(3) If the stock in respect of which the rights are acquired was purchased at different times or at different prices and the identity of the lots can not be determined, or if the stock in respect of which the rights are acquired was purchased at different times or at different prices and the stock rights acquired in respect of such stock can not be identified as having been acquired in respect of any particular lot of such stock, the basis for determining gain or loss from the sale or other disposition of the old shares, or the rights in cases in which the rights are sold, or from the sale or other disposition of the old or new

shares in cases in which the rights are exercised, shall be ascertained in accordance with the principles laid down in section 20B.3 of these regulations.

(*b*) In the case of stock in respect of which were acquired prior to January 1, 1925, stock subscription rights (whether or not constituting income to the shareholder within the meaning of the sixteenth amendment to the Constitution), and in the case of such rights, the following rules are to be applied (except as otherwise prescribed in section 20B.7 of these regulations):

(1) If the right to subscribe relates to new stock of substantially the same character or preference as the stock with respect to which the right was acquired—

(A) If the shareholder exercises his right to subscribe, the basis for determining gain or loss from a subsequent sale or other disposition of any one of the old or new shares will be the cost or other basis of the old shares, properly adjusted, plus the subscription price of the new shares, divided by the total number of the old and new shares.

(B) If the shareholder sells the right to subscribe, the gain or loss from the sale will be determined by comparing the sum of the sale price of the right and the subscription price with the basis of the shares as determined in (A) above. The gain computed under the provisions of this paragraph shall not exceed the amount for which the right is sold. If, however, this limitation has been applied, the gain or loss from the subsequent sale of the stock with respect to which the right was acquired, shall be determined as if no right to subscribe had been acquired with respect to it.

(2) If the right acquired deals with stock in whole or in part of a character or preference materially different from the stock with respect to which the right was acquired, or if the stock with respect to which the right was acquired was purchased at different times or at different prices, and the identity of the lots can not be determined, or if the stock with respect to which the right was acquired was purchased at different times or at different prices and the stock right acquired with respect to such stock can not be identified as having been acquired with respect to any particular lot of such stock, the computation of the gain from the sale of the old shares or the right in cases in which the right is sold, or from the sale of the old or new shares in cases in which the right is exercised, shall be made in accordance with the principles laid down in section 20B.3 of these regulations.

SEC. 20B.5. *Holding period.*—The period for which the taxpayer has held stock, or stock subscription rights, acquired by him as a dividend shall be determined as though the stock dividend or the subscription right were the stock in respect of which the dividend was acquired, if the basis for determining gain or loss upon the sale or other disposition of such stock dividend or right is fixed by application of the general rule of apportionment provided by section 214 of the Revenue Act of 1939.

SEC. 20B.6. *Stock dividends to which section 214 applies.*—The general rule provided by section 214 of the Revenue Act of 1939 requiring an apportionment of basis in certain stock dividend and stock right cases and discussed in sections 20B.1 to 20B.4 of these regulations, and the rule governing the computation of holding periods apply equally in the case of a taxable year beginning after December 31, 1938, and in the case of all prior taxable years, and apply regardless of whether the distribution is made out of earnings or profits accumulated after February 28, 1913, or earnings or profits accumulated prior to March 1, 1913, or from any other source. In all cases, the application of the rule is subject to the exceptions, limitations, and qualifications expressed in subsections (a) and (e) of that section and in section 20B.7 of these regulations.

SEC. 20B.7. *Exceptions, limitations, and qualifications to general rule.*—The general rule for determining the basis for gain or loss in the case of stock dividends and stock rights is subject to the following exceptions, limitations, and qualifications:

(*a*) *Proceeds of sale of rights reported as income.*—In the case of stock rights sold in a taxable year beginning prior to January 1, 1939, the general rule shall not apply if the entire proceeds of such sale were included by the taxpayer as gross income for the year of the sale and if, before June 29, 1939, the taxpayer had not asserted by a claim for a refund or credit or otherwise that any part of such proceeds should not have been included in gross income for the year of the sale. In such cases, no part of the proceeds of such sale shall ever be excluded from gross income for the year of the sale, and the basis for deter-

mining gain or loss from a subsequent sale or other disposition of the stock in respect of which the rights were acquired shall be the same as though the rights had not been acquired.

(*b*) *Receipt of new stock reported as income in prior years.*—In the case of stock dividends or stock rights acquired in a taxable year beginning prior to January 1, 1936, the general rule shall not apply if for any reason there was included in the gross income of the shareholder as a dividend for such year, as, for example, pursuant to the provisions of section 201(c) of the Revenue Act of 1918 or the corresponding provisions of prior Revenue Acts, or as a result of the decision of the Supreme Court in *Koshland* v. *Helvering* (1936) (298 U. S., 441 [Ct. D. 1124, C. B. XV–1, 219 (1936)]), an amount reflecting the acquisition of such stock dividends or stock rights, and if before June 29, 1939, such amount was not excluded from gross income for such year. In such cases, the basis for determining gain or loss with respect to the old stock shall be the same as though the stock dividends or the stock rights had not been acquired, and the basis with respect to the stock dividend or stock right shall be an amount equal to that at which such stock dividend or stock right was included in gross income for the year of its acquisition.

(*c*) *Gain or loss upon sale of old or new stock finally determined upon basis inconsistent with general rule.*—The general rule shall not apply with respect to old stock or new stock remaining on hand after a sale or other disposition of old stock or new stock effected in a taxable year beginning prior to January 1, 1936, if the basis for determining gain or loss on such sale or other disposition was fixed by a decision of a court or the Board of Tax Appeals or by a closing agreement, and if such decision or closing agreement became final on or before September 26, 1939, and if the basis for determining gain or loss upon such sale or other disposition was fixed by a method other than that of allocation of basis provided by the general rule. In such cases, the basis for determining gain or loss with respect to the remaining shares shall be fixed in a manner consistent with the prior determination to the end that, the sale or other disposition of all lots being considered, the taxpayer will have effected ultimately a tax-free recovery of the total cost or other basis of his original shares, and no more.

SEC. 20B.8. *Modification of prior regulations.*—Prior Treasury regulations are hereby modified to the extent that they may be inconsistent with these regulations.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 14, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 18, 1939, 11.19 a. m.)

SECTION 113(b) (AMENDED BY SECTION 223, REVENUE ACT OF 1939).

INTERNAL REVENUE CODE.

Regulations relative to election by taxpayers to include in gross income for the taxable year in which received amounts received as loans from the Commodity Credit Corporation. (See T. D. 4918, page 128.)

ARTICLE 113(b)–3: Substituted basis.

INTERNAL REVENUE CODE.

Amendment of Regulations 101. (See T. D. 4954, page 76.)

ARTICLE 113(b)(3)–1: Adjusted basis: Discharge of corporate indebtedness.—General rule.

INTERNAL REVENUE CODE.

Amendment of Regulations 101. (See T. D. 4954, page 76.)

ARTICLE 113(b)(3)–2: Adjusted basis: Discharge of indebtedness.—Special cases.

INTERNAL REVENUE CODE.

Amendment of Regulations 101. (See T. D. 4954, page 76.)

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 116–1: Income of foreign governments, ambassadors, and consuls. 1939–44–10075 Mim. 4967

Exemption from Federal income tax of compensation received for services rendered in the United States by certain foreign consuls stationed in the United States and certain employees of foreign consulates in the United States.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE.
Washington, D. C., October 4, 1939.

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

In view of the certification made by the Secretary of State under section 116(h) of the Internal Revenue Code, the official compensation for services rendered within the United States of foreign consular officers stationed in the United States (who are not citizens of the United States) and the employees of foreign consulates in the United States (who are not citizens of the United States) of the following countries is exempt from Federal income tax:

Albania, Argentina, Australia, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Cuba, Czechoslovakia, Denmark, Dominican Republic, El Salvador, Ecuador, Egypt, Finland, France, Germany, Great Britain and Northern Ireland, Greece, Guatemala, Haiti, Honduras, Hungary, India, Iraq, Iran, Ireland, Italy, Japan, Latvia, Liberia, Lithuania, Mexico, Morocco, Netherlands, Netherlands Indies, New Zealand, Nicaragua, Norway, Panama, Peru, Poland, Portugal, Rumania, Siam, Spain, Sweden, Turkey, Union of South Africa, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yugoslavia.

In view of the certification referred to above, the official compensation for services rendered within the United States of foreign consular officers stationed in the United States (who are not citizens of the United States) of the following countries (but not the employees of their consulates in the United States) is exempt from Federal income tax:

Belgium, Costa Rica, Estonia, Paraguay.

Correspondence relating to the provisions of this mimeograph should refer to its number and the symbols IT:TM.

GUY T. HELVERING,
Commissioner.

SECTION 123 (ADDED BY SECTION 223, REVENUE ACT OF 1939).—COMMODITY CREDIT LOANS.

(Also Section 113(b).)

1939-33-9959
T. D. 4918

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 20, SUBPART C.—INCOME TAX.

Regulations relative to election by taxpayers to include in gross income for the taxable year in which received amounts received as loans from the Commodity Credit Corporation under section 223 of the Revenue Act of 1939.[1]

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

To Collectors of Internal Revenue and Others Concerned:

SECTION 20C.0. *Introductory.*—Section 223 of Title II (Income Tax Amendments) of the Revenue Act of 1939, enacted June 29, 1939 (Public, No. 155, Seventy-sixth Congress, first session), provides:

SEC. 223. COMMODITY CREDIT LOANS.

(a) The Internal Revenue Code is amended by inserting after section 121 the following new section:

"SEC. 123. COMMODITY CREDIT LOANS.

"(a) Amounts received as loans from the Commodity Credit Corporation shall, at the election of the taxpayer, be considered as income and shall be included in gross income for the taxable year in which received.

"(b) If a taxpayer exercises the election provided for in subsection (a) for any taxable year beginning after December 31, 1938, then the method of computing income so adopted shall be adhered to with respect to all subsequent taxable years unless with the approval of the Commissioner a change to a different method is authorized."

(b) ADJUSTMENT OF BASIS.—Section 113(b)(1) of the Internal Revenue Code is amended by adding at the end thereof a new subparagraph reading as follows:

"(G) in the case of property pledged to the Commodity Credit Corporation, to the extent of the amount received as a loan from the Commodity Credit Corporation and treated by the taxpayer as income for the year in which received pursuant to section 123 of this chapter, and to the extent of any deficiency on such loan with respect to which the taxpayer has been relieved from liability."

(c) The amendments made by subsections (a) and (b) shall be applicable to taxable years beginning after December 31, 1938.

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[1] Sections 20C.0 to 20C.3 issued under the authority contained in section 62 of the Internal Revenue Code (53 Stat., Part 1) and interpret section 123 of the Internal Revenue Code, as added by section 223 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session).

(d) RETROACTIVE APPLICATION.—The provisions of subsection (a) shall be retroactively applied in computing income for any taxable year subject to the provisions of the Revenue Act of 1934, the Revenue Act of 1936, or the Revenue Act of 1938, or any of such Acts amended, if—

(1) The taxpayer elects in writing (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary) within one year from the date of the enactment of this Act to treat such loans as income for such year, and

(2) The records of the taxpayer are sufficient to permit an accurate computation of income for such year, and

(3) The taxpayer consents in writing to the assessment, within such period as may be agreed upon, of any deficiency for such year, even though the statutory period for the assessment of any such deficiency had expired prior to the filing of such consent.

Any tax overpaid for any such year shall be credited or refunded, subject to the statutory period of limitation properly applicable thereto.

(e) ADJUSTMENT OF BASIS FOR PRIOR YEARS.—In computing income for any taxable year subject to the provisions of the Revenue Act of 1934, the Revenue Act of 1936, or the Revenue Act of 1938, or any of such Acts as amended, the basis, for determining gain or loss from the sale or other disposition of any property, pledged to the Commodity Credit Corporation as security on a loan obtained therefrom, shall be adjusted for the amount of such loan to the extent it was considered as income and included in gross income for the year in which received, and for the amount of any deficiency on such loan with respect to which the taxpayer was relieved from liability.

Section 62 of the Internal Revenue Code provides:

SEC. 62. RULES AND REGULATIONS.

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

Pursuant to the above-quoted provisions and other provisions of the internal revenue laws, the following regulations are hereby prescribed with respect to the application of section 123 of the Internal Revenue Code as added by section 223 of the Revenue Act of 1939:

SEC. 20C.1. *Taxable years beginning after December 31, 1938.*—A taxpayer who receives a loan from the Commodity Credit Corporation within any taxable year beginning after December 31, 1938, may, at his election, include the amount of such loan in his gross income for the taxable year in which the loan is received. If a taxpayer makes such an election, then for subsequent taxable years he shall include in his gross income all amounts received during those years as loans from the Commodity Credit Corporation, unless he secures the approval of the Commissioner to change to a different method of accounting. Application for permission to change such method of accounting and the basis upon which the return is made shall be filed within 90 days after the beginning of the taxable year to be covered by the return.

SEC. 20C.2. *Taxable years beginning after December 31, 1933, and before January 1, 1939.*—A taxpayer who has received a loan from the Commodity Credit Corporation within any taxable year beginning after December 31, 1933, and before January 1, 1939, may include the amount of such loan in his gross income for the taxable year in which the loan was received if he complies with the following conditions:

(1) Elects to include such loan in gross income by filing an amended return on or before June 29, 1940, including therein such item as a part of gross income;

(2) Has kept sufficient records so as to permit an accurate computation of income for such year; and

(3) Files with the amended return Form 872 consenting therein to the assessment, within such period as may be agreed upon, of any deficiency for such year.

SEC. 20C.3. *Effect of election on adjustments for other taxable years.*—If a taxpayer elects under section 20C.1 or 20C.2 of these regulations to include in his

gross income the amount of a loan from the Commodity Credit Corporation for the taxable year in which it is received, then—

(1) no part of the amount realized by the Commodity Credit Corporation upon the sale or other disposition of the commodity pledged for such loan shall be recognized as income to the taxpayer, unless the taxpayer receives an amount in addition to that advanced to him as the loan, in which event such additional amount shall be included in the gross income of the taxpayer for the year in which received; and

(2) no deductible loss to the taxpayer shall be recognized on account of any deficiency realized by the Commodity Credit Corporation on such loan if the taxpayer was relieved from liability for such deficiency.

Example: A, a taxpayer who elected for his taxable years 1937, 1938, and 1939 to include in gross income amounts received during those years as loans from the Commodity Credit Corporation, received as loans $500 in 1937, $700 in 1938, and $900 in 1939. In 1940 all the pledged commodity was sold by the Commodity Credit Corporation for an amount $100 and $200 less than the loans with respect to the commodity pledged in 1937 and 1938, respectively, and for an amount $150 greater than the loan with respect to the commodity pledged in 1939. A, in making his return for 1940, shall include in gross income the sum of $150 if it is received during that year, but will not be allowed a deduction for the deficiencies of $100 and $200 unless he is required to satisfy such deficiencies and does satisfy them during that year.

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved August 7, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 9, 1939, 2.44 p. m.)

SUPPLEMENT C.—CREDITS AGAINST TAX.

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

ARTICLE 131–5: Countries which do or do not satisfy the similar credit requirement. 1939–43–10069 I. T. 3331

INTERNAL REVENUE CODE.

The Commonwealth of Australia satisfies the similar credit requirement of section 131(a)3 of the Internal Revenue Code.

The State of Queensland, a political subdivision of Australia, does not satisfy such similar credit requirement.

Advice is requested whether the Commonwealth of Australia and the State of Queensland, a political subdivision of Australia, satisfy the similar credit requirement of section 131(a)3 of the present income tax law.

Under section 131(a)3 of the Internal Revenue Code, an alien resident of the United States is entitled to credit his Federal income tax with the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country.

Article 131–5 of Regulations 101, pertaining to the income tax under the Revenue Act of 1938, made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939–1 (Part 1), 396] reads in part as follows:

Countries which do or do not satisfy the similar credit requirement.—A country satisfies the similar credit requirement of section 131(a)3, as to income tax paid to such country, either by allowing to citizens of the United States residing in such country a credit for the amount of income taxes paid to the United States, or, in imposing such taxes, by exempting from taxation the incomes received from sources within the United States by citizens of the United States residing in such country. * * *

The following is an excerpt from the Income Tax Assessment Act, 1936, of the Commonwealth of Australia, as amended by the Income Tax Assessment Act (No. 2), 1936:

PART III.—LIABILITY TO TAXATION.

DIVISION 1.—GENERAL.

* * * * * * *

23. The following income shall be exempt from income tax:—

* * * * * * *

(q) income derived by a resident from sources out of Australia, where that income is not exempt from income tax in the country where it is derived * * *.

(r) income derived by a nonresident from sources wholly out of Australia;

Part I, 6, provides in part as follows:

* * * * * * *

"nonresident" means a person who is not a resident of Australia;

* * * * * * *

"resident" or "resident of Australia" means—

(a) a person, other than a company, who resides in Australia and includes a person—

(i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia; or

(ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia * * *.

Thus, whether or not a citizen of the United States residing in Australia be considered a resident or a nonresident under the laws of such country, it is apparent that income received by him from sources within the United States is exempted from taxation under the Australian law. The Commonwealth of Australia, therefore, satisfies the similar credit requirement of section 131(a)3 of the Internal Revenue Code.

Examination of the Income Tax Assessment Act of 1936 of the State of Queensland, as amended by the Income Tax Act of 1936, discloses that no credit for the amount of taxes paid to the United States is allowed to citizens of the United States residing in Queensland, nor is the income of such United States citizens received from sources within the United States exempted from taxation. Paragraph 18(c), division 3, section 29, of the Income Tax Assessment Act of 1936, as amended, provides that "sums paid by the taxpayer for any income tax (other than unemployment relief tax) shall not be allowable deductions."

Queensland, therefore, does not satisfy the similar credit requirement of section 131(a)3 of the Internal Revenue Code.

ARTICLE 131–5: Countries which do or do not satisfy the similar credit requirement. 1939–49–10112 I. T. 3337

INTERNAL REVENUE CODE.

The Union of South Africa satisfies the similar credit requirement of section 131(a)3 of the Internal Revenue Code.

Advice is requested whether the Union of South Africa satisfies the similar credit requirement of section 131(a)3 of the Internal Revenue Code.

Under section 131(a)3 of the Internal Revenue Code, an alien resident of the United States is entitled to credit his Federal income tax with the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country.

Article 131–5 of Regulations 101, pertaining to the income tax under the Revenue Act of 1938, made applicable to the Internal Revenue Code by Treasury Decision 4885 (C. B. 1939–1 (Part 1), 396), reads in part as follows:

Countries which do or do not satisfy the similar credit requirement.—A country satisfies the similar credit requirement of section 131(a)3, as to income tax paid to such country, either by allowing to citizens of the United States residing in such country a credit for the amount of income taxes paid to the United States, or, in imposing such taxes, by exempting from taxation the incomes received from sources within the United States by citizens of the United States residing in such country. * * *

The following is an excerpt from the Income Tax Act of 1925, as amended, of the Union of South Africa:

Chapter II, Part I, section 7, page 273, The Law of Income Tax in South Africa—Ingram.

7. (1) For the purposes of this chapter—

"gross income" means the total amount whether in cash or otherwise received by or accrued to or in favour of any person, other than receipts or accruals of a capital nature, in any year or period assessable under this chapter from any source within the Union or deemed to be within the Union * * *.

In Volume III of Taxation of Foreign and National Enterprises, at pages 168 and 170, it is stated by the Commissioner for Inland Revenue for the Union of South Africa that:

Neither nationality, domicile, nor residence affect the liability of individuals, save in a few special instances. The general basis of the tax is source within the Union, and, provided that the income arises from such a source, the recipient is liable whatever may be his nationality, domicile or residence. Conversely, Union nationality, domicile or residence does not create liability in respect of income derived from sources outside the Union.

* * * * * * *

For the purposes of this study, national income is taken to be income derived from sources within the Union, and foreign income is taken to be income derived from sources outside the Union.

By the terms of the Income-Tax Act No. 40, of 1925, the income-tax of the Union is imposed only upon income derived from sources within the Union, or, by the terms of the Act, deemed to be so derived. * * *

Since the law of the Union of South Africa does not require a taxpayer to include in gross income, for the purpose of the income tax of that country, income from sources without that country, it is held that the Union of South Africa satisfies the similar credit requirement of section 131(a)3 of the Internal Revenue Code.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 143-1: Withholding tax at source. 1939-28-9908
I. T. 3296

INTERNAL REVENUE CODE.

Where books are sold exclusively in the Philippine Islands under a Philippine copyright, the royalties paid thereon to A, a nonresident alien, by the M Company, a domestic corporation, are income from sources without the United States and are not subject to withholding even though the books are printed in the United States.

Advice is requested whether the M Company is required to withhold income tax at the source with respect to royalties paid to A, a nonresident alien, under the circumstances herein set forth.

A, a nonresident alien, residing in the Philippine Islands, prepared the manuscript for certain textbooks to be used in the public schools of the Philippines. The books were printed in the United States by the M Company and were copyrighted in the United States and the Philippines. The United States copyright is of no effect in the Philippines as that possession has its own copyright law. The books were not designed for use in the United States and are sold exclusively in the Philippines. A received the royalties from the M Company for the books sold in the Philippines.

Section 119(a)4 of the Internal Revenue Code provides that royalties for the use of or for the privilege of using copyrights in the United States shall be treated as income from sources within the United States. Section 119(c)4 of the Internal Revenue Code provides that royalties for the use of or for the privilege of using copyrights without the United States shall be treated as income from sources without the United States.

It appears in the instant case that there is no commercial publication of the textbooks within the United States in that the textbooks are not sold within the United States. Without such commercial publication, it appears that the M Company is engaged solely in printing or manufacturing books within the United States, which books are later sold in the Philippines, and in the vending of such books in the Philippines, the Philippine copyrights are used and not the United States copyrights.

It is held, therefore, that the royalties paid by the M Company in the instant case are not taxable to A, a nonresident alien, as income from sources within the United States, and are not subject to withholding of Federal income tax.

SECTION 147.—INFORMATION AT SOURCE.

ARTICLE 147-1: Return of information as to payments of $1,000. 1939-44-10076 Mim. 4968

Information returns, Form 1099, with respect to wages.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 9, 1939.

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

Reference is made to Mimeograph 4689, dated November 11, 1937 (C. B. 1937-2, 149), which permits the filing of information returns on Form 1099 on the basis of wages earned, instead of wages paid, in cases of employees whose earnings for the latter part of December are not paid to them until January of the following year. That mimeograph was designed for the convenience of employers in preparing Forms 1099, Social Security Tax returns, and Carriers Tax returns from one set of pay-roll records. Under the provisions of the Social Security Act Amendments of 1939, the tax on employers of eight or more for the calendar year 1939 and subsequent calendar years is computed on the basis of "wages paid" instead of "wages payable."

In view of the foregoing, employers who have followed the method authorized by Mimeograph 4689 for 1937 and 1938 and who desire to make a change for 1939 and subsequent years, reporting the wages actually or constructively paid to their employees during the calendar year, may make such change. If the change is made, the employer should show by appropriate entry on the Form 1099 filed for the calendar year 1939 the amount representing wages earned in December, 1938, and not paid until January, 1939.

Correspondence relative to this mimeograph should refer to its number and the symbols IT:TM.

GUY T. HELVERING,
Commissioner.

ARTICLE 147-2: Return of information as to payments to employees. 1939-44-10077 I. T. 3333

INTERNAL REVENUE CODE.

Filing of information returns, Form 1099, by States and political subdivisions, or any agency or instrumentality thereof.

Advice is requested with respect to the filing of information returns on Form 1099 for the calendar year 1939 and subsequent calendar years in connection with compensation paid officers and employees of the various States, political subdivisions, and agencies and instrumentalities thereof.

In order that as little expense and inconvenience as possible be caused the several States, political subdivisions, and their agencies and instrumentalities in the filing of information returns with respect to the payment of compensation to their officers and employees, the

Bureau will consider it as a satisfactory compliance with the regulations if, in the case of payments of any form of compensation made by a State, or any political subdivision, or any agency or instrumentality of any one or more of the foregoing, to persons in its service (civil, military, or naval), information returns on Form 1099 are filed by any officer, or officers, as best suits the convenience of the State, political subdivision, agency, or instrumentality. Furthermore, it will not be necessary to report on the information returns, Form 1099, amounts paid as allowances for traveling expenses, including allowances for meals and lodging, as, for example, per diem allowances in lieu of subsistence and amounts paid as reimbursements for traveling expenses.

SUPPLEMENT E.—ESTATES AND TRUSTS.

SECTION 162.—NET INCOME.

ARTICLE 162–1: Income of estates and trusts. 1939–40–10038
I. T. 3324

INTERNAL REVENUE CODE.

Treatment for Federal income tax purposes of interest (increment in value) on United States savings bonds in the case of trusts and beneficiaries of trusts.

Advice is requested by the M Trust Co. relative to the proper method of reporting, for Federal income tax purposes, the interest (increment in value) on United States savings bonds in the case of trusts and the beneficiaries thereof.

The M Trust Co. has purchased a considerable amount of United States savings bonds for trust accounts in some of which there will be successor beneficiaries upon the death of the original beneficiaries prior to the redemption of the bonds. The company has been following the practice in small trusts, where the continuity of income is of primary importance, of transferring to the beneficiaries at 6-month intervals an amount equal to the increment in value of United States savings bonds during such period. This, it is stated, constitutes in effect an additional cash investment of trust corpus and a distribution to the beneficiaries which they might consider as income.

The 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. Such interest (increment in value) on United States savings bonds is exempt from the "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. (I. T. 3262, C. B. 1939-1 (Part 1), 96.)

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. (I. T. 3262, supra.)

If the trusts in the instant case regularly employ the accrual method of accounting, the increment in value of United States savings bonds should be reported as income when accrued. In G. C. M. 15875 (C. B. XIV-2, 100 (1935)) it was held that taxpayers who regularly employ the accrual method of accounting should report the increment in value of United States savings bonds as income for each taxable year when and to the extent that it is earned during the year, according to the terms of the bonds and in the amount set forth in the table of redemption values shown thereon.

The increment in value of United States savings bonds with respect to trusts employing the accrual method of accounting, the indentures of which provide for the current distribution of trust income to beneficiaries, should be treated as income currently distributed to the beneficiaries and deduction therefor taken by the trusts under section 162(b) of the Internal Revenue Code in computing income subject to tax. The beneficiaries, as provided in section 162(b) of the Code, should include such amounts in computing their net income "whether distributed to them or not." Such amounts so included as income by the beneficiaries will have the status for Federal income tax purposes of interest on United States savings bonds.

If the trusts employ the cash receipts and disbursements basis of accounting, the increment in value of United States savings bonds is not income to such trusts until the year of redemption. In I. T. 2958 (C. B. XV-1, 120 (1936)) it was held that taxpayers who regularly make their income tax returns on the cash receipts and disbursements basis should not include in such returns any increment in value of United States savings bonds issued under the provisions of section 22(c) of the Second Liberty Bond Act, as amended, until they receive payment for the bonds, whether at or before maturity, and that the entire difference between the price paid for the bonds at issue and the amount received in payment therefor should be reported as income for the taxable year in which redemption occurs.

Since the increment in value of United States savings bonds, except in the year of redemption, is not income to trusts which employ the cash receipts and disbursements basis of accounting, the distribution of an amount every six months by fiduciaries of such trusts to beneficiaries thereof equal to the increment in value of such bonds can not be considered as a distribution of trust income to that extent, nor as a distribution of interest on United States savings bonds. Such distribution, therefore, is not deductible by the trust under section 162(b) of the Internal Revenue Code in computing its income subject to tax, and the amount thereof in the hands of the beneficiaries, not representing a distribution of trust income, is not taxable income to them. Accordingly, the original beneficiaries or the successor beneficiaries, as the case may be, at the time the

United States savings bonds are redeemed, if the income of the trusts is currently distributable, are the beneficiaries who will be liable for Federal income tax on the increment in value of such redeemed bonds.

SUPPLEMENT G.—INSURANCE COMPANIES.

SECTION 204(e).—INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL: DOUBLE DEDUCTIONS.

(Also Section 24, Article 24–4.) 1939–28–9909
I. T. 3297

INTERNAL REVENUE CODE AND REVENUE ACTS OF 1934, 1936, AND 1938.

Tax-exempt interest should be excluded from gross income from sources within the United States of a resident foreign insurance company but should be included in the gross income from all sources of such company in determining the ratio of unallocable expenses which may be deducted from income from sources within the United States. Section 24(a)5 of the Revenue Act of 1934 did not change the previous Bureau rule that deductions allocable to earning of tax-exempt interest are not allowable in the case of taxpayers subject to tax under section 204.

Advice is requested whether a resident foreign insurance company is entitled under the Revenue Act of 1934 and subsequent Revenue Acts to deduct home office expenses attributable to the earning in the United States of tax-exempt interest. It is stated that the expenses in question can not definitely be allocated solely to tax-exempt interest and only a ratable part thereof is deductible under section 119(b) of the Revenue Act of 1934 which reads as follows:

(b) *Net income from sources in United States.*—From the items of gross income specified in subsection (a) of this section there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the United States.

In other words, the question is whether tax-exempt interest should be included in the gross income of the company from sources within the United States as well as in the total gross income in determining the ratio of gross income from sources within the United States to the total gross income. (See article 119–10 of Regulations 86.)

It is contended that section 24(a)5 of the Revenue Act of 1934 and subsequent Revenue Acts permits the deduction of expenses allocable to tax-exempt interest and that, consequently, such interest should be included in the gross income from United States sources as well as in the total gross income in determining the ratio. That section reads in part as follows:

(a) *General rule.*—In computing net income no deduction shall in any case be allowed in respect of—

* * * * * * *

(5) Any amount otherwise allowable as a deduction which is allocable to one or more classes of income *other than interest* (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by this title * * *. [Italics supplied.]

Other provisions of the Revenue Act of 1934 pertinent to the issue are as follows:

SEC. 204. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL.

(a) *Imposition of tax.*—In lieu of the tax imposed by section 13 of this title, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

* * * * * * *

(2) In the case of such a foreign insurance company, 13¾ per centum of the amount of its net income from sources within the United States in excess of the credit provided in subsection (f) of this section. [Subsection (f) is not material to present issue.]

* * * * * * *

(c) *Deductions allowed.*—In computing the net income of an insurance company subject to the tax imposed by this section there shall be allowed as deductions:

(1) All ordinary and necessary expenses incurred, as provided in section 23(a);

* * * * * * *

(8) The amount of interest earned during the taxable year which under section 22(b)(4) is excluded from gross income. [Section 22(b)4 excludes tax-exempt interest from gross income.]

(d) *Deductions of foreign corporations.*—In the case of a foreign corporation the deductions allowed in this section shall be allowed to the extent provided in Supplement I.

(e) *Double deductions.*—Nothing in this section shall be construed to permit the same item to be twice deducted.

SEC. 206. COMPUTATION OF GROSS INCOME.

The gross income of insurance companies subject to the tax imposed by section 201 or 204 shall not be determined in the manner provided in section 119.

SEC. 231. GROSS INCOME.

(a) *General rule.*—In the case of a foreign corporation gross income includes only the gross income from sources within the United States.

SEC. 232. DEDUCTIONS.

In the case of a foreign corporation the deductions shall be allowed only if and to the extent that they are connected with the income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in section 119, under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

Under the Revenue Acts prior to the Revenue Act of 1934, it is settled that tax-exempt income is to be excluded from the gross income within the United States of a resident foreign insurance company in determining the ratio for the deduction of unallocable expenses. To hold otherwise would be to allow a double deduction in contravention of section 204(e). (*London & Lancashire Insurance Co., Ltd.*, v. *Commissioner*, 34 B. T. A., 295; *Royal Insurance Co., Ltd.*, v. *Commissioner*, 38 B. T. A., 955.) Section 24(a)5, supra, was first enacted in the Revenue Act of 1934. Prior to the enactment of that section, deductions allocable to the earning of tax-exempt interest were allowed by the Bureau in cases where section 204 was not applicable. In effect section 24(a)5 merely adopts the previous Bureau rule. Section 24(a)5 did not supersede section 204(e), which prohibits double deductions. Section 204(e) still controls as to deductions allocable to tax-exempt interest in the case of insurance companies.

Accordingly, it is held that tax-exempt interest should be excluded from the gross income from sources within the United States of a resident foreign insurance company but should be included in the

gross income from all sources of such company in determining the ratio of unallocable expenses which may be deducted from income from sources within the United States.

This ruling is also applicable under the corresponding provisions of the Revenue Acts of 1936 and 1938 and the Internal Revenue Code.

CHAPTER 34.—INFORMATION AND RETURNS.

SUBCHAPTER A.—DISCOVERY OF TAX LIABILITY.

SECTION 3604 (AMENDED BY SECTION 404, REVENUE ACT OF 1939).—RETURNS AS TO FORMATION, ETC., OF FOREIGN CORPORATIONS.

1939–33–9960
T. D. 4917

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 20, SUBPART D.—INCOME TAX.

Regulations under section 3604 of the Internal Revenue Code, as amended by section 404 of the Revenue Act of 1939, relating to returns of information with respect to foreign corporations.[1]

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

To Collectors of Internal Revenue and Others Concerned:

SECTION 20D.0. *Introductory.*—(*a*) Section 3604 of the Internal Revenue Code (53 Stat., Part 1), approved February 10, 1939, provides:

> SEC. 3604. RETURNS AS TO FORMATION, ETC., OF FOREIGN CORPORATIONS.
>
> (a) REQUIREMENT.—Under regulations prescribed by the Commissioner with the approval of the Secretary, any attorney, accountant, fiduciary, bank, trust company, financial institution, or other person, who aids, assists, counsels, or advises in, or with respect to, the formation, organization, or reorganization of any foreign corporation, shall, within 30 days thereafter, file with the Commissioner a return.
>
> (b) FORM AND CONTENTS OF RETURN.—Such return shall be in such form, and shall set forth, under oath, in respect of each such corporation, to the full extent of the information within the possession or knowledge or under the control of the person required to file the return, such information as the Commissioner with the approval of the Secretary prescribes by regulations as necessary for carrying out the provisions of the income tax laws. Nothing in this section shall be construed to require the divulging of privileged communications between attorney and client.
>
> (c) PENALTY.—Any person required under subsection (a) to file a return, or to supply any information, who willfully fails to file such return, or supply such information, at the time or times required by law or regulations, shall, in lieu of other penalties provided by law for such offense, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $2,000, or imprisoned for not more than one year, or both.

[1] Section 20D.0 to section 20D.6 issued under the authority contained in section 3604 of the Internal Revenue Code, as amended by section 404 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session), and in section 3791 of the Internal Revenue Code (53 Stat., Part 1).

(b) Section 404 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session), provides:

SEC. 404. RETURNS BY ATTORNEYS AS TO FOREIGN CORPORATIONS.

Effective as of the date of the enactment of the Internal Revenue Code, section 3604 of such Code is amended by striking out "Nothing in this section shall be construed to require the divulging of privileged communications between attorney and client," and inserting in lieu thereof "Nothing in this section shall be construed to require the filing by an attorney-at-law of a return with respect to any advice given or information obtained through the relationship of attorney and client."

(c) Section 3632 of the Internal Revenue Code provides:

SEC. 3632. AUTHORITY TO ADMINISTER OATHS, TAKE TESTIMONY, AND CERTIFY.

(a) INTERNAL REVENUE PERSONNEL.—

(1) PERSONS IN CHARGE OF ADMINISTRATION OF INTERNAL REVENUE LAWS GENERALLY.—Every collector, deputy collector, internal revenue agent, and internal revenue officer assigned to duty under an internal revenue agent, is authorized to administer oaths and to take evidence touching any part of the administration of the internal revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken.

(2) PERSONS IN CHARGE OF EXPORTS AND DRAWBACKS.—Every collector of internal revenue and every superintendent of exports and drawbacks is authorized to administer such oaths and to certify to such papers as may be necessary under any regulation prescribed under the authority of the internal revenue laws.

(b) OTHERS.—Any oath or affirmation required or authorized by any internal revenue law or by any regulations made under authority thereof may be administered by any person authorized to administer oaths for general purposes by the law of the United States, or of any State, Territory, or possession of the United States, or of the District of Columbia, wherein such oath or affirmation is administered, or by any consular officer of the United States. This subsection shall not be construed as an exclusive enumeration of the persons who may administer such oaths or affirmations.

(d) Section 3797 of the Internal Revenue Code provides in part:

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) *Person.*—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation.

* * * * *

(4) *Domestic.*—The term "domestic" when applied to a corporation or a partnership means created or organized in the United States or under the law of the United States or of any State or Territory.

(5) *Foreign.*—The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

(6) *Fiduciary.*—The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

* * * * *

(11) *Secretary.*—The term "Secretary" means the Secretary of the Treasury.

(12) *Commissioner.*—The term "Commissioner" means the Commissioner of Internal Revenue.

(e) Section 3791 of the Internal Revenue Code provides in part as follows:

SEC. 3791. RULES AND REGULATIONS.

(a) AUTHORIZATION.—

(1) IN GENERAL.—* * * the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

(2) IN CASE OF CHANGE IN LAW.—The Commissioner may make all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue.

(b) RETROACTIVITY OF REGULATIONS OR RULINGS.—The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury decision, relating to the internal revenue laws, shall be applied without retroactive effect.

Pursuant to the authority contained in the above-quoted provisions of law, the following regulations are prescribed with respect to returns of information to be filed by attorneys, accountants, fiduciaries, banks, trust companies, financial institutions, or other persons as to the formation, organization, or reorganization of foreign corporations, all references to sections being to sections of the Internal Revenue Code, or such Code as amended, except as otherwise indicated:

SECTION 20D.1. *Information returns.*—(*a*) *General.*—Any attorney (except as hereinafter provided in (*b*)(4) of this section), accountant, fiduciary, bank, trust company, financial institution, or other person, who aids, assists, counsels, or advises in, or with respect to, the formation, organization, or reorganization of any foreign corporation shall file with the Commissioner, within 30 days after giving such aid, assistance, counsel, or advice, an information return as provided in section 3604(a) and these regulations. The return must be filed in every such case (1) regardless of the nature of the counsel or advice given, whether for or against the formation, organization, or reorganization of the foreign corporation, or the nature of the aid or assistance rendered and (2) regardless of the action taken upon the advice or counsel, that is, whether the foreign corporation is actually formed, organized, or reorganized.

If, in a particular case, the aid, assistance, counsel or advice given by any person extends over a period of more than 1 day and not for more than 30 days, such person, to avoid the multiple filing of returns, may file a single return for the entire period. In such case, the return shall be filed within 30 days from the first day of such period. If, in a particular case, the aid, assistance, counsel, or advice given by any person extends over a period of more than 30 days, such person may file a return at the end of each 30 days included within such period and at the end of the fractional part of a 30-day period, if any, extending beyond the last full 30 days. In each such case, the return must disclose all the required information which was not reported on a prior return.

(*b*) *Special provisions.*—(1) *Employers.*—In the case of aid, assistance, counsel, or advise in, or with respect to, the formation, organization, or reorganization of a foreign corporation given by a person in whole or in part through the medium of subordinates or employees (including in the case of a corporation the officers thereof), the return of the employer must set forth to the full extent all information prescribed by these regulations, including that which, as an incident to such employment, is within the possession or knowledge or under the control of such subordinates or employees.

(2) *Employees.*—The obligation of a subordinate or employee (including in the case of a corporation the officers thereof) to file a return with respect to any aid, assistance, counsel, or advice in, or with respect to, the formation, organization, or reorganization of a foreign corporation, given as an incident to his employment, will be satisfied if a complete and accurate return as prescribed by those regulations is duly filed by the employer setting forth all of the information within the possession or knowledge or under the control of such subordinate or employee.

Clerks, stenographers, and other subordinates or employees, rendering aid or assistance solely of a clerical or mechanical character in, or with respect to, the formation, organization, or reorganization of a foreign corporation are not required to file returns by reason of such services.

(3) *Partners.*—In the case of aid, assistance, counsel, or advice in, or with respect to, the formation, organization, or reorganization of a foreign corporation given by one or more members of a partnership in the course of its business, the obligation of each such individual member to file a return will be satisfied if a complete and accurate return, as prescribed by these regulations, is duly filed by the partnership, executed by all the members of the firm who gave any such aid, assistance, counsel, or advice. If, however, the partnership has been dissolved at the time the return is due, individual returns must be filed by each member of the former partnership who gave any such aid, assistance, counsel, or advice.

(4) *Attorneys-at-law.*—An attorney-at-law is not required to file a return with respect to any advice given or information obtained through the relationship of attorney and client.

(5) *Returns jointly made.*—If two or more persons aid, assist, counsel, or advise in, or with respect to, the formation, organization, or reorganization of a particular foreign corporation, any two or more of such persons may, in lieu of filing several returns, jointly execute and file one return.

(c) *Penalties.*—For criminal penalties for failure to file the returns required by section 3604(a) and these regulations, see section 3604(c) quoted in section 20D.0 of these regulations.

SEC. 20D.2. *Form of return.*—The returns under section 20D.1 of these regulations shall be made on Form 959. Such forms may, upon request, be procured from any collector. Each person should carefully prepare his return so as to set forth fully and clearly the information called for therein. Returns which have not been so prepared will not be accepted as meeting the requirements of the Code.

SEC. 20D.3. *Contents of returns.*—The return shall, in accordance with the provisions of these regulations and the instructions on the form, set forth the following information to the full extent such information is within the knowledge or possession or under the control of the person required to file the return:

(1) The name and the address of the person (or persons) to whom and the person (or persons) for whom or on whose behalf the aid, assistance, counsel, or advice was given;

(2) A complete statement of the aid, assistance, counsel, or advice given;

(3) Name and address of the foreign corporation and the country under the laws of which it was formed, organized, or reorganized;

(4) The month and year when the foreign corporation was formed, organized, or reorganized;

(5) A statement of how the formation, organization, or reorganization of the foreign corporation was effected;

(6) A complete statement of the reasons for, and the purposes sought to be accomplished by, the formation, organization, or reorganization of the foreign corporation;

(7) A statement showing the classes and kinds of assets transferred to the foreign corporation in connection with its formation, organization, or reorganization, including a detailed list of any stock or securities included in such assets, and a statement showing the names and addresses of the persons who were the owners of such assets immediately prior to the transfer;

(8) The names and addresses of the shareholders of the foreign corporation at the time of the completion of its formation, organization, or reorganization, showing the classes of stock and number of shares held by each;

(9) The name and address of the person (or persons) having custody of the books of account and records of the foreign corporation; and

(10) Such other information as may be required by the return form.

If a person aids, assists, counsels, or advises in, or with respect to, the formation, organization, or reorganization of more than one foreign corporation, a separate return must be filed with respect to each foreign corporation.

SEC. 20D.4. *Verification of return.*—All returns required by section 3604(a) and these regulations shall be verified under oath or affirmation. The oath or affirmation may be administered by a person authorized to administer oaths for general purposes by the law of the United States, or of any State, Territory, or possession of the United States, or of the District of Columbia, wherein

such oath or affirmation is administered, or by a consular officer of the United States. Such returns executed abroad may be attested free of charge before United States consular officers. If a foreign notary or other official having no seal shall act as attesting officer, the authority of such attesting officer shall be certified to by some judicial official or other proper officer having knowledge of the appointment and official character of the attesting officer.

SEC. 20D.5. *Place of filing returns.*—Returns required by section 3604(a) and these regulations shall be filed with the Commissioner of Internal Revenue, Washington, D. C., attention of the Income Tax Unit, Records Division.

SEC. 20D.6. *Effective date.*—These regulations, with the exception of paragraph (4) of section 20D.1(*b*) of these regulations relating to returns of attorneys-at-law, shall take effect upon the date approved; paragraph (4) of section 20D.1(*b*) of these regulations shall take effect as of February 10, 1939. These regulations supersede the provisions of Treasury Decision 4816, approved June 20, 1938 [C. B. 1938–1, 74] (Part 10, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939–1 (Part 1), page 396] (Part 465, Subpart B, Title 26, Code of Federal Regulations).

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved August 7, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 9, 1939, 2.41 p. m.)

CHAPTER 2.—ADDITIONAL INCOME TAXES.

SUBCHAPTER B.—EXCESS PROFITS TAX.

1939–35–9987
T. D. 4927

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 21—EXCESS-PROFITS TAX.

Regulations relating to the excess-profits tax imposed by Subchapter B of Chapter 2 of the Internal Revenue Code.[1]

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

To Collectors of Internal Revenue and Others Concerned:

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[1] Sections 21.0 to 21.9 issued under the authority contained in sections 62 and 603 of the Internal Revenue Code (53 Stat., Part 1) and interpret sections 600 to 603 of the Code (53 Stat., Part 1).

SECTION 21.0. *Introductory.*—(*a*) Chapter 6 (Capital Stock Tax) of the Internal Revenue Code (53 Stat., Part 1), amended by the addition of subsection (e) to section 1202, by section 301, Revenue Act of 1939, approved June 29, 1939 (Public, No. 155, Seventy-sixth Congress, first session), provides in part:

SEC. 1200. TAX.

(a) DOMESTIC CORPORATIONS.—For each year ending June 30, beginning with the year ending June 30, 1939, there shall be imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

(b) FOREIGN CORPORATIONS.—For each year ending June 30, beginning with the year ending June 30, 1939, there shall be imposed upon every foreign corporation with respect to carrying on or doing business in the United States for any part of such year an excise tax equivalent to $1 for each $1,000 of the adjusted declared value of capital employed in the transaction of its business in the United States.

SEC. 1201. EXEMPTIONS.

(a) The taxes imposed by section 1200 shall not apply—

(1) CORPORATIONS EXEMPT FROM INCOME TAX.—To any corporation enumerated in section 101;

(2) INSURANCE COMPANIES.—To any insurance company subject to the tax imposed by section 201, 204, or 207.

(b) COMMON TRUST FUNDS.—

For exemption of common trust funds from the capital stock tax, see section 169(b) of Chapter 1.

SEC. 1202. ADJUSTED DECLARED VALUE.

(a) DECLARATION YEAR.—

(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 to the tax imposed for such year, the first year of such 3-year period for which the corporation is subject to such tax, shall constitute a "declaration year."

(2) For the declaration year of the first 3-year period the adjusted declared value shall be the value as declared by the corporation in its return under section 601 of the Revenue Act of 1938 (52 Stat. 565), for the year ended June 30, 1938, or in the case of a corporation not subject to the tax imposed for such year, the value as declared in its return filed under this chapter for the first year with respect to which it is subject to the tax. For each subsequent 3-year period, the adjusted declared value for a declaration year shall be the value as declared by the corporation in its return for such declaration year. The value declared by a corporation in its return for a declaration year (which declaration of value cannot be amended) shall be 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).

(b) SUBSEQUENT YEARS.—

(1) DOMESTIC CORPORATIONS.—For each year of any 3-year period subsequent to the declaration year, the adjusted declared value in the case of a domestic corporation shall be the value declared in the return for the declaration year plus—

(A) the cash, and the fair market value of property, paid in for stock or shares,

(B) paid-in surplus and contributions to capital,

(C) its net income,

(D) its income wholly exempt from Federal income tax, and

(E) the amount, if any, by which the deduction for depletion exceeds the amount which would be allowable if computed without regard to discovery value or to percentage depletion, under section 114(b) (2), (3), or (4) of Chapter 1 or a corresponding section of a later Revenue Act;

and minus—

(i) the cash, and the fair market value of property, distributed to shareholders,

(ii) the amount disallowed as a deduction by section 24(a) (5) of Chapter 1 or a corresponding provision of a later Revenue Act, and

(iii) the excess of the deductions allowable for income tax purposes over its gross income.

The adjustments provided in this paragraph shall be made for each income-tax taxable year included in the 3-year period from the date as of which the value was declared in the return for the declaration year to the close of the last income-tax taxable year ending with or prior to the close of the year for which the tax is imposed by this section. The amount of such adjustment for each such year shall be computed (on the basis of a separate return) according to the income tax law applicable to such year.

(2) FOREIGN CORPORATIONS.—For each year of any 3-year period subsequent to the declaration year, the adjusted declared value in the case of a foreign corporation shall be the value declared in the return for the declaration year adjusted (for the same income-tax taxable years as in the case of a domestic corporation), in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases in the capital employed in the transaction of its business in the United States.

(c) CORPORATIONS IN BANKRUPTCY OR RECEIVERSHIP.—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 of 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.

(d) CREDIT FOR CHINA TRADE ACT CORPORATIONS.—For the purpose of the tax imposed by section 1200 there shall be allowed in the case of a corporation organized under the China Trade Act, 1922 (42 Stat., 849 (U. S. C., Title 15, ch. 4)), as a credit against the adjusted declared value of its capital stock, an amount equal to the proportion of such adjusted declared value which the par value of the shares of stock of the corporation, owned on the last day of the taxable year by (1) persons resident in China, the United States, or possessions of the United States, and (2) individual citizens of the United States or China wherever resident, bears to the par value of the whole number of shares of stock of the corporation outstanding on such date. For the purposes of this subsection shares of stock of a corporation shall be considered to be owned by the person in whom the equitable right to the income from such shares is in good faith vested; and as used in this subsection the term "China" shall have the same meaning as when used in the China Trade Act, 1922.

(e) ADDITIONAL DECLARATION YEARS.—In the case of any domestic corporation, the year ending June 30, 1939, and the year ending June 30, 1940, shall each, if not otherwise a declaration year, constitute an additional declaration year if with respect to such year (1) the taxpayer so elects (which election cannot be changed) in its return filed before the expiration of the statutory filing period of any authorized extension thereof, and (2) the value declared by the taxpayer is in excess of the adjusted declared value computed under paragraph (1) of subsection (b). If, under this subsection, the year ending June 30, 1939, is a declaration year, the computation, under paragraph (1) of subsection (b), of the adjusted declared value for the year ending June 30, 1940, shall be made on the basis of the value declared for the year ending June 30, 1939.

(*b*) Subchapter B of Chapter 2 of the Internal Revenue Code provides:

SEC. 600. RATE OF TAX.

If any corporation is taxable under section 1200 with respect to any year ending June 30, there shall be imposed upon its net income for the income-tax taxable year ending after the close of such year, an excess-profits tax equal to the sum of the following:

6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value.

SEC. 601. ADJUSTED DECLARED VALUE.

The adjusted declared value shall be determined as provided in section 1202 as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year). If the income-tax taxable year in respect of which the tax under section 600 is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears the same ratio thereto as the number of months in the period bears to 12 months.

SEC. 602. NET INCOME.

For the purposes of this subchapter the net income shall be the same as the net income for income-tax purposes for the year in respect of which the tax under section 600 is imposed, computed without the deduction of the tax imposed by section 600, but with a credit against net income equal to the credit for dividends received provided in section 26(b) of Chapter 1.

SEC. 603. OTHER LAWS APPLICABLE.

All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by section 600, except that the provisions of section 131 of that chapter shall not be applicable.

SEC. 604. PUBLICITY OF RETURNS.

For provisions with respect to publicity of returns under this subchapter, see subsection (a) (2) of section 55.

(*c*) Section 53 of Chapter 1 of the Internal Revenue Code provides in part:

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) TIME FOR FILING.—

(1) GENERAL RULE.—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

(2) EXTENSION OF TIME.—The Commissioner may grant a reasonable extension of time for filing returns, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

(b) TO WHOM RETURN MADE.—

* * * * *

(2) CORPORATIONS.—Returns of corporations shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the collector at Baltimore, Md.

(*d*) Section 145 of Chapter 1 of the Internal Revenue Code provides in part:

SEC. 145. PENALTIES.

(a) FAILURE TO FILE RETURNS, SUBMIT INFORMATION, OR PAY TAX.—Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) PERSON DEFINED.—The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

* * * * *

(*e*) Section 62 of Chapter 1 of the Internal Revenue Code provides:

SEC. 62. RULES AND REGULATIONS.

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

(*f*) Pursuant to the above-quoted provisions of the Internal Revenue Code and other provisions of the Code, the following regulations are hereby prescribed with respect to the excess-profits tax imposed by the Internal Revenue Code:

SECTION 21.1. *Definitions.*—As used in these regulations, the term—

(*a*) "*Adjusted declared value*" means in the case of a domestic corporation the adjusted declared value of its capital stock as determined under section 1202 of the Internal Revenue Code, as amended by section 301 of the Revenue Act of 1939, and the regulations issued respecting the capital stock tax imposed by section 1200 of such Code and in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States as determined under such section 1202, as amended, and the regulations issued in reference thereto.

(*b*) "*Tax*," except as otherwise indicated, means the excess-profits tax imposed by section 600 of the Internal Revenue Code.

(*c*) "*Income-tax taxable year*" means the calendar year, the fiscal year ending during such calendar year, or the fractional part of a year, upon the basis of which the corporation's net income is computed and for which its income tax returns are made for Federal income tax purposes.

(*d*) "*Net income*" means (1) "net income" within the contemplation of section 21 of the Internal Revenue Code, or (2) in the case of an income-tax taxable year governed by the Revenue Act of 1938, "net income" within the contemplation of section 21 of the Revenue Act of 1938. Neither the amount of income tax imposed by the Internal Revenue Code or by prior laws, nor the amount of the excess-profits tax imposed by the Internal Revenue Code or by prior laws, shall be deducted from net income in computing the excess-profits tax and none of the credits allowed corporations against net income for income

tax purposes are applicable in respect of the excess-profits tax except the credit against net income equal to the credit for dividends received provided in section 26(b) of the Internal Revenue Code and in section 26(b) of the Revenue Act of 1938.

SEC. 21.2. *Scope of tax.*—The excess-profits tax, imposed by section 600 of the Internal Revenue Code, is imposed upon the net income of every corporation for each income-tax taxable year ending after the close of any year ending June 30 in respect of which the corporation is subject to the capital stock tax imposed by section 1200 of the Internal Revenue Code.

SEC. 21.3. *Measure and rate of tax.*—(*a*) *Domestic and foreign corporations.*—The tax is imposed in an amount equal to the sum of (1) 6 per cent of such portion of the corporation's net income for the income-tax taxable year as is in excess of 10 per cent and not in excess of 15 per cent of the adjusted declared value plus (2) 12 per cent of such portion of its net income for the income-tax taxable year as is in excess of 15 per cent of the adjusted declared value, as of the close of the last preceding income-tax taxable year (or as of the date of organization if the corporation had no preceding income-tax taxable year).

(*b*) *Adjusted declared value.*—No variation is permitted between the adjusted declared value set forth in the corporation's capital stock tax return and the adjusted declared value set forth in its excess-profits tax return, except that in the case of an excess-profits tax return for an income-tax taxable year which is a period of less than 12 months the adjusted declared value set forth in its capital stock tax return shall be reduced to an amount which bears the same ratio thereto as the number of months in the period bears to 12 months. The first return of a corporation covering the part of a year in which it was incorporated, or the final return of a corporation covering the part of the year in which it was dissolved, is a return for 12 months and not for a period of less than 12 months, for the purposes of these regulations.

SEC. 21.4. *Method of computation, example.*—The application of the provisions of section 21.3 of these regulations may be illustrated generally by the following example:

Example: The M Corporation, the income-tax taxable year of which is the calendar year, is subject to the capital stock tax imposed by section 1200, as amended, of the Internal Revenue Code, for the year ending June 30, 1939. The value declared in its capital stock tax return for the year ending June 30, 1939, of its capital stock as of the close of its preceding income-tax taxable year (the calendar year 1938) is $100,000. The net income of the corporation for the calendar year 1939, determined under the Internal Revenue Code, is $25,000. (The net income for income-tax taxable years beginning after December 31, 1938, shall be determined under the Internal Revenue Code.) During its taxable year the corporation received dividends from corporations subject to taxation under Chapter 1 of the Internal Revenue Code, amounting to $5,000. The excess-profits tax for the calendar year 1939 is $990, computed as follows:

Net income for calendar year 1939	$25,000
Less:	
Credit for dividends received (85 per cent of $5,000)	4,250
Balance of net income	20,750
Less:	
10 per cent of the value declared in the capital stock tax return for the year ending June 30, 1939, of the capital stock as of December 31, 1938 (10 per cent of $100,000)	10,000
Net income subject to excess-profits tax	10,750
Less:	
Amount taxable at 6 per cent, portion of net income in excess of 10 per cent and not in excess of 15 per cent of the adjusted declared value of the capital stock as of December 31, 1938 ($15,000 minus $10,000)	5,000
Amount taxable at 12 per cent	5,750
Excess-profits tax at 6 per cent (6 per cent of $5,000)	300
Excess-profits tax at 12 per cent (12 per cent of $5,750)	690
Total excess-profits tax ($300 plus $690)	990

SEC. 21.5. *Returns.*—Every corporation which is subject to the capital stock tax imposed by section 1200 of the Internal Revenue Code, for any year shall make an excess-profits tax return for each income-tax taxable year which ends after the close of the year in respect of which it is subject to such capital stock tax. There is no provision in the Internal Revenue Code which authorizes the making of a consolidated return by an affiliated group of corporations for the purpose of the excess-profits tax imposed by section 600 of the Internal Revenue Code. Accordingly, every corporation which is liable for the making of an excess-profits tax return under section 600 of the Internal Revenue Code (for any income-tax taxable year ending after June 30, 1939), whether or not such corporation is a member of an affiliated group of corporations, must make its excess-profits tax return and compute its net income separately, without regard to the provisions of section 141 of the Internal Revenue Code.

The excess-profits tax return shall be made within the time prescribed for making the corporation's Federal income tax return for the income-tax taxable year, and shall be made to the collector of internal revenue to whom such income tax return is required to be made.

SEC. 21.6. *Payment of tax.*—The excess-profits tax for any income-tax taxable year shall be paid within the time prescribed for paying the Federal income tax for such taxable year.

SEC. 21.7. *Credits against tax prohibited.*—Foreign income and profits taxes may not be credited against the excess-profits tax imposed by section 600 of the Code.

SEC. 21.8. *Determination of tax, assessment, collection.*—The determination, assessment, and collection of the tax, and the examination of returns and claims in connection therewith, will be made under such procedure as may be prescribed from time to time by the Commissioner.

SEC. 21.9. *Previous regulations superseded.*—These regulations supersede any previous regulations relative to excess-profits tax imposed by section 600 of the Internal Revenue Code.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 23, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 25, 1939, 10.20 a. m.)

B. REVENUE ACT OF 1938.

PART II.—COMPUTATION OF NET INCOME.

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

1939–32–9945
I. T. 3306

REVENUE ACT OF 1938.

Accident disability benefits received by employees of the M Company, under a plan which expressly provides that the employee may elect to accept the benefits under the plan or to prosecute such claims as he may have, constitute damages received by agreement within the contemplation of section 22(b)5 of the Revenue Act of 1938.

Advice is requested relative to the taxability for Federal income tax purposes of accident disability benefits received by employees of the M Company.

There has been in operation for many years by the M Company, whose employees receive the benefits in question, a plan for employees' pensions, disability benefits, and death benefits. With few exceptions, the plan has throughout its existence provided more liberal accident disability payments than have been required by State workmen's compensation laws. The plan specifically provides that accident disability benefits thereunder are not in addition to any claims at law, or claims under workmen's compensation laws, which the employee might be entitled to assert against the company except to the extent that benefits provided by the plan are in excess of such claims.

In this particular the plan provides:

> In case of accident resulting in injury to or death of an employee which entitles such employee or his beneficiaries to benefits under these regulations, he or they may elect to accept such benefits or to prosecute such claims at law as he or they may have against the company. If election is made to accept the benefits, such election shall be in writing and shall release the company from all claims and demands which the employee or his beneficiaries may have against it, otherwise than under these regulations, on account of such accident. If any persons other than the beneficiaries under these regulations might legally assert claims against the company on account of the death of the employee, no part of the death benefit under these regulations shall be due or payable until there have also been delivered to the committee good and sufficient releases of all claims, arising from or growing out of the death of the employee, which such other persons might legally assert against the company. * * * The right of the employee to accident disability benefits under these regulations shall lapse if election to accept such benefits, as above provided, is not made within 60 days after injury, or within such greater time as the committee shall, by resolution duly entered on its records, fix for the making of such election.
>
> In case any benefit or pension shall be payable under the laws now in force or hereafter enacted of any State or country to any employee of the company or his beneficiaries under such laws, the excess only, if any, of the amount prescribed in these regulations above the amount of such benefit or pension prescribed by law shall be the benefit or pension payable under these regulations. * * *

The plan does not impose an obligation upon the employee to accept, or on the employer to pay, which could be denominated a contract or an agreement. On the contrary, the plan expressly provides that the employee may elect to accept the benefits under the plan or pursue such claims and demands as he may have otherwise than under the plan. However, if he elects to accept the benefits under the plan, he is required to release the company from all claims or demands which he or his beneficiaries may have against the company.

Section 22(b)5 of the Revenue Act of 1938 excludes from gross income damages received "whether by suit or agreement" on account of injuries or sickness. The association of the word "agreement" with the word "suit" in that section indicates an intent to exclude from gross income amounts received by way of a settlement agreement entered into in lieu of the prosecution of a suit. The evident purpose of the plan in the instant case is that the acceptance of benefits thereunder shall be in lieu of other claims an employee may have against the employer. Payments under such an arrangement constitute damages received by agreement within the contemplation of section 22(b)5, supra. That the amount received under such an arrangement is in excess of the amount an employee might otherwise receive is immaterial, inasmuch as the amount is received by agreement and as compensation for injuries or sickness.

ARTICLE 22(b)-1: Exemptions—Exclusions from gross income. 1939-27-9898 I. T. 3294

REVENUE ACT OF 1938.

Dividends and proceeds from maturing Government endowment insurance contracts are not subject to Federal income tax.

The World War Veterans' Act and similar laws, relating to the allowance of benefits to veterans of the World War, provided for the issuance of war risk term insurance and the conversion of such term insurance to standard forms of life insurance, now known as Government life insurance. Some of these contracts of insurance will mature in the near future. The question is presented whether dividends on maturing Government life insurance endowment contracts or the proceeds thereof are subject to Federal income tax.

Section 3 of the Act of August 12, 1935 (49 Stat., 607), entitled "An Act to safeguard the estates of veterans derived from payments of pension, compensation, emergency officers' retirement pay and insurance, and for other purposes," provides in part as follows:

* * * Payments of benefits due or to become due * * * and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation * * *.

It is held that both the dividends and proceeds from the maturing Government endowment insurance contracts are not subject to Federal income tax. (See Mim. 4411, C. B. XV-1, 497 (1936), and cf. *Lawrence* v. *Shaw*, 300 U. S., 245.)

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

ARTICLE 23(a)-1: Business expenses. 1939-40-10039 I. T. 3325

REVENUE ACT OF 1938.

Expenses incurred by A, a retired noncommissioned United States Army officer, in connection with successful litigation relating to an increase in his retirement pay, are deductible as "business" expenses under section 23(a) of the Revenue Act of 1938.

Advice is requested whether certain expenses incurred by A in 1938 are deductible for Federal income tax purposes.

A, the taxpayer, a retired noncommissioned United States Army officer, deducted in his return for 1938 the amount of x dollars representing attorney's fees and miscellaneous expenses paid by him in 1938 in connection with a suit instituted by him. A's retirement pay had been based on the rank of second sergeant, and he found it necessary to employ an attorney to establish the fact that he should have been retired as a first sergeant. As a result of the decision of the court, A received $3x$ dollars in back pay, which he included as income in his income tax return for 1938, and claimed as deductions the above-mentioned fees and expenses.

Section 23(a) of the Revenue Act of 1938 provides that in computing net income there shall be allowed as a deduction the following expenses:

* * * All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

In *Kornhauser* v. *United States* (276 U. S., 145; T. D. 4222, C. B. VII-2, 267 (1928)) the United States Supreme Court held that where a former partner sued his copartner for an accounting of receipts of the dissolved partnership and the suit was successfully defended, the copartner may be allowed the deduction of attorney's fees arising from the defense of the suit. The Court stated in part as follows:

* * * where a suit or action against a taxpayer is directly connected with, or * * * proximately resulted from, his business, the expense incurred is a business expense within the meaning of section 214(a), subdivision (1), of the Act [1918].

In the instant case, the litigation arose out of A's service in the United States Army, which service was his "business." (See *Flint* v. *Stone Tracy Co.*, 220 U. S., 107.) The litigation proximately resulted from A's service in the United States Army. Therefore, even though his retirement severed his connection with the Army, the deductions here in question should be allowed as "business" expenses within the meaning of section 23(a) of the Revenue Act of 1938. (Cf. *Kornhauser* v. *United States*, supra.)

ARTICLE 23(a)-2: Traveling expenses. 1939-37-10005
I. T. 3314

REVENUE ACTS OF 1936 AND 1938.

The taxpayer, a professional baseball player employed by the M Baseball Club of the city of R, is not entitled to deduct, for Federal income tax purposes, the cost of his meals and lodging while living at a hotel in that city during the absence of his family in the city of S.

Advice is requested concerning the deductibility of certain expenses incurred by A in his business as a professional baseball player.

A states that his home is located in the city of S and that he is employed by the M Baseball Club of the city of R. While in the latter city, he pays his own expenses, but when he is away from that city traveling with the club, his expenses are paid by his employer. Part of the time his family lives with him in the city of R and he does not ask a deduction for his expenses during such period. He contends, however, that when he is living in a hotel in the city of R, and his family is in the city of S, he is entitled to a deduction on account of the expenses so incurred.

Section 23(a) of the Revenue Acts of 1936 and 1938 provides for the deduction, in computing net income, of:

All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * * traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *.

Section 24(a)1 of those Acts provides that in computing net income no deduction shall in any case be allowed in respect of—

Personal, living, or family expenses.

The term "home" as used in section 23(a) quoted above is to be distinguished from domicile. The term "home" has been construed to mean the principal place of business, post of duty, or place of employment. (*Charles E. Duncan* v. *Commissioner*, 17 B. T. A., 1088, affirmed without opinion in 47 Fed. (2d), 1082; *George W. Lindsay* v. *Commissioner*, 34 B. T. A., 840.)

The Board of Tax Appeals held in *Mort. L. Bixler* v. *Commissioner* (5 B. T. A., 1181) that certain expenses claimed by the taxpayer did not constitute business expenses. In that case the taxpayer was employed at Hammond, La. While so employed he made two or three trips to visit his family at Mobile, Ala., where he maintained his residence. and made one trip to Houston, Tex., to secure employment. He obtained the employment sought, returned to Hammond and resigned his position there, and then proceeded to Houston. He claimed a deduction in the amount expended for railroad fare and for meals, lodging, and laundry while on these trips. In deciding the case against the taxpayer, the Board said in part:

> We think the Commissioner in this case correctly held that railroad fare and living expenses paid out by this petitioner during the year 1922 were not deductible from gross income * * *. In the opinion of the Board, *traveling and living expenses are deductible under the provisions of this section [214(a)1, Revenue Act of 1921] only while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct, and carrying on of a trade or business. A taxpayer may not keep his place of residence at a point where he is not engaged in carrying on a trade or business, as this petitioner testified was true in this instance, and take a deduction from gross income for his living expenses while away from home.* We think section 214(a)1 intended to allow a taxpayer a deduction of traveling expenses while away from his post of duty or place of employment on duties connected with his employment. [Italics supplied.]

It follows, therefore, that the taxpayer's "home," as that term is used in section 23(a) of the Revenue Acts of 1936 and 1938, is his principal place of employment in the city of R. During the period of employment which he spent in that city, he was not *away from home in the pursuit of his business* and, therefore, is not entitled to deduct the cost of meals and lodging incurred at a hotel in the city of R during the absence of his family in the city of S.

ARTICLE 23(a)-9: Pensions—Compensation for injuries. 1939-41-10054
I. T. 3329

REVENUE ACTS OF 1936 AND 1938.

> Payments made in 1937 and 1938 by the M Company to the widow of an officer-stockholder who died in January, 1937, though not required to be made by any contractual obligation, are deductible by the corporation as business expenses. Such amounts are gifts to the widow, and, therefore, are not taxable income to her.

Advice is requested relative to the proper treatment for Federal income tax purposes of certain payments made by the M Company

to B, the widow of A, a deceased officer-stockholder of that corporation. A, a minority stockholder and salaried officer of the M Company, died on January —, 1937. During 1937 the M Company paid to B, his widow, x dollars a week, a total of $52x$ dollars for the year, which was the amount of salary A would have drawn had he lived. During 1938 the payments to B were x dollars a month, or $12x$ dollars for the year. These amounts were reported by the corporation as salaries paid by it.

The minutes of the corporation for the year 1937 contain the following:

Mr. A passed away during the first week of January, 1937. His salary for the year was to be x dollars a week, which x dollars is to be paid to his widow until January 1, 1938. By order of the secretary and treasurer.

The minutes for the year 1938 contain the following:

The pension to be paid to B for the year beginning January 1, 1938, and ending December 31, 1938, was authorized at x dollars per month, and it was understood that this was noncompulsory, and was to be paid as deemed advisable by C, secretary-treasurer.

The amount of A's salary for one year, which was paid by the corporation in weekly installments to his widow, is deductible by the corporation as a business expense under the provisions of article 23(a)-9 of Regulations 94 and 101, relating to the Revenue Acts of 1936 and 1938, respectively. That article reads in part as follows:

* * * When the amount of the salary of an officer or employee is paid for a limited period after his death to his widow or heirs, in recognition of the services rendered by the individual, such payments may be deducted.

Although the payments made to B during the year 1938 in the total amount of $12x$ dollars do not come specifically within the above-quoted language for the reason that they were not equal in amount to the salary of the deceased officer of the corporation, nevertheless such payments are deductible by the corporation. The provision of the regulations quoted above is construed to mean that payments made by a corporation under such circumstances not in excess of the decedent's salary are properly deductible by the payor corporation as ordinary and necessary business expenses.

The amounts constitute gifts to B and are, therefore, not taxable income to her. With respect to the sum received by her in 1938, the fact that it is termed "pension" does not exclude it from consideration as a gift since the terms "pension" and "gift" are not mutually exclusive. When an allowance is paid by an organization to which the recipient has rendered no service, the amount is deemed to be a gift or gratuity and is not subject to Federal income tax in the hands of the recipient.

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

ARTICLE 23(c)-1: Taxes. 1939-31-9932
I. T. 3303

REVENUE ACT OF 1938.

For Federal income tax purposes, real and personal property taxes in the State of Wyoming accrue on February 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 property taxes in the State of Wyoming.

The law imposing such taxes is found in chapter 115 of the Wyoming Revised Statutes, 1931, Annotated. Subsequent enactments have not altered the sections of that chapter pertinent to the question involved, which read in part as follows:

115-101. *Purposes for which taxes levied—Limitations upon amount.*—There shall be levied and assessed upon the taxable real and personal property within this State in each year, the following taxes:

* * * * * * *

115-108. *Property subject to taxation.*—All other property, real and personal, within this State is subject to taxation in the manner herein directed, and this section is intended to embrace lands and lots in towns * * *. Building or improvements erected upon lands, * * * and all lands entered by preemption, * * * or as desert land, * * * shall be subject to taxation whether patent for the same has been issued or not, and when such final proof shall have been made before the 1st day of February in any year, the land so entered shall be subject to taxation for that year. * * *

* * * * * * *

115-113. *Listing of personal property.*—All personal property shall be listed in the county where it may be on the 1st day of February of the then current year; * * *.

* * * * * * *

115-305. *Grantor and grantee, which shall pay taxes.*—As between the grantor and grantee of any property, real, personal or mixed, where there is no express agreement in writing as to which shall pay the taxes that may be assessed thereon, if such property is conveyed on or after the 1st day of January, then the grantor shall pay the taxes thereon for that year.

In *United States* v. *Anderson* (269 U. S., 422, T. D. 3839, C. B. V-1, 179 (1926)) it was stated with respect to the proper accrual of taxes for income tax purposes that:

* * * In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and *determine the liability of the taxpayer* to pay it. * * *. [Italics supplied.]

In general the position of the Bureau with respect to the accrual of property taxes is that ownership of property on the date as of which assessment is made by the State taxing authorities is the "event" which determines the liability for property taxes, and that, accordingly, the taxes should be accrued as of that date. (See G. C. M. 15305, C. B. XIV-2, 80 (1935), and cases cited therein.)

Under the laws of Wyoming, lands are subject to taxation on the 1st day of February in each year and personal property is required to be listed for assessment as of that date. The taxable status of the property, therefore, relates to February 1. Since ownership on the date as of which assessment is made by the State taxing authorities is the "event" which determines liability, ownership of property on February 1 fixes the liability for the taxes thereon. It is held, therefore, that Wyoming property taxes, both real and personal, should be accrued for Federal income tax purposes as of 1st day of February for each year.

The law of Wyoming dealing with who shall pay the taxes as between grantor and grantee in the absence of a written agreement as to which shall pay the tax is not conclusive as between the owner of the property and the taxing authorities. (*Corthell* v. *Board of Commissioners of Albany County*, 44 Wyo., 71, 8 Pac. (2d), 812.)

The court's statement in that case "that ordinarily property is taxable only to the person who is the owner thereof on the date to which assessments for the current year are referable" is in accord with the Bureau's conclusion that the accrual date of property taxes in Wyoming is February 1.

ARTICLE 23 (c)-1: Taxes. 1939-33-9954
I. T. 3307

REVENUE ACTS OF 1936 AND 1938.

The occupation tax imposed by the State of Utah on persons engaged in mining in that State accrues, for Federal income tax purposes, on the last day of the calendar year preceding that in which the statement for the taxable year is required to be filed with the State tax commission.

Advice is requested relative to the proper accrual date for Federal income tax purposes of the occupation tax imposed by the State of Utah on persons engaged in mining in that State.

The tax in question is imposed by chapter 101 of the Laws of Utah, 1937, effective May 11, 1937, and is entitled "An act amending sections 80-5-55, 80-5-56, and 80-5-57, Revised Statutes of Utah, 1933, relating to the assessment of mines; enacting new sections imposing an occupation tax on all engaged in the business of mining or producing metalliferous ores; providing for the collection and disposition of such occupation tax; fixing the time in which an action for the collection thereof may be commenced; fixing the duties of the State tax commission; * * * fixing penalties * * *." Chapter 101 provides in part:

SECTION 1. *Sections amended.*

Sections 80-5-55 * * *, Revised Statutes of Utah, 1933, are amended to read:

"80-5-55. *Occupation tax and assessment book of mines.*

"The State tax commission must prepare each year a book called the occupation tax and assessment book of mines, in which must be entered all occupation taxes fixed and the assessment of all mines in the State subject to assessment by it * * *."

* * * * * * *

SEC. 3. *Occupation tax—Annual exemption.*

Except as herein otherwise specifically provided, every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this State shall pay to the State of Utah an occupation tax equal to 1 per cent of the gross amount received for or the gross value of metalliferous ore sold which tax shall be in addition to all other taxes provided by law. Said tax shall be delinquent on the 1st day of June next succeeding the calendar year when the ore or metal is sold.

* * * * * * *

An annual exemption from the payment of the occupation tax imposed by this act upon $20,000 in gross value of ore shall be allowed to each person, provided but one exemption shall be allowed for one claim or group of claims operating under one ownership as a mine.

SEC. 4. *Statements.*

Every person engaged in the business of mining or producing metalliferous ore shall make and file with the tax commission, on or before the 10th day of February of each year beginning with the year 1938 on forms furnished by the tax commission, a statement containing:

(1) The name, description and location of the mine or mining claim owned and operated by him during the preceding calendar year.

(2) The number of tons of ore mined during the preceding calendar year and the disposition made of the same.

(3) The total amount received during the preceding calendar year from the sale of ore and metals.

(4) If a deduction is claimed for milling, smelting, refining, marketing or transporting the ore or the products of the same from the place where produced to the place where sold, the amount of deduction claimed therefor.

(5) Such other reasonable and necessary information as the commission may require for the proper enforcement of this act.

* * * * * * *

SEC. 7. *Date tax due—Extensions.*

The tax imposed by this act shall be due and payable on or before the 1st day of June of the year next succeeding the calendar year when the ore or metal is sold * * *.

* * * * * * *

SEC. 9. *Notice of amount of tax.*

Not later than the first Monday in May of each year, the tax commission shall fix the amount of occupation tax that each person shall pay. Immediately thereafter the person whose occupation tax is so fixed shall be notified by mail, postage prepaid, addressed to his last known place of residence, of the amount of the occupation tax so fixed.

From the above-quoted provisions of the law, it is clear that the taxable year with respect to which the occupation tax pertains is the calendar year preceding that in which the statement is required to be filed with the State tax commission. Upon an accrual basis of accounting, true income for such preceding year can not be determined without taking into account the occupation tax based upon the gross amount received or the gross value of metalliferous ore sold during such preceding year. While it is true that the tax is not assessed and does not become due until the year in which the statement is required to be filed, yet at the end of the preceding taxable year all the events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it. (See *United States* v. *Anderson*, 269 U. S., 422, T. D. 3839, C. B. V-1, 179 (1926).)

Accordingly, it is held that, for Federal income tax purposes, the occupation tax in question accrues on the last day of the calendar year preceding that in which the statement for the taxable year is required to be filed with the tax commission of the State of Utah; that is, for the calendar year 1937, the tax accrued on December 31, 1937, and for the calendar year 1938, the tax accrued on December 31, 1938.

ARTICLE 23(c)-1: Taxes. 1939-40-10040
I. T. 3326

REVENUE ACT OF 1938

A mortgagor under a Federal Housing Administration insured loan, who keeps his accounts on the cash receipts and disbursements basis, may deduct as taxes paid amounts of real property taxes advanced to the mortgagee only for the taxable year in which payment of such taxes is made by the mortgagee to the proper taxing authorities. If the accounts of the mortgagor are kept on the accrual basis, the deduction of the amount of the tax liability should be taken in his return for the year in which falls the date as of which the tax is assessed.

Advice is requested by the M Trust Co. concerning the year for which advances of real property taxes made by mortgagors to mortgagees under Federal Housing Administration insured loans are deductible for Federal income tax purposes.

The M Trust Co. states that the Federal Housing Administration Act provides that the mortgagee shall collect monthly one-twelfth of

the estimated taxes so that one month prior to the delinquent date of the taxes sufficient funds will be on hand with which to make the payment and, if there is a shortage, the mortgagor shall pay it upon request of the mortgagee. A monthly receipt for a Federal Housing Administration payment shows that such payments are divided as to principal, interest, taxes, fire insurance, Federal Housing Administration insurance, and service charges.

The M Trust Co. suggests that the borrower should deduct, for Federal income tax purposes, the amount of taxes paid to the company as mortgagee during the taxable year in which such payment is made, even though the 1938 State and county taxes collected from the borrower during 1938 were not paid by the company to the taxing authorities until January, 1939.

With respect to a taxpayer (mortgagor) who keeps his accounts on the cash receipts and disbursements basis, the deduction as taxes paid of the amounts so advanced to the mortgagee may be taken only for the taxable year in which payment of the tax is made by the mortgagee to the proper taxing authorities. (See *Arthur T. Galt* v. *Commissioner*, 31 B. T. A., 930, and *Edward Hagelin* v. *Commissioner*, 37 B. T. A., 8.) If the mortgagor's accounts are kept on an accrual basis, the deduction of the amount of the tax liability should be taken in his return for the year in which falls the date as of which the tax is assessed. (See G. C. M. 15305, C. B. XIV-2, 80 (1935), and cases cited therein.)

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

ARTICLE 23(e)-1: Losses by individuals. 1939-31-9933
I. T. 3304

REVENUE ACT OF 1938.

A and B, husband and wife, owned property as tenants by the entireties. The property was damaged by hurricane and A defrayed all of the expenses in repairing it.

Held, A may deduct the entire amount of the loss actually sustained under section 23(e) of the Revenue Act of 1938, but not in excess of the amount computed in accordance with sections 23(i) and 113(b) of the Act. If the entire loss is claimed as a deduction by A in his separate return, it follows that no deduction is allowable in the return of B.

Advice is requested relative to the deductibility for Federal income tax purposes of a loss caused by hurricane.

A and B, husband and wife, owned property as tenants by the entireties. In September, 1938, a hurricane caused material damage to the property. A defrayed all of the expenses in repairing the property. The question is presented whether A may deduct in his separate return the entire loss caused by the hurricane.

Section 23 of the Revenue Act of 1938 provides in part as follows:

Deductions from gross income.
In computing net income there shall be allowed as deductions:

* * * * * * *

(e) *Losses by individuals.*—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

* * * * * * *

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

Deduction of loss for property damaged or destroyed by hurricane is allowable under section 23(e) of the Revenue Act of 1938, supra, in the amount of the loss actually sustained, but not in excess of the amount computed in accordance with the provisions of sections 23(i) and 113(b) of that Act. (See G. C. M. 21013, C. B. 1939-1 (Part 1), page 101.)

It is held that A is entitled to a deduction on his individual return for the loss computed as above set forth, assuming, of course, that if he claims the entire allowable deduction his wife does not claim any deduction for the loss in her return. (See generally G. C. M. 15530, C. B. XIV-2, 107 (1935); G. C. M. 17570, C. B. 1937-1, 193; *F. C. Nicodemus* v. *Commissioner*, 26 B. T. A., 125, acquiescence, C. B. XIV-2, 16 (1935); and *George A. Neracher* v. *Commissioner*, 32 B. T. A., 236, acquiescence, C. B. XIV-2, 15 (1935).)

ARTICLE 23(e)-1: Losses by individuals. 1939-35-9980
G. C. M. 21478

REVENUE ACT OF 1938.

A, who is a member of a partnership engaged in the business of accepting wagers on horse racing, and who also personally bets large amounts with handbooks other than those in which the partnership is interested, may not reduce his share of gains derived by the partnership from wagering by the amount of his individual net wagering loss.

An opinion is requested whether the taxpayer, A, may take as a deduction in his Federal income tax return his net individual gambling loss to the extent of his share of partnership gambling gains.

The taxpayer is a member of a partnership which is engaged in the business of accepting wagers on horse racing. He also personally bets large amounts with handbooks other than those operated by the partnership. A net loss was sustained by him in 1938 on such individual wagering transactions but net gambling profits were derived by the partnership. The deductibility of such individual net loss sustained by A to the extent of his share of partnership gambling gains is the question presented.

Only in a manner and to the extent permitted by Congress may the tax burden imposed thereby be delimited or reduced. (*Lloyd* v. *Commissioner*, 55 F. (2d), 842; Ct. D. 542, C. B. XI-2, 268 (1932).) Congress has prescribed that "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions." (Section 23(g), Revenue Act of 1936; section 23(h), Revenue Act of 1938.) Thus, reduction in income subject to taxation may be effected by losses from wagering to the extent of gains which result from wagering. A taxpayer may not, however, relate the character of income or loss of a venture in which he is a partner to that of income or loss arising from his individual activity. With certain exceptions, the source to the taxpayer of income or loss resulting from partnership activity may be said to be the partnership

itself, regardless of the character of its operations. As stated in *Johnston* v. *Commissioner* (86 F. (2d), 732; Ct. D. 1247, C. B. 1937–2, 238):

* * * Though a partnership is not a taxpayer * * * the partnership is a tax computing unit * * *.

While it is true that each partner owns his share of the net worth of the partnership of which he is a member * * * and consequently his distributive share of the partnership net income is taxable directly to him * * * it is equally true that the partnership status has not been disregarded in the scheme of income taxation set up by Congress. * * * That scheme provides in general for the carrying over into his own return of a partner's distributive share of partnership income as computed in the partnership information return as so much ordinary income without noticing its source as shown in the partnership return except in those instances for which especial provision has been made.

In rejecting the petitioner's right to deduct a loss on a personal sale of noncapital assets to the extent of his share of gain resulting from a partnership sale of noncapital assets, the court in the Johnston case said:

* * * when the partnership return shows net income, a partner's distributive share is to be entered in his own return as his own income derived from the partnership without retaining the peculiar character it had in the partnership return unless Congress has expressly so provided and then only for the purpose stated.

The venture in which the taxpayer is interested apparently is a partnership within the statutory definition. (Section 1001(a)3, Revenue Act of 1936; section 901(a)3, Revenue Act of 1938.) Whether partnership returns were actually filed is immaterial. Since there exists no express statutory authority permitting the gambling income derived from partnership transactions to be carried over to the taxpayer's return as such, or permitting him to trace such income to its source within the partnership, his distributive share of such partnership gains must be regarded as an indivisible item of income (*Helvering* v. *Smith*, 90 F. (2d), 590; Ct. D. 1297, C. B. 1938–1, 277) which may not be characterized in his individual return as gambling gain. Nothing, therefore, is derived from the partnership activity which may be offset by any net loss sustained by the taxpayer in his individual gambling activities.

It follows that the taxpayer's share of the gains from wagering derived by the partnership of which he is a member may not be reduced by his net individual wagering loss.

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

SECTION 24.—ITEMS NOT DEDUCTIBLE.

ARTICLE 24–4: Amounts allocable to exempt income, other than interest.

REVENUE ACT OF 1938.

Tax-exempt interest, and expenses allocable thereto, in cases of resident foreign insurance companies. (See I. T. 3297, page 137.)

ARTICLE 24–6: Disallowance of deductions for unpaid expenses and interest. 1939–38–10019 I. T. 3319

REVENUE ACT OF 1938.

Applicability of section 24(c) of the Revenue Act of 1938, relating to the disallowance of unpaid expenses and interest, to the M Company, which uses the accrual method of accounting, filed its return for 1938 on the calendar year basis, and whose bond interest which accrued for the three months' period ended December 31, 1938, was not payable until April 1, 1939.

Advice is requested relative to the applicability of section 24(c) of the Revenue Act of 1938, relating to the disallowance of unpaid expenses incurred and interest accrued, to the case of the M Company under the following facts:

The M Company was incorporated in 1910 and over 90 per cent of its outstanding stock is owned by two brothers, C and D. The company uses the accrual method of accounting and files its returns on the basis of the calendar year. In 1918 first mortgage bonds were issued for the retirement of the existing mortgage on property of the corporation. The bonds contain interest-bearing coupons which are due and payable April 1 and October 1 of each year and the coupons have always been paid by the corporation when due. These bonds are owned by C and D, the principal stockholders.

At the close of the calendar year 1938, the corporation's financial statement showed bond interest accrued as of December 31, including interest accrued from October 1, 1938 (the last interest payment date), to December 31, 1938, but not yet paid. It is stated that inasmuch as the interest for the last three months of the calendar year 1938 was not payable until April 1, 1939, it was impracticable to prepay such interest within the 2½-month period after the close of the taxable year as specified in section 24(c), supra, since the bonds are coupon bonds. The individual bondholders keep their books on the cash basis. It is contended (1) that it is not the intention of the Revenue Act to penalize the corporation by the disallowance of legitimate interest payments when the interest payments are not being withheld for the purpose of tax evasion, and (2) that it is not reasonable that the corporation should be required to change its method of accounting or its taxable period to correspond to the coupon dates.

Section 24(c) of the Revenue Act of 1938 reads as follows:

Unpaid expenses and interest.—In computing net income no deduction shall be allowed under section 23(a), relating to expenses incurred, or under section 23(b), relating to interest accrued—

(1) If such expenses or interest are 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 pertinent provisions of section 24(b) of the Revenue Act of 1938 read as follows:

(b) LOSSES FROM SALES OR EXCHANGES OF PROPERTY.—

(1) *Losses disallowed.*—In computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property, directly or indirectly—

(A) Between members of a family, as defined in paragraph (2)(D);

(B) Except in the case of distributions in liquidation, between an individual and a corporation more than 50 per centum in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual;

* * * * * * *

(2) *Stock ownership, family, and partnership rule.*—For the purposes of determining, in applying paragraph (1), the ownership of stock—

* * * * * * *

(B) An individual shall be considered as owning the stock owned, directly or indirectly, by or for his family;

* * * * * * *

(D) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; * * *

* * * * * * *

In order for the provisions of section 24(c) of the Revenue Act of 1938 to operate to disallow the deduction of any item of accrued interest, it is essential that all three factors set forth in that section be present with respect to such item of interest. In the instant case, all three factors are clearly present and the case comes squarely within the provisions of section 24(c) of the statute. The Bureau is without authority to exclude the M Company from the application of the statute to the accrued interest in question, with respect to which all three factors set out in section 24(c) are present, irrespective of the reason why payment of the accrued interest was not made within the taxable year or within two and one-half months thereafter.

It is concluded, therefore, that section 24(c) of the Revenue Act of 1938 is applicable to the instant case.

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 25-3: Amount of personal exemption allowable.

REVENUE ACT OF 1938.

Citizen of United States entitled to benefits of section 251. (See I. T. 3327, page 173.

SECTION 27(a).—CORPORATION DIVIDENDS PAID CREDIT: DEFINITION IN GENERAL.

ARTICLE 27(a)-3: Amounts used or irrevocably set aside to pay or to retire indebtedness. 1939-30-9921 I. T. 3299

REVENUE ACT OF 1938.

Where a corporation is required to make a deposit of cash annually with a trustee for bond retirement, or in lieu thereof an equivalent amount of its bonds at par value, the cost of the bonds purchased during the year and so deposited rather than their par value measures the dividends paid credit for that year under section 27(a)4 of the Revenue Act of 1938.

Advice is requested relative to the dividends paid credit allowable under the provisions of section 27(a)4 of the Revenue Act of 1938 in the case of the M Corporation. That section provides for the inclusion in the term "dividends paid credit" of—

Amounts used or irrevocably set aside to pay or to retire indebtedness of any kind, if such amounts are reasonable with respect to the size and terms of such indebtedness. As used in this paragraph the term "indebtedness" means only an indebtedness of the corporation existing at the close of business on December 31, 1937, and evidenced by a bond, note, debenture, certificate of indebtedness, mortgage, or deed of trust, issued by the corporation and in existence at the close of business on December 31, 1937, * * *.

In 1938 the M Corporation had bonds, issued in 1927 and 1931, outstanding in the amount of $120x$ dollars. The mortgage securing the bonds contains a sinking fund provision requiring the corporation (1) to pay into a sinking fund annually on December — of each year $6x$ dollars to be used by the trustee in the purchase and retirement of an equivalent amount of the outstanding bonds, or (2) to deposit with the trustee for retirement, on or before December —, bonds of the company having a par value equal to the amount required to be paid into the sinking fund. On December —, 1938, the M Corporation deposited with the trustee for retirement bonds of the corporation having a par value of $6x$ dollars, all of such bonds having been acquired by the corporation during the calendar year 1938 at a cost price which was less than the par value of the bonds. The question presented is whether, in computing the dividends paid credit, the par value of the bonds deposited or the cost thereof represents the "amounts used or irrevocably set aside to pay or to retire indebtedness" within the meaning of section 27(a)4 of the Revenue Act of 1938, supra.

It is held that "amounts used or irrevocably set aside" does not mean the par value of bonds purchased during the year by the corporation for deposit with the trustee, but rather the cost to the corporation of such bonds. For example, if the corporation purchased $100,000 par value of its bonds at a cost of $75,000 and deposited them pursuant to the terms of the sinking fund agreement, the latter amount would represent the credit allowable under section 27(a)4, supra, for the taxable year in which the purchase was made

ARTICLE 27(a)-3: Amounts used or irrevocably set aside to pay or to retire indebtedness.

REVENUE ACT OF 1938.

Article 27(a)-3, Regulations 101, amended. (See T. D. 4948, page 88.)

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 41-1: Computation of net income. 1939-29-9917
I. T. 3298

REVENUE ACT OF 1938.

Treatment by borrowers of discount or interest paid in connection with FHA loans.

Advice is requested as to the treatment by borrowers of discount or interest paid in connection with FHA loans.

The M Bank states that it has made a great many FHA loans not exceeding five years, and that the discount or interest on these loans is deductible in advance. Some of the bank's clients have inquired whether the entire amount of the discount or interest should be taken as a deduction in one year, or whether they are required to pro rate it over the life of the notes covering the loan.

The discount or interest paid by the bank's clients with respect to FHA loans should be treated by the borrowers the same as discount or interest paid in connection with other kinds of loans. That is, if the borrower reports his income for Federal income tax purposes on the cash basis, the discount or interest is not actually paid when the money is borrowed and is therefore not deductible by him until the year in which payment of the loan is made. If the borrower reports his income on the accrual basis, the discount or interest should be deducted as it accrues.

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

ARTICLE 42-1: When included in gross income. 1939-37-10006
I. T. 3315

REVENUE ACT OF 1938.

A mortuary benefit which was not payable by an employer to an employee, his beneficiary, or other persons unless the employee died within the term of his employment contract did not accrue to him, was not compensation received by him, and should not be included in the return filed for him for the portion of the taxable year prior to his death. Neither does the amount of the mortuary benefit constitute taxable income to the designated beneficiary to whom it was paid.

Advice is requested relative to the taxability for Federal income tax purposes of a mortuary benefit paid by the M Life Insurance Co. to B, the beneficiary named by A, an employee of the company.

A, the father of B, was employed as an agent of the M Life Insurance Co. A mortuary benefit was payable upon the death of A measured by insurance written by him in his capacity as agent. The benefit was payable only upon death, had no cash surrender or loan value, and the right thereto would have terminated had A, during his lifetime, discontinued his contract of employment with the insurance company. B, the son, was designated as the beneficiary by the father, who died in August, 1938. The benefit was paid to B pursuant to a resolution adopted by the board of directors of the insurance company in 1937.

The resolution adopted by the board of directors of the M Life Insurance Co. reads as follows:

Resolved, That the M Life Insurance Company will pay as part compensation a mortuary benefit upon the death of any agent member whose employment contract authorizing him to solicit for new insurance for the company is in full force and effect at the time of his death, in addition to his other compensation, a sum equal to *x* dollars per thousand of the business written and qualified by him under company rules during the period of his membership and upon which business the second insurance year's premium has been paid or shall be paid.

Resolved further, That such sum as shall become payable as above shall be paid to such beneficiary as the deceased member shall have designated in written notice filed with the company; that if no such written notice shall have been so filed, the payment due shall be paid to such person or persons as the company may deem best entitled to receive same.

Resolved, That the company shall hold such addition to its reserve as the actuaries of the company shall deem sufficient to meet the mortuary benefits accruing hereunder during the year.

Section 42 of the Revenue Act of 1938, relating to the period in which items of gross income are included, provides in part as follows:

* * * In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

It is held that no part of the mortuary benefit in question ever accrued to A, the decedent. Under the terms of the above-quoted resolution, he would never receive anything, and his beneficiary, or the person or persons deemed by the M Life Insurance Co. best entitled to receive the mortuary benefit, had no right to receive anything unless A died within the term of his employment contract. This was a condition precedent which had to occur in order to establish any liability on the part of the insurance company. The death of A established the liability of the corporation. Since, during his life, A had no right to receive income under the contract, no income accrued to him. Accordingly, the mortuary benefit is not regarded as compensation received by A or accrued to him, and it should not be included in the return filed for the decedent for the portion of the taxable year prior to his death. Neither does the amount of the mortuary benefit constitute taxable income to B, the beneficiary.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 55.—PUBLICITY OF RETURNS.

ARTICLE 55(b)-5. Inspection of original returns.

REVENUE ACT OF 1938.

Regulations governing the inspection of income tax returns, Form 1042B, by the Department of National Revenue, Ottawa, Canada. (See T. D. 4936, page 101.)

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 1938.

Determination of purpose of an organization. (See G. C. M. 21610, page 103.)

ARTICLE 101(9)-1: Social clubs.

REVENUE ACT OF 1938.

Effect of receipt of income from investments on exempt status of club. (See I. T. 3302, page 105.)

ARTICLE 101(9)-1: Social clubs.

REVENUE ACT OF 1938.

Club leasing its physical property to another club. (See I. T. 3339, page 106.)

SECTION 102.—SURTAX ON CORPORATIONS IMPROPERLY ACCUMULATING SURPLUS.

ARTICLE 102-2: Purpose to avoid surtax; evidence; burden of proof; definition of holding or investment company.

REVENUE ACT OF 1938.

Instructions to officers and employees relative to giving particular attention to returns of corporations which might be improperly accumulating surplus. (See T. D. 4914, page 108.)

SECTION 112(f).—RECOGNITION OF GAIN OR LOSS: INVOLUNTARY CONVERSIONS.

ARTICLE 112(f)-1: Reinvestment of proceeds of involuntary conversion.

REVENUE ACT OF 1938.

Article 112(f)-1, Regulations 101, amended. (See T. D. 4951, page 110.)

SECTION 113(a).—ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS: BASIS (UNADJUSTED) OF PROPERTY.

ARTICLE 113(a)(5)-1: Basis of property acquired by bequest, devise, or inheritance. 1939-52-10125 I. T. 3340

REVENUE ACT OF 1938.

The optional valuation of property for Federal estate tax purposes, permitted by section 302 of the Revenue Act of 1926, as amended by section 202(a) of the Revenue Act of 1935, has no application to the basis for determining gain or loss on the sale or other disposition of such property for purposes of the Federal income tax.

Advice is requested whether the basis for gain or loss purposes of property acquired from the decedent by will, or under the law governing the descent and distribution of property, is the fair market value of the property at the date of death of the decedent, where the executor has elected to use the value as of the date one year after the decedent's death in determining the value of the gross estate, in accordance with the provisions of section 302 of the Revenue Act of 1926, as amended by section 202(a) of the Revenue Act of 1935.

Section 113(a)5 of the Revenue Act of 1938 prescribes a single uniform basis rule, for Federal income tax purposes, applicable to all property passing from a decedent by will or under the laws governing the descent and distribution of the property of a decedent. This uniform basis is the fair market value of the property at the time of acquisition, that is, the date of death of the decedent.

Article 113(a)(5)-1 of Regulations 101, interpretative of section 113(a)5, provides that the value of property as of the date of the death of the decedent as appraised for the purpose of the Federal estate tax, or if the property is not appraised as of the date of death of the decedent for such purpose, or if the estate is not subject to such tax, its value as appraised as of the date of death of the decedent for the purpose of State inheritance or transmission taxes, shall be deemed to be its fair market value at the time of the death of the decedent.

Section 302 of the Revenue Act of 1926, as amended by section 202(a) of the Revenue Act of 1935, relative to the gross estate of a decedent for Federal estate tax purposes, has no application to the basis for determining gain or loss on the sale or other disposition of such property for the purposes of the Federal income tax.

SECTION 117.—CAPITAL GAINS AND LOSSES.

ARTICLE 117-1: Meaning of terms. 1939-36-9992
I. T. 3312

REVENUE ACT OF 1938.

Interest coupons detached from bonds of the M Company were purchased by A and redeemed by him at maturity for an amount in excess of the cost to him of such coupons. *Held*, the gain derived constitutes ordinary income and not capital gain. The retirement of such coupons is not governed by section 117(f) of the Revenue Act of 1938.

Advice is requested relative to the manner of reporting the income received by A from coupons detached from bonds of the M Company.

The M Company issued bonds dated May —, 1914, due to mature May —, 1944, with 5 per cent and 2 per cent coupons attached. Although both the bonds and the 5 per cent coupons are callable, the 2 per cent coupons are not, and the bonds are bought and sold either with or without the 2 per cent coupons. There has been no default in the payment of the principal of the bonds or the interest thereon.

In January, 1938, A purchased in the open market detached interest coupons of the M Company on which he collected $60 interest in May, 1938, and in November, 1938. It is contended that when A redeemed the coupons and collected $60 thereon in May and November, 1938, he realized a gain of the amount collected in excess of the cost to him of the coupons instead of receiving interest of $60; also, that he should treat these coupons as capital assets and report the gain in Schedule F of his income tax return as gains from the sale or exchange of property rather than as interest on corporation bonds.

Capital gain, as contemplated by the income tax law, means capital gain derived from a "sale or exchange." There was neither a sale nor an exchange of a capital asset when A presented the 2 per cent coupons for payment at their maturity dates. Payment of the face amount of the coupons at maturity constituted merely the satisfaction of an obligation according to its fixed terms. (*John H. Watson, Jr.*, v. *Commissioner*, 27 B. T. A., 463, acquiescence, C. B. XII-2, 14 (1933); *Arthur E. Braun, Trustee*, v. *Commissioner*, 29 B. T. A., 1161, acquiescence, C. B. XIII-2, 3 (1934); and I. T. 1637, C. B. II-1, 36 (1923).) (Cf. I. T. 2678, C. B. XII-1, 117 (1933).)

Furthermore, the payment of the amount due on the coupons does not constitute the retirement of bonds issued by a corporation within the purview of section 117(f) of the Revenue Act of 1938, which provides in part as follows:

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

The statute plainly states that the bonds or other securities contemplated are those "with interest coupons or in registered form." The 2 per cent coupons detached from bonds of the M Company have become bearer instruments of the issuing corporation, but not bonds with interest coupons or bonds in registered form.

In view of the foregoing, it is held that the amount collected by A on the coupons in excess of their cost to him is taxable as ordinary income and not as a capital gain.

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

ARTICLE 118-1: Losses from wash sales of stock or securities. 1939-45-10083 G. C. M. 21496

REVENUE ACT OF 1938.

Notes of the M Company purchased by A and bonds of that corporation which he sold on the same day, which differ with respect to interest rates, interest payment dates, and dates of issuance and maturity, are not substantially identical securities within the meaning of section 118 of the Revenue Act of 1938, even though the notes are secured by a pledge of the bonds.

An opinion is requested whether a loss sustained by the taxpayer, A, on the sale of bonds of the M Company in 1938 is subject to the wash sales provisions of section 118 of the Revenue Act of 1938 by virtue of his purchase of notes of the same corporation. The pertinent provisions of that section are as follows:

SEC. 118. LOSS FROM WASH SALES OF STOCK OR SECURITIES.

(a) In the case of any loss claimed to have been sustained from any sale or other disposition of shares of stock or securities where it appears that, within a period beginning 30 days before the date of such sale or disposition and ending 30 days after such date, the taxpayer has acquired (by purchase or by an exchange upon which the entire amount of gain or loss was recognized by law), or has entered into a contract or option so as to acquire, substantially identical stock or securities, then no deduction for the loss shall be allowed under section 23(e)2; nor shall such deduction be allowed under section 23(f) unless the claim is made by a corporation, a dealer in stocks or securities, and with respect to a transaction made in the ordinary course of its business.

On January 5, 1938, the taxpayer sold $26x$ dollars par value of the M Company's first and refunding 5 per cent bonds of 1966. On the same date he purchased $26x$ dollars par value of the same company's 7 per cent convertible notes of 1932. The sale of the bonds resulted in a loss of $10x$ dollars. The bonds are dated January 1, 1913, and mature in 1966. The notes are dated September 1, 1922, and matured on September 1, 1932, but are in default both as to principal and interest. The interest rate on the bonds is 5 per cent and on the notes, 7 per cent. The interest payment dates on the bonds are January 1 and July 1. The interest payment dates on the notes are March 1 and September 1, although at the present time payments on account of principal and interest are being made on January 1 and July 1 pursuant to court order. The entire issue of the notes is secured by a pledge of y dollars of the bonds. The question presented is whether the bonds and notes are "substantially identical" securities.

In I. T. 1365 (C. B. I-1, 151 (1922)) it was held that the second 4¼ per cent Liberty bonds and the fourth 4¼ per cent Liberty bonds are not substantially identical property within the meaning of section 214(a)5 of the Revenue Act of 1921, the counterpart in

that Act of section 118 of the Revenue Act of 1938. It was stated in that ruling that:

"Substantially identical property" does not include all of one kind or class of property, the meaning given to "property of a like kind" under section 202(c)1, Revenue Act of 1921, but is limited to property which is the same in all important particulars. Important features of securities are their earning power or interest rate; value of assets, tangible and intangible, or security; and conditions of retirement, or, in the case of bonds, the date of maturity. The market values and dates of maturity of the second Liberty Loan 4¼ per cent bonds and the fourth Liberty Loan 4¼ per cent bonds are different. This of itself shows that there is no substantial identity between these bonds.

It was held in I. T. 2672 (C. B. XII-1, 72 (1933)) that two bonds of the same face value issued by the same municipality at the same rate of interest, but of different dates of issue and having different interest payment and maturity dates, were not substantially identical securities. One of the bonds was issued in 1927 and matures in 1977, and the other was issued in 1930 and matures in 1980. The interest payment dates were May 1 and November 1, and April 1 and October 1, respectively.

In I. T. 2734 (C. B. XII-2, 73 (1933)) it was held that the exchange of fourth Liberty Loan 4¼ per cent called or uncalled bonds for new Treasury bonds maturing October 15, 1945, constituted a transaction in which gain or loss would be recognized for income tax purposes, or, in other words, that the bonds were not substantially identical.

Municipal bonds maturing on or before June —, 1943, were exchanged for refunding bonds dated as of the interest payment date next preceding June 30, 1933, and maturing in February —, 1963, subject to redemption at an earlier date. The bonds had the same par value and bore the same rate of interest. They were held not to be substantially identical. (I. T. 2896, C. B. XIV-1, 96 (1935).)

In I. T. 2778 (C. B. XIII-1, 79 (1934)) "Series A" debentures of a corporation were exchanged for "Series B" debentures of the same corporation. The former were issued under an indenture dated in 1929 and the latter under a supplemental indenture dated in 1930. Both series matured on the same date and had the same interest rate and interest payment dates. The only differences were the one year difference in dates of issuance and the difference in the amounts redeemed annually. Of the "Series A" debentures, the amount of $.5x$ dollars was to be redeemed annually and of the "Series B" debentures the amount of $.38x$ dollars. It was held that in view of the fact that the two series had the same maturity dates, the same interest payment dates, and the same rate of interest, they were substantially identical securities.

It is obvious from the Bureau rulings summarized above that the notes and bonds in the instant case are not substantially identical securities. Giving the term the utmost elasticity allowed by the rulings, it can not be held where two securities differ in interest rates, interest payment dates, dates of issuance, and dates of maturity that they are substantially identical. Furthermore, the fact that the notes in the instant case, being in default, might be satisfied from the proceeds of the sale of the pledged bonds does not make the two substantially identical.

In addition to the essential differences in detail between the two, there is also a difference in kind. Notes and bonds are two different kinds of securities. While the exact rights of their holders depend

upon their specific terms, neither in common parlance nor in legal effect are they substantially identical kinds of securities. (See Fletcher Cyc. Corp., volume 6, section 2635, et seq.)

Accordingly, it is the opinion of this office that the notes of the M Company purchased by A and the bonds of that company sold by him are not substantially identical securities. The loss incurred on the sale is, therefore, not subject to the wash sale provisions of section 118 of the Revenue Act of 1938.

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

SUPPLEMENT C.—CREDITS AGAINST TAX.

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

ARTICLE 131–1: Analysis of credit for taxes. 1939–36–9993
I. T. 3313

REVENUE ACTS OF 1932, 1934, 1936, AND 1938.

The 4 per cent tax imposed by the Brazilian Income Tax Act, and covered by article 174, Brazilian Income Tax Regulations, modified to June 20, 1932, is an income tax and may be taken as a credit under section 131 of the Revenue Acts of 1932, 1934, 1936, and 1938.

Advice is requested as to the treatment for Federal income tax purposes of the 4 per cent tax imposed by the Brazilian Government upon certain income remitted to the M Company, a domestic corporation, by the Brazilian branch of that company. The income of the Brazilian branch of the M Company was taxed by the Brazilian Government at the regular corporation tax rate of 6 per cent. An additional tax of 4 per cent was also levied on the profits of the Brazilian branch to the extent that the profits were remitted to the United States. The question is whether this 4 per cent additional tax imposed by the Brazilian Income Tax Act, as set forth in article 174 of the Brazilian Income Tax Regulations, modified to June 20, 1932, is allowable as a credit under section 131 of the Revenue Acts of 1932, 1934, 1936, and 1938.

Article 174 of the regulations referred to provides in part as follows:

A tax of 8 per cent is payable on income belonging to residents abroad, except in the case of profits or dividends which, having already paid proportional tax in the possession of the firm or company, will only pay another 4 per cent when they belong to a resident abroad.

PAR. 1. The tax referred to in this article will be deducted at the actual source, when handing over, remitting, utilizing or crediting the income.

The income tax, as set forth in the regulations approved by Executive Decree 17,390 of July 26, 1926, of the Brazilian Government with modifications made during each succeeding year to and including 1932, applies to all income and profits earned in Brazil. The tax is at the rate of 6 per cent on the net earnings of concerns operating for profit. All income remitted to residents abroad is subject to an 8 per cent tax, unless consisting of dividends or profits already subjected to tax, in which case the rate is 4 per cent.

It is held that the tax of 4 per cent in question is an income tax within the meaning of section 131 of the Revenue Acts of 1932, 1934,

1936, and 1938, and, may be taken as a credit on income tax returns filed by the M Company for the years 1932 to 1938, inclusive, subject, however, to the limitation provisions of section 131 of the respective Acts.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 143-2: Fixed or determinable annual or periodical income. 1939-42-10062 G. C. M. 21575

REVENUE ACTS OF 1936 AND 1938.

Prizes awarded by the M Institute to nonresident alien artists do not come within the meaning of the term "fixed or determinable annual or periodical income." Consequently, withholding is not required with respect thereto.

An opinion is requested whether prizes awarded by the M Institute to nonresident alien artists are subject to withholding under section 143(b) of the Revenue Acts of 1936 and 1938.

The M Institute holds an art exhibit each year in the city of R at which there are exhibited pictures by artists of many nationalities, including citizens of the United States. Cash prizes are awarded to the artists whose pictures are selected by the judges as being the best pictures in the exhibit. These prizes are sometimes won by nonresident alien individuals. The question involved is whether the institute is required to withhold tax from prizes awarded by it to nonresident alien artists for the years 1936, 1937, and 1938.

Section 143(b) of the Revenue Acts of 1936 and 1938 reads in part as follows:

Nonresident aliens.—All persons, in whatever capacity acting, * * * having the control, receipt, custody, disposal, or payment of interest * * * rent, salaries, wages, premiums, * * * or other fixed or determinable annual or periodical gains, profits, and income, of any nonresident alien individual, * * * shall * * * deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof * * *.

Article 143-2 of Regulations 94 and 101 reads in part as follows:

Fixed or determinable annual or periodical income.—Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments. * * *

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. * * *

In S. M. 975 (C. B. 1, 184 (1919)) it was held that amounts won in horse races in the United States by horses belonging to a nonresident individual were not subject to withholding under the Revenue Act of 1918. Such amounts were considered not to constitute "annual or periodical income." In O. D. 907 (C. B. 4, 232 (1921)) it was held that a commission paid on account of a single transaction was not "fixed or determinable annual or periodical income" within the meaning of section 221(a) of the Revenue Act of 1918.

It is the opinion of this office that the prizes awarded by the M Institute to nonresident alien artists during the years 1936, 1937, and 1938 do not come within the meaning of the term "fixed or determinable annual or periodical income" and are not, therefore, subject to withholding under section 143(b) of the Revenue Acts of 1936 and 1938.

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

SUPPLEMENT G.—INSURANCE COMPANIES.

SECTION 204(e).—INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL: DOUBLE DEDUCTIONS.

REVENUE ACT OF 1938.

Tax-exempt interest, and expenses allocable thereto, in cases of resident foreign insurance companies. (See I. T. 3297, page 137.)

SUPPLEMENT H.—NONRESIDENT ALIEN INDIVIDUALS.

SECTION 212.—GROSS INCOME.

ARTICLE 212–2: Exclusion of earnings of foreign ships from gross income. 1939–30–9922 I. T. 3300

REVENUE ACT OF 1938.

Trinidad does not satisfy the equivalent exemption requirements of sections 212(b) and 231(d) of the Revenue Act of 1938.

SUPPLEMENT J.—POSSESSIONS OF THE UNITED STATES.

SECTION 251.—INCOME FROM SOURCES WITHIN POSSESSIONS OF UNITED STATES.

ARTICLE 251–1: Citizens of the United States and domestic corporations deriving income from sources within a possession of the United States. (Also Section 25, Article 25–3.) 1939–40–10041 I. T. 3327

REVENUE ACT OF 1938.

The provisions of section 251(f) of the Revenue Act of 1938 preclude the allowance to a citizen of the United States "entitled to the benefits" of section 251 of a personal exemption of more than $1,000. A taxpayer "entitled to the benefits" of section 251 of the Revenue Act of 1938 may not waive such benefits in order to obtain credit for the personal exemption prescribed in section 25(b) of that Act.

Advice is requested as to the personal exemption to be allowed A, a citizen of the United States, for the calendar year 1938.

A's income tax return for the year 1938 discloses that A is an officer in the United States Army and that from January 1, 1938, to November 1, 1938, he was on duty within the United States, receiving for that period a salary of x dollars which he reported as taxable income in his return. In the last two months of that year he served with the Army in a possession of the United States, and he claims that his salary for those two months is exempt from Federal income tax under the provisions of section 251 of the Revenue Act of 1938. The taxpayer was married and living with his wife during the entire taxable year.

Section 251 of the Revenue Act of 1938 provides as follows:

(a) *General rule.*—In the case of citizens of the United States or domestic corporations, satisfying the following conditions, gross income means only gross income from sources within the United States—

(1) If 80 per centum or more of the gross income of such citizen or domestic corporation (computed without the benefit of this section), for the 3-year period immediately preceding the close of the taxable year (or for such part of such period immediately preceding the close of such taxable year as may be applicable) was derived from sources within a possession of the United States; and

* * * * * * *

(3) If, in case of such citizen, 50 per centum or more of his gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States either on his own account or as an employee or agent of another.

* * * * * * *

(f) *Credits against net income.*—A citizen of the United States entitled to the benefits of this section shall be allowed a personal exemption of only $1,000 and shall not be allowed the credit for dependents provided in section 25(b)(2).

The income received by A for the months of November and December, 1938, meets the requirements of section 251, supra, and, therefore, he is entitled to exemption from Federal income tax on his salary for that period.

The personal exemption to which A is entitled is $1,000. The provisions of section 251(f), supra, are mandatory and preclude the taxpayer from waiving the "benefits" of section 251 and claiming the personal exemption of $2,500, prescribed in section 25(b) of the Revenue Act of 1938, even though such action would reduce his tax liability.

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. 1939-46-10088
G. C. M. 20960

REVENUE ACT OF 1936 AND PRIOR REVENUE ACTS.

The decision of the Circuit Court of Appeals for the Fifth Circuit in *Stewart* v. *Commissioner* (95 Fed. (2d), 821), relating to a husband's right to convey community income to his wife under the laws of Texas, does not require modification of G. C. M. 18884 (C. B. 1937-2, 58), relating to the community property laws of California, which ruling was based on *Helvering* v. *Hickman* (70 Fed. (2d), 985).

An opinion is requested whether, in view of the decision in *Stewart* v. *Commissioner* (95 Fed. (2d), 821), any modification should be made of G. C. M. 18884 (C. B. 1937-2, 58) holding that the decision in *Helvering* v. *Hickman* (70 Fed. (2d), 985) should be followed by the Bureau in certain California cases.

In *Helvering* v. *Hickman*, supra, it appeared that a husband and wife residing in California orally agreed in 1907 that the earnings of each should be and remain the separate property of the earner. Since that time they adhered to the agreement, each maintaining separate bank accounts, making separate investments, and paying his or her own expenses. For the year 1923 the Bureau took the position that the earnings of the wife constituted part of the taxable income of the husband regardless of the agreement. The Board of Tax Appeals held that the husband was not taxable upon the income of the wife. That decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit. The court held that under the law of California, as decided by the highest court of that State, an agreement between a husband and wife that the future earnings of each shall be the separate property of the earner is valid and enforceable and has the legal effect of converting such earnings from the status of community property to that of separate property upon the moment of acquisition. Relying principally upon the decision of the United States Supreme Court in *Poe* v. *Seaborn* (282 U. S., 101, Ct. D. 259, C. B. IX-2, 202 (1930)) to the effect that earnings should be taxed upon the basis of ownership, the court further held that since, in view of the agreement, the earnings of the wife never became community property, they should not be taxed as such.

In G. C. M. 18884, supra, it was stated:

This office * * * has reached the conclusion that the decision in *Helvering* v. *Hickman*, supra, should be followed in determining the tax liability of husband and wife residing in California who have entered into a valid

agreement providing that the earnings of each shall be the separate property of the earner. * * *

G. C. M. 9938, supra, G. C. M. 9953, supra, and G. C. M. 14198, supra, are revoked, and all memoranda of this office inconsistent herewith are modified accordingly. It is recommended that nonacquiescences in Board of Tax Appeals decisions on this issue be withdrawn.

In *Stewart* v. *Commissioner*, supra, it appeared that Mrs. Stewart, a resident of Texas, upon the death of her first husband in 1922, acquired a substantial estate consisting of real and personal property. In 1925 she married Harry Stewart, from whom she was divorced in 1934. On March 19, 1927, by written instrument, her husband conveyed, assigned, and released to her all of his interest in their community property and all income therefrom theretofore received, or which thereafter might be received by either of them or to which either of them might be entitled. The instrument also provided that the intention of the parties was to make all of such property the separate property of the wife. Treating the execution of this instrument as having terminated their community status under Texas law with respect to her property, the husband and wife filed separate returns for the year 1930. She reported all of the income from her separate estate, deducted therefrom all of the expenses and other items permitted under the applicable Revenue Act, and returned individually the net income thus computed.

The Commissioner treated the income of husband and wife as community income irrespective of the execution of the instrument. The Board of Tax Appeals affirmed the Commissioner's determination. (*Mellie Esperson Stewart* v. *Commissioner*, 35 B. T. A., 406.) On appeal to the Fifth Circuit, the court held that although under Texas law a husband may convey community property to his wife as a separate estate it must be in existence at the time when the conveyance is made. The court thus held that the instrument by which the husband attempted to assign his share of the community income thereafter received by the wife during coverture was ineffective under the law of Texas. Consequently, when such income was thereafter received, the husband had a one-half interest therein (*Hopkins* v. *Bacon*, 282 U. S., 122), which, under the principle announced in *Lucas* v. *Earl* (281 U. S., 111), could not be assigned so as to relieve him of liability for income taxes thereon. The court accordingly held that the income and deductions must be apportioned in equal parts between the husband and wife, thus affirming the decision of the Board of Tax Appeals. Application for writ of certiorari was not filed.

A careful examination of the decisions in the Hickman and Stewart cases indicates that, under the theory upon which they were decided, there is no conflict between them. It is well recognized that property relationships between husband and wife in community property States, and the effect of agreements with respect to such relationships, are determined by the law of the State in which they reside. (*Poe* v. *Seaborn*, supra; cf. *Anderson* v. *Commissioner*, 78 Fed. (2d), 636.) Two different States were involved in the Hickman and Stewart cases. Under the law of one State (California), it is held that a husband and wife can sever the community relationship with respect to future income. (*Wren* v. *Wren*, 100 Cal., 276, 34 Pac., 775.) Under the law of the other (Texas), such an attempted severance will not be given

legal effect. (*Frame* v. *Frame*, 120 Texas, 61, 36 S. W. (2d), 152.) The court in the Hickman case, supra, decided that, since under the California law a husband and wife can by agreement change the community relationship as to future income, there is no reason why such income should be reported on a community basis for Federal income tax purposes. On the other hand, the court in the Stewart case, supra, decided that, since under the Texas law a husband and wife can not by agreement change the community relationship as to future income, such income must be reported on a community basis.

It is, therefore, the opinion of this office that the decision in the Stewart case does not require a modification of G. C. M. 18884, supra, to the effect that the Hickman case should be followed in substantially similar situations arising in California. However, in view of the decision in the Stewart case, the principle therein announced should be followed with regard to agreements between spouses in the State of Texas whereby an attempt is made to sever the community relationship with respect to future community income.

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

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

ARTICLE 22(b)(2)-2: Annuities. 1939-39-10026
I. T. 3322

REVENUE ACT OF 1936.

Taxability of payments received under the provisions of a refund annuity contract.
I. T. 3140 (C. B. 1937-2, 62) modified.

Further consideration has been given to the question of the taxable status of certain payments made to A in 1936 under a refund annuity contract. This question was previously considered in I. T. 3140 (C. B. 1937-2, 62).

Pursuant to the terms of a refund annuity contract, A became payee of certain periodic payments to be made during the life of B, his wife, who purchased the contract and was designated as the annuitant. The contract further provided that the agreed periodic payments were to continue after the death of B until the aggregate payments received equaled the consideration paid for the annuity contract. The rights of the wife (B) as annuitant were contingent upon her outliving her husband and were lost by reason of her death during his lifetime.

As payee of the annuity during the life of B, A was liable to tax on such payments in the manner and to the extent provided by section 22(b)2 of the Revenue Act of 1936, pertaining to the method of taxing amounts received as an annuity. By the express terms of the contract, however, such payments were to be made only "during the lifetime of the said B." Upon her death, the periodic payments were continued by virtue of the alternative or refund provisions of the contract. The question presented is the proper treatment for Federal income tax purposes of the payments received after the death of B.

It is evident that the payee (A) acquired, upon issuance of the contract, an indefeasible right to the payments to be made thereunder

by reason of the relinquishment by the purchaser (B) of both the right to change the beneficiary and the right to demand the surrender value of the contract. This feature of the instant situation distinguishes it from one in which the annuity contracts are revocable at the option of the purchaser. (Cf. *Guaranty Trust Co. of New York, Executor under the Last Will and Testament of Roxy M. Smith*, v. *Commissioner*, 16 B. T. A., 314, and *Chemical Bank & Trust Co. et al., Executors of the Estate of Frank J. Saxe*, v. *Commissioner*, 37 B. T. A., 535, acquiescence, C. B. 1939-1 (Part 1), 31.) This situation is further distinguishable from that in the Smith case, supra, by reason of the fact that the rights under the present contract were acquired by gift during the lifetime of the donor and not as part of the estate of the decedent passing upon death. The instant transaction is, therefore, to be treated for Federal tax purposes as a transfer or gift *inter vivos*. The basis for determining the tax due under the existing circumstances is cost to the donor, whereas the value of a right passing to a refund beneficiary upon the death of another (as in the Smith case) is the commuted value of the future payments as of the date of death.

It is, accordingly, held that A, the beneficiary under the contract, is not subject to tax with respect to the refund payments made thereunder until the payments made in the future, when added to the payments previously received tax-free, equal the consideration paid for the contract.

I. T. 3140 (C. B. 1937-2, 62) is modified to the extent that it conflicts with the foregoing conclusion.

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

ARTICLE 23(a)-9: Pensions—Compensation for injuries.

REVENUE ACT OF 1936.

Payments by corporation to widow of deceased officer-stockholder. (Sec. I. T. 3329, page 153.)

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

ARTICLE 23(c)-1: Taxes.

REVENUE ACT OF 1936.

Occupation tax imposed by State of Utah in 1937 on persons engaged in mining. (See I. T. 3307, page 156.)

ARTICLE 23(c)-1: Taxes.

REVENUE ACT OF 1936.

Mexican tax on participations received from oil production. (See I. T. 3320, page 191.)

SECTION 23(d).—DEDUCTIONS FROM GROSS INCOME: TAXES OF SHAREHOLDER PAID BY CORPORATION.

ARTICLE 23(d)-1: Tax on bank or other stock. 1939-29-9918
G. C. M. 21329

REVENUE ACT OF 1936.

The tax on bank shares in Pennsylvania, which is a tax on the shareholders although paid by the bank, is an allowable deduction to the bank under section 23(d) of the Revenue Act of 1936, for the taxable year in which paid, regardless of the bank's method of accounting.

An opinion is requested whether Pennsylvania banks employing the accrual basis of accounting may deduct the Pennsylvania tax on their shares paid in 1937 on their 1937 Federal income tax returns.

Deduction of taxes of shareholders paid by corporations is provided for by section 23(d) of the Revenue Act of 1936 and article 23(d)-1 of Regulations 94, which read as follows:

Section 23(d):

Taxes of shareholder paid by corporation.—The deduction for taxes allowed by subsection (c) shall be allowed to a corporation in the case of taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder, but in such cases no deduction shall be allowed the shareholder for the amount of such taxes.

Article 23(d)-1:

Tax on bank or other stock.—Banks or other corporations paying taxes assessed against their shareholders on account of their ownership of the shares of stock issued by such corporations without reimbursement from such shareholders may deduct the amount of taxes so paid. The Act specifically provides, however, that in such cases the shareholders may not deduct the amount of the taxes. The amount so paid should not be included in the income of the shareholder.

The tax in question is a tax on the shareholders and not on the bank. The banks are required to file reports on or before February 15, showing the actual value of their shares as of the preceding December 31. The Commonwealth of Pennsylvania makes a settlement of the tax based upon the actual value of the shares as of the preceding December 31, but no tax is due the Commonwealth until 60 days after the settlement of the tax has been made.

The taxable year of the Pennsylvania tax on shares of banks is the calendar year immediately preceding the filing of the return; consequently, the tax settled and collected in 1937 is a tax for the preceding calendar year ended December 31, 1936. Settlement of the tax is made by the department of revenue in accordance with the provisions of the fiscal code applicable to State taxes in general. After such settlement the department sends a copy thereof to the bank showing the amount of tax due on the shares. The settlement must be posted in a conspicuous place in the bank, so as to give notice to the shareholders of the amount of tax. The officers of any bank, on behalf of its shareholders, or any shareholder himself, may appeal to the department of revenue within 90 days after the date of settlement. (Fiscal Code, Title 72, Purdon's Penna. Stats. Anno., section 807.)

Section 1951 of title 72, Purdon's Penna. Stats. Annotated, as amended, provides as follows:

It shall be the duty of every bank or savings institution, within a period of 60 days after the date of such settlement by the department of revenue, to collect the amount of said tax from its shareholders and to pay the same to the State treasurer through the department of revenue.

It is plain that the tax is a tax upon shareholders and not upon banks, and it has been specifically so held in *Commonwealth* v. *Schuylkill Trust Co.* (315 Pa., 429, 173 Atl., 309), not overruled on this point by *Schuylkill Trust Co.* v. *Pennsylvania* (296 U. S., 113). Such being the case, payment of the tax by a bank is purely voluntary and can not be considered the liability of the bank.

It is the opinion of this office, therefore, that the tax on bank shares in Pennsylvania, which is a tax on the shareholders although paid by the bank, is an allowable deduction to the bank under section 23(d) of the Revenue Act of 1936, for the taxable year in which paid, regardless of the bank's method of accounting.

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

SECTION 24.—ITEMS NOT DEDUCTIBLE.

ARTICLE 24-4: Amounts allocable to exempt income, other than interest.

REVENUE ACT OF 1936.

Tax-exempt interest, and expenses allocable thereto, in cases of resident foreign insurance companies. (See I. T. 3297, page 137.)

ARTICLE 24-5: Losses from sales between members of family and between individuals and corporations. 1939-45-10084 I. T. 3334

REVENUE ACT OF 1936.

In the year 1936, A, a majority stockholder of the M Company, a "family" corporation, transferred to that company certain stocks in liquidation of his indebtedness to the company. On some of the transfers gains were realized and on others losses were sustained. *Held*, the gains realized constitute taxable income but the losses sustained are not deductible in view of the provisions of section 24(a)6 of the Revenue Act of 1936.

Advice is requested relative to the deductibility, for Federal income tax purposes, of the losses sustained by A, a majority stockholder of the M Company, a "family" corporation, through the transfer of several blocks of stock to the corporation in liquidation of his indebtedness thereto where gains were also realized on other similar transfers.

During the year 1936, A was president of the M Company and owned more than 50 per cent of the stock of the company, the remain-

der of the stock being owned by members of his family. A owed the corporation as of December 31, 1935, the sum of $71x$ dollars. During the year 1936, he transferred to the corporation in partial liquidation of the debt shares of stock at an aggregate price of $64x$ dollars. The transaction resulted in a gain with respect to some of the shares of stock and a loss with respect to other shares. Computing the gain or loss on the sale of each block of stock separately, it is found that losses aggregated $10x$ dollars and that gains aggregated $9x$ dollars; and that, considering the transfers as a whole, a net loss of x dollars was sustained.

Inasmuch as the M Company is a " family " corporation, and losses sustained on the sale or exchange of stocks by A to the corporation are not deductible in view of the provisions of section 24(a)6 of the Revenue Act of 1936, the question has been raised as to whether all of the stocks transferred should be considered as a unit resulting in a net loss of x dollars on the transfer, or whether the transfer of each block of stock should be considered as a separate transaction and the gains derived be reported as income but the losses sustained not allowed as a deduction.

In view of the specific provisions of section 24(a)6 of the Revenue Act of 1936 to the effect that no deduction shall in any case be allowed in respect of losses " from sales or exchanges of property, directly or indirectly, * * * between an individual and a corporation in which such individual owns, directly or indirectly, more than 50 per centum in value of the outstanding stock," it is apparent that the losses sustained by A in the transfer to the M Company of particular blocks of stock may not be offset against the gains derived from the transfer to that company of other blocks of stock, thereby reducing the amount of the taxable income derived from the transfers, and, in effect, allowing losses specifically prohibited by statute. Accordingly, the aggregate gain of $9x$ dollars represents taxable income to A and no deduction from gross income is allowable with respect to the losses of $10x$ dollars.

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 25-3: Amount of personal exemption allowable. 1939-43-10070 I. T. 3332

REVENUE ACT OF 1936.

Where a husband filed a timely return and claimed the full joint personal exemption of $2,500 and his wife filed a delinquent return for the same taxable year, the portion of the joint personal exemption not required to render the husband's return nontaxable is allowable to the wife as a credit against her net income.

Advice is requested whether a wife who filed a delinquent return is entitled to that portion of the joint personal exemption which is not required by the husband to render his income, reported in a timely return, nontaxable.

On March 7, 1938, A, the husband, filed an income tax return, Form 1040A, for the taxable year 1937 which showed that he was married and living with his wife during the entire taxable year. In answer to the question whether the income or deductions of both husband and wife were included in the return he answered "No." The return disclosed a net income of $3,125.08 and an earned income credit of $312.50, and A claimed the full joint personal exemption of $2,500 and a credit of $400 for a dependent. Thereafter, it was ascertained that the taxpayer's wife, B, had taxable income and, since such income was not included in the husband's return, she was requested to file a return. She executed and filed a delinquent return on Form 1040A. B claims that she is entitled to a portion of the joint personal exemption.

Upon examination of the husband's return, it was found that he was entitled to a credit of $800 for dependents instead of the $400 claimed, and that he required only $2,012.58 of the joint personal exemption to render his return nontaxable.

Section 25(b) of the 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.*—* * * A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $2,500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.

Article 25–3 of Regulations 94 provides in part:

Amount of personal exemption allowable.—* * * A husband and wife living together have but one personal exemption, which is $2,500. If they make separate returns, each may claim one-half of the personal exemption, or such exemption may, in accordance with an agreement entered into by them, be taken by either or divided between them in any proportion.

By allowing A a credit of $800 for dependents instead of the $400 credit originally claimed by him, only $2,012.58 of the joint personal exemption of $2,500 is required to render his return nontaxable. Under these circumstances, it is held that the portion of the joint personal exemption not used as a credit in the husband's return ($487.42) is allowable to the wife as a credit against her net income. (Cf. I. T. 2090, C. B. III–2, 163 (1924).)

Attention was called in this case to the decision of the Board of Tax Appeals in *Mrs. Carmen V. Green* v. *Commissioner* (11 B. T. A., 184), in which the Board held (syllabus):

Where a wife makes no return of her income and it is not reported by her husband in a joint return, and the entire personal exemption is allowed the husband, she is not entitled to claim a part of the personal exemption in a return filed for her by the Commissioner under section 3176 R. S.

The decision in the Green case is not applicable to a case (such as the instant one) in which the entire exemption has not been used by either spouse and where both the husband and the wife filed separate returns, even though the return of one spouse was delinquent.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

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

ARTICLE 43-1: "Paid or incurred" and "paid or accrued." 1939-34-9968 I. T. 3309

REVENUE ACT OF 1936.

The British national defense contribution tax imposed under section 19, Part III of the British Finance Act, 1937 (1 Edw. 8 and 1 Geo. 6, ch. 54), is accruable, for Federal income tax purposes, for the United States taxable year in which falls the end of the British chargeable accounting period upon the profits of which the national defense contribution tax is subsequently computed and assessed. For example, such tax on profits for the chargeable accounting period April 1, 1937, to November 30, 1937, is accruable in the Federal income tax return of a corporation for the calendar year 1937.

Advice is requested as to the year of accrual of the British national defense contribution tax assessed against and payable by the London branch of the M Company in 1938.

The M Company employs the accrual method of accounting and files its Federal income tax returns on the basis of the calendar year.

The tax in question is imposed under the British Finance Act of 1937, which was passed July 30, 1937. The tax, assessed on the London branch of the M Company on October 5, 1938, and payable on or before November 4, 1938, is based on the earnings of the branch for the period of eight months, April 1, 1937, to November 30, 1937, the latter date being the end of the accounting year of that branch, which period was used by the British tax authorities in determining the assessment for the regular tax on the income of the branch.

The national defense contribution tax is provided for under Part III of the British Finance Act, 1937 (1 Edw. 8 and 1 Geo. 6, ch. 54). Pertinent sections of the act read in part as follows:

19.-(1) There shall be charged, on the profits arising in each chargeable accounting period falling within the five years beginning on the 1st day of April, 1937, from any trade or business to which this section applies, a tax (to be called the "national defense contribution") of an amount equal to 5 per cent of those profits in a case where the trade or business is carried on by a body corporate and 4 per cent of those profits in any other case.

* * * * * * *

(2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom.

* * * * * * *

20.-(1) For the purpose of the national defense contribution, the profits arising from a trade or business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of the fourth schedule to this act.

* * * * * * *

(2) For the purpose of the national defense contribution * * * the expression "chargeable accounting period" means—

(i) any accounting period determined as aforesaid which falls wholly within the five years beginning on the 1st day of April, 1937; and

(ii) in a case where any such accounting period falls partly within and partly without the said five years, such part of that period as falls within those five years.

* * * * * * *

24.-(1) The national defense contribution shall be assessed and collected by the Commissioners of Inland Revenue in accordance with the provisions of Part I of the fifth schedule to this act, and shall be due and payable at the expiration of one month from the date of the assessment * * *.

* * * * * * *

25.-(1) The amount of the national defense contribution payable in respect of the profits arising from a trade or business in any chargeable accounting period shall be allowed to be deducted as an expense in computing for the purpose of income tax the profits and gains arising from that trade or business in that period.

Section 9 of the fourth schedule reads as follows:

9. No deduction shall be made on account of liability to pay or the payment of United Kingdom income tax or the national defense contribution.

The Bureau has held that British income taxes on gains and profits accrue on the first day of the British tax year of assessment, for it appears that under the British income tax act, liability for the payment of British taxes is dependent upon whether the British taxpayer continues in business during the year of assessment. (See G. C. M. 10613, C. B. XI-1, 173 (1932).) It has also been held by the Bureau that the national defense contribution is an income tax. (See I. T. 3171, C. B. 1938-1, 192.) Although the computation of profits for the purpose of the national defense contribution is based on income tax principles, there is no provision that liability for the payment of the national defense contribution is dependent upon whether the taxpayer continues in business during the year of assessment, and, therefore, the conclusion as to the accrual date of taxes under the British income tax act contained in G. C. M. 10613, supra, is not applicable to the national defense contribution tax.

As the national defense contribution is an income tax, a credit may be claimed for such taxes paid or accrued. Inasmuch as such tax is imposed on profits for the chargeable accounting period of the British taxpayer, the tax becomes a liability of the taxpayer on the last day of his accounting period when the question of profit or no profit is definitely determinable.

It is held that the national defense contribution tax, imposed under section 19, Part III of the Finance Act, 1937, may be accrued, for Federal income tax purposes, for the United States taxable year in which falls the end of the British chargeable accounting period upon the profits of which the national defense contribution tax is subsequently computed and assessed.

Inasmuch as the books of the M Company are kept on the accrual basis and it files its Federal income tax returns on the calendar year basis, the national defense contribution tax assessed against and payable by its London branch on or before November 4, 1938, on profits for the chargeable accounting period of April 1, 1937, to November 30, 1937, is accruable in its Federal income tax return for the calendar year 1937.

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.

Determination of purpose of an organization. (See G. C. M. 21610, page 103.)

ARTICLE 101(6)-1: Religious, charitable, scientific, literary, and educational organizations and community chests. 1939-42-10063 I. T. 3330

REVENUE ACT OF 1936.

The M Organization, which conducts study courses for the benefit of individuals connected with banking institutions of the city of S and vicinity, is entitled to exemption from Federal income taxation under the provisions of section 101(6) of the Revenue Act of 1936, its entertainment features being merely incidental for the purpose of stimulating interest in its educational activities.

Advice is requested whether the M Organization is entitled to exemption from Federal income taxation under the provisions of section 101(6) of the Revenue Act of 1936 as an educational organization.

The M Organization was incorporated under the laws of the State of R for the purpose of promoting the educational welfare of individuals connected with banking institutions of the city of S and vicinity. No stock is outstanding or has ever been issued and no part of its earnings is credited to surplus or inures to the benefit of any individual. It does not, directly or indirectly, carry on propaganda or otherwise attempt to influence legislation. Competent instructors are employed and classrooms are furnished for the presentation of the study courses prescribed for the organization. Its activities are carried on through committees designated as educational, membership, and entertainment. The entertainment committee is an auxiliary to the other committees with the essential and primary purpose of conducting entertainment to create and stimulate interest in the educational purposes of the organization, its activities being merely incidental to the primary purpose of education. Textbooks and books for collateral reading are purchased for resale at cost to students taking the several courses. A nonprofit-making professional magazine containing items of interest and assistance to the members is published as a part of the activity undertaken to stimulate interest in membership and in the educational phases of the organization.

During the current scholastic year, courses are offered in the various banking subjects with instruction by the N University and O University professors and specialists in laws affecting banks. Credit is given by these universities for the hours spent in such work. While it is not necessary to be a banker in order to take one or more of the courses, membership in the organization is required of a person desiring registration as a student. Attendance records are kept and a student is not permitted to take a final examination unless he has attended 80 per cent of all lectures. Final examinations are given in each course and a passing mark of 75 per cent is required. The present membership is composed of employees of banks of the community and banks located within 25 miles of the city of S. The income of the organization is derived principally from membership dues, tuition, and contributions from the banks of the city of S and vicinity and is disbursed for operating expenses.

Based upon the foregoing, it is held that the M Organization is entitled to exemption under the provisions of section 101(6) of the Revenue Act of 1936. This ruling is also applicable under the corresponding provisions of the Revenue Act of 1938 and of the Internal Revenue Code.

ARTICLE 101(9)-1: Social clubs.

REVENUE ACT OF 1936.

Club leasing its physical property to another club. (See I. T. 3339, page 106.)

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 111.—DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

ARTICLE 111-1: Computation of gain or loss. 1939-37-10007
(Also Section 117, Article 117-1.) I. T. 3316

REVENUE ACTS OF 1934 AND 1936.

The transfer of securities by the trustees of a testamentary trust created under the will of A to the beneficiary of the trust in satisfaction of annuity payments provided for in the will, such transfer having been made at a price in excess of the basis of the securities in the hands of the trust, resulted in gain to the trust (subject to the capital gain provisions), measured by the difference between the basis of the securities in the hands of the trust and the amount of the obligation satisfied by the transfer.

Advice is requested whether transfers of shares of stock by the trustees of the trust created under the will of A, in satisfaction of an annuity provided for in the will, should be considered as sales of such stock resulting in gain to the trust for Federal income tax purposes.

Under the will of A, the trustees were authorized to sell the trust property for the purpose of reinvesting the proceeds, or of making a division of the trust estate, or in carrying out any provision of such

trust. The testator directed that 7x dollars be paid monthly to his wife out of income of the trust or, if necessary, out of the corpus, so long as she remains unmarried. During the years 1935, 1936, and 1937, due to a shortage of cash, the trustees of the testamentary trust transferred certain shares of stock, a part of the corpus of the estate, to the widow in satisfaction of the monthly annuity of 7x dollars payable to her. The price at which the stock was transferred was substantially in excess of the basis of such shares in the hands of the trust. The question presented is whether the transfers resulted in taxable gains to the trust, and, if so, the measure and treatment of such gains for Federal income tax purposes.

It has been held that the payment by a testamentary trustee of a general legacy by the transfer of securities at market value to the legatee constitutes a sale or other disposition of the securities from which a gain or loss is derived, and that the amount realized therefrom is the amount of the obligation discharged by the transfer. (*Suisman* v. *Eaton*, 15 F. Supp., 113, affirmed, 83 F. (2d), 1019, certiorari denied, 299 U. S., 573.) In the case of *Betty Rogers et al.* v. *Commissioner* (103 Fed. (2d), 790, affirming 37 B. T. A., 897), the court held that the conveyance of property in consideration of the cancellation of a debt was a "sale" of property and that the transaction resulted in a capital loss.

It is held, therefore, that the transfer of the securities in satisfaction of the annuity payments here in question resulted in a capital gain to the trust equal to the difference between the basis of the securities in the hands of the trustees and the amount of the obligation satisfied by the transfer. The gain must be included in the gross income of the trust to the extent provided in section 117(a) of the Revenue Acts of 1934 and 1936.

SECTION 112(f).—RECOGNITION OF GAIN OR LOSS: INVOLUNTARY CONVERSIONS.

ARTICLE 112(f)-1: Reinvestment of proceeds of involuntary conversion.

REVENUE ACT OF 1936.

Article 112(f)-1, Regulations 94, amended. (See T. D. 4951, page 110.)

SECTION 117.—CAPITAL GAINS AND LOSSES.

ARTICLE 117-1: Meaning of capital assets. 1939-35-9981
G. C. M. 21497

REVENUE ACTS OF 1934 AND 1936.

A bank, mortgage finance company, or a building and loan association which is offering for sale parcels of real estate on which it has been compelled to foreclose is holding property "primarily for sale to customers in the ordinary course of * * * trade or business" within the provisions of section 117(b) of the Revenue Acts of 1934 and 1936, and the gains or losses incurred in such sales are to be treated as ordinary gains or losses and not as capital gains or losses.

An opinion is requested whether, under the Revenue Acts of 1934 and 1936, gains derived or losses sustained by building and loan associations, mortgage finance companies, and banks in disposing of real estate which has been taken over by such institutions on default of mortgage loans constitute capital gains or losses.

It is contended that properties thus disposed of are not capital assets since, as a necessary incident of the business of making loans on real estate and as authorized and contemplated under their corporate charters, such properties are acquired and held primarily for sale.

Section 117(b) of the Revenue Acts of 1934 and 1936 provides as follows:

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

Under the above provision of law, real property is not included within the meaning of the clause "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year." (*John S. Phipps* v. *Commissioner*, 19 B. T. A., 1293; I. T. 2555, C. B. X-1, 306 (1931).) Accordingly, the question remains whether the real estate involved in the instant case is properly to be considered as "property held * * * primarily for sale to customers in the ordinary course of * * * trade or business."

Prior to the Revenue Act of 1934, the provision read (section 101(c)8 of the Revenue Act of 1932) "property held * * * primarily for sale in the course of * * * trade or business." Under this provision, real property taken over on foreclosure by building and loan associations, mortgage finance companies, and banks and held by them for sale would be included. (Cf. *Harr.* v. *MacLaughlin*, 15 Fed. Supp., 1004.) The legislative history of section 117(b) of the Revenue Act of 1934 indicates that the words "to customers" were added for the purpose of making it impossible for people trading on their own account to claim that they were not subject to the provisions of section 117. Article 117-1 of Regulations 101, relating to the Revenue Act of 1938, refers to a dealer in real estate as holding land "primarily for sale to customers." (Cf. *Weinhouse* v. *Cronin*, 68 Conn., 250, 36 Atl., 45, and *Julius Goodman* v. *Commissioner*, 40 B. T. A., 22.)

It is the opinion of this office that a bank, mortgage finance company, or a building and loan association which is offering for sale parcels of real estate on which it has been compelled to foreclose is holding property "primarily for sale to customers in the ordinary course of * * * trade or business" within the provisions of section 117(b) of the Revenue Acts of 1934 and 1936, and that gains or losses incurred in such sales are to be treated as ordinary gains or losses and not as capital gains or losses.

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

ARTICLE 117–1: Meaning of capital assets.

REVENUE ACT OF 1936.

Settlement of pecuniary legacies by the transfer of securities belonging to a trust. (See I. T. 3316, page 186.)

ARTICLE 117–1: Meaning of capital assets. 1939–48–10104
I. T. 3336

REVENUE ACTS OF 1934 AND 1936.

Applicability of G. C. M. 21497 (page 187, this Bulletin) to insurance companies other than life insurance companies.

G. C. M. 21497 (page 187, this Bulletin), which holds that a bank, mortgage finance company, or a building and loan association which is offering for sale parcels of real estate on which it has been compelled to foreclose is holding property "primarily for sale to customers in the ordinary course of * * * trade or business," within the provisions of section 117(b) of the Revenue Acts of 1934 and 1936, and that the gains or losses incurred on such sales are to be treated as ordinary gains or losses and not as capital gains or losses, is applicable under similar circumstances to insurance companies other than life insurance companies.

ARTICLE 117–3: Determination of period for which capital assets are held 1939–34–9969
G. C. M. 21507

REVENUE ACT OF 1936.

In determining the percentage of the capital gain realized on the sale of a patent to be reported for taxation under section 117 of the Revenue Act of 1936, the date on which the original invention forming the basis of the patent was reduced to actual practice should be used as the beginning of the period for which the patent was held. Recommended that I. T. 3112 (C. B. 1937–2, 139) be revoked.

In view of the decision of the Board of Tax Appeals in *Samuel E. Diescher et al.* v. *Commissioner* (36 B. T. A., 732), advice has been requested as to the correctness of I. T. 3112 (C. B. 1937–2, 139), in which it was held that in determining the percentage of the capital gain realized on the sale of a patent to be reported for taxation under section 117 of the Revenue Act of 1936, the date on which letters patent were issued should be used as the beginning of the period for which the patent was held.

In *Samuel E. Diescher*, supra, it was held that in determining whether certain patents which were transferred had been held for more than two years, and hence constituted capital assets within the meaning of section 101 of the Revenue Act of 1932, the date on which the original invention forming the basis for the patent was reduced to actual practice should be used as the beginning of the period. In that case the Board stated in part:

* * * As to certain others among the inventions, patents had not been applied for at the time of the transfer or had not been issued two years prior to that time. However, some of these inventions, we have found, were developed and perfected more than two years prior to their transfer to the Diescher Tube

Mills, Inc., and these inventions had been embodied in a mill constructed and operated by the petitioners at the A. M. Byers Co. plant, in which their feasibility and value were demonstrated. They were thus reduced to practice more than two years prior to their exchange.

Under the common law, the property right of the inventor, to make, use and vend, was recognized. The patents issued under statute are merely the grant of the right to exclude others from that use for a period of 17 years. The inventor's property right in his invention does not come into being upon his obtaining of a patent but exists prior to that time upon his reduction of an original invention to actual practice. (*Crown Die & Tool Co.* v. *Nye Tool & Machine Works*, 261 U. S., 24; *Six Wheel Corporation* v. *Sterling Motor Truck Co.*, 50 Fed. (2d), 568.) As the court said in the last cited case—

"From the foregoing, it will be seen that the irreducible quantum of the inventor's right in the res [the invention], even under the common law, is that of making, using and vending. The Federal Constitution and the statutes passed thereunder simply make that right exclusive. The statutes certainly do not curtail the natural right; they enlarge it."

We think, therefore, that petitioners had a property right in each of the inventions which they had reduced to practice. These rights represented something of exchangeable value which the partnership possessed since it was able to exchange them for a valuable consideration. (See *Gayler* v. *Wilder*, 10 Howard, 477; *Individual Drinking Cup Co.* v. *Osmun-Cook Co.*, 220 Fed., 335; *Hershey Manufacturing Co.*, 14 B. T. A., 867; affirmed, 43 Fed. (2d), 298; *George Washington, Sr.*, 36 B. T. A., 74.)

The Commissioner acquiesced in the decision of the Board upon this point. (C. B. 1938-1, 9.)

The holding of the Board in the Diescher case is contrary in principle to the ruling in I. T. 3112, supra, and it is accordingly recommended that I. T. 3112 be revoked.

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

ARTICLE 117-3: Determination of period for which capital assets are held. 1939-34-9970 I. T. 3310

REVENUE ACT OF 1936.

I. T. 3112 (C. B. 1937-2, 139) is revoked, in view of G. C. M. 21507 (page 189, this Bulletin).

SUPPLEMENT C.—CREDITS AGAINST TAX.

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

ARTICLE 131-1: Analysis of credit for taxes.

REVENUE ACT OF 1936.

The 4 per cent tax imposed by the Brazilian Income Tax Act and covered by article 174, Brazilian Income Tax Regulations. (See I. T. 3313, page 171.)

ARTICLE 131–1: Analysis of credit for taxes. 1939–38–10020
(Also Section 23(c), Article 23(c)–1.) I. T. 3320

REVENUE ACT OF 1936.

The Mexican "proportional rate" tax of 10 per cent on participations received from oil production imposed by articles 26 and 27 of Chapter IV, third schedule, of "Ley del Impuesto sobre la Renta," is not an income tax within the purview of section 131 of the Revenue Act of 1936, and no credit is allowable therefor against United States income tax. The amount of such Mexican tax, however, is allowable as a deduction under section 23(c) of the Act.

Advice is requested whether the "proportional rate" tax of 10 per cent paid by A to the Mexican Government is an income tax within the meaning of section 131 of the Revenue Act of 1936, relating to credits for income taxes imposed by foreign countries.

A owns interests in oil wells in Mexico from which he derives a substantial income, and in his return for the year 1937 he claimed a credit, under section 131 of the Revenue Act of 1936, on account of tax paid to the Mexican Government. This tax, levied under articles 26 and 27 of the Mexican law "Ley del Impuesto sobre la Renta," amounted to $28x$ dollars and is based upon the gross receipts from oil production in the amount of $280x$ dollars. During the year 1937, the taxpayer expended $32x$ dollars for repairs and other miscellaneous items on the wells, but this amount was not taken into consideration by the Mexican Government in computing the tax due from the taxpayer.

The translation of the law "Ley del Impuesto sobre la Renta" is based upon the 1934 edition published by Antolin Jimenez and incorporates all amendments promulgated up to June 15, 1937. Pertinent provisions of the law are found under Chapter I, General Provisions, article 1, and under Chapter IV, third schedule, in articles 26 and 27.

Chapter I, General Provisions, article 1, reads as follows:

ARTICLE 1. The following are liable for payment of income tax:
I.— * * *.
II.—Foreigners domiciled in the Republic or abroad whose income or profits are derived from sources of wealth within national territory or business transactions effected therein.

Chapter IV, third schedule, articles 26 and 27, reads in part:

ARTICLE 26. The following are included under this schedule:
I.—Taxpayers who, normally or occasionally, receive participations, either in the form of rentals or otherwise, from the exploitation of the subsoil or concessions granted by the Federal or State Governments or municipalities.

* * * * * * *

ARTICLE 27. Income included under Section I of the preceding article shall be computed in its entirety; * * *

* * * * * * *

The tax payable on the total yearly income of the taxpayer shall be calculated in the manner laid down in the regulations; but in all cases—and likewise in accordance with the regulations—the proportional 10 per cent rate established in this tariff on the taxable income must be paid in advance, at the time of its receipt.

It appears that the "proportional rate" tax of 10 per cent, which was paid by A, is based on gross receipts and, hence, is in the nature of an excise tax and is not an income tax within the purview of section 131 of the Revenue Act of 1936. (See I. T. 3288, C. B. 1937–1 (Part 1), page 139, and citations therein.)

It is, accordingly, held that such tax, imposed under articles 26 and 27 of the Mexican law "Ley del Impuesto sobre la Renta," is not an income tax for the purposes of section 131, supra, and no credit may be allowed therefor against United States income tax. The amount of such Mexican tax is, however, allowable as a deduction under section 23(c) of the Revenue Act of 1936.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 143–2: Fixed or determinable annual or periodical income.

REVENUE ACT OF 1936.

Prizes awarded to nonresident alien artists. (See G. C. M. 21575, page 172.)

SUPPLEMENT G.—INSURANCE COMPANIES.

SECTION 204(e).—INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL: DOUBLE DEDUCTIONS.

REVENUE ACT OF 1936.

Tax-exempt interest, and expenses allocable thereto, in cases of resident foreign insurance companies. (See I. T. 3297, page 137.)

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.

Agreements between husband and wife residing in the State of California and Texas with respect to community income. (See G. C. M. 20960, page 175.)

ARTICLE 22(a)-1: What included in gross income. 1939-47-10099
I. T. 3335

REVENUE ACT OF 1928.

Revocation of I. T. 2681 (C. B. XII-1, 93 (1933)).

Advice has been requested whether I. T. 2681 (C. B. XII-1, 93 (1933)) should be revoked in view of the fact that the nonacquiescence in the case of *Reginald Fincke* v. *Commissioner* (39 B. T. A., 510; nonacquiescence, C. B. 1939-1 (Part 1), 47) has been withdrawn (page 12, this Bulletin).

The Board of Tax Appeals held in the Fincke case (syllabus):

The petitioner had certain shares of stock. Similar shares were selling on the market at prices far in excess of the cost of the petitioner's stock. He sold his shares at cost to his minor daughter and three family trusts. Shortly thereafter the purchasers sold the shares on the market at a profit. *Held*, the petitioner realized no profit from the transactions.

In that case the difference between the cost (selling price) and the value of the property transferred was treated as a gift and gift tax paid thereon.

I. T. 2681 held (syllabus):

The taxpayer, intending to make a gift of $5,000 in value to each of his children, conveyed to one child in 1931 certain real estate having a fair market value of $8,500, and received a mortgage thereon for $3,500. The basic cost of the property was $4,500.

The transaction represents a gift to the extent of $5,000 of the value of the property and a sale as to $3,500 of such value. Seven-seventeenths ($3,500/$8,500) of the cost ($4,500), or $1,852.94, represents the basis to the taxpayer of that part sold. In the hands of the child the basis of the property is ten-seventeenths ($5,000/$8,500) of the cost to the donor, or $2,647.06, plus $3,500, the amount which the child is obligated to pay for the part purchased.

In view of the fact that I. T. 2681, supra, is contrary in principle to the decision of the Board of Tax Appeals in the Fincke case, that ruling is revoked.

ARTICLE 22(a)-2: Compensation for personal services. 1939-49-10113 Ct. D. 1428

INCOME TAX—REVENUE ACT OF 1934—DECISION OF COURT.

1. GROSS INCOME—SALARY OF JUDGE OF UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS—CONSTITUTIONALITY OF TAX.

The salary of a judge of the United States Court of Customs and Patent Appeals appointed prior to June 6, 1932, is includible in taxable gross income under the provisions of section 22(a) of the Revenue Act of 1934. That court is a legislative court rather than a constitutional court, and the tax imposed does not violate the provision of Article III of the Constitution prohibiting diminution of compensation during continuance in office.

2. REHEARING DENIED.

Petition for rehearing denied March 29, 1939.

3. CERTIORARI DENIED.

Petition for certiorari denied October 9, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Oscar E. Bland and Josephine H. Bland, petitioners, v. *Commissioner of Internal Revenue, respondent.*

[102 F. (2d), 157.]

Petition for review of decision of the United States Board of Tax Appeals.

Before EVANS, SPARKS, and KERNER, CIRCUIT JUDGES.

[February 27, 1939.]

OPINION.

KERNER, Circuit Judge: This is an appeal from a decision of the Board of Tax Appeals, and involves a deficiency in income taxes for the years 1934 and 1935.

Petitioner Oscar E. Bland was on March 4, 1923, appointed an associate judge of the United States Court of Customs Appeals (now called the United States Court of Customs and Patent Appeals). He took the oath of office on March 5, 1923. The Commissioner of Internal Revenue determined that his salary as judge of that court was subject to income tax and the Board approved.

The only question presented is whether the salary of a judge of the United States Court of Customs and Patent Appeals appointed prior to June 6, 1932, is includible in taxable gross income.

Section 22(a): "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. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. (Revenue Act of 1934; ch. 277, 48 Stat., 686; U. S. C., Title 26, section 22.)

Petitioners contend that Congress can not constitutionally impose the tax, and in support of their contention urge that the Court of Customs and Patent Appeals is a court established under Article III of the Constitution and that a tax imposed upon its judges violates that provision of Article III prohibiting diminution of compensation during continuance in office.

Article III, section 1, of the Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior

Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

On the other hand respondent contends that the salary of the petitioner is not constitutionally protected against diminution, since that court is a legislative court rather than a constitutional court.

We believe the answer is to be found in *Ex parte Bakelite Corp'n* (279 U. S., 438). In that case it was contended that the Court of Customs Appeals was an inferior court created by Congress under section 1, Article III of the Constitution, and in discussing this contention the court said (page 449): "While Article III of the Constitution declares, in section 1, that the judicial power of the United States shall be vested in one Supreme Court and in 'such inferior courts as the Congress may from time to time ordain and establish,' and prescribes, in section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article III does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribed, whether it be a fixed period of years or during good behavior."

Nevertheless, the ground upon which the Bakelite decision was reached, petitioners argue, have been removed by subsequent decisions and we are asked to disregard the Bakelite case entirely. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.* (289 U. S., 266); *Old Colony Trust Co.* v. *Commissioner* (279 U. S., 716 [Ct. D. 80, C. B. VIII–2, 222 (1929)]); *Fidelity National Bank* v. *Swope et al.* (274 U. S., 123); and other cases are cited. We have carefully read these cases and considered the arguments advanced, but we are unable to hold that the Supreme Court intended to recede from the pronouncements of the Bakelite case.

We are fortified in our decision by the language used in *Williams* v. *United States* (289 U. S., 553), where the Court said (page 571): "Further reflection tends only to confirm the views expressed in the Bakelite opinion as to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them. And giving these views due effect here, we see no escape from the conclusion that if the Court of Customs Appeals is a legislative court, so also is the Court of Claims." The Court then held that the salary of a judge of a legislative court could be diminished.

The petitioners also urge that the last sentence of the section of the statute involved operates to exclude his salary since he was appointed prior to June 6, 1932, on the ground that the mention of one thing implies the exclusion of another thing; *expressio unius est exclusio alterius*. This maxim is not of universal application, but is to be applied only as an aid in arriving at intention. (*United States* v. *Barnes*, 222 U. S., 513.) It should never be followed to the extent of overriding a different intent of the legislature. (*Consumers Co.* v. *City of Chicago*, 313 Ill., 408.) Congress intended to use its power to the full extent, and by this Act it was the intention of Congress to put money into the Federal Treasury by imposing a tax upon pretty much every sort of income subject to the Federal power. (*Helvering* v. *Stockholms Enskilda Bank*, 293 U. S., 84, 89 [Ct. D. 887, C. B. XIII–2, 299 (1934)].)

The sentence we are considering first appeared in the law as section 22(a) of the Revenue Act of 1932 (ch. 209, 47 Stat., 178), except that the phrase "After June 6, 1932," read "after the date of the enactment of this Act." The date of enactment of the 1932 Act was in fact June 6, 1932, and, when these provisions were reenacted in 1934, there occurred the above change in phraseology merely to preserve continuity.

The Revenue Act immediately prior to the 1932 Act (the Revenue Act of 1928, ch. 852, 45 Stat., 791) contained no provision in section 22(a) comparable to the last sentence of the 1932 and 1934 Acts. And under the 1928 Act the salaries of all judges of legislative courts were included in gross income pursuant to the general provisions of section 22(a). The salaries of judges of constitutional courts were not included. (See *Evans* v. *Gore*, 253 U. S., 245 [T. D. 3037, C. B. 3, 93 (1920)].) In passing the Revenue Act of 1932, Congress believed it had the power and it was undertaking to tax the salaries of judges of constitutional courts, provided the statute applied only to after-appointed judges.

It is obvious that gross income as defined in the statute is all-inclusive and includes salaries from any source whatever, excluding only those judges whose salaries are protected by the Constitution. It is clear to us that it was the intention of Congress to enlarge, not to reduce, the number subject to the payment of income tax. It was never intended to exempt those already plainly within the provisions of the existing law. To hold with petitioners it would be necessary to say that Congress, in making clear its intention to tax the salaries of all after-appointed judges, impliedly exempted the salaries of judges already clearly taxable under the existing law. We can not bring ourselves to the belief that Congress ever intended such a result. Laws should receive a sensible construction. The maxim urged by petitioners is not productive of such sensibleness.

The order of the Board of Tax Appeals is affirmed.

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

ARTICLE 22(b)(4)-1: Interest upon State obligations. 1939-34-9971 Ct. D. 1414

INCOME TAX—REVENUE ACT OF 1934—DECISION OF COURT.

GROSS INCOME—EXEMPTION—INTEREST ON OBLIGATIONS OF POLITICAL SUBDIVISION OF STATE—NOTES GIVEN BY VILLAGE.

Interest received by the taxpayer on notes given by a village in partial payment of the purchase price of real property is exempt from Federal income tax, as such notes are obligations of a political subdivision of a State within the meaning of section 22(b)(4) of the Revenue Act of 1934. The word "obligations" in the statute was intended to extend only to those obligations which were created in the exercise of the borrowing power; but where credit is obtained in consideration for a promise to pay money in the future, together with interest on that money, there is no valid ground for making a distinction between interest paid on bonds duly issued and interest paid on notes duly delivered.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Henry Von L. Meyer, respondent.*

[104 Fed. (2d), 155.]

Petition to review a decision of the Board of Tax Appeals redetermining a deficiency in income taxes for 1934. Affirmed.

Before L. HAND, CHASE, and PATTERSON, Circuit Judges.

[May 22, 1939.]

OPINION.

CHASE, Circuit Judge: The respondent in 1932 purchased certain land in the village of Suffern, N. Y., which some of the inhabitants of the village then desired to have it acquire for public use. His purchase of the land was made

to assure its availability for such use in the event that the village did decide to take it. He paid $15,000 for it and incurred expenses of $198.33 in connection with the purchase. On January 16, 1933, the board of trustees of the village of Suffern voted to purchase the property from the respondent and to pay him what he had expended for it. He thereupon conveyed the property to the village and received as the consideration for the deed cash to the amount of $1,198.33, and the duly executed promissory notes of the village for the remainder of the purchase price. There were five of these notes which were dated January 15, 1933, and all bore interest at the rate of 5 per cent payable semiannually until maturity. The first was for $2,000 payable on July 15, 1933; the next two were for the same amount payable on the 15th of July in 1934 and 1935, respectively; and the last two were each for $4,000. One of them was payable on the same day of July in 1936 and the other one year later. The interest on the notes then unmatured was paid by the village to the respondent in 1934 to the amount of $600. He failed to include it in his return of income for that year as he claimed it to be exempt from such taxation under section 22(b)(4) of the Revenue Act of 1934. The Commissioner treated such interest as taxable income, however, and determined a deficiency based in part thereon. The Board of Tax Appeals redetermined the deficiency and in so doing held that such interest was exempt from taxation. The Commissioner has brought this petition to review the redetermination of the Board. The taxability of such interest is the only issue before us.

It has been agreed that the village of Suffern is a political subdivision of the State of New York. Section 22(b)(4) of the Revenue Act of 1934 provided, inter alia, that interest upon the obligations of a political subdivision of a State should not be included in gross income and should be exempt from taxation.

The petitioner contends that this statute is not applicable to interest paid on these notes, given in part payment of the purchase price of property acquired, upon the theory that they were not issued by the village acting by its constituted authorities empowered to issue such obligations as provided by article 22(b)(4) of Treasury Regulations 86. No question is raised as to the authority of the person who signed the notes to do so on behalf of the village; nor is it claimed that the notes were not legally enforceable obligations of the village according to their terms. The argument is that they were not the kind of obligations covered by the statute because they were not executed in the exercise of the borrowing power of the village like bonds duly authorized, issued and sold for the purpose of borrowing money.

In *United States Trust Co. of New York* v. *Anderson* (65 Fed. (2d), 575 [Ct. D. 736, C. B. XII-2, 104 (1933)]), we held that interest paid by the city of New York on a condemnation award was not exempt from taxation under the similar provisions of the Revenue Act of 1926 and in so doing distinguished such interest from that paid on obligations issued under the borrowing power of the city. That sort of interest was but part of the award itself. (See *Baltimore & Ohio R. R.* v. *Commissioner*, 78 Fed. (2d), 460; *Phelps* v. *United States*, 274 U. S., 341.) It was payable not by virtue of any contract under which credit was obtained but because required by law as part of the just compensation for what was condemned and taken in invitum for public use.

It is manifest that the word "obligations" in the statute was not intended to extend to every obligation which included the payment of interest but only to those obligations which were created in the exercise of the borrowing power. (See *Helvering* v. *Stockholms, etc., Bank*, 293 U. S., 84 [Ct. D. 887, C. B. XIII-2, 299 (1934).].) But where credit is obtained in consideration for a promise to pay money in the future, together with interest on that money, there is no valid ground for making a distinction between interest paid on bonds duly issued and interest paid on notes duly delivered. In this instance the village purchased the property in part on its credit and gave its interest-bearing notes for the remainder of the purchase price not paid in cash. If instead of buying the property in the first place to keep it available for purchase by the village, the taxpayer had advanced the money to the village on its notes and the village had bought the property directly there would have been a patent exercise of the borrowing power. That, too, would have been plain enough had the village sold its bonds to raise the needed money. The practical effect of what it did from the standpoint of its borrowing power was the same when it gave its interest bearing notes for property instead of for cash. Its

obligations were "issued" within the above regulations when its notes were delivered to the respondent to obtain credit on obligations incurred under its borrowing power. Such circumstances bring the interest paid on the notes within the scope of the above statute and make it exempt from taxation. (*Kings County D. Co.* v. *Commissioner*, 93 Fed. (2d), 33; *Norfolk Nat. Bank* v. *Commissioner*, 66 Fed. (2d), 48.)

Affirmed.

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

ARTICLE 23(c)-1: Taxes. 1939-31-9935
Ct. D. 1409

INCOME TAX—REVENUE ACT OF 1934—DECISION OF COURT.

1. DEDUCTION—TAXES PAID OR ACCRUED WITHIN TAXABLE YEAR—LIEN UPON REAL PROPERTY—MINNESOTA LAW.

A taxpayer reporting on the cash receipts and disbursements basis is not entitled to a deduction, under section 23(c) of the Revenue Act of 1934, for 1933 taxes paid in 1934 on Minnesota real estate acquired in August, 1933, through the purchase of a sheriff's certificate of mortgage foreclosure sale, since under the laws of Minnesota the taxes assessed became a lien on the property on May 1, 1933, although the amount thereof had not at that time been ascertained or levied and they were not due and payable until January, 1934. The taxes accrued on May 1, 1933, while the land was in other ownership, and the payment of them by the purchaser was merely a payment of part of the cost of acquiring the property.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (36 B. T. A., 593) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied January 16, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Carl K. Lifson, Administrator of the Estate of Benjamin Lifson, Deceased, and Sophie Lifson, petitioners, v. *Commissioner of Internal Revenue, respondent.*[1]

[98 Fed. (2d), 508.]

On petition to review decision of United States Board of Tax Appeals.

Before GARDNER, SANBORN, and THOMAS, Circuit Judges.

[August 18, 1938.]

OPINION.

SANBORN, Circuit Judge, delivered the opinion of the court.

This is a petition to review an order of the Board of Tax Appeals (36 B. T. A., 593) redetermining a deficiency in income taxes of Sophie Lifson and Benjamin Lifson, her husband, for the year 1934 occasioned by the disallowance of a deduction, from their joint gross income, of an item of $19,288.31 representing the payment in 1934 by Sophie Lifson of taxes for the year 1933 upon real estate in St. Paul, Minn., known as the "Minnesota Building."

The Minnesota Building in 1932 belonged to Lincoln Development Co., which in May of that year mortgaged it to Fleisher Engineering & Construction Co.

[1] See G. C. M. 21373, page 4, this Bulletin.

This mortgage was foreclosed and the property was bid in at foreclosure sale on October 7, 1932, by the mortgagee. On August 16, 1933, Sophie Lifson purchased the sheriff's certificate of mortgage foreclosure sale. The period within which the property could have been redeemed from the foreclosure expired October 7, 1933, and on or about October 16, 1933, Sophie Lifson went into possession. The 1933 taxes upon the property became a lien as of May 1, 1933, although the amount of the taxes had not at that time been ascertained or levied and they were not due and payable until January, 1934.[2]

The Revenue Act of 1934 (ch. 277, section 23(c), 48 Stat., 680, 688) provided that in computing net income there should be allowed as a deduction "Taxes paid or accrued within the taxable year" (with certain exceptions not here material).

The Commissioner and the Board of Tax Appeals were of the opinion that taxes upon the Minnesota Building for the year 1933 "accrued" on May 1, 1933, and that, since the building at that time did not belong to Sophie Lifson and she acquired it after that date subject to the lien of the taxes, the payment of these taxes in 1934 did not entitle her to a deduction.

The petitioners contend: (1) that the taxes did not "accrue" on May 1, 1933, because all of the events which fixed the amount of the taxes and which determined the liability of the taxpayer to pay them had not then occurred, and because there was no personal obligation imposed by the laws of Minnesota upon owners of real estate with respect to real estate taxes—the tax being made a charge against, and lien upon, the land only; (2) that, since Sophie Lifson and her husband made their joint return upon a cash basis, they were entitled to a deduction for "taxes paid * * * within the taxable year" regardless of when such taxes accrued or became a lien; and (3) that if the doctrine of relation is to be invoked to make the 1933 taxes a lien as of May 1, 1933, the same doctrine should be invoked to make Sophie Lifson the owner of the real estate as of May, 1932, when the mortgage upon which her title is based was executed.

That Sophie Lifson acquired the Minnesota Building after May 1, 1933, and that at the time she acquired it the taxes for 1933 were, by State statute, a charge against and a lien upon it, can not be controverted. She certainly had no interest in this real estate until August 16, 1933. The liability of the real estate for the taxes to be levied in 1933 and the lien for those taxes had then accrued.

When one purchases land which is subject to a lien for taxes, the subsequent payment of those taxes by the purchaser does not constitute an allowable deduction from gross income, for the reason that the taxes accrued while the land was in other ownership and the payment of them is merely a payment of a part of the cost of acquiring the property.[3]

The fact that the amount of the taxes here involved had not been definitely ascertained at the time the lien attached does not alter the situation. (*The Walsh-McGuire Co.* v. *Commissioner* (6 Cir.), 97 F. (2d), 983, opinion filed

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[2] Mason's Minnesota Statutes, 1927, section 1984, provides that all real estate shall be listed and assessed every even-numbered year with reference to its value on May 1 preceding the assessment. Mason's Minnesota Statutes, 1927, section 2191, provides: "The taxes assessed upon real property shall be a perpetual lien thereon * * * from and including May 1 in the year in which they are levied, until they are paid: but, as between grantor and grantee, such lien shall not attach until the first Monday of January of the year next thereafter." The lien of the State for taxes upon real estate attaches on the 1st day of May in the year they are levied. (Dunnell's Minnesota Digest, Second Ed., section 9161; *Kate Fowler Merle-Smith* v. *Minnesota Iron Co.*, 195 Minn., 313, 262 N. W., 865; *National Bond & Security Co.* v. *Hopkins*, 96 Minn., 119, 121, 104 N. W., 678; *State* v. *Northwestern Tel. Exchange Co.*, 80 Minn., 17, 82 N. W., 1090; *State* v. *Bellin*, 79 Minn., 131, 81 N. W., 763; *County of Martin* v. *Drake*, 40 Minn., 137, 139, 41 N. W., 942; *Merchants Bank Bldg. Co.* v. *Helvering* (8 Cir.), 84 F. (2d), 478, 480 [Ct. D. 1189, C. B. 1937-1, 189]; *Thompson* v. *United States* (D. C. Minn.), 8 F. (2d), 175; *Roy J. O'Neil* v. *Commissioner*, 31 B. T. A., 727, 729; *Leamington Hotel Co.* v. *Commissioner*, 26 B. T. A., 1004, 1006–1007; *Cloquet Co-operative Society* v. *Commissioner*, 21 B. T. A., 744, 748.)

[3] See *Merchants Bank Bldg. Co.* v. *Helvering* (8 Cir.) (84 F. (2d), 478, 481); *Helvering* v. *Missouri State Life Ins. Co.* (8 Cir.) (78 F. (2d), 778, 781); *Falk Corporation* v. *Commissioner* (7 Cir.) (60 F. (2d), 204); *The Walsh-McGuire Co.* v. *Commissioner* (6 Cir.) (97 F. (2d), 983, opinion filed June 7, 1938); *California Sanitary Co.* v. *Commissioner* (32 B. T. A., 122); *Texas Coca-Cola Bottling Co.* v. *Commissioner* (30 B. T. A., 736); *Leamington Hotel Co.* v. *Commissioner* (26 B. T. A., 1004); *Grand Hotel Co.* v. *Commissioner* (21 B. T. A., 890); *Kissel* v. *Commissioner* (15 B. T. A., 1270, 1274); *John Hancock Mutual Life Ins. Co.* v. *Commissioner* (10 B. T. A., 736).

June 7, 1938.) There is no merit in the contention that real estate taxes do not "accrue"[4] unless they become a personal obligation of the owner of the land. They accrue in Minnesota when they become a charge against and a lien upon the land taxed.

The order of the Board was correct, and is affirmed.

ARTICLE 23(c)-1: Taxes. 1939-31-9936
Ct. D. 1410

INCOME TAX—REVENUE ACT OF 1932—DECISION OF COURT.

1. DEDUCTION—TAXES PAID OR ACCRUED WITHIN TAXABLE YEAR—LIEN UPON REAL PROPERTY—WASHINGTON LAW.

The taxpayers, husband and wife, reporting on the cash receipts and disbursements basis, are entitled to a deduction, under section 23(c) of the Revenue Act of 1932, for taxes paid by the wife in 1932 on real estate situated in the State of Washington which she, as devisee under her father's will, acquired on April 5, 1931, the date of the latter's death, since the State statute provides that the lien for taxes shall attach on the 1st day of March of each year, *except that* as between a grantor and grantee the lien shall not attach until the first Monday in February of the succeeding year. The devisee was a grantee within the meaning of the State statute, and therefore the lien did not attach until February, 1932.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (35 B. T. A., 508) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Mrs. Gwendolen C. Plestcheeff, respondent.*

Commissioner of Internal Revenue, petitioner, v. *Theodore Plestcheeff, respondent.*[1]

[100 F. (2d), 62.]

Upon petition to review a decision of the United States Board of Tax Appeals.

Before GARRECHT, HANEY, and HEALY, Circuit Judges.

[November 18, 1938.]

OPINION.

HANEY, Circuit Judge: The Commissioner of Internal Revenue has filed a petition to review a decision of the Board of Tax Appeals which permitted respondents in their income tax return for the year 1932, to deduct the amount of taxes paid during that year on real property acquired by respondents under a devise in 1931.

Respondents were, at times material herein, husband and wife. On April 5, 1931, the wife's father died, leaving a will, by the terms of which real estate in Washington was devised to the wife. A decree, in the probate proceeding, confirmed the devise on December 31, 1931. The wife, during 1932, paid $4,266.69 as taxes on the property devised to her. In their income tax return for the year 1932, which was made on the "cash" basis, respondents claimed a deduction for the amount of the taxes paid. Petitioner audited the return and adjusted the net income by disallowing the deduction for taxes, and assessed a deficiency in the tax of $309.22, on the ground that "the ownership of property in the State of Washington on March 1 is the event which determines the

[4] "Accrue. To grow to; to be added to; to attach itself to; as a subordinate or accessory claim or demand arises out of, and is joined to, its principal; thus, costs accrue to a judgment, and interest to the principal debt. The term is also used of independent or original demands, and then means to arise, to happen, to come into force or existence; to vest; as in the phrase, 'The right of action did not *accrue* within six years.' (*Amy* v. *Dubuque*, 98 U. S. 470, 476.)" Black's Law Dictionary, second edition, page 18. See also *Ewbank* v. *United States* (7 Cir.) (50 F. (2d), 409); Words and Phrases, particularly the third and fourth series.

[1] See G. C. M. 21373, page 82, this Bulletin.

liability for both real estate and personal property taxes and fixes the amount, although not ascertainable on that date." Upon petition for review, the Board determined that there was no deficiency, on the ground that "the taxes assessed on real estate for the year 1931 did not, under the statutes of Washington as construed by its courts, attach and become a perfected lien on said realty prior to October, 1931, in which month the tax levy is made in that State." The Commissioner filed in this court a petition to review that decision

By Remington's Rev. St. of Washington, section 1366, title to real property of a deceased vests in the heirs or devisees immediately upon the death. Real property is "subject to assessment and taxation" on March 1 of each year. (Section 11111.) The assessment year commences "on the 1st day of March and [ends] on the last day of February in each year." (Section 11242.) The board of county commissioners is required to "levy taxes" at its October session, and "on or before the second Monday in October in each year, to certify to the county assessor of the county the amount of taxes levied upon the property in the county." (Sections 11238, 11239.) The county auditor is required to deliver "to the county treasurer the tax rolls of his county for such assessment year" on the "first Monday in January next succeeding the date of levy of taxes," but no collection thereof shall be made prior to the first Monday in the following February. (Section 11243.)

Section 11265 provides in part:

"The taxes assessed upon real property shall be a lien thereon from and including the 1st day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year."

The Revenue Act of 1932, section 23(c) (47 Stat., 169), applicable here, provides that "Taxes paid or accrued within the taxable year" shall be allowed as a deduction in computing net income. It does not limit the deduction to cases where the taxpayer owns the property on which the taxes are paid, but literally includes the case where a taxpayer pays taxes on property not owned by him. The administrative interpretation of the statute, however, limits the deduction to the person who owned the property at the time the lien for the taxes attaches.[2] (G. C. M. 6667 (C. B. VIII–2, 94).) Subsequent tax Acts have contained the same provision as the Revenue Act of 1928, the Act under which the administrative interpretation above referred to, was made. The administrative interpretation therefore stands approved by Congress. (*Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S., 269, 273 [Ct. D. 638, C. B. XII–1, 286 (1933)].)

Therefore, the right to the deduction is dependent upon the date upon which the lien for the taxes attached. Both of the parties hereto rely upon the law of Washington as the determinative factor in ascertaining such date, and we consider the cause upon that assumption. (Cf. *Burnet* v. *Harmel*, 287 U. S., 103, 110 [Ct. D. 611, C. B. XI–2, 210 (1932)]. See also *Welch* v. *Kerckhoff* (C. C. A. 9), 84 F. (2d), 295, 298 [Ct. D. 1180, C. B. XV–2, 355 (1936)], and cases cited.) If it attached prior to April 5, 1931, the deduction can not be permitted. We may here assume that the lien attached on March 1, 1931, unless the deceased father and wife were in the position of "grantor and grantee," thus making applicable the provision in section 11265 that "as between a grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year." Since a "grantee" is one to whom a grant is made, we must determine whether or not a devise is included within the term "grant." Petitioner contends that a "grant" does not include a "devise."

In ancient times, the word "grant" had a limited meaning and included only a conveyance of incorporeal rights which were transferable only by deed. (2 Tiffany on Real Property (2d Ed.), sections 427, 1567.) The word now is a "generic term applicable to all transfers of real property." (Black's Law Dict. (3d Ed.), 855.) It is defined in Webster as a "transfer of property, real or personal, by deed or writing." See also: Ballentine's Law Dict., 561; 1 Bouvier's Law Dict. (Rawle's 3d rev.), 1379; 4 Words and Phrases, 3151. Thus the broad meaning of the word would now include a devise. That the restricted meaning of "grant" was not intended by the Washington Legislature is shown, we think, by the holdings that the relation of grantor and grantee is created by the condemnation of land by a city. (*Bethany Presbyterian*

[2] Article 151 of Regulations 77, promulgated under the Revenue Act of 1932, provides: "In general taxes are deductible only by the person upon whom they are imposed * * *." This regulation does not aid the solution of the question before us, because in Washington a tax on real property is not a "personal liability against the owner." (*Clizer* v. *Krauss*, 57 Wash., 26, 106 Pac., 145.)

Church v. *Seattle*, 154 Wash., 529; *Port of Seattle* v. *Yesler Estate*, 83 Wash., 166, 172.) We must indulge the presumption that the legislative authority in enacting section 11265, supra, used words in their ordinary sense and with the meaning commonly attributed to them.[1] The ordinarily accepted meaning of "grant" is as above indicated.

A further point which suggests itself, relates to the kind of a controversy to which it was intended that the phrase "as between a grantor and grantee" would be applicable. Should the statute be construed to mean "but in a controversy solely between a grantor and grantee as to who is liable for unpaid taxes, such lien shall not attach until the first Monday in February of the succeeding year"? In other words, is the provision which postpones the date when the lien attaches, limited to a controversy solely between a grantor and grantee? In *Bethany Presbyterian Church* v. *Seattle*, supra, and *Port of Seattle* v. *Yesler*, supra, sufficient of the awards to pay unpaid taxes was left on deposit in the registry of the court in the condemnation proceeding. The taxing authorities made claims to the deposits. Although the grantees (the parties who brought the condemnation proceeding) were still nominal parties to the proceeding, actually the real parties were the taxing authorities and the grantors (the owners of the property condemned), and the actual controversy was between such parties. In any view, the Supreme Court of Washington did not restrict the application of the statute to controversies solely between grantors and grantees. We think it is implied in these cases that such application is not so restricted.

As thus construed, we think the lien did not attach until the February after respondents acquired the property, and they are entitled to the deduction.

Affirmed.

ARTICLE 23(c)-1: Taxes. 1939-31-9937
Ct. D. 1411

INCOME TAX—REVENUE ACT OF 1932—DECISION OF COURT.

1. DEDUCTION—TAXES PAID OR ACCRUED WITHIN TAXABLE YEAR—REAL AND PERSONAL PROPERTY—WISCONSIN LAW.

The taxpayer, a Wisconsin business corporation, keeping its books on an accrual basis, is entitled to deduct, in income tax returns filed for fiscal years ended June 30, 1933, and June 30, 1934, the amount of real and personal property taxes assessed for the years 1932 and 1933, respectively, and which were due and payable before February 1 of the succeeding year. Although the State statute provides for assessment of such taxes as of May 1 of each year, the tax rate is not fixed until November and the taxes are not due and payable until the following January. The liability therefor does not accrue, within the meaning of section 23(c) of the Revenue Act of 1932, until the events by which such liability is fixed have occurred.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (36 B. T. A., 1147) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Patrick Cudahy Family Co., respondent.*[2]

[102 Fed. (2d), 930.]

Petition for review of decision of the United States Board of Tax Appeals.

Before SPARKS, TREANOR, and KERNER, Circuit Judges.

[March 31, 1939.]

OPINION.

SPARKS, Circuit Judge: The question here presented is: When, under section 23(c) of the Revenue Act of 1932, do personal and real property taxes in the

[1] 25 R. C. L., 988.
[2] See G. C. M. 21373, page 82, this Bulletin.

State of Wisconsin accrue as liabilities so as to be deductible from gross income in tax returns made on the accrual basis.

Respondent is a Wisconsin business corporation. It keeps its books on an accrual basis, for a fiscal year ending June 30 of each year. Its income tax return is due October 15 of each year. In these tax returns for the years ending June 30, 1933 and 1934, it deducted $560 for personal property taxes, and $59,715 for real property taxes assessed for the year 1932 and due and payable before February 1, 1933, and $525 for personal property taxes, and $55,862 for real property taxes assessed for the year 1933 and due and payable before February 1, 1934. The Commissioner allowed the items claimed as a deduction for the year 1934 to be deducted for the year 1933, and deducted the sum of $56,192 which represented total real and personal property taxes assessed as of May 1, 1934, for the year 1934, but disallowed any deduction for taxes for the year 1932. This adjustment was in accordance with a departmental ruling to the effect that in Wisconsin, property taxes accrue on May 1 of each year, and a taxpayer is entitled to deduct such taxes only on the basis that they accrue as of that date.

The following provisions of the Wisconsin statutes are pertinent to the question here presented:

"SEC. 70.10. * * * All real and personal property shall be assessed as of the 1st day of May in such year except as provided in section 70.13. All real property conveyed to any county by tax deed before the first Monday in August of any year shall not be included in such assessment for such year."

"SEC. 74.01. All taxes levied upon any tract or parcel of land and all costs, charges and interest thereon shall be a lien thereon until paid except as otherwise provided by law; * * * and all taxes levied upon any lands and all costs, charges and interest thereon shall also be a lien on all logs, wood and timber cut upon such lands subsequent to the 1st day of May in the year in which such taxes are levied * * *."

"SEC. 74.62. As between grantor and grantee of any land, when there is no express agreement as to which shall pay the taxes assessed thereon for the year in which the conveyance is made, if such land is conveyed on or before the 1st day of December, then the grantee shall pay the same; but if conveyed after that date, then the grantor shall pay them * * *."

In accordance with further provisions of the statute, the tax rolls, although based on valuations as of May 1 of each year, were not actually made up until some time later, and it was not until in November that the tax rate was fixed, while the tax rolls were not delivered by the tax commissioner to the city treasurer with his warrant for the collection of the taxes until the second Monday in December of each year.

The ruling to which the Commissioner referred in making his decision not to allow the deduction here claimed was entered in response to a question relative to the deduction of real property taxes, as between buyer and seller, on certain parcels of real estate which were transferred in the State of Wisconsin as of May 1, 1930. (See Cumulative Bulletin XII-1, 1933, I. T. 2694, page 107.) It was there held that the taxes accrued on May 1, 1930, and were deductible by the vendor, and that if the amount thereof were paid by the vendee, it should be considered as a part of the cost of the property. The ruling quoted section 70.06 of the Statutes, 1929, set forth above as section 70.10, which provides that property is to be assessed as of May 1. There was no reference to section 74.62 above, which provides, in effect, that ownership as of December 1 shall determine the incidence of the tax on real property, although this provision of the statute was then in effect.

It is clear that the entire emphasis is placed by the Commissioner upon the fact of assessment, under the Wisconsin Act, as of May 1. We are of opinion that that fact alone is not controlling. "The word 'assessment,' as used in the decisions and statutes, has various meanings. Properly speaking it does not include the levy of taxes although sometimes the words 'assess,' 'assessed,' or 'assessment' are used in a statute as including both the levy and the assessment. An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not, therefore, of itself lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment. As the word is more

commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them." (Cooley on Taxation (4th Ed.), volume 3, section 1044. See also *Evansville & I. R. Co.* v. *Hays*, 118 Ind., 214.)

We think it can not be said that liability for the taxes accrues until the events by which that liability is fixed have occurred. This appears to be in harmony with the construction placed upon the taxing statute by the Wisconsin authorities. Article 507.1 of the Wisconsin Income Tax Regulations provides that property taxes are deductible in the year in which they are assessed, but that no accrual for such taxes may be deducted on any return for a fiscal year ending prior to November 30. This is consistent with the provisions of section 74.62 that as to real estate which is conveyed on or before December 1, the grantee shall be liable for the taxes, but if after that date, the grantor shall pay them.

The supreme court, in *Spear* v. *Door County* (65 Wis., 298), stated that this rule "goes upon the theory that the taxes are not a specific lien upon real estate until the tax roll is completed and the taxes extended on such roll." (See also *Patterson* v. *Cappon*, 125 Wis., 198.) It is also to be noted that if real property is conveyed to any county before August of any year, it shall not be included in the assessment for such year.

The Commissioner considers it significant that in 1929 the Wisconsin statute was amended to provide for assessment of real property as of May 1, as personal property had been assessed prior to the amendment. Since we do not consider the fact of assessment as the controlling factor in determining when the liability for the tax accrues, and are of opinion that the Wisconsin construction of its statutes is in harmony with this interpretation, we do not agree with the Commissioner as to the significance of the amendment.

The Commissioner also contends that taxes may accrue at a date prior to the time when the amount of the tax can be definitely ascertained, citing *United States* v. *Anderson* (269 U. S., 422 [T. D. 3839, C. B. V-1, 179 (1926)]) and *Continental Tie & L. Co.* v. *United States* (286 U. S., 290 [Ct. D. 494, C. B. XI-1, 260 (1932)]). We do not consider the Continental case analogous to the one here presented.

The Anderson case held that munitions profits taxes due under the Revenue Act of 1916 for that year but payable in 1917, must be deducted in the year 1916 when they accrued, rather than in 1917 when they were paid. It is clear from a reading of the opinion in that case that all the events had occurred by which the amount was fixed, and that the tax was essentially one on the income of the earlier year, 1916. The Court said: "In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued. It should be noted that section 13(d) makes no use of the words 'accrue' or 'accrual' but merely provides for a return upon the basis upon which the taxpayer's accounts are kept, if it reflects income—which is precisely the return insisted upon by the Government."

In the case at bar, prior to the close of its fiscal year on June 30, and the date by which it was required to file its income tax return, October 15, only one of the events had occurred by which the taxpayer's liability was to be ascertained, namely, the assessment as of May 1, by which only the valuation upon which it was to be taxed was fixed. The actual rate of the tax was not known until the levy in November, and the tax did not become due and payable until the following January. Under these circumstances we think it can not be said that the liability accrued during the fiscal year as of which the tax was assessed so that the deduction had to be taken as of that year.

The decision of the Board of Tax Appeals is affirmed.

ARTICLE 23(c)-1: Taxes. 1939-31-9934
I. T. 3305

REVENUE ACT OF 1928.

I. T. 2633 (C. B. XI-2, 77 (1932)) and I. T. 2694 (C. B. XII-1, 107 (1933)), involving the accrual date of Wisconsin real property taxes, are revoked in view of G. C. M. 21373 (page 82, this Bulletin).

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

ARTICLE 23(e)-1: Losses by individuals. 1939-34-9972
G. C. M. 21503

REVENUE ACT OF 1928.

Where a contract to sell stock on a stock exchange for less than the basis thereof was entered into on December 31, 1930, and delivery of the stock was made in the regular way on January 2, 1931, the loss on the transaction was incurred in the year 1930 and constitutes a proper deduction for that year. G. C. M. 12570 (C. B. XIII-1, 114 (1934)) revoked.

In G. C. M. 12570 (C. B. XIII-1, 114 (1934)) it was held that where a contract to sell stock on a stock exchange was entered into on December 31, 1930, and delivery of the stock was made in the regular way on January 2, 1931, the loss, if any, was incurred in the year 1931 and constitutes a proper deduction for that year.

In *Ruml* v. *Commissioner* (83 F. (2d), 257) the Circuit Court of Appeals, Second Circuit, in considering a similar issue, stated:

* * * Losses must be realized before they are deductible. (*Weiss* v. *Wiener*, 279 U. S., 333, 49 S. Ct., 337, 73 L. Ed., 720.) But when the evidence of realization is a sale of personal property, it is not always necessary to deliver the property before there may be a deduction of a loss. It is enough that the obligation to deliver is so fixed that the loss is reasonably certain in fact and ascertainable in amount. (*Lucas* v. *American Code Co.*, 280 U. S., 445, 50 S. Ct., 202, 74 L. Ed., 538, 67 L. Ed., 1010.) Here the transaction was so far advanced in December that the petitioner was bound to deliver the stock to the broker at a price which was then determined by the sale the broker made. That sufficed to make the loss certain and established the amount. Moreover, the intention of the petitioner and the broker being that the particular shares then owned by the petitioner should be delivered to the broker, it follows that title to them passed to the broker in December. (*Hoffman* v. *Commissioner*, 71 F. (2d), 929 (C. C. A. 2).) The loss was accordingly all realized in 1928, and so was deductible in that year.

Similar conclusions were reached by the Circuit Court of Appeals, Sixth Circuit, in *Huntington National Bank* v. *Commissioner* (90 F. (2d), 876), and *Commissioner* v. *Robinson* and *Commissioner* v. *Mott*, both reported in 103 F. (2d), 1009, and by the Circuit Court of Appeals, Seventh Circuit, in *Commissioner* v. *Dashiell* (100 F. (2d), 625).

In view of the position taken by the circuit courts of appeals as indicated by the decisions above referred to, G. C. M. 12570 is revoked.

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

ARTICLE 23(e)-2: Voluntary removal of buildings. 1939-35-9982 I. T. 3311

REVENUE ACT OF 1918.

Loss on demolition of buildings. O. D. 773 (C. B. 4, 164 (1921)) revoked.

Advice is requested relative to the correctness of O. D. 773 (C. B. 4, 164 (1921)), which reads as follows:

A taxpayer sustains no deductible loss in the demolition of 80 per cent of his building for the purpose of reconstruction. The amount expended is an investment of capital and should be considered as a part of the cost of reconstruction.

Article 23(e)-2 of Regulations 101 provides:

Voluntary removal of buildings.—Loss due to the voluntary removal or demolition of old buildings, the scrapping of old machinery, equipment, etc., incident to renewals and replacements is deductible from gross income. When a taxpayer buys real estate upon which is located a building, which he proceeds to raze with a view to erecting thereon another building, it will be considered that the taxpayer has sustained no deductible loss by reason of the demolition of the old building, and no deductible expense on account of the cost of such removal, the value of the real estate, exclusive of old improvements, being presumably equal to the purchase price of the land and building plus the cost of removing the useless building.

Regulations under prior Revenue Acts have contained similar provisions.

The language of O. D. 773, supra, is too broad, since it ignores the distinction made in the cases of taxpayers who purchase property with the intent at the time of purchase to demolish the building thereon and erect a new one and those who purchase property without such intent. (See generally *Providence Journal Co.* v. *Broderick*, 104 Fed. (2d), 614, and cases cited therein.) Furthermore, it is not in accord with the first sentence of article 23(e)-2 of Regulations 101, supra.

O. D. 773, supra, is, therefore, revoked.

ARTICLE 23(e)-3: Loss of useful value. 1939-46-10089 Ct. D. 1421

INCOME TAX—REVENUE ACT OF 1934—DECISION OF COURT.

1. DEDUCTION—LOSS—ALLEGED DESTRUCTION OF VALUE OF MOTOR CARRIER CERTIFICATES BY CHANGE IN STATUTE.

A motor carrier which, prior to 1934, had purchased certificates of public convenience and necessity, authorized by a State statute the effect of which was to grant a monopoly to carriers then in operation, was not entitled to a deduction in 1934 on account of alleged loss in value of the certificates because of new legislation which in that year removed the monopolistic features of the certificates, but allowed continued operation. The statute under which the certificates were issued, and not the certificates themselves, conferred the monopoly, and the destruction of that statute did not destroy the certificates or their value.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1938) (37 B. T. A., 576) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied October 9, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Consolidated Freight Lines, Inc., a Corporation, petitioner, v. Commissioner of Internal Revenue, respondent.

[101 F. (2d), 813.]

Upon petition to review a decision of the United States Board of Tax Appeals.

Before GARRECHT, HANEY, and STEPHENS, Circuit Judges.

[February 16, 1939.]

OPINION.

HANEY, Circuit Judge: The question presented is whether or not a deduction from gross income may be taken for an alleged loss of a monopoly in the field of transportation for hire. The Board approved the disallowance of the loss by respondent.

In 1921 the State of Washington began to regulate motor carriers operating for the transportation of persons and property for compensation between fixed termini or over a regular route in that State. Regulation was effected by issuing or withholding certificates of public convenience and necessity. Issuance of such certificates to carriers operating on January 15, 1921, was required. Competitive lines could obtain certificates, after hearing, only when the existing line failed to provide satisfactory service. Certificates issued had a substantial value and could be sold, assigned, leased, transferred, inherited, mortgaged and were taxable as personal property. (Laws of 1921, ch. 111.) The effect of the act as described by the Board, "was to grant monopolies to those carriers in operation on January 15, 1921, and the first comers thereafter in other territory, and to perpetuate the monopolies in successors who acquired the certificates of public convenience and necessity by purchase or otherwise."

Pursuant to the act the several certificates involved herein were issued upon payment to the State of a $25 fee for each certificate.

Petitioner, a Washington corporation, was incorporated on August 29, 1929, and acquired prior to January 17, 1934, the above-mentioned certificates at a cost of $84,388.98.

By Ch. 55 of the Extraordinary Session Laws of 1933, which became effective January 17, 1934, the monopolistic characteristics which existed under the act of 1921 were destroyed. As a result, many competing common carriers by truck began operating over routes served by petitioner, petitioner's rates were reduced, and its tonnage decreased. The record does not disclose whether or not there was a corresponding decrease of profit.

In its income tax return for the year 1934, petitioner claimed that the destruction of the monopolistic rights by the 1934 act had destroyed the value of the certificates issued under the 1921 act, and therefore it had sustained a deductible loss in the amount of $84,388.98, the cost of the certificates to it. Respondent disallowed the deduction and assessed a deficiency in the sum of $11,927.19. The Board held:

"* * * The monopolistic character of the certificates is not, so far as the record shows, a thing separate and apart from the right to carry on a business under them. In other words, there is no showing that the certificates were bought and sold like shares of stock or bonds which are so often held by the owner for income or appreciation without thought of his engaging in the business which gives value to the securities. Such monopolistic features as the certificates had were, in fact, effective only if the holder engaged in the business to which the certificate related. If he did not conduct the business authorized and did not do it in such a way as to furnish service satisfactory to the issuing department, certificates could be issued to others to serve the same territory and thus destroy the petitioner's monopoly. Thus, the monopoly granted by the certificates can not be viewed as a thing separate and distinct from the other rights granted and duties imposed by them. The monopoly was only one element that gave them value."

It further held:

"Assuming in the present case that the monopolistic features of the certificates issued under the 1921 statute had some value apart from the operative rights, and that the monopolistic features were destroyed by the 1934 legislation, the peti-

tioner has not shown what part of cost is attributable separately to those features. Hence it has not established its basis for gain or loss."

Decision was entered in favor of respondent, and petitioner seeks review of such decision.

We think the Board's decision was right.

The certificates issued under the 1921 act conferred no monopoly. The language of the certificates, so far as is here material, simply stated that the applicant "is hereby authorized to furnish" a particular kind of service. No statement was contained therein that a monopoly was thus granted for such particular service. The authority granted by the certificate remained unchanged after the 1934 act. Petitioner retained the same authority to furnish the particular service after 1934 that it had before. No change, either enlarging or restricting rights under the certificates, was made by the 1934 act.

The monopoly enjoyed by petitioner sprang from the provisions of the 1921 act which placed upon the appropriate State department the limitation that it could issue further permits to operate in the same territory "only when the existing auto transportation company * * * serving such territory will not provide the same to the satisfaction of" such department. Thus a rule of law specifying the duty of the department had the effect of creating a monopoly, not alone by issuance of the certificate, but coupled with the desire and ability of the certificate-holder to furnish the service to the "satisfaction" of the department. These latter things were merely means of effecting, not creating, the monopoly.

Destruction of the statute which put an end to the monopoly did not destroy the certificates, nor their value. The thing destroyed was the right of monopoly conferred by the statute, not by the certificate. What interest did petitioner have in the rule of law, declared by statute? "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit * * *." (*New York Central R. R. Co.* v. *White*, 243 U. S., 188, 198; *Second Employers Liability Cases*, 223 U. S., 1, 50.) Whatever right the statute conferred on petitioner was subject to the right of the State to change it. When petitioner purchased the certificates, it did not purchase a monopoly, but the means by which it might take advantage of a monopoly conferred by statute. It now has had no loss of such means, for they exist now as before. We think petitioner suffered no loss on the certificates, for the thing destroyed was not a part thereof.

Affirmed.

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

ARTICLE 23(l)-2: Depreciable property. 1939-51-10122
Ct. D. 1430

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

1. DEDUCTION FROM GROSS INCOME—DEPRECIATION—ALLOWABLE TO LESSEE UNDER 99-YEAR LEASE WHERE TRANSACTION BETWEEN LESSEE AND TRUSTEE WAS IN REALITY A MORTGAGE LOAN.

A corporation occupied and used in its business three buildings, the legal title to two of which, and an assignment of a 99-year lease to the third, were in a bank as trustee for certain land-trust certificate holders. At the time of the transfer of the properties to the trustee bank, in 1928, all three buildings were leased back to the corporation by the trustee for 99 years, with option to renew and purchase. *Held*, That the Board of Tax Appeals justifiably concluded, from a consideration of all the evidence, that the transaction between the corporation and the trustee, in written form a transfer of ownership with a lease back, was in reality a mortgage loan secured by the property involved, and that, in computing its net taxable income for 1930 and 1931, the corporation was entitled to the statutory allowance for depreciation of buildings.

2. DECISION AFFIRMED.

Decision of the United States Circuit Court of Appeals, Sixth Circuit (1939) (101 F. (2d), 728), affirming decision of the United States Board of Tax Appeals (1935) (32 B. T. A., 633), affirmed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *The F. & R. Lazarus & Co.*

[60 S. Ct., 209.]

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 4, 1939.]

OPINION.

MR. JUSTICE BLACK delivered the opinion of the Court.

In computing its net taxable income for 1930 and 1931, respondent claimed depreciation on three buildings occupied and used in its business as a department store. During those years, the legal title to two of these properties and an assignment of a 99-year lease to the third were in a bank as trustee for certain land-trust certificate holders. These properties had been transferred to the trustee by the respondent in 1928 and the trustee had at the same time leased all three back to respondent for 99 years, with option to renew and purchase. In claiming the deduction, respondent insisted that the capital loss from wear, tear, and exhaustion of the buildings was falling upon it, thus entitling it to the statutory allowance for depreciation of buildings.[1] The Commissioner disallowed this deduction on the ground that the statutory right to depreciation follows legal title. Reviewing the evidence, the Board of Tax Appeals concluded that the transaction between respondent and the trustee bank was in reality a mortgage loan and ordered the deduction allowed,[2] and the circuit court of appeals affirmed.[3] Upon facts which it considered "in all essential respects identical," the Court of Appeals for the District of Columbia held depreciation not allowable.[4] Because of the different results reached by the courts of appeal, we granted certiorari.[5]

The Federal income tax is aimed at net income determined from gross income less items such as necessary expenses incurred or capital consumed in earning it. Thus, the controlling statute permits a taxpayer in computing net income to deduct a "reasonable allowance for * * * exhaustion, wear and tear." While it may more often be that he who is both owner and user bears the burden of wear and exhaustion of business property in the nature of capital, one who is not the owner may nevertheless bear the burden of exhaustion of capital investment. Where it has been shown that a lessee using property in a trade or business must incur the loss resulting from depreciation of capital he has invested, the lessee has been held entitled to the statutory deduction.[6]

Here, the taxpayer used business property in which it had a depreciable capital investment, provided it had not recovered its investment through a sale. The Board in substantial effect found that the instrument under which the taxpayer purported to convey legal ownership to the trustee bank was in reality

[1] Revenue Act of 1928 (ch. 852, 45 Stat., 791, 799–800). In computing net income there shall be allowed as deductions: * * *

Depreciation.—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

[2] 32 B. T. A., 633. The Board found the depreciable life of the property to be 50 years, instead of 40 as originally claimed by respondent.

[3] 101 F. (2d), 728; cf. *Commissioner* v. *H. F. Neighbors Realty Co.* (81 F. (2d), 173).

[4] *City National Bank Building Co.* v. *Helvering* (98 F. (2d), 216, 217).

[5] — U. S., —.

[6] *Duffy* v. *Central R. Co. of N. J.* (268 U. S., 55 [T. D. 3704, C. B. IV–1, 143 (1925)]); *Appeal of Gladding Dry Goods Co.* (2 B. T. A., 336, 338); *Cogar* v. *Commissioner* (44 F. (2d), 554). See *Bowman Co.* v. *Commissioner* (32 F. (2d), 404, 405 [Ct. D. 68, C. B. VIII–1, 251 (1929)]); *Nat'l City Bank of Seattle* v. *United States* (64 C. Cls., 236, certiorari denied, 276 U. S., 620); *Commissioner* v. *H. F. Neighbors Realty Co.*, supra.

given and accepted as no more than security for a loan on the property; the "rent" stipulated in the concurrently executed 99-year "lease" back was intended as a promise to pay an agreed 5 per cent interest on the loan; and the "depreciation fund" required by the "lease" was intended as an amortization fund, designed to pay off the loan in 48½ years. These findings are supported by evidence which permits, at most, conflicting inferences and are, therefore, conclusive here. And, unless the Board committed error of law we must affirm.[7]

We think the Board justifiably concluded from its findings that the transaction between the taxpayer and the trustee bank, in written form a transfer of ownership with a lease back, was actually a loan secured by the property involved. General recognition has been given the "established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money."[8] In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding. Congress has specifically emphasized the equitable nature of proceedings before the Board of Tax Appeals by requiring the Board to act "in accordance with the rules of evidence applicable in courts of equity of the District of Columbia." (26 U. S. C., 611.)

The Government relies in part upon *Senior* v. *Braden* (295 U. S., 422). Whatever the significance of that case, it can have no application here. In the Braden case, the equitable doctrine—here controlling—of looking to extrinsic evidence behind a transfer absolute on its face to determine whether only a security transaction was contemplated by the parties, was neither invoked nor passed upon.

Judgment below is affirmed.

Mr. Justice REED took no part in the consideration or decision of this case.

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

ARTICLE 23(m)-1: Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements. — 1939-36-9994 Ct. D. 1416

INCOME TAX—REVENUE ACT OF 1932—DECISION OF COURT.

INCOME—DEDUCTION—OIL WELL DRILLING CONTRACTS—VALUE OF CONTINGENT RIGHT TO FUTURE OIL PAYMENTS—DEPLETION—DRILLING COSTS.

A partner in a firm which contracted to drill oil wells and to receive pay for its services partly in cash and partly in a right to payment of a fixed sum out of oil and gas produced is not subject to income tax upon the so-called "oil payments" until the contracts are sold or money is received under them from the oil sales, since such contracts, although salable, are too uncertain and contingent to have any readily ascertainable market value. The money receipts from the production of oil carried a 27½ per cent depletion allowance, as provided by section 114(b)3 of the Revenue Act of 1932, since the contracts, by assigning and setting over to the driller the oil and gas in the ground in the proportion agreed upon, conveyed to the partnership an economic interest in the oil in place which was depleted by the production of oil; but there is no right first to deduct cost in dealing with such receipts, treating as taxable gain only those payments which are received after cost has been fully returned.

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[7] 26 U. S. C., 641(c).

[8] *Peugh* v. *Davis* (96 U. S., 332 336); *Hughes* v. *Edwards* (9 Wheat., 489, 495); *Russell* v. *Southard et al.* (12 How., 139); *Teal* v. *Walker* (111 U. S., 242). See cases collected in 79 A. L. R., 937.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8880. *Willis R. Dearing (Nannie Clinton Dearing et al., Independent Executors, Substituted in the Place and Stead of Willis R. Dearing, Deceased), petitioners, v. Commissioner of Internal Revenue, respondent.*

[102 Fed. (2d), 91.]

Petition for review of decision of United States Board of Tax Appeals (district of Texas).

Before FOSTER, SIBLEY, and MCCORD, Circuit Judges.

[March 3, 1939.]

OPINION.

SIBLEY, Circuit Judge: The taxpayer, Willis R. Dearing, during the tax year 1932 was a partner in the firm of R. H. Dearing & Co., which was doing a large business in drilling oil wells and receiving pay for its services partly in cash and partly in a right to payment of a fixed sum out of the oil and gas produced, saved and marketed from the several wells successfully brought in. The present contest relates to the proper treatment for income tax purposes of the receipts in or from these so-called "oil payments." The partnership returned only the money received, having always made its returns on a cash receipts basis, and claimed that as to each successful well it should apply the receipts in money from the oil payments first to extinguish the cost of drilling the particular well and treat the excess only as a taxable gain. The Commissioner as to each partner held that the right to receive in the future the agreed oil payments was, when the well turned out a producer, a property having present market value, and therefore was a taxable gain in the year the well was completed, and fixed that gain at 75 per cent of the total to be paid out of the well; and he held also that when the payments from the oil contract in after years exceeded the 75 per cent thus taxed the excess was an additional taxable gain. He allowed no deduction for depletion. The Board of Tax Appeals held that although such an oil payment contract might be salable, there was too much uncertainty and contingency about it to make it a property having a readily ascertainable market value, following *Edwards Drilling Co.* (35 B. T. A., 341, affirmed, 95 Fed. (2d), 719), and that in consequence it should not be taxed as a gain until sold or until money should be received under it from the oil sales. This ruling is acquiesced in by the Commissioner. The Board further held that the expenditures in drilling, if not deducted in the returns as expenses of doing business as was held might be done in the case of *Vinton Petroleum Co.* v. *Commissioner* (71 Fed. (2d), 420 [Ct. D. 925, C. B. XIV–1, 176 (1935)]), stood as the investment of the partnership in the oil payments contracts obtained by the drilling; that these contracts conveyed to the partnership an economic interest in the oil in place which was depleted by the production of the oil, so that the money receipts derived from the production of the oil carried a depletion allowance of 27½ per cent as provided by section 114(b)3, Revenue Act of 1932; but that there is no right to recover the drilling expenses otherwise. These rulings the taxpayer contests.

We think the Board is right. There is no claim here to deduct anything as necessary expense of business in the year the expenditure was made. As to the oil payments contracts here involved, the drilling expenditures were paid out in previous years. Such as were not then deducted as necessary expense of business or repaid by cash payment on the contract were, according to the case of *Vinton Petroleum Co.* v. *Commissioner* (71 Fed. (2d), 420), capitalized as an investment in the future oil payments. These oil payment contracts as above stated were for so much money to be paid only out of a fraction of the oil or gas produced, saved and marketed. The landowner who let the contract for the drilling undertook no personal liability for the payment of the money, but did expressly assign and set over to the driller the oil and gas in the ground in the proportion agreed on. This can be effectually done in Texas, and vests not only an economic interest in the oil in place, but a title in the driller. The partnership thereby acquired a property which was salable, and we have no doubt that should it sell that property it could deduct the cost of it in ascertaining gain,

as the taxpayer wishes to do. But the production of oil under the contract is not a sale of the partnership's interest in the oil in place, but is an enjoyment of that interest. Its interest in the oil reserve, like the landowner's, is not thereby sold, but only depleted. Neither of them can deduct cost in dealing with the income so received, but each may reduce his income 27½ per cent on account of the depletion of his capital investment. (See *Palmer* v. *Bender*, 287 U. S., 551; [Ct. D. 641, C. B. XII-1, 235 (1933)]; *Thomas* v. *Perkins*, 301 U. S., 655; *Vinton Petroleum Co.* v. *Commissioner*, 71 Fed. (2d), 420; *Commissioner* v. *Fleming*, 82 Fed. (2d), 324.)

Affirmed.

NOTE.—The court also on March 3, 1939, on authority of the decision in case No. 8880, *Willis R. Dearing* v. *Commissioner of Internal Revenue*, decided and affirmed the Board of Tax Appeals in—

Willis R. Dearing, Executor of R. H. Dearing Trust Estate, No. 8881;

Willis R. Dearing, Executor for the Estate of R. H. Dearing, Deceased, No. 8882;

Mrs. R. H. Dearing, No. 8883;

Mrs. Willis R. Dearing, No. 8884.

ARTICLE 23(m)-4: Computation of depletion based on a percentage of income in the case of oil and gas wells.

1939-47-10093
Ct. D. 1423

INCOME TAX—REVENUE ACT OF 1932—DECISION OF SUPREME COURT.

1. DEDUCTION—DEPLETION ALLOWANCE—"NET INCOME * * * FROM THE PROPERTY."

An oil company, in computing its "net income * * * from the property" for the years 1932 and 1933 for the purpose of applying the 50 per cent limitation on depletion allowance under section 114(b)3 of the Revenue Act of 1932, may not refuse to take as deductions certain development expenditures, where, under the election permitted by the regulations, it had deducted such expenditures in computing taxable net income for those years.

2. REGULATIONS SUSTAINED.

The provisions of article 221(h) of Regulations 77, promulgated under the Revenue Act of 1932, are valid and binding upon the taxpayer. (See *Helvering* v. *Wilshire Oil Co., Inc.*, decided on November 6, 1939, this Bulletin, page 213.)

3. DECISION AFFIRMED.

Decision of the United States Circuit Court of Appeals, Fifth Circuit (1939) (102 F. (2d), 596), reversing a memorandum opinion of the United States Board of Tax Appeals, affirmed.

SUPREME COURT OF THE UNITED STATES.

F. H. E. Oil Co., petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

[308 U. S., 104.]

On writ of certiorari to United States Circuit Court of Appeals, Fifth Circuit.

[November 6, 1939.]

OPINION.

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case presents the same issue as is involved in No. 1, *Helvering* v. *Wilshire Oil Co., Inc.*, ante, page 213, except that it arises under the Revenue Act of 1932 (47 Stat., 169). In computing its taxable net income under that Act, petitioner deducted certain development expenditures as it had done since its organization in 1925. But it refused to take these same deductions in computing net income for the purpose of applying the 50 per cent limitation on the depletion al-

lowance, as provided in section 114(b)3 of the 1932 Act.[1] That section, so far as material here, was the same as section 114(b)3 of the 1928 Act (45 Stat., 791). And Treasury Regulations 77, article 221(h) promulgated under the 1932 Act[2] defined "net income * * * from the property" as used in section 114(b)3 so as to require "development costs" of the kind here involved to be deducted from "gross income from the property."[3] The Board of Tax Appeals held that petitioner need not deduct these development expenditures in applying the 50 per cent limitation on depletion allowance (36 B. T. A., 1327) and the circuit court of appeals reversed (102 F. (2d), 596). Since we have this day decided in *Helvering* v. *Wilshire Oil Co., Inc.*, supra [Ct. D. 1424, below], that comparable regulations under the 1928 Act were lawful, *a fortiori* those here involved are valid and binding on petitioner. The judgment of the court below was therefore right and is

Affirmed.

Mr. Justice BUTLER and Mr. Justice REED took no part in the consideration or disposition of this case.

ARTICLE 23(m)-4: Computation of depletion based on a percentage of income in the case of oil and gas wells.

1939-47-10094
Ct. D. 1424

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

1. DEDUCTION — DEPLETION ALLOWANCE — "NET INCOME * * * FROM THE PROPERTY."

An oil company, in computing its "net income * * * from the property" for the years 1929 and 1930 for the purpose of applying the 50 per cent limitation on depletion allowance under section 114(b)3 of the Revenue Act of 1928, may not refuse to take as deductions certain development expenditures, where, under the election permitted by the regulations, it had deducted such expenditures in computing taxable net income for those years.

2. VALIDITY OF REGULATIONS—EFFECT OF LEGISLATIVE REENACTMENT WHERE PRIOR REGULATIONS DIFFERED.

Article 221(i) of Regulations 74, approved February 15, 1929, is valid notwithstanding the fact that the statutory provisions which it interprets are reenactments of prior statutory provisions upon which prior regulations placed a different interpretation. Administrative interpretation of the ambiguous phrase "net income * * * from the property" was within the rule-making power conferred upon the Commissioner by section 23(l) of the 1928 Act, and restrictions on that power may not be lightly imposed where the incidence of such rules as are promulgated is prospective only. *Helvering* v. *R. J. Reynolds Tobacco Co.* (306 U. S., 110 (Ct. D. 1383, C. B. 1939-1, Part 1, 225)), distinguished.

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[1] That section provided:

"In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayers in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

[2] Section 23(l) of the Revenue Act of 1932 provided:

"In computing net income there shall be allowed as deductions:

* * * * * * *

"(1) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *"

[3] Treasury Regulations 77, article 221(h) provided:

"'Net income of the taxpayer (computed without allowance for depletion) from the property,' as used in section 114(b) (2), (3), and (4) and articles 221 to 248, inclusive, means the 'gross income from the property' as defined in paragraph (g) less the allowable deductions attributable to the mineral property upon which the depletion is claimed and the allowable deductions attributable to the processes listed in paragraph (g) in so far as they relate to the product of such property, including overhead and operating expenses, development costs properly charged to expense, depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion. * * *"

3. DECISION REVERSED.

Decision of the United States Circuit Court of Appeals, Ninth Circuit (1938) (95 F. (2d), 971), affirming decision of the United States Board of Tax Appeals (1937) (35 B. T. A., 450), reversed.

SUPREME COURT OF THE UNITED STATES.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. *Wilshire Oil Co., Inc.*

[308 U. S., 90.]

On writ of certiorari to United States Circuit Court of Appeals, Ninth Circuit.

[November 6, 1939.]

OPINION.

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case presents the question whether respondent, Wilshire Oil Co., Inc., in computing its net income for the years 1929 and 1930 for the purpose of applying the 50 per cent limitation on depletion allowance under section 114(b)3 of the Revenue Act of 1928 (45 Stat., 791), may refuse to take as deductions certain development expenditures,[1] where it has deducted those development expenditures in computing its taxable net income for those years. The Board of Tax Appeals held for the respondent (35 B. T. A., 450) and that decision was affirmed by the circuit court of appeals, one judge dissenting (95 F. (2d), 971). Because of the importance of the problem of the scope of the Commissioner's rule-making power and because of an asserted conflict of the decision below with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner of Internal Revenue* v. *F. H. E. Oil Co.* (102 F. (2d), 596), we granted certiorari.

Respondent is engaged in the business of producing oil and gas from its various properties. In computing taxable net income in its returns for 1929 and 1930 respondent, pursuant to the regulations, deducted development expenditures in the respective amounts of $606,051.66 and $279,927.04. But it refused to make those deductions in determining its "net income * * * from the property" for the same years, when computing allowable depletion under section 114(b)3 of the Revenue Act of 1928.[2]

That section provides:

"In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the tax-

[1] These expenditures consisted of such items as labor, fuel and power, materials and supplies, tool rental, truck and auto hire, repairs to drilling equipment and depreciation upon equipment used in drilling.

[2] For the year 1929 the Commissioner's computations were as follows:

Gross income from the properties		$1,001,375.17
Deductions:		
Production expense	$171,399.03	
Development expense	606,051.66	
Total expenses		777,450.69
Net income from property (computed without allowance for depletion)		223,924.48
50 per cent of that income		111,962.24

The Commissioner limited the depletion allowance to the last mentioned figure since 50 per cent of the net income from the property as thus computed was less than 27½ per cent of the gross income.

Under the taxpayer's computation, the net income for depletion purposes would be $1,001,375.17 less $171,399.03 or $829,976.14 and 50 per cent thereof would not be less than 27½ per cent of the gross income.

For the year 1930 the Commissioner's computation showed a loss of $194,869.22. He therefore ruled that since the percentage depletion allowance was limited to 50 per cent of the net income from the properties and since the taxpayer had no such net income, no deduction on account of percentage depletion could be allowed. The taxpayer refused, however, to deduct development expenses in the application of the 50 per cent limitation and claimed a depletion deduction of $42,528.91, arrived at as follows:

Gross income from the properties		$370,448.72
Deductions: Production expense		285,390.90
Net income		85,057.82
Depletion deduction (50 per cent of net income)		42,528.91

payer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

By virtue of section 23 of the Revenue Act of 1928 companies like respondent were allowed as deductions in computing net income a "reasonable allowance for depletion * * * according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary." Pursuant to that rule-making power the phrase "net income of the taxpayer (computed without allowance for depletion)" as used in section 114(b)3 was defined by Treasury Regulations 74, article 221(i) promulgated under the 1928 Act as meaning "gross income from the sale of oil and gas" less certain deductions including "development expenses (if the taxpayer has elected to deduct development expenses) * * * but excluding any allowance for depletion." For 1925 respondent, having the option to treat these expenses as deductions for development expenses or as charges to the capital account returnable through depletion,[3] chose the former.

On these facts it would seem that Treasury Regulations 74, article 221(i) would require respondent to deduct development expenses in computing "net income" as used in section 114(b)3, since respondent fell clearly within the class described therein.

But respondent contends that these regulations as applied to it for the taxable years in question are invalid. Its argument runs as follows: (1) The phrase "net income * * * from the property" present in section 114(b)3 originated in section 234(a)9 of the Revenue Act of 1921 (42 Stat., 227) and was reenacted without change in section 204(c) of the 1924 Act (43 Stat., 253). It was also carried over into section 204(c)2 of the 1926 Act (44 Stat., 9), when Congress adopted the present so-called percentage depletion formula. Shortly after the enactment of the Revenue Act of 1921, Treasury regulations were issued defining "net income * * * from the property" as meaning gross income from the property less "operating expenses."[4] A similar definition was given in the Treasury regulations issued under the Revenue Act of 1924.[5] The admitted Treasury practice under those two Acts was to permit net income from the property to be computed without regard to development expenditures. Hence, respondent argues, the meaning of the phrase "net income * * * from the property" had acquired a plain and definite meaning, known to the Congress; thus when that phrase was reenacted in the 1924 Act, the Congress intended it to have the meaning which administrative practice had given it. And, the argument continues, that meaning having been adopted by the Congress in the 1924 Act, it clung to the same phrase in the 1926 Act[6] and in the 1928 Act, especially since the Commissioner prior to February 15, 1929[7] never did undertake by regulation or decision to give that phrase a meaning different from that which had been consistently applied under the earlier Acts.

(2) Secondly, respondent contends that the fact that it deducted development expenses in computing taxable net income does not mean that it is required to make the same deductions for the "net income" computation under section 114(b)3 for the reason that it had no free choice in the first of these computations. In that connection it points out that it was required to make these deductions from gross income by reason of its election in its 1925 return to treat these expenses as deductions for development expenses rather than as charges to capital account returnable through depletion, an election binding for all subsequent years. In that posture of the case it argues that the attempted change in the regulations here involved has a retroactive effect, as

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[3] Treasury Regulations 69, article 223, promulgated under the Revenue Act of 1926 provides that "such incidental expenses as are paid for * * * development of the property may at the option of the taxpayer be deducted as a development expense or charged to capital account returnable through depletion. * * * An election once made under the provisions of this article will control the taxpayer's returns for all subsequent years."

[4] Treasury Regulations 62, article 201(h).

[5] Treasury Regulations 65, article 201(h).

[6] Respondent points to the report of Committee on Ways and Means on revenue bill of 1926 (H. Rept. No. 1, Sixty-ninth Congress, first session, page 6): "The discovery depletion deduction limitation of an amount not in excess of 50 per cent of the net income of the taxpayer from the property upon which discovery was made, provided in existing law, is retained in this provision."

[7] The date when Treasury Regulations 74, article 221(i), here in question, were promulgated.

applied to it, and withdraws one of the important inducements offered by the Commissioner in connection with the election which respondent made in its 1925 return.

We do not think that respondent's position is tenable.

As to respondent's claim of retroactivity, it is true that the election made in connection with its 1925 return was known to be binding for all subsequent years. It is likewise true that it was made at a time when Treasury practice did not require deduction of development expenses in making the computation under section 114(b)3. But that is no basis for a claim of retroactivity. Treasury Regulations 74, article 221(i) which required the deduction of development expenses for the purpose of the computation under section 114(b)3 were issued February 15, 1929, under the 1928 Act. These regulations applied prospectively only and did not purport to reach back to earlier years when the taxpayer relied on a different rule or practice. Tax statutes and tax regulations never have been static. Experience, changing needs, changing philosophies inevitably produce constant change in each. One making an election in the 1925 return took the risk that the method of treatment of depletion might be changed by the Congress, or, where power existed, by the Commissioner. Any other conclusion would make the application of changes pursuant to regulations, though prospective, dependent on fortuitous circumstances under which each taxpayer made such an election. Rigidity, as well as confusion, in administration of tax laws would be the result.

But in this case there is another answer to respondent's claim that an inequity results by changing the regulations after it had made its election in the 1925 return. On June 18, 1927, the Commissioner, with the approval of the Secretary, issued a Treasury decision [8] stating that " In view of the change in the basis for depletion provided by the Revenue Act of 1926, in the case of oil and gas wells, taxpayers may make a new election as to the treatment " of development expenditures " for taxable periods ending on or after January 1, 1925, but not later than six months after the date of this decision." Taxpayers desiring to make a new election were required to file amended returns for the taxable periods involved within six months from the date of that decision. Thus respondent, after Congress adopted the new percentage depletion provision, was afforded ample opportunity to make a new election. This it did not do. To be sure that Treasury decision contained no notice of any projected change in the meaning of " net income * * * from property " as used in section 114(b)3. But in September, 1927, there issued a General Counsel's memorandum [9] in which it was stated that thereafter " if a taxpayer elects to treat development expenditures as ordinary and necessary business expenses * * * in computing taxable net income, such expenditures must be deducted in determining the net income from the property, which amount is used as a limitation in computation of the depletion allowance based on income." To be sure this was merely an opinion of the General Counsel of the Bureau and did not have the force or effect of a Treasury decision. Yet in view of such ruling, there is now no reasonable basis for concluding that when respondent made its second election in 1927 it had no basis for assuming that the policy as respects " net income * * * from the property " under the 1926 Act was or would be no different than it had been under the 1921 and 1924 Acts. Therefore, in terms of equitable considerations respondent has no just ground of complaint. On these facts substantial justice requires that respondent take such burdens as may flow from its election along with the benefits.

Irrespective of these considerations, we think the regulations in question were valid. It is true, as stated by respondent, that the regulations under the 1921 Act provided that the " net income * * * from the property " should be computed for purpose of the depletion allowance without regard to development expenditures. And it may be assumed that that administrative construction received legislative approval by the reenactment of the statutory provision in the 1924 Act, without material change. (Cf. *United States* v. *Dakota-Montana Oil Co.*, 288 U. S., 459, 466 [Ct. D. 655, C. B. XII-1, 243 (1933)].) But that does not mean that that meaning survived both the 1926 and the 1928 Acts. In the first place, there were no comparable regulations under the 1926 Act.[10]

[8] Treasury Decision 4025 (C. B. VI-1, 75 (1927)).
[9] G. C. M. 2315 (C. B. VI-2, 21 (1927)).
[10] As respects discovery depletion in the case of mines under the 1926 Act, provisions similar to those under the 1921 and 1924 Acts were retained. (Treasury Regulations 69, article 201(h).) But this was not true as respects oil and gas wells. Section 204(c)2 of

In fact, the Commissioner undertook under that Act to follow the practice later set forth in the regulations here in question. (See *Ambassador Petroleum Co.* v. *Commissioner*, 81 F. (2d), 474.) Those facts are of some significance here for they refute the suggestion that the Congress in enacting the 1928 Act was giving approval to an administrative construction which had been given to comparable provisions of earlier Acts but which was abandoned before the passage of the 1928 Act. The more reasonable inference seems to be that reenactment of the provision in question by the 1928 Act at a time when Treasury policy as respects its construction had changed did nothing more than to restore to the phrase "net income * * * from the property" its original ambiguity. Accordingly that phrase became peculiarly susceptible to new administrative interpretation. (*Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S., 110; *Morrissey* v. *Commissioner of Internal Revenue*, 296 U. S., 344 [Ct. D. 1064, C. B. XV-1, 264 (1936)].)

But in any event, the validity of the regulations in question seems clear. The oft-repeated statement that administrative construction receives legislative approval by reenactment of a statutory provision, without material change (*United States* v. *Dakota-Montana Oil Co.*, supra) covers the situation where the validity of administrative action standing by itself may be dubious or where ambiguities in a statute or rules are resolved by reference to administrative practice prior to reenactment of a statute; and where it does not appear that the rule or practice has been changed by the administrative agency through exercise of its continuing rule-making power. It does not mean that a regulation interpreting a provision of one Act becomes frozen into another Act merely by reenactment of that provision, so that that administrative interpretation can not be changed prospectively through exercise of appropriate rule-making powers. (Cf. *Morrissey* v. *Commissioner of Internal Revenue*, supra, at page 355.) The contrary conclusion would not only drastically curtail the scope and materially impair the flexibility of administrative action; it would produce a most awkward situation. Outstanding regulations which had survived one Act could be changed only after a pre-view by the Congress. In preparation for a new Revenue Act the Commissioner would have to prepare in advance new regulations covering old provisions. Their effectiveness would have to await Congressional approval of the new Act. The effect of such procedure, so far as time is concerned, would be precisely the same as if these new regulations were submitted to the Congress for approval. Such dilution of administrative powers would deprive the administrative process of some of its most valuable qualities—ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations. It would make the administrative process under these circumstances cumbersome and slow. Known inequities in existing regulations would have to await the advent of a new Revenue Act. Paralysis in effort to keep abreast of changes in business practices and new conditions would redound at times to the detriment of the revenue; at times to the disadvantage of the taxpayer. Likewise the result would be to read into the grant of express administrative powers an implied condition that they were not to be exercised unless, in effect, the Congress had consented. We do not believe that such impairment of the administrative process is consistent with the statutory scheme which the Congress has designed.

The only remaining question is whether Treasury Regulations 74, article 221(i) were within the power of the Commissioner to promulgate. That they were seems clear beyond question. We are not dealing here, as was this Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, supra, with regulations applied retroactively. These are applied prospectively only. The rule-making power here in question may be found in section 23(l) of the Revenue Act of 1928. That section, after providing that companies like respondent were entitled, as a

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the Revenue Act of 1926 applied the percentage depletion allowance exclusively to "oil and gas wells." Treasury Regulations 69, article 221, provided:

"Under section 204(c)2, in the case of oil and gas wells, a taxpayer may deduct for depletion an amount equal to 27½ per cent of the gross income from the property during the taxable year, but such deduction shall not exceed 50 per cent of the net income of the taxpayer (computed without allowance for depletion) from the property. In no case shall the deduction computed under this paragraph be less than it would be if computed upon the basis of the cost of the property or its value at the basic date, as the case may be. In general, 'the property,' as the term is used in section 204(c)2 and this article, refers to the separate tracts or leases of the taxpayer."

Thus, it is apparent that the delimitation implied in the permission to deduct "operating expenses" present under the earlier regulations disappeared from the 1926 regulations in case of oil and gas wells.

deduction in computing net income, to a "reasonable allowance for depletion * * * according to the peculiar conditions in each case" laid especial emphasis on the power of the Commissioner to make rules for the computation of the depletion allowance, by providing that "such reasonable allowance in all cases is to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary."

Respondent does not strongly urge that the regulatory power conferred by section 23(1) does not extend to the percentage depletion allowance under section 114(b)3. Rather the contention seems to be that to allow the Commissioner by regulation to change the measure of "net income * * * from the property" from time to time, especially in the manner here attempted, would be to approve a result equally as contrary to the intention of Congress as if he had attempted by regulation to change the percentage factors themselves. But the scope or importance of the change effected by the regulations is immaterial if the power to promulgate such regulations exists. Here the Congress has not prescribed a precise formula free from all ambiguity. The ambiguous phrase "net income * * * from the property" was susceptible of various meanings and hence administrative interpretation of it was peculiarly appropriate, as we have said. And there were special reasons growing out of the complex nature of the depletion problem as it is treated for purposes of the income tax, for requiring the Commissioner to make precise the vague elements of that formula. In its general aspects under Revenue Acts depletion is a problem on which taxpayers, Government and accountants have expressed a contrariety of opinions.[11] Obfuscation in attempted application of its principles under income tax laws has frequently been the result. The Congress itself, as revealed in the history of the Revenue Acts, has expressed varying philosophies. In practical administration of any one statute there are admittedly borderline cases between deductible business expenses and nondeductible capital outlays. On specific fact situations the clear line between depletion, depreciation, and obsolescence often becomes blurred.[12] What those lines are or should be is for the Congress and the Commissioner. Experience and new insight can be expected to produce rather constant change. In sum, the highly technical and involved factors entering into a practical solution of the problem of depletion in administration of the tax laws points to the necessity of interpreting section 23(1) so as to strengthen rather than to weaken the administrative powers to deal with it equitably and reasonably. These considerations are persuasive here not only in reaffirming the conclusion that the rule-making power existed, but also in concluding that restrictions on that power should not be lightly imposed where the incidence of such rules as are promulgated is prospective only.

Reversed.

Mr. Justice BUTLER and Mr. Justice REED took no part in the consideration or decision of this case.

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

1939-51-10123
G. C. M. 21714

REVENUE ACT OF 1932.

A loss of $4x$ dollars from the sale of stock held for not more than two years was sustained in the fiscal year ended May 31, 1934, by the M Company, not a dealer in securities. In its return for that year the company properly reported $3x$ dollars as profit on the sale in the previous year of stock held for not more than two years, the profit from the sale in the previous year being properly reported on the installment basis. *Held*, the loss of $4x$ dollars sustained in the year ended May 31, 1934, is deductible in that year to the extent of $3x$ dollars.

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[11] 2 Paul & Mertens, The Law of Federal Income Taxation (1934), ch. 21; 47 Yale L. Journ., 806 (1938).

[12] See for example the issues posed in *United States* v. *Dakota-Montana Oil Co.*, supra.

An opinion is requested whether the M Company, not a dealer in securities, is entitled to deduct for the fiscal year ended May 31, 1934, any part of the loss of $4x$ dollars sustained by it during that year from the sale of stock held for not more than two years. The company seeks to deduct the loss to the extent of the gain of $3x$ dollars properly reported by it in that year as profit on the sale in the previous taxable year of stock held for not more than two years, the total profit from which sale, $30x$ dollars, is being reported on the installment basis.

Since the taxable year is the fiscal year ended May 31, 1934, the Revenue Act of 1932 is applicable. (Cf. section 1, Revenue Act of 1934.) Section 23(r) of the Revenue Act of 1932 provides in part as follows:

> *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).
>
> * * * * * * *
>
> (3) This subsection shall not apply to a dealer in securities (as to stocks and bonds acquired for resale to customers) in respect of transactions in the ordinary course of his business, * * *.

In so far as here concerned, section 101(8) of the Revenue Act of 1932 provides that "'Capital assets' means property held by the taxpayer for more than two years * * *."

The question presented in this case is whether the words "gains from such sales or exchanges," as used in section 23(r), supra, include a gain from the sale of stock in a prior year which is properly reported on the installment basis in the year in which the loss in question is sustained.

In the opinion of this office the answer is in the affirmative. The provisions of section 23(r), supra, to the effect that losses from sales or exchanges of stocks and bonds which are not capital assets are allowable to the extent of "the gains from such sales or exchanges," do not exclude gains which are being reported on the installment basis even though the sale was made on such basis in a prior year. Such income clearly qualifies as "gains from such sales or exchanges" within the meaning of section 23(r), supra. In other words, the fact that the gain from such a sale or exchange reported for the taxable year in which such a loss is sustained represents gain from a sale or exchange in a prior year which is properly reported on the installment basis does not deprive the taxpayer from deducting such loss to the extent of the gain from the installment sale reported in that year. Furthermore, there is no legislative history indicating any other intent.

In *C. Perry Snell* v. *Commissioner* (97 Fed. (2d), 891), the taxpayer was held not entitled to the 12½ per cent capital gain tax rate under the Revenue Acts of 1924 and 1926 for the taxable years 1924 to 1927, inclusive, in respect of profit or gain returnable in those years on the installment basis from real estate sold in 1923, on the ground that the taxpayer was "actively and continuously engaged in the development of real estate," and that these lands were held for sale by him in the course of his business even though held for

more than two years when sold. The concluding paragraph of the court's opinion is particularly noteworthy in connection with the question presented in the instant case:

As to the installment sales made in 1923, the taxpayer might have elected to take his whole profit then and have had it taxed under the Revenue Act of 1921. He chose to defer realization of the profits on the deferred installments. These thereby were left to fall under such provisions of the law as might be of force at their maturity. That the law might be changed, not only in the tax rate but in any other of its provisions, was a risk the taxpayer took in deferring the realization of his gains. The Board rightly applied to them the law as it stood when the gains became taxable.

In view of the foregoing, it is the opinion of this office that the aforementioned loss of $4x$ dollars is allowable as a deduction to the extent of the aforementioned gain of $3x$ dollars.

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

SECTION 24.—ITEMS NOT DEDUCTIBLE.

ARTICLE 24–4: Amounts allocable to exempt income, other than interest.

REVENUE ACT OF 1934.

Tax-exempt interest, and expenses allocable thereto, in cases of resident foreign insurance companies. (See I. T. 3297, page 137.)

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 44.—INSTALLMENT BASIS.

ARTICLE 44–3: Sale of real property on installment plan. 1939–35–9983 Ct. D. 1415

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

INSTALLMENT BASIS—SALE OF PROPERTY—FAILURE TO REPORT ASSIGNMENT OF INSTALLMENT CONTRACT—ESTOPPEL.

A corporation sold property on the installment basis in 1929, and although the installment contract was assigned in that year to the corporation's sole stockholder, returns filed by the corporation in subsequent years reported income on the installment basis, making no disclosure of the assignment, until 1933, when it was too late to make the proper assessment against the corporation for 1929. The corporation in 1934 filed a claim for refund of the 1932 tax, on the ground that the corporate charter had expired in 1930. Under the facts disclosed, the failure of the Commissioner to assess the appropriate tax for 1929 is conclusively shown to be attributable to the corporation's erroneous omissions in its subsequent returns, and the corporation is now estopped from asserting, for the purpose of obtaining a refund, that the contract was actually transferred in 1929. The circumstances show that the Commissioner without fault relied upon the corporation's misrepresentations, and was prejudiced thereby.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Lofquist Realty Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*
[102 Fed. (2d), 945.]

Petition for review of decision of the United States Board of Tax Appeals.

Before SPARKS, MAJOR, and TREANOR, Circuit Judges.

[March 24, 1939.]

OPINION.

SPARKS, Circuit Judge: The taxpayer petitions for review of a decision of the Board of Tax Appeals disallowing its claim for refund of $433.22, the total amount of taxes paid by it for the year 1932, which disallowance was based on principles of estoppel.

Petitioner sold property on the installment basis in 1929, utilizing the installment statute, section 44 (b) and (c) of the Revenue Act of 1928 (ch. 852, 45 Stat., 791).[1] In the same year, it assigned the installment contract to Oscar Lofquist, its president and sole stockholder, but made no disclosure of such transfer in its 1929 return. In its 1930, 1931, and 1932 returns executed by Lofquist, as president, the petitioner represented the installment payments as its own income and paid the tax thereon. In its 1933 return it represented for the first time that the contract had been transferred. It was then too late to make the proper assessment against the petitioner for 1929, which would have exceeded the taxes actually paid. We are confronted with the question, Is the petitioner now estopped from asserting, for the purpose of obtaining a refund of the 1932 tax, that the contract was actually transferred in 1929?

The facts found by the Board were substantially as follows: The petitioner was an Iowa corporation. It was incorporated October 13, 1910, for a period of 20 years. Its purpose was to acquire a leasehold on a building in Des Moines, Iowa. This property was leased by petitioner on October 14, 1910, for a period of 73 years. On April 22, 1929, it entered into a contract to sell all of its right, title and interest under the lease and improvements made upon the property by it, to the DeHaan Company, effective May 1, 1929.

The book value of the leasehold interest in this property at the date of sale was $8,433.10, and the price at which it was sold to the DeHaan Company was $25,000, of which $5,000 was to be paid in cash at the time of the sale, and $4,000 annually to petitioner for the five succeeding years with interest on the unpaid balance at the rate of 5 per cent per annum.

All of the capital stock of petitioner was owned by Lofquist, with the exception of four qualifying shares, two of which were held by his wife and two by his sister. It kept only memorandum records, and had a stock record book but no minute book or general ledger. It employed a part-time bookkeeper who worked at irregular intervals and made up the accounts once a year for tax purposes. There were no stockholders' or directors' meetings. The capital of the corporation, approximately $12,000, was contributed by Oscar Lofquist.

On May 17, 1929, petitioner assigned its interest under the contract to Oscar Lofquist, who, on the same day assigned his interest therein to the Des Moines National Bank as security for his personal debts. On that same day the DeHaan Company acknowledged notice of both assignments and they were on that date recorded in the office of the recorder of Polk County, Iowa. There-

[1] SEC. 44. INSTALLMENT BASIS.

* * * * * * *

(b) *Sales of realty and casual sales of personalty.*—In the case * * * of a sale or other disposition of real property, if in either case the initial payments do not exceed 40 per centum of the selling price, the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term "initial payments" means the payments received in cash, or property, other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

* * * * * * *

(d) *Gain or loss upon disposition of installment obligations.*—If an installment obligation is * * * 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 * * * the fair market value of the obligation at the time of such distribution, transmission, or disposition. 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 obligation satisfied in full.

after, all payments under the contract were made by the DeHaan Company to the Des Moines National Bank, and by it applied to the personal obligations of Oscar Lofquist. Thereafter the only assets of the petitioner consisted of $104.89 cash, and loans receivable in the sum of $491.33. After the assignment the petitioner transacted only that business necessary to wind up its affairs. This was permitted to be done under paragraph 8392 of the Iowa Code (1927).

On petitioner's income tax return for 1929, signed by Oscar Lofquist as president and duly filed on June 3, 1930, the sale of the leasehold in 1929 was reported as resulting in a profit to petitioner of $16,566.90, and inasmuch as one-fifth of the total sale price was received in that year, the corporation, on the installment basis, included one-fifth of $16,566.90 in its income. The return showed a tax of $21.87 which was paid. It also disclosed a payment of cash dividends of $5,400 during that year. A like return was filed by the petitioner for the year 1930 reporting the installment profit of $2,650.70 attributable to the $4,000 payment made by the DeHaan Company in that year, and $1,000 received as interest on the unpaid sale price. This 1930 return disclosed a tax liability of $78.08. For the year 1931 a like return was filed by petitioner showing an installment profit of $2,650.70 attributable to the annual payment of $4,000, and $750 as interest on the unpaid portion of the sale price. The amount of $30 was claimed as a deduction for local taxes. Cash dividends of $10,000 were shown as having been paid during that year. This return reflected a tax liability of $44.48. For the year 1932 a like return was made showing an installment profit of $2,650.70, and interest income of $500. This return reported dividends paid during that year of $4,630.81, and disclosed a tax liability of $433.22 which was paid. All of these returns were executed by Oscar Lofquist as president of petitioner.

For the year 1933 the petitioner filed an income tax return, by Lofquist, its president, which showed no income or deductions, but which listed in its balance sheet the sale contract as an asset in the amount of $8,000, and as its liabilities "deferred profit sale contract" in the amount of $5,301.32; common stock in the amount of $5,000; and surplus and undivided profits in the amount of $2,198.58. Under the balance sheet appeared the statement "assets transferred to individuals prior to 1933 but no record made."

On September 14, 1934, there was filed with the collector of internal revenue for the district of Iowa in the name of the petitioner, a claim for tax refunds in the amount of $433.22, representing the total amount of income taxes paid by the petitioner for the year 1932. This claim, signed by Oscar Lofquist as former president of petitioner, was based on the ground that the corporate charter of the company had expired in October, 1930.

In his individual income tax return for 1929 Lofquist included as income the amount of $5,400 received as dividends from the petitioner. No dividends from the company were reported by him for 1930, but for 1931 his return disclosed $10,000 as dividends received by him from the petitioner, and in 1932 he reported like dividends from the same source of $4,630.81. His individual returns for these years reflected no tax liability.

In his tax return for 1933, Lofquist reported as "other income" the sum of $2,650.70 which he explained in an attached schedule as installment profit calculated in the same way as it appeared in the income tax return of the petitioner for the years 1930, 1931, and 1932. A similar item appeared on his return for 1934. His return for 1933 reflected no tax liability and his 1934 return reflected a tax liability of $167.46.

The Board found that if the above recited facts had been disclosed to respondent by the income tax returns of petitioner and Oscar Lofquist, the petitioner would have been liable for the payment of taxes in 1929, pursuant to section 44(d) of the Revenue Act of 1928, in the sum of $1,614.28 instead of $21.87, as reported in petitioner's income tax return for that year. The Board denied the Commissioner's claim for additional deficiency but concluded that the principle of estoppel could be defensively asserted and accordingly denied the refund.

Petitioner contends that under the sections of the statute above referred to, a refund of an overpayment of taxes is mandatory. If at the time of overpayment no taxes are due for another year, all equitable principles must give way to the statutory command. It argues that when petitioner's tax return for the year 1932 was filed, the statute of limitations had run upon its 1929 return and that the respondent could not be prejudiced with respect to the 1929 return by the representation contained in the 1932 return. In support of this position it relies on *McEachern* v. *Rose* (302 U. S., 56 [Ct. D. 1282, C. B. 1937-2, 322]). In

that case the Court states that the collector did not press his former contention that the petitioner was estopped to challenge the correctness of his returns for the years of overpayment, and that the failure of the Government to assess the appropriate tax in 1928 was not shown to be attributable to the erroneous statements made in returns for the later years. In these respects the case is to be differentiated from the one at bar. Here the respondent is pressing the contention of estoppel by challenging the correctness of petitioner's returns, and the failure of respondent to assess the appropriate tax for 1929 is conclusively shown to be attributable to petitioner's erroneous omissions in its subsequent returns. It is further found in this case that respondent relied upon these false returns and was thereby precluded from collecting $1,614.28 instead of $21.87.

We think it is clear that the respondent, without fault, relied upon petitioner's misrepresentations and that the respondent was prejudiced thereby. In *Stone* v. *White* (301 U. S., 532 [Ct. D. 1232, C. B. 1937-1, 224]), the Court said:

"The action, brought to recover a tax erroneously paid, although an action at law, is equitable in its functions. It is the lineal successor of the common count in *indebitatus assumpsit* for money had and received. * * * Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, * * * have long been recognized in this Court. * * * Since, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right, * * * even without resort to the modern statutory authority for pleading equitable defenses in actions which are more strictly legal. * * *"

The opinion further states:

"* * * The statute [sections 607, 609] does not override a defense based on the estoppel of the taxpayer. * * * The statutory bar to the right of action for the collection of the tax does not prevent reliance upon a defense which is not a set-off or a counterclaim, but is an equitable reason, growing out of the circumstances of the erroneous payment, why petitioners ought not to recover.

"Here the defense is not a counter demand on petitioners, but a denial of their equitable right to undo a payment which, though effected by an erroneous procedure, has resulted in no unjust enrichment to the Government, and in no injury to petitioners or their beneficiary. The Government, by retaining the tax paid by the trustees, is not reviving a stale claim. Its defense, which inheres in the cause of action, is comparable to an equitable recoupment or diminution of petitioners' right to recover."

The foregoing case, from the factual standpoint, is not in all respects like the one at bar, but the principles therein enunciated support the Board's ruling. The facts in *Alamo National Bank* v. *Commissioner* (95 F. (2d), 622) are held analogous to those in the instant case. The ruling there supports our conclusion and we think it is quite reconcilable with the ruling in the McEachern case.

Petitioner contends that respondent must prove that it did not merely make an innocent mistake of law instead of a misrepresentation of facts. We think it clear that petitioner did not make a mistake of law but that it was purely one of fact. It is not necessary in order to support the Board's finding to prove by direct evidence that petitioner fraudulently intended to make the misrepresentations in question. It is presumed to intend the natural consequences of its acts and the Board was warranted in concluding from those acts that it was responsible for the legal fraud practiced upon respondent.

It is further contended by petitioner that the fact that the assignments were recorded in the county recorder's office in Iowa, gave the respondent an equal opportunity with the petitioner to ascertain the facts. We think this is not a sound conclusion. The facts presented here were within the knowledge of the petitioner's officers and agents, at all times, and the respondent had a right to rely upon statements under oath submitted in its behalf. To hold otherwise would be to place a burden upon the taxing department, which in all fairness would be unreasonable. (See *Robinson* v. *Commissioner*, decided by the Court of Appeals for the Sixth Circuit, January 16, 1939.)

The decision of the Board is affirmed.

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 1934.

Determination of purpose of an organization. (See G. C. M. 21610, page 103.)

ARTICLE 101(7)-1: Business leagues, chambers of commerce, real estate boards, and boards of trade. 1939-41-10055 Ct. D. 1419

INCOME TAX—REVENUE ACT OF 1934—DECISION OF COURT.

EXEMPTION—CORPORATIONS—STATE BUSINESS CORPORATION—DEALER IN STATE AND MUNICIPAL SECURITIES.

An association organized under a State business corporation act for the declared purpose of dealing in State and municipal securities either on its own account or for others, of advising and assisting holders of such securities with respect to their financial problems and the enforcement of their obligations, and of assisting States and municipalities in preventing defaults and refunding securities, is not exempt from tax under the provisions of section 101(7) of the Revenue Act of 1934, where the evidence shows that the association was organized to do a regular business ordinarily carried on for profit and that its net earnings inured to the benefit of its shareholders and individuals.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Northwestern Municipal Association, Inc., appellant, v. *United States, appellee.*[1]

[99 Fed. (2d), 460.]

[November 9, 1938.]

OPINION.

THOMAS, Circuit Judge, delivered the opinion of the court.

This is an appeal from a judgment for the United States in an action at law brought to recover income taxes for the year 1934 and capital stock taxes for 1934 and 1935. (*Northwestern Municipal Association, Inc.*, v. *United States*, 22 F. Supp., 18.)

The appellant, plaintiff below, was incorporated in July, 1933, under the Minnesota Business Corporation Act (ch. 300, Laws of Minnesota, 1933), with an authorized capital of 50 shares of the par value of $50 each, of which 25 shares purchased at par are held by 14 banks and investment firms resident at or near St. Paul and Minneapolis, Minn. The by-laws provide for non-voting associate members of which there are 6. The associate members are engaged in the same kind of business as that of the shareholders. The capital of the corporation consists of $1,250 paid in by the shareholders and $1,700 contributed by the associate members.

[1] See G. C. M. 21610, page 103, this Bulletin.

The taxpayer bases its claim that it should be allowed a refund on the ground that it is exempt from tax under the provisions of section 101(7) of the Revenue Act of 1934 in that it is a business league, is not organized for profit, and no part of its net earnings inures to the benefit of any private individual or shareholder. The statute provides that the following organizations shall be exempt from taxation under this title:

"(7) Business leagues, chambers of commerce, real estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

To be exempt from taxation under this statute it is not sufficient that the organization claiming exemption be a business league. It must be a business league having two particular qualities: (1) "not organized for profit," and (2) "no part of the net earnings of which inures to the benefit of any private shareholder or individual." Further than these two restrictions the statute furnishes no definition of a business league. Treasury Regulations 86, promulgated under the Revenue Act of 1934, provides:

"ART. 101(7)–1. *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 service for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a co-operative basis or produces only sufficient income to be self-sustaining, is not a business league. An association engaged in furnishing information to prospective investors, to enable them to make sound investments, is not a business league, since its activities do not further any common business interest, even though all of its income is devoted to the purpose stated. A stock exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of the law and is not exempt from tax."

The first restriction of the statute, it will be observed, relates to the character of the organization and the second to its method of operation. Under the first the organization may be incorporated or unincorporated, but whatever the form it must not be organized for profit. Under the second restriction it is not prohibited from operating for profit, provided that none of its net earnings inure to the benefit of any private shareholder or individual. Regulations 86 merely amplifies the statutory definition. We do not think appellant meets either of these tests.

First. Appellant was organized for profit within the meaning of the statute; that is, it is "An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit."

The purpose of an organization must be determined from the purpose declared in the instrument creating it. (*Helvering* v. *Coleman-Gilbert Associates*, 296 U. S., 369, 56 S. Ct., 285, 80 L. Ed. 278 [Ct. D. 1067, C. B. XV–1, 261 (1936)]; *Retailers Credit Ass'n* v. *Commissioner of Internal Revenue*, 9 Cir., 90 F. (2d), 47; *Gagne, Collector of Internal Revenue*, v. *Hanover Water Works Co.*, 1 Cir., 92 F. (2d), 659; *Sun-Herald Corporation* v. *Duggan, Collector of Internal Revenue*, 2 Cir., 73 F. (2d), 298 [Ct. D. 953, C. B. XIV–1, 190 (1935)]; *Louisville Credit Men's Adjustment Bureau* v. *United States*, 6 F. Supp., 196 [Ct. D. 831, C. B. XIII–1, 126 (1934)]. Cf. *Roche's Beach, Inc.*, v. *Commissioner of Internal Revenue*, 2 Cir., 96 F. (2d), 776 [Ct. D. 1359, C. B. 1938–2, 230].) In *Helvering* v. *Coleman-Gilbert Associates*, supra, the court stated that "The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted."

The appellant was organized under the Minnesota Business Corporation Act, and in its articles of incorporation it declared:

"The purposes of the corporation shall be:

"To provide organized representation for holders of securities issued by the several States of the United States, and by the counties, cities, towns, villages, school districts, drainage districts and other governmental subdivisions of any and all States, and to advise and assist such security holders with respect to their financial problems and the enforcement of their obligations;

"To advise and assist the several States and their governmental subdivisions in working out their financial problems with a view to preventing defaults on their outstanding securities and to working out plans for curing defaults and refunding securities;

"To act as trustee, agent, attorney-in-fact or otherwise as representative of holders of municipal securities;

"To acquire, hold, mortgage, pledge or dispose of State and municipal securities, either on its own account or as trustee agent, attorney-in-fact or in any other capacity as representative of the owners of such securities; and

"To do any and all things reasonably necessary or incidental to accomplish said purposes."

These declared purposes are sufficiently inclusive to permit appellant to engage in operations covering the whole field of dealings in municipal securities. There are no restrictions against profits, or the amount thereof, that might be made in any of these authorized activities, and no requirement that the corporation shall be merely self-sustaining. Under the first declared purpose it may represent as agent the holders of municipal securities with respect to their financial problems and the enforcement of the "obligations" due them. For such services it may exact compensation the same as attorneys, brokers or other agents. Under another of its declared purposes it may acquire, hold or dispose of municipal securities on its own account or for others; and there is no prohibition in its articles against its making a profit on each transaction in which it engages. This is the regular business of brokers and investment bankers "ordinarily carried on for profit."

The articles provided that "no dividend * * * shall be paid shareholders prior to the dissolution of the corporation." Upon dissolution shareholders may receive a return of their investment and "any amounts thereafter remaining shall be contributed" to some charitable organization in the city of Minneapolis. This provision, however, is not material in determining the character of the organization. (*Louisville Credit Men's A. Bureau* v. *United States*, supra; *Northwestern Jobbers' Credit Bureau* v. *Commissioner*, 8 Cir., 37 F. (2d), 880 [Ct. D. 206, C. B. IX–2, 228 (1930)].)

Second. Did appellant operate or carry on its business so that none of its net earnings inured to the benefit of private shareholders or individuals?

The record shows that appellant carried on three classes of activities: (1) preliminary investigations and advisory work; (2) assisting municipalities in refunding operations; and (3) promoting the enactment of remedial legislation.

In the first and third of these activities the appellant made no charge for its services. In the second type of activity, refunding operations, the services of appellant are performed under a written contract with the municipality. These services involve, among other things, working out the details of the refunding issue in the light of the municipality's probable ability to pay as disclosed by the preliminary investigation, securing an approving opinion of counsel, preparing a letter showing the debtor's financial condition and the proposed plan of adjustment, and mailing the letter to all known bondholders and securing the consent to the exchange of obligations. The appellant always makes a charge for such refunding operations, and on rare occasions this charge was made against the bondholders if the municipality could not afford to handle it. The testimony is to the effect that the charges for refunding services are not fixed with a view to profit to the appellant but are determined with the view of keeping it on a self-sustaining basis. Only on rare occasions are appellant's charges as much as would be charged by others.

The appellant's years of greatest activity were in 1934 and 1935. Since then there has been a decline and some thought has been given to dissolution but, to date, the corporation has not been dissolved. Practically all the appellant's receipts have been derived from fees from its refunding operations. The following is a schedule of receipts and disbursements for the years 1934 to 1937, inclusive:

Year.	Receipts.	Disbursements.
1934	$8,346.73	$4,028.24
1935	9,144.79	8,706.78
1936	11,727.84	6,268.98
1937	818.71	2,916.62

The important question here is, Did the net earnings for the services so rendered inure to the benefit of private shareholders or individuals? In considering this question it must be kept in mind that the term "net earnings" may include more than the term net profits as shown by the books of the organization or than the difference between the gross receipts and disbursements in dollars. Profit may inure to the benefit of shareholders in other ways than in dividends. (*Northwestern Jobbers' Credit Bureau* v. *Commissioner*, 8 Cir., 37 F. (2d), 880, 883; *Louisville Credit Men's Adjustment Bureau* v. *United States*, D. C., 6 F. Supp., 196; *Uniform Printing & Supply Co.* v. *Commissioner*, 7 Cir., 33 F. (2d), 445.)

Under the statute, in connection with the inquiry whether the net earnings of the organization claiming exemption as a business league inure to the benefit of private stockholders or individuals, especially where its activities are multifarious and for some of which it makes a charge and for others none, the court often considers which of its activities represents the main purpose of its operations and which are incidental thereto. If its main purpose is to benefit its shareholders or individuals it is not exempt. On the other hand, if benefit to the individuals is secondary and incidental, it is exempt. (*Crooks* v. *Kansas City Hay Dealers' Ass'n*, 8 Cir., 37 F. (2d), 83; *Northwestern Jobbers' Credit Bureau* v. *Commissioner*, 8 Cir., supra; *Retailers Credit Assn.* v. *Commissioner*, 9 Cir., 90 F. (2d), 47, 51.)

It is the contention of counsel for appellant that the main purpose of its activities is to maintain sound municipal credit, a purpose which is not within the category of a regular business ordinarily carried on for profit. This contention is not supported by the record. The first purpose declared in appellant's articles of incorporation is to aid bondholders in enforcing payment of the obligations due them from municipalities. The principal end to be achieved by the incorporators was to benefit bondholders as individuals. Sound municipal credit was incidental to this primary purpose as an aid in effecting its accomplishment.

The trial court found that the appellant is a mere adjunct to the business of the several investment banking corporations and bond houses represented by their agents as shareholders or associate members; that the enterprise which was undertaken was a cooperative endeavor to render services which the separate members might have been required to furnish; and that the performance of these services at less than it would have cost the individual members to furnish inured directly to the benefit of the investment bankers. The evidence supports these conclusions. The president of appellant was the only witness to testify for the taxpayer. He testified that at about the time of and prior to the organization of appellant corporation there had been many defaults by municipalities in Minnesota, in North and South Dakota and in Montana in the payment of interest on their bonds. Each one of the investment bankers interested who had some of the bonds, or who may have had clients who held some of the bonds, would go out and make an investigation or check up on the situation when a default occurred; but they could not before the organization of appellant make any concerted action. He testified that they felt a moral obligation to help their customers. By helping them they retained their good will. Clearly their motive in organizing the corporation and in carrying on the work which it did was to benefit their customers, to minimize the cost to themselves of a service which they elected to give, and, in so far as they held the bonds of any of the defaulting municipalities, to collect interest for themselves. These were the ends which the operations of appellant sought primarily to serve. Sound municipal credit was incidental to these objectives.

Since it is clear that appellant was organized to do a regular business ordinarily carried on for profit, and since in the operation of its business its net earnings inured to the benefit of its shareholders and individuals, it was not exempt from tax under the Revenue Act of 1934. The judgment of the district court is, therefore, affirmed.

SECTION 111.—DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

ARTICLE 111-1: Computation of gain or loss.

REVENUE ACT OF 1934.

Settlement of pecuniary legacies by transfer of securities belonging to a trust. (See I. T. 3316, page 186.)

SECTION 112(f).—RECOGNITION OF GAIN OR LOSS: INVOLUNTARY CONVERSIONS.

ARTICLE 112(f)-1: Reinvestment of proceeds of involuntary conversion.

REVENUE ACT OF 1934.

ARTICLE 112(f)-1, Regulations 86, amended. (See T. D. 4951, page 110.)

SECTION 112(g).—RECOGNITION OF GAIN OR LOSS: DEFINITION OF REORGANIZATION.

ARTICLE 112(g)-3: Exchanges solely of stock or securities, or property, solely for stock or securities, in pursuance of plan of reorganization. 1939-27-9900 Ct. D. 1406

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

1. GAIN OR LOSS—RECOGNITION—EXCHANGE OF STOCK FOR STOCK ON REORGANIZATION—"PARTY TO A REORGANIZATION."

Where the X Corporation, which owned two-thirds of the outstanding stock of Y Corporation, acquired from the taxpayer the remaining one-third of the outstanding stock of Y in exchange for certain shares of its own stock, and also acquired substantially all of the assets of Y, the corporations were parties to a reorganization within the meaning of section 112(i) of the Revenue Act of 1928, and any gain realized by the taxpayer in the exchange of stock is not to be recognized as taxable.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (36 B. T. A., 97) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Charles A. Dana, respondent.*

[103 Fed. (2d), 359.]

Petition for review from the United States Board of Tax Appeals.

Before DAVIS, MARIS, and BUFFINGTON, Circuit Judges.

[March 28, 1939.]

OPINION.

DAVIS, Circuit Judge: The Commissioner determined that there was a deficiency of $125,534.97 in the income taxes of Charles A. Dana, taxpayer, for

the year 1929. The taxpayer thereupon filed a petition for review with the Board of Tax Appeals which, on June 11, 1937, filed its opinion (36 B. T. A., 97) in which it found that the Commissioner "had erred in determining the above deficiency." From the order of redetermination entered thereon, the Commissioner appealed to this court.

The question involved is whether or not the Spicer Manufacturing Co., hereinafter called Spicer, and the Salisbury Axle Co., hereinafter called Salisbury, were parties to a reorganization within the meaning of section 112(i) of the Revenue Act of 1928.[1]

If they were, any "gain" realized by the taxpayer when he exchanged stock in Salisbury for stock in Spicer, is not to be "recognized" in computing his taxable income and there was no deficiency, for section 112(b)3 of the Act provides that:

"(3) *Stock for stock on reorganization.*—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."

Whether or not they were parties, depends upon either of two subsidiary questions. The first is whether or not the acquisition by Spicer, which owned approximately two-thirds of all of the outstanding stock of Salisbury, of the remaining one-third outstanding stock constituted a merger or consolidation within the meaning of section 112(i)1(A) of the Act. The second question is whether or not the acquisition by Spicer of "substantially *all* the properties" of Salisbury constituted a merger or consolidation within the meaning of that section.

If either of the above questions are answered in the affirmative, the order of the Board must be affirmed.

Prior to 1927, Spicer was a corporation which was engaged in the manufacture of universal joints and propellor shafts for motor vehicles in its plant at Plainfield, N. J. Its outstanding stock consisted of 313,750, out of an authorized 600,000 shares of no par common stock of which the taxpayer owned 118,125 shares. Of the 100,000 shares of $100 par preferred stock authorized, none were outstanding. Salisbury was a corporation engaged in the manufacture of automobile axles at Jamestown, N. Y. Its outstanding stock consisted of the entire authorized 20,000 shares of no par common, and 27,500, out of an authorized 30,000 shares of $100 par preferred. Approximately two-thirds of both types of stock issued by Salisbury was owned by Spicer, and the remaining one-third was owned by the taxpayer who was president of both corporations.

In 1927, it was determined to move both Spicer and Salisbury to Toledo, Ohio, so that they would be nearer to the automobile industry, and also to merge the operation of both corporations in one plant.

In furtherance of this plan, property was purchased in Toledo and, in the spring of 1928, construction of the plant was started. By the fall of 1928 Spicer commenced the removal of its machinery, equipment and a part of its personnel to the new plant, completing such removal in the first half of 1929. The section of the plant intended for Salisbury was begun early in 1929, and in August of that year the removal of its machinery and equipment to the new plant was begun. By fall the building was completed and by the end of the year substantially all of the machinery and equipment of Salisbury, except obsolete equipment, had been moved.

In the fall of 1928, while the above activities were taking place, the Brown-Lipe Gear Co., hereinafter called Gear company, which manufactured gears for motor vehicles, was offered for sale for the sum of $3,900,000.

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[1] (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an 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.

After discussion with certain bankers, a plan was evolved which called for the acquisition by Spicer of all of the outstanding stock of Salisbury and Gear company, making them wholly owned subsidiaries of Spicer. In order to accomplish this purpose Spicer issued 125,000 additional shares of no par common stock, bringing the total number of such shares outstanding up to 438,750 out of 600,000 shares authorized. Of this newly issued stock 40,000 shares were given to the taxpayer in exchange for all of his stock in Salisbury, and the remaining 85,000 shares were sold to the bankers for the sum of $3,846,250 which was used to purchase all of the outstanding stock of Gear company.

Since the execution of this plan, and the removal of substantially all of the assets of Salisbury to the new plant in Toledo, Salisbury has carried on no business except that of disposing of its obsolete equipment. The assets transferred to Toledo were taken over by Spicer and were carried on it books as assets belongings to it. On December 31, 1929, Salisbury notified all of its customers that it would carry on no further business and that all of its manufacturing operations would be conducted by Spicer. As Spicer owned all of the stock of Salisbury, no payment was ever made or even contemplated for the transfer of Salisbury's equipment to Spicer, though, in order to balance its books, debit and credit entries were made therein. In June, 1932, the outstanding stock of Salisbury, originally carried at over $2,000,000, was reduced to $2,500. Its only remaining assets consisted of certain Liberty bonds amounting to $9,176.38 which were deposited with the New York State industrial commissioner pending termination of its liability on account of compensation insurance, and the land and buildings located at Jamestown, N. Y.

The taxpayer's stock in Salisbury cost him $1,000,000. According to the determination of the Commissioner, the value of the 40,000 shares of Spicer stock acquired by the taxpayer in 1929 in exchange for his Salisbury stock, was $2,005,000. The taxpayer, however, did not report any income as a result of this exchange.

Section 112(i) of the Revenue Act of 1928 should be liberally construed and the definitions therein given of the terms "reorganization," "merger," "consolidation" and "party to a reorganization," are not exclusive definitions but are intended, rather, to enlarge the connotation of such terms. (*Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S., 462 [Ct. D. 630, C. B. XII-1, 161 (1933)]; *Groman* v. *Commissioner*, 302 U. S., 82, 86 [Ct. D. 1285, C. B. 1937-2, 286].) This conclusion is strengthened by the consideration that, ordinarily, the mere acquisition by one corporation of a majority of the stock of another corporation would not fulfill the strict definition of merger or consolidation. (*Metropolitan Edison Co.* v. *Commissioner*, 98 Fed. (2d), 807, 809, 810 (C. C. A. 3).) Under the somewhat broad definition given to the term "merger" in the statute, it is obvious that the acquisition by one corporation of all of the outstanding stock of another corporation was included, even if this means the acquisition of only a minority interest therein. The Board aptly expressed this conclusion as follows:

"If the acquisition by one corporation of a bare majority of the stock of another constitutes a reorganization, we are of the opinion that the acquisition by one corporation of all the outstanding stock of another, thus enabling the acquiring corporation, at its pleasure, to consolidate or merge the two corporations, falls within the same category."

However, even if we are in error concerning the first question, it is nevertheless clear that a merger as defined by the statute occurred between Spicer and Salisbury.

During the year 1929, besides acquiring all of the outstanding stock of Salisbury, Spicer acquired "substantially all the *properties*" of Salisbury and though debit and credit entries were made for bookkeeping purposes, it is obvious that no payment was ever intended to be made or was made for these "properties."

For this second and additional reason, we are convinced that the Board reached the correct conclusion that there was a reorganization to which Spicer and Salisbury were parties and its order of redetermination is affirmed.

SECTION 113(a).—ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS: BASIS (UNADJUSTED) OF PROPERTY.

ARTICLE 113(a)(5)-1: Basis of property acquired by bequest, devise, or inheritance. 1939-37-10012 G. C. M. 21532

REVENUE ACT OF 1934.

Where a nontaxable stock dividend was distributed to a testamentary trust, and, by order of court, that part thereof not required to maintain the parity of the trust was distributed to beneficiaries entitled only to income, the shares thus distributed retained the same basis in the hands of the beneficiaries which they had in the hands of the trust. Such basis is arrived at by allocating to the dividend stock the pro rata part of the basis of the original stock prescribed by section 113(a)5 or section 113(a)14 of the Revenue Act of 1934. Recommended that I. T. 1622 (C. B. II-1, 135 (1923)) be modified to the extent inconsistent herewith.

An opinion is requested as to the basis to be used under the Revenue Act of 1934 in determining gain or loss upon the sale of stock distributed to beneficiaries of a testamentary trust as a nontaxable stock dividend under the circumstances herein set forth.

A and B are two of the four beneficiaries who shared in the distribution of income of a testamentary trust established by the will of their grandfather, E, who died prior to March 1, 1913. Originally the trust held 1,165 shares of the M Company, the March 1, 1913, value of which was $300 per share. Subsequent adjustments for capital changes resulted in the trust having 23,300 shares. On December —, 1922, a 200 per cent stock dividend was distributed to shareholders, and the court having jurisdiction over the testamentary trust ruled that such portion of this stock dividend as was needed to maintain the parity of the trust was to be retained and the excess distributed to the beneficiaries. Pursuant to this ruling, each of the beneficiaries received his or her proportionate part of the distribution. In the year 1935 A sold a part of her dividend stock and reported a loss on her income tax return, and in the same year B sold part of his dividend stock and reported a gain. The question presented in the determination of whether the loss reported by A and the gain reported by B were computed correctly is the proper basis of the dividend stock in their hands. It is contended that under I. T. 1622 (C. B. II-1, 135 (1923)) the basis of the dividend stock in the hands of the beneficiaries is the fair market value of such stock on the date it was distributed to them by the trustees.

That portion of I. T. 1622, supra, which prescribes the basis, under the Revenue Acts of 1918 and 1921, for gain or loss on the disposition of stock by beneficiaries in the type of situation presented in the instant case reads as follows:

The basis for determining gain or loss upon a sale by the beneficiary of dividend stock received from a trust prior to January 1, 1921, is *the fair market value of the dividend stock at the time of its receipt.* This rule applies whether the trust from which the beneficiary received the dividend stock was a testamentary trust or a trust created by conveyance inter vivos. *This rule will also govern in the case of testamentary trusts, whether the stock dividend was received by the beneficiary before or after January 1, 1921.* [Italics supplied.]

It is the opinion of this office that the quoted portion of I. T. 1622, supra, is incorrect in providing that in the case of testamentary trusts, whether the stock dividend was received by the beneficiary before or after January 1, 1921, the basis for determining gain or loss upon the sale of such stock is the fair market value of the stock at the time of its receipt. Section 113(a)5 of the Revenue Act of 1934, as interpreted by article 113(a)(5)–1 of Regulations 86, relating to that Act, clearly manifests an intent that in such a case the basis of the property in the hands of the beneficiaries shall remain the same as the basis in the hands of the trustees. It is believed, therefore, that the question presented in this situation is governed by the provisions of section 113(a)5 of the Revenue Act of 1934, as interpreted by article 113(a)(5)–1 of Regulations 86. The basis of the shares of dividend stock in the possession of the trustees is arrived at by allocating to such dividend stock the pro rata part of the basis of the original stock prescribed by section 113(a)5 or section 113(14) of the Revenue Act of 1934.

In view of the foregoing, this office is of the opinion that under the provisions of the Revenue Act of 1934, the shares of stock distributed to the beneficiaries in the instant case retain the same basis which they had in the hands of the trustees prior to their distribution.

It is recommended that I. T. 1622, supra, be modified in so far as it is inconsistent with this memorandum.

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

ARTICLE 113(a)(5)–1: Basis of property acquired by bequest, devise, or inheritance. 1939–37–10013 I. T. 3318

REVENUE ACTS OF 1918 AND 1921.

I. T. 1622 (C. B. II–1, 135 (1923)) is hereby modified to the extent inconsistent with G. C. M. 21532 (see page 231, this Bulletin).

SECTION 117.—CAPITAL GAINS AND LOSSES.

ARTICLE 117–1: Meaning of capital assets.

REVENUE ACT OF 1934.

Resale of property acquired by banks, mortgage finance companies, or building associations through foreclosure. (See G. C. M. 21497, page 187.)

ARTICLE 117–1: Meaning of capital assets.

REVENUE ACT OF 1934.

Settlement of pecuniary legacies by transfer of securities belonging to a trust. (See I. T. 3316, page 186.)

ARTICLE 117-1: Meaning of capital assets.

REVENUE ACT OF 1934.

Disposition of property acquired by insurance companies other than life insurance companies through foreclosure. (See I. T. 3336, page 189.)

ARTICLE 117-3: Determination of period for which capital assets are held. 1939-37-10008 I. T. 3317

REVENUE ACT OF 1928 AND PRIOR REVENUE ACTS.

In the case of "wash sales" the 2-year period during which property must be held in order to constitute "capital assets" within the meaning of section 101 of the Revenue Act of 1928 and the corresponding provisions of prior Revenue Acts runs from the date of repurchase of the securities and not from the date of acquisition of the original securities. I. T. 2832 (C. B. XIII-2, 201 (1934)) revoked.

Advice is requested whether I. T. 2832 (C. B. XIII-2, 201 (1934)) should be revoked in view of certain court decisions hereinafter referred to.

I. T. 2832, supra, held (syllabus):

In the case of "wash sales" the 2-year period during which property must be held to constitute "capital assets" within the meaning of section 101 of the Revenue Act of 1928 and the corresponding provisions of prior Revenue Acts runs from the date of the acquisition of the original securities and not from the date of repurchase.

That ruling covered the case of a taxpayer who, in the year 1931, sold securities which had been held for more than two years, repurchased identical securities within a period of 30 days, and sold such securities within the same taxable year. The securities involved in the second sale having been held for less than two years, the taxpayer claimed the loss sustained on the sale as an ordinary loss under the Revenue Act of 1928. The Bureau held, however, that the loss was a "capital loss."

This question has been considered by the courts and it has uniformly been held, under the Revenue Act of 1928, that for the purpose of determining whether a loss on a sale of stock purchased in connection with a "wash sale" was a capital loss, the repurchase date, and not the date of purchase of the original stock, should govern. (*Guy Cary* v. *Commissioner*, 91 Fed. (2d), 1009; *Howard Heinz* v. *Commissioner*, 94 Fed. (2d), 832; *John Francis Neylan* v. *Commissioner*, 97 Fed. (2d), 410; *United States* v. *Bok et al., Executors of the Estate of Cyrus H. K. Curtis*, 102 Fed. (2d), 358; and *Elizabeth G. Augustus* v. *Moore*, 103 Fed. (2d), 1006.)

In view of the decisions cited, I. T. 2832, supra, is revoked.

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

ARTICLE 131-1: Analysis of credit for taxes.

REVENUE ACT OF 1934.

The 4 per cent tax imposed by the Brazilian Income Tax Act and covered by article 174, Brazilian Income Tax Regulations. (See I. T. 3313, page 171.)

ARTICLE 131-8: Limitations on credit for foreign taxes. 1939-36-9997 G. C. M. 21432

REVENUE ACT OF 1934.

Computation of the amount of the credit which should be allowed to a citizen of the United States under section 131 of the Revenue Act of 1934 with respect to income tax paid to the Philippine Islands on capital gains which were taken into account for Federal income tax purposes only to the extent of 30 per cent, as provided by section 117(a) of the Revenue Act of 1934.

An opinion is requested as to the amount of credit which a citizen of the United States should be allowed, under section 131 of the Revenue Act of 1934, with respect to income tax paid to the Philippine Islands on capital gains which were taken into account for Federal income tax purposes only to the extent of 30 per cent, as provided by section 117(a) of the Revenue Act of 1934.

The following example, setting forth the income received by a citizen of the United States from the Philippine Islands and the taxes paid thereon, is submitted:

Gross income from all sources.

From Philippine Islands—		
Interest	$2,000	
Dividends	5,000	
Capital gain $10,000, but taxable under section 117(a) as	3,000	
		$10,000
From United States—		
Interest	1,000	
Dividends	4,000	5,000
		15,000
Less: Deductions		None
Net income from all sources as reported on Form 1040		15,000
Total tax paid to Philippines on $17,000 (including capital gain of $10,000)		700
Total United States tax on $15,000 (including capital gain of only $3,000)		1,000

In *Hubbard* v. *United States* (17 Fed. Supp., 93) it was pointed out that the primary design of the provisions carried in the various Revenue Acts permitting taxpayers to credit taxes paid or accrued to foreign countries during the taxable year against their domestic

taxes (see section 131, Revenue Act of 1934) was to mitigate the evils of double taxation, citing *Burnet* v. *Chicago Portrait Co.* (285 U. S., 1). It was also stated in that decision that "Double taxation exists only when the same income is taxed both in the foreign country and in the United States."

The general principle that credit for taxes paid to a foreign country is allowable only if the same income is also taxed for Federal income tax purposes is of long standing. In I. T. 2294 (C. B. V–2, 62 (1926)) it was held that income tax paid to a foreign country by an individual citizen of the United States upon income excluded from gross income under section 213(b)14 of the Revenue Act of 1926 may not be claimed as a credit under section 222 nor as a deduction under section 214 of that Act. In G. C. M. 4969 (C. B. VII–2, 269 (1928)) it was held that where the operation of a foreign branch by a citizen of the United States or a domestic corporation results in a loss because of a difference in current rates of exchange, there being an actual gain derived from the operation of such branch in terms of the currency of the country in which it is located, the amount of foreign income taxes paid on such income is not allowable as a credit under section 238(a) of the Revenue Act of 1918.

The Board of Tax Appeals held in *Burk Bros.* v. *Commissioner* (20 B. T. A., 657) that a taxpayer who bought raw materials in India and transported them to this country where they were manufactured and sold is not entitled, under section 238(a) of the Revenue Act of 1926, to credit for income taxes paid the Indian Government on the profits derived from the transaction because the petitioner's entire income was derived from sources within the United States. The Board held that the petitioner "having no net income within the meaning of our statute from sources without the United States" is not entitled to use same as a credit against the income tax liability to the United States. In *Hugh C. Wallace* v. *Commissioner* (17 B. T. A., 406) it was held that resident citizens of the United States, owners of a residence in France, but receiving no income therefrom, nor any income from any business or profession situated or carried on in France or any other foreign country (their income being received exclusively from sources within the United States), are not entitled to have allowed as credits against income taxes due the United States the "amount of income taxes computed upon an estimated income of seven times the rental value of such residence" and paid to the Republic of France. The Board stated that the "petitioners' net income from sources without the United States becomes the numerator and their entire net income becomes the denominator" of the fraction used in determining the allowance of the credit. The Board further stated that in the absence of a numerator, within the meaning of our law, no credit could be allowed.

It has been held that an income tax paid to a foreign country on income derived from sources therein was not allowable as a credit against the United States tax where, because of continued depreciation in the value of the francs during the year, there was in fact a loss when measured in terms of United States dollars. (See *Frederick Vietor & Achelis* v. *Salt's Textile Mfg. Co.*, 26 F (2d), 249.) In other words, it was held in that case that where the income was not included for Federal income tax purposes, credit for taxes paid

thereon was not allowable. Another case in point is *J. Haseltine Carstairs, Exr.*, v. *United States* (United States District Court for the Eastern District of Pennsylvania, January 15, 1936), in which it was held that where income was excluded from taxation under section 116(a) of the Revenue Act of 1928, the amount of tax paid to a foreign country was not allowable as a credit against the United States tax. The logic of this position is easily understandable. The primary design of the foreign tax credit provision was to eliminate the evils of double taxation. (*Burnet* v. *Chicago Portrait Co.*, supra.) If, therefore, a specific item of income is not subject to double taxation, a basis of credit for foreign tax does not exist with respect to such item of income.

From the foregoing precedents, it is evident that under the Revenue Act of 1934 if the income taken into account under section 117(a) is limited to 30 per cent of the actual income, the remaining 70 per cent of the profit from the transaction is excluded entirely from gross income and, therefore, forms no part of the net income upon which the United States tax is computed. Therefore, any tax paid with respect to the income excluded from taxation by the United States is not allowable as a credit for the reason that double taxation does not result in such cases with respect to the amount excluded from gross income.

Using the foregoing example, if a tax of $700 is paid to the Philippine Government on income of $17,000, whereas the income from sources in the Philippine Islands computed under the United States income tax law is only $10,000 (which does not include $7,000 of the capital gain excluded by section 117(a) of the Revenue Act of 1934), it will be necessary first to apportion the Philippine tax between the Philippine income taxed by the United States and the Philippine income exempted by the United States, and exclude as a credit, and from the computation thereof, that part of the Philippine tax paid with respect to the income excluded from taxation by the United States. This may be illustrated as follows:

If $17,000 income from Philippine sources, computed under the Philippine law, bore a tax of $700, it follows that $1 of such income bore a tax of $\frac{\$700}{\$17,000}$, and $10,000 of such income bore a tax of $\frac{\$700}{\$17,000} \times \$10,000$, or $411.76. This is the tax against which the limitation contained in section 131(b) of the Revenue Act of 1934 must be applied. That section reads in part as follows:

> (b) *Limit on credit.*—The amount of the credit taken under this section shall be subject to each of the following limitations:
>
> (1) The amount of the credit in respect of the tax paid or accrued to any country shall not exceed the same proportion of the tax against which such credit is taken, which the taxpayer's *net income* from sources within such country bears to his entire *net income* for the same taxable year * * *. [Italics supplied.]

The words "net income" contained in the above quoted provision have reference to net income within the meaning of the United States income tax law. In applying the fraction of apportionment under section 131(b), the denominator consists of two items, namely, $10,000 net income from sources within the Philippine Islands, plus $5,000 net income from sources within the United States, or $15,000, whereas

the numerator is the United States income derived from the Philippine Islands, namely, $10,000. The limitation against the United States tax of $1,000 is, therefore, $\frac{\$10,000}{\$15,000} \times \$1,000$, or $666.67. As the tax paid to the Philippine Government with respect to $10,000 income from sources within the Philippine Islands, within the meaning of the United States income tax law, is $411.76, that amount is allowable as a credit because it is less than the amount of tax arrived at by applying the limitation contained in section 131(b)1, namely, $666.67.

Although the total income tax paid to the Philippine Government on $17,000 income was $700, and as indicated above only $411.76 is allowable as a credit, the balance of $288.24 tax paid to the Philippine Government may not be allowed as a deduction from gross income. The reason for this is that section 23(c) of the Revenue Act of 1934, relating to the deduction for taxes in general, provides in part as follows:

> In computing net income there shall be allowed as deductions:
>
> * * * * * * *
>
> (c) *Taxes generally.*—Taxes paid or accrued within the taxable year, except—
>
> * * * * * * *
>
> (2) income, war-profits, and excess-profits taxes imposed by the authority of any foreign country or possession of the United States; *but this deduction shall be allowed in the case of a taxpayer who does not signify in his return his desire to have to any extent the benefits of section 131* (relating to credit for taxes of foreign countries and possessions of the United States) * * *. [Italics supplied.]

The taxpayer having signified in his return his desire to have the benefits of section 131 of the Revenue Act of 1934, relating to credit for taxes paid to foreign countries and possessions of the United States, he is not entitled to a deduction for any portion of such taxes under section 23(c) quoted above.

Section 24(a)5 of the Revenue Act of 1934, which prohibits a deduction with respect to items of income "wholly exempt" from income tax, is not applicable to the gain derived from the sale or exchange of a capital asset as defined in section 117 of the Act. Notwithstanding such gain may be partially taxable and partially nontaxable under section 117(a), the foreign income tax paid on the entire profit is allowable as a deduction if the taxpayer does not claim the benefits of section 131 of the Act.

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

SUPPLEMENT G.—INSURANCE COMPANIES.

SECTION 204(e).—INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL: DOUBLE DEDUCTIONS.

REVENUE ACT OF 1934.

Tax-exempt interest, and expenses allocable thereto, in cases of resident foreign insurance companies. (See I. T. 3297, page 137.)

SECTION 251.—INCOME FROM SOURCES WITHIN POSSESSIONS OF UNITED STATES.

ARTICLE 251–1: Citizens of the United States and domestic corporations deriving income from sources within a possession of the United States. 1939–38–10021 I. T. 3321

REVENUE ACT OF 1934 AND PRIOR REVENUE ACTS.

Income of American citizens residing in the Philippine Islands from both real and personal property is governed by the laws of the State of their domicile in the United States.

Advice is requested whether the income of American citizens residing in the Philippine Islands is governed by the laws of the State of their domicile in the United States or by the laws of the Philippines. In the case presented income is derived from both real and personal property.

It seems clear, with respect to American citizens residing in the Philippines, that mere residence in the Philippines, no matter how long continued, does not affect their status as citizens of the State of their domicile in the United States. See *Matter of Johnson* (39 Phil., 156). Johnson was a naturalized citizen of the United States. Prior to taking up residence in the Philippines he was a resident of the State of Illinois. The court, in upholding the validity of Johnson's will made in accordance with the laws of the State of Illinois, stated:

* * * it should not be forgotten that the intrinsic validity of the provisions of this will must be determined by the law of Illinois, and not, as the appellant apparently assumes, by the general provisions here applicable on such matters; * * *.

To the same effect are *Templeton* v. *Babcock* (52 Phil., 130), *Miciano* v. *Brimo* (50 Phil., 867), and *Antongiorgi* v. *The Registrar of Property* (6 P. R. R., 493).

It is well established that rents and earnings from real property constitute personal property. (See *Broadwell* v. *Banks*, 134 Fed., 470; *Richardson* v. *Neblett et al.*, 84 So., 695; *State* v. *Royal Mineral Ass'n*, 156 N. W., 128.) It is equally well established that ownership and disposition of personal property are governed by the *lex domicilii*. (*Francis C. Black et al.* v. *J. W. Zacharie & Co.*, 3 How., 483.) This latter principle is fully recognized in the Philippine Civil Code, which states specifically in article 10 that "personal property is subject to the laws of the nation of the owner thereof." Accordingly, it is held that the income of American citizens residing in the Philippines, from both real and personal property, is governed by the laws of the State of their domicile in the United States.

SECTION 311.—TRANSFERRED ASSETS.

ARTICLE 311-1: Claims in cases of transferred assets. 1939-32-9946 Ct. D. 1412

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INCOME—SALE OF CORPORATE ASSETS—CONSIDERATION PAID TO STOCKHOLDERS—TRANSFEREE LIABILITY OF PURCHASERS.

A corporation sold all of its physical property and other assets in 1926 to certain individuals, who agreed to assume "all existing liabilities" of the corporation. The consideration for such assets was paid to the stockholders of the dissolving corporation. In its income tax return for 1926, filed on the accrual basis, the corporation did not report as income any profit from the sale. *Held:* That the term "all existing liabilities" included taxes, although inchoate at the time of the agreement, and that the purchasers were liable for payment of the tax which the consummation of the agreement created; such liability arising not alone because of the transferee provisions of section 280 of the Revenue Act of 1926, but also because of the application of principles of equity.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (36 B. T. A., 268) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied May 29, 1939.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

George C. Shepard, petitioner, v. *Commissioner of Internal Revenue, respondent.*
[101 Fed. (2d), 595.]

Petition for review of decision of the United States Board of Tax Appeals.

Before EVANS and TREANOR, Circuit Judges, and LINDLEY, District Judge.

[January 11, 1939.]

OPINION.

Petitioner seeks to reverse the ruling of the Board of Tax Appeals which affirmed a tax assessment against him as one of two transferees of the assets of the City Ice & Supply Co., a dissolved corporation. The tax of $37,766.04 was levied upon the dissolved corporation's income for 1926.

EVANS, Circuit Judge: We are here confronted with the validity of a tax assessed against the alleged transferee of a corporation which dissolved without paying its income tax and without assets from which the tax could be collected.

The facts: The City Ice & Supply Co., an Illinois corporation, herein called the old company, had a stock issue of 3,325 shares of common stock and 1,000 shares of preferred stock, each of the par value of $100. Petitioner and an associate, Hunt, entered into negotiations with two officers and stockholders of the old company, which resulted in the execution of a 30-day option to purchase the common stock at $200 per share. The option was never exercised, and its importance lies in its possible bearing on the subsequently executed escrow agreement out of which the tax in question grew. The second agreement named a bank as escrow agent to hold in escrow all certificates of capital stock of the old company; it provided that the stockholders execute proxies to petitioner who

also acquired the exclusive option to purchase the stock deposited with the escrow agent on the payment of $200 per share for common stock, two-thirds of which was to be in cash and one-third in 7 per cent preferred stock of an Illinois corporation to be known as the City Ice & Coal Co., herein called the new company; and also provided for the redemption of the preferred stock at $105 per share. The agreement contained other provisions which, however, do not bear on our question.

The new company was promptly organized. Directors of the old company accepted the proposal of petitioner and his associate which is evidenced by letters from petitioner to the old company from which the following excerpts are taken:

Offer submitted May 6, 1926, and accepted May 7, 1926. "All existing liabilities of City Ice & Supply Co. to be assumed and paid by the parties making this proposition and payment thereof guaranteed by the corporation to whom will be made the conveyance herein contemplated."

May 6, 1926. "Steps have been taken by the undersigned to acquire the physical properties and certain other assets of the City Ice & Supply Co., an Illinois corporation chiefly engaged in the manufacture and sale of ice in the city of Chicago. Such acquisition being on the basis of assumptions and payment by us of all liabilities and obligations of said City Ice & Supply Co. We propose to cause to be conveyed to you certain of such assets as set forth in the statement hereto attached marked 'Schedule A,' in consideration of the payment and delivery to us or our nominees of—"

May 10, 1926. "It is the object of this memorandum effectively to designate and constitute said City Ice & Coal Co. and ourselves, respectively, as our nominees to whom shall be conveyed, assigned and delivered the property purchased by us in pursuance to our written offer above mentioned."

Change in plans by petitioner was necessitated because of inability to raise the cash requirements. Under second agreement the purchaser used cash of old company and proceeds of a $375,000 first mortgage bond issue of new company. When payments had been fully made, petitioner signed a receipt to the bank for "40 options and 4,365 shares of capital stock representing all of the common and preferred stock of the old company. After cancellation these certificates can be returned to L. R. to complete records of old company."

Petitioner did not take possession of the stock which he received. His attorney refused to accept the certificates, saying, "We don't want it; it is not ours." The stock was thereupon left with the escrow agent and later by it returned to the old company.

The new company issued 200 shares of common stock, of which petitioner and his associate each took 96 shares and 8 were scattered. Additional shares were subsequently issued to petitioner and his associate who were at all times the officers and directors of the new company.

The old company kept its books and filed its income tax return for the year 1926 on the accrual basis. It did not report as income any profit from the sale of its assets. No question was ever raised by it as to the correctness of the Commissioner's determination that the old company's net profit of $277,748.42 from this transaction should have been included in its 1926 income. The Commissioner subsequently added this profit to the income reported by the old company and determined the deficiency tax at $37,766.04. The old company had no assets and the tax was never paid by it. Subsequently the Commissioner determined a deficiency tax against the petitioner for the amount of this unpaid tax, acting under section 280 of the Revenue Act of 1926, which deals with the liability of transferees.

The Commissioner first assessed the tax against the stockholders of the old company as transferees, but this position was not sustained by the Board of Tax Appeals. The Commissioner then proceeded against petitioner and his associate. Two grounds were advanced for the Commissioner's action against petitioner: (*a*) Petitioner's agreement to assume all existing liabilities of the old company, and (*b*) the propositions of law applicable to one who is a transferee of another taxpayer's assets. This liability is also asserted on the theory that one is a trustee who has taken all of the taxpayer's assets without paying its income taxes.

The petitioner's defenses are several—as many as the theories of the Commissioner.

As to liability growing out of his agreement to assume the old company's debts, he asserts that income taxes accruing and assessed subsequent to the

execution of his agreement were not part of "existing liabilities" thereby assumed. He denies that he is a transferee within the meaning of section 280 of the Revenue Act of 1926 and also denies liability on the theory of a trustee: first, because the facts do not make of him a trustee; second, there is no showing that the old company was insolvent when he closed his dealings with it; and third, even as a trustee he would not be liable for income taxes subsequently assessed when the purchase price was paid to the stockholders of the old company.

To a large degree he rests his contention on a fact basis; namely, that the profit occurred after the property was transferred and therefore he was not liable on any theory for a debt or tax obligation arising after his transactions with the debtor were closed.

Respondent also stresses a fact, viz, petitioner acquired *all* of the assets of old company and paid the purchase price therefor to a *third party*, thereby making it impossible for the old company to pay any part of its tax.

Several of petitioner's contentions are readily disposed of.

Res judicata. The earlier holding of the Commissioner to the effect that the stockholders of the old company were the transferees and liable for the tax may be somewhat embarrassing as a matter of fact, but it in no way operates as a legal bar to the same official taking a different position later on. In the prior proceedings before the Board, the parties were not the same as here. The evidence was not the same. To a certain extent the issues were not the same. Clearly then, there was no room for the application of the doctrine of *res judicata*.

The extent and degree of factual embarrassment depends largely upon one's regard for the sacredness, the sanctity, and the all-around virtue of consistency. Slavish devotion to consistency rather frequently accompanies a tenacious pride of opinion. At other times it indicates merely a lack of imagination. Assuming that the Commissioner believed the facts pointed to liability on the part of the stockholders as transferees, and his mistake was demonstrated to his satisfaction by the opinion of the Board of Tax Appeals, and the Commissioner then decided to pursue the petitioner herein, there is presented no cause for serious embarrassment.

Whether petitioner or the stockholders should be liable for the tax as transferees is still the subject of earnest and honest dispute. Our determination of the question can not in the slightest degree be affected by the theory of the Board of Tax Appeals in another case or the Commissioner's view or theory of the instant case.

The amount of the tax against the old company for its 1926 income was not the subject of challenge either by pleading or argument before the Commissioner or the Board of Tax Appeals. We accept it as correct.

Likewise, we are satisfied that the action of the Board of Tax Appeals should be sustained if the facts show its conclusion was correct regardless of the soundness of the theory it adopted in reaching its conclusion. (*Commissioner* v. *Kelly's Estate*, 84 F. (2d), 958, 963; *Starr* v. *Commissioner*, 82 F. (2d), 964, 966 [Ct. D. 1147, C. B. XV–2, 229 (1936)].)

The prevailing party should have the right to advance all of the reasons which support the decision of the Board on the merits, and exceptions to any of the Board's adverse rulings are unnecessary in order that a victor may, on appeal, advance reasons by it made before and rejected by the Board.

This brings us to the merits of the controversy. We are convinced that the decision of the Board of Tax Appeals must be affirmed on both grounds urged by respondent. That is to say, petitioner, by his agreement to assume all of the old company's "existing liabilities," became bound to pay the income tax which the consummation of said agreement created. Likewise, in a case where Corporation A transfers all of its assets to B for a consideration which B pays to C, then B, regardless of any agreement, is liable for any unpaid income tax, which represents the profits made on such transfer on the theory that B is a trustee, to the extent of the value of the property which it acquired from A.

We have held and hold again that a tax may be a debt. For stronger reasons it may fall within the possible meaning of the word "liability." In the same case under the facts there shown, we held that the term "existing debts" should be construed in the light of the understanding and intention of the parties at the time of the execution of the agreement to include Federal income taxes subsequently assessed by the Commissioner. (*Tevandcr* v. *Ruysdael*, 299 Fed., 746.)

For more extended discussion, but with the same conclusion, see *Helvering* v. *Wheeling Mold & Foundry Co.* (71 F. (2d), 749 [Ct. D. 928, C. B. XIV–1, 352 (1935)]).

Reviewing the circumstances present in the instant case which color the intent and meaning of the words "all existing liabilities," we find the parties to the agreement were providing for the transfer of all the assets of the taxpayer to petitioner and his associate who agreed to pay the stockholders of said taxpayer, a sum equal to the value of the assets thus transferred. This left the taxpayer with nothing. It owed debts. Its profits for the year, due largely to the agreement in question, were large. An income tax of some $37,000 would be lawfully due thereon when the Commissioner made the assessment after the taxpayer made its return. All this was known to the parties who made the agreement in question. They contracted in the light thereof, and it was expressly provided in their agreement that petitioner and his fellow promoter Hunt should assume "all existing liabilities."

Petitioner's argument is in effect this:

We took all of the assets of the taxpayer away from it. We paid the price which represented the fair value of the assets so taken, to third parties, the stockholders. We agreed with the stockholders to pay "all existing liabilities" of the taxpayer. This, as we understood it, included all the debts, but did not include income taxes not yet due but which nevertheless were as certain to become due as anything in life.

The inescapable answer to the query,—How was the taxpayer's liability to the Government arising out of this transaction to be satisfied?—is,—the Government loses.

To give to the language of the contract such a version or construction would necessitate our impugning both the intelligence and the integrity of the parties. To assume that the parties would entertain the belief that by such a simple device as disposing of all of the assets of a taxpayer its taxes could be avoided, is to question the intelligence of the parties so acting. To assume that the parties contemplated and carried out plans which left the Government's claim for taxes growing out of the transaction unpaid, reflects on the integrity of the same parties.

It is fairer to assume, as was done in the two cases cited above, that the parties did not specifically cover the subject of inchoate taxes because the broad term "all existing liabilities" covered the situation.

Equally clear and definite must be the holding that one who dispossesses another company of all of its assets, paying the consideration therefor to a third party, and leaving the propertyless corporation unable to pay its debts, including taxes which were inchoate at the time, becomes a trustee and liable in such trusteeship for taxes and other debts in an amount not exceeding the value of the property taken from the debtor taxpayer. This is so, not alone because of any transferee liability section of the Revenue Act, but because of the application of principles of equity. (Fletcher "Cyclopedia Corporations," volume 7, page 8398, section 4756; *Brum* v. *Merchants' Mut. Ins. Co.*, 16 Fed., 140; *Hibernia Ins. Co.* v. *St. Louis & N. O. Transportation Co.*, 13 Fed., 516; *Grenell* v. *Detroit Gas Co.*, 112 Mich., 70, 70 N. W., 413; *Jennings, Neff & Co.* v. *Crystal Ice Co.*, 128 Tenn., 231, 159 S. W., 1088.)

The theory of these holdings is that courts of equity will protect creditors from fraudulent action on the part of the debtors by holding the recipient of the debtor's property as a trustee thereof for the benefit of the creditors of said debtor.

We see no possible application for the asserted tax exemption based on the theory that the transaction between the old and the new companies was a reorganization for which the Revenue Act makes special provision.

The order of the Board of Tax Appeals is affirmed.

TITLE IA.—ADDITIONAL INCOME TAXES.

SECTION 351.—SURTAX ON PERSONAL HOLDING COMPANIES.

ARTICLE 351-6: Illustration of computation of undistributed adjusted net income and surtax. 1939-27-9901 I. T. 3295

REVENUE ACT OF 1934.

Where, pursuant to section 351(d) of the Revenue Act of 1934, the shareholders of the M Corporation included in their returns for the calendar year 1935 their pro rata shares of its adjusted net income for that year, the amount of such adjusted net income, to the extent of the earnings and profits for the year 1935, is exempt from tax when distributed to the shareholders, *provided* the earnings and profits of subsequent years have first been distributed.

Advice is requested whether, in order for a distribution of the adjusted net income of the M Corporation for 1935, to the extent of earnings and profits for that year, to be exempt from tax under section 351(d) when distributed to the shareholders who previously reported such income in their individual returns, it is necessary for the more recently accumulated earnings of the corporation, i. e., the net balance of earnings for 1936, 1937, and 1938, to be first distributed.

Section 351(d) of the Revenue Act of 1934 provides as follows:

Payment of surtax on pro rata shares.—The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire pro rata shares, whether distributed or not, of the "adjusted net income" of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his pro rata share, be exempt from tax in the amount of the share so included.

The M Corporation filed a personal holding company return for the calendar year 1935 showing an adjusted net income of $1.34x$ dollars which was not distributed to shareholders in 1935 or in any subsequent year. Pursuant to the provisions of section 351(d) of the Revenue Act of 1934, supra, all of the shareholders included in their respective income tax returns for the calendar year 1935, as dividends received, their entire pro rata shares of the corporation's adjusted net income for that year. There has been no change in stock ownership since 1935.

In regard to the term "dividend" and the source of distribution, it is provided in section 115 of the Revenue Act of 1938 that:

(a) *Definition of dividend.*—The term "dividend" when used in this title (except in section 203(a)3 and section 207(c)1, relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) 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.

(b) *Source of distributions.*—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

In view of the provisions of section 115, supra, it is evident that any distribution made by the corporation in any taxable year begin-

ning after December 31, 1937, must be treated as having been made, first, from the earnings or profits of the taxable year in which the distribution is made, to the extent of such earnings and profits (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), and, second, from the next most recently accumulated earnings or profits since February 28, 1913. The portion of such a distribution determined to have been made out of earnings or profits of the taxable year in which the distribution is made, and the portion of such distribution made out of any prior year's earnings or profits (excluding the earnings or profits reported by distributee shareholders in their gross income under section 351(d) of the Revenue Act of 1934) constitute a taxable dividend in the hands of the shareholders.

As the shareholders of the M Corporation, pursuant to the provisions of section 351(d) of the Revenue Act of 1934, included in their individual income tax returns for 1935 the corporation's adjusted net income for that year, such income, to the extent of the earnings or profits for the year 1935, may be distributed by the corporation tax free to the shareholders *at any time after the earnings or profits for the years 1936, 1937, and 1938 have been distributed.* (With respect to the corporation surtax credit in such a case, see I. T. 3035, C. B. XV-2, 92 (1936).)

TITLE VI.—GENERAL PROVISIONS.

SECTION 801.—DEFINITIONS.

ARTICLE 801-2: Association. 1939-37-10009
Ct. D. 1417

INCOME TAX—REVENUE ACT OF 1932—DECISION OF COURT.

1. ASSOCIATION—PILOTS—NOT TAXABLE AS A CORPORATION.

An association of pilots licensed to pilot vessels in and out of harbor, which does no business except as an agent of its individual members and which owns no property and has no income as an entity, is not taxable as a corporation.

2. DECISION REVERSED.

Decision of the United States Board of Tax Appeals (1936) (35 B. T. A., 12) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mobile Bar Pilots Association, petitioner, v. *Commissioner of Internal Revenue, respondent.*

[97 Fed. (2d), 695.]

Petition for review of decisions of the United States Board of Tax Appeals (district of Alabama).

Before FOSTER, SIBLEY, and HUTCHESON, Circuit Judges.

[June 30, 1938.]

OPINION.

FOSTER, Circuit Judge: Petitioner filed income tax returns for its fiscal years 1930 and 1932 [1932 and 1933] and took certain deductions, which were disallowed by the Commissioner and deficiencies were determined. The Board

reversed the Commissioner in part and affirmed him in part and reduced the amount of the deficiencies. Before the Board petitioner contended that it is a nonprofit cooperative organization of pilots and is not taxable as a corporation. The Board found as a fact that petitioner is engaged in the business of furnishing qualified licensed pilots for the purpose of piloting boats across Mobile bar into and out of the harbor of Mobile, Ala. On this finding the Board held petitioner to be an association taxable as a corporation. Error is assigned to this finding of fact and to the ruling based thereon.

The undisputed facts in the record are these. Petitioner has been in existence for at least 50 years, has 20 members, all pilots licensed by the United States and the State of Alabama, actively engaged in piloting vessels in and out of the port of Mobile. Its members jointly own three boats, which are used exclusively in enabling them to render their service as pilots. The largest boat, the *Alabamian*, is stationed off Mobile bar and is used as a quarter boat for pilots awaiting their turns to bring in incoming vessels. She is registered in the name of all the members of the association. The other boats are too small to require registry. The association has by-laws and rules regulating the conduct of its members. The pilots take regular turns in piloting vessels. It has a president and a secretary elected from its members and a paid bookkeeper, maintains an office in Mobile with a telephone. In the usual course when a pilot has completed the taking of a ship in or out of Mobile he presents a ticket to the master, who approves it, although sometimes payment is made in cash to the pilot. The association renders bills to the agents of the vessels in its own name but the name of the pilot for the particular ship appears on each bill. The association has a bank account and after paying current bills and deducting an amount for an emergency fund the balance is distributed pro rata to its members monthly. When a member resigns or dies an amount equaling his pro rata ownership in the property of the association is paid to him or his heirs. When a new member is admitted he pays into the association an amount necessary to equalize his joint ownership of the common property with the other members.

The Commissioner relies upon the following cases as having facts analogous with those in the case at bar and as sustaining the conclusion that petitioner is an association taxable as a corporation: *Morrissey* v. *Commissioner* (296 U. S., 344 [Ct. D. 1064, C. B. XV–1, 264 (1936)]); *Swanson* v. *Commissioner* (296 U. S., 362 [Ct. D. 1065, C. B. XV–1, 270 (1936)]); *Helvering, Commissioner,* v. *Combs* (296 U. S., 365 [Ct. D. 1066, C. B. XV–1, 272 (1936)]); *Helvering* v. *Coleman-Gilbert* (296 U. S., 369 [Ct. D. 1067, C. B. XV–1, 261 (1936)]). In each of these cases property was transferred to trustees with authority to manage and dispose of it with the same authority as if they were the owners. In each case the trust was actively engaged in business for profit. We do not consider these and similar cases in point for the following reasons:

Pilotage is the performance of personal services requiring the pilot to have the highest degree of skill as a seaman and is controlled by law. Under the law of Alabama (Acts 81 and 611 Reg. Ses. 1931), before a man can be licensed as a pilot at the port of Mobile he must have a license from the United States. (See 46 U. S. C. A., section 214.) He must have served at least three years at sea and one year as an apprentice pilot. He must pass an examination before the Alabama commission to establish his fitness and be an American citizen of good character. He must take an oath to faithfully perform his duties, give bond in the sum of $2,000 to guarantee that he will do so, and pay an annual privilege tax of $50. He may be deprived of his license by either the Federal or State authorities for incompetency, negligence, or habitual drunkenness. Pilotage fees are fixed by the State board. A pilot can not demand more nor accept less than these fees under penalty fixed by law. For one not licensed to act as a pilot is a punishable offense.

Pilot associations have existed at all ports in civilized countries from time immemorial. It is not necessary for a man to be a member of an association to practice his profession but in the nature of things it would be impossible for him to operate alone. He must meet vessels beyond the bar in all kinds of weather and maintain boats of sufficient size and seaworthiness to permit him to do so. This would be impossible without an organization as the cost would be prohibitive to a single individual.

For the convenience of shipping it is necessary that headquarters of some kind be maintained at each port so that the pilot can be called when needed. It is necessary for the pilots to have some one to look after their business affairs such as collecting their fees as it would be impracticable for the pilot to do that personally.

Pilotage is personal service by an individual for which he has a maritime lien on the vessel. (*The Queen*, 206 F., 148.) A pilot is the servant of the owner of the vessel who is responsible to third persons for his negligence or want of skill. (*Sherlock* v. *Alling*, 93 U. S., 99.) But an association of which the pilot is a member, similar to petitioner, is not responsible for his acts. (*Guy* v. *Donald*, 203 U. S., 399.)

It would be impossible for petitioner to engage in the business of piloting as an independent contractor. Petitioner does no business except as an agent of its individual members. It owns no property and has no income as an entity. Consequently is not required to pay income taxes as an association. If by mistake it has filed an income tax return estoppel does not result therefrom and it is immaterial what deductions it attempts to take from the income reported. It follows that it was error for the Board to hold that petitioner was engaged in the business of furnishing licensed pilots and is an association taxable as a corporation.

The judgment of the Board is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

ARTICLE 801–4: Partnerships.

1939–30–9923
Ct. D. 1408

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

1. SYNDICATE FORMED TO BUY AND SELL STOCK—JOINT VENTURE—NOT AN ASSOCIATION.

Under a written agreement made between 65 individuals and companies, and an individual called a "manager," a syndicate was formed in October, 1929, to buy and sell the common stock of a certain corporation for a limited period of time. The manager was authorized to purchase and sell for the account of each subscriber, who was to participate in the shares in proportion to his interest in the syndicate and was bound by the action of the manager in proportion to, but not to exceed his liability for, the number of shares subscribed. The manager was given sole direction and control of the business, with certain limitations, but took no title to the stock purchased. Stocks bought were not put in the name of either the manager or the syndicate, but were left in the broker's hands as security for marginal purposes, and some stocks were pledged to banks to secure funds on better terms. There was no provision for issuance of certificates of interest or for transfer of interests. The syndicate was closed in March, 1930. *Held*, that the legal effect of the agreement as a whole was that each subscriber created a general nonrevocable agency in the manager; that each share was owned by the subscribers in common; and that the syndicate was a joint venture and not an association which could be taxed as a corporation.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (35 B. T. A., 1031) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *N. B. Whitcomb Coca-Cola Syndicate, Trust Company of Georgia, Syndicate Manager, respondent.*

[95 Fed. (2d), 596.]

Petition for review of decision of the United States Board of Tax Appeals (District of Georgia).

Before FOSTER, SIBLEY, and HUTCHESON, Circuit Judges.

[March 29, 1938.]

OPINION.

SIBLEY, Circuit Judge: The Commissioner of Internal Revenue assessed corporation income taxes against N. B. Whitcomb Coca-Cola Syndicate as an

association upon its profitable operations in the early months of the year 1930. The subscribers to the syndicate denied that they were a taxable association, and claimed to have had a joint adventure with a manager, and that they are to be classed under the tax laws as a partnership rather than a corporation. The Board of Tax Appeals held that the syndicate was not an association, and we agree.

The facts were stipulated. Sixty-five individuals and companies on October 29, 1929, signed an agreement with each other and with N. B. Whitcomb, called manager, which stated that they desired to and did thereby form a syndicate for the purpose of buying and selling shares of the common stock of Coca-Cola Co. It provided [italics ours]: "The manager is *authorized* to purchase and sell for the account of *each subscriber* common capital stock of the Coca-Cola Co. * * * not to exceed at any time the number of shares set opposite *his name*." "All stock bought by the manager pursuant to *the authority given* to him *by each of the subscribers* shall be carried by the manager in the syndicate account, and the subscribers hereto shall *all participate in each purchase or sale* in proportion to their interest in the syndicate." Each subscriber bound himself to pay in $20 for each share subscribed for by him at the manager's call. When purchases of stock were made, each subscriber was to pay in additionally his pro rata part of the price. The manager was given sole direction and control of the business and transactions of the syndicate, with broad discretionary powers, except that he could not have in hand at any one time more than 100,000 shares unless the subscriptions exceeded that figure, in which case the total number of shares subscribed was to be the limit. The syndicate was to have a life of 90 days, which the manager could extend for another 90 days, and which a majority of the subscribers could further extend for a total period not more than one year. The manager was not to be liable for error of judgment or mistake of law or fact, but only for gross negligence or willful default "in the exercise of the powers or authority herein conferred on him." "*Each subscriber ratifies* and assents to, and is bound by, any action of the manager" under the agreement in proportion to his subscribed shares, but not for an amount exceeding the liability arising against him on the number of shares subscribed for by him. Failure of any subscriber to perform is not to affect or release any other subscriber. "Nothing herein contained or otherwise arising shall constitute the subscribers *partners with or agents for one another or for the manager* or render any of them liable to contribute in any event more than the interest in the syndicate subscribed for by him." On the termination of the syndicate the manager was to pay off its obligations and distribute the stocks on hand and other assets to the subscribers in proportion to their subscriptions. There was no provision for any certificates of interest to be issued, or for a transfer of interests. Stocks bought were not put in the name of either the manager or the syndicate, but were left in the broker's hands as security for marginal purposes. Some stocks were pledged to banks to secure funds on better terms. The syndicate did a large business without profit in 1929, but profitable in 1930, and was closed in less than five months on March 17, 1930.

The subscribers called their enterprise a syndicate. Such aggregations of capital are usually for a limited and temporary operation. (*Gates* v. *Megargel*, 266 Fed., 811.) But we are informed by Webster, International Dictionary, that the term is a loose one, that the members may be partners, joint contractors, or in any other relation agreed upon. The relationships must be ascertained by examining the agreement. We think the relationship created between each subscriber and the manager was that of principal and agent. Words of agency occur frequently in the contract. The name "manager" appropriately describes an agent with broad powers. There was no trust in a technical sense, for the manager was not to hold title to any property for the use of others. Each share bought was to be participated in by each subscriber in proportion to his interest in the syndicate. Each share was thus owned by the subscribers in common. The manager was not the agent of an aggregation of subscribers, that is to say, of an entity, but the authority was expressly to buy and sell the stock "for the account of each subscriber." In a syndicate agreement before the Supreme Court in *Sim* v. *Edenborn* (242 U. S., 131, 135), it was said of the manager that the subscribers "created him their agent to acquire and deal in certain properties, a position of especial trust and confidence." The manager's authority here was not revocable and not alterable by his several principals, but only because they had thus agreed among themselves. The agreement did not create a partnership for there was no mutual agency

among the subscribers and no intention to become liable each for the whole debts of the business; partnership was expressly disclaimed. The legal effect of the agreement as a whole was that each subscriber created a general non-revocable agency in the manager for the period fixed to do what was specified, the property acquired to belong in common to the subscribers. There was a joint adventure undertaken. There was an effort to limit personal liability, but probably as to third persons the effort would be effectual only as it might operate to limit the authority of the manager. The liability on any engagement made by the manager within his authority was the several personal liability of the subscribers. An association which can be taxed as a corporation is organized with more permanency. It owns its property. Its managers are its agents. Its profits and losses are conceived of as its own, the associates as having ownership only in what may finally be distributed to them. A joint adventure is not such. In the Revenue Act of 1932, section 1111(a)3, syndicates and pools are expressly mentioned, and classed not as associations taxable as corporations, but with partnerships in which each individual pays his own tax. The enactment we think merely declared the previous law. The Board of Tax Appeals rightly held there was here no such entity as should be taxed as a corporation.

Affirmed.

TITLE III.—TAX ON UNJUST ENRICHMENT. (1936)

REGULATIONS 95, ARTICLE 13: Computation of extent to which burden of a Federal excise tax was shifted to others. 1939-28-9915 T. D. 4910

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PARTS 2 AND 465.—TAX ON UNJUST ENRICHMENT UNDER THE REVENUE ACT OF 1936

Article 13, Regulations 95, and that article as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939-1 (Part 1), 396], amended.

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

To Collectors of Internal Revenue and Others Concerned:

Paragraph (6) under the heading of "Method II" in article 13 of Regulations 95 (section 2.13, Method II, paragraph (6), of Title 26, Code of Federal Regulations), and that article as made applicable to the Internal Revenue Code by Treasury Decision 4885 (Part 465, Subpart B, of such Title 26), is amended to read as follows:

The difference between each aggregate selling price computed as provided in paragraph (1), above, and the deductions specified in paragraph (2), above, shall be divided by the total number of units determined as provided in paragraph (4). The resulting amount per unit shall be the margin per unit except that in the case of a taxable year during all of which the Federal excise tax in question was in effect, the following adjustment, made in the return, will ordinarily be allowed pursuant to section 501(i): A deduction from the amount per unit, computed as provided in the first sentence of this paragraph, of an amount equal to the amount obtained by dividing by the total number of units determined as provided in paragraph (4), the reimbursement to purchasers made as specified in section 501(f)(3) with respect to the articles expressed in terms of units determined in each case under (A), (B), or (C), respectively, of paragraph (5), and the remainder, if any, in such case shall be the margin per unit.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 700(e)(2), 702(a), and 62 of the Internal

Revenue Code (53 Stat., Part 1); sections 501(e)(2), 503(a), and 62 of the Revenue Act of 1936 (49 Stat., 1734, 1738, 1673; 26 U. S. C., Sup. IV, 345(e)(2), 345b(a), 62).)

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved July 1, 1939.

HERBERT E. GASTON,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register July 6, 1939, 11.53 a. m.)

SECTION 501.—TAX ON NET INCOME FROM CERTAIN SOURCES.

REGULATIONS 95, ARTICLE 7: Computation of net income from sales of articles with respect to which a Federal excise tax was imposed but not paid. 1939–32–9947 G. C. M. 21418

REVENUE ACT OF 1936.

Deductions for salaries of individual partners are not allowable in determining the net income of a partnership for the purpose of computing the tax on unjust enrichment.

An opinion is requested whether, in determining the net income of a partnership for the purpose of computing the tax on unjust enrichment, an allowance may properly be made for salaries paid to the individual partners.

In support of such an allowance, attention has been invited to the decision of the Board of Tax Appeals in *Appeal of Gottlieb Bros.* (1 B. T. A., 684, acquiescence, C. B. X–2, 27 (1931)). In that case the Board held that in computing the net income of a partnership for the purpose of the excess profits tax under the Revenue Act of 1917 a reasonable allowance for compensation for services rendered by its members could be deducted. That decision related to the Revenue Act of 1917, section 206 of which provides in part as follows:

The net income of a partnership or individual shall be ascertained and returned * * * upon the same basis and in the same manner as provided in Title I of such Act of September eighth, nineteen hundred and sixteen, * * *.

Section 5 (Title I) of the Act of 1916 provides, *inter alia:*

(a) For the purpose of the tax there shall be allowed as deductions—
First. The necessary expenses actually paid in carrying on any business or trade, not including personal, living, or family expenses * * *.

In the light of the results that would follow an absolutely strict construction of the statute, the then Commissioner, with the approval of the Secretary, promulgated Regulations 41, article 32 of which reads in part as follows:

ART. 32. * * * In computing net income for purposes of the excess-profits tax a partnership will be allowed to deduct as an expense reasonable salaries or compensation paid to individual partners for personal services actually rendered during the taxable year * * *.

In regard to that regulation, the Board stated in the Gottlieb case, supra, that—

> The regulation quoted seems to us reasonable and proper in the light of the whole intent and purpose of Title II of the Revenue Act of 1917. It certainly does justice where a strict application of the letter of the statute would do grave injustice.

The deductions allowable in the present case are only those which are permitted under the Revenue Act of 1934, and since neither that Act nor the regulations applicable thereto contains any provision for the allowance as a deduction of salaries paid to members in computing partnership net income, it seems clear that the Gottlieb case, supra, affords no authority for a determination of the present question. On the contrary, so-called salary payments by a partnership to its members have long been held to constitute a distribution of profits, anticipated or realized, rather than the payment of compensation. In *Appeal of the Executors of the Estate of S. U. Tilton et al.* (8 B. T. A., 914, acquiescence, C. B. VII–1, 31 (1928)), the Board, considering a situation similar to that here present, stated in part as follows:

> * * * A partner devoting his time and energies to the business of the firm is in fact working for himself and can not be considered as an employee of the firm in the sense that he is in the service of another. It follows, therefore, that he can not be paid a salary by the firm out of earnings in the sense of compensation for services rendered to an employer. In effect any allowances drawn by a partner from partnership assets are payments which he makes to himself and no man can be his own employer or employee. A partner receiving a salary is merely transferring money from one to another of his own pockets. (*Leo Schwartz* v. *Commissioner*, 7 B. T. A., 223.)

In *Augustine M. Lloyd* v. *Commissioner* (15 B. T. A., 82) the Board used the following language:

> * * * Further, it being concluded that payments of compensation to partners are but a means for dividing the partnership profits, it must necessarily follow that such payments are not proper deductions from income in computing the partnership net income. * * *

(See also *Karl Pauli* v. *Commissioner*, 11 B. T. A., 784, G. C. M. 6582, C. B. VIII–2, 200 (1929), and G. C. M. 13771, C. B. XIII–2, 229 (1934).)

From the above it follows that no deductions may be allowed for salaries of individual partners in determining the net income of the partnership for the purpose of computing the tax on unjust enrichment.

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

EMPLOYMENT TAXES.

INTERNAL REVENUE CODE

CHAPTER 9, SUBCHAPTER A.—EMPLOYMENT BY OTHERS THAN CARRIERS.

REGULATIONS 91. 1939–41–10056
(Also Subchapter C; Regulations 90 and Social Security Act, Titles VIII and IX.) Mim. 4952

Social Security Act Amendments of 1939.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., August 21, 1939.

Collectors of Internal Revenue and Others Concerned:

The purpose of this mimeograph is to outline for the information of collectors of internal revenue and other interested persons the changes effected in Subchapters A and C of Chapter 9 of the Internal Revenue Code and Titles VIII and IX of the Social Security Act by the Social Security Act Amendments of 1939, approved August 10, 1939 (Public, No. 379, Seventy-sixth Congress). The majority of these changes do not become effective until January 1, 1940. Certain of the changes, however, became effective on the date of enactment of the amendments and have application to the year 1939 or prior years. In the preparation of this mimeograph, an attempt has been made to indicate clearly the effective dates of the various provisions of the amendments and the years to which they apply.

The mimeograph is divided into three main parts. Part I explains the changes made in Subchapter A of Chapter 9 of the Internal Revenue Code which levies the old-age insurance taxes (applicable to employers of one or more and to their employees), and which, effective April 1, 1939, superseded Title VIII of the Social Security Act. (This subchapter is now referred to as the "Federal Insurance Contributions Act.") Part II explains the changes made in Subchapter C of Chapter 9 of the Internal Revenue Code which levies the Federal unemployment compensation tax (applicable only to employers of eight or more), and which, effective with the tax for the year 1939, superseded Title IX of the Social Security Act. (This subchapter is now referred to as the "Federal Unemployment Tax Act.") Part III explains certain miscellaneous provisions, among which are the provisions relating to the credit against the tax imposed under Title IX of the Social Security Act for the years 1936, 1937, and 1938, and the provisions in regard to the retroactive application of the old-age insurance taxes on the wages of employees over age 65.

It is emphasized that this explanation of the changes made by the amendments is for informational purposes only and does not commit

the Bureau of Internal Revenue to any interpretation of the law in advance of the promulgation of formal regulations approved by the Secretary of the Treasury. Such regulations are in the course of preparation and will be made available at the earliest practicable date.

PART I.

FEDERAL INSURANCE CONTRIBUTIONS ACT.

(Subchapter A of Chapter 9 of the Internal Revenue Code which, effective April 1, 1939, superseded Title VIII of the Social Security Act.)

RATES OF TAX.

Sections 601 and 604 of the amendments amend sections 1400 and 1410, respectively, of the Internal Revenue Code to fix the old-age insurance tax rates at 1 per cent on the employee and 1 per cent on the employer for the calendar years 1940, 1941, and 1942 as against the 1½ per cent rate provided under the old law.

A further change has been made in these sections in that the rates of tax applicable are the rates in effect at the time the wages are paid and received, without regard to the rates in effect at the time the services were performed.

ADJUSTMENT OF TAXES.

Effective upon the enactment of the amendments, sections 602(a) and 605 amend sections 1401(c) and 1411, respectively, of the Code, to allow more latitude in the manner in which the varied situations requiring adjustments may be treated. This has been accomplished by deleting the term "wage payment," which has a restricted meaning, and substituting in its stead the term "payment of remuneration," and by allowing adjustments to be made in such manner and at such times as may be prescribed by regulations.

SPECIAL REFUND.

Effective with the year 1940, section 602(b) further amends section 1401 of the Code by inserting at the end thereof a new subsection (d) allowing an employee who performs service for more than one employer during any calendar year to obtain a refund, without interest, of the employees' tax imposed by section 1400 paid on the wages in excess of $3,000 received by him with respect to employment during such year. Under the present law, both the employers' and employees' taxes are collectible on the remuneration of an employee with respect to employment during any calendar year up to and including $3,000 received from each of his employers. For administrative reasons, the amendment does not disturb this provision, nor does it in any way relieve each employer from the duty of deducting the employees' tax from wages which he pays to the employee within the $3,000 maximum, without regard to the fact that deductions are also being made by other employers for whom the employee also performs services. At any time within the two years *after the close of the calendar year*, however, the employee is entitled to file a claim establishing his right to this special refund of employees' tax on wages in excess of $3,000 for such year which has actually been de-

ducted and paid to the collector. It should be noted that this special refund applies only to the employees' tax imposed under section 1400. No such similar refund is provided for employers for the employers' tax imposed under section 1410.

RECEIPTS FOR EMPLOYEES.

Effective January 1, 1940, section 603 adds at the end of Part I of Subchapter A a new section (1403) relating to the furnishing of receipts to employees. Subsection (a) of the new section requires every employer to furnish each of his employees with a statement *in a form suitable for retention by the employee* showing the taxable wages paid to the employee after December 31, 1939. Each statement must cover one or more, but not more than four, calendar quarters and must show the names of the employer and the employee, the period covered by the statement, the total amount of wages paid within the period covered, and the amount of employees' tax with respect to such wages. Each statement must be furnished to the employee not later than the last day of the second calendar month following the period covered by the statement except that in any case where an employee leaves the employ of his employer, the final statement must be furnished at the time the final payment of wages is made. If the employer so chooses, he has the option under this section of furnishing such a statement at the time of each payment of wages to the employee during any calendar quarter and, in such case, the statement may show the date of payment of the wages, in lieu of the period covered by the statement.

Subsection (b) of the new section provides for a civil penalty of not more than $5 for each willful failure to furnish the statement in the manner, at the time, and showing the information required.

DEFINITION OF WAGES.

Effective January 1, 1940, section 606 amends subsection (a) of section 1426 of the Code, defining the term "wages." The subsection, as amended, continues the present definition of wages (including, in paragraph (1), the $3,000 limitation), clarifies it in some respects, and excludes certain types of payments heretofore taxable.

Paragraph (2) of the subsection excludes payments made to or on behalf of an employee under a plan or system established by an employer which makes provision for his employees generally or for a class or classes of his employees (including any amount paid by an employer for insurance or annuities or into a fund to provide for any such payment) on account of (A) retirement, or (B) sickness, or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death (including life insurance), provided the employee, while living, does not have certain specified rights or options.

Paragraph (3) expressly excludes the payment by an employer (without deduction from the remuneration of, or reimbursement by, the employee) of the employees' tax imposed by section 1400 or employee contributions under State unemployment compensation laws.

Paragraph (4) excludes dismissal payments which the employer is not legally required to make.

DEFINITION OF EMPLOYMENT.

Effective January 1, 1940, section 606 also amends the provisions of subsection (b) of section 1426 of the Code, defining the term "employment." Under the amended subsection, the term means any service performed prior to January 1, 1940, which was employment under the old law; and any service of whatever nature performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either (A) within the United States, or (B) on or in connection with an American vessel under a contract of service entered into within the United States or during the performance of which the vessel touches a port therein, if the employee is employed on and in connection with such vessel when outside the United States, with certain exceptions hereinafter discussed.

Under this amendment, the definition of employment contained in the law prior to January 1, 1940, is retained with respect to services rendered through December 31, 1939. The definition applicable to services rendered on and after January 1, 1940, however, is extended to include, with certain qualifications, all services which are attached to or connected with American vessels. It is made clear that the existing law, under which the citizenship or residence of the employer or employee is immaterial in determining whether services are included, is equally applicable to maritime services covered by the amendment. The term "American vessel" is defined in a new subsection (g) to mean any vessel documented or numbered under the laws of the United States, and also to include any vessel neither so documented nor numbered nor documented under the laws of any foreign country while the crew is in the employ only of citizens or residents of the United States or corporations organized under the laws of the United States or of any State.

EXCEPTIONS FROM EMPLOYMENT.

The definition of employment applicable to services rendered on and after January 1, 1940, continues unchanged some of the exceptions contained in the law prior to that date, revises others, and makes certain additions. Unless otherwise indicated in the discussion of each exception, as set forth in the following titled paragraphs, all of the revisions and additions become effective *January 1, 1940.*

Agricultural labor.—Paragraph (1) of section 1426(b), as amended, continues the exception of agricultural labor, but a new subsection (h) has been inserted defining the term for purposes of the exclusion. The term, as defined, has considerably broadened the scope of the exemption by excluding numerous types of services considered to be an integral part of farming activities, but which have heretofore constituted taxable employment.

Paragraph (1) of subsection (h) excepts service performed *on a farm in the employ of any person* in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of live stock, bees, poultry, fur-bearing animals, and wildlife.

Paragraph (2) excepts service performed *in the employ of the owner, tenant, or other operator of a farm* in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, provided the major part of such service is performed on a farm. (For a provision granting retroactive exemption to services similar to the last type mentioned in this paragraph, see page 266.)

Paragraph (3) excepts service performed in connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (e. g., certain naval stores products), or in connection with the raising or harvesting of mushrooms, the hatching of poultry, the ginning of cotton, or the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes. In order for the services described in this paragraph to be excepted, it is not necessary that they be performed on a farm, nor that they be rendered in the employ of the owner or tenant of a farm.

Paragraph (4) excepts service performed in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits or vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of the paragraph, however, have no applicability to service performed in connection with commercial canning or freezing, or in connection with any horticultural or agricultural commodity after its delivery to a terminal market for distribution for consumption. The last sentence of this paragraph makes it clear that the term "farm" as used in subsection (h) has a broad and comprehensive meaning, and that it includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

Domestic service.—Paragraph (2) of section 1426(b) continues the present exception of domestic service in a private home and adds to the exception such service when performed in a local college club, or local chapter of a college fraternity or sorority.

Casual labor.—Paragraph (3) continues unchanged the exception of casual labor not in the course of the employer's trade or business.

Employees who have attained age 65.—Effective January 1, 1939, the exception accorded service performed by individuals over age 65 has been repealed. (See discussion of section 905 of amendments under "Miscellaneous Provisions.")

Family employment.—Paragraph (4) contains a new exception which exempts service performed by an individual in the employ of his son, daughter, or spouse and service performed by a child under the age of 21 in the employ of his father or mother. The language of this new exception is identical with the language of the exception

accorded family employment in Subchapter C of Chapter 9 of the Code, which superseded Title IX of the Social Security Act.

Maritime workers on non-American vessels.—Paragraph (5) excludes service performed on or in connection with a vessel, not an American vessel, if the employee is employed on and in connection with such vessel when outside the United States. This provision excludes all service, although performed within the United States, rendered by an employee who was rendering service on and in connection with such a vessel upon its entry into, or departure from, the United States. This exception will take the place of the one in the law as it existed prior to the amendments excluding services performed as an officer or member of the crew of a documented vessel.

Employees of the United States and instrumentalities thereof.—Paragraph (6) continues the exception of service performed in the employ of the United States, or an instrumentality thereof, but limits the exception to those instrumentalities which are wholly owned by the United States or exempt from the tax imposed by section 1410 of the Code by virtue of any other provision of law. This change brings within the scope of the law numerous Federal instrumentalities previously excluded, such as national banks and State banks which are members of the Federal Reserve System.

Employees of States, their instrumentalities, and political subdivisions.—Paragraph (7) continues the exception of service performed in the employ of a State, its instrumentalities, and political subdivisions, but limits the exception with respect to instrumentalities in that only those instrumentalities which are wholly owned by one or more States or political subdivisions or which would be immune from the tax imposed by section 1410 of the Code by the Constitution, are excluded.

Religious, charitable, etc., organizations.—Paragraph (8) continues the exception of service performed in the employ of religious, charitable, scientific, literary, or educational organizations, but brings the language into conformity with section 101(6) of the Code by adding a clause which disqualifies any organization when a substantial part of its activities is carrying on propaganda, or otherwise attempting, to influence legislation.

Carrier employees and employee representatives.—Paragraph (9) continues without change the provisions of law excepting service performed by an individual as an employee or an employee representative as defined in Subchapter B of Chapter 9 of the Code (which superseded the Carriers Taxing Act of 1937).

Employees of nonprofit organizations exempt from Federal income tax, etc.—Paragraph (10) sets forth several entirely new exceptions from employment. Clause A exempts service *performed in any calendar quarter* in the employ of an organization exempt from income tax under section 101 of the Internal Revenue Code, if (*i*) the remuneration for such service does not exceed $45, *or* (*ii*) if such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, *or* (*iii*) if such service is per-

formed by a student who is enrolled and is regularly attending classes of a school, college, or university.

Agricultural and horticultural organizations.—Clause B of such paragraph (10) excepts all service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101(1) of the Internal Revenue Code, without regard to the type of service rendered or the amount of remuneration received.

Voluntary employees' beneficiary associations.—Clause C excepts all service performed in the employ of a voluntary employees' beneficiary association, providing for payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (*i*) no part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (*ii*) 85 per cent or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses. This exemption is identical with that of those organizations exempt from income tax under section 101(16) of the Internal Revenue Code.

Clause D excepts all service in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries if (*i*) admission to membership in such association is limited to individuals who are officers or employees of the United States Government, and (*ii*) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

Students.—Clause E excepts service performed *in any calendar quarter* in the employ of a school, college, or university, not exempt from income tax under section 101 of the Code, if such service is performed by a student enrolled and regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed $45 (exclusive of room, board, and tuition).

Employees of foreign governments and certain of their instrumentalities.—Paragraph (11) excepts service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative), and paragraph (12) excepts, on a reciprocity basis, service performed in the employ of an instrumentality wholly owned by a foreign government. *These exemptions are made retroactive to the date of enactment of the Social Security Act by section 902(f) of the amendments.*

Student nurses and interns.—Paragraph (13) is a new exception excluding service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in such a school, chartered or approved pursuant to a State law; and service performed as an interne in the employ of a hospital by an individual who has completed a 4-year course in a medical school chartered or approved pursuant to a State law.

Fishermen and officers and members of crews of certain small vessels.—Paragraph (14) is a new exception which excludes service

performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except (A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States).

20 *Newsboys.*—Paragraph (15) contains a new exception which excludes service performed by individuals under the age of 18 in the delivery or distribution of newspapers or advertising material. It does not exclude the handling of newspapers and advertising material prior to the time they are turned over to the individual who makes the final distribution.

INCLUDED AND EXCLUDED SERVICES.

21 Effective January 1, 1940, a new subsection (c) has been inserted in section 1426, relating to an employee who renders both included and excluded service for the same employer during a particular pay period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made. It provides that if one-half or more of the service constitutes employment, all of such service will be included; but that if less than one-half of the service constitutes employment, all will be excluded. The provision, however, does not apply to the service of an employee in a pay period if any of such service is covered under Subchapter B of Chapter 9 of the Internal Revenue Code (which superseded the Carriers Taxing Act of 1937).

NEW SHORT TITLE.

Section 607 adds a new section providing that Subchapter A of Chapter 9 of the Internal Revenue Code (which superseded Title VIII of the Social Security Act) may be cited as the "Federal Insurance Contributions Act."

PART II.

FEDERAL UNEMPLOYMENT TAX ACT.

(Subchapter C of Chapter 9 of the Internal Revenue Code which, effective with the tax for the year 1939, superseded Title IX of the Social Security Act.)

TAX BASIS.

Effective with the tax for the year 1939, section 608 amends section 1600 of the Code to change the basis for determining tax liability from "wages payable" to "wages paid." This amendment has the effect of bringing the provisions of this subchapter more nearly into conformity with the provisions of the Federal Insurance Contributions Act.

Effective with the tax for the year 1939, section 609 of the amendments liberalizes the provisions of section 1601(a) of the Code in several important particulars. Under the law as it existed prior to the amendments, taxpayers could credit against the Federal tax only contributions paid under a State law with respect to "employment" as defined in section 1607 of the Code. Since the definition of "employment" in section 1607 restricts the meaning of the term to certain types of services, the taxpayer was not given credit for contributions made under a State law with respect to services not covered by the Federal law. Subdivision (1) of the amended section eliminates all reference to the term "employment," thus allowing the taxpayer to credit (subject to the 90 per cent limitation) the contributions required and paid under a State law without regard to whether such contributions are with respect to "employment" as defined in the Federal law.

Subdivision (2) provides that credit shall be allowed against the tax for the taxable year only for the amount of contributions paid with respect to such year. This effects no substantive change in the old law.

Subdivision (3) allows taxpayers more time in which to pay their contributions to the State and secure credit against the Federal tax. The amendment permits full credit for contributions paid on (as well as before) the due date for the Federal return. The amendment further permits a credit for contributions paid after such due date but on or before June 30 next following the due date, but this credit may not exceed 90 per cent of the amount which would have been allowable as credit on account of such contributions had they been paid on or before the due date. This subdivision further provides for the removal of the time limitation for credit of contributions paid to a State in those cases where the assets of the taxpayer are in the custody of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction at any time beginning with the due date and ending with the next following June 30, both dates inclusive.

Subdivision (4) grants relief to those taxpayers who have erroneously paid contributions to the wrong State. In any case where a taxpayer has made such an erroneous payment, the payment to the proper State will be deemed, for purposes of the credit against the Federal tax, to have been made on the date of the erroneous payment. If the taxpayer's experience under the law of the wrong State had entitled him to cease paying contributions with respect to services subject to the law of that State, and by reason thereof no contributions had actually been paid with respect to the remuneration in question, payment to the proper State will be treated, for credit purposes, as having been made on the date on which the Federal return is actually filed.

Subdivision (5) provides for refund, without interest, of any tax (including penalties and interest) based on any credit allowable under this section in accordance with the provisions of law (including statutes of limitations) applicable in the case of erroneous or illegal collection of the tax.

ADDITIONAL CREDIT.

Effective with the tax for the year 1939, section 609 also amends section 1601(b) of the Code by expressly conditioning the allowance of additional credit upon certification by the Social Security Board of the State law under section 1603(c) and the amended section 1602(b), and by extending the additional credit to reduced rates of contributions required under a State law with respect to services not covered by the Federal law. The subsection, in this latter respect, is thus brought into conformity with the amendment to subsection (a) of section 1601 (relating to credit for contributions paid to State unemployment funds). The additional credit allowance will be based on the difference between the amount of contributions the taxpayer was required to pay under the State law and the amount he would have been required to pay if, throughout the taxable year, he had been subject to the highest rate applied under the State law, or to a rate of 2.7 per cent, whichever is lower. This amendment, in addition to measuring the credit by the applicable per cent of the pay roll with respect to which contributions are required under the State law, also eliminates the possible necessity for measuring additional credits in terms of periods less than one year.

An amendment to section 1601(c) of the Code restates the provisions of the old law and limits the total credits allowed to a taxpayer under Subchapter C to an amount not in excess of 90 per cent of the tax against which such credits are allowable.

Section 610 amends section 1602(a) of the Code relating to the conditions of additional credit allowance and adds a new subsection (b) requiring the Social Security Board to certify to the Secretary of the Treasury, State laws which comply with amended section 1602(a). Section 611 of the amendments amends section 1603(a) of the Code relating to the requirements of State laws for approval by the Social Security Board. The changes effected by the amendments to sections 1602 and 1603 are not discussed in detail since the authority for the issuance of regulations under such sections is vested in the Social Security Board.

EXTENSION OF TIME.

Effective with the returns for the taxable year 1939, section 612 amends section 1604(b) of the Code to authorize an extension of time for the filing of returns of the tax imposed by section 1600 for not more than 90 days under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe. Taxpayers may thus be given 30 days, in addition to the 60 days allowable under the old law, within which to file their returns.

INTERSTATE COMMERCE AND FEDERAL INSTRUMENTALITIES.

Section 613 amends section 1606 of the Code, relating to the application of State unemployment compensation laws to employers engaged in interstate or foreign commerce, to employers located on Federal lands, and to certain Federal instrumentalities. The administration of the section is not within the province of the Bureau of Internal Revenue.

DEFINITION OF EMPLOYER.

Effective January 1, 1940, section 614 amends subsection (a) of section 1607 of the Code, defining the term "employer," to make it clear that in determining whether a person employs eight or more employees, only those employees who are employed in an employment, as defined in section 1607(c), are to be counted. This is only a clarifying amendment and effects no change in the interpretation which the Bureau has heretofore placed on section 1607(a). In all other respects the language of the definition remains the same.

DEFINITION OF WAGES.

Effective January 1, 1940, section 614 also amends the provisions of subsection (b) of section 1607 of the Code, defining the term "wages," so that its provisions are identical to those contained in amended section 1426(a). Under the amendment, the $3,000 limitation on remuneration paid to an employee by his employer with respect to employment during any calendar year has been inserted in Subchapter C of the Code as have the other exclusions previously mentioned in the section of this mimeograph dealing with the definition of "wages" under the Federal Insurance Contributions Act.

DEFINITION OF EMPLOYMENT.

Effective January 1, 1940, section 614 also amends the provisions of subsection (c) of section 1607 of the Code, defining the term "employment." Under the amended subsection, the term is defined to mean any service performed prior to January 1, 1940, which was employment under the old law, and any service performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, with certain exceptions hereinafter discussed. This definition is not extended to include service attached to or connected with American vessels, and in certain other respects as well differs from the definition of employment in the amended section 1426(b) of the Federal Insurance Contributions Act.

EXCEPTIONS FROM EMPLOYMENT.

The exceptions from employment under amended section 1607(c) conform, for the most part, with those contained in amended section 1426(b) (although, it is to be noted, there are some differences) and represent considerable change from the provisions of the law in effect prior to the enactment of the amendments. Unless otherwise indicated in the discussion of each exception, as set forth in the following titled paragraphs, all of the changes become effective *January 1, 1940.*

Agricultural labor.—Paragraph (1) excepts agricultural labor, the term being defined, for purposes of the exemption in subsection (1). This definition is identical to the one contained in section 1426(h) of the Code heretofore mentioned and is, therefore, not discussed in detail. (See pages 21 and 32.)

Domestic service.—Paragraph (2) excepts domestic service and is identical to the amended section 1426(b)2.

Casual labor.—Paragraph (3) adds a new exception of casual labor not in the course of the employer's trade or business and is identical to amended section 1426(b)3.

Maritime workers.—Paragraph (4) continues the exception of service performed as an officer or member of the crew of a vessel on the navigable waters of the United States. (This provision represents a difference from the definition of employment in section 1426(b) of the Code.)

Family employment.—Paragraph (5) continues the exception of service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother. This exception is identical to amended section 1426(b)4.

Employees of the United States and instrumentalities thereof.—Paragraph (6) continues the exception of service performed in the employ of the United States, or an instrumentality thereof, but limits the exception in the same manner as amended section 1426(b)6.

Employees of States, their instrumentalities, and political subdivisions.—Paragraph (7) continues the exception of service performed in the employ of a State, its instrumentalities, and political subdivisions, but limits the exemption in the same manner as amended section 1426(b)7.

Religious, charitable, etc., organizations.—Paragraph (8) continues the exception of service performed in the employ of religious, charitable, scientific, literary, or educational organizations with the same disqualifying clause contained in amended section 1426(b)8.

Carrier employees and employee representatives.—Paragraph (9) excepts service performed by an individual as an employee or an employee representative as defined in section 1 of the Railroad Unemployment Insurance Act.

Employees of nonprofit organizations exempt from Federal income tax, etc.—Paragraph (10) adds a new exception of certain services performed in the employ of organizations exempt from income tax under section 101 of the Internal Revenue Code, and excepts certain other types of service, in the same language employed in amended section 1426(b)10.

Employees of foreign governments and certain of their instrumentalities.—Paragraph (11) contains a new exception exempting service performed in the employ of a foreign government and paragraph (12) excepts, on a reciprocity basis, service performed in the employ of certain instrumentalities of foreign governments. These exceptions are identical to amended sections 1426(b) (11) and (12), respectively, *and likewise are made retroactive to the date of the enactment of the Social Security Act by section 902(f) of the amendments.*

Student nurses and interns.—Paragraph (13) sets forth a new exception identical to amended section 1426(b)13, excluding service performed as a student nurse attending a nurses' training school and service performed as an interne in the employ of a hospital.

Insurance agents on commission basis.—Paragraph (14) excludes service performed as insurance agents and solicitors if the remuneration received for such service is solely on a commission basis. If any part of such remuneration is a fixed salary the services are not

excepted, and the tax is computed on the aggregate remuneration. There is no similar exclusion under section 1426(b).

Newsboys.—Paragraph (15) excludes service performed by individuals under the age of 18 in the delivery or distribution of newspapers or advertising material and is identical to amended section 1426(b)15.

INCLUDED AND EXCLUDED SERVICES.

Effective January 1, 1940, a new subsection (d) has been inserted in section 1607, relating to an employee who performs both included and excluded services for the same employer during a particular pay period. The provisions of this subsection do not apply to the service of an employee in a pay period if any of such service is covered under the Railroad Unemployment Insurance Act. Except for this necessary change, the provision is identical to amended section 1426(c).

NEW SHORT TITLE.

Section 615 adds a new section (1611) providing that Subchapter C of Chapter 9 of the Internal Revenue Code (which superseded Title IX of the Social Security Act) may be cited as the "Federal Unemployment Tax Act."

PART III.

MISCELLANEOUS PROVISIONS.

CREDITS AGAINST THE TAX IMPOSED UNDER TITLE IX OF THE SOCIAL SECURITY ACT FOR THE YEARS 1936, 1937, AND 1938.

Section 902 of the amendments provides for the substantial liberalization of the conditions of credit against the Federal tax imposed by Title IX of the Social Security Act for the calendar years 1936, 1937, and 1938 and grants relief to taxpayers who failed to pay timely contributions to the States with respect to employment during these calendar years.

Subsection (a) provides for the allowance of credit against the tax imposed by section 901 of the Social Security Act for the years 1936, 1937, and 1938, for contributions with respect to employment paid into State funds *before* the sixtieth day after the date of enactment of the amendments, that is, before October 9, 1939.

The subsection further provides for credit for contributions paid on or after October 9, 1939, but only to the extent that such contributions are with respect to wages paid by the employer after September 19, 1939, for services performed during 1936, 1937, or 1938. (This provision is designed to permit credit in cases in which, because the "wages payable" basis of the tax for the years 1936, 1937, and 1938 is still retained, credit would otherwise be lost since some wages are still being paid with respect to those years, and it may not be possible to estimate the amount thereof or the amount may have been underestimated.)

Provision is also made in the subsection for credit for contributions paid for the year 1936, 1937, or 1938 without regard to the date of payment, if the assets of the taxpayer are in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction at any time during the 59-day period following the date of enactment of the amendments.

Subsection (b) provides for relief for taxpayers who have paid contributions with respect to employment during the calendar years 1936, 1937, and 1938, into the unemployment fund of the wrong State. In any case where such an erroneous payment has been made, the payment of the contributions into the proper State fund will be deemed to have been made at the time of the erroneous payment. If the taxpayer was entitled to cease paying contributions with respect to services subject to the law of the wrong State, the payment into the proper fund shall be deemed to have been made on the date the return for the taxable year was filed under Title IX of the Social Security Act. This subsection makes the same provision with respect to the taxable years 1936, 1937, and 1938 as is made in amended sections 1601(a)4 of the Code for the taxable year 1939 and thereafter.

Subsection (c) preserves the definitions of section 907 of the Social Security Act, the maximum credit limitation of 90 per cent, and other provisions of Title IX of the Social Security Act essential to the operation of the relief provisions contained in subsections (a), (b), and (h) of this section for the taxable years 1936, 1937, and 1938.

Subsection (d) provides for refund, without interest, of any tax (including penalties and interest) which has been collected but with respect to which credit is allowable under subsections (a), (b), and (h) of this section. These refunds are to be made in accordance with the provisions of law (including statutes of limitations) applicable in the case of erroneous or illegal collection of tax.

Subsection (e) provides for the allowance of credit against the tax for the taxable years 1940, 1941, and 1942, in which remuneration is paid for services rendered in a taxable year after December 31, 1938, but during a year prior to that in which payment occurs, for the amounts of contributions with respect to such remuneration which have not been credited against the tax for any prior taxable year. This provision is designed to relieve cases of hardship which might arise by reason of the change in the basis of the Federal tax from "wages payable" to "wages paid."

Subsection (h) grants relief to taxpayers as well as States in cases in which the highest court of the State has held contributions paid under the State law with respect to the taxable year 1936 or 1937 not to have been required payments. Under this subsection, credit is allowed against the tax imposed by section 901 of the Social Security Act for the calendar years 1936 and 1937 for so much of any such payments as is not refunded to the taxpayer. This subsection also postpones the periods of limitations prescribed by section 3312(a) of the Code. Such periods shall not begin to run in the case of any taxpayer to whom the payments are returned until the last of such payments is returned to him.

RETROACTIVE EXEMPTION OF SERVICES PERFORMED IN THE EMPLOY OF FOREIGN GOVERNMENTS AND CERTAIN OF THEIR INSTRUMENTALITIES.

Subsection (f) of section 902 provides that no tax shall be collected under Titles VIII and IX of the Social Security Act or under the Federal Insurance Contributions Act or the Federal Unemployment Tax Act with respect to services rendered prior to January 1, 1940, which are described in paragraphs (11) and (12) of amended sections 1426(b) and 1607(c) of the Code (services performed in the

employ of foreign governments and certain of their instrumentalities). If any tax (including penalties and interest) has been collected with respect to such services, it is to be refunded, without interest, in accordance with the provisions of law (including statutes of limitations) applicable to cases of illegal or erroneous collection of tax.

COLLECTION OF TAX IMPOSED UNDER TITLE IX OF SOCIAL SECURITY ACT AND SUBCHAPTER C, CHAPTER 9, OF INTERNAL REVENUE CODE IN BANKRUPTCY PROCEEDINGS.

Subsection (i) of section 902 provides that no part of the tax imposed by Title IX of the Social Security Act or by the Federal Unemployment Tax Act shall be deemed to be a penalty or forfeiture within the meaning of section 57j of the Bankruptcy Act, as amended. This subsection effects no substantive change in the law nor does it affect the liberalization in subsection (a) of this section or in amended section 1601(a)3 of the Code, of the conditions for credit in the case of an employer whose assets are in the custody of a court.

RETROACTIVE APPLICATION OF TAXES UNDER FEDERAL INSURANCE CONTRIBUTIONS ACT IN CASE OF EMPLOYEES OVER AGE 65.

Effective January 1, 1939, section 905(a) of the amendments repeals the exemption contained in paragraph (4) of section 1426(b) of the Code, in the case of service performed by an individual who has attained age 65. As a result of this provision, employers are now required to deduct from the wages paid to employees over age 65 for services performed by them on and after August 10, 1939, which are not otherwise excepted, not only the 1 per cent employees' tax on those wages but also back employees' tax at the same rate on all taxable wages paid to such employees for services performed by them from January 1, 1939, through August 9, 1939, both dates inclusive. The employer is liable for all of such employees' tax collected by him. The employer is also personally liable for all of such employees' tax even though he does not collect it from the employee, with one exception provided in the amendment. That exception applies only in the case of employees' tax on wages paid for services performed prior to August 10, 1939, by employees over age 65 which is not collected from the employee, and only then if the employer does not have under his control on or after November 8, 1939, remuneration earned at any time by the employee. It should be especially noted that this exception applies only to the employer's liability for the employees' tax imposed under section 1400 of the Code and does not extend to his liability for the employers' tax imposed under section 1410 thereof. The employer is thus liable in any event for the employers' tax not only on the wages paid to each employee over age 65 for services performed in his employ on and after August 10, 1939, but also on the wages paid to any such employee for services performed in his employ for any length of time during the period January 1, 1939, through August 9, 1939, both dates inclusive, irrespective of the fact that the employee may have since resigned or been discharged. Detailed instructions as to the time when, and the manner in which, these back employers' and employees' taxes are to be reported and paid to the collector will be issued at an early date.

RETROACTIVE EXEMPTION OF SERVICES PERFORMED IN SALVAGING TIMBER AND CLEARING LAND OF BRUSH AND OTHER DEBRIS LEFT BY A HURRICANE.

A provision granting retroactive exemption from the taxes imposed under Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, and the Federal Unemployment Tax Act, to services performed in salvaging timber or clearing land of brush and other debris left by a hurricane, has been incorporated in Public, No. 400, Seventy-sixth Congress, approved August 11, 1939, entitled "An Act to provide for the refund or credit of internal-revenue tax paid on spirits lost or rendered unmarketable by reason of the floods of 1936 and 1937 where such spirits were in the possession of the original taxpayer or rectifier for bottling or use in rectification under Government supervision as provided by law and regulations."

This Act consists of two sections, the first of which does not relate to the social security taxes. Section 2 of the Act, however, provides, in part, that no tax shall be collected under Title VIII or IX of the Social Security Act, or under the Federal Insurance Contributions Act, or the Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1940, in the employ of the owner or tenant of land, in salvaging timber on such land or clearing such land of brush and other debris left by a hurricane. The section further provides that any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax, but that no interest shall be allowed or paid on the amount of any such refund.

It should be noted that this retroactive exemption provision is somewhat broader in its terms than is the exception accorded similar services performed on and after January 1, 1940, by paragraph 2 of sections 1426(h) and 1607(l) of the Social Security Act Amendments of 1939.

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.

REGULATIONS 91. 1939-33-9961
(Also Subchapter C; Regulations 90 and Social Security Act, Titles VIII and IX.) S. S. T. 371

Rulings and mimeographs published under Titles VIII and IX of the Social Security Act applicable under Subchapters A and C, Chapter 9 of the Internal Revenue Code.

Treasury Decision 4885 (C. B. 1939-1 (Part 1), 396) reads in part as follows:

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.

All rulings and mimeographs heretofore published relating to the provisions of Titles VIII and IX of the Social Security Act are applicable under Subchapters A and C, respectively, of Chapter 9 of the Internal Revenue Code in so far as such rulings and mimeographs are not inconsistent with the Code.

REGULATIONS 91. 1939-37-10016
T. D. 4935

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER D, PART 401; SUBCHAPTER E, PART 465, SUBPART B.

Regulations 91, as amended, as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939-1 (Part 1), 396], amended.

Taxes under the Federal Insurance Contributions Act (Subchapter A of Chapter 9 of the Internal Revenue Code, which supersedes Title VIII of the Social Security Act) with respect to service performed after December 31, 1938, by an individual after he attains age 65.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 91, approved November 9, 1936 [Part 401, Title 26, Code of Federal Regulations], as amended, as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] [Part 465, Subpart B, of such Title 26], to section 905 of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session), such regulations only as made applicable to the Internal Revenue Code are amended as follows:

(1) Immediately preceding article 1 [section 401.1, Title 26, Code of Federal Regulations] the following is inserted:

Section 905(a) of the Social Security Act Amendments of 1939.

No service performed at any time during the calendar year 1939 by any individual shall, by reason of the individual having attained the age of 65, be excepted from employment as defined in section 1426(b) of Subchapter A of Chapter 9 of the Internal Revenue Code. Paragraph (4) of such section (which excepts such service from employment) is repealed as of the effective date thereof, and paragraph (4) of section 811(b) of the Social Security Act is repealed as of January 1, 1939. * * *

(2) Immediately preceding article 9 [section 401.9, Title 26, Code of Federal Regulations] the following is inserted:

Section 905 of the Social Security Act Amendments of 1939.

(a) No service performed at any time during the calendar year 1939 by any individual shall, by reason of the individual having attained the age of 65, be excepted from employment as defined in section 1426(b) of Subchapter A of Chapter 9 of the Internal Revenue Code. Paragraph (4) of such section (which excepts such service from employment) is repealed as of the effective date thereof, and paragraph (4) of section 811(b) of the Social Security Act is repealed as of Janu-

ary 1, 1939. The tax on employees imposed by section 1400 of such subchapter and the tax on employers imposed by section 1410 of such subchapter, and the provisions of law applicable to such taxes, shall apply with respect to remuneration paid after December 31, 1938, for service which, by reason of the enactment of this section, constitutes employment as so defined.

(b) Notwithstanding any other provision of law, no employer shall be liable for the tax on any employee, imposed by section 1400 of such subchapter (unless the employer collects such tax from the employee), with respect to service performed before the date of enactment of this Act which constitutes employment by reason of the enactment of this section, except to the extent that the employer has under his control at any time on or after the ninetieth day after such date amounts of remuneration earned at any time by the employee.

(3) Article 9 [section 401.9, Title 26, Code of Federal Regulations] is amended to read as follows:

ART. 9. *Employees who have attained age 65.*—Services performed prior to January 1, 1939, by an individual after he has attained the age of 65 years are excepted. The employer has the burden of establishing to the satisfaction of the Commissioner the age of any employee whose services are claimed to be excepted by reason of his having attained the age of 65. All services performed prior to January 1, 1939, by an individual on and after the day preceding the sixty-fifth anniversary of his birth are within this exception. Services performed on and after January 1, 1939, by an individual after he has attained the age of 65 are not excepted by reason of his attainment of such age. Such services of an employee, unless otherwise excepted from employment (e. g., agricultural labor), constitute employment, and the employees' tax and the employers' tax apply with respect to wages therefor paid after December 31, 1938.

(4) Immediately after article 204 [section 401.204, Title 26, Code of Federal Regulations] the following new article is inserted:

ART. 204½ [Sec. 401.204½, Title 26, Code of Federal Regulations]. *Collection of, and liability for, employees' tax with respect to service performed by an employee after he attains age 65.*—Under the provisions of section 905 of the Social Security Act Amendments of 1939, enacted August 10, 1939, service performed on and after January 1, 1939, by an employee after his attainment of the age of 65 is not excepted from employment by reason of the age of the employee. The employer shall collect the employees' tax with respect to such service as follows:

(*a*) With respect to wages paid to the employee for service performed on and after August 10, 1939, by deducting the amount of such tax from his wages as and when paid.

(*b*) With respect to wages paid to the employee for service performed prior to August 10, 1939, by deducting the amount of the tax from such of his remuneration (whether or not such remuneration constitutes wages) as is under the control of the employer on or after such date, in addition to the employees' tax, if any, with respect to such remuneration.

Until collected from him the employee is liable for the employees' tax with respect to wages received by him for such service. The employer is liable for all employees' tax collected by him with respect to such service. The employer is liable for the employees' tax with respect to such service performed on and after August 10, 1939, whether or not collected from the employee. Notwithstanding any other provision of these regulations, the employer is liable for the employees' tax not collected from the employee with respect to such service performed prior to August 10, 1939, only to the extent that the employer has under his control at any time on or after November 8, 1939, amounts of remuneration earned at any time by the employee. Except as provided in the preceding sentence, this article shall not be deemed to limit the application of article 204 [section 401.204, Title 26, Code of Federal Regulations] (relating, generally, to collection of, and liability for, employees' tax) to the employees' tax with respect to such service. (See article 9, as amended [section 401.9, Title 26, Code of Federal Regulations, 1939 Sup.], relating to the exception of service performed prior to January 1, 1939, by an individual after he attains the age of 65.)

(5) Immediately after article 304 [section 401.304, Title 26, Code of Federal Regulations] the following new article is inserted:

ART. 304½ [Sec. 401.304½, Title 26, Code of Federal Regulations]. *Liability for employers' tax with respect to service performed by an employee after he attains age 65.*—Under the provisions of section 905 of the Social Security Act Amendments of 1939, enacted August 10, 1939, service performed on and after January 1, 1939, by an employee after his attainment of the age of 65 is not excepted from employment by reason of the age of the employee. The employer is liable for the employers' tax with respect to wages paid for such service, including wages paid prior to August 10, 1939. (See article 9, as amended [section 401.9, Title 26, Code of Federal Regulations, 1939 Sup.], relating to the exception of service performed prior to January 1, 1939, by an individual after he attains the age of 65.)

(6) Immediately after article 402½ [section 401.402½, Title 26, Code of Federal Regulations], added by Treasury Decision 4786, approved December 29, 1937 [C. B. 1938–1, 388], the following new article is inserted:

ART. 402¾ [Sec. 401.402¾, Title 26, Code of Federal Regulations]. *Manner of reporting taxable wages for service performed by an employee after he attains age 65.*—Under the provisions of section 905 of the Social Security Act Amendments of 1939, service performed on and after January 1, 1939, by an employee after his attainment of the age of 65 is not excepted from employment by reason of the age of the employee. Taxable wages with respect to such service shall be reported in returns as provided in article 402½ [section 401.402½, Title 26, Code of Federal Regulations] (relating, generally, to the manner of reporting taxable wages); except that taxable wages with respect to such service, actually or constructively paid on or before June 30, 1939, shall be reported in the return for the quarter ending on September 30, 1939, together with taxable wages actually or constructively paid in such quarter.

(7) Article 410 [section 401.410, Title 26, Code of Federal Regulations] is amended to read as follows:

ART. 410. *Payment of tax.*—The employees' tax and the employers' tax required to be reported on each return on Form SS–1 or SS–1a are due and payable to the collector, without assessment by the Commissioner or notice by the collector, at the time fixed for filing such return. With respect to wages paid on or before June 30, 1939 (as well as wages paid during the quarter ending September 30, 1939), for services rendered on or after January 1, 1939, by an individual after his attainment of the age of 65, the employees' tax and the employers' tax are due and payable to the collector, without assessment or notice, at the time fixed for filing the return on Form SS–1a for the quarter ending September 30, 1939. For provisions relating to interest and penalties see articles 602, 603, and 604 [sections 401.602, 401.603, and 401.604, Title 26, Code of Federal Regulations].

(This Treasury decision is issued under the authority contained in sections 1420 and 1429 of the Internal Revenue Code (53 Stat., Part 1), and interprets section 905 of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session), sections 1400, 1401 (a) and (b), 1410, and 2702 of the Internal Revenue Code (53 Stat., Part 1), and sections 1400, 1410, and 1426(b) of the Internal Revenue Code, as amended by such Social Security Act Amendments of 1939.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 6, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 7, 1939, 12.46 p. m.)

REGULATIONS 91, ARTICLES 13½ AND 504½. 1939–37–10014
(Also Social Security Act, Title VIII.) T. D. 4934

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER D, PART 401; SUBCHAPTER E, PART 465, SUBPART B.

Regulations 91, as amended, relating to the employees' tax and the employers' tax under Title VIII of the Social Security Act, and such regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939–1 (Part1), 396], further amended.

Exemption from taxation under Title VIII of the Social Security Act and Chapter 9, Subchapter A, of the Internal Revenue Code of services rendered prior to January 1, 1940, in the employ of foreign governments and certain of their instrumentalities.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 91, approved November 9, 1936 [Part 401, Title 26, Code of Federal Regulations], as amended, relating to the employees' tax and the employers' tax under Title VIII of the Social Security Act, and such regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939–1 (Part 1), 396] [Part 465, Subpart B, of such Title 26], to section 902(f) of the Social Security Act Amendments of 1939, approved August 10, 1939 (Public, No. 379, Seventy-sixth Congress, first session), each of such regulations are further amended as follows:

(1) Immediately after article 13, as amended by Treasury Decision 4801, approved April 28, 1938 [C. B. 1938–1, 378] [section 401.13, Title 26, Code of Federal Regulations], the following is inserted:

Section 902(f) of the Social Security Act Amendments of 1939.

No tax shall be collected under Title VIII * * * of the Social Security Act or under the Federal Insurance Contributions Act * * *, with respect to services rendered prior to January 1, 1940, which are described in subparagraphs (11) and (12) of sections 1426(b) * * * of the Internal Revenue Code, as amended, and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. * * *

Section 607 of the Social Security Act Amendments of 1939.

Subchapter A of Chapter 9 of the Internal Revenue Code is amended by adding at the end thereof the following new section:

"SEC. 1432. This subchapter may be cited as the 'Federal Insurance Contributions Act.'"

Section 606 of the Social Security Act Amendments of 1939.

Effective January 1, 1940, section 1426 of the Internal Revenue Code is amended to read as follows:

"SEC. 1426. DEFINITIONS.

"When used in this subchapter—

* * * * *

"(b) EMPLOYMENT.—The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

"(11) Service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

"(12) Service performed in the employ of an instrumentality wholly owned by a foreign government—

"(A) If the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

"(B) If the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof; * * *"

ART. 13½ [Sec. 401.13½, Title 26, Code of Federal Regulations]. *Exemption from taxation of services performed in the employ of foreign governments and certain of their instrumentalities.*—(*a*) *Service performed in the employ of a foreign government.*—Service performed in the employ of a foreign government is not subject to the taxes. The exemption embraces not only services performed by ambassadors, ministers, and other diplomatic representatives but also includes services performed as a consular or other officer or employee of a foreign government or as a nondiplomatic representative thereof. For purposes of the exemption, the citizenship of the employee is immaterial. It is also immaterial whether the foreign government grants an equivalent exemption with respect to similar services performed in the foreign country by citizens of the United States.

(*b*) *Service performed in the employ of certain instrumentalities of foreign governments.*—Service performed in the employ of certain instrumentalities of a foreign government is likewise not subject to the taxes. The exemption extends to all services performed in the employ of an instrumentality of the government of a foreign country, without distinction between those exercising functions of a governmental nature and those exercising functions of a proprietary nature, provided:

(1) The instrumentality is wholly owned by the foreign government;

(2) The services are of a character similar to those performed in foreign countries by employees of the United States or of an instrumentality thereof; and

(3) The Secretary of State certifies to the Secretary of the Treasury that the foreign government with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to services performed in the foreign country by employees of the United States Government and of instrumentalities thereof.

For purposes of this exemption the citizenship of the employee is likewise immaterial.

(2) Immediately after article 504 [section 401.504, Title 26, Code of Federal Regulations], the following is inserted:

Section 902(f) of the Social Security Act Amendments of 1939.

No tax shall be collected under Title VIII * * * of the Social Security Act or under the Federal Insurance Contributions Act * * *, with respect to services rendered prior to January 1, 1940, which are

described in subparagraphs (11) and (12) of sections 1426(b) * * * of the Internal Revenue Code, as amended, and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. * * *

ART. 504½ [Sec. 401.504½, Title 26, Code of Federal Regulations]. *Refund under section 902(f) of the Social Security Act Amendments of 1939.*—Any tax (including interest or penalty, if any) paid with respect to services rendered prior to January 1, 1940, which are described in paragraph (11) or (12) of section 1426(b) of the Federal Insurance Contributions Act, as amended by section 606 of the Social Security Act Amendments of 1939 (see article 13½ [section 401.13½, Title 26, Code of Federal Regulations, 1939 Sup.]), may be refunded to the person who paid the amount of such tax to the collector. No interest shall be allowed or paid by the Government on the amount of any such refund. Every claim for such refund shall be made on Form 843 in accordance with the provisions of this article and article 504 [section 401.504, Title 26, Code of Federal Regulations], relating to credit or refund of overpayments which are not adjustable. A claim which does not comply with these requirements will not be considered for any purpose as a claim for refund.

(This Treasury decision is issued under the authority contained in section 808 of the Social Security Act (49 Stat., 638; 42 U. S. C., Sup. IV, 1008), and sections 1429 and 3791 of the Internal Revenue Code (53 Stat., Part 1); and interprets section 902(f) of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session) and section 1426(b) (11) and (12), of the Federal Insurance Contributions Act, as amended by section 606 of such Social Security Act Amendments of 1939.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 6, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 7, 1939, 11.06 a. m.)

REGULATIONS 91, ARTICLES 13¾ AND 504¾. 1939-39-10031
(Also Social Security Act, Title VIII.) T. D. 4941

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER D, PART 401; SUBCHAPTER E, PART 465, SUBPART B.

Regulations 91, as amended, relating to the employees' tax and the employers' tax under Title VIII of the Social Security Act, and such regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939-1 (Part 1), 396], further amended.

Exemption from taxation under Title VIII of the Social Security Act and the Federal Insurance Contributions Act (Chapter 9, Subchapter A, of the Internal Revenue Code) of certain services rendered prior to January 1, 1940, in salvaging timber and clearing debris left by a hurricane.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 91, approved November 9, 1936 [Part 401, Title 26, Code of Federal Regulations], as amended, relat-

ing to the employees' tax and the employers' tax under Title VIII of the Social Security Act, and such regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939–1 (Part 1), 396] [Part 465, Subpart B, of such Title 26], to section 2 of the Act approved August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session), entitled "An Act to provide for the refund or credit of the internal-revenue tax paid on spirits lost or rendered unmarketable by reason of the floods of 1936 and 1937 where such spirits were in the possession of the original taxpayer or rectifier for bottling or use in rectification under Government supervision as provided by law and regulations," each of such regulations are further amended as follows:

(1) Immediately preceding sections 811(a) and 1101(c) of the Social Security Act quoted immediately preceding article 14 [section 401.14, Title 26, Code of Federal Regulations], the following is inserted:

Section 2 of the Act approved August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session).

No tax shall be collected under Title VIII * * * of the Social Security Act or under the Federal Insurance Contributions Act * * * with respect to services rendered prior to January 1, 1940, in the employ of the owner or tenant of land, in salvaging timber on such land or clearing such land of brush and other debris left by a hurricane; and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. * * *

ART. 13¾ [Sec. 401.13¾, Title 26, Code of Federal Regulations]. *Exemption from taxation of services performed in salvaging timber and clearing debris left by a hurricane.*—Certain services performed in salvaging timber and clearing land of brush and other debris left by a hurricane are not subject to the taxes. In order to be exempted from the taxes the services must be performed:

(1) Prior to January 1, 1940; and

(2) As an employee of the owner or tenant of land on which a hurricane has left brush or other debris, or timber in need of salvaging by reason of such hurricane; and

(3) In clearing such land of such brush or other debris, or in salvaging such timber.

(2) Immediately preceding section 806 of the Social Security Act quoted immediately preceding article 505 [section 401.505, Title 26, Code of Federal Regulations], the following is inserted:

Section 2 of the Act approved August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session).

No tax shall be collected under Title VIII * * * of the Social Security Act or under the Federal Insurance Contributions Act * * * with respect to services rendered prior to January 1, 1940, in the employ of the owner or tenant of land, in salvaging timber on such land or clearing such land of brush and other debris left by a hurricane; and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. * * *

ART. 504¾ [Sec. 401.504¾, Title 26, Code of Federal Regulations]. *Refund under section 2 of the Act approved August 11, 1939.*—Any tax (including interest or penalty, if any) paid with respect to services rendered prior to

January 1, 1940, which are described in section 2 of the Act approved August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session), may be refunded to the person who paid the amount of such tax to the collector. (See article 13¾ [section 401.13¾, Title 26, Code of Federal Regulations, 1939 Sup.].) No interest shall be allowed or paid by the Government on the amount of any such refund. Every claim for such refund shall be made on Form 843 in accordance with the provisions of this article and article 504 [section 401.504, Title 26, Code of Federal Regulations], relating to credit or refund of overpayments which are not adjustable. A claim which does not comply with these requirements will not be considered for any purpose as a claim for refund.

(This Treasury decision is issued under the authority contained in section 808 of the Social Security Act (49 Stat., 638; 42 U. S. C., Sup. IV, 1008), and sections 1429 and 3791 of the Internal Revenue Code (53 Stat., Part 1).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 20, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 22, 1939, 12.52 p. m.)

SECTION 1426: Definitions. 1939–31–9938
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 370
(Also Subchapter C, Section 1607; Regulations 90, Article 205.)

A, a "research associate" conducting scientific research at the National Bureau of Standards for the M Institute, is an employee of that institute for the purpose of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

Advice is requested whether A, a "research associate" conducting scientific research at the National Bureau of Standards for the M Institute, an industrial association which employs several hundred persons, is an employee of that institute for purposes of the taxes imposed under Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

It is stated that under authority of an Act of Congress research facilities of the National Bureau of Standards are made available to scientists representing technical and industrial groups, subject to such rules and restrictions as the Director of the Bureau may prescribe. The M Institute, being desirous of obtaining for its membership the benefits of technical research in a certain field of building construction, submitted to the Director of the Bureau of Standards a plan of proposed research activities in the particular field. Such plan having been approved by the Director, the M Institute engaged A, a scientist with the requisite training and background for the particular type of work, at an annual salary of x dollars, to conduct research pursuant to the plan. Upon his appointment as a "research associate," A became subject to the rules and regulations of the Bureau and also became entitled to many of the rights and privileges which accrue to members of its staff. However, he did not take an oath of office, is not in any way subject to civil service requirements

as a Government employee, and is required to be covered by the M Institute by workmen's compensation insurance. Although A's research activities are subject to general supervision by the Bureau of Standards, he is not considered by that Bureau to be its employee. That Bureau does not determine or pay the amount of his salary. Each month a progress report is made to the M Institute for its information and the results of A's research are submitted to the institute for comment prior to their publication.

Under Subchapters A and C, Chapter 9, of the Internal Revenue Code, the relationship of employer and employee 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. (Article 3, Regulations 91; article 205, Regulations 90; T. D. 4885, C. B. 1939–1 (Part 1), 396.)

From the facts presented it is apparent that A is subject to such control over the manner in which his services are performed as to constitute him an employee. However, even though the National Bureau of Standards exercises general supervision over A's activities under its regular administrative practices, it can not be said that he is an employee of that Bureau. He was engaged by the M Institute and one of the conditions of his employment was that, by reason of the fact that his research activities would be carried on at the National Bureau of Standards under an established plan of procedure, he must conform to its rules and regulations. It is clear that the M Institute has retained the right, through the Bureau, to exercise control over A's activities. Accordingly, it is held that A, the "research associate" of the M Institute at the National Bureau of Standards, is an employee of that institute for the purpose of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

SECTION 1426: Definitions. 1939–34–9973
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 373
(Also Subchapter C, Section 1607; Regulations 90, Article 205.)

B, a business analyst and consultant, performing services for the O Corporation pursuant to the terms of a written agreement, is an employee of that corporation within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

Advice is requested whether B, a business analyst and consultant, performing services for the O Corporation, is an employee of that corporation within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

Under a written agreement dated May —, 1939, the O Corporation engaged B, a business analyst and consultant, to analyze the financial condition of the corporation as requested and to advise it with respect to the possibilities of paying dividends, the establishment of special funds for annuities, depreciation, insurance, and contingencies. He also acts as liaison officer between the corporation and the Valuation Division of the Interstate Commerce Commission. A considerable portion of his time is devoted to the development of plans and proced-

ures which will coordinate the standard accounting procedure established by the Interstate Commerce Commission with reports required annually by that Commission for valuation purposes. However, any plans, procedures, or financial policies advanced by B are subject to the review and approval of the officers of the corporation.

Under the terms of the agreement, which may be terminated by either party giving 30 days' notice, B is engaged on an annual retainer basis, the amount of such retainer being paid in monthly payments. He agrees to hold himself available for services on certain specific days during each calendar month, and he devotes approximately three-fourths of his time to the company's affairs. During that time he is furnished a desk and stenographer at the general office of the corporation and keeps regular office hours. The stipulated fee is not increased to cover reasonable overtime services, and on occasions when he must render expeditious services to other concerns which he represents, he retains the right to devote not more than three days in any monthly period to such duties without a reduction in his fee. The corporation pays all traveling and other expenses incurred by B in connection with services performed outside the city where the general office of the corporation is located. B holds himself out to the public as a business analyst as well as a consultant in reorganization and finance, capital constructions, and Federal tax matters, and operates from his home with respect to services performed for concerns other than the O Corporation.

Under Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly 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; T. D. 4885, C. B. 1939-1 (Part 1), 396.)

In view of the above provisions of the regulations and under the facts presented in this case, it is held that the O Corporation exercises, or has the right to exercise, over B the direction and control contemplated by the regulations as being necessary to establish the legal relationship of employer and employee. Accordingly, B is an employee of that corporation within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

SECTION 1426: Definitions. 1939-36-9998
REGULATIONS 91, ARTICLE 3: Who are employees. Mim. 4767 (Rev.)
(Also Subchapter C, Section 1607; Regulations 90, Article 205.)

Information required for rulings as to whether sales agents are employees for employment tax purposes.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., August 1, 1939.

Collectors of Internal Revenue and Others Concerned:

As originally written, Mimeograph 4767, dated May 17, 1938 [C. B. 1938-1, 420], was intended, among other things, to be attached to

Form SS–8, for the information of persons to whom the form was given to prepare and forward to the Bureau for the purpose of obtaining a ruling as to whether a sales agent is an employee for the purposes of the employment taxes imposed under Chapter 9, Subchapters A and C, of the Internal Revenue Code (formerly Titles VIII and IX, respectively, of the Social Security Act). That part of the text of the original mimeograph, consisting of a quotation of part of article 3 of Regulations 91 and explanations regarding the information required, has been incorporated in a statement which will be attached to Form SS–8, as revised. A supply of the revised form with statement attached will be furnished collectors at an early date.

In response to inquiries as to whether a certain sales agent is an employee within the meaning of article 3 of Regulations 91, or article 205 of Regulations 90, collectors should, when the information given in the first instance is insufficient for a determination, request the inquirer to fill out Form SS–8. (Two copies should be furnished, one to be retained by the inquirer.) If, after considering all the information submitted in the light of the regulations and Bureau rulings, the status of the sales agent is clear, the collector may give the inquirer an opinion in the matter. However, if the collector is doubtful as to the status of the sales agent, he should transmit Form SS–8 and all related documents and correspondence to the Bureau with a request that a ruling be made and forwarded to him. Upon receipt of the ruling, the collector will forward a carbon copy to the inquirer and retain the original copy for his files.

Correspondence in regard to the contents of this mimeograph should refer to its number and to the symbols A&C.

HAROLD N. GRAVES,
Acting Commissioner.

[Form SS–8. Treasury Department, Internal Revenue Service. (Revised July, 1939.)]

QUESTIONNAIRE FOR USE IN SECURING RULING FROM BUREAU OF INTERNAL REVENUE ON STATUS OF SALES AGENTS UNDER CHAPTER 9, SUBCHAPTERS A AND C, OF THE INTERNAL REVENUE CODE (FORMERLY TITLES VIII AND IX OF THE FEDERAL SOCIAL SECURITY ACT).

INSTRUCTIONS.

A. Before filling out this questionnaire read carefully the informatory statement attached hereto.

B. ANSWERS TO ALL QUESTIONS SHOULD BE FULL AND COMPLETE. While "Yes" or "No" answers may be used where appropriate, if a complete answer requires some further explanation and the space furnished is insufficient, *a supplemental statement* making reference to the number of the question involved should be prepared and submitted with the form. It is only through the submission of *complete, clear,* and *specific* evidence that the Bureau can assist taxpayers in meeting any requirements that may be imposed upon them by the law. *Careful compliance with this instruction will obviate much unnecessary correspondence and greatly facilitate the issuance of a ruling.*

C. Particular attention is invited to questions 3, 4, and 11. These questions are of the utmost importance. They should be read very carefully and answered in a full and comprehensive manner.

D. As used in this questionnaire—

(1) The term "firm" includes an individual, a corporation, a partnership, an association, or any other form or type of business organization;

(2) The term "agent" or "sales agent" includes individuals designated as "salesmen," "field representatives," "distributors," "dealers," etc.

E. All copies of contracts and other data submitted as a part of this questionnaire become a part of the records of the Bureau and may not be returned.

1. (*a*) Name of firm for whom agent performs services_____
   (*b*) Address _____
   (*c*) Nature of firm's business_____
2. (*a*) Name of sales agent on whose status this ruling is requested_____
   _____
   (*b*) Address _____
3. (*a*) If the agent performs his services under a formal written contract, attach *a certified or photostatic copy of the actual executed contract*, together with any supplemental agreements, riders, etc., that may be in effect.
   (*b*) If no formal written contract exists but the services of the agent were arranged for through an interchange of letters or telegrams, *certified or photostatic copies of such letters or telegrams* should be furnished.
   (*c*) In the event the agreement was arrived at orally, the *complete* understanding of the parties, including a *full* statement of the date, terms, and conditions of the agreement, should be reduced to writing and submitted.
4. Attach copies of *all* sales or instruction manuals, statements of rules, directions or policies, record or report forms, with which the agent is furnished and which he is required to follow or use. If none are furnished, please indicate that fact.
5. Is the agent required to devote any particular amount of time to the firm's business? _____ If so, state how much and whether he must conform to fixed hours of service_____
6. (*a*) Does the firm require the agent to canvass an assigned territory within any particular time or with specified frequency? _____
   (*b*) Is the agent required to follow sales routes or schedules prescribed by the firm? _____
   (*c*) Is the agent ever *required* to call on particular customers or prospects whose names are furnished by the firm? _____ If so, under what circumstances? _____
7. Does the firm ever require the agent to submit written reports? _____ If so, explain fully their nature and purpose, indicating the frequency with which they are furnished, and whether they may be had by the firm on demand_____
8. Is the agent ever required to report personally to the firm or to any of its branch offices at any time? _____ If so, for what purpose?_____
   _____
9. To what extent, if any, does the firm require the agent to perform other services for it, such as the collection of accounts, the investigation of complaints or credit ratings, the making of adjustments, etc.? _____
   _____
10. Is the agent ever required to attend sales meetings, conferences, consultations, etc.? _____ If so, for what purpose? _____
11. Explain *fully* the specific nature of any other instructions or restrictions to which the agent is subject in the conduct of his selling activities. If there are none, please indicate that fact_____
    _____
12. Is the agent required to be licensed in order to engage in his selling activities? ____ If so, furnish a reference to the State or Federal law imposing this requirement_____
    _____
13. To what extent, if any, does the firm furnish the sales agent with any facilities such as an office, desk space, telephone, transportation, advertising material, etc.? _____
    _____
14. To what extent, if any, does the firm bear any part of the expenses incurred by the agent in his selling activities? _____
    _____
15. Is the agent required to refrain from engaging in other employment while performing services for the firm? _____ If not, indicate to what extent he is engaged in other activities. (Give details, and, if known, the names and addresses of any other firms for which he performs services.) _____
    _____

16. (*a*) In what manner is the agent compensated? _____
(*b*) If by commission, is the agent allowed a drawing account or advance of any kind against unearned commissions? _____ If so, explain.
_____
17. (*a*) Under what circumstances and for what reasons is the agent subject to discharge by the firm? _____
(*b*) May the agent terminate his services at any time? _____
18. (*a*) Does the agent engage helpers to assist him in the performance of his duties, such as other agents, clerks, stenographers, etc.? _____
(*b*) If so, are they hired with the knowledge and consent of the firm? _____
(*c*) May they be discharged by the firm? _____
(*d*) Are they paid directly by the firm? _____
19. To the firm's knowledge, has any agent, or the estate of any such agent, ever filed a claim for old age insurance or lump-sum payment with the Federal Social Security Board? _____ If so, specify name, address, and account number of agent, and, if known, disposition of claim. _____
_____
20. Has the status of the agent, or that of any other agent performing similar services for the firm, ever been the subject of a court action or been ruled upon by any State unemployment compensation agency? (If so, identify the proceeding or State agency and attach copies of any decisions or rulings that were issued.) _____
_____
21. Obtain from the agent, either on the reverse of this sheet or on a supplemental sheet, a statement to the effect that he has been afforded an opportunity to read and examine the answers to this questionnaire (including any contracts, rules and regulations, and other data submitted as a part hereof) and that he has found all representations made by the firm with respect to the circumstances under which he performs his services true and correct to the best of his knowledge and belief.

INFORMATION REQUIRED TO BE SUBMITTED TO THE BUREAU OF INTERNAL REVENUE IN ORDER TO OBTAIN A RULING AS TO WHETHER SALES AGENTS ARE EMPLOYEES FOR FEDERAL EMPLOYMENT TAX PURPOSES.

The regulations of the Bureau of Internal Revenue applicable in determining whether a sales agent is an employee for the purposes of the employment taxes imposed under Chapter 9, Subchapters A and C, of the Internal Revenue Code (formerly Titles VIII and IX, respectively, of the Federal Social Security Act) are the regulations defining the employer-employee relationship generally. Article 3 of Regulations 91, relating to the employees' tax and the employers' tax under Title VIII of the Social Security Act, and such article as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939–1 (Part 1), page 396], provides 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. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another 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.

"Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent

trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

"Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists."

Article 205 of Regulations 90, relating to the excise tax on employers of eight or more under Title IX of the Social Security Act, and such article as made applicable to the Internal Revenue Code by Treasury Decision 4885, contains substantially the same provisions.

The status of sales agents for purposes of the taxes imposed under Chapter 9, Subchapters A and C, of the Internal Revenue Code is governed generally by the provisions of the regulations set forth above. As will be noted, the question whether the relationship of employer and employee exists in doubtful cases involving services performed by such agents must be determined upon an examination of the particular facts of each case.

Accordingly, in any case where a firm (including, for purposes of this informatory statement, an individual, a corporation, a partnership, an association, or any other form or type of business organization) desires a ruling as to whether its sales agents are "employees" within the purview of articles 3 and 205 of Regulations 91 and 90, respectively, the information indicated in the attached questionnaire (Form SS–8) should be submitted by the firm or by its attorney or other representative who is enrolled to practice before the Treasury Department and who has filed with the Bureau a proper power of attorney.[1]

The completed questionnaire should be returned to the collector of internal revenue for the district in which the firm's Federal employment tax returns are filed if it was obtained from that office with a request that it be completed and returned. Otherwise, it should be forwarded to the Commissioner of Internal Revenue, Washington, D. C., Attention: A&C:RR. The information submitted should not relate to the firm's agents generally but rather to *a particular sales agent whose status is typical of the firm's agents as a class.* If the firm has more than one class of agents, separate questionnaires should be submitted with respect to *particular individuals, whose status is typical of each such class.* A ruling made in the case of any such individual will have application in the case of other sales agents of the same class, provided, the facts in the case of such other agents do not differ in any material respect from the facts in the case of the agent upon whose status the ruling is issued.

If an agent desires a ruling as to whether he is an "employee," he should fill out the questionnaire to the best of his knowledge and belief, and submit any supplemental information which he may believe to be material. If the agent performs services for more than one firm, a separate questionnaire should be submitted with respect to each such firm.

Additional copies of the questionnaire may be obtained from any collector of internal revenue.

SECTION 1426: Definitions. 1939–38–10022
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 375
(Also Subchapter C, Section 1607; Regulations 90, Article 205.)

Status under Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act) of B, an orchestra leader, and musicians engaged by him.

Advice is requested whether B, an orchestra leader, who contracts with various "purchasers" of music to furnish them with the services of his orchestra, is the employer of the members of the orchestra

[1] Inquiries relating to enrollment and power of attorney requirements should be addressed to the Commissioner of Internal Revenue, Washington, D. C., Attention: "Pub. Rel.: PA."

within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act) or whether both he and the members of his orchestra are employees of the respective " purchasers " of music.

The organization conducted by B is variously known as B and his Orchestra, B and his Band, and by other similar designations. The orchestra is not maintained as a unit except when performing an engagement. Upon the termination of an engagement, there remains a nucleus of musicians, sometimes small, sometimes large, who comprise part of the orchestra conducted by B during the succeeding engagement. Members of the orchestra are not required to give preference to any engagement contracted for by B. Some of the members of the orchestra have been with B for approximately a month and others have been with him at various times over a period of 10 years. Occasionally, a " purchaser " of music has specified that the personnel of the orchestra engaged by him must be the same as that which existed during some prior engagement performed either for him or for another " purchaser." The orchestra is usually composed of 14 persons, including B, and all are members of the American Federation of Musicians. The orchestra travels from place to place and occasionally an engagement requires extra musicians, who are engaged by B for the period of the particular engagement and at its conclusion are dismissed. The rules of the federation require that a member of a traveling orchestra give the leader two weeks' notice of his withdrawal unless, of course, the member was engaged for less than two weeks. The leader likewise is required to give a member two weeks' notice of his discharge. A " purchaser " has the right to terminate his contract with B in the event of a material breach thereof.

The members of the orchestra are not paid fixed salaries nor are they guaranteed a minimum salary or a minimum amount of work. Under the rules of the federation, B is not responsible for the payment of the other members of the orchestra unless the " purchaser " has discharged his contractual obligation to B. The lump sum stipulated in the contracts generally is turned over by the " purchaser " to B, who pays each member of the orchestra his weekly wages for his hours of service, pays such expenses as the commission of the booking agency and the cost of musical arrangements, and retains the balance. The remuneration paid to the members of the orchestra is not the same from week to week, but is governed largely by the scale prescribed by the local union in whose jurisdiction an engagement is performed. Sometimes when the scale prescribed by a particular local union is very low, the members are paid in excess of that scale. Remuneration is not paid to members of the orchestra for periods during which their services are not required. B pays no personal expenses of the musicians except transportation, which the federation regulations require that the leader pay and which is taken into consideration in determining the price charged the " purchaser." B has a continuing contract with the M Corporation, a booking agency, under the terms of which the M Corporation, for a fixed percentage of the contract price, acts as his agent in obtaining engagements for the orchestra and planning its trips. Generally, the booking agent submits the names of a number of orchestras, for

which it is acting as agent, to a "purchaser," who selects the one which he deems best suited to his establishment.

On August 31, 1937, the Bureau issued Mimeographed 4651 (C .B. 1937–2, 389), the second paragraph of which reads as follows:

> The purpose of this mimeograph is to clarify the matter of the application of the social security taxes with respect to the relationship which exists between so-called "contractors," musicians, and "purchasers" of music, and to set forth certain distinctions between so-called "nonname" orchestras and "name" orchestras.

Other portions of the mimeograph distinguish between "name" and "nonname" orchestras and set out the facts which will usually be found to exist with respect to the rendition of services by each type of orchestra. It is then stated that in cases similar to those outlined in the mimeograph it will usually be true that the relationship between the "purchaser" of a "nonname" orchestra's services and both the leader and members of the orchestra will be that of employer and employee, while in the cases of "name" orchestras it will usually be found that the members are employees of the leader.

The conclusions reached in the mimeograph are applicable with regard to situations similar to those outlined therein. However, such conclusions are predicated upon the existence of certain facts which the mimeograph states will generally be found to exist, facts relating to the organization of the orchestras, and facts relating to the circumstances under which engagements are performed. Some orchestras are so organized and conducted that they may not be classified as "name" or "nonname" orchestras within the meaning of the mimeograph, while others, though they may be classified as "name" or "nonname" orchestras because of the manner in which they are organized, perform services under circumstances dissimilar to those outlined in the mimeograph. In such cases, primary reliance may not be placed upon the provisions of the mimeograph.

Under Subchapters A and C, Chapter 9, of the Internal Revenue Code, the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individuals who perform 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; T. D. 4885, C. B. 1939–1, (Part 1), 396.) Mimeograph 4651, supra, is intended only as an aid to be used in applying the tests set out in the regulations to situations involving the performance of services by orchestras. In determining who is the employer of the members of an orchestra during a particular engagement, it is necessary to determine who has retained the right to control and direct the orchestra 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, and the answer to this question in any case depends upon the facts presented in that case in the light of the relevant portions of the regulations. It is essential that each case be considered separately. The leader and members of an orchestra may all be employees of the "purchaser" in view of the facts shown to exist in connection with one engagement and the same leader may be an independent contractor and the members of the orchestra his employees under the facts of another engagement.

In considering situations involving orchestras, not only must the relationship existing between the "purchaser" and the orchestra be considered, but due consideration must also be given to the relationship existing between the leader and the members of the orchestra. In the present case, the relationship between B and the members of his orchestra will be considered first.

The organization conducted by B is not a permanent one, although there is a certain nucleus which generally forms a part of it whenever it plays. The orchestra is not maintained as a unit except when performing an engagement. That some form of agreement exists between B and the members of the orchestra is evidenced by the fact that the members are engaged by B to play for the different engagements, that the salaries paid by B at times exceed the union scale, and that B may discharge any member of the orchestra by giving him two weeks' notice. Ordinarily, the services of the orchestra are paid for by a lump sum, out of which B pays the various members of the orchestra. From the remaining portion of this sum, B pays certain expenses and retains the balance. It is evident that to an extent he controls the amount of his own compensation. No other member of the orchestra can interfere with B's discretion in this regard. B or his representative (signing for him) signs the contract obligating the orchestra to perform an engagement. Ordinarily the members of the orchestra are not named; it is merely stated that the orchestra is to be composed of a specified number of musicians. The "purchaser" does not know the names of the men in the orchestra nor the amount of compensation paid to each. Such matters are arranged between B and the musicians he engages. B has complete discretion in selecting the musicians. Although the fact that B is not liable to the musicians for the payment of their salaries unless the "purchaser" has discharged his contractual obligation to B is evidence indicating there may be no employer and employee relationship between the parties, it is not, in and of itself, determinative of the question and must be considered in connection with all other circumstances.

Consideration of the foregoing indicates that B exercises, or has the right to exercise, that degree of control over the manner in which the orchestra members are to perform their services which is contemplated by article 3 of Regulations 91 and article 205 of Regulations 90, and that, consequently, he is the employer of the members of the orchestra within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act), *unless, under the terms of the contract entered into by him, he has so surrendered the right of control over the manner in which the services are rendered as to make the "purchaser" the employer of both B and the members of the orchestra.*

The orchestra has performed services for various "purchasers" under different types of contracts. Contracts containing similar provisions will be discussed together.

1. Contracts negotiated by the M Corporation, a booking agency. (*a*) Short form contracts: These contracts are substantially identical. They are embodied in the same printed form and differ only with respect to the typed-in portions which set out the hours for play.

The attraction is designated as "B and His Orchestra," which is to be composed of a specified number of musicians, and the "purchaser" is designated as the "employer." The date, location, and hours of play of the engagement are set out, and the orchestra agrees to broadcast at the direction of the management. All of these contracts are signed by B or his representative in his behalf. The members of the orchestra are not named and the remuneration for the services of the orchestra is to be paid weekly to B or his representative in a lump sum. In one of these contracts, B agrees to deliver the same orchestra on opening date that was contracted for at the date of the contract. These engagements vary in length from one week to four weeks and the contracts were entered into, respectively, with an amusement park, a hotel, and a ballroom.

It appears from the terms of the contracts that these "purchasers" engage a complete musical unit, the members of which have been engaged and rehearsed by B. The "purchasers" rely on B to bring an organization capable of producing B's quality of music. There are no provisions in the contracts indicating that the "purchaser" has retained any substantial degree of control over the manner in which the services are to be rendered, nor is there any basis, under the terms of the contracts or the circumstances of the engagements, for concluding that B is acting as agent of the respective "purchasers" in hiring the musicians and conducting and managing the orchestra. The fact that the hours of play are designated and that the orchestra agrees to broadcast at the direction of the "purchaser" does not indicate that the "purchaser" has retained control. These provisions only allow the "purchaser" to say what shall be done. The reference made in the contracts to the "purchaser" as the "employer" does not affect the situation and the *true relationship* must be determined in the light of all the facts. The "purchaser" has no authority to discharge any individual member of the orchestra, B having retained the right to exercise such authority in his own discretion.

In view of the foregoing, it is held that the "purchasers" who engaged the services of the orchestra under such contracts were not employers of B and the members of his orchestra within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act), and that, as to those engagements, B was an independent contractor and the members of the orchestra were his employees.

(*b*) Long form contracts: These two contracts are similar to those discussed above under (*a*). The same provisions existing in the contracts under (*a*) are present here and it is further provided that the orchestra is to furnish, free of charge, pictures and other material suitable for publicity purposes. The orchestra also agrees to broadcast as often as required by the "purchaser" during certain hours; it is provided that the "purchaser" must pay the cost of the transportation of the orchestra from its last engagement to the engagement contracted for by the "purchaser"; and it is provided that the personnel of the orchestra shall be the same as during its last permanent engagement. One of the engagements is for a week and the other for one night, and they were entered into,

respectively, with the manager of an automobile show and a State university.

The reasoning set out in connection with the short form contracts is equally applicable here. None of the provisions in these agreements indicates that the " purchaser " retained any substantial degree of control over the manner in which the orchestra is to render its services, nor is there any basis, under the terms of the contracts or the circumstances of the engagements, for concluding that B is acting as agent of the " purchasers " in hiring the musicians and conducting and managing the orchestra. It is, therefore, held that B was acting as an independent contractor and the members of the orchestra were his employees within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

2. Contract negotiated by the N Theatrical Booking Agency.

This contract, entered into with the X Amusement Corporation, the owner of several theaters, is signed by B and provides for an engagement of one week. The contract states that it is entered into between the Corporation and B and his Orchestra, the latter being designated as the artist. The relevant portions of this contract read as follows:

The corporation engages the artist and the latter agrees upon the terms, covenants and conditions herein contained, to present his certain act under and according to the direction of the corporation * * * or at any other theater or place designated by the corporation, and to radio broadcast said act or so much thereof at such times and places as the corporation may direct and to report for broadcasting rehearsals as and when directed.

The artist agrees to give the number of performances each day required by the policy of the theater, and, in addition thereto, to give an extra performance on any holiday, when requested by the corporation or the theater at which the artist is performing, without additional compensation.

The artist agrees to perform the said act or specialty at such other theaters in lieu of those herein designated, under the terms of this agreement, as required by the corporation, and if the place of performance is changed, the corporation will pay any extra railroad and baggage fares caused thereby, but otherwise, the artist is to pay all transportation.

The artist agrees (*a*) to abide by the rules and regulations in force at said theater or other place of performance; (*b*) to report for rehearsals promptly at such times as the corporation may require; (*c*) to furnish complete orchestration of music used in act; (*d*) to furnish the required number of photographs and such other advertising and/or publicity matter or information as the corporation may require; (*e*) to provide at his own expense any and all stage hands, electricians or properties needed in or for the said act in excess of those regularly employed at the theater; (*f*) where Sunday concerts are given, the artist agrees to dress as directed by the corporation; (*g*) the artist will not permit any reduction or change of personnel or number of persons in said act or any change or alteration in quality thereof; and (*h*) the artist, or any member of his act, will not appear or perform publicly or privately in any manner whatsoever for any person, firm or corporation between the date hereof and 30 days after the time fixed for the termination of this agreement in any of the cities mentioned herein where the artist is to perform or in any city otherwise designated by the corporation for the artist's performance under this agreement, nor will the artist radio broadcast or permit any member of the act to radio broadcast anywhere in the United States or Canada, prior to the time herein fixed for the expiration of this agreement, or perform in any motion picture with or without voice synchronization during said period without the written consent of the corporation.

Special artist agrees to give four performances daily—five performances daily if requested by the corporation.

Artist further agrees to work in show as directed by the corporation.

The artist agrees to eliminate any part of said act, attraction or revue deemed objectionable by the corporation or the theater management and to

make such additions, substitutions or changes therein of title, persons, material, lyrics, music or any other thing as the corporation or the theater management may require.

The artist agrees to join with other artists in an afterpiece, ensemble, combination, or revue as required so to do.

Under this type of contract, the orchestra was engaged to work in a theater as a part of a stage show. The above-quoted provisions of the contract show that the "purchaser" retained the right to fit the orchestra into the show in any manner desired and to exercise a substantial degree of control over the manner in which the leader and the members of the orchestra rendered the particular services for which they were engaged. It is, therefore, held that the "purchaser" under this contract is the employer of B and the members of his orchestra within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

It should be especially noted that the above conclusions were arrived at upon consideration of the facts involved in the particular engagements. It should not be inferred therefrom that Mimeograph 4651, supra, is revoked, since, as stated above, the conclusions reached in the mimeograph are applicable only to situations similar to those outlined therein. The manner in which the orchestra conducted by B is organized and the circumstances under which it performs services are such, however, that the mimeograph does not furnish an exclusive test for determining the status, under Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act), of B and the members of his orchestra.

SECTION 1426: Definitions. 1939-41-10057
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 376
(Also Subchapter C, Section 1607; Regulations 90, Article 205.)

Feature performers engaged by the O Circus Co. pursuant to the terms of written contracts are employees of that company for purposes of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

Advice is requested whether feature performers engaged by the O Circus Co. are employees of that company for the purpose of Subchapters A and C, Chapter 9, of the Internal Revenue Code.

The O Circus Co., in planning the show to be presented during the ensuing season, engages the feature performers. The contracts for the services of the feature performers are entered into by the company with the performers, or, in those instances where a number of individuals make up a performing unit, with a member of the group, appointed by the performers for that purpose, who has supervision over the personnel of the group. Most of the performing units are composed of members of the same family or of individuals associated together over a long period of time. Under the terms of such contracts, the artist (which term is defined therein to include the entire personnel of the act) agrees to furnish the act to the

company for a lump sum per week, and to maintain throughout the season the property and personnel of the act as represented. The contracts also specify the number of performances constituting a week's work and provide that no compensation shall be paid for rehearsals during or previous to the engagement or for any performance omitted during the season. In addition to the lump-sum payment per week, the company furnishes the artist with meals, car lodging. and transportation, common and customary in the circus business. It is understood, however, that the artist has the right to reject the privileges offered to him for meals, car lodging, and transportation. The artist is prohibited from engaging or appearing with any other circus or show in the United States during the period of his contract and is required to produce and present his act to the entire satisfaction of the company at all times and places. The contracts set forth in detail the nature and manner of performance required. In some instances the contracts provide that particular performances shall be presented "as may be directed" or "if required," or that a designated member or the entire personnel of the act shall take part in ensemble numbers. In other instances the company agrees to furnish costumes for a certain performance, performers to take part in the act, food for animals used in the act, etc.

Under Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly 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. 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. 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. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the person who performs the services. In general, if a person is subject to the control or direction of another 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, not an employee. (Article 3, Regulations 91, and article 205, Regulations 90; T. D. 4885, C. B. 1939–1 (Part 1), 396.)

In the present case the facts indicate that, although the feature performers are allowed to determine among themselves many of the details incident to the production of the circus performance, in order to produce and operate an exhibition such as is presented by the O Circus Co., it is essential that the right be retained by the company to direct and control the individuals performing therein should the occasion arise requiring the exercise of such right.

Under the facts presented, the O Circus Co. exercises, or has the right to exercise, over the performers in question the direction and control contemplated by the regulations as being necessary to establish the legal relationship of employer and employee. Accordingly,

it is held that the feature performers are employees of that company within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

SECTION 1426: Definitions. 1939-42-10066
REGULATIONS 91, ARTICLE 3: Who are employees. S. S. T. 377
(Also Subchapter C, Section 1607; Regulations 90, Article 205.)

Sales clerks trained by the O Employee Service Co. and furnished to a retail establishment to perform temporary services in such establishment are employees of the O Employee Service Co. for the purpose of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

Advice is requested whether sales clerks trained by the O Employee Service Co. and furnished to a retail establishment to perform temporary services therefor are employees of the company or of the establishment for the purpose of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

The O Employee Service Co. (hereinafter referred to as the company) was formed for the purpose of training sales clerks and other temporary employees and furnishing them to retail establishments whose businesses are of such a nature as to require the services of additional individuals during special sales and certain other periods. Upon request of a retail establishment for a certain number of sales clerks, the company will train individuals to perform services in accordance with the store system adopted by such establishment. The company places a supervisor (who is unquestionably its employee) in the establishment to which sales clerks are furnished. It is the duty of the supervisor to ascertain whether the clerks have been properly assigned to the respective departments for which they were requested, and to see that such individuals are neat in appearance and dressed in accordance with the establishment's regulations. Reports are made by the supervisor to the company showing the length of time each clerk performs services in addition to the number of sales made. Each sales clerk is required to forward to the company a weekly time ticket for pay roll computation after it has been approved by the proper official in the establishment. The sales clerks are subject to the instructions and control of the supervisor and are not under the supervision of the establishment while performing their services. The establishment does not have the right to demand any particular individuals, but is required to accept the individuals assigned to it. However, it is the company's policy to furnish the best clerks available, and if the services of any clerks prove to be unsatisfactory, the establishment may request the company to remove those particular individuals. The clerks are not subject to discharge by the establishment but the company may discontinue their services at any time. The working hours established by the company conform to those of the establishment and are maintained in accordance with the company's instructions. The company carries public liability

insurance and standard workmen's compensation and employers' liability insurance on the sales clerks. The establishment pays the company stipulated amounts and the clerks receive standard wages direct from the company.

Under Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly 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. 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. (Article 3, Regulations 91, and article 205, Regulations 90; T. D. 4885, C. B. 1939–1 (Part 1), 396.)

Under the facts presented, it appears that the O Employee Service Co. exercises over the sales clerks the degree of direction and control contemplated by the regulations as being necessary to establish the legal relationship of employer and employee. Accordingly, the sales clerks are employees of that company within the meaning of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

SECTION 1426: Definitions. 1939–52–10126
REGULATIONS 91, ARTICLE 4: Who are employers. S. S. T. 380
(Also Subchapter C, Section 1607; Regulations 90, Article 204.)

For purposes of the provisions of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act), the estate of B is the employer of those persons engaged by the legal representatives of the decendent in the administration of the estate and must report in one return for each return period the total wages paid to employees of the estate regardless of where the services are performed.

Advice is requested relative to the manner in which returns should be filed by the estate of B in reporting the taxes incurred under Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

It is stated that B, a resident of the State of R, owned and operated small loan offices in the States of T and Y. B died and A was appointed domiciliary administrator of the decedent's estate in the State of R. A was also appointed ancillary administrator of the estate in the State of T, and C was appointed ancillary administrator in the State of Y. The operation of the small loan offices has been continued by the estate of B during the period of administration and pending the payment of the debts and legacies. The question presented is whether each administrator should file a separate return reporting thereon the taxes with respect to the wages of employees performing services in the State in which that administrator is acting, or whether the taxes with respect to the wages of all employees performing services for the estate should be reported on one return.

In S. S. T. 199 (C. B. 1937–2, 405) it was held that the appointment of an administrator to operate the business of a decedent does not create a new employment but that the estate of the decedent continues

to be the employer under the Act. That ruling is applicable only where the administrator is engaged in the settlement and disposition of the estate and does not apply where a separate trust is created and the trust property is being operated by the trustee. (See S. S. T. 343, C. B. 1938–2, 306.) Inasmuch as the administrators in the instant case are engaged in the operation of the decendent's business activities during ordinary administration proceedings, the conclusion reached in S. S. T. 199, supra, is applicable, and no change in employment of the individuals performing services in connection with the business activities of B occurred upon his death and upon continuation of such actvities by the legal representatives of decedent's estate.

It was held in S. S. T. 21 (C. B. XV–2, 404 (1936)) that an employer should report on one return, for purposes of the tax under Title IX of the Social Security Act, the total of the wages paid to all of his employees, regardless of where such employees performed services within the United States. That ruling is equally applicable with respect to the taxes imposed under Title VIII of that Act and Subchapters A and C, Chapter 9, of the Internal Revenue Code.

In the instant case there is only one "employer," that is, the estate of B. It is immaterial that certain employees may perform services under the direction of, and receive remuneration from, an ancillary administrator in another State. Accordingly, it is held that only one return for each return period should be filed on which the taxes with respect to the wages of all employees of B's estate should be reported.

SECTION 1426: Definitions. 1939-36-9999
REGULATIONS 91, ARTICLE 6: Agricultural labor. S. S. T. 374
(Also Subchapter C, Section 1607; Regulations 90, Article 206(1).)

Where services performed by employees of the M Company in connection with grading and packing of farm products produced on farms owned or tenanted by the company are not segregable from substantial services performed by such employees in connection with the grading and packing of products of farms not owned or tenanted by the company, none of such services may be considered as "agricultural labor" for purposes of Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act), even though the grading and packing of products produced on the company's farms are carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

Advice is requested whether the services performed by the employees of the M Company in connection with the grading and packing of products produced on farms owned or tenanted by the M Company, which company also grades and packs products produced on farms of others, may be considered as "agricultural labor" which is excepted from "employment" under Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

Article 6 of Regulations 91 and article 206(1) of Regulations 90, relating to Titles VIII and IX, respectively, of the Social Security Act, and made applicable by Treasury Decision 4885 (C. B. 1939–1 (Part 1), 396) to Subchapters A and C, respectively, of Chapter 9 of the Internal Revenue Code, provide that the term "agricultural

labor" includes, among others, services performed by employees in connection with the processing, packing, packaging, transporting, and marketing of farm products, provided the products in their raw and natural state were produced on a farm owned or tenanted by the employer, and provided such activities are carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

The products with respect to which the services in question were performed are graded and packed in a packing shed located on a farm owned by the company. Employees who perform services in connection with the raising and harvesting of products of the company also perform services in connection with the grading and packing operations. It is the general custom in the particular type of farming in which the company is engaged for the producing company to carry on the handling operations in question. The equipment used and methods employed by the company in handling the crops are dissimilar to the equipment and methods used in like operations conducted by persons admittedly engaged in commercial or manufacturing activities. The capital invested in the packing shed and equipment constitutes a small portion of the investment in the enterprise as a whole. No marketing organization is maintained by the company, all crops being sold at wholesale to produce buyers.

Although substantial quantities of crops produced by neighboring farmers are graded and packed by the company, it appears that the facts set forth in the preceding paragraph warrant a finding that the grading and packing of crops *produced on land owned or tenanted by the company* are incident to the company's ordinary farming operations. It follows, therefore, that services performed by the company's employees in connection with the handling of products grown on the company's farms exclusively constitute "agricultural labor." It is clear also that services performed by the company's employees in connection with the grading and packing of products that are produced on farms of others do not constitute "agricultural labor" within the meaning of that term as used in Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act). (Article 6, Regulations 91, and article 206(1), Regulations 90; T. D. 4885, C. B. 1939–1 (Part 1), 396.)

The information submitted discloses that generally the crops produced on the company's farms are graded and packed concurrently with crops produced on the farms of others, and that even at times when such crops are not handled simultaneously the changes from the handling of one class of products to the handling of the other class occur with such frequency that it is impossible for the company to make a segregation of the time spent by each employee in performing services in grading and packing of crops produced on the company's farms from the time spent by each employee in such handling of products produced on the farms of others.

As indicated in S. S. T. 125 (C. B. 1937–1, 397) and in S. S. T. 286 (C. B. 1938–1, 427), where an employee during certain portions of a pay-roll period, that is, a period for which a payment of remuneration is ordinarily made to the employee by the employer,

renders services which constitute "agricultural labor" and during other portions of the same pay-roll period renders services which constitute "employment" and the amount of time devoted to each type of service is substantial, the services which constitute "agricultural labor" must be segregated from the services which constitute "employment" on the basis of time during which each type of service is rendered. If in such a case the agricultural services can not be so segregated, the entire services rendered during that pay-roll period must be considered as "employment." Thus, if any employee *concurrently* performs services which if separate and distinct as to time of performance would constitute "agricultural labor" and other services which constitute "employment," the entire services must be classified as "employment."

The circumstances surrounding the performance of services in the instant case render it impossible for the company to effect a segregation in accordance with the rules set forth in S. S. T. 125 and S. S. T. 286, supra. Since the company is unable to make such a segregation of services performed by its employees in grading and packing the products produced on its farms from the substantial services performed by them in grading and packing the products produced on farms of others, it is held that all of such services must be considered as "employment" for purposes of Subchapters A and C, Chapter 9, of the Internal Revenue Code, even though the grading and packing of products produced on the company's farms are carried on as an incident to ordinary farming operations as distinguishable from manufacturing or commercial operations.

SECTION 1426: Definitions. 1939-43-10071
REGULATIONS 91, ARTICLE 11: Government employees. S. S. T. 378
(Also Subchapter C, Section 1607; Regulations 90, Article 206(5)-(6).)

Services performed by individuals engaged in the operation of the M Office Building owned by the estate of B, an Indian ward of the United States, are subject to the taxes imposed by Subchapters A and C, Chapter 9 of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act), since the estate is not an instrumentality of the United States.

Advice is requested whether the taxes imposed by Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act) are applicable with respect to services performed by individuals engaged in the operation of the M Office Building, which is owned by the estate of B, an Indian ward of the United States.

The M Office Building was purchased by the Secretary of the Interior with restricted funds of B, an Indian ward of the United States. The building is held in the custody of the Bureau of Indian Affairs pursuant to the provisions of certain Acts of Congress relating to Indians of the O Tribe, of which B is a member. A rental agent was authorized by the Secretary of the Interior, through the O Indian Agency, to take over the management of the building. Under such authorization and with the written consent of B, the rental agent engages, directs, and controls on behalf of the estate the individuals employed in the operation of the building. Their

remuneration is determined by him with the approval of the agency, and workmen's compensation insurance is carried in the name of the owner of the building for the protection of those engaged in the operation thereof. Leases are made by the rental agent in accordance with the regulations governing rental of restricted property and the agent retains his stipulated commission from the rents and remits the balance to the O Indian Agency. Large repair items and matters of policy must be referred to the O Indian Agency.

Sections 1426(b)6 and 1607(c)5 of the Internal Revenue Code except from the term "employment," as used in Subchapters A and C of Chapter 9 of the Code, service performed in the employ of the United States Government or of an instrumentality of the United States. The exception extends to every service performed by an individual in the employ of the United States, the several States, the District of Columbia, or the Territory of Alaska or Hawaii, or any political subdivision or instrumentality thereof, including every unit or agency of government, without distinction between those exercising functions of a governmental nature and those exercising functions of a proprietary nature. (Article 11, Regulations 91; article 206(5)-(6), Regulations 90; T. D. 4885, C. B. 1939-1 (Part 1), 396.)

A trust or an estate managed and conducted by a fiduciary, rather than the fiduciary or the beneficiary, is held generally to be the employer for employment tax purposes. (S. S. T. 120, C. B. 1937-1, 375.) In the present case the estate of B is the employer, and the services are performed on behalf of a private estate. As the estate is not engaged in carrying into execution any of the powers of the United States (S. S. T. 16, C. B. XV-2, 386 (1936)), such estate is not an instrumentality of the United States within the exception provided by sections 1426(b)6 and 1607(c)5 of the Internal Revenue Code. Accordingly, the taxes imposed by Subchapters A and C, Chapter 9, of the Internal Revenue Code are applicable with respect to services performed by the individuals engaged in the operation of the M Office Building.

SECTION 1426: Definitions. 1939-44-10078
REGULATIONS 91, ARTICLE 14: Wages. S. S. T. 379
(Also Subchapter C, Section 1607; Regulations 90, Article 207.)

Advances made to employees of the M Company which they are legally obligated to repay do not constitute wages for purposes of the taxes imposed by Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

Advice is requested whether advances made to employees of the M Company should be considered wages subject to the taxes imposed by Subchapters A and C, Chapter 9, of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

The M Company engages in a general investment banking business and maintains trading departments in its principal offices in several cities. These departments are operated by employees who have profit-sharing agreements with the company. At the end of each calendar month a statement of account is made for the employees showing the net profits credited to their accounts. The net profits

represent the gross earnings of such employees, less expenses incurred in the operation of the trading departments. These employees may make withdrawals at any time of amounts standing to their credit and are also allowed, with limitations, cash advances where there is no credit balance in their accounts. At the time such cash advances are made, they are set up by the company on its books as amounts due from employees and are acknowledged by the employees either by note or letter.

Sections 1426(a) and 1607(b) of the Internal Revenue Code define the term "wages" as used in Subchapters A and C of Chapter 9 of the Code to mean "all remuneration for employment," subject to a limitation under Subchapter A not here material. (Article 14, Regulations 91; article 207, Regulations 90; T. D. 4885, C. B. 1939–1 (Part 1), 396.)

In S. S. T. 68 (C. B. 1937–1, 355) it was held that where "advances" are made to salesmen against unearned commissions and their employment is subsequently terminated prior to earning commissions equal to the amounts advanced, the deficit being charged to profit and loss, those "advances" constitute "wages" at the time of payment for purposes of Title VIII of the Social Security Act. In the instant case there is an acknowledgment of the indebtedness by note or letter, the M Company carries the balances as accounts due from employees, and there is an obligation on the part of the employees to repay the advances, which obligation must be satisfied although the employment is terminated prior to payment. The "advances" in the present case are, therefore, distinguishable from those in S. S. T. 68, supra.

Under the facts in the present case, it is held that the advances in question are loans and do not constitute wages for purposes of the taxes imposed by Subchapters A and C, Chapter 9, of the Internal Revenue Code.

Since, under the facts presented, the crediting of net profits constitutes "constructive" payment within the meaning of Regulations 91 (whether or not the accounts show a credit balance), the wages (represented by net profits) should be reported by the M Company on the return filed for the period within which credited for purposes of Subchapter A of Chapter 9 of the Internal Revenue Code.

CHAPTER 9, SUBCHAPTER B.—EMPLOYMENT BY CARRIERS.

REGULATIONS 100. 1939–33–9962
(Also Carriers Taxing Act of 1937.) C. T. 19

Rulings published under the Carriers Taxing Act of 1937 applicable under Subchapter B, Chapter 9, of the Internal Revenue Code.

Treasury Decision 4885 (C. B. 1939–1 (Part 1), 396) reads in part as follows:

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.

All rulings heretofore published relating to the provisions of the Carriers Taxing Act of 1937 are applicable under Subchapter B, Chapter 9, of the Internal Revenue Code in so far as such rulings are not inconsistent with the Code.

SECTION 1532: Definitions. 1939-32-9948
REGULATIONS 100, ARTICLE 3: Who are employees. C. T. 18
(Also Carriers Taxing Act of 1937, Section 1.)

Physicians, designated local surgeons, engaged by the M Railway Co. to assist the chief surgeon of that company in the treatment of its sick and injured employees and other persons injured on the company's right of way, are not employees of that company within the meaning of Subchapter B, Chapter 9, of the Internal Revenue Code (formerly the Carriers Taxing Act of 1937).

Advice is requested whether physicians, designated local surgeons, who render medical services to employees of the M Railway Co. and other persons injured on the company's right of way, are employees of that company under Subchapter B, Chapter 9, of the Internal Revenue Code (formerly the Carriers Taxing Act of 1937).

It is stated that on May —, 1939, the M Railway Co. by oral agreement engaged the services of certain physicians, designated local surgeons, to assist the chief surgeon of the company in the treatment of its sick and injured employees and other persons injured on the company's right of way. The local surgeons perform their services within assigned territories subject to general suggestions from the chief surgeon. Although the chief surgeon may advise a certain course of treatment for patients, it is stated that the local surgeons are in every instance solely responsible for the result of their treatment. They are required to make a report to the chief surgeon after the first examination of each patient and another report when the treatment is concluded. The local surgeons are paid monthly retainer fees but receive no other remuneration for their services. They maintain offices at their own expense, furnish their own equipment, and are not required to keep regular office hours with respect to the services rendered for the company or to devote a minimum amount of time thereto. Their services are performed at their own offices, in hospitals, or wherever the patients may be. They are engaged in general practice and devote a relatively small portion of their time to work for the company. The company agrees to give reasonable notice of dismissal to any local surgeon whose services are to be discontinued.

Section 1532(b) of the Internal Revenue Code provides in part as follows:

* * * The term "employee" means any person in the service of one or more employers for compensation * * *.

Section 1532(d) 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, made applicable under the Code by Treasury Decision 4885 (C. B. 1939-1 (Part 1), 396), 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.

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 the local surgeons which would constitute them employees under the provisions of section 1532(b) of the Internal Revenue Code and article 3, supra. This conclusion also applies under the Carriers Taxing Act of 1937 prior to the effective date of Subchapter B, Chapter 9, of the Code, i. e., April 1, 1939, with respect to surgeons engaged under like circumstances. (Cf. C. T. 15, C. B. 1939-1 (Part 1), 318.)

SECTION 1532: Definitions. 1939-36-10000
REGULATIONS 100, ARTICLE 5: Definition of "compensation." Mim. 4949
(Also Carriers Taxing Act of 1937, Section 1.)

Taxability, under the Carriers Taxing Act of 1937 and Subchapter B of Chapter 9 of the Internal Revenue Code, of amounts of dues and insurance premiums which "employees" of various units of railway labor organizations, national in scope, and "employee representatives" are freed from paying.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., August 9, 1939.

Collectors of Internal Revenue and Others Concerned:

The Bureau has received numerous inquiries from collectors and other persons relative to the applicability of the taxes imposed by the Carriers Taxing Act of 1937 and by Subchapter B of Chapter 9 of the Internal Revenue Code with respect to amounts of dues and insurance premiums which "employees" of various units of railway labor organizations, national in scope, and "employee representatives," as defined in such Act and subchapter, are freed from the necessity of paying. (Subchapter B of Chapter 9 of the Internal Revenue Code corresponds to and, as of April 1, 1939, supersedes the Carriers Taxing Act of 1937.)

Members of units of various railway labor organizations are ordinarily required to pay regular dues and, in some instances, insurance premiums. Many of such units, however, have adopted the practice of relieving officers and other employees, or employee representatives, of the necessity of paying such dues and insurance premiums. In some instances, subordinate units of railway labor organizations relieve the employees or employee representatives from payment not only of dues assessed by the subordinate units but also of dues which would otherwise be paid to superior divisions or committees of the organization. Relief from such payments is effected by various methods, including waiver, remission, credit, and refund.

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, or as an employee representative * * *.

Similar provisions are contained in section 1532(e) of the Internal Revenue Code.

Article 5 of Regulations 100, prescribed under the Carriers Taxing Act of 1937 and made applicable by Treasury Decision 4885 (C. B. 1939–1 (Part 1), 396) to Subchapter B of Chapter 9 of the Internal Revenue Code, provides in part as follows:

> The term *compensation* means all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example), which is earned by an individual for services performed as an employee for one or more employers, or as an employee representative. * * *

Under the provisions of the Carriers Taxing Act of 1937, Subchapter B of Chapter 9 of the Internal Revenue Code, and the regulations relating thereto, if a unit of a railway labor organization which ordinarily requires its members to pay dues or insurance premiums frees a member from the necessity of paying such dues or insurance premiums *in consideration of, or as remuneration for, service performed as an "employee" or "employee representative,"* as defined in such provisions of law and regulations, the amount of such dues or insurance premiums constitutes taxable "compensation" within the meaning of such provisions.

Correspondence relating to this mimeograph should refer to its number and to the symbols A&C:RR.

GUY T. HELVERING,
Commissioner.

CHAPTER 9, SUBCHAPTER C.—TAX ON EMPLOYERS OF EIGHT OR MORE.

REGULATIONS 90. 1939–47–10100
T. D. 4953

TITLE 26—INTERNAL REVENUE—CHAPTER I, SUBCHAPTER D, PART 400; SUBCHAPTER E, PART 465, SUBPART B.

Regulations 90, as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939–1 (Part 1), 396], further amended.

Tax for the calendar year 1939 under the Federal Unemployment Tax Act (Subchapter C of Chapter 9 of the Internal Revenue Code, as amended, which supersedes Title IX of the Social Security Act).

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

To Collectors of Internal Revenue and Others Concerned:

In order to prescribe regulations applicable to the excise tax on employers of eight or more for the calendar year 1939, imposed under the Federal Unemployment Tax Act (Subchapter C of Chapter 9 of the Internal Revenue Code), as amended by sections 608, 609, 610, 611, 612, 613, and 615 of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session [page 470, this Bulletin]), Regulations 90, approved February 17, 1936 [Part 400, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939 (Part 1), 396] [Part 465, Subpart B, of such Title 26], as amended, are further amended as follows:

(1) Immediately preceding article 1 [section 400.1, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, the following is inserted:

Section 615 of the Social Security Act Amendments of 1939.

Subchapter C of Chapter 9 of the Internal Revenue Code is amended by adding at the end thereof the following new section:

"SEC. 1611. This subchapter may be cited as the 'Federal Unemployment Tax Act.'"

(2) Article 1 [section 400.1, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, is amended by striking out paragraphs (*c*) and (*d*), and by adding at the end thereof the following new paragraphs:

(*j*) The term "Internal Revenue Code" means the Act entitled "An Act to consolidate and codify the internal revenue laws of the United States," approved February 10, 1939 (53 Stat., Part 1), as amended.

(*k*) The term "Social Security Act Amendments of 1939" means the Act entitled "An Act to amend the Social Security Act, and for other purposes," approved August 10, 1939 (Public, No. 379, Seventy-sixth Congress, first session).

(*l*) The term "Federal Unemployment Tax Act" means Subchapter C of Chapter 9 of the Internal Revenue Code, as amended by sections 608, 609, 610, 611, 612, 613, and 615 of the Social Security Act Amendments of 1939. Such Subchapter C, as so amended, comprises sections 1600 to 1611, inclusive, of the Internal Revenue Code.

(*m*) The term "tax" means the excise tax on employers of eight or more imposed by section 1600 of the Federal Unemployment Tax Act.

(*n*) The term "taxable year" means the calendar year 1939.

(3) Immediately after article 1 [section 400.1, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, the following new article is inserted:

ART. 2 [Sec. 400.2, Title 26, Code of Federal Regulations, 1939 Sup.]. *Scope of regulations for calendar year 1939.*—(*a*) These regulations relate to the excise tax on employers of eight or more for the calendar year 1939 imposed under the Federal Unemployment Tax Act (Subchapter C of Chapter 9 of the Internal Revenue Code, which superseded Title IX of the Social Security Act with respect to the tax for such year and subsequent years), as amended by sections 608, 609, 610, 611, 612, 613, and 615 of the Social Security Act Amendments of 1939. The Federal Unemployment Tax Act, as so amended, comprises sections 1600 to 1611, inclusive, of the Internal Revenue Code. All provisions of, and references to, the Social Security Act or other laws of the

United States which have been codified in the Federal Unemployment Tax Act or other portions of the Internal Revenue Code, but which remain in these regulations, shall be deemed to be, and shall be read as if they were, provisions of or references to the corresponding provisions of the Internal Revenue Code.

(*b*) These regulations also relate to services performed during the calendar year 1939 which constitute employment as defined in section 1607(c) of the Federal Unemployment Tax Act in force prior to January 1, 1940. (See also section 13(a) of the Railroad Unemployment Insurance Act, section 902(f) of the Social Security Act Amendments of 1939, and section 2 of the Act of August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session), relating, respectively, to the exemption from the tax of service performed on and after July 1, 1939, in the employ of an "employer" or as an "employee representative" as those terms are defined in the Railroad Unemployment Insurance Act, to the exemption from the tax of service performed prior to January 1, 1940, in the employ of foreign governments and certain of their instrumentalities, and to the exemption from the tax of certain service performed prior to such date in salvaging timber and clearing debris left by a hurricane; and see articles 206(8), 206(9), and 206(10) [sections 400.206(8), 400.206(9), and 400.206(10), Title 26, Code of Federal Regulations, 1939 Sup.], relating to such exemptions.

(*c*) Section 614 of the Social Security Act Amendments of 1939 amends section 1607 of the Federal Unemployment Tax Act, containing definitions of terms used in such Act (for example, "wages," "employment," and "agricultural labor"), but the changes in such definitions do not apply to services performed during the calendar year 1939. Thus, for example, whether particular services performed during 1939 constitute employment will be determined under the provisions of section 1607(c) of the Federal Unemployment Tax Act in force prior to January 1, 1940 (see articles 206(1) to 206(7), inclusive [sections 400.206(1) to 400.206(7), inclusive, Title 26, Code of Federal Regulations]; and see also articles 206, 206(8), 206(9), and 206(10) [sections 400.206, 400.206(8), 400.206(9), and 400.206(10), Title 26, Code of Federal Regulations, 1939 Sup.]). As a further example, all remuneration (including amounts exceeding $3,000) paid to an employee by an employer during the calendar year 1939 for employment during such year is subject to the tax, since no limitation as to the amount taxable is contained in the definition of wages in section 1607(b) of the Federal Unemployment Tax Act in force prior to January 1, 1940. (As to "wages" for purposes of the tax for the year 1939, see articles 207 to 210, inclusive [sections 400.207 to 400.210, inclusive, of such Title 26, 1939 Sup.].)

(*d*) New regulations will be promulgated under the Federal Unemployment Tax Act relating to the tax for the calendar year 1940 and subsequent years.

(4) The provisions of law under the caption "Section 901 of the Act" immediately preceding article 200 [section 400.200, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, are stricken out, together with the caption, and the following is inserted in lieu thereof:

Section 608 of the Social Security Act Amendments of 1939.

Section 1600 of the Internal Revenue Code is amended to read as follows:

"SEC. 1600. RATE OF TAX.

"Every employer (as defined in section 1607(a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607(b)) paid by him during the calendar year with respect to employment (as defined in section 1607(c)) after December 31, 1938."

(5) Article 201 [section 400.201, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, is amended to read as follows:

ART. 201 [Sec. 400.201, Title 26, Code of Federal Regulations, 1939 Sup.]. *Measure of tax for calendar year 1939.*—(*a*) The measure of the tax for the calendar year 1939 is the total amount of wages (without limitation in

amount—see article 2(*c*) [section 400.2(*c*), Title 26, Code of Federal Regulations, 1939 Sup.]) *paid* by an employer during such calendar year with respect to employment after December 31, 1938.

(*b*) Wages are *paid* for purposes of the tax imposed for the calendar year 1939 when actually or constructively paid. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case the wages must be credited or set apart to the employee 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 they may be drawn at any time, and their payment brought within his own control and disposition.

(6) Article 202 [section 400.202, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, is amended to read as follows:

ART. 202 [Sec. 400.202, Title 26, Code of Federal Regulations, 1939 Sup.]. *Rate and computation of tax for calendar year 1939.*—The rate of tax applicable for the calendar year 1939 is 3 per cent.

The tax for the calendar year 1939 is computed by applying the 3 per cent rate to the total wages (without limitation in amount—see article 2(*c*) [section 400.2(*c*), Title 26, Code of Federal Regulations, 1939 Sup.]) *paid* during such year by the employer with respect to employment after December 31, 1938.

(7) Article 203, as amended by Treasury Decision 4931, approved August 29, 1939 [page 312, this Bulletin] [section 400.203, Title 26, Code of Federal Regulations, 1939 Sup.], only as made applicable to the Internal Revenue Code, is amended by striking out the last paragraph and by inserting in lieu thereof the following:

Even if an "employer" is not subject to any State unemployment compensation law, he is nevertheless subject to the tax. However, if he is subject to such a State law, he is entitled to credit against the tax to the extent permitted by section 1601 of the Federal Unemployment Tax Act. (See articles 211(1) and 212 [sections 400.211(1) and 400.212, Title 26, Code of Federal Regulations, 1939 Sup.].)

(8) Articles 206 and 208, as amended by Treasury Decision 4931, approved August 29, 1939 [sections 400.206 and 400.208, Title 26, Code of Federal Regulations, 1939 Sup.], and articles 207, 210, and 302 [sections 400.207, 400.210, and 400.302 of such Title 26], only as made applicable to the Internal Revenue Code, are each amended by striking out the term "payable" wherever it appears and by inserting in lieu thereof the term "paid"; and such article 210 is further amended by striking out the word "actually" where it appears in paragraph (*b*) thereof.

(9) Article 209(*a*) [section 400.209(*a*), Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, is amended to read as follows:

(*a*) *General.*—Wages paid during the calendar year 1939 with respect to employment after December 31, 1938, include items paid in money and the fair value, at the time of payment, of all items other than money.

(10) The provisions of law under the caption "Section 902 of the Act" preceding article 211, as amended by Treasury Decision 4812, approved June 18, 1938 [C. B. 1938–1, 462] [section 400.211, Title 26, Code of Federal Regulations, 1938 Sup.], only as made applicable to the Internal Revenue Code, are stricken out, together with the caption, and the following is inserted in lieu thereof:

Section 609 of the Social Security Act Amendments of 1939.

Section 1601 of the Internal Revenue Code is amended to read as follows:

"SEC. 1601. CREDITS AGAINST TAX.

"(a) CONTRIBUTIONS TO STATE UNEMPLOYMENT FUNDS.—

"(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.

"(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

"(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 1604 to file a return for such year; except that credit shall be permitted for contributions paid after such last day but before July 1 next following such last day, but such credit shall not exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last day. The preceding provisions of this subdivision shall not apply to the credit against the tax of a taxpayer for any taxable year if such taxpayer's assets, at any time during the period from such last day for filing a return for such year to June 30 next following such last day, both dates inclusive, are in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

"(4) Upon the payment of contributions into the unemployment fund of a State which are required under the unemployment compensation law of that State with respect to remuneration on the basis of which, prior to such payment into the proper fund, the taxpayer erroneously paid an amount as contributions under another unemployment compensation law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made on the date the return for the taxable year was filed under section 1604.

"(5) Refund of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under this section, may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund.

* * * * * * *

"(c) LIMIT ON TOTAL CREDITS.—The total credits allowed to a taxpayer under this subchapter shall not exceed 90 per centum of the tax against which such credits are allowable."

(11) Article 211, as amended by Treasury Decision 4812, approved June 18, 1938 [section 400.211, Title 26, Code of Federal Regulations, 1938 Sup.], only as made applicable to the Internal Revenue Code, is stricken out and the following new article is inserted in lieu thereof:

ART. 211(1) [Sec. 400.211(1), Title 26, Code of Federal Regulations, 1939 Sup.]. *Credit against tax for calendar year 1939 for contributions paid.*—(*a*) *General.*—Subject to the limitations hereinafter prescribed in paragraph (*b*), the taxpayer may credit against the tax for the calendar year 1939 the total amount of contributions paid by him under all State laws which have been

found by the Social Security Board to contain the provisions specified in section 1603(a) of the Federal Unemployment Tax Act; provided that no credit may be taken for a contribution under a State law if such State has not been duly certified for the calendar year to the Secretary by the Social Security Board. The contributions may be credited against the tax whether or not they are paid with respect to employment as defined in the Federal Unemployment Tax Act.

(*b*) *Limitations on allowance of contributions as credit against tax.*—The allowance of contributions as credit against the tax for the calendar year 1939 is subject to the following limitations:

(1) The total credit allowed to any taxpayer for contributions to State unemployment funds shall not exceed 90 per cent of the tax against which such credit is applied.

(2) The contributions must have been actually paid into the State unemployment fund. Such payment must have been made on or before the last day upon which the return for the taxable year is required to be filed (see article 303 [section 400.303, Title 26, Code of Federal Regulations], article 304 [section 400.304, of such Title 26, 1939 Sup.], and article 305 [section 400.305, of such Title 26]), except that:

(i) Contributions may be paid into a State unemployment fund after such last day but before July 1, 1940, and, in such case, may be credited against the tax in an amount not to exceed 90 per cent of the amount which would have been allowable as credit on account of such contributions had they been paid into the State unemployment fund on or before such last day. (See examples A, B, and C of this paragraph.)

(ii) Contributions of a taxpayer whose assets, at any time during the period from such last day for filing a return for the calendar year 1939, to June 30, 1940, both dates inclusive, are in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction, may be paid into the State fund at any time (subject, however, to the provisions of article 503 [section 400.503, Title 26, Code of Federal Regulations] relating to the statutory period of limitations applicable to credits), and upon such payment may be credited against the tax in the same amount that would have been allowable as credit had the contributions been paid on or before the last day upon which the return for the taxable year was required to be filed.

(iii) Contributions for the calendar year 1939 paid into the unemployment fund of a State which are required under the unemployment compensation law of that State, but which are paid with respect to remuneration on the basis of which the taxpayer had, prior to such payment, erroneously paid an amount as contributions under another unemployment compensation law, shall be deemed for purposes of credit to have been paid at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions for the calendar year 1939 with respect to services subject to such other law, the payment into the proper fund shall be deemed for purposes of credit to have been made on the date the return for the calendar year 1939 was actually filed under section 1604 of the Federal Unemployment Tax Act. (See example D of this paragraph.)

(3) The contributions must have been paid with respect to the calendar year 1939. (See examples E and F of this paragraph.)

Example A, illustrating article 2Ī1(1)(b)(2)(i): The Federal return of the M Company for the calendar year 1939 discloses a total tax of $12,000. The company is liable for total State contributions of $8,000 for such year. The due date of the company's Federal return is January 31, 1940, no extension of time for filing the return having been granted. The contributions are not paid until February 1, 1940. If the contributions had been paid on or before January 31, 1940, the entire amount could have been credited against the tax (such amount not exceeding 90 per cent of the Federal tax of $12,000). Since the contributions were paid after January 31, but before July 1, 1940, the M Company is entitled to a credit of 90 per cent of the amount of the contributions ($8,000), or $7,200, the net liability for Federal tax being $4,800 ($12,000 minus $7,200).

Example B, illustrating article 2Ī1(1)(b)(2)(i): The facts are the same as in example A, except that the M Company is liable for and pays total State contributions of $12,000, instead of $8,000. If the contributions had been paid

on or before January 31, 1940, the amount allowable as credit would have been $10,800 (90 per cent of the Federal tax of $12,000). Since the contributions were paid after January 31, but before July 1, 1940, the M Company is entitled to a credit of 90 per cent of $10,800, or $9,720, the net liability for Federal tax being $2,280 ($12,000 minus $9,720).

Example C, illustrating article 211(1)(b)(2)(i): The Federal return of the R Company for the calendar year 1939 discloses a total tax of $10,000. The company is liable for total State contributions of $9,000 for such year. The due date of the company's Federal return is January 31, 1940, no extension of time for filing the return having been granted. The R Company pays $8,000 of the total State contributions on or before such date, and the remaining $1,000 on February 1, 1940. If the $1,000 had been paid on or before January 31, 1940, that amount could have been credited against the tax (such amount plus the $8,000 paid on or before January 31, 1940, not exceeding 90 per cent of the Federal tax of $10,000). Since the $1,000 was paid after January 31, but before July 1, 1940, the R Company is entitled to a credit of 90 per cent of this amount or $900, plus the credit of $8,000 allowable for the contributions paid on or before January 31, 1940. The net liability for Federal tax is thus $1,100 ($10,000 minus $8,900).

Example D, illustrating article 211(1)(b)(2)(iii): Employer N, whose Federal return for the calendar year 1939 discloses a total tax of $1,000, employs individuals in State X and State Y during the calendar year 1939. N assumes in good faith that the services of his employees are covered by the unemployment compensation law of State Y, and pays as contributions to State Y the amount of $900 based upon the remuneration of the employees. All of the services were in fact covered by the unemployment compensation law of State X, and none by the law of State Y. The payment to State Y was made on January 31, 1940. When the error was discovered thereafter, N paid to State X contributions in the amount of $900 based upon such remuneration. Since the contributions were paid to State Y on January 31, 1940, the contributions to State X are, for purposes of the credit, deemed to have been paid on such date. N is entitled to a credit of $900 against the Federal tax of $1,000, the net liability for Federal tax being $100 ($1,000 minus $900).

Example E, illustrating article 211(1)(b)(3): Under the unemployment compensation law of State X, employer M is required to report in his contribution return for the quarter ended December 31, 1939, all remuneration *payable* for services rendered in such quarter. A portion of such remuneration is not paid to his employees until February 1, 1940. On January 20, 1940, M pays to the State the total amount of contributions due with respect to all remuneration so required to be reported. Such contributions, including those with respect to the remuneration paid on February 1, 1940, may be included in computing the credit against the tax for the calendar year 1939. This is true even though the remuneration paid on February 1, 1940 (if it constitutes "wages"), is required to be reported in the Federal return for 1940 and not in the Federal return for 1939.

Example F, illustrating article 211(1)(b)(3): Under the unemployment compensation law of State Y, employer N is required to include in his contribution return for the quarter ended December 31, 1939, certain remuneration paid on December 30, 1939, to an employee for services to be rendered after December 31. On January 20, 1940, N pays to the State the total amount of contributions due with respect to all remuneration required to be reported on the contribution return. Such contributions, including those with respect to the remuneration paid on December 30, 1939, may be included in computing the credit against the tax for the calendar year 1939.

(c) If, subsequent to the filing of the return for the calendar year 1939, a refund is made by a State to the taxpayer of any part of his contributions for such year which had been credited against the tax, the taxpayer is required to advise the Commissioner under oath of the date and amount of such refund and the reason therefor, and to pay the tax, if any, due as a result of such refund, together with interest from the date when the tax was due.

(12) The provisions of law under the captions "Section 909 of the Act" and "Section 910 of the Act" immediately preceding article 212, as amended by Treasury Decision 4876, approved November 30, 1938 [C. B. 1938-2, 338] [section 400.212, Title 26, Code of Federal

Regulations, 1938 Sup.], only as made applicable to the Internal Revenue Code, are stricken out, together with the captions, and the following is inserted in lieu thereof:

Section 609 of the Social Security Act Amendments of 1939.

Section 1601 of the Internal Revenue Code is amended to read as follows:

"SEC. 1601. CREDITS AGAINST TAX.

* * * * * * *

"(b) ADDITIONAL CREDIT.—In addition to the credit allowed under subsection (a), a taxpayer may credit against the tax imposed by section 1600 for any taxable year an amount, with respect to the unemployment compensation law of each State certified for the taxable year as provided in section 1602 (or with respect to any provisions thereof so certified), equal to the amount, if any, by which the contributions required to be paid by him with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to the highest rate applied thereunder in the taxable year to any person having individuals in his employ, or to a rate of 2.7 per centum, whichever rate is lower.

* * * * * * *

(13) Article 212, as amended by Treasury Decision 4876, approved November 30, 1938 [section 400.212, Title 26, Code of Federal Regulations, 1938 Sup.], only as made applicable to the Internal Revenue Code, is amended to read as follows:

ART. 212 [Sec. 400.212, Title 26, Code of Federal Regulations, 1939 Sup.]. *Additional credit against tax for calendar year 1939.*—(*a*) *General.*—In addition to the credit against the tax allowable under section 1601(a) of the Federal Unemployment Tax Act for contributions actually paid to State unemployment funds (see article 211(1) [section 400.211(1), Title 26, Code of Federal Regulations, 1939 Sup.]), the taxpayer may be entitled to a further credit under section 1601(b) of such Act. This further or *additional* credit is allowable to the taxpayer with respect to the amount of contributions which he is relieved from paying to an unemployment fund under the provisions of a State law which have been certified for the calendar year 1939 as provided in section 1602(b) of such Act. Generally, an additional credit is available to an employer, if, by reason of having stabilized the employment of his employees in any State, or for some other reason, he is permitted to pay contributions to such State for the calendar year 1939, or portion thereof, at a lower rate than the highest rate applied under such law in such year. For the purposes of this article and article 213 [section 400.213, Title 26, Code of Federal Regulations, 1939 Sup.], the phrase "highest rate applied" means the highest rate which is actually applied under the State law in the calendar year 1939 to any person having individuals in his employ. The computation of the additional credit and the limitations upon its allowance are set forth in the remaining paragraphs of this article.

(*b*) *Method of computing amount of additional credit allowable with respect to a State law.*—(1) In ascertaining the additional credit for the calendar year 1939 with respect to a particular State law as to which the Social Security Board, in accordance with the provisions of section 1602(b)(1) of the Federal Unemployment Tax Act, certifies to the Secretary that reduced rates of contributions were allowable with respect to such year only in accordance with the provisions of section 1602(a) of such Act, the taxpayer must first compute the following amounts:

(A) The amount of contributions (whether or not with respect to employment as defined in the Federal Unemployment Tax Act) which the taxpayer would have been required to pay under the State law for such year if throughout the year he had been subjected to the highest rate applied under such law in such year, or to a rate of 2.7 per cent, whichever rate is lower.

(B) The amount of contributions (whether or not with respect to employment as defined in the Federal Unemployment Tax Act) he was required to pay under the State law with respect to such year, whether or not paid.

The amount computed under (B) should then be subtracted from the amount computed under (A), and the result will be the additional credit for the taxable year with respect to the law of that State.

Example: A employs individuals in State X only during the calendar year 1939. The highest rate applied in such year under the unemployment compensation law of State X to any taxpayer was 3 per cent. However, A had obtained a reduced rate of 1 per cent under the law of such State and was required to pay his entire year's contributions at that rate. The amount of remuneration of A's employees subject to contributions under such State law was $25,000. The amount of wages paid by A during that year with respect to employment under the Federal law likewise was $25,000, the Federal tax at the 3 per cent rate being $750. A's additional credit under section 1601(b) is $425, computed as follows:

Remuneration subject to contributions	$25,000
Contributions at 2.7 per cent rate	675
Less:	
Contributions required to be paid at reduced rate of 1 per cent	250
Additional credit to A	425

Since the 2.7 per cent rate is less than the highest rate applied (3 per cent), the 2.7 per cent rate is used in computing the amount ($675) from which the amount of contributions required to be paid at the reduced rate ($250) is deducted in order to ascertain the additional credit ($425). Thus, A is entitled to an additional credit under section 1601(b) of the Federal Unemployment Tax Act of $425.

(2) If the Social Security Board makes a certification to the Secretary with respect to a particular State law for the calendar year 1939 pursuant to section 1602(b)(2) of the Federal Unemployment Tax Act, the additional credit of the taxpayer for such year with respect to such law shall be computed in such manner as the Commissioner shall determine.

(*c*) *Amount of additional credit allowable where contributions are paid under more than one State law.*—If the taxpayer is permitted to pay contributions at a reduced rate under more than one State law in the calendar year 1939, the additional credit allowable with respect to each State law shall be computed separately (in accordance with (*b*) above), and the total additional credit allowable against the tax shall be the aggregate of the additional credits allowable with respect to such State laws.

(*d*) *Limitations on allowance of additional credit.*—The allowance of the additional credit under section 1601(b) of the Federal Unemployment Tax Act is subject to the following limitations:

(1) In no case is a taxpayer entitled to an additional credit unless under the State law he is permitted to pay contributions for the calendar year 1939, or portion thereof, at a rate which is lower than the highest rate applied under such law in such year. If the State law does not make provision for such a lower rate no *additional* credit is available to the taxpayer and he can take only the credit allowable under section 1601(a) of such Act for contributions actually paid. (See article 211(1) [section 400.211(1), Title 26, Code of Federal Regulations, 1939 Sup.].)

(2) The aggregate of such additional credit and the credit under section 1601(a) of such Act (see article 211(1) [section 400.211(1), Title 26, Code of Federal Regulations, 1939 Sup.]) shall not exceed 90 per cent of the tax against which credit is taken.

(3) No additional credit shall be allowed except to the extent that the State unemployment compensation law under which such reduced rate is permitted is certified for the calendar year 1939 to the Secretary by the Social Security Board as meeting the conditions set forth in section 1602 of such Act.

(14) Article 213, as added by Treasury Decision 4876, approved November 30, 1938 [section 400.213, Title 26, Code of Federal Regu-

lations, 1938 Sup.], only as made applicable to the Internal Revenue Code, is amended to read as follows:

ART. 213 [Sec. 400.213, Title 26, Code of Federal Regulations, 1939 Sup.]. *Proof of credit for calendar year 1939.*—(*a*) *Credit under section 1601(a) of Federal Unemployment Tax Act.*—Credit against the tax for contributions paid into State unemployment funds for the calendar year 1939 shall not be allowed unless there is submitted to the Commissioner:

(1) A certificate of the proper officer of each State (the laws of which required the contributions to be paid) showing, for the taxpayer:

(A) The total amount of contributions required under the State law with respect to the calendar year 1939 (exclusive of penalties and interest) actually paid on or before the date the Federal return is required to be filed; and

(B) The amounts and dates of such required payments (exclusive of penalties and interest) actually paid after the date the Federal return is required to be filed.

(2) An affidavit by the taxpayer that no part of any payment made by him into a State unemployment fund for the calendar year 1939, which is claimed as a credit against the tax, was deducted or is to be deducted from the wages of individuals in his employ.

(3) Such other or additional proof as the Commissioner may deem necessary to establish the right to the credit provided for under section 1601(a) of the Federal Unemployment Tax Act.

(*b*) *Additional credit under section 1601(b) of Federal Unemployment Tax Act.*—Additional credit under section 1601(b) of the Federal Unemployment Tax Act shall not be allowed unless there is submitted to the Commissioner, in addition to the proof required by paragraph (*a*) above:

(1) A certificate of the proper officer of each State (with respect to the law of which the additional credit is claimed) showing, for the taxpayer who is permitted to pay contributions to such State at a rate which is lower than the highest rate applied under the law of such State:

(A) The total remuneration with respect to which contributions were required to be paid by the taxpayer under the State law for the calendar year 1939;

(B) The rate of contributions applied to the taxpayer under the State law for the calendar year 1939;

(C) The total amount of contributions the taxpayer was required to pay under the State law with respect to the calendar year 1939, whether or not paid; and

(D) The highest rate of contributions applied under the State law in the calendar year 1939 to any taxpayer having individuals in his employ.

If under the law of such State different rates of contributions were applied to the taxpayer during particular periods of the calendar year 1939, the certificate shall set forth the information called for in (A), (B), and (C) with respect to each such period, as well as the total amount of contributions the taxpayer was required to pay under such law, whether or not paid, and the information called for in (D).

(2) Such other or additional proof as the Commissioner may deem necessary to establish the right to the additional credit provided for under section 1601(b) of the Federal Unemployment Tax Act.

(15) The following provisions of law under the caption "Section 905(b) of the Act" preceding article 300, as amended by Treasury Decision 4931, approved August 29, 1939 [page 312, this Bulletin] [section 400.300, Title 26, Code of Federal Regulations, 1939 Sup.], only as made applicable to the Internal Revenue Code, are stricken out:

* * * The Commissioner may extend the time for filing the return of the tax imposed by this title, under such rules and regulations as he may prescribe with the approval of the Secretary of the Treasury, but no such extension shall be for more than sixty days. * * *

(16) Immediately preceding the caption "Section 1102 of the Revenue Act of 1926, made applicable by section 905(b) of the Act"

preceding article 300, as amended by Treasury Decision 4931, approved August 29, 1939 [section 400.300, Title 26, Code of Federal Regulations, 1939 Sup.], only as made applicable to the Internal Revenue Code, the following is inserted:

Section 612 of the Social Security Act Amendments of 1939.

Section 1604(b) of the Internal Revenue Code is amended to read as follows:

"(b) EXTENSION OF TIME FOR FILING.—The Commissioner may extend the time for filing the return of the tax imposed by this subchapter, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than ninety days."

(17) Article 304 [section 400.304, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, is amended by striking out "60 days" where that phrase appears in the second sentence of such article, and by inserting in lieu thereof "90 days."

(18) Article 307(*a*) [section 400.307(*a*), Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, is amended to read as follows:

(*a*) Every person subject to the tax shall, with respect to the calendar year 1939, keep such permanent records as are necessary to establish:

(1) The total amount of remuneration paid during the calendar year 1939 to his employees in cash or in a medium other than cash, showing separately, (*a*) total remuneration paid with respect to services not subject to the tax, performed within the United States, (*b*) total remuneration paid with respect to services performed outside of the United States, and (*c*) total remuneration paid with respect to all other services.

(2) The amount of contributions paid by him into each State unemployment fund, with respect to services subject to the law of such State, showing separately (*a*) payments made and not deducted (or to be deducted) from the remuneration of employees, and (*b*) payments made and deducted (or to be deducted) from the remuneration of employees.

(3) The information required to be shown on the prescribed return and the extent to which such person is liable for the tax.

(19) Immediately preceding article 504 [section 400.504, Title 26, Code of Federal Regulations], only as made applicable to the Internal Revenue Code, the following is inserted:

Section 609 of the Social Security Act Amendments of 1939.

Section 1601 of the Internal Revenue Code is amended to read as follows:

"SEC. 1601. CREDITS AGAINST TAX.

"(a) CONTRIBUTIONS TO STATE UNEMPLOYMENT FUNDS.—

* * * * * * *

"(5) Refund of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under this section, may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund.

* * * * * * *

ART. 503⅝ [Sec. 400.503⅝, Title 26, Code of Federal Regulations, 1939 Sup.]. *Refund under section 1601(a)(5) of Federal Unemployment Tax Act.*—If the tax against which an amount is allowable as credit under section 1601 of the Federal Unemployment Tax Act has been paid without the benefit of such credit, the taxpayer shall be entitled to a refund of the tax equal to the amount of such allowable credit. (See articles 211(1), 212, and 213 [sections

400.211(1), 400.212, and 400.213, Title 26, Code of Federal Regulations, 1939 Sup.], relating, respectively, to credit against the tax for contributions paid, additional credit, and proof of credit, for the calendar year 1939.) The taxpayer shall also be entitled to a refund of the amount of interest or penalty, if any, collected from him with respect to the amount of tax refunded. No interest, however, shall be allowed or paid by the Government on the amount of any such refund. Every claim for such refund shall be made on Form 843 in accordance with the provisions of this article and article 503 [section 400.503, Title 26, Code of Federal Regulations], relating to refund and credit of taxes erroneously collected. A claim which does not comply with these requirements will not be considered for any purpose as a claim for refund.

(This Treasury decision is issued under the authority contained in section 1609 of the Federal Unemployment Tax Act (Subchapter C of Chapter 9 of the Internal Revenue Code (53 Stat., Part 1), and sections 608, 609, 612, and 615 of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 9, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register November 14, 1939, 9.55 a. m.)

REGULATIONS 90.

Social Security Act Amendments of 1939. (See Mim. 4592, page 251.)

REGULATIONS 90, ARTICLES 206(9) AND 503¾. 1939-37-10015
(Also Social Security Act, Title IX.) T. D. 4933

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER D, PART 400; SUBCHAPTER E, PART 465, SUBPART B.

Regulations 90, as amended, relating to the excise tax on employers under Title IX of the Social Security Act, and such regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939-1 (Part 1), 396], further amended.

Exemption from taxation under Title IX of the Social Security Act and Chapter 9, Subchapter C, of the Internal Revenue Code of services rendered prior to January 1, 1940, in the employ of foreign governments and certain of their instrumentalities.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 90, approved February 17, 1936 [Part 400, Title 26, Code of Federal Regulations], as amended, relating to the excise tax on employers under Title IX of the Social Security Act, and such regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] [Part 465, Subpart B, of such Title 26], to section 902(f) of the Social Security Act Amendments of 1939, approved August 10, 1939 (Public, No. 379, Seventy-sixth Congress, first session), each of such regulations are further amended as follows:

(1) Immediately preceding sections 901 and 907(b) of the Social Security Act quoted immediately preceding article 207 [section 400.207, Title 26, Code of Federal Regulations], the following is inserted:

Section 902(f) of the Social Security Act Amendments of 1939.

No tax shall be collected under Title * * * IX of the Social Security Act or under * * * the Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1940, which are described in subparagraphs (11) and (12) of sections * * * 1607(c) of the Internal Revenue Code, as amended, and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. * * *

Section 615 of the Social Security Act Amendments of 1939.

Subchapter C of Chapter 9 of the Internal Revenue Code is amended by adding at the end thereof the following new section:

"SEC. 1611. This subchapter may be cited as the 'Federal Unemployment Tax Act.'"

Section 614 of the Social Security Act Amendments of 1939.

Effective January 1, 1940, section 1607 of the Internal Revenue Code is amended to read as follows:

"SEC. 1607. DEFINITIONS.

"When used in this subchapter—

* * * * *

"(c) EMPLOYMENT.—The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * *

"(11) Service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

"(12) Service performed in the employ of an instrumentality wholly owned by a foreign government—

"(A) If the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

"(B) If the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof * * *."

ART. 206(9) [Sec. 400.206(9), Title 26, Code of Federal Regulations]. *Exemption from taxation of services performed in the employ of foreign governments and certain of their instrumentalities.*—(a) *Service performed in the employ of a foreign government.*—Service performed in the employ of a foreign government is not subject to the tax. The exemption embraces not only services performed by ambassadors, ministers, and other diplomatic representatives but also includes services performed as a consular or other officer or employee of a foreign government or as a nondiplomatic representative thereof. For purposes of the exemption, the citizenship of the employee is immaterial. It is also immaterial whether the foreign government grants an equivalent exemption with respect to similar services performed in the foreign country by citizens of the United States.

(*b*) *Service performed in the employ of certain instrumentalities of foreign governments.*—Service performed in the employ of certain instrumentalities of a foreign government is likewise not subject to the tax. The exemption extends to all services performed in the employ of an instrumentality of the government of a foreign country, without distinction between those exercising functions of a governmental nature and those exercising functions of a proprietary nature, provided:

(1) The instrumentality is wholly owned by the foreign government;

(2) The services are of a character similar to those performed in foreign countries by employees of the United States or of an instrumentality thereof; and

(3) The Secretary of State certifies to the Secretary of the Treasury that the foreign government with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to services performed in the foreign country by employees of the United States Government and of instrumentalities thereof.

For purposes of this exemption the citizenship of the employee is likewise immaterial.

(2) Immediately preceding article 504 [section 400.504, Title 26, Code of Federal Regulations], the following is inserted:

Section 902(f) of the Social Security Act Amendments of 1939.

No tax shall be collected under Title * * * IX of the Social Security Act or under * * * the Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1940, which are described in subparagraphs (11) and (12) of sections * * * 1607(c) of the Internal Revenue Code, as amended, and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. * * *

ART. 503¾ [Sec. 400.503¾, Title 26, Code of Federal Regulations]. *Refund under section 902(f) of the Social Security Act Amendments of 1939.*—Any tax (including interest or penalty, if any) paid with respect to services rendered prior to January 1, 1940, which are described in paragraph (11) or (12) of section 1607(c) of the Federal Unemployment Tax Act, as amended by section 614 of the Social Security Act Amendments of 1939 (see article 206(9) [section 400.206(9), Title 26, Code of Federal Regulations, 1939 Sup.]), may be refunded to the person who paid the amount of such tax to the collector. No interest shall be allowed or paid by the Government on the amount of any such refund. Every claim for such refund shall be made on Form 843 in accordance with the provisions of this article and article 503 [section 400.503, Title 26, Code of Federal Regulations], relating to refund and credit of taxes erroneously collected. A claim which does not comply with these requirements will not be considered for any purpose as a claim for refund.

(This Treasury decision is issued under the authority contained in section 908 of the Social Security Act (49 Stat., 643; 42 U. S. C., Sup. IV, 1108), and sections 1609 and 3791 of the Internal Revenue Code (53 Stat., Part 1); and interprets section 902(f) of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session) and section 1607(c) (11) and (12) of the Federal Unemployment Tax Act, as amended by section 614 of such Social Security Act Amendments of 1939.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 6, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 7, 1939, 11.06 a. m.)

REGULATIONS 90, ARTICLES 206(10) AND 5034/5. (Also Social Security Act, Title IX.)

1939-39-10032
T. D. 4940

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER D, PART 400; SUBCHAPTER E, PART 465, SUBPART B.

Regulations 90, as amended, relating to the excise tax on employers under Title IX of the Social Security Act, and such regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939-1 (Part 1), 396], further amended.

Exemption from taxation under Title IX of the Social Security Act and the Federal Unemployment Tax Act (Chapter 9, Subchapter C, of the Internal Revenue Code) of certain services rendered prior to January 1, 1940, in salvaging timber and clearing debris left by a hurricane.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 90, approved February 17, 1936 [Part 400, Title 26, Code of Federal Regulations], as amended, relating to the excise tax on employers under Title IX of the Social Security Act, and such regulations as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] [Part 465, Subpart B, of such Title 26], to section 2 of the Act approved August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session), entitled "An Act to provide for the refund or credit of the internal-revenue tax paid on spirits lost or rendered unmarketable by reason of the floods of 1936 and 1937 where such spirits were in the possession of the original taxpayer or rectifier for bottling or use in rectification under Government supervision as provided by law and regulations," each of such regulations are further amended as follows:

(1) Immediately preceding sections 901 and 907(b) of the Social Security Act quoted immediately preceding article 207 [section 400.207, Title 26, Code of Federal Regulations], the following is inserted:

Section 2 of the Act approved August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session).

No tax shall be collected under Title * * * IX of the Social Security Act or under the * * * Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1940, in the employ of the owner or tenant of land, in salvaging timber on such land or clearing such land of brush and other debris left by a hurricane; and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. * * *

ART. 206(10) [Sec. 400.206(10), Title 26, Code of Federal Regulations]. *Exemption from taxation of services performed in salvaging timber and clearing debris left by a hurricane.*—Certain services performed in salvaging timber and clearing land of brush and other debris left by a hurricane are not subject to the tax. In order to be exempted from the tax the services must be performed:

(1) Prior to January 1, 1940; and

(2) As an employee of the owner or tenant of land on which a hurricane has left brush or other debris, or timber in need of salvaging by reason of such hurricane; and

(3) In clearing such land of such brush or other debris, or in salvaging such timber.

(2) Immediately preceding article 504 [section 400.504, Title 26, Code of Federal Regulations], the following is inserted:

Section 2 of the Act approved August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session).

No tax shall be collected under Title * * * IX of the Social Security Act or under the * * * Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1940, in the employ of the owner or tenant of land, in salvaging timber on such land or clearing such land of brush and other debris left by a hurricane; and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. * * *

ART. 503⅘ [Sec. 400.503⅘, Title 26, Code of Federal Regulations]. *Refund under section 2 of the Act approved August 11, 1939.*—Any tax (including interest or penalty, if any) paid with respect to services rendered prior to January 1, 1940, which are described in section 2 of the Act approved August 11, 1939 (Public, No. 400, Seventy-sixth Congress, first session), may be refunded to the person who paid the amount of such tax to the collector. (See article 206(10) [section 400.206(10), Title 26, Code of Federal Regulations, 1939 Sup.].) No interest shall be allowed or paid by the Government on the amount of any such refund. Every claim for such refund shall be made on Form 843 in accordance with the provisions of this article and article 503 [section 400.503, Title 26, Code of Federal Regulations], relating to refund and credit of taxes erroneously collected. A claim which does not comply with these requirements will not be considered for any purpose as a claim for refund.

(This Treasury decision is issued under the authority contained in section 908 of the Social Security Act (49 Stat., 643; 42 U. S. C., Sup. IV, 1108), and sections 1609 and 3791 of the Internal Revenue Code (53 Stat., Part 1).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 20, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 22, 1939, 12.52 p. m.)

SECTION 1607: Definitions. 1939–36–10004
REGULATIONS 90. T. D. 4931

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER D, PART 400; SUBCHAPTER E, PART 465, SUBPART B.

Regulations 90, as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939–Part 1), 396], amended. Services excepted from "Employment" under section 1607(c) of the Internal Revenue Code (which supersedes section 907(c), Title IX, of the Social Security Act) by reason of the provisions of section 13(a) of the Railroad Unemployment Insurance Act.

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

To Collectors of Internal Revenue and Others Concerned:

Section 13(a) of the Railroad Unemployment Insurance Act, approved June 25, 1938 (52 Stat., 1110; 42 U. S. C., Sup. IV, 1107(c)(8)), provides:

Effective July 1, 1939, section 907(c) of the Social Security Act is hereby amended by substituting a semicolon for the period at the end thereof, and by adding: "(8) service performed in the employ of an employer as defined in the Railroad Unemployment Insurance Act and service performed as an employee representative as defined in said Act."

Section 1607(c) of Subchapter C of Chapter 9 of the Internal Revenue Code, as enacted February 10, 1939 (53 Stat., Part 1), which supersedes section 907(c) of the Social Security Act, provides:

EMPLOYMENT.—The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 22 of the Act of June 20, 1939 (Public, No. 141, Seventy-sixth Congress), provides:

The provisions of the Railroad Unemployment Insurance Act, as herein amended, shall be in full force and effect notwithstanding the enactment of the Internal Revenue Code.

Regulations 90, approved February 17, 1936 (Part 400, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939–1, (Part 1), page 396] (Part 465, Subpart B, of such Title 26), are amended as follows, in order to conform with the above-quoted provisions of law:

(1) Immediately preceding article 1 (section 400.1, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code, the following is inserted:

Section 13(a) of the Railroad Unemployment Insurance Act.

Effective July 1, 1939, section 907(c) of the Social Security Act is hereby amended by substituting a semicolon for the period at the end thereof, and by adding: "(8) service performed in the employ of an employer as defined in the Railroad Unemployment Insurance Act and service performed as an employee representative as defined in said Act."

(2) Article 203 (section 400.203, Title 26, Code of Federal Regulations), article 204 (section 400.204 of such Title 26), article 206 (section 400.206 of such Title 26), article 208 (section 400.208 of such Title 26), and article 211(b)3 (section 400.211(b)3 of such Title 26), as made applicable to the Internal Revenue Code, are each amended by striking out "206(7)," in the parenthetical cross-refer-

ence to articles 206 to 206(7), inclusive, as contained in each of such articles, and by inserting in lieu thereof "206(8)."

(3) Immediately after article 206(7) (section 400.206(7), Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code, the following is inserted:

Section 13(a) of the Railroad Unemployment Insurance Act.

Effective July 1, 1939, section 907(c) of the Social Security Act is hereby amended by substituting a semicolon for the period at the end thereof, and by adding: "(8) service performed in the employ of an employer as defined in the Railroad Unemployment Insurance Act and service performed as an employee representative as defined in said Act."

Section 1, as amended, of the Railroad Unemployment Insurance Act.

For the purposes of this Act, * * *—

(a) The term "employer" means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which 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 the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and by-laws of such organizations.

(b) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act.

(c) The term "company" includes corporations, associations, and joint-stock companies.

* * * * *

(f) The term "employee representative" means any officer or official representative of a railway labor organization other than a labor organization included in the term employer as defined in section 1(a) who before or after August 29, 1935, was in the service of an employer as defined in section 1(a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

* * * * *

(r) The term "Board" means the Railroad Retirement Board.

ART. 206(8) (Section 400.206(8), Title 26, Code of Federal Regulations). *Employees and employee representatives under the Railroad Unemployment Insurance Act.*—Services performed on and after July 1, 1939, in the employ of an "employer" or as an "employee representative," as those terms are defined in the Railroad Unemployment Insurance Act, are excepted.

(4) Immediately preceding the last paragraph of article 300 (section 400.300, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code, the following new paragraph is inserted:

Returns required under Subchapter C of Chapter 9 of the Internal Revenue Code to be made by employers who are also employers as defined in the Railroad Unemployment Insurance Act shall be made in the same manner and at the same time and place as returns are required under such subchapter to be made by other employers subject to such subchapter.

(5) Article 400 (section 400.400, Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code, is amended by adding at the end thereof the following new paragraph:

The tax imposed under Subchapter C of Chapter 9 of the Internal Revenue Code on employers who are also employers as defined in the Railroad Unemployment Insurance Act shall be due and payable in the same manner and at the same time and place as the tax is due and payable by other employers subject to such subchapter.

(This Treasury decision is prescribed pursuant to the following sections of law: Section 1607(c) of the Internal Revenue Code (53 Stat., Part 1), section 13(a) of the Railroad Unemployment Insurance Act (52 Stat., 1110; 42 U. S. C., Sup. IV, 1107(c)8), section 22 of the Act of June 20, 1939 (Public, No. 141, Seventy-sixth Congress), and section 1609 of the Internal Revenue Code (53 Stat., Part 1).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 29, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 31, 1939, 10.41 a. m.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 204: Who are employers.

Administrators—domiciliary and ancillary. (See S. S. T. 380, page 289.)

SECTION 1607: Definitions. 1939–33–9963
REGULATIONS 90, ARTICLE 205: Employed individuals. S. S. T. 372

Vice presidents of the M Corporation are not "honorary" officers within the meaning of Mimeograph 4880 (C. B. 1939–1 (Part 1), 312) and should be included in determining the total number of employees for the purpose of Subchapter C, Chapter 9, of the Internal Revenue Code (formerly Title IX of the Social Security Act).

Advice is requested whether the vice presidents of the M Corporation should be included in the total number of employees in deter-

mining whether the corporation is subject to the tax imposed by Subchapter C, Chapter 9, of the Internal Revenue Code (formerly Title IX of the Social Security Act).

The M Corporation contends that the vice presidents are "honorary" officers and should not be considered as employees of the corporation. It is pointed out that the board of directors of the M Corporation assigned no duties to the vice presidents and that they have performed no physical services for the corporation. It is also stated that they receive no compensation as vice presidents of the corporation, that the purpose of the board of directors in appointing the individuals to such offices was to associate their names with the corporation since they are men of prominence in their respective communities, and that in the event a vice president resigned or died, the vacancy thereby created would not be filled.

Section 1607(h) of Subchapter C, Chapter 9, of the Internal Revenue Code provides that the term "employee" includes an officer of a corporation. In accordance with this provision of law, the officers of a corporation should be included for the purpose of determining whether the corporation employs a sufficient number of employees for the prescribed period to be an employer subject to the tax imposed by Subchapter C, Chapter 9, of the Internal Revenue Code. The fact that the officer does not receive any remuneration or that he performs no physical service for the corporation does not necessarily mean that he is not an employee.

Mimeograph 4880 (C. B. 1939–1 (Part 1), 312), made applicable to Subchapter C, Chapter 9, of the Internal Revenue Code, holds that an "honorary" officer of a corporation may not, in any real sense, be regarded as an officer of the corporation and concludes that an "honorary" officer is not an employee for purposes of the tax imposed under Title IX of the Social Security Act. In determining whether the conclusion reached in Mimeograph 4880 applies in any particular instance, it is necessary to decide whether the individual involved is an "honorary" officer.

In the present case the record does not disclose that the vice presidents of the M Corporation have an honorary status. The offices were created by the by-laws of the corporation. The by-laws provide that each vice president shall have such powers as are incident to the office of vice president and shall perform such duties as may be assigned to him by the board of directors. In the absence or disability of the president, the duties of his office shall be performed by one of the vice presidents.

Under the facts presented, it is held that the vice presidents of the M Corporation are not "honorary" officers within the meaning of Mimeograph 4880. Accordingly, the vice presidents should be included as employees of the M Corporation for purposes of Subchapter C, Chapter 9, of the Internal Revenue Code (formerly Title IX of the Social Security Act).

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

"Research associates" performing services at the National Bureau of Standards. (See S. S. T. 370, page 274.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Information required for rulings as to whether sales agents are "employees." (See Mim. 4767 (rev.), page 276.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Business analyst and consultant. (See S. S. T. 373, page 275.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Orchestra leader contracting with various "purchasers." (See S. S. T. 375, page 280.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Feature performers of the O Circus Co. (See S. S. T. 376, page 286.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 205: Employed individuals.

Sales clerks. (See S. S. T. 377, page 288.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 206(1): Agricultural labor.

Status of services of employees who perform both excepted and nonexcepted services. (See S. S. T. 374, page 290.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 206(5)–(6): Government employees.

Individuals rendering services to the estate of an Indian ward of the United States. (See S. S. T. 378, page 292.)

SECTION 1607: Definitions.
REGULATIONS 90, ARTICLE 207: Wages.

Advances made to employees which they are legally obligated to repay. (See S. S. T. 379, page 293.)

CARRIERS TAXING ACT OF 1937.

REGULATIONS 100.

Applicability of rulings under Carriers Taxing Act of 1937 to Internal Revenue Code. (See C. T. 19, page 294.)

SECTION 1: Definitions.
REGULATIONS 100, ARTICLE 3: Who are employees.

Physicians engaged by railroad company. (See C. T. 18, page 295.)

SECTION 1: Definitions.
REGULATIONS 100, ARTICLE 5: Definition of "compensation."

Taxability of amounts of dues and insurance premiums employees are freed from paying. (See Mim. 4949, page 296.)

SECTION 1: Definitions. 1939-28-9910
REGULATIONS 100, ARTICLE 6: Items included as compensation. C. T. 17

The value of housing accommodations furnished section foremen of the M Railroad Co. as a part of their remuneration, such value being fixed by agreement between the employer and employee, constitutes taxable "compensation" for the purpose of the Carriers Taxing Act of 1937.

Advice is requested whether the value of housing accommodations furnished section foremen under circumstances set forth below constitutes "compensation" within the meaning of section 1(e) of the Carriers Taxing Act of 1937.

It is stated that prior to July —, 19—, it had been the practice of the M Railroad Co. to furnish, wherever practicable, housing accommodations for section foremen since it was desirable to have this class of employees always available, and since, in many cases, the railroad passed through sections of the country where other suitable housing could not be found. The desire of the railroad company to furnish such accommodations to all section foremen was not completely realized and agitation arose among the foremen who were not furnished housing accommodations for an allowance in lieu of such accommodations. As a result of negotiations, an agreement was entered into which specifies the amount of remuneration to be paid to all section foremen. Those who are not furnished housing accommodations are paid $10x$ dollars in cash each month, and those furnished such accommodations are paid $9x$ dollars in cash, it being agreed that the value of the housing accommodations be fixed at x dollars per month.

Section 1(e) of the Carriers Taxing Act of 1937 provides 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, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. Such term does not include

tips, or the voluntary payment by an employer, without deduction from the remuneration of the employee, of the tax imposed on such employee by section 2 of this Act. * * *

Where it is agreed by the employer and employee that housing accommodations of a *fixed* value constitute a part of the employee's total remuneration, it is held that the value of such accommodations constitutes "compensation" for the purpose of the Carriers Taxing Act of 1937. On the other hand, where the employment agreement does not provide, either expressly or impliedly, for the inclusion of a fixed value for housing accommodations as part of the employee's remuneration, such value does not constitute taxable compensation. A determination of whether, in any case, the value of such accommodations constitutes taxable compensation must, of course, be based upon the particular facts of that case.

In the present case the result of the agreement entered into was to establish a certain *money remuneration* for all foremen. In other words, the effect of the agreement was that all foremen would receive the same amount of wages, some foremen receiving all wages in cash, and others in cash and housing accommodations. The fixed value of the housing accommodations so furnished is, in effect, subtracted from the total amount of the foremen's agreed wages in determining the amount of cash compensation to be paid to him. Under the circumstances in this case, it is held that the *fixed* value of the housing accommodations, that is, the difference between the cash payment of wages to those not furnished housing accommodations and the cash payment to those furnished such accommodations, constitutes taxable "compensation" for the purpose of the Carriers Taxing Act of 1937. The conclusions reached are equally applicable to the value of similar items furnished to an employee by his employer.

TAXES UNDER SOCIAL SECURITY ACT.

TITLE VIII.—TAXES WITH RESPECT TO EMPLOYMENT.

REGULATIONS 91.

Social Security Act Amendments of 1939. (See Mim. 4952, page 251.)

REGULATIONS 91.

Applicability of rulings and mimeographs under Social Security Act to Internal Revenue Code. (See S. S. T. 371, page 266.)

REGULATIONS 91, ARTICLES 13½ AND 504½.

Services performed in the employ of foreign governments and instrumentalities, Regulations 91 amended. (See T. D. 4934, page 270.)

REGULATIONS 91, ARTICLES 133¾ AND 504¾.

Salvaging timber and clearing debris left by a hurricane, Regulations 91 amended. (See T. D. 4941, page 272.)

TITLE IX.—TAX ON EMPLOYERS OF EIGHT OR MORE.

REGULATIONS 90.

Social Security Act Amendments of 1939. (See Mim. 4952, page 251.)

REGULATIONS 90.

Applicability of rulings and mimeographs under Social Security Act to Internal Revenue Code. (See S. S. T. 371, page 266.)

REGULATIONS 90, ARTICLES 206(9) AND 503¾.

Services performed in the employ of foreign governments and instrumentalities, Regulations 90 amended. (See T. D. 4933, page 308.)

REGULATIONS 90, ARTICLES 206(10) AND 503⅘.

Salvaging timber and clearing debris left by a hurricane, Regulations 90 amended. (See T. D. 4940, page 311.)

REGULATIONS 90, ARTICLES 211 AND 503½. 1939–38–10023
T. D. 4937

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER D, PART 400.

Regulations 90, as amended, relating to the excise tax on employers under Title IX of the Social Security Act, further amended. Credits against, and refunds of, the tax imposed by Title IX of the Social Security Act for the calendar years 1936, 1937, and 1938.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 90, approved February 17, 1936 [Part 400, Title 26, Code of Federal Regulations], as amended, to section 902 (a), (b), (c), (d), and (h) of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session), such regulations are further amended as follows:

(1) Immediately preceding article 211, as amended by Treasury Decision 4812, approved June 18, 1938 [C. B. 1938–1, 462] [section 400.211, Title 26, Code of Federal Regulations, 1938 Sup.], the following is inserted:

Section 902 of the Social Security Act Amendments of 1939.

(a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be

allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

(1) Before the sixtieth day after the date of the enactment of this Act;

(2) On or after such sixtieth day, with respect to wages paid after the fortieth day after such date of enactment;

(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

(b) Upon the payment of contributions into the unemployment fund of a State which are required under the unemployment compensation law of that State with respect to remuneration on the basis of which, prior to such payment into the proper fund, the taxpayer erroneously paid an amount as contributions under another unemployment compensation law, the payment into the proper fund shall, for purposes of credit against the tax imposed by section 901 of the Social Security Act for the calendar years 1936, 1937, and 1938, respectively, be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made on the date the return for the taxable year was filed under section 905 of the Social Security Act.

(c) The provisions of the Social Security Act in force prior to February 11, 1939 (except the provisions limiting the credit to amounts paid before the date of filing returns), shall apply to allowance of credit under subsections (a), (b), and (h), and the terms used in such subsections shall have the same meaning as when used in Title IX of the Social Security Act prior to such date. The total credit allowable against the tax imposed by section 901 of such Act for the calendar years 1936, 1937, and 1938, respectively, shall not exceed 90 per centum of such tax.

* * * * * * *

(h) Notwithstanding the provision of section 907(f) of the Social Security Act limiting the term "contributions" to payments required by a State law, credit shall be permitted against the tax imposed by section 901 of such Act for the calendar year 1936 or 1937, for so much of any payments made as contributions for such year into the unemployment fund of a State which are held by the highest court of such State not to be required payments under the unemployment compensation law of such State if they are not returned to the taxpayer. So much of such payments as are not so returned shall be considered to be "contributions" for the purposes of section 903 of such Act. The periods of limitations prescribed by section 3312(a) of the Internal Revenue Code shall not begin to run, in the case of the tax for such year of any taxpayer to whom any such payment is returned, until the last such payment is returned to the taxpayer.

* * * * * * *

(2) Article 211, as amended by Treasury Decision 4812, approved June 18, 1938 [section 400.211, Title 26, Code of Federal Regulations, 1938 Sup.], is further amended to read as follows:

ART. 211. *Credit of contributions against tax for calendar years 1936, 1937, and 1938.*—(*a*) *General.*—Subject to the limitations hereinafter prescribed in paragraph (*b*), the taxpayer may credit against the tax for the calendar year 1936, 1937, or 1938 the total amount of his contributions under all State laws which have been found by the Social Security Board to contain the provisions specified in section 903(a) of the Social Security Act; provided that no credit may be taken for a contribution under a State law if such State has not been duly certified for the calendar year to the Secretary by the Social Security Board.

(*b*) *Limitations on allowance of contributions as credit against tax.*—The allowance of contributions as credit against the tax for the calendar year 1936, 1937, or 1938 is subject to the following limitations:

(1) The total credit allowed to any taxpayer for contributions to State unemployment funds with respect to employment during any one year shall not exceed 90 per cent of the tax against which such credit is applied.

(2) The contributions must have been actually paid into the State unemployment fund. Such payment must have been made before October 9, 1939, except that:

(*i*) The contributions with respect to wages paid after September 19, 1939 (for employment during the calendar year 1936, 1937, or 1938), may be paid into the State fund on or after October 9, 1939, subject, however, to the provisions of article 503 of these regulations [section 400.503, Title 26, Code of Federal Regulations], relating to the statutory period of limitations applicable to credits.

(*ii*) The contributions of a taxpayer whose assets, at any time during the period August 11, 1939, to October 8, 1939, inclusive, are in the custody or control of a receiver, trustee, or fiduciary appointed by, or under the control of, a court of competent jurisdiction, may be paid into the State fund at any time, subject, however, to the provisions of article 503 of these regulations [section 400.503, Title 26, Code of Federal Regulations], relating to the statutory period of limitations applicable to credits.

(*iii*) The contributions paid into the unemployment fund of a State which are required under the unemployment compensation law of that State, with respect to remuneration on the basis of which the taxpayer had, prior to such payment, erroneously paid an amount as contributions under another unemployment compensation law, shall be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall be deemed to have been made on the date the return for the taxable year was actually filed under section 905 of the Social Security Act.

(3) The contributions must have been paid with respect to employment as defined in section 907(c) of the Social Security Act, that is, with respect to services performed by an employee within the United States and not excepted by such Act. (See articles 206 to 206(7) [sections 400.206 to 400.206(7), Title 26, Code of Federal Regulations], inclusive.)

(4) The contributions must have been paid with respect to services performed during the calendar year covered by the return.

(*c*) *Contributions.*—The term "contributions" for purposes of credit against the tax means payments required to be made by an employer pursuant to a State law into the unemployment fund of such State, to the extent that such payments are made by the employer without any part thereof being deducted or deductible from the wages of individuals in his employ. Notwithstanding the provision limiting the term to payments required by a State law, the term also includes so much of any payments made as contributions for the calendar year 1936 or 1937 into the unemployment fund of a State which payments are held by the highest court of such State not to be required payments under the unemployment compensation law of such State, as are not returned to the taxpayer.

(*d*) If, subsequent to the filing of the return, a refund is made by a State to the taxpayer of any part of his contributions which had been credited against the tax, the taxpayer is required to advise the Commissioner under oath of the date and amount of such refund and the reason therefor, and to pay the tax, if any, due as a result of such refund, together with interest from the date when the tax was due.

(3) Immediately preceding article 503½, as added by Treasury Decision 4812, approved June 18, 1938 [section 400.503½, Title 26, Code of Federal Regulations, 1938 Sup.], the following is inserted:

Section 902(d) of the Social Security Act Amendments of 1939.

Refund of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under subsections (a), (b), and (h), may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund.

(4) Article 503½, as added by Treasury Decision 4812, approved June 18, 1938 [section 400.503½, Title 26, Code of Federal Regulations, 1938 Sup.], is amended to read as follows:

ART. 503½. *Refund under section 902(d) of the Social Security Act Amendments of 1939.*—(*a*) If the tax against which an amount is allowable as credit under section 902 (a), (b), and (h) of the Social Security Act Amendments of 1939 (see article 211, as amended [section 400.211, Title 26, Code of Federal Regulations, 1939 Sup.]) has been paid without the benefit of such credit, the taxpayer shall be entitled to a refund of the tax equal to the amount of such allowable credit. The taxpayer shall also be entitled to a refund of the amount of interest or penalty, if any, collected from him with respect to the amount of tax refunded. No interest, however, shall be allowed or paid by the Government on the amount of any such refund.

(*b*) Every claim for refund under section 902(d) of the Social Security Act Amendments of 1939 shall be made on Form 843 in accordance with the provisions of this article and article 503 [section 400.503, Title 26, Code of Federal Regulations]. A claim which does not comply with these requirements will not be considered for any purpose as a claim for refund.

This Treasury decision is effective only with respect to the tax imposed by Title IX of the Social Security Act for the calendar years 1936, 1937, and 1938. For provisions with respect to subsequent calendar years, see the Federal Unemployment Tax Act (Subchapter C of Chapter 9 of the Internal Revenue Code, as amended by the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session)).

(This Treasury decision is issued under the authority contained in section 902(c) of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session), and section 908 of the Social Security Act (49 Stat., 643; 42 U. S. C., Sup. IV, 1108); and interprets section 902 (a), (b), (c), (d), and (h) of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session), and sections 902 and 907 of the Social Security Act (49 Stat., 639, 642; 42 U. S. C., Sup. IV, 1102, 1107).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 9, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 12, 1939, 12.48 p. m.)

SECTION 907: Definitions. 1939–27–9902
REGULATIONS 90, ARTICLE 209: Items included as wages. S. S. T. 369

Computation of wages under Title IX of the Social Security Act in the case of a salesman whose expenses for a calendar year exceed the commissions payable for employment within that year.

Advice is requested whether in cases where the expenses of a salesman exceed his commissions for any calendar year it is permissible to carry over and deduct such excess from commissions payable within the succeeding year for the purpose of computing the salesman's taxable wages under Title IX of the Social Security Act for that year.

The term "wages" as defined in section 907(b), Title IX, of the Social Security Act includes "all remuneration for employment." Amounts paid to traveling salesmen or other employees as allowances or reimbursements for traveling or other expenses incurred in the business of the employer constitute wages only to the extent of the excess of such amounts over the expenses actually incurred and accounted for by the employee. (Article 209(c), Regulations 90.) In S. S. T. 28 (C. B. XV–2, 397 (1936)) it was held that where a salesman is paid a certain amount to cover his salary and expenses incurred in his employer's business, the basis for computing the tax imposed by section 901, Title IX, of the Act is the total amount paid or payable minus the expenses actually incurred and accounted for by the salesman. In S. S. T. 365 (C. B. 1939–1, (Part 1), 307) it was held that, for purposes of Title VIII of the Act, the excess of expenses incurred by a salesman within the last quarter of a calendar year over commissions paid within that quarter may not be carried over and deducted from commissions earned within the first quarter of the succeeding calendar year for the purpose of computing the wages of the salesman for that quarter.

Since the tax imposed by section 901, Title IX, of the Social Security Act is specifically levied upon a calendar year basis, it is held that where a salesman's expenses exceed his commissions for any taxable year, such excess may not be carried over and deducted from commissions payable within the subsequent year for the purpose of computing the wages of the salesman for that year. Furthermore, although only the total wages payable by an employer with respect to employment within a calendar year are required to be reported in the return filed for that year, in computing that total, the wages of each individual employee must be separately determined. That is, the employer may not compute the total wages by deducting the total expenses incurred by all employees from the total commissions payable for employment during the year.

MISCELLANEOUS TAX RULINGS.

ESTATE TAX.

INTERNAL REVENUE CODE.

ESTATE TAX—SECTION 813.—CREDITS AGAINST TAX.

REGULATIONS 80(1937), ARTICLE 9(*b*): Credit for estate, inheritance, legacy, or successsion taxes. ARTICLE 82(b): Extension of time for payment of tax attributable to a reversionary or remainder interest.

1939–36–9996
T. D. 4932

Articles 9 and 82 of Regulations 80(1937 Edition) as made applicable to the Internal Revenue Code amended. Credit for estate, inheritance, legacy, or succession taxes.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 80 (Part 80, 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 [C. B. 1939–1 (Part 1), 396] (Part 465, Subpart B, Title 26, Code of Federal Regulations), to the Revenue Act of 1939 (53 Stat., 862), such regulations are amended as follows:

1. Insert immediately preceding article 9(*a*) (section 80.9(a) of such Title 26):

SEC. 403. REVENUE ACT OF 1939.

(a) Section 813(b) of the Internal Revenue Code (relating to the 80 per centum credit for estate, legacy, succession, and inheritance taxes paid) is amended by inserting after "District of Columbia," the following: "or any possession of the United States,".

(b) The amendment made by subsection (a) shall be applicable only with respect to estates of decedents dying after the date of the enactment of this Act.

2. (*a*) Insert immediately following the first sentence of article 9(*b*) (section 80.9(b), Title 26, Code of Federal Regulations):

If the decedent died after June 29, 1939, the credit against the basic Federal estate tax, is, under the same conditions, authorized by section 813(b) of the Internal Revenue Code, as amended by section 403 of the Revenue Act of 1939, for estate, inheritance, legacy, or succession taxes paid to any State or Territory, the District of Columbia, or any possession of the United States.

(*b*) Insert immediately after the comma following the word "Territory" in the first and fourth paragraphs of article 9(*b*), the words "possession of the United States" followed by a comma.

(*c*) Insert immediately after "District of Columbia" in the second paragraph of article 9(*b*):

(or, if the decedent died after June 29, 1939, to any possession of the United States).

(*d*) Insert immediately after the word "Territory" in the sixth paragraph of article 9(*b*) the words "or possession of the United States."

3. Insert in the seventh paragraph of article 82(*b*) (section 80.82, Title 26, Code of Federal Regulations) after the comma following the word "Territories" the words "or possessions of the United States" followed by a comma.

(This Treasury decision is prescribed pursuant to section 813(b) of the Internal Revenue Code (53 Stat., Part 1), as amended by section 403 of the Revenue Act of 1939 (53 Stat., 862), and section 3791(a) of the Internal Revenue Code.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 30, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 31, 1939, 3.40 p. m.)

SECTION 812(d).—NET ESTATE—TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

REGULATIONS 80 (1937), ARTICLE 44: Transfers for public, charitable, religious, etc., uses. 1939–36–10001 E. T. 13

A bequest of a remainder interest in A's estate to the M Association subject to the conditions that the association shall not remove from a certain county or cease to operate for the same purpose as prior to A's death is deductible in determining the value of the net estate of A.

Advice is requested whether, in determining the value of the net estate of A, a resident of Arizona, the bequest hereinafter described is allowable as a deduction under section 812(d) of the Internal Revenue Code.

Section 812(d) provides in part for the deduction from the value of the gross estate of bequests to or for the use of any corporation organized and operated exclusively for charitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

Under the terms of A's will, the residue of his estate is bequeathed in trust for the benefit of his wife and the M Association, a corpora-

tion. The income of the trust is to be paid to the wife for life, and after her death to the M Association so long as the association, as then existing, shall be maintained in N County, and in the event that the association, as then existing, shall be removed from N County or shall cease to operate as an association for the care and maintenance of orphan children, the trust shall cease and the principal thereof shall be distributed to A's heirs. The association had been maintaining a home in N County, Ariz., for orphan children prior to and at the time of A's death.

The question is whether the possibility that the M Association may remove from N County, or cease to operate as an association for the care and maintenance of orphan children, affects the deductibility of the bequest of the remainder interest in determining A's net estate.

Inasmuch as the M Association had been operating a home for orphan children in N County prior to, and at the time of, A's death, it evidently was the intention of A that the income of the trust should be paid to the association so long as it continued to operate in N County for the same purposes it had operated up to A's death. There is no evidence of any act or omission on the part of the association which would give the trustee any right to claim a forfeiture of the bequest.

The M Association, by virtue of A's will, has a vested remainder in the trust income subject to being divested by reason of its removal from N County or the cessation of its operation of a home for orphan children, which are conditions subsequent. (See *Fargason* v. *Commissioner*, 21 B. T. A., 1032, acquiescence, C. B. X-2, 22 (1931).) Conditions subsequent are those whose effect is not produced until after the vesting of the estate. " * * * a condition subsequent defeats the estate in case it does not happen or is not performed." (*United States* v. *Fourth National Bank in Wichita, Kans.*, 83 Fed. (2d), 85.) In 107 A. L. R., 803, appears the following annotation to the decision cited above:

> Where the conditions and circumstances were such that the value of the conditional gift or bequest could be reasonably ascertained by recognized methods from known data, or the contingency which might defeat it was so remote and wholly improbable that the uncertainty was not "appreciably greater than the general uncertainty that attends human affairs," the amount of such gift or bequest has generally been held to be deductible. See, for example, *Ithaca Trust Co.* v. *United States* (1929) (279 U. S., 151, 73 L. ed., 647, 49 S. Ct., 291 [Ct. D. 61, C. B. VIII-1, 313 (1929)]); *United States* v. *Provident Trust Co.* (1934) (291 U. S., 272, 78 L. ed., 793, 54 S. Ct., 389 [Ct. D. 797, C. B. XIII-1, 365 (1934)]); *First Nat. Bank* v. *Snead* (1928; C. C. A. 5) (24 F. (2d), 186).

(See also *Lucas* v. *Mercantile Trust Co.*, 43 Fed. (2d), 39.)

Under the facts presented in this case, it is held that the bequest of the remainder interest to the M Association is deductible in determining the value of the net estate of A.

SECTIONS 862 AND 863.

REGULATIONS 80 (1937), ARTICLE 50: Situs of property. 1939–48–10110 T. D. 4956

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 80.—ESTATE TAX.

Article 50, Regulations 80 (1937 edition), amended.—Situs of property.

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

To Collectors of Internal Revenue and Others Concerned:

Article 50 of Regulations 80, 1937 edition (section 80.50 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 [C. B. 1939–1 (Part 1), 396] (Part 465, Subpart B, of such Title 26), is hereby amended to read as follows:

ART. 50. *Situs of property.*—Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespective of where the certificates thereof are physically located.

Intangible personal property the written evidence of which is not treated as being the property itself constitutes property within the United States if consisting of a property right issuing from or enforcible against a resident of the United States or a domestic corporation (public or private), if not subject to the exception prescribed in section 303(e). Under the provisions of that section the amount receivable as insurance upon the life of a nonresident decedent (nonresident alien decedent, if death occurred after the enactment of the Revenue Act of 1934), and moneys deposited by or for such a decedent, who was not engaged in business in the United States at the time of his death, with any person carrying on the banking business, shall not be deemed property within the United States.

Property of which the decedent has made a transfer taxable under the provisions of article 15 is deemed to be situated in the United States if so situated either at the time of the transfer or at the time of the decedent's death. (See articles 15 to 21, inclusive.)

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 862, 937, and 3791(a)1 of the Internal Revenue Code (53 Stat., Part 1); section 303(d) of the Revenue Act of 1926 (44 Stat., 72), as amended by section 403(d) of the Revenue Act of 1934 (48 Stat., 753; 26 U. S. C., 462); 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 November 20, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register November 21, 1939, 12.56 p. m.)

TITLE III.—ESTATE TAX. (1926)

SECTION 302(g).

REGULATIONS 70 (1929), ARTICLE 25: Taxable insurance. 1939-33-9956 Ct. D. 1413

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GROSS ESTATE—INSURANCE PROCEEDS—PREMIUMS PAID BY PLEDGEE.

The decedent and his wife entered into an agreement with a corporation of which he was president, whereby insurance policies on his life, issued in the usual form and naming his wife as beneficiary, with reservation of the right to change such designation, were pledged to the corporation as collateral security for payment of the premiums by the pledgee until the insured attained the age of 40 years, or until he died, if that event should first occur; it being agreed that if he should die before reaching that age, the pledgee should be paid from the insurance proceeds the amount of all the premiums which it had paid, with interest, and $25,000 in addition, and that if the insured should reach the age of 40, he and his wife should then pay to the pledgee the amount of all premiums paid by it, with interest, and that thereafter the pledgee should have no further interest in the policies. The insured died before attaining the age of 40, and the beneficiary paid to the pledgee the amounts agreed upon. *Held:* That the insured retained title to the policies, with all the legal incidents of ownership, until his death; that the payment of premiums must be attributed to the insured, who owned and pledged the policies, and not to the beneficiary or to the pledgee; and that the policies were "taken out" by the insured, within the meaning of section 302(g) of the Revenue Act of 1926 and the applicable regulations, so that that portion of the proceeds receivable by the beneficiary in excess of the statutory exemption was required to be included in the gross estate of the decedent.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1937) (36 B. T. A., 1138) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Helen H. Nelson, Administratrix of the Estate of Frank R. McDermand, Jr., Deceased, petitioner, v. *Commissioner of Internal Revenue, respondent.*

[101 Fed. (2d), 568.]

On petition to review decision of the United States Board of Tax Appeals.

Before SANBORN, WOODROUGH, and THOMAS, Circuit Judges.

[February 23, 1939.]

OPINION.

SANBORN, Circuit Judge, delivered the opinion of the court.

This is a petition to review a decision of the Board of Tax Appeals redetermining a deficiency in the Federal estate tax due upon the estate of Frank R. McDermand, Jr., deceased, resulting from the failure of the petitioner to include proceeds of certain policies of life insurance in gross estate. (36 B. T. A., 1138.)

Frank R. McDermand, Jr., the insured under six policies of life insurance aggregating $200,000 in face value, which were pledged to the Columbian Hog & Cattle Powder Co., a Missouri corporation of which he was president, died July 3, 1931, at the age of 30 years. His wife, Helen McDermand (now Helen H. Nelson), was the beneficiary under each of the policies, and received the

proceeds. She paid to the pledgee, from the proceeds of the policies, $18,846.68, the amount of premiums which it had paid with 5 per cent interest, and $25,000 in addition. These payments were made in fulfillment of an agreement which she and her husband had made with the pledgee August 8, 1929 (amended April 26, 1930).[1] In substance, the agreement was that the pledgee should pay all premiums upon these policies until the insured reached the age of 40 years or until he died if that event should first occur; that if he died before he was 40 years of age, the pledgee should be paid, out of the proceeds of the insurance, all premiums which it had paid, with interest at 5 per cent per annum, and $25,000 in addition; that if the insured lived until he was 40 years of age, he and his wife should then pay to the pledgee all premiums paid by it, with interest, and that, upon such payment being made, the pledgee should have no further interest in the policies.

Three of the pledged policies, aggregating $100,000 in face value, had been applied for and issued to the insured several months before the pledge agree-

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[1] Articles of agreement, made and entered into this 8th day of August, 1929, by and between Columbian Hog & Cattle Powder Co., a corporation organized and existing under the laws of the State of Missouri, of the first part, and Frank R. McDermand, Jr., and Helen McDermand, his wife, of the second part, all of Kansas City, Mo., witnesseth:

Whereas the recent death of Frank R. McDermand, Sr., has made necessary new management of first party, of which Frank R. McDermand, Jr., is president, as the successor of Frank R. McDermand, Sr.; and

Whereas for the next several years the death of the said Frank R. McDermand, Jr., would be a serious loss to first party; and

Whereas Frank R. McDermand, Jr., one of the second parties, is desirous of having his life insured in favor of his wife, Helen McDermand, the other of said second parties, and desires the aid of first party in providing for and paying the premiums on such insurance.

Now, Therefore, for and in consideration of the sum of one dollar ($1) each to the other in hand paid, the receipt of which is hereby acknowledged, and of the mutual covenants and agreements herein made, It is Agreed by and between the parties hereto as follows, to wit:

1. The said Frank R. McDermand, Jr., one of second parties, agrees to procure and have his life insured in approved and recognized old line life insurance company or companies, in the sum of one hundred seventy-four thousand five hundred dollars ($174,500), payable to Helen McDermand, his wife, the other of second parties.

2. The premiums on said insurance from year to year until the death of the said Frank R. McDermand, Jr., or until such time as he attains the age of 40 years, shall be paid by first party.

3. Should the said Frank R. McDermand, Jr., die at or prior to attaining the age of 40 years, it is agreed that there shall be paid to first party, from and out of the insurance hereinabove mentioned, the following items:

(*a*) The sum of twenty-five thousand dollars ($25,000).

(*b*) A sum equivalent to all premiums on said insurance paid by first party.

(*c*) Interest upon all premiums aforesaid paid by first party from the date of the respective payments, at the rate of five per cent (5%) per annum.

And it is agreed that the beneficiary under the terms of the policies aforesaid, shall come into possession of and hold the amount necessary to meet the aforesaid items (*a*), (*b*), and (*c*), as trustee for first party; and promptly upon receipt thereof from the insurance company or companies, she agrees to pay the same to first party, and said policies of insurance shall be, and hereby are pledged, as collateral security to said payment so to be made to first party. The balance of said insurance shall be the absolute property of the beneficiary under the provisions of said policies of insurance.

4. Should the said Frank R. McDermand, Jr., live to attain the age of 40 years, then, and at that time, the parties of the second part agree to and shall pay first party, its successors or assigns, a sum of money equivalent to all sums paid by first party to and upon the premiums for insurance aforesaid, together with interest thereon at the rate of five per cent (5%) per annum from the date of the respective premium payments; and upon the said Frank R. McDermand, Jr., attaining the age of 40 years the said first party shall be under no obligation to make any further or additional premium payments on said insurance, and thereafter, and upon receiving payment as aforesaid, it shall have no right, title nor claim in and to said insurance or any of the proceeds arising therefrom, but the whole of said policy or policies shall be paid as per the terms of said policy or policies, and this contract shall thereafter be null and void.

In witness whereof, the said Columbian Hog & Cattle Powder Co. has caused these presents to be signed by its president and attested by its secretary and the corporate seal to be hereto attached, and the said second parties have hereto set hands and seals on the day and year first above written.

COLUMBIAN HOG & CATTLE POWDER CO.
By [Signature of parties.]

It being to the mutual interest of the undersigned, and in consideration of one dollar ($1) each to the other in hand paid, the receipt of which is hereby acknowledged, it is agreed that the insurance provided for in paragraph 1 of the within contract may be increased from one hundred seventy four thousand five hundred dollars ($174,500) to two hundred thousand dollars ($200,000); the said insurance being in all respects subject to the terms and provisions of the within contract bearing date August 8, 1929.

Done this 26 day of April, 1930.

COLUMBIAN HOG & CATTLE POWDER CO.
By [Signature of parties.]

ment was made. The other three policies were all applied for by, and issued to, the insured during the eight months subsequent to that time. The policies were 20-payment life policies in the usual form, reserving to the insured the right to change the beneficiary and providing loan and surrender values after three years. They were assignable without the consent of the beneficiary.

The question presented is whether the six policies in suit were "taken out" by the insured, so that that portion of the insurance receivable by the beneficiary in excess of $40,000 was required to be included in gross estate, by virtue of the provisions of section 302(g) of the Revenue Act of 1926 [ch. 27, 44 Stat., 9, 70–71; 26 U. S. C., section 441(g)] and the applicable Treasury regulations.[2]

The petitioner contends that when the insured entered into the pledge agreement and secured its fulfillment by delivering the policies to the pledgee, he no longer had any interest in them transferable by death, and that none of the premiums were paid by him either directly or indirectly. The respondent contends that the insured, in effect, borrowed the money with which the premiums were paid, and remained the owner of the policies, and that his death resulted in terminating substantial rights under the policies.

Reduced to its simplest terms, it seems to us that this is a plain case of an insured pledging his policies of insurance as security for the payment of premiums which he would otherwise have to pay himself. Whether the arrangement constituted the insured a debtor of the pledgee in a strict and technical sense, we regard as of no substantial importance. The pledgee contracted that there should be repaid to it by the insured and his wife or from the proceeds of the policies the moneys which it advanced for premiums. It charged these premium payments upon its books to "The Frank R. McDermand, Jr., Insurance Account." If the insured did not contract a debt, he at least assumed an obligation that the amount advanced by the pledgee for premiums should be repaid and that it should retain possession of the policies until it was repaid.

It must be remembered that substance, not form, should control in the application of taxing statutes. (*United States* v. *Phellis*, 257 U. S., 156, 168 [T. D. 3270, C. B. 5, 37 (1921)]; *S. A. MacQueen Co.* v. *Commissioner* (3 Cir.), 67 F. (2d), 857, 858; *Lonsdale* v. *Commissioner* (8 Cir.), 32 F. (2d), 537, 539 [Ct. D. 93, C. B. VIII–2, 237 (1929)]; *Helvering* v. *Gordon* (8 Cir.), 87 F. (2d), 663, 666; *Sanborn* v. *Commissioner* (8 Cir.), 88 F. (2d), 134, 137.)

The insured retained the title to these policies subject to the pledge agreement. The rights of the beneficiary, which were contingent under the terms of the policies, were not enlarged by the pledge agreement. The fact that the insured, by pledging his policies for all or more than they were worth, made it impracticable to surrender them for cash, to secure policy loans, or even to change the beneficiary, is, we think, unimportant in determining whether the proceeds receivable by the beneficiary were to be included in the insured's

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[2] SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Treasury Regulations 70 (1929 Ed.):

ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (*a*) All insurance receivable by, or for the benefit of, the estate; (*b*) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid.

ART. 27. *Insurance receivable by other beneficiaries.*—All insurance in excess of $40,000 receivable by beneficiaries other than the estate, regardless of when taken out, must be included in the gross estate where the decedent during his life retained legal incidents of ownership in the policies of insurance, as, for example, a power to change the beneficiary, to surrender or cancel the policies, to assign them, to revoke an assignment of them, to pledge them for loans, or to dispose otherwise of them and their proceeds for his own benefit, * * *.

gross estate. It is, of course, true that any collateral which, to the extent of its full value, is pledged to secure a loan, is, as a practical matter, not usable as security for another loan, but it still belongs to the pledgor and remains a part of his estate, subject to the rights of the pledgee.[3]

So in this case the insured retained title to the policies, with all the incidents of ownership. Not until his death did the rights of the beneficiary become vested. Then for the first time, it became certain that the insured would never change the beneficiary, that he would never surrender the policies for cash, or cancel them, or again pledge them as security for a loan. The termination by death of the legal incidents of ownership, which freed the beneficiary from the possibility of their exercise, was a transfer justifying the inclusion in gross estate of so much of the proceeds of these policies as was receivable by the beneficiary in excess of the statutory exemption. (*Chase Nat. Bank* v. *United States*, 278 U. S., 327, 335 [Ct. D. 40, C. B. VIII–1, 308 (1929)]; *Walker* v. *United States* (8 Cir.), 83 F. (2d), 103, 108; *Brown* v. *Commissioner* (6 Cir.), 95 F. (2d), 184, 188; *Igleheart* v. *Commissioner* (5 Cir.), 77 F. (2d), 704, 711 [Ct. D. 1089, C. B. XV–1, 351 (1936)].)

Moreover, we think that the payment of the premiums upon these policies must be attributed to the insured, who owned and pledged them, and not to the beneficiary or to the pledgee. For that reason, also, the insurance is to be regarded as having been "taken out" by the insured. (*Lang* v. *Commissioner*, 304 U. S., 264, 268–270; *Bank of America* v. *Commissioner* (9 Cir.), 90 F. (2d), 981, 983 [Ct. D. 1298, C. B. 1938–1, 504]; *Walker* v. *Commissioner* (8 Cir.), 83 F. (2d), 103, 109; *Helvering* v. *Reybine* (2 Cir.), 83 F. (2d), 215, 216–217; *Wilson* v. *Crooks* (D. C.), 52 F. (2d), 692, 695.)

The order of the Board is affirmed.

REGULATIONS 70 (1929), ARTICLE 25: Taxable insurance. 1939–50–10118 Ct. D. 1429

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GROSS ESTATE—PAYMENT TO BENEFICIARIES UNDER ANNUITY CONTRACT NOT EXEMPT FROM TAXATION AS LIFE INSURANCE.

A contract entered into between the decedent and the Sun Life Assurance Co. of Canada whereby, in consideration of a single payment of $42,000, the company agreed to pay to the decedent an annuity of $1,400 during his life, to pay to him or his assigns the sum of $40,000 at any time upon surrender of the contract, or to pay to beneficiaries named in the contract at least the principal sum of $40,000 upon proof of decedent's death, is an annuity or investment contract and not a life insurance contract, and the amount paid to the beneficiaries pursuant to the terms of the contract is therefore includible in the gross estate of the decedent for estate tax purposes.

2. DECISION AFFIRMED.

Decision of the United States Board of Tax Appeals (1938) (37 B. T. A., 435) affirmed.

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[3] A pledge is a contract for the delivery of personalty, to be retained by the pledgee as security for the performance of some obligation due from the pledgor; the legal title remaining in the pledgor and possession only passing to the pledgee, who has special property in the thing pledged until the obligation secured is satisfied. (*Tennent* v. *Union Cent. Life Ins. Co.*, 133 Mo. App., 345, 112 S. W., 754, 759–760; *Milliken-Helm Commission Co.* v. *C. H. Albers Commission Co.*, 244 Mo., 38, 147 S. W., 1065, 1067; *Neal* v. *Heinrichs* (Mo. App.), 259 S. W., 492, 494; *Williams* v. *Schmeltz* (Mo. App.), 14 S. W. (2d), 966, 967; *New York Life Ins. Co.* v. *Rees* (8 Cir.), 19 F. (2d), 781, 784; *Insurance Co.* v. *Kiger*, 103 U. S., 352, 356; 21 R. C. L., sections 1, 5, 7, pages 630–638.) The obligation or debt is an essential element of the pledge. (*Insurance Co.* v. *Kiger*, supra, 356.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Old Colony Trust Co. et al., Executors, of the Will of Everett Morss, petitioner for review, v. Commissioner of Internal Revenue.

[102 F. (2d), 380.]

Petition for review of a decision of the United States Board of Tax Appeals.

Before BINGHAM, WILSON, and BREWSTER, JJ.

[March 2, 1939.]

OPINION.

BREWSTER, J.: This is a petition for review of a decision of the United States Board of Tax Appeals, determining a deficiency in the estate tax liability of the estate of which the petitioners are executors. The question is whether a sum of money paid to the beneficiaries pursuant to a policy issued by the Sun Life Assurance Co. of Canada should be included in the gross estate of the decedent.

The decedent, Everett Morss, died December 27, 1933.

On August 27, 1928, the Assurance company entered into a written contract with Morss. The contract, therein termed a "policy," provided that in consideration of the payment of a single premium of $42,000 the company would pay to the decedent (therein called "the annuitant") a yearly annuity of $1,400 during his lifetime, and would pay at his death to the beneficiaries named in the policy the greater of two amounts—first, the principal sum of $40,000 together with a proportionate part of the annuity payment for the fractional period between the date of the last annuity payment and the date of death, or, second, a sum equal to the premium paid for the policy less the sum of all annuity payments which should have been made under it; all annuity payments, including the proportionate payment on the death of the annuitant, to be increased by such dividends as might be allotted by the company out of its surplus interest earnings. The beneficiaries were the decedent's three children, and it was provided "that should any child have predeceased the annuitant, his or her share shall be paid to his or her legal wife or husband, if any, otherwise to the executors, administrators or assigns of the annuitant." In lieu of payment in one sum of the amount payable at death, options were given for alternative methods of settlement by annuity or installment payments.

The age of the decedent was stated in the policy as 63. The policy was stated to be issued in consideration of the representations and agreements contained in the written application therefor, and it was provided that if the age of the annuitant had been misstated, the amount payable should be such sum as the premium paid would have purchased according to the rate at the true age. The policy contained a provision permitting its surrender to the company at any time for an amount equal to the principal sum, and the company agreed that it would advance to the annuitant, upon proper assignment of the policy, any amount not exceeding the cash value of the policy. There was a provision also permitting the annuitant to change the beneficiaries. The contract was described as "Life Annuity Principal Sum Payable at Death—Single Premium—Annual Dividends."

After the death of the decedent, the Assurance company in due course paid to his three children the sum of $40,994.20. Of this amount, $40,000 was the principal sum under the policy and $994.20 was accrued annuity.

The petitioners, in their Federal estate tax return, reported the receipt of said sum of $40,994.20 as insurance on the life of the decedent, payable to the named beneficiaries, and excluded the amount of $40,000 as "Insurance receivable by beneficiaries other than the estate not in excess of $40,000."

The Commissioner added to the value of the gross estate the amount of $40,000, having concluded that the agreement under which the payment was made was not a policy of insurance but an annuity contract, and as such was taxable to the estate.

The Board of Tax Appeals held that the Commissioner was correct in including that amount in the gross estate.

It was stipulated between the parties in the proceedings before the Board that the following facts should be deemed to be true for the purposes of the appeal.

The consideration paid by the decedent for the issue of the contract was allocated by the Sun Life Assurance Co. of Canada on an actuarial basis, a portion of such consideration being treated as an amount paid for a life annuity during the life of the decedent and the other portion of such consideration as an amount paid as a single premium for a paid-up life insurance policy on the life of the decedent. Subject to only minor variations, the amounts so allocated accord with the published premium rates of the Sun Life Assurance Co. of Canada for the issue of such life annuity and life insurance contracts respectively, issued in each instance to a male person of the age of the decedent.

Contracts of the type issued by the Sun Life Assurance Co. of Canada to the decedent, in August, 1928, were commonly written at that time by the Sun Life Assurance Co. of Canada and by numerous other insurance companies. An actual allocation of the consideration paid for the issue of such contracts is customarily made by the Sun Life Assurance Co. of Canada and by other insurance companies writing similar contracts, the method of allocation employed and the results of such allocation being substantially as set forth above with respect to the allocation of the consideration paid under the contract of the decedent.

The Commissioner reserved the right to object to these facts as being irrelevant and immaterial, and the Board apparently deemed them immaterial.

The statute upon which petitioner relies is section 302(g) of the Revenue Act of 1926 (26 U. S. C. A., 411) which provides for the inclusion in a decedent's gross estate of the excess over $40,000 of the amount receivable by all beneficiaries, other than decedent's estate, "as insurance under policies taken out by the decedent upon his own life." The case turns upon the question whether the contract described above was a contract of life insurance or an annuity or investment contract. The Board of Tax Appeals held that the contract made by the decedent was not a contract of life insurance. In its opinion it said:

"This seems evident from reading the contract. Further, there is no evidence that decedent applied for life insurance or submitted to the usual physical examination. The company appears to have been unconcerned with the element of life expectancy or physical condition, even though decedent was 63 years of age at the time he made the contract. The single payment in the amount of $42,000 does not appear to have been a 'premium' for life insurance. It was not consideration given for an agreement to indemnify against the loss of life nor does the amount of the payment appear to have been proportioned to any life insurance risk."

As the Board of Tax Appeals pointed out, the company agreed to pay "the annuitant" the amount of $1,400, annually, for life, to be increased by such dividends as may be allotted by the company out of its surplus interest earnings; to pay to the annuitant or his assigns $40,000, *at any time* upon surrender of the contract; to pay to the beneficiaries of the annuitant at least the principal sum of $40,000 upon proof of death of the annuitant. The amount of the annuity agreed to be paid is 3½% (three and one-half per cent) of the principal amount. Thus it appears that the company guaranteed to the annuitant a return of 3⅓% (three and one-third per cent) on the total amount paid to the company and a return of at least the principal amount of $40,000 either to the annuitant or his assigns during his life, on surrender of the "policy," or to his beneficiaries upon his death. The Board, in its opinion, added that:

"The death of the annuitant operated to terminate the contract rather than cause an insurer's obligation to become payable. The company had an obligation at all times to pay the principal sum set forth in the contract conditioned only on the surrender thereof. Death of the annuitant was not the sole contingency for payment of the principal sum."

We are of the opinion that the decision of the Board of Tax Appeals was correct. A contract of insurance is generally regarded as one whereby, for a stipulated consideration, a party undertakes to indemnify another against loss by a specified contingency or peril, called a "risk." In the case of life insurance, the contingency is the death of the insured. The contract now under consideration does not present the essential requisites of life insurance. There is no undertaking by the company to indemnify anyone for a loss. The extent of its liability for the principal sum was not contingent upon the event of death. That event only determined the time when and the persons to whom the sum advanced was to be repaid. The petitioner argues that the company assumed a risk, but we have difficulty in discovering any risk which was dependent upon the duration of the life of the insured. To go to realities, we are confronted

with a case where the decedent turned over to the company $42,000 and took the company's agreement that it would return $40,000 at any time he or his assigns so requested, and in the meantime would pay to him an amount equal to 3½% (three and one-half per cent) of that sum so long as the company retained it. It is true the company made the further agreement that upon the decedent's death the $40,000 was to be paid over to the beneficiaries. We do not think that such an undertaking involved the kind of risk which characterizes life insurance.

It is the petitioner's contention that the policy combines an annuity feature and a life insurance feature, and, so far as it provides for a payment of the principal sum on the death of the insured, it is a contract of life insurance. This contention is not sound because the obligations of the company were such that the investment feature predominates and gives character to the contract. In other jurisdictions, there is authority for the proposition that annuity and investment contracts are not life insurance contracts, even though provision is made for the payment to beneficiaries named. (*State ex rel. Thornton* v. *Probate Court*, 186 Minn., 351; *In re Walsh*, 19 F. Supp., 567; *Moskowitz* v. *Davis*, 68 F. (2d), 818; *Carroll* v. *Equitable Life Assurance Society of the United States*, 9 F. Supp., 223.)

Moskowitz v. *Davis*, supra, was a case where a single premium had been paid for an agreement to pay a specified sum at a future date. If the policyholder died before that date, the sum of the premiums paid was to be paid to his son. In the course of the opinion, the court said:

"We think the contract simply represents an investment or pure endowment with provision for the return of premiums rather than life insurance."

The mere fact that the company agreed to pay over to named beneficiaries the principal of $40,000 upon the annuitant's death is not sufficient to justify giving to a purely investment contract the attributes of life insurance in the absence of the essential requisite of such insurance.

We are not able to see resemblance between the policy which is the subject of this controversy and policies before the court in *Helvering* v. *Inter-Mountain Life Insurance Co.* (294 U. S., 686) and *Helvering* v. *Illinois Life Insurance Co.* (299 U. S., 88), but it may be noted that the court, in applying provisions of the income tax laws, drew a clear distinction between liability arising from death of the insured and liability which could not be attributed to life insurance risk.

The petitioner has assigned as error the refusal of the Board of Tax Appeals to receive in evidence the facts stipulated to be true, as recited above. On the particular facts of this case, we agree that the question presented could well be determined with reference to the provisions of the contract without recourse to accounting or actuarial practices of the Sun Life Assurance Co. or of any other company issuing similar policies.

The order or decision of the Board of Tax Appeals is affirmed.

SECTION 303(a)3 OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 807 OF THE REVENUE ACT OF 1932, AND SECTIONS 403 AND 406 OF THE REVENUE ACT OF 1934.

REGULATIONS 80 (1937), ARTICLE 44: Transfers for public, charitable, religious, etc., uses. 1939-32-9951 E. T. 12

Where the corpus of the trust, from which charitable bequests under the will of A are payable, may be used in whole or in part for the comfort, support, maintenance, and/or happiness of the testator's widow, the bequests are not deductible from the gross estate for Federal estate tax purposes.

Advice is requested whether in determining the value of the net estate of A, a resident of Massachusetts who died on May 3, 1936, the bequests hereinafter described are allowable as deductions under section 303(a)3 of the Revenue Act of 1926, as amended by section 807 of the Revenue Act of 1932 and sections 403 and 406 of the Revenue Act of 1934.

Section 303(a)3 of the Revenue Act of 1926, as amended, provides in part for the deduction from the value of the gross estate of bequests to or for the use of any corporation organized and operated exclusively for charitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda.

Under the terms of A's will, the residue of his estate was bequeathed in trust for the benefit of his widow for life, with remainders in part to his children for life and in part to designated charitable corporations.

The will provides in part as follows:

> My said trustee shall also have the right to pay to, or for the benefit of my said wife * * * such sum or sums from the principal of the trust fund and at such time or times as my said trustee shall in its sole discretion deem wise and proper for the *comfort, support, maintenance, and/or happiness of my said wife*, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife * * * my said trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust. [Italics supplied.]

The question is whether the fact that the bequests to the charitable corporations are subject to diminution through the use of a part or the whole of the trust corpus for the "comfort, support, maintenance, and/or happiness" of A's widow affects the deductibility of the bequests in determining the net estate.

It is to be noted that under the will the corpus of the trust may be used in whole or in part by the trustee in its discretion not only for the comfort, support, or maintenance of the decedent's widow but also for her happiness, and that the trustee shall exercise its discretion with liberality and consider the widow's welfare, comfort, and happiness prior to claims of the other beneficiaries.

In construing a provision in the will of a resident of Connecticut authorizing the trustee to pay over to the testator's widow such part of the principal of the trust fund which may be deemed necessary or advisable for her comfortable maintenance and support, the Circuit Court of Appeals for the Second Circuit stated that "the question depends upon how the courts of Connecticut interpret such a provision." (*Hartford-Connecticut Trust Co.* v. *Eaton*, 36 Fed. (2d), 710.) The decedent in the instant case was a resident of Massachusetts on the date of his death. The decision of the Supreme Judicial Court of Massachusetts in *Dana* v. *Dana* (185 Mass., 156, 70 N. E., 49, 50) construed language similar to that in the will now under consideration. That decision is summarized by the Supreme Court of Illinois in *Rock Island Bank & Trust Co.* v. *Rhoads* (353 Ill., 131, 187 N. E., 139), wherein the court held that the word "comfort" must be construed as relating to support and ease, and that the word "satisfaction" was a word of wider meaning and must be construed as intending more than support and comfort. The court said in part as follows:

> The language in this will is not unlike that considered in *Dana* v. *Dana* (185 Mass., 156, 70 N. E., 49, 50). The will in that case gave to the widow power to sell so much of the corpus of the estate as she thought necessary "for her own comfort and happiness." It was there held that the power of dis-

posal given was not alone for her comfortable physical support and existence, though such was undoubtedly in the mind of the testator, but in addition she was to spend and enjoy in the largest manner for her happiness. It was there said: "If, through reasons of religion or of benevolence, and for her mental satisfaction, she chose to devote any part of the estate left to her in aid of either charitable or philanthropic objects, there is nothing in the terms of his will that restricts her from making such use of the principal. If the testator did not care to confine her discretionary powers, there is no duty incumbent on us to seek for reasons to limit their exercise." So, in this case, power to dispose of the principal of the estate as she shall deem necessary to her satisfaction may properly be said to include such religious or charitable donations or gifts as she might choose to make from the corpus, and where such is not for the purpose of building up her separate estate.

(See also *Lord* v. *Roberts*, 84 N. H., 517, 153 A., 1; *Colburn* v. *Burlingame*, 190 Cal., 697, 214 P., 226; *Knoernschild et al.* v. *Commissioner*, 97 Fed. (2d), 213; *Philip W. Blood et al., Executors*, v. *Commissioner*, 22 B. T. A., 1000; *Humes* v. *United States*, 276 U. S., 487; *Gage et al.* v. *O'Neill*, 78 N. H., 539, 103 A., 262; *McDonald, Executor*, v. *Welch*, 17 Fed. Supp., 549.)

The fact that the widow had funds of her own sufficient for her support does not change the legal force of the language employed by the testator or cut down his clearly expressed intention by making his purpose depend in any degree upon the fact that she possessed a separate estate. (*Dana* v. *Dana*, supra.)

In view of the foregoing, it is held that the bequests here involved are not deductible in determining the value of the net estate of A for the reason that the right of the trustee to invade the corpus of the trust in favor of the widow makes the amount of the bequests so uncertain as to be unascertainable as of the date of A's death.

GIFT TAX.

INTERNAL REVENUE CODE.

SECTION 1005.—GIFTS MADE IN PROPERTY.

REGULATIONS 79 (1936), ARTICLE 18: Situs of property — 1939–48–10109 T. D. 4955

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 85.—GIFT TAX.

Article 18, Regulations 79, amended.—Situs of property.

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

To Collectors of Internal Revenue and Others Concerned:

The second paragraph of article 18 of Regulations 79, 1936 edition (section 85.18 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 [C. B. 1939–1 (Part 1), 396] (Part 465, Subpart B, of such Title 26), is hereby amended to read as follows:

Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespective of where the certificates thereof are physically located. (See section 531(b).) Intangible personal property the written evidence of which is not treated as being the property itself constitutes property within the United States if consisting of a property right issuing from or enforcible against a resident of the United States or a domestic corporation (public or private), irrespective of where such written evidence is physically located.

(This Treasury decision is prescribed pursuant to the following sections of law: Sections 1030(b) and 1029 of the Internal Revenue Code (53 Stat., Part 1); and sections 531(b) and 530 of the Revenue Act of 1932 (47 Stat., 259; 26 U. S. C., 580, 579).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 20, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register November 21, 1939, 12.56 p. m.)

TITLE III.—GIFT TAX. (1932).

SECTION 501.—IMPOSITION OF TAX.

REGULATIONS 79(1933), ARTICLE 3: Transfers in trust. 1939–47–10095 Ct. D. 1425

GIFT TAX—REVENUE ACT OF 1932—DECISION OF SUPREME COURT.

1. TRANSFER IN TRUST—RESERVATION OF POWER TO CHANGE BENEFICIARIES.

The transfer of remainder interests resulting from the creation of a trust by a donor who retains a life estate, with reservation to himself of a power to change the beneficiaries of the trust but without power to increase his own beneficial interest in the trust property, does not constitute a completed gift at the time of the creation of the trust and is not subject to the gift tax imposed by the Revenue Act of 1932.

2. DECISION AFFIRMED.

Decision of the United States Circuit Court of Appeals, Second Circuit (1939) (101 F. (2d), 1012), affirmed.

SUPREME COURT OF THE UNITED STATES.

Almon G. Rasquin, Collector of Internal Revenue of the United States for the First District of New York, petitioner, v. *George Arents Humphreys.*

[308 U. S., 54.]

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 6, 1939.]

OPINION.

Mr. Justice STONE delivered the opinion of the Court.

Decision in this case turns on the question, differing only in form from that this day decided in No. 34, *Sanford* v. *Helvering* [Ct. D. 1426, page 340, this Bulletin], whether, in case of an *inter vivos* transfer of property in trust, reserving to the donor power to designate new beneficiaries other than himself, the gift becomes complete at the time of the creation of the trust and subject to the gift tax imposed by the Revenue Act of 1932.

In December, 1934, respondent created a trust of personal property for his own benefit for life, with remainders over to specified classes of beneficiaries. By the trust indenture he reserved to himself a power to change the beneficiaries of the trust and to prescribe the conditions under which the new beneficiaries should take an interest in the trust, but without any power to increase his own beneficial interest in the trust property.

Respondent paid the gift tax assessed against him with respect to the transfer of the remainder interests upon creation of the trust, and brought the present suit in the district court to recover the tax as illegally collected. Judgment in his favor was affirmed by the Circuit Court of Appeals for the Second Circuit (101 F. (2d), 1012) on the authority of *Hesslein* v. *Hoey* (91 F. (2d), 954). We granted certiorari May 22, 1939, so that this case might be considered with the Sanford case.

The gift tax, section 319 of the 1924 Act, so far as now material, reappeared in section 501 of the 1932 Act (47 Stat., 169). Other pertinent provisions of the earlier Act were reenacted without change of present moment in sections 501, 510, 801. The applicable estate tax provisions are section 302(c)(d) of the 1926 Act (44 Stat., 40, 71). Section 501(c) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by section 511 of the Act of 1934 (48 Stat., 680), because *Burnet* v. *Guggenheim* (288 U. S., 280 [Ct. D. 636, C. B. XII–1, 374 (1933)]) had declared that such was the law

without specific legislation. (H. Rept. No. 704, Seventy-third Congress, second session, page 40; S. Rept. No. 558, Seventy-third Congress, second session, page 50.)

For the reasons stated in our opinion in the Sanford case we conclude that the reserved power in the donor at the time of the creation of the trust rendered the gift incomplete and not subject to the gift tax. As pointed out in our opinion in the Sanford case the Treasury regulation under the 1932 Act, article 3, Regulations 79 (1933 edition), in force when the trust was created, affords no basis for modification of our construction of the statute. Whatever validity the amended regulation of 1936 may have in its prospective operation, we think it is so plainly in conflict with the statute as to preclude its application retroactively so as to subject to tax such transfer as was made by the creation of the trust in 1934. (Cf. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S., 110.)

Affirmed.

Mr. Justice Butler took no part in the consideration or decision of this case.

TITLE III.—GIFT TAX. (1924)

SECTION 319.

Regulations 67 (1924), Article 1: Transfers reached. 1939-47-10096 Ct. D. 1426

GIFT TAX—REVENUE ACT OF 1924—DECISION OF SUPREME COURT.

1. Transfer in Trust—Reservation of Power to Designate Beneficiaries—Relinquishment of Power.

An *inter vivos* transfer of property in trust, by a donor who reserves the power to designate new beneficiaries other than himself, becomes a completed gift and subject to the gift tax imposed by the Revenue Act of 1924 upon the relinquishment of such power.

2. Statutory Construction.

The construction of a statute, derived from its language and history, can not be modified because of Treasury regulations or administrative practice where the regulations are without persuasive force in determining the true construction, and where the administrative practice conflicts with other provisions of the statute and is so inconsistent with applicable decisions of the courts as to produce confusion in the administration of the law.

3. Decision Affirmed.

Decision of the United States Circuit Court of Appeals, Third Circuit (1939) (103 F. (2d), 81), affirming a memorandum opinion of the United States Board of Tax Appeals, affirmed.

Supreme Court of the United States.

Estate of Charles Henry Sanford, Deceased, Jennie R. Baird, Substitutionary Administratrix, C. T. A., petitioner, v. *Commissioner of Internal Revenue.*

[308 U. S., 39.]

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 6, 1939.]

OPINION.

Mr. Justice Stone delivered the opinion of the Court.

This and its companion case, No. 37, *Rasquin* v. *Humphreys* [Ct. D. 1425, page 339, this Bulletin] present the single question of statutory construction

whether in the case of an *inter vivos* transfer of property in trust, by a donor reserving to himself the power to designate new beneficiaries other than himself, the gift becomes complete and subject to the gift tax imposed by the Federal revenue laws at the time of the relinquishment of the power. Corelative questions, important only if a negative answer is given to the first one, are whether the gift becomes complete and taxable when the trust is created or, in the case where the donor has reserved a power of revocation for his own benefit and has relinquished it before relinquishing the power to change beneficiaries, whether the gift first becomes complete and taxable at the time of relinquishing the power of revocation.

In 1913, before the enactment of the first gift tax statute of 1924, decedent created a trust of personal property for the benefit of named beneficiaries, reserving to himself the power to terminate the trust in whole or in part, or to modify it. In 1919 he surrendered the power to revoke the trust by an appropriate writing in which he reserved "the right to modify any or all of the trusts" but provided that this right "shall in no way be deemed or construed to include any right or privilege" in the donor "to withdraw principal or income from any trust." In August, 1924, after the effective date of the gift tax statute, decedent renounced his remaining power to modify the trust. After his death in 1928, the Commissioner following the decision in *Hesslein* v. *Hoey* (91 F. (2d), 954), in 1937, ruled that the gift became complete and taxable only upon decedent's final renunciation of his power to modify the trusts and gave notice of a tax deficiency accordingly.

The order of the Board of Tax Appeals sustaining the tax was affirmed by the Court of Appeals for the Third Circuit (103 F. (2d), 81), which followed the decision of the Court of Appeals for the Second Circuit in *Hesslein* v. *Hoey*, supra, in which we had denied certiorari (302 U. S., 756). In the Hesslein case, as in the Humphreys case now before us, a gift in trust with the reservation of a power in the donor to alter the disposition of the property in any way not beneficial to himself, was held to be incomplete and not subject to the gift tax under the 1932 Act so long as the donor retained that power.

We granted certiorari in this case May 15, 1939, and in the Humphreys case May 22, 1939, upon the representation of the Government that it has taken inconsistent positions with respect to the question involved in the two cases and that because of this fact and of the doubt of the correctness of the decision in the Hesslein case decision of the question by this Court is desirable in order to remove the resultant confusion in the administration of the revenue laws.

It has continued to take these inconsistent positions here, stating that it is unable to determine which construction of the statute will be most advantageous to the Government in point of revenue collected. It argues in this case that the gift did not become complete and taxable until surrender by the donor of his reserved power to designate new beneficiaries of the trusts. In the Humphreys case it argues that the gift upon trust with power reserved to the donor, not afterward relinquished, to change the beneficiaries was complete and taxable when the trust was created. It concedes by its brief that "a decision favorable to the Government in either case will necessarily preclude a favorable decision in the other."

In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 of the Revenue Act of 1924 (43 Stat., 253), reenacted as section 501 of the 1932 Act (47 Stat., 169), imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. When the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title. (See *Burnet* v. *Guggenheim*, 288 U. S., 280, 287 [Ct. D. 636, C. B. XII–1, 374 (1933)].) Following the enactment of the gift tax statute this Court in *Reinecke* v. *Northern Trust Co.* (278 U. S., 339 (1929) [T. D. 4261, C. B. VIII–1, 305 (1929)]), held that the relinquishment at death of a power of revocation of a trust for the benefit of its donor was a taxable transfer. Cf. *Saltonstall* v. *Saltonstall* (276 U. S., 260); *Chase National Bank* v. *United States* (278 U. S., 327 [Ct. D. 40, C. B. VIII–1, 308 (1929)]), and similarly in *Porter* v. *Commissioner* (288 U. S., 436 (1933) [Ct. D. 647, C. B. XII–1, 354 (1933)]), that the relinquishment by a donor at death of a reserved power to modify the trust except in his own favor is likewise a transfer of the property which could constitutionally be

taxed under the provisions of section 302(d) of the 1926 Revenue Act (reenacting in substance 302(d) of the 1924 Act) although enacted after the creation of the trust. (Cf. *Bullen* v. *Wisconsin*, 240 U. S., 625; *Curry* v. *McCanless*, 307 U. S., 357; *Graves* v. *Elliott*, 307 U. S., 383.) Since it was the relinquishment of the power which was taxed as a transfer and not the transfer in trust, the statute was not retroactively applied. (Cf. *Nichols* v. *Coolidge*, 274 U. S., 531 [T. D. 4072, C. B. VI–2, 351 (1927)]; *Helvering* v. *Hemholz*, 296 U. S., 93, 98.)

The rationale of decision in both cases is that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed" (see *Corliss* v. *Bowers*, 281 U. S., 376, 378 [Ct. D. 188, C. B. IX–1, 254 (1930)]; *Saltonstall* v. *Saltonstall*, supra, 261; *Burnet* v. *Guggenheim*, supra 287), and that a retention of control over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death. The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself is incomplete, and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death.

There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. (*Burnet* v. *Guggenheim*, supra, 286.) An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.[1]

Section 322 of the 1924 Act provides that when a tax has been imposed by section 319 upon a gift, the value of which is required by any provision of the statute taxing the estate to be included in the gross estate, the gift tax is to be credited on the estate tax. The two taxes are thus not always mutually exclusive as in the case of gifts made in contemplation of death which are complete and taxable when made, and are also required to be included in the gross estate for purposes of the death tax. But section 322 is without application unless there is a gift *inter vivos* which is taxable independently of any requirement that it shall be included in the gross estate. Property transferred in trust subject to a power of control over its disposition reserved to the donor is likewise required by section 302(d) to be included in the gross estate. But it does not follow that the transfer in trust is also taxable as a gift. The point was decided in the Guggenheim case where it was held that a gift upon trust, with power in the donor to revoke it is not taxable as a gift because the transfer is incomplete, and that the transfer whether *inter vivos* or at death becomes complete and taxable only when the power of control is relinquished. We think, as was pointed out in the Guggenheim case, supra, 285, that the gift tax statute does not contemplate two taxes upon gifts not made in contemplation of death,

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[1] The gift tax provisions of the Revenue Act of 1924 were added by amendments to the revenue bill introduced on the floor of the House and the Senate. (Cong. Record, Volume 65, Part 3, pages 3118–3119; Part 4, pages 3170, 3171; Part 8, page 8094.) The sponsor of the amendment in both Houses urged the adoption of the bill as a "corollary" or as "supplemental" to the estate tax. (Cong. Record, Volume 65, Part 3, pages 3119–3120, 3122; Part. 4, page 3172; Cong. Record, Volume 65, Part 8, pages 8095, 8096.)

The gift tax of 1924 was repealed when Congress, concurrently with the enactment of section 302(2) of the Revenue Act of 1926 (44 Stat., 70, 125, 126), establishing a conclusive presumption that gifts within two years of death were made in contemplation of death and therefore subject to the estate tax. A gift tax was reenacted by section 501 of the Revenue Act of 1932 (47 Stat., 169), shortly after it was decided in *Heiner* v. *Donnan* (285 U. S., 312 [Ct. D. 473, C. B. XI–1, 324 (1932)]), that the legislative enactment of such a presumption violated the fifth amendment.

Section 501(c) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by section 511 of the Act of 1934 (48 Stat., 680), because *Burnet* v. *Guggenheim* (288 U. S., 280), had declared that such was the law without specific legislation (H. Rept. No. 704, Seventy-third Congress, second session, page 40; S. Rept. No. 558, Seventy-third Congress, second session, page 50.)

one upon the gift when a trust is created or when the power of revocation, if any, is relinquished, and another on the transfer of the same property at death because the gift previously made was incomplete.

It is plain that the contention of the taxpayer in this case that the gift becomes complete and taxable upon the relinquishment of the donor's power to revoke the trust can not be sustained unless we are to hold, contrary to the policy of the statute and the reasoning in the Guggenheim case, that a second tax will be incurred upon the donor's relinquishment at death of his power to select new beneficiaries, or unless as an alternative we are to abandon our ruling in the Porter case. The Government does not suggest, even in its argument in the Humphreys case, that we should depart from our earlier rulings, and we think it clear that we should not do so both because we are satisfied with the reasoning upon which they rest and because departure from either would produce inconsistencies in the law as serious and confusing as the inconsistencies in administrative practice from which the Government now seeks relief.

There are other persuasive reasons why the taxpayer's contention can not be sustained. By sections 315(b), 324, and more specifically by section 510 of the 1932 Act, the donee of any gift is made personally liable for the tax to the extent of the value of the gift if the tax is not paid by the donor. It can hardly be supposed that Congress intended to impose personal liability upon the donee of a gift of property, so incomplete that he might be deprived of it by the donor the day after he had paid the tax. Further, section 321(b)1 exempts from the tax, gifts to religious, charitable, and educational corporations and the like. A gift would seem not to be complete, for purposes of the tax, where the donor has reserved the power to determine whether the donees ultimately entitled to receive and enjoy the property are of such a class as to exempt the gift from taxation. Apart from other considerations we should hesitate to accept as correct a construction under which it could plausibly be maintained that a gift in trust for the benefit of charitable corporations is then complete so that the taxing statute becomes operative and the gift escapes the tax even though the donor should later change the beneficiaries to the nonexempt class through exercise of a power to modify the trust in any way not beneficial to himself.

The argument of petitioner that the construction which the Government supports here, but assails in the Humphreys case, affords a ready means of evasion of the gift tax is not impressive. It is true, of course, that under it gift taxes will not be imposed on transactions which fall short of being completed gifts. But if for that reason they are not taxed as gifts they remain subject to death taxes assessed at higher rates, and the Government gets its due, which was precisely the end sought by the enactment of the gift tax.

Nor do we think that the provisions of section 219(g) of the 1924 Act have any persuasive influence on the construction of the gift tax provisions with which we are now concerned. One purpose of the gift tax was to prevent or compensate for the loss of surtax upon income where large estates are split up by gifts to numerous donees.[2] Congress was aware that donors in trust might distribute income among several beneficiaries, although the gift remains so incomplete as not to be subject to the tax. It dealt with that contingency in section 219(g) which taxes to the settlor the income of a trust paid to beneficiaries where he reserved to himself an unexercised power to "revest in himself title" to the trust property producing the income. Whether this section is to be read as relieving the donor of the income tax where the power reserved is to modify the trust, except for his own benefit, we do not now decide. If Congress, in enacting it, undertook to define the extent to which a reserved power of control over the disposition of the income is equivalent to ownership of it so as to mark the line between those cases on the one hand where the income is to be taxed to the donor and those on the other where, by related sections, the income is to be taxed to the trust or its beneficiaries, we do not perceive that the section presents any question so comparable to that now before us as to affect our decision. We are concerned here with a question to which Congress has given no answer in the words of the statute, and it must be decided in conformity to the course of judicial decision applicable to a unified scheme of taxation of gifts whether made *inter vivos* or at death. If Congress, for the purpose of taxing income, has defined precisely the amount of control over the

[2] See references to Congressional Record, footnote 1.

income which it deems equivalent to ownership of it, that definition is controlling on the courts even though without it they might reach a different conclusion, and even though retention of a lesser degree of control be deemed to render a transfer incomplete for the purpose of laying gift and death taxes.

The question remains whether the construction of the statute which we conclude is to be derived from its language and history, should be modified because of the force of Treasury regulations or administrative practice. Article 1 of Regulations 67, under the 1924 Act (adopted without any change of present significance in article 3, Regulations 79, under the 1932 Act) provides that the creation of a trust where the grantor retains the power to revest in himself title to the corpus of the trust does not constitute a gift subject to the tax and declares that "where the power retained by the grantor to revest in himself title to the corpus is not exercised, a taxable transfer will be treated as taking place in the year in which such power is terminated." Petitioner urges that the regulation is in terms applicable to the trust presently involved because it was subject to a power of revocation in favor of the donor before the enactment of the gift tax which was later relinquished. But we think, as the court below thought, that the regulation was not directed to the case of the relinquishment of a reserved power to select new beneficiaries other than the donor and did not purport to lay down any rule for cases where there was a reserved power different from or in addition to the power to revest the title in the donor. At most the regulation is ambiguous and without persuasive force in determining the true construction of the statute. (*Burnet* v. *Chicago Portrait Co.*, 285 U. S., 1, 16, 20 [Ct. D. 463, C. B. XI–1, 286 (1932)].) The amended regulation of 1936 under the 1932 Act (article 3, Regulations 79), removed the ambiguity by declaring that the gift is complete and subject to the tax when "the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself." But this regulation is by its terms applicable only to gifts made after June 6, 1932, and is of significance here only so far as it is declaratory of the correct construction of the 1924 Act.

Petitioner also insists that the construction of the statute for which he contends is sustained by the administrative practice. That practice is not disclosed by any published Treasury rulings or decisions and our only source of information on the subject is a stipulation appearing in the record. It states that in the administration of the gift tax under the 1924 and 1932 Acts and until the decision in the Hesslein case it was "the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to gift tax as occurring when the transferor relinquished all power to revest in himself title to the property constituting the subject of the transfer"; and that 300 cases "of such character" have been closed or adjusted in conformity to this practice.

This definition of the practice appears as a part of a stipulation of facts setting forth in some 126 printed pages the original trust deed of December 24, 1913, and 13 modifications of it between that date and the final relinquishment of the power of modification on August 20, 1924. They reveal a varied and extensive power of control by the donor over the disposition of the trust property which survived the relinquishment, in 1919, of the power of revocation for his own benefit, and with which he finally parted after enactment of the gift tax. The description of the practice as that resorted to in adjusting "cases of the character of that here involved," presupposes some knowledge on our part of what the signers of the stipulation regarded as the salient features of the present case which, although not specified by the stipulation, were necessarily embraced in the practice. Administrative practice, to be accepted as guiding or controlling judicial decision, must at least be defined with sufficient certainty to define the scope of the decision. If relinquishment of the power of revocation mentioned by the stipulation was of controlling significance in defining the practice, that circumstance was not present in the Hesslein case or in the Humphreys case. Whether in any of the 300 cases mentioned in the stipulation the relinquishment of the power of revocation was followed by the relinquishment *inter vivos* of a power of changing the beneficiaries like that in this case, does not appear.

Such a stipulated definition of the practice is too vague and indefinite to afford a proper basis for a judicial decision which undertakes to state the construction of the statute in terms of the practice. Moreover, if we regard the stipulation as agreeing merely that the legal questions involved in the present case have uniformly been settled administratively in favor of the contention now

made by the petitioner, it involves conclusions of law of the stipulators, both with respect to the legal issues in the present case and those resolved by the practice. We are not bound to accept, as controlling, stipulations as to questions of law. (*Swift & Co.* v. *Hocking Valley Railway Co.*, 243 U. S., 281, 289.)

Without attempting to say what the administrative practice has actually been we may, for present purposes, make the assumption most favorable to the taxpayer in this case that the practice was as stated by the Government in its brief in the Humphreys case, viz, that until the decision in the Hesslein case "the Bureau consistently took the position that the gift tax applied to a transfer in trust where the grantor reserved the right to modify the trust but no right to vest title in himself."

But the record here shows that no such practice was recognized as controlling in 1935 when the present case first received the attention of the Bureau. On February 21, 1935, the Assistant General Counsel gave an opinion reviewing at length the facts of the present case and the applicable principles of law, and concluded on the reasoning and authority of the Guggenheim and Porter cases that the gift was not complete and taxable until the relinquishment in August, 1924, of the power to modify the trust by the selection of new beneficiaries. In April, 1935, the matter was reconsidered and a new opinion was given which was finally adopted by the Assistant Secretary who had intervened in the case. This opinion reversed the earlier one on the authority of the Guggenheim case. It was at pains to point out that in that case the Court had held that the relinquishment of the power of revocation was a taxable gift but it made no mention of the fact that there, unlike the present case, there was no power of modification which survived the relinquishment of the power of revocation, which was crucial in the Porter case. Neither opinion rested upon or made any mention of any practice affecting cases where such a power of modification is reserved. After the decision in the Hesslein case the ruling of the Bureau in this case was again reversed and notice of deficiency sent to the taxpayer.

From this record it is apparent that there was no established administrative practice before the opinion of April, 1935,[3] and if the practice was adopted then it was because of a mistaken departmental ruling of law based on an obvious misinterpretation of the decisions in the Porter and Guggenheim cases.

Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law. Such a choice, in practice, of one of two possible constructions of a statute by those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. This is the more so when reliance has been placed on the practice by those affected by it.

But courts are not bound to accept the administrative construction of a statute regardless of consequences, even when disclosed in the form of rulings. (See *Helvering* v. *New York Trust Co.*, 292 U. S., 455, 468 [Ct. D. 840, C. B. XIII–1, 188 (1934)].) Here the practice has not been revealed by any published rulings or action of the Department on which taxpayers could have relied. The taxpayers in the present cases are contending for different rulings. In *Harriet Rosenau* (37 B. T. A.) (1938), as in the Humphreys case, the taxpayer contended that the date when the power to change the beneficiary is renounced is controlling. The petitioner here, who contends that the date of relinquishment of the power of revocation is controlling, rather than the date of surrender of power of modification, set up his trust and relinquished the power of revocation before the gift tax was enacted. The reenactment of the gift tax statute by the 1932 Act can not be said to be a legislative approval of the practice which had not been disclosed by Treasury regulation, ruling or decision, and which does not appear to have been established before the adoption of the 1932 Act. (Cf. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S., 488, 492 [Ct. D. 345, C. B. X–1, 444 (1931)]; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S., 269, 273; *Helvering* v. *New York Trust Co.*, 292 U. S., 455, 468.)

[3] In the petition for certiorari filed in November, 1937, in *Hesslein* v. *Hoey* (No. 556), the Government asserted that the 300 cases referred to in the stipulation in this case had been decided so recently that the time for filing claims for refunds had not expired.

The very purpose sought to be accomplished by judicial acceptance of an administrative practice would be defeated if we were to regard the present practice as controlling. If a practice is to be accepted because of the superior knowledge of administrative officers of the administrative needs and convenience (see *Brewster* v. *Gage*, 280 U. S., 327, 336 [Ct. D. 148, C. B. IX–1, 274 (1930)]), there is no such reason for its acceptance here. The Government by taking no position confesses that it is unable to say how administrative need and convenience will best be served. If, as we have held, we may reject an established administrative practice when it conflicts with an earlier one and is not supported by valid reasons (see *Burnet* v. *Chicago Portrait Co.*, 258 U. S., 1, 16), we should be equally free to reject the practice when it conflicts with our own decisions. A change of practice to conform to judicial decision, such as has occurred since the decision in the Hesslein case, or to meet administrative exigencies, will be accepted as controlling when consistent with our decisions. (*Morrissey* v. *Commissioner*, 296 U. S., 344, 354 [Ct. D. 1064, C. B. XV–1, 264 (1936)].) Here we have an added, and we think conclusive reason for rejecting the earlier practice and accepting the later. The earlier, because in sharp conflict with our own decisions, as we have already indicated, can not be continued without the perpetuation of inconsistency and confusion comparable to that of which the Government asks to be relieved by our decision.

Affirmed.

Mr. Justice BUTLER took no part in the consideration or decision of this case.

CAPITAL STOCK TAX.

INTERNAL REVENUE CODE.

SECTION 1202(e), ADDED BY SECTION 301 OF THE REVENUE ACT OF 1939.—DECLARATION OF VALUE FOR CAPITAL STOCK TAX PURPOSES, 1939 AND 1940.

REGULATIONS 64 (1938), ARTICLE 21: Definitions. 1939-31-9941
ARTICLE 44: Declared value. T. D. 4912
ARTICLE 45½: (Added.)

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 137; SUBCHAPTER E, PART 465.—CAPITAL STOCK TAX.

Section 301, Revenue Act of 1939.
Articles 21(m) and 44 of Regulations 64 (1938 Edition) amended.
Article 45½ added.

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

To Collectors of Internal Revenue and Others Concerned:

In order to conform Regulations 64 (1938 Edition) (Part 137, Subpart B, 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 [C. B. 1939-1 (Part 1), 396] (Part 465, Subpart B, of such Title 26), to section 1202, Internal Revenue Code, as amended by section 301 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session), such regulations are amended as follows:

1. Article 21(*m*) (section 137.21(m) of such Title 26), as made applicable to the Internal Revenue Code, is amended to read as follows:

(*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, (2) 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, and (3) in the case of a domestic corporation, the capital stock tax year ending June 30, 1939, or June 30, 1940, or both, if the corporation elects under section 1202(e) of the Internal Revenue Code, added by section 301, Revenue Act of 1939, to establish either or both of such years as an additional declaration year or years.

2. Article 44 (section 137.44 of such Title 26), as made applicable to the Internal Revenue Code, is amended by changing the third paragraph thereof to read as follows:

For any declaration year (except for the limitation as to an additional declaration year established by an election under section 1202(e) of the Internal Revenue Code, added by section 301, Revenue Act of 1939—see article 45½ [section 137.45½, Title 26, Code of Federal Regulations]), a corporation may exercise unrestricted judgment and discretion in determining the value to be declared for its capital stock; and in making such declaration, the corporation is not bound by any previous declaration of value.

3. Immediately following article 45 (section 137.45 of such Title 26) there are inserted a heading, a quotation of section 1202(e) of the Internal Revenue Code, added by section 301, Revenue Act of 1939,

and a new article designated article 45½ (section 137.45½ of such Title 26), as follows:

Section 1202(e) of the Internal Revenue Code, Added by Section 301, Revenue Act of 1939.

(e) *Additional declaration years.*—In the case of any domestic corporation, the year ending June 30, 1939, and the year ending June 30, 1940, shall each, if not otherwise a declaration year, constitute an additional declaration year if with respect to such year (1) the taxpayer so elects (which election cannot be changed) in its return filed before the expiration of the statutory filing period or any authorized extension thereof, and (2) the value declared by the taxpayer is in excess of the adjusted declared value computed under paragraph (1) of subsection (b). If, under this subsection, the year ending June 30, 1939, is a declaration year, the computation, under paragraph (1) of subsection (b), of the adjusted declared value for the year ending June 30, 1940, shall be made on the basis of the value declared for the year ending June 30, 1939.

ART. 45½ (Sec. 137.45½). *New declaration of value by domestic corporation pursuant to election under section 1202(e) of Internal Revenue Code, added by section 301, Revenue Act of 1939.*—Under section 1202(e) of the Internal Revenue Code, added by section 301, Revenue Act of 1939, a domestic corporation may, by complying with certain conditions, establish the year ending June 30, 1939, or June 30, 1940, or both, as an additional declaration year or years. The election applies only to domestic corporations required to report an adjusted value for either or both of such years. The election can be exercised only (*a*) by filing a return prior to the expiration of the filing period, or any authorized extension thereof, and (*b*) by declaring a value in such return in excess of the adjusted value correctly computed under section 1202(b)(1) of the Internal Revenue Code (same as section 601(f) (3) and (4), Revenue Act of 1938).

In general, the rules stated in article 44 [section 137.44, Title 26, Code of Federal Regulations], which relates to declared value, are equally applicable to declarations of value made for an additional declaration year established by an election under section 1202(e), added by section 301, Revenue Act of 1939, with these limitations: (*a*) the election if exercised may not be changed after the close of the filing period, or any authorized extension thereof, and (*b*) the value declared must be in excess of the adjusted value for the year for which the new value is declared, correctly computed under section 1202(b)(1) of the Internal Revenue Code (same as section 601(f) (3) and (4), Revenue Act of 1938).

In the event the election is exercised, the return must include a computation of the adjusted value as well as a statement of the new declared value. A change of election or of declared value, if desired, can be made only by filing an amended return before the expiration of the filing period or authorized extension thereof. Unless the last return timely filed shows a declared value exceeding the correct adjusted value as determined by audit of the return, even though it is more than the adjusted value as computed on the return, the purported election of an additional declaration year is nugatory, and the correct adjusted value controls.

If the year ending June 30, 1939, is established as an additional declaration year, the value declared for that year will constitute the base for computing the adjusted value for the year ending June 30, 1940.

(This Treasury decision is prescribed pursuant to section 1202(e) as added to the Internal Revenue Code by section 301 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and section 3791 of the Internal Revenue Code (53 Stat., Part 1).)

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved July 24, 1939.

STEPHEN B. GIBBONS,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register July 25, 1939, 3.03 p. m.)

REGULATIONS 64 (1938), ARTICLE 45½: New declaration of value by domestic corporation pursuant to election under section 1202(e) of the Internal Revenue Code, added by section 301, Revenue Act of 1939. (Also Article 44.) 1939-47-10101 C. S. T. 10

Where the capital stock tax return for the year ended June 30, 1939, was not filed until after August 31, 1939, and no application for an extension of time for filing such return was made, the elective declared value shown on the return may not be used in determining the capital stock tax liability for that year.

Where the adjusted declared value shown in the capital stock tax return for the year ended June 30, 1939, is a minus amount, such minus amount must be used as the base for computing the adjusted declared value for the taxable year ending June 30, 1940.

Advice is requested (1) whether the elective declared value shown on the capital stock tax return of the X Corporation for the taxable year ended June 30, 1939, which was filed after August 31, 1939, no application for an extension of time for filing such return having been made to the collector but " reasonable cause " for delinquency having been established, may be used in determining the capital stock tax liability of the corporation for that year; and (2) whether the minus amount shown as the adjusted value of the capital stock of the Y Corporation for the taxable year ended June 30, 1939, must be used as the base for computing the adjusted value for the taxable year ending June 30, 1940, no elective declared value having been established in a 1939 return timely filed, or must zero be used as such base.

Under section 1202(e) of the Internal Revenue Code, added by section 301 of the Revenue Act of 1939, a domestic corporation may, by complying with certain conditions, elect to establish the year ended June 30, 1939, as an additional declaration year. The election applies only to domestic corporations required to report an adjusted value for that year and can be exercised only (*a*) by filing a return prior to the expiration of the filing period or any authorized extension thereof, and (*b*) by declaring a value in such return in excess of the adjusted value for the year ended June 30, 1939, correctly computed under section 1202(b)1 of the Internal Revenue Code. A change of election or of declared value, if desired, can be made only by filing an amended return before the expiration of the filing period or authorized extension thereof.

Unless the last return timely filed shows a declared value exceeding the correct adjusted value as determined by audit of the return, even though it is more than the adjusted value as computed on the return, the purported election of an additional declaration year is nugatory, and the correct adjusted value controls.

In the case of the X Corporation, the return was not received by the collector until September 6, 1939. The return was, therefore, delinquent, as the statutory filing period as extended by the Commissioner in Treasury Decision 4911 [page 351, this Bulletin] expired August 31, 1939. No application for a further extension of time was submitted to the collector as provided in article 36(*b*) of Regulations

64 (1938). The fact that the failure to file the return on time was due to "reasonable cause" and that no delinquency penalty will be asserted does not make the return a timely return for the purpose of making an elective declaration of value, since the return was not "filed before the expiration of the statutory filing period or any authorized extension thereof," as prescribed in section 1202(e) of the Internal Revenue Code.

Since the return filed by the X Corporation for the taxable year ended June 30, 1939, was not timely filed, the elective declared value shown in such return may not be used in determining the capital stock tax liability of the corporation for that year. The corporation may, however, elect to declare a new value for the taxable year ending June 30, 1940, provided the statutory requirements are met.

With respect to the second question, it is held that the minus adjusted declared value of the capital stock of the Y Corporation for the taxable year ended June 30, 1939, must be used as the base for computing the adjusted declared value of its capital stock for the taxable year ending June 30, 1940. Section 1202(b)1 of the Internal Revenue Code provides that, in computing the adjusted declared value of the capital stock of a corporation for a year subsequent to a declaration year, "The adjustments * * * shall be made for each income-tax taxable year included in the 3-year period from the date as of which the value was declared in the return for the declaration year to the close of the last income-tax taxable year ending with or prior to the close of the year for which the tax is imposed by this section." Pursuant to this provision of law, the next to last paragraph of article 46, Regulations 64 (1938), explains the method of computing the adjusted declared value for the year ended June 30, 1939. Following this explanation is the statement that "This adjusted value, to the extent that it is true and correct, will constitute the base for computing the adjusted value for the taxable year ending June 30, 1940 * * *." Therefore, in any case where the statutory adjustments result in an adjusted value for the first adjustment year of a 3-year period in an amount which is less than zero, that minus or deficit value must be used as the base for the computation of the adjusted value for the following adjustment year, if any, of the same 3-year period; otherwise, the statutory requirement that the adjusted value for a year subsequent to the declaration year must be computed by making the adjustments "for each income-tax taxable year included in the 3-year period" would not be met.

The foregoing, however, does not apply to any corporation which, in a return timely filed for the year ended June 30, 1939, declared a value in excess of the correct adjusted value, and does not in any way deprive a corporation of its right to establish the year ending June 30, 1940, as an additional declaration year under section 1202(e) of the Internal Revenue Code.

SECTIONS 1203 AND 1205.

1939-30-9927
T. D. 4911

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 137, SUBPART C.—CAPITAL STOCK TAX.

Sections 1203 and 1205, Internal Revenue Code.—Extension of time for filing capital stock tax returns and paying tax.

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

To Collectors of Internal Revenue and Others Concerned:

SECTION 137C.1. *General extension.*—Forms 707 and 708 for the filing of returns of capital stock tax under Chapter 6 of the Internal Revenue Code (53 Stat., Part 1), as amended, for the year ended June 30, 1939, are required to be filed and the tax paid on or before July 31, 1939, unless the time for filing returns and paying the tax is extended under the provisions of sections 1203 and 1205 of the aforementioned chapter.

In accordance with the provisions of these sections, the period during which the returns of capital stock tax may be filed, and the tax paid, is hereby extended; and collectors of internal revenue are authorized to accept returns without assertion of penalties for delinquency or of interest if the returns are filed and the tax paid on or before the dates indicated in the next two paragraphs below:

1. Returns of corporations having a principal place of business within the continental United States must be filed with collectors of internal revenue on or before August 31, 1939.

2. Returns of corporations having no principal place of business within the continental United States must be filed with collectors of internal revenue on or before September 29, 1939. (Sections 1203, 1205, 3791, 53 Stat., Part 1.)

SEC. 137C.2. *Special extensions.*—Corporations within the first of the classes indicated above may be granted further extensions by collectors of internal revenue to a date not later than September 29, 1939, under the provisions of article 36(*b*) of Regulations 64 (1938 Edition) (section 137.36(b), Title 26, Code of Federal Regulations), as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 (Part 465, Subpart B, of such Title 26 [C. B. 1939-1 (Part 1), 396]), upon the condition that interest at the rate of 6 per cent per annum be paid from August 31, 1939, to the date of payment. (Sections 1203, 1205, 3791, 53 Stat., Part 1.)

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved July 14, 1939.

HERBERT E. GASTON,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register July 15, 1939, 11.04 a. m.)

TITLE V.—CAPITAL STOCK * * * TAXES. (1934)

SECTION 701(f)(A).

REGULATIONS 64 (1934), ARTICLE 43: Adjusted declared value. 1939-48-10105 Ct. D. 1427

CAPITAL STOCK TAX—REVENUE ACT OF 1934—DECISION OF COURT.

1. ADJUSTED DECLARED VALUE—DEDUCTION—DISTRIBUTION IN LIQUIDATION—DISTRIBUTION FROM PAID-IN SURPLUS WHERE NO STOCK CANCELED OR REDEEMED.

A distribution by a corporation to its stockholders of an amount of paid-in surplus, where no stock was canceled or redeemed, does not constitute a distribution in liquidation, within the meaning of sections 115 (c) and (i) and 701(f)(A) of the Revenue Act of 1934 and article 43(5)(A) of Regulations 64, and is not a proper deduction in fixing the adjusted declared value of the stock in subsequent years.

2. DECISION AFFIRMED.

Decision of the District Court of the United States for the Eastern District of Missouri (23 F. Supp., 191), affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Beattie Investment Co., appellant, v. *United States of America, appellee.*

[101 F. (2d), 850.]

Appeal from the District Court of the United States for the Eastern District of Missouri.

[March 9, 1939.]

OPINION.

THOMAS, Circuit Judge, delivered the opinion of the court.

This is an appeal by the taxpayer from a judgment denying recovery of $500 and interest claimed to have been erroneously assessed and paid as capital stock taxes for the taxable year ended June 30, 1935. The opinion of the district court is reported in 23 F. Supp., 191. A jury was waived and the case submitted to the court upon a stipulation of facts. Both parties filed motions for judgment. The motion of appellant was overruled and that of appellee sustained; and upon findings of fact and conclusions of law made by the court the judgment appealed from was entered.

The question presented for determination is whether a distribution by appellant to its stockholders of $500,000 of paid-in surplus, where no stock was canceled or redeemed, constitutes a distribution in liquidation within the meaning of section 701(f)(A) of the Revenue Act of 1934 (ch. 277, 48 Stat., 680), and is a proper deduction in fixing the adjusted value of the stock in subsequent years.

The appellant, a Missouri corporation, is engaged solely in owning and holding interest-bearing obligations of the United States. All of its capital stock is owned by the Boatmen's National Bank of St. Louis, Mo. On December 31, 1933, its capital aggregated $2,000,000, consisting of $45,000 representing 450 shares of capital stock of the par value of $100 each and of $1,955,000 of paid-in surplus.

In its first return under the Act for the year ending June 30, 1934, the appellant declared $500,000 to be the value of its capital stock. In its return for the year ending June 30, 1935, in arriving at the adjusted value of its stock it deducted the sum of $500,000 as a "liquidating distribution" to its sole stockholder during the year. The Commissioner disallowed the deduction and assessed the additional tax now the subject of dispute.

The Revenue Act of 1934 imposes a tax of $1 for each $1,000 of the adjusted value of the capital stock of every domestic corporation for carrying on or doing business in the United States. A corporation is required to declare the value of

its capital stock in its first return under the Act, which declaration of value can not be amended. Section 701(f) of the Act further provides:

"For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid in surplus and contributions to capital, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by Title I over the amount disallowed as a deduction by section 24(a)(5) of such title, and (5) the amount of the dividend deduction allowable for income tax purposes, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings or profits, and (C) the excess of the deductions allowable for income tax purposes over its gross income; adjustment being made for each income-tax taxable year included in the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. The amount of such adjustment for each such year shall be computed (on the basis of a separate return) according to the income tax law applicable to such year."

The appellant contends that the claimed deduction is allowable under subdivision (A) of subsection (f) of the statute as "the value of property distributed in liquidation to shareholders." The Commissioner of Internal Revenue in rejecting the claim for deduction on that basis directed attention to the last sentence of that part of the statute quoted supra providing that "The amount of such adjustment * * * shall be computed * * * according to the income tax law applicable to such year." The provisions of the income tax law claimed to be applicable and in force on June 30, 1935, are subdivisions (c) and (i) of section 115 of the Revenue Act of 1934 (26 U. S. C., 115) as follows:

"(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. * * *

* * * * * * *

"(i) *Definition of partial liquidation.*—As used in this section the term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock."

The lower court sustained the interpretation of the statute adopted by the Commissioner and held that the distribution was not deductible as a liquidation to shareholders within the meaning of the statute because it was not in redemption of stock.

We have reached the conclusion that the Commissioner and the court properly construed and applied the law. The contention of the taxpayer that such an interpretation is not correct because it is unreasonable and unjust is not persuasive. It is argued that the real capital of a corporation is pro tanto liquidated by a distribution to its stockholders of a part of its paid-in surplus. Conceding this to be true when the word "liquidate" is used in the popular sense, it does not aid the appellant here for the reason that the word is defined in the Act in language clear and definite; and it is there restricted in its application to "distributions in complete cancellation or redemption of all or a portion of its (the corporation's) stock." It is not claimed that so construed the Act violates any constitutional provision. The fact that it may be a seeming injustice in some cases is therefore not a matter which the courts have power to correct. Congress alone can give relief in such a case. (*Magnano Co.* v. *Hamilton*, 292 U. S., 40; *Fox* v. *Standard Oil Co.*, 294 U. S., 87.) The court may neither enlarge nor restrict by construction the application of a statute which is clear and unambiguous. There is nothing in such a statute to construe. (*Lake County* v. *Rollins*, 130 U. S., 662; *Thompson* v. *United States*, 246 U. S., 547; *Thompson* v. *Siratt*, 8 Cir., 95 F. (2d), 214.)

Appellant contends that in providing that "The amount of such adjustment for each such (subsequent) year shall be computed * * * according to the income tax law applicable to such year" Congress did not in fact mean the "amount of such adjustment," but it meant "the amount of net income or net loss of the

corporation." So construed section 115 of the Revenue Act of 1934 would apply only to the additions and the deductions other than distributions in liquidation provided for in section 701(f) of the Act. Nothing in the statute itself is pointed out to sustain this interpretation and no authority has been found to support it. The language of the statute is inclusive; and the word "amount" embraces all the items entering into the "adjustment."

Article 43(5)(A) of Treasury Regulations 64 promulgated under the Revenue Act of 1934 defines the term "liquidation" as having the same meaning as the provisions of the applicable income tax law respecting distribution by corporations. It is argued that the regulation is void because Congress did not confer power upon the Commissioner to define the terms of the statute. The question of whether or not the regulation is ultra vires is immaterial since it expresses what we hold to be the plain meaning of the statute itself. The statute and the regulation are entirely consistent and harmonious.

The meaning of the law is clear. The Commissioner and the lower court correctly applied it to the facts. The judgment is

Affirmed.

MANUFACTURERS' EXCISE TAXES.

INTERNAL REVENUE CODE.

SECTION 3452, AS AMENDED

REGULATIONS 44 (1934), ARTICLE 2: Effective period. 1939-34-9976
T. D. 4921

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 309; SUBCHAPTER E, PART 465, SUBPART B.

Taxes on gasoline, lubricating oil, and matches. Subtitle C of the Internal Revenue Code.
Article 2 of Regulations 44 (revised September, 1934), amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 1 of the Revenue Act of 1939, approved June 29, 1939, reads in part as follows:

SEC. 1. CONTINUATION OF EXCISE TAXES * * *.

Sections * * * 3452 * * * of the Internal Revenue Code are amended by striking out "1939" wherever appearing therein and inserting in lieu thereof "1941." * * *

In conformity with the provision of law quoted above, article 2 of Regulations 44 (revised September, 1934), as amended (section 309.2 of Title 26, Code of Federal Regulations), but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] (Part 465, Subpart B of such Title 26), under the authority contained in section 3450 of the Internal Revenue Code, is further amended to read as follows:

ART. 2. *Effective period.*—The tax is imposed upon any sale or use prior to July 1, 1941, of gasoline, lubricating oil, or matches by the manufacturer or other person liable for tax under the provisions of section 3445 of the Internal Revenue Code (same as section 623 of the Revenue Act of 1932), irrespective of when the article was manufactured, produced, or imported.

This Treasury decision is prescribed pursuant to section 3452 of the Internal Revenue Code (53 Stat., Part 1), as amended by section 1 of the Revenue Act of 1939 (Public, No. 155, Seventy-Sixth Congress, first session) and section 3450 of the Internal Revenue Code.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 14, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 15, 1939, 12.42 p. m.)

REGULATIONS 46(1932), ARTICLE 1: Effective period. 1939-35-9988
T. D. 4925

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 303; SUBCHAPTER E, PART 465, SUBPART B.

Excise taxes on sales by the manufacturer, Subtitle C of the Internal Revenue Code.
Article 1 of Regulations 46, approved June 18, 1932, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 1 of the Revenue Act of 1939, approved June 29, 1939, reads in part as follows:

SEC. 1. CONTINUATION OF EXCISE TAXES * * *.

Sections * * * 3452, * * * of the Internal Revenue Code are amended by striking out "1939" wherever appearing therein and inserting in lieu thereof "1941."

Section 2 of the Revenue Act of 1939, approved June 29, 1939, reads as follows:

SEC. 2. SPORTING ARMS AND AMMUNITION TAX.

Section 3407 of the Internal Revenue Code (relating to the tax on firearms, shells, and cartridges) is amended by adding at the end thereof the following new paragraph:

"The provisions of section 3452 (relating to expiration of taxes) shall not apply to the tax imposed by this section."

In conformity with the provisions of law quoted above, the second paragraph of article 1 of Regulations 46, as amended (section 303.1, Title 26, Code of Federal Regulations), but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] (Part 465, Subpart B of such Title 26), under authority contained in section 3450 of the Internal Revenue Code, is further amended to read as follows:

No such sale, lease, or use after June 30, 1941 (or after July 31, 1941, in the case of articles taxable under sections 3400 and 3403 of the Internal Revenue Code (same as sections 602 and 606 of the Revenue Act of 1932, as amended), relating to the tax on tires and inner tubes and automobiles, etc.), is taxable under the title except that with respect to firearms, shells, and cartridges taxable under section 3407 of the Internal Revenue Code (same as section 610 of the Revenue Act of 1932), the limitation does not apply.

(This Treasury decision is prescribed pursuant to section 3452 of the Internal Revenue Code (53 Stat., Part 1), as amended by section 1 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and section 3450 of the Internal Revenue Code.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 21, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 23, 1939, 11.13 a. m.)

SECTION 3401, AMENDED BY SECTION 3 OF THE REVENUE ACT OF 1939.—TAX ON TOILET PREPARATIONS, ETC.

REGULATIONS 46 (1932), CHAPTER III: Toilet preparations. 1939-40-10047 T. D. 4947

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 303; SUBCHAPTER E, PART 465, SUBPART B.—MANUFACTURERS' EXCISE TAX ON TOILET PREPARATIONS.

Chapter III of Regulations 46, approved June 18, 1932, amended.

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

To Collectors of Internal Revenue and Others Concerned:

In conformity with the provisions of section 3 of the Revenue Act of 1939, approved June 29, 1939 (Public, No. 155, Seventy-sixth Congress, first session), which amends section 3401 of the Internal Revenue Code (53 Stat., Part 1) (derived from section 603 of the Revenue Act of 1932), and under the authority contained in section 3450 of the Internal Revenue Code, Chapter III of Regulations 46, as amended [Subpart D, Part 303, Title 26, Code of Federal Regulations], but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-7 (Part 1), 396] [Part 465, Subpart B of such Title 26], is further amended to read as follows:

CHAPTER III.

TOILET PREPARATIONS, ETC.

Section 3401 of the Internal Revenue Code.

There shall be imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

Revenue Act of 1939.

SEC. 3. TOILET PREPARATIONS TAX AMENDMENTS.

(a) Section 3401 of the Internal Revenue Code (relating to the tax on toilet preparations) is amended by inserting at the end thereof the following new paragraphs:

"In the case of a sale by a manufacturer to a selling corporation of an article to which the tax under this section applies, the transaction shall be prima facie presumed to be otherwise than at arm's length if either the manufacturer or the selling corporation owns more than 75 per centum of the outstanding stock of the other, or if more than 75 per centum of the outstanding stock of both corporations is owned by the same persons in substantially the same proportions. Sales by a manufacturer to a selling corporation shall in all other cases be prima facie presumed to be at arm's length.

"Notwithstanding section 3441(a), in determining, for the purpose of this section, the price for which an article is sold, whether at arm's length or not, there shall be included any charge for coverings and containers of whatever nature, only if furnished by the actual manufacturer of the article, and any charge incident to placing the article in condition packed ready for shipment, only if performed by the actual manufacturer of the article, but there shall be excluded the amount of the tax imposed by this section, whether or not stated as a separate charge. Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (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) The amendments made by subsection (a) shall be effective only with respect to sales made after the date of the enactment of this Act.

ART. 22(*a*) [Section 303.22(*a*)]. *Scope of tax.*—The tax attaches to the sale by the manufacturer of the articles enumerated in section 3401 of the Internal Revenue Code (derived from section 603 of the Revenue Act of 1932) and similar articles commonly or commercially known as toilet articles, which are used or applied, or intended to be used or applied, for toilet purposes. Any article advertised or held out to be suitable for toilet purposes, or for any purposes for which the articles enumerated in the section are customarily used, will be subject to the tax, regardless of the name by which it may be known or distinguished. The tax attaches to the sale by the manufacturer of any preparation which is used or applied or intended to be used or applied for toilet purposes or used in connection with the bath or care of the body, or applied to the clothing as a perfume or to the body as a toilet article. The fact that any particular product, preparation, or substance coming within the scope of the Act may have, or be held out to have, a medicinal, stimulating, remedial, or curative value does not exempt it from the tax, if it is used as an adjunct to the toilet or for toilet purposes.

The tax will not attach to an article which is not a finished product or is not susceptible of use for toilet purposes but is only suitable for use in the manufacture of articles subject to tax.

Shampoo oils and liquids containing 5 per cent or less of saponaceous matter are taxable as toilet preparations.

ART. 22(*b*) [Section 303.22(*b*)]. *Rate of tax.*—The tax is payable by the manufacturer at the rate of 10 per cent of the sale price as determined under article 22(*c*), or 10 per cent of the fair market price as established under article 22(*d*), whichever is applicable.

ART. 22(*c*) [Section 303.22(*c*)]. *Sale price.*—Subject to the qualifications and additional exclusions specified in this article with respect to sales made after June 29, 1939, the sale price for purposes of the tax on all sales other than sales coming within the purview of section 3441(b) of the Internal Revenue Code (same as section 619(b) of the Revenue Act of 1932) shall be determined in accordance with the provisions of section 3441(a) of the Internal Revenue Code (derived from section 619(a) of the Revenue Act of 1932) and articles 8 to 14, inclusive, of these regulations [sections 303.8 to 303.14, inclusive, Title 26, Code of Federal Regulations].

In determining the sale price for purposes of the tax on sales made after June 29, 1939—

(i) any charge for coverings and containers of whatever nature shall be included in the price only if furnished by the actual manufacturer of the article;

(ii) any charge incident to placing the article in condition packed ready for shipment shall be included in the price only if performed by the actual manufacturer of the article; and

(iii) the wholesaler's salesmen's commissions and costs and expenses of advertising and selling shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with these regulations (see article 69) [section 303.69, Title 26, Code of Federal Regulations].

ART. 22(*d*) [Section 303.22(*d*)]. *Fair market price.*—Subject to the qualifications and additional exclusions specified in this article with respect to sales made after June 29, 1939, the sale price for purposes of the tax on articles sold (1) at retail, (2) on consignment, or (3) otherwise than through an arm's length transaction and at less than the fair market price, shall be the price for which such articles are sold in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner in accordance with the provisions of section 3441(b) of the Internal Revenue Code (derived from section 619(b) of the Revenue Act of 1932) and article 15 of these regulations [section 303.15, Title 26, Code of Federal Regulations].

In determining the fair market price under section 3441(b) of the Internal Revenue Code as the basis for tax with respect to sales made after June 29, 1939—

(i) any charge for coverings and containers of whatever nature shall be included in the price only if furnished by the actual manufacturer of the article;

(ii) any charge incident to placing the article in condition packed ready for shipment shall be included in the price only if performed by the actual manufacturer of the article; and

(iii) the wholesaler's salesmen's commissions and costs and expenses of advertising and selling shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with these regulations (see article 69 [section 303.69, Title 26, Code of Federal Regulations]).

ART. 22(*e*) [Section 303.22(e)]. *Sales otherwise than through an arm's-length transaction.*—The determination whether a sale was made otherwise than through an arm's-length transaction depends necessarily upon the particular facts of each case. (See article 15 [section 303.15, Title 26, Code of Federal Regulations].)

With respect to sales by a manufacturer to a selling corporation made after June 29, 1939, the transaction shall be presumed prima facie to be otherwise than at arm's length, if either the manufacturer or the selling corporation owns more than 75 per cent of the outstanding stock of the other, or if more than 75 per cent of the outstanding stock of both corporations is owned by the same persons in substantially the same proportions. In all other cases, sales by a manufacturer to a selling corporation made after June 29, 1939, shall be presumed prima facie to be at arm's length unless the facts of the particular case establish a conclusion to the contrary.

(This Treasury decision is prescribed pursuant to section 3401 of the Internal Revenue Code (53 Stat., Part 1), as amended by section 3 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and section 3450 of the Internal Revenue Code.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 23, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 26, 1939, 11.56 a. m.)

REGULATIONS 46(1932), ARTICLE 67: RETURNS. 1939–32–9952
ARTICLE 68: Payment of tax. T. D. 4916

TITLE 26—INTERNAL REVENUE.—CHAPTER 29, SUBCHAPTER A.—MANUFACTURERS' EXCISE TAX ON TOILET PREPARATIONS, ETC.

Returns of tax for June and July, 1939, imposed under section 3401 of the Internal Revenue Code, as amended by section 3 of the Revenue Act of 1939.

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

To Collectors of Internal Revenue and Others Concerned:

For the purposes of articles 67 and 68 of Regulations 46 (1932) as amended (sections 303.67 and 303.68 of Title 26, Code of Federal Regulations), but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] (Part 465, Subpart B, Title 26, Code of Federal Regulations), returns for the period June 1 to June 29, 1939, inclusive, and for the period June 30 to July 31, 1939, inclusive, will be accepted under the authority contained in section 3448 of the Internal Revenue Code, as being returns for the months of June and July, 1939, respectively, from persons liable for the tax on toilet preparations imposed under the provisions of section 3401 of the Internal Revenue Code, as amended by section 3 of the Revenue Act of 1939.

A return for the period ended June 29, 1939, must be filed with the collector of internal revenue on or before July 31, 1939, and a return for the period ending July 31, 1939, must be filed with the collector on or before August 31, 1939.

(This Treasury decision is prescribed pursuant to section 3401 of the Internal Revenue Code (53 Stat., Part 1), as amended by section 3 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and sections 3448 and 3450 of the Internal Revenue Code (53 Stat., Part 1).)

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved July 31, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 2, 1939, 11.10 a. m.)

ELECTRICAL ENERGY TAX.

SECTION 3411.—TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION.

REGULATIONS 42, ARTICLE 40: Scope of tax. 1939-43-10072
S. T. 892

Taxability of electrical energy sold for consumption in various activities.

Advice is requested whether electrical energy sold for the uses hereinafter indicated is subject to tax under section 3411 of the Internal Revenue Code as electrical energy sold for commercial consumption.

Section 3411 provides in part as follows:

(a) There shall be imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe. The sale of electrical energy to an owner or lessee of a building, who purchases

such electrical energy for resale to the tenants therein, shall for the purposes of this section be considered as a sale for consumption and not for resale, but the resale to the tenant shall not be considered a sale for consumption.

Article 40 of Regulations 42 (1932), as amended by Treasury Decision 4393 (C. B. XII–2, 322 (1933)), provides in part:

* * * The tax is imposed upon electrical energy sold for domestic or commercial consumption and not for resale, except as provided hereinafter.

The term "electrical energy sold for domestic or commercial consumption" does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, processing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by public utilities, waterworks, telegraph, telephone, and radio communication companies, railroads, other common carriers, educational institutions not operated for profit, churches, and charitable institutions. However, electrical energy is subject to tax if sold for use in the commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc.

Where electrical energy is sold to a single consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy used at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax.

The tax does not apply to electrical energy sold for resale, except where the electrical energy is sold to an owner or lessee of a building who purchases such electrical energy for resale to the tenants therein. The sale of electrical energy to an owner or lessee of a building who purchases such electrical energy for resale to the tenants therein, shall for the purposes of this tax be considered as a sale for consumption and not for resale, but the resale to the tenants shall not be considered a sale for consumption.

The following typical cases are presented:

1. The M Company is the owner of a building which is leased to various manufacturers of women's clothing. The clothing is made, displayed, and sold at wholesale on the premises. The electrical energy consumed in the building is metered through a master meter and is submetered by the M Company to the tenants for consumption in their manufacturing operations. The M Company is billed for the energy.

2. The N Company is the owner of a building which is leased to printing establishments and manufacturers of Christmas novelties. The N Company has a contract with the O Company whereby the O Company, *as agent for the N Company*, furnishes the meters for measuring the energy used on the premises by the tenants. The producer of the energy bills the N Company, in care of the O Company, for the energy consumed in the building. The O Company takes the meter readings for all the tenants, bills each tenant for the energy consumed, makes all collections, and pays the producing company for such energy.

3. The P Company is engaged in the business of repairing wrecked automobiles, radiator repairing, and general welding. The electrical energy furnished the company is used for lighting the premises, welding, drilling, and other operations incidental to repairing wrecked automobiles. The customers of the company are automobile repair shops and individual car owners. Substantially all of the business of the company is repair work.

4. The Q Company is engaged in the business of repairing steam pumps, boilers, and related equipment. Incidental to, and for use in, making such repairs, replacement parts, such as shafts, casings, pistons, etc., are manufactured on the premises. Replacement work is, however, a very minor activity, substantially all of the company's activities being repair work. The electrical energy is used for lighting and power requirements. The customers of the company are largely dealers in steam pumps and boilers.

5. A operates a hand laundry. The electrical energy is consumed for lighting the premises.

6. B operates a tailor shop. His activities consist of pressing and repairing clothing, and occasionally making garments to order for individuals. The electrical energy is used for heating, lighting, and power purposes.

7. C is a practicing physician. The electrical energy is consumed in lighting his office and in the operation of the medical equipment therein. All of the activities carried on at the premises are of a professional nature.

The question involved in each of the foregoing cases is whether the electrical energy was sold for " commercial " or " industrial " consumption within the meaning of the law and regulations.

Based upon the facts presented in these cases, it is held that the electrical energy in cases 1 and 2 consumed in manufacturing operations was sold for *industrial* consumption and is not subject to tax, and that the electrical energy in cases 3 to 7, inclusive, was sold for *commercial* consumption and is subject to tax.

TITLE IV.—MANUFACTURERS' EXCISE TAXES. (1932)

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.) — 1939-28-9911 S. T. 883

The exemption provided in section 630 of the Revenue Act of 1932, as amended, applies to articles sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on civil aircraft registered in Bermuda.

S. T. 879 (C. B. 1939-1 (Part 1), 354) modified.

Advice is requested whether Bermuda allows 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.

In accordance with the requirements prescribed in section 630 of the Revenue Act of 1932, as amended, the Secretary of Commerce has advised the Secretary of the Treasury that Bermuda allows 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. Accordingly, exemption under section 630, as amended, will be allowed in respect of aircraft registered in Bermuda so long as Bermuda continues 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).

S. T. 879 (C. B. 1939–1 (Part 1), 354) is modified to include Bermuda in the list of foreign countries which allow privileges which are substantially reciprocal to those specified in section 630 of the Revenue Act of 1932, as amended.

TELEGRAPH, TELEPHONE, RADIO, AND CABLE FACILITIES, ETC.

REGULATIONS 42(1932), ARTICLES 1, 8, 25, 39. 1939–34–9977
T. D. 4922

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 130; SUBCHAPTER E, PART 465, SUBPART B.

Tax on telegraph, telephone, radio, and cable facilities; transportation of oil by pipe line, and electrical energy—Subtitle C of the Internal Revenue Code.

Articles 1, 8, 25, and 39 of Regulations 42, approved October 22, 1932, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 1 of the Revenue Act of 1939, approved June 29, 1939, reads in part as follows:

SEC. 1. CONTINUATION OF EXCISE TAXES * * *.

Sections * * * 3452, 3460(a), 3465, * * * of the Internal Revenue Code are amended by striking out "1939" wherever appearing therein and inserting in lieu thereof "1941." * * *

In conformity with the provision of law quoted above, articles 1, 8, 25, and 39 of Regulations 42 (revised October, 1932), as amended (sections 130.1, 130.8, 130.25, and 130.39 of Title 26, Code of Federal Regulations), but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939–1 (Part 1), 396] (Part 465, Subpart B of such Title 26), under the authority contained in sections 3431 and 3472 of the Internal Revenue Code, are further amended to read as follows:

ARTICLE 1. *Effective period.*—The tax is imposed upon payments for the transmission by telegraph, telephone, cable, or radio of dispatches, messages, and conversations originating in the United States prior to July 1, 1941, regardless of the date of payment.

ART. 8. *Effective period.*—The tax imposed under section 3465(b) attaches to the amount paid for any leased wire or talking circuit special service fur-

nished prior to July 1, 1941. If the rendition of the service occurs prior to July 1, 1941, the tax attaches thereto notwithstanding the date of payment.

Art. 25. *Effective period.*—The tax imposed under section 3460 applies to all transportation of crude petroleum and liquid products thereof by pipe line where the movement begins prior to July 1, 1941. In the case of any such transportation by pipe line where the movement originates prior to July 1, 1941, and ends on or after that date, the tax attaches to the entire amount charged for the transportation, although paid on or after July 1, 1941.

ART. 39. *Effective period.*—The tax applies to electrical energy sold prior to July 1, 1941.

(This Treasury decision is prescribed pursuant to sections 3452, 3460(a), and 3465 of the Internal Revenue Code (53 Stat., Part 1), as amended by section 1 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and sections 3431 and 3472 of the Internal Revenue Code.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 15, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 16, 1939, 1.12 p. m.)

SECTION 3465, AS AMENDED BY SECTION 1 OF THE REVENUE ACT OF 1939.—IMPOSITION AND RATE OF TAX.

REGULATIONS 42 (1932), ARTICLE 10: Leased wire special service. 1939–43–10073 S. T. 893

(Also Articles 12, 13, 14, and 15.)

Amounts paid for leased wires used in the transmission of messages or signals are not subject to tax under section 3465(b) of the Internal Revenue Code, as amended, where all of the terminals of such wires are located within an area served by a local telephone exchange not charging tolls upon messages transmitted between points within such area.

S. T. 594 (C. B. XI–2, 519 (1932)) revoked.

Advice is requested whether amounts paid to a telegraph or telephone company for leased wires used for the transmission of messages or signals other than telephone conversations are subject to tax under section 3465(b) of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939, where all of the terminals are located within an area served by a local telephone exchange not charging tolls upon messages transmitted between points within such area.

Section 3465, as amended, provides in part as follows:

There shall be imposed—

* * * * * * *

(b) a tax equivalent to 5 per centum of the amount paid to any telegraph or telephone company for any leased wire or talking circuit special service furnished before July 1, 1941. This subsection shall not apply to the amount paid for so much of such service as is utilized in the conduct, by a common carrier or telephone or telegraph company or radio broadcasting station or net work, of its business as such.

A similar tax was imposed by the Revenue Acts of 1918 and 1921. Article 19 of Regulations 57 (approved July 24, 1920) and article 18 of Regulations 57 (approved February 15, 1922) provide:

For administrative purposes it is held that where the area covered by a leased wire special service is served by a local telephone exchange, tolls not being charged upon messages transmitted between points within such area, such special service does not come within the provisions of the Act.

In construing the provisions of section 500(g) of the Revenue Act of 1918, imposing the tax under that Act, it was held in S. T. 1–21–120 (Sales Tax Rulings, Cumulative Bulletin January–June, 1921, page 17), that—

Where leased wire or talking circuit special service is strictly local, it is not subject to tax under paragraph (g), section 500, such exempt service being required in paragraph 3 of article 19, Regulations 57 (revised), to be within an area actually served by a local telephone exchange without toll charges upon messages transmitted between points within such area. Such special service as tickers with messages relayed mechanically or otherwise is not subject to tax if the terminals of the special service are within an area actually served by a local telephone exchange without toll charges upon messages transmitted between points within such area.

In S. T. 594 (C. B. XI–2, 519 (1932)), it was held that where wires and instruments were leased to a person who had the exclusive use thereof the amount paid therefor was taxable under section 701(a)2 of the Revenue Act of 1932 as a leased wire or talking circuit special service, even though the facilities were confined to the building in which the lessee's office was located.

The language of section 500(g) of the Revenue Act of 1918 and section 3465(b) of the Internal Revenue Code is substantially the same. The rule stated in S. T. 1–21–120 is considered a correct interpretation of section 500(g) of the Revenue Act of 1918. Since section 3465(b) is substantially the same as section 500(g) of the Revenue Act of 1918, the rule set forth in S. T. 1–21–120 is applicable under section 3465(b). For tax purposes, there is no distinction between leased wires used for telephonic communication and such wires used for other types of communication.

In view of the foregoing, it is held that amounts paid for leased wires, which are used in the transmission of messages or signals and all of the terminals of which are located within the same local area, are not subject to tax under section 3465(b) of the Internal Revenue Code, as amended.

S. T. 594 (C. B. XI–2, 519 (1932)) is revoked.

TITLE V.—MISCELLANEOUS TAXES. (1932)

SECTION 731.—TRANSPORTATION OF OIL BY PIPE LINE.

REGULATIONS 42 (1932), ARTICLE 26: Basis of tax. 1939–28–9914
Ct. D. 1407

MISCELLANEOUS TAXES—REVENUE ACT OF 1932—DECISION OF COURT.

TAX ON TRANSPORTATION OF OIL BY PIPE LINE—CRUDE PETROLEUM—CASING-HEAD GASOLINE.

Casing-head or natural gasoline is a product of crude petroleum, and its transportation by pipe line is therefore taxable under the provisions of section 731 of the Revenue Act of 1932.

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

General Petroleum Corporation of California, a Corporation, plaintiff, v. *United States of America, defendant.*

[24 F. Supp., 285.]

[July 30, 1938.]

OPINION.

YANKWICH, District Judge: By this action, General Petroleum Corporation of California, a corporation, seeks to recover the sum of $6,194.48 paid by its predecessor, General Pipe Line Co. of California, between June 21, 1932, and December 31, 1934, as a tax on casing-head or natural gasoline transported by pipe line.

The payment was made under the Revenue Act of 1932, which imposed a tax "upon all transportation of crude petroleum and liquid products thereof by pipe line originating on and after the fifteenth day after the date of the enactment of this Act and before July 1, 1935." (Section 731(a), Revenue Act of 1932, 26 U. S. C. A., note following section 1481.)

The question we are to decide is whether casing-head or natural gasoline is a product of crude petroleum.

Words used in legislative enactments are to be given their natural significance. The sense to be attributed to them is that of the everyday speech of men. If words refer to articles of trade, they are to be interpreted in the sense in which they are understood by those in the trade. (See: *Two Hundred Chests of Tea, Smith Claimant* (1824), 9 Wheat., 430; *Maillard* v. *Lawrence* (1853), 16 How., 251, 261; *American Net & Twine Co.* v. *Worthington* (1891), 141 U. S., 468; *Robinson* v. *Salomon* (1889), 130 U. S., 413; *Burke* v. *Southern Pacific R. R.* (1914), 234 U. S., 669; *Ozawa* v. *United States* (1922), 260 U. S., 178, 194; *United States* v. *Thind* (1923), 261 U. S., 204, 209; *Lincoln* v. *Ricketts* (1936), 297 U. S., 373, 376.)

These principles are a recognition of the democratic origin of language. Words do not become a part of language unless they get themselves accepted as a part of the everyday speech of man. Technical words, of course, are given the technical significance which their acceptance by a particular craft or group has conferred upon them.

The difficulty which confronts us here is traceable to the absence of agreement as to the meaning of the words "crude petroleum" and as to the derivation of casing-head gasoline.

Petroleum is a mineral consisting essentially of a complex mixture of hydrocarbons [*Burke* v. *Southern Pacific Co.*, supra; Webster's New International Dictionary, 1937]. Casing-head or natural gasoline is gasoline extracted from wet gas taken from an oil well, at the casing head, in a separator or trap, as the gas leaves the well. The different kinds of gasoline contain the same hydrocarbons in various proportions. But while there is agreement as to the method of extraction, the experts disagree as to the source of the particles of gasoline found in casing-head or wet gas. Some assert that it is a product of the gas. Others assert that even when extracted from a gas well, *it originates in contact with crude oil in some subterranean stratum.* We quote from the testimony of H. H. Cannon, a consulting engineer with long experience in the oil industry, who testified for the Government:

"The COURT. Suppose you had a gas well but no liquid visible, at all, so far as you drill it. *What would you consider the gasoline that came from that gas to be?*

"The WITNESS. *A petroleum product because, in my opinion, that gas has been in contact with a body of liquid petroleum somewhere.*

"The COURT. *You don't know where that gas came in contact with the body of liquid petroleum?*

"The WITNESS. *That is right.*

"The COURT. In other words, the presence of the particles of these various things which constitute gasoline which are found in gas and extracted from it by separation, (are?) show clearly a petroleum product?

"The WITNESS. That is right." [Italics added.]

On the basis of testimony before him, Judge Williams in *Twin Hills Gasoline Co.* v. *Bradford Oil Co.* (D. C. Okla., 1919) (264 Fed., 440, 441) arrived at a similar conclusion:

"*that wet gas exists only with oil. Therefore, casing-head gas is a component of oil.*"

Ordinarily, in instruments dealing with the products of oil, gas is used in juxtaposition with oil. So we speak ordinarily of "gas, oil and other hydrocarbon substances." Much of the legislation concerning oil and having the aim to conserve oil uses this terminology. (See, Oil and Gas Conservation Law of California, Act 4916, Gen. Laws of Cal. (1937), page 2069; Laws of Texas, articles 6014, 6023, 6029; Compiled Oklahoma Statutes, sections 7954–7963.) The words "petroleum" and "oil" are, technically, synonymous.

As the experts are in disagreement as to the relationship between gasoline, especially casing-head gasoline, and petroleum, so are the courts. Some hold that gasoline and casing-head gasoline are a part of crude oil or petroleum. (See: *Kings County Fire Ins. Co.* v. *Swigert* (1882), 11 Ill. App., 590, 598; *Poe* v. *Humble Oil & Refining Co.* (Tex. Civ. App.) (1926), 288 S. W., 264; *Gilbreath* v. *States Oil Corporation* (C. C. A. 5, 1925), 4 Fed. (2d), 232; *Connellee* v. *Magnolia Petroleum Co.* (Tex. Civ. App., 1926), 279 S. W., 597; *Locke* v. *Russell* (W. Va., 1915), 75 W. Va., 602, 84 S. E., 948; *Wemple* v. *Producers' Oil Co.* (1919), 145 La., 1031, 83 So., 232; *Livingston Oil Corporation* v. *Waggoner* (1925), 273 S. W., 903.) Others hold that they are neither oil nor gas. (*Clymore Production Co.* v. *Thompson* (1936) (D. C. Tex.), 13 Fed. Sup., 469; *Hammett* v. *Gypsy Oil Co.* (1921), 95 Okla., 235, 218 P., 501; *Ludey* v. *Pure Oil Co.* (1932), 157 Okla., 1, 11 P. (2d), 102; *Broswood Oil Co.* v. *Sand Springs Home* (1936), 178 Okla., 550, 62 P. (2d), 1004; *Hopkins* v. *Texas Co.* (C. C. A. 10, 1933), 62 Fed. (2d), 691; applying Oklahoma decisions; *Lone Star Gas Co.* v. *Harris* (Tex. Civ. App., 1932), 45 S. W. (2d), 664.)

With this divergence in the opinion of experts and of courts, the meaning of the words is to be determined in the light of the circumstances attending their use in the particular legislation. What militates in favor of construing casing-head gasoline as a product of crude oil or petroleum is the fact that the wet gas from which it is extracted is *never found except with oil.* The coupling of the words "crude" and "petroleum" is, from a strictly scientific standpoint, tautological. For the word "petroleum" conveys all the meaning which the words "crude petroleum" do. Yet we find that the phrase has been used in legal instruments and in legislation and has received judicial definition. in *Kings County Fire Insurance Co. v. Swigert* (11 Ill. App. 590, 598), it is defined as follows:

"Crude petroleum consists of a number of different oils, all more or less volatile, which are separated from each other by a process of distillation; and of these gasoline, being the most volatile, and consequently the most explosive, is the one driven off at the lowest temperature." (See 48 Corpus Juris, 1953.)

When they occur, as they often do, in various tariff acts, the words are given a broad interpretation. (See: *United States* v. *Downing & Co.*, C. C. A. 2, 1906, 146 Fed., 56; *United States* v. *Swan & Finch Co.*, C. C. A. 2, 1909, 169 Fed., 108; *United States* v. *F. A. Marsily & Co.*, C. C. A. 1, 1908, 165 Fed., 186.)

The legislative history of the section under consideration shows that the object sought to be attained by the 1932 enactment *was the taxation of gasoline transported by pipe line.* The Revenue Acts of 1917 and 1918 taxed the transportation of "oil by pipe line." Article 91 of Regulations 49, promulgated under the 1918 Act, defined the word oil as "crude petroleum and such of its products as may be transported by pipe line." The tax on pipe line transportation was repealed in 1921. It was the object of the 1932 Act to restore it. The Act as it reached the Senate Finance Committee retained the word "oil." It was changed in committee to the present wording. The committee, in its report, stated the object of the change to be as follows:

"PART IV. TAX ON TRANSPORTATION OF OIL BY PIPE LINE.

"The rate under section 731 on transportation of oil by pipe line has been reduced from 8 to 3 per cent. The word 'oil' has been changed to 'crude petroleum and liquid products thereof.' *This will make transportation of gasoline as well as crude oil taxable.*

"Amendments have been made to impose the tax on the pipe line rather than the person paying for the transportation." [Italics added.]

The conference report on the bill stated the object of the amendment as follows:

"Section 731(a). Tax on transportation of oil by pipe line. Amendment No. 232: This amendment [addition of words 'crude petroleum and liquid products thereof' following 'transportation of' in the first line] makes the tax under the House bill on transportation by pipe line applicable *to crude petroleum and its liquid products, instead of to oil only.* The House recedes." [Italics added.]

The deliberate substitution of the words "crude petroleum" for "oil" indicates an intention to avoid the possible effect of decisions which had declined to consider gasoline as a derivative of oil. The use of the phrase "*instead of to oil only*" in the report, shows plainly that the new terminology was to reach *more products* than the old one. If, as contended by the plaintiff, the words "crude petroleum" mean nothing more than "crude oil," then the change was a useless gesture. Yet the conference committee says that they sought words of a broader meaning because they aimed to reach, by the change, products not reached by the old law. It is a peculiarity of the legislative mind in the English speaking world, as it is of its legal mind, to retain phrases which, through long usage, have acquired a definite meaning. This is especially true when a phrase has been the subject of judicial interpretation.

When words existing in a prior enactment which it is sought to revive are changed, the inference is that the old words proved inadequate to cover the matters which the legislation sought to reach. When added to that is the fact, expressed specifically by the legislative body, that the substitution of wording aimed to achieve a certain result, there is no room for speculation. And when the aim is obvious, the literal or even scientific meaning of a word must be disregarded in order to achieve it. (See: *Ozawa* v. *United States* (1922), 260 U. S., 178, 194.) It is conceded by the plaintiff that the tax applied to straight-run gasoline, i. e., gasoline extracted by various processes directly from the oil. The object of the Congress being to tax *gasoline in general,* without any specific designation of kind, no reason appears for declining to include casing-head gasoline. Casing-head gasoline is gasoline. As the witness Cannon testified:

"Q. Is there *any chemical difference* between the several commodities *contained in the gaseous vapor* in the separator *and in the oil?*

"A. No. None, at all.

"Q. Can you produce from crude petroleum or crude oil a gasoline which will have approximately the same characteristics as casing-head gasoline?

"A. Yes.

"Q. Can such a product be utilized for the same purpose as casing-head gasoline is utilized?

"A. Yes.

"Q. Is there a definite dividing line between casing-head gas and crude petroleum at the separator?

"A. No. There is not a distinct line of demarcation between those two products.

"Q. Does the petroleum industry recognize that fact?

"A. Oh, yes.

"Q. Is there a definite dividing line between casing-head gasoline and straight-run gasoline?

"A. No, there is no definite distinct line of demarcation there.

"Q. Does the petroleum industry also recognize that fact?

"A. Yes." [Italics added.]

In view of the state of the law at the time of the enactment and its avowed purpose, I am of opinion that the Congress intended to designate by the words "crude petroleum" all the hydrocarbon substances—whether in liquid, solid or gaseous form coming out of an oil well—and that they intended to include not only the gasoline which is mingled with the liquid substance so as to require extraction through various methods but also the natural or casing-head gasoline contained in the gas coming out at the same time as the oil and which can be captured at the casing head through separation.

There is evidence in the record that the word "petroleum" is understood in the trade to include all the hydrocarbon substances coming out of the well

and to include specifically casing-head gas. We quote the following from the witness Cannon:

"Q. Did you ever hear in the industry the use of the word 'crude petroleum'?

"A. I think that is a word that is very rarely used.

"Q. In the industry, what is the common understanding as to the meaning of the term 'crude oil'? I am not asking you the techincal meaning, but give us the understanding of the term 'crude oil' and the way it is understood in the industry?

"A. Crude oil, I think, is considered to be any of that product anywhere from the separator through the dehydrating plant, if any, into the storage tanks, through the pipe lines, into the refining and storage and clear into the final sale. It is all considered crude oil all the way through.

"Q. That is in the industry?

"A. Yes, in the industry it is all considered crude oil, all the way through.

"Q. *In the industry, what is the understanding of the term 'petroleum products'?*

"A. *Any product that is derived from petroleum.*

"Q. *And what is 'petroleum'?*

"A. Well, I have pretty well covered that when I went down to the bottom of the reservoir.

"The COURT. Well, go down farther.

"Q. Just repeat it, briefly.

"A. I don't know as I have checked the actual definition of the word. *My understanding has been that it is any substance that is produced from an oil well, or is mined as asphalt is mined.*

* * * * * * *

"Q. *I believe that you stated, in answer to a question asked by the court, that casing-head gasoline is in* the casing-head gas after the gas is separated at the well. Is casing-head gas a *product of petroleum?*

"A. Absolutely.

* * * * * * *

"The COURT. Well, it would be on this witness's statement obviously—in common parlance, however, in the industry. In the industry, there has grown up, in the last few years, a certain generic term for petroleum products, and, in the nomenclature, where they speak of liquid oil as oil and gas and they throw in for good measure the term 'and other hydrocarbon substances' in their leases and royalty agreements?

"The WITNESS. That is true.

"The COURT. And all the instruments that are written relating to various products of a well are written with that terminology?

"The WITNESS. That is right.

"The COURT. But, *in the scientific view, and the general view, they are all one and the same thing and are designated,* as you say, *as petroleum and merely divided into the various components after they leave the reservoir.* Is that correct?

"The WITNESS. Yes, sir." [Italics added.]

Alexander B. Morris, petroleum engineer of the Department of Internal Revenue, who testified for the Government, states:

"Q. (By Mr. MITCHELL): Is there any definite or sharp dividing line *between casing-head gas and casing-head gasoline and crude oil?*

"A. *There is no definite, clear-cut line where one can be separated from another.* The only distinction that can be made is where it exists at no set equilibrium point. You might say, for illustration, that you have a bowl of bean soup. In that bowl of soup you might have 3 navy beans, 5 lima beans, and 300 of other kinds of beans. It will still be bean soup, however. And these are still portions of crude petroleum regardless of how many compound component parts there be in it.

"Q. *Is casing-head gasoline a product of crude petroleum?*

"A. *Yes. I can unhesitatingly state that casing-head gasoline is a product of crude petroleum.*

"Q. *Is casing-head gasoline a product of crude oil?*

"A. It may be. Not necessarily. It depends on the system.

"Q. Is casing-head gasoline a product of crude petroleum?

"A. It is." [Italics added.]

These statements lend force to the announced conclusion, derived from the legislative history of the enactment.

Tax laws are interpreted liberally in favor of the taxpayer. Doubts arising in their interpretation or application must be resolved against the taxing body. (*United States* v. *Isham* (1873), 17 Wall., 496, 504; *Crooks* v. *Harrelson* (1930), 282 U. S., 55, 61 (Ct. D. 271, C. B. X–1, 469 (1931)); *Miller* v. *Standard Nut Margarine Co.* (1932), 284 U. S., 498, 508 (Ct. D. 457, C. B. XI–1, 370 (1932)).) But the doubts must be real and must spring from uncertainties apparent on the face of the taxing law. However, where, as here, the legislative history of the enactment and expert testimony in the record show the meaning intended, we would be striving for imaginary doubts, if we failed to apply it.

We conclude that casing-head gasoline transported by pipe line, was taxable under the Revenue Act of 1932 and that the taxes paid by the plaintiff's predecessor are not recoverable.

Judgment will be for the Government. Findings and judgment under rule 44. Exception to the plaintiff.

ADMISSIONS TAX.

INTERNAL REVENUE CODE.

SECTION 1700, AS AMENDED BY SECTION 1 OF THE REVENUE ACT OF 1939.—TAX.

REGULATIONS 43 (1932), ARTICLE 1: Basis, rate, and computation of tax. (Also Section 1701 and Article 14.) 1939-32-9949 S. T. 885

Amounts paid for admission to dances held by members of the Civilian Conservation Corps at the camps of the corps are subject to the admissions tax imposed by section 1700 of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939, *provided* such amounts are 41 cents or more.

Advice is requested whether the amounts paid for admission to dances held by members of the Civilian Conservation Corps at camps of the corps are subject to tax under section 1700 of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

Section 1700 of the Internal Revenue Code, as amended, imposes a tax of 1 cent for each 10 cents or fraction thereof paid for admission to any place, including admission by season ticket or subscription, if the amount paid is 41 cents or more. Section 1701 exempts from tax any admissions all of the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, if no part of the net earnings thereof inures to the benefit of any private stockholder or individual.

The members of the Civilian Conservation Corps from time to time hold dances at the camps of the corps under the authority of the Civilian Conservation Corps regulations. Members of the corps and others are admitted. The proceeds from the admissions are deposited in the funds of the particular company sponsoring the dance. The Civilian Conservation Corps was established for the purpose of providing employment as well as vocational training. At least 10 hours each week may be devoted to general educational and vocational training. (Act of June 28, 1937, 50 Stat., 319; 16 U. S. C. Sup., 584.) The question presented is whether the Civilian Conservation Corps may properly be classed as an educational or charitable organization for the purpose of determining liability to the tax on admissions paid by its members and others.

Article 14 of Regulations 43 (1932) provides in part that for an organization to be considered an educational or charitable organization within the meaning of the law the purpose of the organization as put into practice must be educational or charitable and its funds must be used solely in furtherance of such purpose, none of them being paid or otherwise distributed to any of its members except as charity or as reasonable compensation for services actually rendered.

While the vocational training afforded those enrolled in the Civilian Conservation Corps is an important educational activity, the furnishing of employment on a salary basis to such persons is one of the pri-

mary purposes of the corps. That activity can not properly be said to be exclusively educational or charitable.

It is held that the Civilian Conservation Corps does not qualify as an educational or charitable organization within the meaning of section 1701, supra, and that the amounts paid for admission to the dances at the camps of the corps are subject to the tax imposed by section 1700 of the Internal Revenue Code, *provided* such amounts are 41 cents or more. Where the admission charges to members of the corps are less than the amounts charged to other persons for admission to the dances, it is held that such charges are not reduced-rate admissions within the meaning of the law since the members of the corps are not admitted under the same circumstances under which such other persons are admitted. In such cases, the amount paid by a member is subject to tax only when the amount is 41 cents or more.

REGULATIONS 43 (1932), ARTICLE 57: Effective date of change in exemption. 1939-34-9978 T. D. 4923

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 100; SUBCHAPTER E, PART 465, SUBPART B.

Tax on admissions, Chapter 10, Subchapter A, of the Internal Revenue Code.
Article 57 of Regulations 43, approved June 14, 1932, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 1 of the Revenue Act of 1939, approved June 29, 1939, reads in part as follows:

SEC. 1. CONTINUATION OF EXCISE TAXES * * *.

Sections 1700(a)(1) * * * of the Internal Revenue Code are amended by striking out "1939" wherever appearing therein and inserting in lieu thereof "1941." * * *

In conformity with the provision of law quoted above, article 57 of Regulations 43 (revised June, 1932), as amended (section 100.57 of Title 26, Code of Federal Regulations), but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] (Part 465, Subpart B of such Title 26), under the authority contained in section 3791 of the Internal Revenue Code, is further amended to read as follows:

ART. 57. *Effective date of change in exemption.*—The sums paid for admission which are not subject to tax under section 1700(a)(1) of the Internal Revenue Code (same as section 500(a)(1), as amended, of the Revenue Act of 1926) are those which are "less than 41 cents." Effective July 1, 1941, any sum of "$3.00 or less" paid for admission will not be taxable. The time of payment and not the time of admission will govern in determining which exemption is applicable. Consequently, if a person should purchase a ticket of admission for an amount in excess of 40 cents where the payment was made before July 1, 1941, for an admission to take place after that date, the payment so made would be subject to tax.

(This Treasury decision is prescribed pursuant to section 1700 (a) (1) of the Internal Revenue Code (53 Stat., Part 1), as amended by section 1 of the Revenue Act of 1939 (Public, No. 153, Seventy-sixth Congress, first session) and section 3791 of the Internal Revenue Code.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 15, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 16, 1939, 1.12 p. m.)

STAMP TAXES.

INTERNAL REVENUE CODE.

REGULATIONS 71 (1932), ARTICLE 2: Effective period. 1939-33-9965 T. D. 4920

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 111; SUBCHAPTER E, PART 465, SUBPART B.

Stamp taxes on issues and transfers of stocks and bonds, passage tickets, foreign insurance policies, and deeds of conveyance. Article 2 of Regulations 71, approved July 16, 1932, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 1 of the Revenue Act of 1939, approved June 29, 1939 (Public, No. 155, Seventy-sixth Congress, first session), provides:

SEC. 1. CONTINUATION OF EXCISE TAXES * * *.

Sections * * *, 1801, 1802, * * * 3481(b), and 3482 of the Internal Revenue Code are amended by striking out "1939" wherever appearing therein and inserting in lieu thereof "1941." * * *

Pursuant to the above amendment, Regulations 71, approved July 16, 1932, as amended (Part 111 of Title 26, Code of Federal Regulations), but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] (Part 465, Subpart B, of Title 26, Code of Federal Regulations), under the authority contained in section 3791 of the Internal Revenue Code, are amended as follows:

Article 2, as amended by Treasury Decision 4824 [C. B. 1938-2, 405] (section 111.2 of such Title 26), is amended to read as follows:

ART. 2. *Effective period.*—The stamp tax provisions of the Internal Revenue Code, as amended by the Revenue Act of 1939, are in full force and effect. The rates of tax imposed by sections 1801, 1802(a), and 1802(b) of the Internal Revenue Code, which would have been reduced on July 1, 1939, and the stamp taxes imposed by sections 3481 and 3482 of the Internal Revenue Code, which would have been repealed as of that date, will remain effective to and including June 30, 1941.

(This Treasury decision is prescribed pursuant to sections 1801, 1802(a), 1802(b), 3481, and 3482 of the Internal Revenue Code (53 Stat., Part 1), as amended by section 1 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and section 3791 of the Internal Revenue Code.

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved August 10, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 12, 1939, 11.01 a. m.)

SECTION 1802, AS AMENDED BY SECTION 1 OF THE REVENUE ACT OF 1939.—CAPITAL STOCK (AND SIMILAR INTERESTS).

REGULATIONS 71, ARTICLE 28: Issues subject to tax. 1939-35-9984 S. T. 891

The original issue of certificates of membership by the M Rural Electric Cooperative Association, Inc. (Kansas), and the original issue of capital stock by the N Rural Electric Cooperative Association, Inc. (Colorado), are subject to stamp tax.

Advice is requested whether certificates of membership issued by the M Rural Electric Cooperative Association, Inc. (hereinafter referred to as the M Association), a Kansas corporation, and capital stock issued by the N Rural Electric Cooperative Association, Inc. (hereinafter referred to as the N Association), a Colorado corporation, are subject to stamp tax under section 1802(a) of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

Section 1802(a), as amended, imposes a stamp tax on each original issue of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation.

The articles of incorporation of the M Association provide for the issuance of capital stock in the amount of $10x$ dollars divided into $2x$ shares having a par value of $5x$ dollars each. The shares are referred to in the by-laws of the association as "certificates of membership" and were issued as such. The by-laws provide that the "termination of membership in any manner shall operate as a release of all right, title and interest of the member in the property and assets" of the association.

The N Association issued capital stock in the amount of $20x$ dollars consisting of $10x$ shares having a par value of $2x$ dollars each.

It is contended that the issue of the certificates of membership and the issue of the capital stock here involved are exempt from stamp tax (1) on the ground that the associations are agencies of the States of Kansas and Colorado, respectively, or (2) under the provisions of the Rural Electrification Act of 1936 (49 Stat., 1363–1367; 7 U. S. C., Sup. IV, 901–914).

The certificates of membership issued by the M Association are clearly certificates of interest in property within the meaning of section 1802(a), as amended. Under the laws of Kansas, organizations such as the M Association are treated as a specialized class of private corporations and not as agencies of the State. (General Statutes of Kansas, 1935, article 15, chapter 17.)

The laws of Colorado under which the N Association was incorporated do not contemplate an agency relationship between organizations incorporated thereunder and the State. (1935 Colorado Statutes Annotated, chapter 41, sections 210–226.) Such laws merely confer on such corporations features which may be distinguished from the features of ordinary business corporations. (*Johnson Olmsted Realty Co.* v. *City and County of Denver et al.*, 89 Colo., 250, 1 P. (2d), 928.) The association, according to its articles of incorporation, was organized for the purpose of furnishing rural power cooperatively. It has no incidents which would justify its classification as an agency of the State.

There is no provision in the Rural Electrification Act of 1936 exempting from Federal taxes the issuance of certificates of member-

ship and capital stock by associations or corporations coming within the scope of that Act.

In view of the foregoing, it is held that the original issue of certificates of membership by the M Rural Electric Cooperative Association, Inc., and the original issue of capital stock by the N Rural Electric Cooperative Association, Inc., are subject to stamp tax under section 1802(a) of the Internal Revenue Code, as amended.

REGULATIONS 71, ARTICLE 34: Sales or transfers subject to tax. 1939-34-9974 S. T. 889

Where corporate stock was bequeathed to B for life and to C at B's death, the transfer of the stock upon B's death from the name of B, the life tenant, to C, the remainderman, does not result wholly by operation of law and is subject to stamp tax.

Advice is requested whether the transfer of corporate stock from the name of B, a deceased life tenant, to the name of C, the remainderman, pursuant to the provisions of a will is subject to the stamp tax imposed by section 1802(b) of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

The law imposes a stamp tax on all sales or transfers of legal title to any shares or certificates of corporate stock, with certain exceptions not here applicable.

Under the will of A, corporate stock was bequeathed to B for life and upon B's death to C. Upon the death of B, the life tenant, the stock was transferred to C, the remainderman. The question is presented whether the transfer of the stock to C is subject to stamp tax.

Transfers of stock in pursuance of a gift or bequest are subject to stamp tax. (Article 34(*l*) of Regulations 71.) Transfers of stock which result wholly by operation of law are not subject to stamp tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor. (Article 35(*r*) of Regulations 71.)

When B, the life tenant, died, C, the remainderman, had the right to have the stock transferred to him. Such a transfer is not one resulting wholly by operation of law, but one pursuant to a bequest under the will of A. The will was the generating source of the transfer and designated the person who was to receive the stock at the death of B. Accordingly, it is held that the transfer of the stock here involved from the name of B, the life tenant, to the name of C, the remainderman, is subject to stamp tax under section 1802 of the Internal Revenue Code, as amended.

REGULATIONS 71, ARTICLE 34: Sales or transfers subject to tax. 1939-46-10091 S. T. 894

Transfers of corporate stock made in furtherance of integration plans adopted by public utility companies, pursuant to the Public Utility Act of 1935 and the orders of the Securities and Exchange Commission approving such plans, are subject to stamp tax under section 1802(b) of the Internal Revenue Code, as amended.

Advice is requested whether transfers of corporate stock made in the furtherance of integration plans adopted by public utility companies, pursuant to the Public Utility Act of 1935 and the orders of

the Securities and Exchange Commission approving such plans, are transfers resulting wholly by operation of law and, therefore, not subject to stamp tax under section 1802(b) of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

Section 1802(b), as amended, imposes a stamp tax on all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any shares or certificates of corporate stock, with certain exceptions not here applicable.

Section 11 of the Public Utility Act of 1935 (49 Stat., 803, 820) provides in part as follows:

(a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: * * *

* * * * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

* * * * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). * * *

Article 35 of Regulations 71 (1932) reads in part:

(r) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

The transfers covered by the above-quoted provisions of article 35 of Regulations 71 are limited to those transfers which result *wholly by operation of law*. While the transfers made in carrying out the integration plans adopted pursuant to the Public Utility Act of 1935 are made pursuant to law, such transfers are not effected *wholly by operation of law*. Furthermore, section 371 of the Internal Revenue Code provides that no gain or loss shall be recognized for income tax purposes with respect to certain exchanges and distributions made in obedience to orders of the Securities and Exchange Commission, but no exemption from stamp tax has been provided for such transfers.

In view of the foregoing, it is held that transfers of corporate stock made in the furtherance of integration plans adopted pursuant to the Public Utility Act of 1935 and the orders of the Securities and Exchange Commission approving such plans are subject to stamp tax under section 1802(b) of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

REGULATIONS 71, ARTICLE 35: Sales or transfers not subject to tax. 1939–33–9957 S. T. 887

The transfer of corporate stock from the name of a guardian to the name of a ward in the State of Minnesota is not subject to stamp tax.

Advice is requested whether the transfer of corporate stock from the name of a guardian to the name of a ward, both being residents of the State of Minnesota, is subject to the stamp tax imposed by section 1802(b) of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

Section 1802(b) of the Internal Revenue Code, as amended, imposes a stamp tax on all sales or transfers of legal title to any shares or certificates of corporate stock, with certain exceptions not here applicable. The taxability of the transfer of corporate stock from the name of a guardian to the name of a ward depends upon whether, under the laws of the jurisdiction, legal title remains in the ward or vests in the guardian at the time of his appointment. (MS. 42, C. B. IV–1, 338 (1925).)

Section 4107f, volume 3 of Dunnell's Digest of Minnesota Laws, second edition, reads as follows:

A guardian has no title or personal interest in the property of his ward, but only a naked authority not coupled with an interest. The legal as well as the beneficial title to both real and personal property remains in the ward. The guardian has a right to the possession of both forms of property, but only for the purposes of his trust and for the use and benefit of the ward. His possession is the possession of the ward. He holds the possession merely as the officer of the court appointing him and subject to its orders in relation thereto.

It is clear from the above-quoted provision of the laws of Minnesota that a guardian in that State does not acquire legal title to corporate stock belonging to his ward. Consequently, a transfer of legal title is not involved in the transfer of corporate stock from the name of a guardian to the name of the ward in that State, and such transfer is not subject to stamp tax.

REGULATIONS 71 (1932), ARTICLE 35: Sales or transfers not subject to tax. 1939-41-10059 T. D. 4950

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 111; SUBCHAPTER E, PART 465, SUBPART B.

Regulations 71, as amended, relating to stamp taxes, as made applicable to the Internal Revenue Code by Treasury Decision 4885 [C. B. 1939-1 (Part 1), 396], amended.

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

Collectors of Internal Revenue and Others Concerned:

Regulations 71, approved July 16, 1932, as amended (Part 111, Title 26, Code of Federal Regulations), but only as made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939-1 (Part 1), 396] (Part 465, Subpart B, of such Title 26), are amended as follows:

Article 35 (section 111.35 of such Title 26) is amended by eliminating therefrom example (*b*) effective on the day following the approval of this Treasury decision.

(This Treasury decision is issued under the authority contained in section 1802 of the Internal Revenue Code (53 Stat., Part 1) as amended by section 1 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and section 3791(b) of the Internal Revenue Code.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved October 4, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register October 5, 1939, 4.03 p. m.)

REGULATIONS 71(1932), ARTICLE 35: Sales or transfers not subject to tax. 1939-36-9995 T. D. 4930

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER C, PART 111; SUBCHAPTER E, PART 465, SUBPART B.

Stamp taxes on issues and transfers of stocks and bonds, passage tickets, foreign insurance policies, and deeds of conveyance. Article 35 of Regulations 71, approved July 16, 1932, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 402 of the Revenue Act of 1939, approved June 29, 1939 (Public, No. 155, Seventy-sixth Congress, first session), provides:

SEC. 402. TAX ON TRANSFERS OF WORTHLESS SECURITIES BY EXECUTOR, ETC.

Section 1802(b) of the Internal Revenue Code (relating to the tax on transfers of capital stock and similar interests) is amended by inserting at the end thereof the following new paragraph:

"The tax imposed by this subsection shall not be imposed upon any delivery or transfer by an executor or administrator to a legatee, heir,

or distributee of shares or certificates of stock if it is shown to the satisfaction of the Commissioner that the value of such shares or certificates is not greater than the amount of the tax that would otherwise be imposed on such delivery or transfer."

Pursuant to the above amendment, Regulations 71, approved July 16, 1932, as amended (Part 111 of Title 26, Code of Federal Regulations), but only as prescribed and made applicable to the Internal Revenue Code by Treasury Decision 4885, approved February 11, 1939 [C. B. 1939–1 (Part 1), 396] (Part 465, Subpart B, of Title 26, Code of Federal Regulations), under the authority contained in section 3791 of the Internal Revenue Code, are amended as follows:

Article 35 (section 111.35 of such Title 26), as amended by Treasury Decision 4888, approved March 9, 1939 [C. B. 1939-1 (Part 1), 357], is further amended by adding the following new subparagraph at the end thereof:

(*w*) Delivery or transfer by an executor or administrator after 10 p. m., eastern standard time, June 29, 1939, to a legatee, heir, or distributee of shares or certificates of stock if it is shown to the satisfaction of the Commissioner that the value of such shares or certificates is not greater than the amount of the tax that would otherwise be imposed on such delivery or transfer.

(This Treasury decision is prescribed pursuant to section 1802(b) of the Internal Revenue Code (53 Stat., Part 1), as amended by section 402 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress, first session) and section 3791 of the Internal Revenue Code.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 29, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 31, 1939, 10.41 a. m.)

SECTION 3482, AS AMENDED BY SECTION 1 OF THE REVENUE ACT OF 1939.—CONVEYANCES.

REGULATIONS 71, ARTICLE 84: What constitutes real property determinable by law of State where located. 1939-33-9958 S. T. 888

Oil and gas leases for an indefinite period covering lands in Iowa and Missouri constitute conveyances of realty subject to stamp tax.

Advice is requested whether oil and gas leases (hereinafter described) covering lands in Iowa and Missouri constitute conveyances of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

Section 3482, as amended, 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 leases here in question, the lessor "granted, demised, leased and let" unto the lessee, his heirs, executors, administrators, successors, and assigns certain lands in Iowa and Missouri, for the exclusive purpose of mining, exploring, and operating for the producing of oil and gas, with rights of way and easements for pipe lines, telephone and telegraph lines, roads, tanks, and other necessary structures. The leases are to remain in force for 10 years and as long thereafter as oil or gas is produced from the leased lands or drilling operations are continued. The leases provide for the payment of a specified royalty to the lessor by the lessee, and for the termination of the lease if no well is commenced within 12 months, unless the lessee shall pay to the lessor a specified sum per acre, with the privilege of deferring drilling operations for similar periods upon the payment of a like sum per acre for each such period.

The courts of Iowa and Missouri have not had occasion to decide whether the interest conveyed by a lease containing such provisions is a freehold interest or a mere chattel interest. Under the general rules of real property, an interest in land which may last indefinitely is a freehold interest and is considered real property. Since the leases in question are for a term of 10 years and as long thereafter as oil or gas is produced from the leased lands, the lessee's interest may last indefinitely. Under the general rule above stated, the interest conveyed by such leases is a freehold interest.

In view of the foregoing, it is held that the leases in question constitute conveyances of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended.

REGULATIONS 71, ARTICLE 84: What constitutes real property determinable by law of State where located. 1939-34-9975 S. T. 890

An instrument designated "Sale of oil and gas royalty," which conveys an interest in the royalty payable under an existing oil and gas lease covering land in Missouri, and also an undivided interest in and to all of the oil and gas in and under such lands, constitutes a conveyance of realty subject to stamp tax.

Advice is requested whether an instrument designated "Sale of oil and gas royalty," which conveys an interest in the royalty payable under an existing oil and gas lease covering land in Missouri, and also an undivided interest in and to all of the oil and gas in and under such lands, constitutes a conveyance of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

The 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 instrument involved, the grantor conveyed to the grantee an interest in the royalty payable under an existing oil and gas lease covering land in Missouri, and also "granted, sold, conveyed, assigned and delivered" to the grantee an undivided interest in and to all of the oil and gas in and under such land, together with the right of ingress and egress for the purpose of drilling and exploring the land for oil and gas. It is also provided that a specified portion of the rentals payable under the existing lease shall be paid to the grantee, and that in the event of the cancellation or forfeiture of the existing lease, an undivided interest in the lease interests and future rentals and bonuses shall be owned by the grantee. The foregoing interests are conveyed by the grantor to the grantee, his heirs and assigns forever.

The instrument conveys to the grantee not only an interest in the royalty payable under an existing lease but also an undivided interest in the oil and gas in fee. Though the Supreme Court of Missouri has not as yet considered this type of instrument, it is well settled in that State that minerals in place are realty, may be conveyed as such, and when so conveyed constitute a separate and distinct inheritance. (*Wardell* v. *Watson*, 93 Mo., 107, 5 S. W., 605; *Gordon* v. *Million*, 248 Mo., 155, 154 S. W., 99.) The above cases have been cited and followed many times by the courts of Missouri and of other States. A discussion of this type of instrument is found in 3 Summers, Oil and Gas (2d ed., 1938), section 606:

> In the better forms of such [royalty] deeds, if a grantor intends to convey, for example, one-half of the rents and royalties under an existing lease, together with a proportionate interest in the mineral fee, the deed first conveys a one-half interest in and to all the oil, gas and other minerals in and under the land, with privileges of entering upon the land to produce them. *This part of the grant is designed to and does convey the fee interest which may be present or reversionary*, depending upon the theory in the particular jurisdiction as to the nature of the interests created by an oil and gas lease. The second clause recites the existing lease and states that it is the intent of the grantor to include in the conveyance one-half of the rents, royalties, delay rentals and other income accruing to the grantor under the existing lease. And finally, such deeds have an explanatory clause which states that in the event the existing lease expires, the grantor and grantee, or their successors in interest, shall each have or own one-half interest in the minerals in place. This last clause may be unnecessary, for its office is to explain the operative effect of the first part of the grant, but where the meaning of the first clause is not clearly apparent, the explanatory clause serves a very useful purpose.
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> * * * * * * *
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> * * * There is little danger that a court will construe such a deed as merely conveying rents and royalties under an existing lease, as has been done where the deed merely conveys rents and royalties. Nor is there danger that royalties under future leases will be declared void for violation of the rule against perpetuities, for under a deed of this type the grantee takes an interest in the minerals in place, or in the right to produce them, contingent upon the expiration of the existing lease. [Italics supplied.]

In view of the foregoing, it is held that the instrument here involved constitutes a conveyance of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended.

REGULATIONS 71, ARTICLE 84: What constitutes real property determinable by law of State where located. 1939-49-10115 G. C. M. 21702

An oil and gas lease, covering lands in Oklahoma, for a specified term and as long thereafter as oil or gas is produced from the leased lands does not constitute a conveyance of realty subject to stamp tax.

An opinion is requested whether an oil and gas lease, covering lands in Oklahoma, for a specified term and as long thereafter as oil or gas is produced from the leased lands constitutes a conveyance of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

Section 3482, as amended, 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.)

The Supreme Court of Oklahoma in *State of Oklahoma* v. *Ernest Shamblin* (90 P. (2d), 1053) held that the interest of a lessee in a nonproducing oil and gas lease is not subject to *ad valorem* taxation as real property under the laws of Oklahoma since the definition of real property for *ad valorem* taxation purposes does not include the lessee's interest in such a lease. The court said in part:

It has been consistently held by this court that an oil and gas mining lease is not real property nor a freehold or corporeal interest therein, and that the execution of such a lease does not constitute a conveyance of lands, tenements or other realty, or of a freehold or corporeal interest therein. This is true of leases having fixed terms, and it is equally true of leases having fixed terms followed by "and as long thereafter as oil or gas is found" or by any similar provision; it being the view and holding of this court that the legal character of an oil and gas lease in Oklahoma is as above stated regardless of the term of the lease, whether fixed or indeterminate. It has also been repeatedly and consistently held that such oil and gas mining leases are chattels real and are therefore personal property. (*Kolachny* v. *Galbreath*, 26 Okla., 772, 110 P., 902, 38 L. R. A., N. S., 451; *Tupeker* v. *Deaner*, 46 Okla., 328, 148 P., 853; *Kelly* v. *Harris*, 62 Okla., 236, 162 P., 219; *White* v. *McVey*, 168 Okla., 19, 31 P. (2d), 850, 94 A. L. R., 656; *Papoose Oil Co.* v. *Swindler*, 95 Okla., 264, 221 P., 506; *Stanolind Crude Oil Purchasing Co.* v. *Busey*, 185 Okla., —, 90 P. (2d), 876.) (Being personal property, such oil and gas mining leases in Oklahoma are not taxable as real property or as conveyances of lands, tenements or other real estate or of a freehold or corporeal interest therein.)

In view of the foregoing decision of the Supreme Court of Oklahoma, it is held that an oil and gas lease, covering lands in Oklahoma, for a specified term and as long thereafter as oil or gas is produced from the leased lands does not constitute a conveyance of realty and is, therefore, not subject to stamp tax under section 3482 of the Internal Revenue Code, as amended.

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

TITLE VIII.—STAMP TAXES. (1926)

SCHEDULE A-2 OF TITLE VIII OF THE REVENUE ACT OF 1926 AS AMENDED BY SECTION 722 OF THE REVENUE ACT OF 1932.

REGULATIONS 71(1932), ARTICLE 27: Computation of tax. 1939-44-10079 Ct. D. 1420

STAMP TAX—REVENUE ACTS OF 1926 AND 1932—DECISION OF COURT.

INVESTMENT TRUST CERTIFICATES—INSTALLMENT PAYMENTS—PAR OR FACE VALUE—INTERPRETATION OF STATUTE.

Investment trust certificates issued and sold in consideration of either a single payment of $1,200 or a partial payment of $10 and the balance in 119 monthly payments had a "par or face value" of $1,200, within the meaning of section 800, Schedule A-2, of the Revenue Act of 1926 as amended by section 722 of the Revenue Act of 1932, and were subject to tax based upon a par value equal to the sum of the installments rather than upon the actual value of each monthly payment. The words "certificates of interest in property" are to be interpreted as being equivalent to "certificates of present or future interest in property."

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Empire Trust Co., as Trustee, appellee, v. *James J. Hoey, Collector of Internal Revenue for the Second District of New York, appellant.*

[103 F. (2d), 430.]

[April 17, 1939.]

OPINION.

Appeal from a judgment for the plaintiff of the District Court for the Southern District of New York, in an action to recover taxes unlawfully collected.

L. HAND, Circuit Judge: The defendant, a collector of internal revenue, appeals from a judgment against him for excise taxes, collected by him on July 31, 1935, under color of section 800, Schedule A-2, of the Revenue Act of 1926. That section imposed a tax "for and in respect of the several * * * documents * * * described in Schedule A" and Schedule A imposed a tax of 10 cents "on each original issue * * * of * * * certificates * * * of interest in property * * * by any investment trust * * * on each $100 of par or face value * * * of the certificates * * *: *Provided*, That where such * * * certificates are issued without par or face value, the tax shall be 10 cents per share * * * unless the actual value is less than $100 per share, in which case the tax shall be 2 cents on each $20 of actual value or fraction thereof." The question is whether certain "certificates," issued by the plaintiff, had a "par or face value." The plaintiff bought and affixed stamps upon all certificates which it issued at their "actual value"; it asserted that they had no "par or face" value. The defendant collected the difference between the tax, 2 cents, so assessed upon their "actual value," and $1.20, collectible upon a "par value" of $1,200; and the judgment against him was for that amount.

The plaintiff was the successor of the Independent Fund of North America, under a deed executed on July 1, 1931, between the fund and the Bank of America National Association. As provided in this deed, the fund sold to its customers "certificates" in consideration, either of a single payment in full at the time of delivery, or of a partial payment of $10, and a promise to make 119 future monthly payments. The fund turned over the money to the bank, which used it, and the future payments as made, to buy "cumulative trust shares" for the customer, which it held in trust for him. "Cumulative trust shares" were themselves only certificates of ownership in an investment trust; so that it resulted that the customer became cestui que trust of the bank which

was itself cestui que trust of another trustee who held the only res—a block of common shares in various corporations. Each "cumulative trust share" was for one fifty-thousandth of 1 of these blocks.

The installment certificates sold to customers under this plan were in the following form. They declared that "in consideration of the undertaking and agreement" of M or N, "to make * * * one hundred and twenty (120) equal monthly payments, the receipt of the first one of which, totaling ten dollars, is hereby acknowledged, the bank * * * agrees to purchase * * * cumulative trust shares at the prevailing price thereof at the time of receipt by the trustee of each of said payments * * * and to hold such trust shares in trust for the beneficiary." If the customer kept up his payments until maturity, (1) he might require the bank to sell the shares, which it was holding for him, and pay him the proceeds; or (2) he might demand the shares themselves; or (3) he might leave them with the bank. He also had the first two of these options at any time before completion of his payments. A large number of these certificates were issued, and a smaller number of those in which the whole price was paid down on delivery. The Commissioner of Internal Revenue first ruled that the installment certificates had no "par or face" value, and he therefore fixed the tax at 2 cents, measured by the amount paid at issue, $10. Later, he changed this ruling, held that they had a "par" value equal to the sum of the payments, and taxed them at $1.20, 10 cents for each $100. The collector's answer has gone even further, and, as a "partial defense," now alleges that each monthly payment of $10 by a customer was in effect a new issue of the certificates upon which a tax of 2 cents was imposed, thus making $2.40 due upon each certificate.

This last position is very clearly untenable. The tax is imposed "on each original issue," and a certificate is issued only once. Whatever tax is due, is due at that time; for it is an excise upon the act of issuance. Either the certificate has a "par or face value" of $1,200, or the Commissioner's first ruling was right. These certificates are like common shares in that they represent an interest in property not measured in dollars; and they may have a "par" value, just as a common share usually has. Such certainly were those certificates for which the customer paid in full at issuance; he got an equitable interest in "cumulative trust shares," measured, then at least, by the amount which he paid, which was spread upon the face of the certificates. That was very close to what one gets who buys a common share in a company; indeed, until comparatively modern times it was generally said that a cestui que trust had no more interest in the res than a shareholder; he had only a chose in action. The fact that the statute classes together shares and certificates in investment trusts, leaves no room for doubt about this.

The installment certificates were like those fully paid as to the first installment paid down, but as to the future ones, they were merely contracts to make monthly payments to the bank which it should turn into shares and hold in trust. Hence when issued, the certificates were not for any present interest in property, except to the extent of $10. Nevertheless, no new certificates were to be issued as the payments succeeded each other, and those outstanding came progressively to represent larger and larger interests. The tax, however, was to be imposed only once, as we have seen, and if it was not intended to be upon all the interests which the certificate would eventually represent, the customer who paid in one installment would pay twelve times as much as he who paid in installments. It seems to us that we can avoid this obvious miscarriage of the intent of the Act, by reading the phrase "certificates * * * of interest in property," as being equivalent to "certificates of present or future interest in property." That does not contradict a syllable of the text, and fulfills what must have been its purpose. It was the document that was taxed, not the property which it described; all that was necessary was that it should state in dollars the amount paid for that property when it first came to represent it.

A subsidiary point is this. Out of the sum received by the bank it paid a percentage to the fund as compensation for its services. In the case of those certificates which were paid in one installment, the question is whether the tax should be calculated upon the amount paid by the customer, or upon the balance invested by the bank. The "par" is what appears on the face of the certificates. There is no more reason to deduct the fund's compensation than there would be to deduct an underwriting commission taken out of the proceeds of a sale of corporate shares.

Judgment reversed; complaint dismissed.

SCHEDULE A-3 OF TITLE VIII OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 723(a) OF THE REVENUE ACT OF 1932, THE ACT OF JUNE 29, 1936 (49 STAT., 2029), AND SECTION 711(a) OF THE REVENUE ACT OF 1938.

REGULATIONS 71, ARTICLE 35: Sales or transfers not subject to tax. 1939-28-9912 S. T. 884

The transfer of corporate stock from the name of a guardian to the name of a ward in the State of South Carolina is not subject to stamp tax.

Advice is requested whether the transfer of corporate stock from the name of a guardian to the name of a ward, both being residents of the State of South Carolina, is subject to the stamp tax imposed by Schedule A-3 of Title VIII of the Revenue Act of 1926, as amended.

The Act imposes a stamp tax on all sales or transfers of legal title to any shares or certificates of corporate stock, with certain exceptions not here applicable. The taxability of the transfer of stock from the name of a guardian to the name of the ward depends upon whether, under the laws of the jurisdiction, *legal title* remains in the ward or vests in the guardian at the time of his appointment. (MS. 42, C. B. IV-1, 338 (1925).)

The laws of South Carolina do not in specific terms provide that a guardian acquires legal title to the personal property of his ward. In *Moore* v. *Hood* (30 S. C. Eq., 311; 70 Amer. Dec., 210) a court of that State held that legal title to the ward's estate is not vested in the guardian. Other decisions of the courts of that State to the same effect are cited in 28 C. J., 1128. Since the guardian does not acquire legal title to corporate stock in that State, such title remaining in the ward during the period of the guardianship, the transfer of the stock from the name of the guardian to the name of the ward is not subject to stamp tax.

BITUMINOUS COAL.

INTERNAL REVENUE CODE.

SECTION 3524.—OTHER LAWS MADE APPLICABLE.

1939–32–9950
S. T. 886

Sales of bituminous coal by the producer thereof for use as bunker coal on the vessels described in section 3451 of the Internal Revenue Code are not subject to the taxes imposed upon the sale of bituminous coal.

Advice is requested whether the exemption provided in section 3451 of the Internal Revenue Code with respect to articles sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on certain vessels is applicable to bituminous coal sold for use as bunker coal.

Section 3451 of the Internal Revenue Code provides in part as follows:

Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this chapter shall be imposed upon any article sold for use as fuel supplies * * * 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. * * *

Section 3524 of the Internal Revenue Code makes the foregoing provisions of section 3451 applicable to the taxes imposed upon the sale of bituminous coal by the producer thereof.

It is held that the exemption provided in section 3451 of the Internal Revenue Code is applicable to the sale of bituminous coal by the producer thereof for use as bunker coal (fuel supplies) 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. It is immaterial whether the vessels are American or foreign vessels. To be tax free, the sale must be made by the producer direct for the prescribed use. The exemption does not apply to bunker coal sold for use on vessels engaged in trade between domestic ports on the Pacific Ocean, or between domestic ports on the Atlantic Ocean and the Gulf of Mexico, or engaged in trade on the inland waterways of the United States. If a vessel is actually engaged in a voyage from a port in the United States to a foreign port or to a port in one of the possessions of the United States, or between Atlantic and Pacific ports of the United States, the exemption is not affected by the fact that the vessel may stop at an intermediate port of call in the United States as a part of the voyage to its ultimate destination.

The producer is required to meet certain requirements in establishing the right to the foregoing exemption. Producers complying with the pertinent provisions of article 28 of Regulations 44 (1934), as amended by Treasury Decision 4604 (C. B. XIV–2, 376 (1935)), will be considered as having met the necessary requirements.

PROCESSING TAXES.

TITLE IV.—EXPORT, CHARITABLE, ETC., REFUNDS AND FLOOR STOCKS ADJUSTMENT UNDER AGRICULTURAL ADJUSTMENT ACT. (1936)

SECTION 601.—REFUNDS UNDER AGRICULTURAL ADJUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.

1939-46-10090
Ct. D. 1422

PROCESSING TAX—REVENUE ACT OF 1936—AGRICULTURAL ADJUSTMENT ACT, AS AMENDED—DECISION OF COURT.

SUIT—RECOVERY OF TAX—TAX PAYMENT WARRANTS—LIABILITY OF COLLECTOR.

A processor of rice who satisfied its processing tax liability by surrender of tax payment warrants provided for by section 8 of the amended Agricultural Adjustment Act, and subsequently exported a part of the rice upon which the tax had been so paid, can not recover in a suit against the collector the amount of tax claimed to have been paid. The action, based upon section 17(a) of the Agricultural Adjustment Act as reenacted by section 601 of the Revenue Act of 1936, was in reality for a subsidy promised by the United States to exporters of rice, and not for money illegally exacted by the collector. Suit against the collector is statutory and must be predicated upon some element of personal responsibility.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION.

Standard Rice Co., Inc., plaintiff, v. *Frank Scofield, Collector of Internal Revenue, defendant.*

[27 F. Supp., 854.]

[May 20, 1939.]

MEMORANDUM OPINION.

ROBERT J. MCMILLAN, District Judge: In this case, plaintiff, a processor of rice, paid the collector the processing taxes claimed to be due with tax payment warrants provided for by section 8 of the amended Agricultural Adjustment Act. A small amount of the tax was paid in cash but to what extent it constituted payment upon rice which was afterwards exported is not disclosed by the evidence.

Plaintiff, after these payments to the collector, exported a part of the rice covered by these processing taxes. It now brings suit against the collector to recover the amount of tax claimed to have been paid, basing its action upon section 17(a) of the Agricultural Adjustment Act as reenacted by section 601 of the Revenue Act of 1936. The collector, asserting that this is not a case in which any personal liability could possibly exist against him, contends that the suit is improperly brought. He further asserts that under subdivision (b) of section 601, supra, plaintiff, being a processor or other person who paid or was liable for the tax, is not entitled to a refund.

It is the court's opinion that the first contention is well founded. The plaintiff here was furnished by the Government with tax payment warrants as an indirect way in which to exempt it from the payment of processing taxes on rice. These warrants were to be accepted by the collector in lieu of money. Furthermore, by virtue of section 17(a), it was given a bonus or subsidy to the extent of the tax supposed to have been paid on such rice as was exported. At the time it gave to the collector these tax payment warrants no cause of action in its favor existed either against the collector or the United States. Its cause of action, if such it has, arose by virtue of the subsequent exportation of the rice. Accordingly, the collector has collected no money from the plaintiff, except about $52 which the evidence fails to satisfactorily connect with

the exported rice. He has been guilty of no misfeasance or illegal or wrongful collection so far as the plaintiff is concerned. Accordingly, it is perfectly obvious that there is no ground existing for personal action against the collector in a case of this kind. Under the decisions as they now stand, a suit against the collector in a proper case is, of course, statutory rather than at common law. However, it must be predicated upon some element of personal responsibility, otherwise one collector could be sued for the acts of another. That would be necessarily true if the collector was simply the conduit through which any suit involving internal revenue matters might be brought against the United States.

The point about the matter is that plaintiff is really suing here not for money illegally exacted by the collector, but for a bonus or subsidy or drawback promised by the United States to exporters of rice. I am aware that in such cases as *Moore Ice Cream Co.* v. *Rose* (289 U. S., 373 [Ct. D. 676, C. B. XII–1, 341 (1933)]), the courts have held that where the collector has illegally exacted payment and covered the money into the Treasury and a certificate of probable cause has been issued, the suit is one in effect against the United States. However, I do not understand that it is the effect of those opinions that the collector can be sued in any case where the United States is liable because some phase of the matter has been handled by the collector's office. As said by the court in the *Moore-Rose case*, supra, "A suit against a collector is an anomalous relic of bygone modes of thought," but the fact still remains that a suit against him is personal in its nature. See *Lowe Bros. Co.* v. *United States* (304 U. S., 302 [Ct. D. 1347, C. B. 1938–1, 327]), where the court, discussing the matter of jurisdiction in one of these internal revenue cases, says:

"Since the suit allowed against the collector before the amendment was based on its personal liability (*Sage* v. *United States*, 250 U. S., 33; *Smietanka* v. *Indiana Steel Co.*, supra [Ct. D. 17, C. B. 5, 251 (1921)]), no such suit will lie unless he has collected the tax."

The amendment referred to was one allowing direct suit against the Government where the amount was over $10,000 and the collector making the collection was dead or out of office.

Again in the same opinion, the court says:

"It is true that under the statutes of the United States the collector is relieved from personal liability except in the case where the district court is of opinion that he acted without probable cause (*Sage* v. *United States*, supra, 37), and that such suits against the collector are commonly but a means of collecting the overpayment from the United States. (*Moore Ice Cream Co.* v. *Rose*, 289 U. S., 373, 382.) But no statute has enlarged the collector's common law liability to suit * * *."

It will be noted that in this latest expression by the Supreme Court reference is made to the Sage case, where it is said:

"But no one could contend that technically a judgment of a district court in a suit against a collector was a judgment against or in favor of the United States. * * * The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different."—

and to the Smietanka case (257 U. S., 1), where it is again said:

"To show that the action still is personal, as laid down in *Sage* v. *United States* (250 U. S., 33, 37), it would seem to be enough to observe that when the suit is begun it can not be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the court in the case. It is not to be supposed that a stranger to an unwarranted transaction is made answerable for it; yet that might be the result of the suit if it could be brought against a successor to the collectorship. A personal execution is denied only when the certificate is given."

If an element of personal liability on the part of the collector is not essential to the maintenance of a suit against him, despite the fact that he may be subsequently relieved by a certificate of probable cause, then these expressions by the Supreme Court are meaningless.

It is obvious that this is not one of the character of cases where the suit against the collector is equivalent to a suit against the United States, for plaintiff's action here is based upon the Government's promise to pay and not upon any illegal or erroneous collection made by the collector. When the plaintiff paid the collector its processing taxes with these tax payment warrants, it had no claim against him or the Government. In fact it did not know it

would ever have a claim for that was contingent on the exportation of the rice. Such claim as it acquired fell with the Agricultural Adjustment Act and was only revived as against the Government by the reenactment of section 17(a). Unless the authorities have progressed to the point where it is now to be held that the Government can be sued in any kind of internal revenue case through its collector, this suit is not maintainable. The collector has done nothing here save to accept, under a void statute, some worthless warrants which cost the plaintiff nothing.

This view of the matter makes it unnecessary to consider the collector's contention that the case of *Cudahy Bros. Co.* v. *LaBudde* (92 Fed. (2d), 937) is incorrectly decided. The question decided here was not raised in the Cudahy case. There the court states at the outset that the suit was filed prior to the Supreme Court's decision holding the Agricultural Adjustment Act invalid and in a form admitted by the collector to have been correct at the time the suit was begun. The court states that the sole question before it was whether the remedy provided by Title VII of the Revenue Act of 1936 was exclusive. Inasmuch as the collector admitted that the suit had been properly brought, the court obviously did not consider the question of parties, nor was the matter before the Supreme Court when it passed on the application for a writ. It will be noted, however, that in the Cudahy case the collection made by the collector was made in cash and not in tax payment warrants.

In so far as it might be contended that regardless of the matter of exportation, the $52 cash was illegally collected because the Agricultural Adjustment Act was void, the taxpayer is relegated now to Title VII of the Revenue Act of 1936, where provision is made for the refund of such payments. (*Anniston Manufacturing Co.* v. *Davis, Collector of Internal Revenue*, 301 U. S., 337 [Ct. D. 1234, C. B. 1937-1, 485].) Such a claim would, of course, not be based on 17(a), which constituted the Government's promise to refund taxes on exported rice.

The case will be dismissed at plaintiff's cost.

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. 1939-42-10064 G. C. M. 21586

REVENUE ACT OF 1936.

The M Company is not entitled to a refund with respect to amounts alleged to have been paid to its vendor as processing taxes on the processing of hogs, since it was not the first domestic processor of hogs and did not pay the processing taxes with respect thereto to the United States.

An opinion is requested whether the M Company is entitled to the refund of amounts alleged to have been paid as processing taxes under the circumstances herein set forth.

The M Company was a packer of pork products. It operated no killing plant but purchased live hogs and employed the N Company to do the killing. The carcasses were then cut up and prepared for market at the M Company's plant. The M Company also purchased a number of hams from other processors for resale, the number thus acquired constituting between 10 and 20 per cent of all hams sold. The processing taxes here in question were paid to the United States by the N Company.

Section 902 of the Revenue Act of 1936 provides in part as follows:

No refund shall be made or allowed, * * * of any amount *paid by or collected from any claimant* as tax under the Agricultural Adjustment Act, unless the claimant establishes * * *.

(a) That he bore the burden of such amount * * *. [Italics supplied.]

Section 903 of the Revenue Act of 1936 provides in part as follows:

> 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, * * * a claim for refund has been filed by such person * * *. [Italics supplied.]

Sections 902 and 903, supra, show clearly the intent of Congress that refunds shall be made only to persons who paid amounts as tax under the Agricultural Adjustment Act to the United States Government. Such is the position taken by the United States Processing Tax Board of Review and the United States Circuit Court of Appeals for the Seventh Circuit. The Processing Tax Board of Review has held that the proper claimant is the person who was liable for and paid the processing tax to the United States. (See *F. & F. Laboratories, Inc.*, v. *Commissioner*, P. T. B. R. Docket No. 52, order dated October 11, 1938; *Grandma Baking Co., Inc.*, v. *Commissioner*, P. T. B. R. Docket No. 64, order dated October 13, 1938; *Superior Portland Cement, Inc.*, v. *Commissioner*, P. T. B. R. Docket No. 29, order dated October 15, 1938; *Florence Stove Co.* v. *Commissioner*, P. T. B. R. Docket No. 65, order dated October 18, 1938; and *United States Sugar Corporation* v. *Commissioner*, P. T. B. R. Docket No. 86, order dated April 14, 1939.)

In *F. & F. Laboratories, Inc.*, v. *Commissioner* (104 F. (2d), 563, Ct. D. 1418, page 396, this Bulletin) the Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the United States Processing Tax Board of Review. The language used by the court with respect to the construction of sections 902 and 903 of the Revenue Act of 1936, supra, is pertinent to the issue here involved. The court stated in part:

> The question presented is whether the United States Processing Tax Board of Review erred in dismissing the petition for want of jurisdiction. The solution of this question is dependent upon whether or not petitioner is within the terms of the Act so as to be entitled to the refund. Petitioner admits that the tax was paid to the United States Government by the Holly Sugar Corporation, but contends the tax was passed on to it and having not passed it on to its customers, it, as the one who bore the burden, is the real party in interest and, therefore, entitled to the refund. Respondent disputes this contention and claims that inasmuch as petitioner did not pay the processing tax directly to the Government, it was not entitled to a refund.
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> * * * * * * *
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> The Act must be construed in the light of the circumstances existing at the time of its enactment. Clearly, its purpose was to make provision for a refund of processing tax illegally collected by reason of the unconstitutional Agricultural Adjustment Act. The tax had been exacted from the processor alone, and had Congress intended to make provision for a refund of such tax to a person other than the one from whom it had been collected, it would have so expressed itself. The vendee of the processor, such as the petitioner here, was not liable to the Government for the tax imposed—in fact, it was a total stranger in the matter.
>
> The language "paid by or collected from any person as tax under the Agricultural Adjustment Act" must be construed to read and mean: Paid to the collector of internal revenue by such person as tax, or collected by the collector of internal revenue from such person as tax. Petitioner is not included in either classification. Many of the provisions of Title VII are inconsistent with the idea that a refund to one other than the taxpayer was intended. Section 902 provides that no refund shall be made of any amount paid by or collected from any claimant "as tax" unless he establish the facts required by subsection (a) or (b). A part of the proof required by subsection (a) is that the claimant has not shifted the burden of the tax through inclusion of the amount thereof in the price of "any article with respect to which a tax was imposed," or in the price of "any article processed from any commodity with respect to which a

tax was imposed." This requirement clearly relates to proof to be made by the taxpayer.

The provisions of section 907 relating to presumptions and proof deal with the margin of processed commodities subject to the processing tax. This section also clearly relates to proof by a processor who has paid the processing tax and not to a vendee to whom the burden was shifted.

The following clause is significant:

"The 'tax period' shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made."

This language seems wholly inconsistent with the theory that a refund was intended for a "claimant" other than one who had "actually paid the processing tax." It seems unnecessary to refer to other language found in the Act inconsistent with the construction sought by petitioner.

Furthermore, in the present case it can not be said that the N Company was merely a "go-between" and paid the tax to the Government as agent for the M Company. The N Company slaughtered the hogs and it, and not the M Company, became liable for the tax on the processing of hogs. The tax was imposed under the Agricultural Adjustment Act on the first domestic processing of hogs. Section 9(a) of the Agricultural Adjustment Act (48 Stat., 31, 35) provides in part as follows:

* * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, *and shall be paid by the processor.* * * * [Italics supplied.]

The first domestic processing of hogs was defined first as "the slaughtering of hogs for market." (T. D. 4406, C. B. XII-2, 453 (1933).) This definition was subsequently expanded to include reselling, cutting, trimming, etc., by any person engaged in the business of reselling, cutting, trimming, etc., and to whom the carcasses or hog products to be so processed are sold or given in exchange by a producer or feeder. (T. D. 4518, C. B. XIV-1, 450 (1935).) As previously stated, the M Company purchased live hogs and had them slaughtered by the N Company and also purchased a number of hams from other producers for resale. Hence, it appears that the M Company performed no activity which could be described as "the first domestic processing."

In view of the foregoing, it is the opinion of this office that the M Company is not entitled to refund of the amounts alleged to have been paid as processing taxes under the circumstances herein set forth.

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

Regulations 96, Article 202: Facts and evidence in support of claim. 1939-39-10027
G. C. M. 21540

REVENUE ACT OF 1936.

Where a processor collected amounts equaling the processing tax from the M Company (vendee), allegedly as required by section 18 of the Agricultural Adjustment Act, by adding the amount of the tax to invoices for flour delivered under contracts existing prior to the effective date of the tax, some of the contracts providing for such addition and some not so providing, the M Company is not entitled to the refund of such amounts thus collected from it since no tax was assessed against the M Company and no tax was paid by the M Company to the United States.

An opinion is requested as to the right of the M Company to a refund of processing taxes stated to have been collected from it under the circumstances herein set forth.

The M Company is a corporation engaged in the business of manufacturing certain food products, the principal ingredient of which is flour. It purchased wheat flour from millers (processors) on contracts entered into prior to the effective date of the processing tax (July 9, 1933). Delivery of the flour was made after July 9, 1933, the amount of the processing tax being added to the contract price on the various invoices. It is alleged that processing taxes were thus collected from the M Company by the vendor as provided in section 18 of the Agricultural Adjustment Act. Some of the contracts involved stipulated that the processing tax should be added to the price fixed therein and should be paid by the buyer to the seller and some did not so stipulate.

It will be noted that the amounts claimed to have been paid as taxes were added to the contract price and were paid to the M Company's vendor—not to the United States. This really constituted an increase in the purchase price of the wheat flour.

The Processing Tax Board of Review dismissed for want of jurisdiction the cases of *A. Hoenigsberger* v. *Commissioner* (P. T. B. R. Docket No. 68, order dated April 14, 1939) and *Zinsmaster Baking Co.* v. *Commissioner* (P. T. B. R. Docket No. 78, order dated April 14, 1939). Both cases involved vendees who alleged that they had paid processing tax to their vendors under the provisions of section 18(a) of the Agricultural Adjustment Act, as amended, on contracts existing prior to the effective date of the tax, and, therefore, claimed refunds under Title VII of the Revenue Act of 1936.

In the A. Hoenigsberger case, supra, the Board stated that it appeared from the petition—

* * * that the disallowance by respondent sought to be reviewed herein was of a claim for refund of an amount paid by petitioner, as vendee, to its vendors under bona fide contracts made prior to the date the tax was first imposed upon cotton under Title I of the Agricultural Adjustment Act, as amended, which cotton was to be delivered on or after such date, and that such contracts did not permit the addition of said tax so that petitioner was compelled to pay such tax to its vendors under the provisions of section 18 of the Agricultural Adjustment Act, as amended; and it further appearing that the amount so paid by petitioner is not denominated a "processing tax" under the Agricultural Adjustment Act, which denomination is essential to vest this Board with jurisdiction in accordance with the provisions of sections 906 and 913(b) of Title VII of the Revenue Act of 1936; * * *.

In the Zinsmaster Baking Co. case, supra, the Board stated that it appeared from the petition—

* * * that the disallowance of the respondent sought to be reviewed was of a claim for refund of amounts allegedly paid to third parties pursuant to purchase contracts which did not permit the addition of the tax to the price thereunder, as provided in section 18 of the Agricultural Adjustment Act, also under contracts which did so permit, and that such third parties were the sole first domestic processors and that no amount was paid by or collected from the petitioner as processing tax under said Act as defined in Title VII of the Revenue Act of 1936; * * *.

As the A. Hoenigsberger case, supra, involved existing contracts which did not permit the addition of the tax, and the Zinsmaster Baking Co. case, supra, involved existing contracts which did not permit the addition of the tax as well as contracts which did so

permit, it would appear that the Board considered vendees under such existing contracts as having no more right to refunds than vendees under contracts entered into after the imposition of the tax.

The Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the Board in the case of *F. & F. Laboratories, Inc.*, v. *Commissioner* (104 Fed. (2d), 563). In that case the petitioner was engaged in the business of manufacturing and selling cough lozenges. It contended that during the period in which the processing tax was payable, the purchase price of all beet sugar which it bought from its vendor, the Holly Sugar Corporation, included the amount of the processing tax thereon, and all invoices received from the said vendor included the amount of such processing tax either as a separate item described as such, or as part of the invoice price charged to the petitioner. As the F. & F. Laboratories, Inc., did not pass the tax on to its customers, it took the position that it was the real party in interest and therefore entitled to the refund. No claim was made by the Holly Sugar Corporation. The following is quoted from the opinion of the court:

Petitioner, in support of its position, points out that the Act in question, in describing who may recover under its provisions, refers to the "claimant" rather than the "taxpayer," and it is argued from this that it was the intention of Congress to provide a refund for the one who bore the burden of the processing tax irrespective of whether it was the processor who paid the tax directly to the Government or whether it was the vendee of the processor who paid an increased price for the processed commodity, and in this manner sustained the burden of the tax. Stress is laid upon the language of section 903 relating to the filing of claims, which states that "no refund shall be made or allowed of any amount paid by or collected from any person as a tax under the Agricultural Adjustment Act. * * *" It is argued that the use of the word "or" distinguishes taxes "paid by" persons and those "collected from" persons. Thus it is contended two classes of claimants were intended—the words "paid by" being employed to designate a claimant such as petitioner who paid the taxes not directly to the Government, but indirectly in the increased price which was paid for the processed commodity, while the words "collected from" were intended to designate as claimant the processor who paid the tax directly to the Government. We are of the opinion that the Act is not susceptible of such a construction.

* * * * * * *

The Act must be construed in the light of the circumstances existing at the time of its enactment. Clearly, its purpose was to make provision for a refund of processing tax illegally collected by reason of the unconstitutional Agricultural Adjustment Act. The tax had been exacted from the processor alone, and had Congress intended to make provision for a refund of such tax to a person other than the one from whom it had been collected, it would have so expressed itself. The vendee of the processor, such as the petitioner here, was not liable to the Government for the tax imposed—in fact, it was a total stranger in the matter.

The language "paid by or collected from any person as tax under the Agricultural Adjustment Act" must be construed to read and mean: Paid to the collector of internal revenue by such person as tax, or collected by the collector of internal revenue from such person as tax. Petitioner is not included in either classification.

* * * * * * *

The following clause is significant:

"The 'tax period' shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made."

This language seems wholly inconsistent with the theory that a refund was intended for a "claimant" other than one who had "actually paid the processing tax." * * *

In the instant case, the amounts involved were paid to processors under contracts existing prior to the effective date of the tax. The tax was added to the contract price on all of the invoices, even though some of the contracts did not permit the addition of the tax. As no tax was assessed against the M Company and no tax was paid by it to the United States, it is the opinion of this office that the M Company is not entitled to the refund of such amounts.

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

SECTION 903 OF THE REVENUE ACT OF 1936, AS AMENDED BY SECTION 405 OF THE REVENUE ACT OF 1939.—FILING OF CLAIMS.

REGULATIONS 96, ARTICLE 203: Period of limitations for filing claims. 1939-31-9942 T. D. 4913

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER E, PART 456.

Amending article 203 of Regulations 96, Relating to period of limitations for filing claims for refund of taxes paid under the Agricultural Adjustment Act, as amended.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 96, approved October 15, 1936 (Part 456 of Title 26, Code of Federal Regulations), are amended as follows:

Immediately after the quotation of section 903 of the Revenue Act of 1936 which precedes article 201 (section 456.201 of Title 26, Code of Federal Regulations) the following subtitle and quotation of section 405 of the Revenue Act of 1939 are inserted:

Section 405 of the Revenue Act of 1939.

Section 903 of the Revenue Act of 1936 (relating to expiration of time for filing claims for refund of amounts paid under the Agricultural Adjustment Act) is amended by striking out "July 1, 1937," and inserting in lieu thereof "January 1, 1940."

Article 203 (section 456.203 of Title 26, Code of Federal Regulations) is amended to read as follows:

ART. 203. *Period of limitations for filing claims.*—No refund shall be made or allowed of any amount paid as tax unless a claim for such refund is filed by the person entitled thereto, or his duly authorized agent or representative, subsequent to June 22, 1936, and prior to January 1, 1940.

(This Treasury decision is issued pursuant to section 903 of the Revenue Act of 1936 (49 Stat., 1747; 7 U. S. C., Sup. IV, 645) as amended by section 405 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress), and section 916 of the Revenue Act of 1936 (49 Stat., 1755; 7 U. S. C., Sup. IV, 658).)

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved July 24, 1939.

STEPHEN B. GIBBONS,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register July 25, 1939, 3.03 p. m.)

REGULATIONS 96, ARTICLE 204: Conditions as to tax burden with respect to amounts of refund allowable. 1939-40-10042 Ct. D. 1418

PROCESSING TAX—REVENUE ACT OF 1936—DECISION OF COURT.

1. RECOVERY OF PROCESSING TAX—VENDEE OF PROCESSOR—JURISDICTION OF PROCESSING TAX BOARD OF REVIEW.

The United States Processing Tax Board of Review did not err in dismissing, for want of jurisdiction, a petition which alleged that the processing tax was paid by the processor which passed on the burden of such tax to petitioner. Title VII of the Revenue Act of 1936 authorizes refund of processing tax collected under the Agricultural Adjustment Act only to those persons who paid the tax to the Government. The tax was exacted from the processor alone, and had Congress intended to make provision for a refund of such tax to a person other than the one from whom it had been collected, it would have so expressed itself.

2. DECISION AFFIRMED.

Decision of the United States Processing Tax Board of Review (P. T. B. R. Docket No. 52) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

F. & F. Laboratories, Inc., petitioner, v. *Commissioner of Internal Revenue, respondent.*

[104 Fed. (2d), 563.]

Petition for review of decision of the United States Processing Tax Board of Review.

Before EVANS, MAJOR, and KERNER, Circuit Judges.

[May 25, 1939.]

OPINION.

MAJOR, Circuit Judge: This is a petition to review a decision of the United States Processing Tax Board of Review in accordance with provisions of Title VII of the Revenue Act of 1936 (7 U. S. C. A., section 648). The involved matter is a claim for refund of the sum of $11,235 alleged to have been paid as a processing tax on beet sugar, under the Agricultural Adjustment Act of 1933 (7 U. S. C. A., section 601), for the period commencing August 1, 1934, and ending December 31, 1935. The claim was rejected by the Commissioner of Internal Revenue and was submitted to the Board of Review upon the Commissioner's motion to dismiss. The motion was granted and the petition dismissed by an order entered October 11, 1938. For the purposes of the motion to dismiss, all facts pleaded in the petition before the Board must be accepted as admitted.

The petitioner, an Illinois corporation, is, at the present time, and was, during the period from August 1, 1934, to December 31, 1935, engaged in the business of manufacturing and selling cough lozenges. In the manufacture of that product it used and consumed large quantities of beet sugar, purchased by it from the Holly Sugar Corporation of Colorado Springs, Colo. During the above period, a processing tax imposed pursuant to section 9(a) of the Agricultural Adjustment Act was in effect with respect to the first domestic processing of sugar beets. With respect to such processing tax, the petition before the Board of Review alleges:

"That although the said Holly Sugar Corporation paid to the Treasury Department of the United States of America the processing taxes payable under the Agricultural Adjustment Act of the United States of America on the manufacture of the aforementioned beet sugar purchased by the petitioner from the Holly Sugar Corporation, nevertheless, the said Holly Sugar Corporation passed on the burden of said tax to the petitioner and petitioner bore the burden thereof.

"That during the period in which the processing taxes were payable under said Agricultural Adjustment Act, the purchase price of all beet sugar purchased by the petitioner from said Holly Sugar Corporation included the amount of the processing tax thereon, and all invoices received by the petitioner from the Holly Sugar Corporation, and paid by petitioner, included the amount of such processing tax either as a separate item described as such, or as a part of the invoice price charged to the petitioner.

"That petitioner has not received any refund in any amount whatsoever from said Holly Sugar Corporation of any part of the processing taxes paid by the petitioner to the Holly Sugar Corporation as above mentioned; the Holly Sugar Corporation has denied all liability to the petitioner for the refund of processing taxes paid by the petitioner to the Holly Sugar Corporation or any part thereof; and said Holly Sugar Corporation has not entered into any agreement whatsoever to refund to the petitioner such processing taxes paid by the petitioner or any part thereof.

"That during the period commencing August 1, 1934, and ending December 31, 1935, the petitioner paid to the Holly Sugar Corporation by way of processing taxes passed on to the petitioner by the Holly Sugar Corporation, the sum of eleven thousand two hundred and thirty-five dollars ($11,235), and the petitioner bore the full burden of said amount and did not pass on to its vendees any part thereof."

No claim for refund was made by the Holly Sugar Corporation.

The Agricultural Adjustment Act was held unconstitutional by the Supreme Court in *United States* v. *Butler* (297 U. S., 1 [Ct. D. 1070, C. B. XV-1, 421 (1936)]), decided January 6, 1936, and thereafter, there was enacted the Revenue Act of 1936 entitled "Title VII—Refunds of Amounts Collected Under the Agricultural Adjustment Act." Petitioner relies upon this Act as giving it the right to a refund as asserted and also as giving the United States Processing Tax Board of Review jurisdiction to entertain its petition for refund. Section 902 of the Act provides that no refund shall be made or allowed in pursuance of court decision or otherwise "of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of the Commissioner" that he bore the burden of such amount and has not been relieved thereof, or reimbursed therefor, or shifted such burden to others. Section 903 relates to the filing of claims and inasmuch as the issue presented depends largely upon the construction to be given this section, we set it forth.[1]

Subsection (b) of section 906 provides that the Board of Review "shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim." Other provisions of the Act do not seem material except as they may afford light upon the construction to be adopted, and for that purpose, will hereafter be referred to.

The question presented is whether the United States Processing Tax Board of Review erred in dismissing the petition for want of jurisdiction. The solution of this question is dependent upon whether or not petitioner is within the terms of the Act so as to be entitled to the refund. Petitioner admits that the tax was paid to the United States Government by the Holly Sugar Corporation, but contends the tax was passed on to it and having not passed it on to its customers, it, as the one who bore the burden, is the real party in interest and, therefore, entitled to the refund. Respondent disputes this contention and claims that inasmuch as petitioner did not pay the processing tax directly to the Government, it was not entitled to a refund.

Petitioner, in support of its position, points out that the Act in question, in describing who may recover under its provisions, refers to the "claimant" rather than the "taxpayer," and it is argued from this that it was the intention of Congress to provide a refund for the one who bore the burden of the processing

[1] 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 in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

tax irrespective of whether it was the processor who paid the tax directly to the Government or whether it was the vendee of the processor who paid an increased price for the processed commodity, and in this manner sustained the burden of the tax. Stress is laid upon the language of section 903 relating to the filing of claims, which states that "no refund shall be made or allowed of any amount paid by or collected from any person as a tax under the Agricultural Adjustment Act. * * *" It is argued that the use of the word "or" distinguishes taxes "paid by" persons and those "collected from" persons. Thus it is contended two classes of claimants were intended—the words "paid by" being employed to designate a claimant such as petitioner who paid the taxes not directly to the Government, but indirectly in the increased price which was paid for the processed commodity, while the words "collected from" were intended to designate as claimant the processor who paid the tax directly to the Government. We are of the opinion that the Act is not susceptible of such a construction. The precise question, so far as we are aware, has not been determined in a case where it was directly in issue. In *Anniston Mfg. Co.* v. *Davis* (301 U. S., 337, 350 [Ct. D. 1234, C. B. 1937–1, 485]), however, the court said:

"The circumstance that under Title VII, here involved, there is no provision for making a refund to particular persons, to whom the burden of the invalid exaction may be found to have been shifted, presents no sound distinction so far as the claimant is concerned."

It is said this statement of the court is obiter dictum. Even if it be such, the opinion discloses that the court was considering the various sections of the Act and the statement carries weight.

The Act must be construed in the light of the circumstances existing at the time of its enactment. Clearly, its purpose was to make provision for a refund of processing tax illegally collected by reason of the unconstitutional Agricultural Adjustment Act. The tax had been exacted from the processor alone, and had Congress intended to make provision for a refund of such tax to a person other than the one from whom it had been collected, it would have so expressed itself. The vendee of the processor, such as the petitioner here, was not liable to the Government for the tax imposed—in fact, it was a total stranger in the matter.

The language "paid by or collected from such person as tax under the Agricultural Adjustment Act" must be construed to read and mean:—Paid to the collector of internal revenue by such person as tax, or collected by the collector of internal revenue from such person as tax. Petitioner is not included in either classification. Many of the provisions of Title VII are inconsistent with the idea that a refund to one other than the taxpayer was intended. Section 902 provides that no refund shall be made of any amount paid by or collected from any claimant "as tax" unless he establish the facts required by subsection (a) or (b). A part of the proof required by subsection (a) is that the claimant has not shifted the burden of the tax through inclusion of the amount thereof in the price of "any article with respect to which a tax was imposed," or in the price of "any article processed from any commodity with respect to which a tax was imposed." This requirement clearly relates to proof to be made by the taxpayer.

The provisions of section 907 relating to presumptions and proof deal with the margin of processed commodities subject to the processing tax. This section also clearly relates to proof by a processor who has paid the processing tax and not to a vendee to whom the burden was shifted.

The following clause is significant:

"The 'tax period' shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made."

This language seems wholly inconsistent with the theory that a refund was intended for a "claimant" other than one who had "actually paid the processing tax." It seems unnecessary to refer to other language found in the Act inconsistent with the construction sought by petitioner.

Petitioner relies strongly upon *United States* v. *Jefferson Electric Manufacturing Co.* (291 U. S., 386 [Ct. D. 803, C. B. XIII–1, 393 (1934)]), in support of its position. There the court was considering an Act of Congress, making provision for a refund of taxes illegally exacted, and held, in effect, that the right of refund might be limited to the one who had not shifted the tax to its vendee, but had itself borne the burden. That is precisely, in our opinion, what Con-

gress intended to do by the Act under consideration. It does not follow from this, however, that some other person, even though the burden was shifted to him, is entitled to a refund where he was under no obligation to pay the tax to the Government and, as a matter of fact, did not do so.

The case of *Standard Oil Co.* v. *Bollinger* (337 Ill., 353), also relied upon by petitioner, is distinguishable for a similar reason. There the Standard Oil Co., as a distributor of motor fuel, after the law imposing a tax on such fuel had been held unconstitutional, sought to recover from the State the tax voluntarily paid. Recovery was denied inasmuch as the tax had been collected from its customers. In other words, the burden had not been borne by the taxpayer. The pronouncement of the court recognized the same principle as that recognized by Congress in the Act in question, in that, provision was made for a refund to the taxpayer who had not shifted the burden.

Neither is there any merit in the argument that the processor was acting in the capacity of agent in collecting the tax from the petitioner and paying it to the Government. Whatever relation might have existed between the petitioner and the Holly Sugar Corporation, with rights created thereby, is here of no consequence. The thing of controlling importance is that no processing tax was paid by the petitioner to the Government or collected by the Government from the petitioner and that by the terms of the Act in question, no claim for refund was provided.

Petitioner argues that if the term "claimant" does not include a purchaser who bore the tax burden, as well as the processor who bore the burden, it violates the fifth amendment to the Constitution. It is urged that there is no difference between a processor who bore the tax burden and a vendee of the processor who bore the burden. We are aware of no authority which supports this contention. We see no reason why Congress must provide for a refund to one who was not obligated to pay the tax and who, as a matter of fact, did not do so in order to provide a refund for the one upon whom the tax was assessed and from whom it was collected.

We conclude that the action of the Processing Tax Board of Review in dismissing the petition for lack of jurisdiction was proper and its decision is affirmed.

TITLES IV AND VII OF THE REVENUE ACT OF 1936, AS AMENDED.

1939–47–10097
Mim. 4977

Procedure relative to certain claims filed under the provisions of Titles IV and VII of the Revenue Act of 1936, as amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., November 6, 1939.

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

1. The final date for the filing of claims under section 602 of Title IV of the Revenue Act of 1936 has been extended from December 31, 1936, to December 31, 1939, by an amendment of section 602(d) of the Revenue Act of 1936 made by section 911 of the Social Security Act Amendments of 1939.

The final date for the filing of claims under Title VII of the Revenue Act of 1936 has been extended from June 30, 1937, to December 31, 1939, by an amendment of section 903 of the Revenue Act of 1936 made by section 405 of the Revenue Act of 1939.

2. Prior to the extension of these filing periods a large number of both types of claims were rejected because not filed within the original period of limitations.

The claims rejected for the reason that they were not timely filed will be reopened by this office and considered on their merits. It will not be necessary for the claimants involved to file new claims.

Correspondence in regard to this mimeograph should refer to the number thereof and the symbols MT:PT.

GUY T. HELVERING,
Commissioner.

AGRICULTURAL ADJUSTMENT ACT.

INTERNAL REVENUE CODE.

1939-39-10033
T. D. 4942

Amending article 6 of Treasury Decision 4672 [C. B. XV-2, 428 (1936)] relating to period of limitations for filing claims for payment under section 602 of the Revenue Act of 1936.

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

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 4672, approved July 27, 1936 [C. B. XV-2, 428 (1936)], is amended as follows:

At the end of paragraph A the following is inserted:

Section 911 of the Social Security Act Amendments of 1939, approved August 10, 1939 (Public, No. 379, Seventy-sixth Congress, first session) provides:

"Subsection (d) of section 602 of the Revenue Act of 1936, as amended (relating to floor stocks adjustment), is amended by striking out 'January 1, 1937,' and inserting in lieu thereof 'January 1, 1940.'"

Article 6 is amended to read as follows:

ART. 6. *Limitation as to time for filing claim.*—No payment shall be made unless claim therefor is filed by the person entitled thereto prior to January 1, 1940.

(This Treasury decision is issued pursuant to section 602(d) of the Revenue Act of 1936 (49 Stat., 1740; 7 U. S. C., Sup. IV, 642(d)) as amended by section 911 of the Social Security Act Amendments of 1939 (Public, No. 379, Seventy-sixth Congress, first session).)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 20, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 22, 1939, 12.52 p. m.)

BANKHEAD COTTON ACT OF 1934 AS AMENDED, KERR TOBACCO ACT AS AMENDED, AND POTATO ACT OF 1935.

1939-39-10034
T. D. 4943

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER E, PART 461.

Amending article 3 of Treasury Decision 4850 [C. B. 1938-2, 476] relating to period of limitations for filing claims for refund of taxes paid under the Bankhead Cotton Act of 1934, as amended, the Kerr Tobacco Act, as amended, and the Potato Act of 1935.

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

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 4850 [C. B. 1938-2, 476] [Part 461 of Title 26, Code of Federal Regulations] is amended as follows:

At the end of paragraph A the following is inserted:

The Third Deficiency Appropriation Act, fiscal year 1939 (Public, No. 361, Seventy-sixth Congress, approved August 9, 1939), provides in part:

"The date appearing in the first proviso of the second paragraph of the appropriation 'Refunds and payments of processing and related taxes, Bureau of Internal Revenue, 1939,' contained in the Second Deficiency Appropriation Act, fiscal year 1938, is hereby changed from 'July 1, 1939,' to 'July 1, 1940.'"

Article 3 [section 461.3 of Title 26, Code of Federal Regulations] is amended to read as follows:

ART. 3. *Period during which claims must be filed.*—No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Bankhead Cotton Act of 1934, as amended, the Kerr Tobacco Act, as amended, or the Potato Act of 1935, unless, subsequent to June 25, 1938, and prior to July 1, 1940, a claim for refund is filed by the person entitled thereto, or his duly authorized agent or representative. In accordance with the requirements of the above-quoted provision of law claims filed on or before June 25, 1938, may not receive favorable consideration by the Commissioner. A person who has filed, on or before June 25, 1938, a claim for refund of any such tax, penalty, or interest, must, nevertheless, to secure refund, file a new claim on the prescribed form subsequent to June 25, 1938, and prior to July 1, 1940.

(This Treasury decision is issued pursuant to the second paragraph of the appropriation "Refunds and payments of processing and related taxes, Bureau of Internal Revenue, 1939," contained in the Second Deficiency Appropriation Act, fiscal year 1938, 52 Stat., 1150.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 20, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 22, 1939, 12.52 p. m.)

FEDERAL FIREARMS ACT. (1938)

1939–40–10048
T. D. 4946

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 315.

Treasury Decision 4896 [C. B. 1939–1 (Part 1), 364], regulations relating to the licensing under the Federal Firearms Act of manufacturers of, and dealers in, firearms or ammunition, amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., September 23, 1939.

To Collectors of Internal Revenue and Others Concerned:

(1) In order to give effect to the provisions of the Act approved August 6, 1939 (Public, No. 298, Seventy-sixth Congress, first session), amending the Federal Firearms Act (52 Stat., 1250; 15 U. S. C., Sup. IV, 901–909), Treasury Decision 4898, approved May 1, 1939 [C. B. 1939–1 (Part 1), 364], [Part 315 of Title 26, Code of Federal Regulations, is amended as follows:

Immediately prior to the word "provides" in section 315.0, there is inserted the following: "as amended by the Act approved August 6, 1939 (Public, No. 298, Seventy-sixth Congress, first session)."

The quotation in section 315.0 of section 1(8) of the Federal Firearms Act is amended to read as follows:

(8) The term "ammunition" shall include only pistol or revolver ammunition. It shall not include shotgun shells, metallic ammunition suitable for use only in rifles, or any .22 caliber rimfire ammunition.

Section 315.1(*c*) is amended to read as follows:

The term "ammunition" means only pistol and revolver ammunition. It does not include shotgun shells, metallic ammunition suitable for use only in rifles, or any .22 caliber rimfire ammunition.

(2) Section 315.10(*a*) is amended by substituting for the matter ending with the word "include," followed by a colon, the following:

Each licensed manufacturer shall maintain complete and adequate records of all firearms and ammunition disposed of in the course of his business, whether manufactured by himself or acquired from other manufacturers or dealers, including firearms in an unassembled condition, but not including parts of firearms. The records shall show and include: * * *

(3) Section 315.10(*b*) is amended by substituting for the matter ending with the word "include," followed by a colon, the following:

Each licensed dealer shall maintain complete and adequate records of all firearms (not including parts of firearms but including firearms in an unassembled condition) acquired or disposed of in the course of his business. The records shall show and include: * * *

(This Treasury decision is issued under the authority contained in section 7 of the Federal Firearms Act (52 Stat., 1252; 15 U. S. C., Sup. IV, 907), as amended by the Act approved August 6, 1939 (Public, No. 298, Seventy-sixth Congress, first session).)

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 26, 1939, 11.56 a. m.)

MISCELLANEOUS RULINGS.

SECTION 3 OF THE VINSON ACT (48 STAT., 503), AS AMENDED BY THE ACT OF JUNE 25, 1936 (49 STAT., 1926), AND BY THE ACT OF APRIL 3, 1939 (PUBLIC, NO. 18, SEVENTY-SIXTH CONGRESS).

1939–33–9955
I. T. 3308

Applicability of I. T. 3289 (C. B. 1939–1 (Part 1), 409), relating to obsolescence of special equipment in connection with Navy contracts, to Army contracts made subject to the Vinson Act by the amendment of April 3, 1939.

I. T. 3289 (C. B. 1939–1 (Part 1), 409), relating to the procedure with respect to determining the allowance for obsolescence of special facilities as part of the cost of performing a Navy 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), is equally applicable to special equipment and facilities necessarily acquired primarily for the performance of an Army contract or subcontract under section 14 of the Act of April 3, 1939, supra. (See section 16.8(*c*) (5) (D) of the regulations, T. D. 4909, page 422, this Bulletin, relating to Army contracts and subcontracts, which is the same as section 17.9(*c*) (5) (D) of the regulations, T. D. 4906, below, relating to Navy contracts and subcontracts.

1939–27–9899
T. D. 4906

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 17.—EXCESS PROFITS ON NAVY CONTRACTS.

Regulations for income-taxable years ending after April 3, 1939.[1]

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:

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[1] Sections 17.0 to 17.20 issued under the authority contained in sections 650, 651, and 3791 of the Internal Revenue Code and 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), and as further amended by the Act of April 3, 1939 (Public, No. 18, Seventy-sixth Congress, first session).

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17.20. Applicability of Treasury Decision 4723, as amended [C. B. 1937-1, 519].

SECTION 17.0. *Introductory.*—(*a*) Section 3 of the Act entitled "An Act to establish the composition of the United States Navy with respect to the categories of vessels limited by the treaties signed at Washington, February 6, 1922, and at London, April 22, 1930, at the limits prescribed by those treaties; to authorize the construction of certain naval vessels; and for other purposes," approved 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), reads as follows:

SEC. 3. The Secretary of the Navy is hereby directed to submit annually to the Bureau of the Budget estimates for the construction of the foregoing vessels and aircraft; and there is hereby authorized to be appropriated such sums as may be necessary to carry into effect the provisions of this Act: *Provided*, That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

(a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.

(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract 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, but the surety under such contracts shall not be liable for the payment of such excess profit: *Provided*, That if there is a net loss on all such contracts or subcontracts completed by the particular contractor or subcontractor within any income taxable year, such net loss shall be allowed as a credit in determining the excess profit, if any, for the next succeeding income taxable year: *Provided further*, That if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under the usual methods employed under the internal-revenue laws to collect Federal income taxes: *Provided further*, That all provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury of overpayments of excess profits into the Treasury: *And provided further*, That this section shall not apply to contracts or subcontracts for scientific equipment used for communication, target detection, navigation, and fire control as may be so designated by the Secretary of the Navy, and the Secretary of the Navy shall report annually to the Congress the names of such contractors and subcontractors affected by this provision, together with the applicable contracts and the amounts thereof: *And provided further*, That the income-taxable years shall be such taxable years beginning after December 31, 1935, except that the above provision relating to the assessment, collection, payment, or refunding of excess profit to or by the Treasury shall be retroactive to March 27, 1934.

(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.

(*b*) Section 3(b) of the Act referred to above in paragraph (*a*) was further amended by the Act of April 3, 1939 (Public, No. 18, Seventy-sixth Congress, first session; C. B. 1939–1 (Part 1), 430), and as so amended reads as follows:

SEC. 3. (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 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, 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, but the surety under such contracts shall not be liable for the payment of such excess profit: *Provided*, That if there is a net loss on all such contracts or subcontracts for the construction and/or manufacture of any complete naval vessel or portion thereof completed by the particular contractor or subcontractor within any income taxable year, such net loss shall be allowed as a credit in determining the excess profit, if any, for the next succeeding income taxable year, 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 if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under the usual methods employed under the internal-revenue laws to collect Federal income taxes: *Provided further*, That all provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury of overpayments of excess profits into the Treasury: *And provided further*, That this section shall not apply to contracts or subcontracts for scientific equipment used for communication, target detection, navigation, and fire control as may be so designated by the Secretary of the Navy, and the Secretary of the Navy shall report annually to the Congress the names of such contractors and subcontractors affected by this provision, together with the applicable contracts and the amounts thereof: *And provided further*, That the income-taxable years shall be such tax-

able years beginning after December 31, 1935, except that the above provisos relating to the assessment, collection, payment, or refunding of excess profit to or by the Treasury shall be retroactive to March 27, 1934.

(*c*) Sections 650 and 651 of the Internal Revenue Code, approved February 10, 1939, read, respectively, as follows:

SEC. 650. METHOD OF COLLECTION.

If the amount of profit required to be paid into the Treasury under section 3 of the Act of March 27, 1934, c. 95, 48 Stat. 505, as amended by the Act of June 25, 1936, c. 812, 49 Stat. 1926 (U. S. C., Supp. III, Title 34, § 496), with respect to contracts completed within income-tax taxable years beginning after December 31, 1938, is not voluntarily paid, the Secretary shall collect the same under the usual methods employed under the internal revenue laws to collect Federal income taxes.

SEC. 651. LAWS APPLICABLE.

All provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, 48 Stat. 683, and not inconsistent with section 3 of said Act of March 27, 1934, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by section 650, and to refunds by the Treasury of overpayments of excess profits into the Treasury.

Pursuant to the authority prescribed by sections 650, 651, and 3791 of the Internal Revenue Code and 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), and as further amended by the Act of April 3, 1939 (Public, No. 18, Seventy-sixth Congress, first session), the following regulations are hereby prescribed with respect to section 3 of such Act, as first amended and as further amended, and sections 650 and 651 of the Internal Revenue Code:

SEC. 17.1. *Definitions.*—As used in these regulations the term—

(*a*) "*Act*" means the Act of March 27, 1934 (48 Stat., 505; 34 U. S. C., 496), as originally enacted, as amended by the Act of June 25, 1936 (49 Stat., 1926; 34 U. S. C., Sup. IV, 496), and as further amended by the Act of April 3, 1939 (Public, No. 18, Seventy-sixth Congress, first session; C. B. 1939–1 (Part 1), 430).

(*b*) "*Person*" includes an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture or other unincorporated organization or group, through or by means of which any business, financial operation or venture is carried on.

(*c*) "*Contract*" means an agreement made by authority of the Secretary of the Navy for the construction or manufacture of any complete naval vessel or aircraft, or any portion thereof.

(*d*) "*Contractor*" means a person entering into a direct contract with the Secretary of the Navy or his duly authorized representative.

(*e*) "*Subcontract*" means an agreement entered into by one person with another person for the construction or manufacture of a complete naval vessel or aircraft or any portion thereof, the prime contract for such vessel or aircraft or portion thereof having been entered into between a contractor and the Secretary of the Navy or his duly authorized representative.

(*f*) "*Subcontractor*" means any person other than a contractor entering into a subcontract.

(*g*) "*Contracting party*" means a contractor or subcontractor as the case may be.

(*h*) "*Contract price*" or "*total contract price*" means the amount or total amount to be received under a contract or subcontract as the case may be.

(*i*) "*Income-taxable year*" means the calendar year, the fiscal year ending during such calendar year, or the fractional part of such calendar or fiscal year, upon the basis of which the contracting party's net income is computed and for which its income tax returns are made for Federal income tax purposes.

SEC. 17.2. *Scope of these regulations.*—These regulations deal with liability for excess profit on contracts and subcontracts for the construction or manufac-

ture of any complete naval vessel or aircraft or any portion thereof completed within income-taxable years ending after April 3, 1939. As to the date of the completion of a contract or subcontract, see section 17.5 of these regulations.

SEC. 17.3. *Contracts and subcontracts under which excess profit liability may be incurred.*—Except as otherwise provided with respect to contracts or subcontracts for certain scientific equipment (see section 17.4 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 profit liability. Any subcontract made with respect to such a contract and involving an amount in excess of $10,000 is also within the scope of the Act. If a contracting party places orders with another party, aggregating an amount in excess of $10,000, for articles or materials which constitute a part of the cost of performing the contract or subcontract, the placing of such orders shall constitute a subcontract within the scope of the Act, unless it is clearly shown that each of the orders involving $10,000 or less is a bona fide separate and distinct subcontract and not a subdivision made for the purpose of evading the provisions of the Act.

SEC. 17.4. *Contracts or subcontracts for scientific equipment.*—No excess profit liability is incurred upon a contract or subcontract entered into after the amendment of section 3(b) of the Act on June 25, 1936, if at the time or prior to the time such contract or subcontract is made it is designated by the Secretary of the Navy as being exempt under the provisions of the Act pertaining to scientific equipment used for communication, target detection, navigation, or fire control. The exemption of contracts or subcontracts for scientific equipment does not extend to any contract or subcontract entered into prior to the enactment of such amendment of section 3(b) of the Act.

SEC. 17.5. *Completion of contract defined.*—The date of delivery of the vessel, aircraft or portion thereof covered by the contract or subcontract shall be considered the date of completion of the contract or subcontract unless otherwise determined jointly by the Secretary of the Navy and the Secretary of the Treasury or their duly authorized representatives. Except as otherwise provided in the preceding sentence, the replacement of defective parts of delivered articles or the performance of other guarantee work in respect of such articles will not operate to extend the date of completion. As to the treatment of the cost of such work as a cost of performing a contract or subcontract, see section 17.9(*h*) of these regulations. As to a refund in case of adjustment due to any subsequently incurred additional costs, see section 17.19 of these regulations. If a contract or subcontract is at any time canceled or terminated, it is completed at the time of the cancellation or termination.

SEC. 17.6. *Manner of determining liability with respect to contracts or subcontracts for complete naval vessels or portions thereof.*—If in an income-taxable year ending after April 3, 1939, a contracting party completes one or more contracts or subcontracts coming within the scope of the Act and entered into for the construction or manufacture of any complete naval vessel or any portion thereof, the amount of excess profit to be paid to the United States with respect to all such contracts and subcontracts completed within the income-taxable year shall be computed as follows:

The first step is to ascertain the total contract prices of all such contracts and subcontracts completed by the contracting party within the income-taxable year. As to total contract prices, see sections 17.1 and 17.8 of these regulations.

The second step is to ascertain the cost of performing such contracts and subcontracts (see section 17.9 of these regulations) and to deduct such cost from the total contract prices of such contracts and subcontracts as computed in the first step.

The amount remaining after such subtraction is the amount of net profit or net loss upon such contracts and subcontracts completed within the income-taxable year.

The third step, in case there is a net profit upon such contracts and subcontracts, is to subtract from the amount of such net profit as computed in the second step the sum of—

(1) An amount equal to 10 per cent of the total contract prices of such contracts and subcontracts completed within the income-taxable year; and

(2) The amount of any net loss which was sustained in the preceding income-taxable year with respect to contracts or subcontracts entered into for the construction or manufacture of any complete naval vessel or any portion thereof, and which is allowable as a credit in determining the excess profit for the income-

taxable year with respect to contracts and subcontracts entered into for the construction or manufacture of any complete naval vessel or any portion thereof (see paragraph (*a*) of section 17.10 of these regulations).

The amount remaining after such subtraction is the amount of excess profit for the income-taxable year with respect to contracts and subcontracts entered into for the construction or manufacture of any complete naval vessel or any portion thereof.

The fourth step is to ascertain the amount of credit allowed for Federal income taxes paid or remaining to be paid upon the amount of such excess profit as computed in the third step (see section 17.11 of these regulations) and then subtract from the amount of such excess profit the amount of credit for Federal income taxes.

The amount remaining after this subtraction is the amount of excess profit to be paid to the United States by the contracting party for the income-taxable year with respect to contracts and subcontracts entered into for the construction or manufacture of any complete naval vessel or any portion thereof and completed within the income-taxable year.

The application of the provisions of this section of the regulations may be illustrated by the following example:

Example: On September 1, 1939, the A Corporation, which keeps its books and makes its Federal income tax returns on a calendar year basis, entered into a contract with the Secretary of the Navy for the construction of portions of a naval vessel coming within the scope of the Act, the total contract price of which was $200,000. On March 10, 1940, the A Corporation entered into another such contract, the total contract price of which was $40,000. Both contracts were completed within the calendar year 1940, the first at a cost of $155,000 and the second at a cost of $45,000. During the year 1940 the A Corporation also completed at a loss of $10,000 two contracts entered into for the construction or manufacture of naval aircraft coming within the scope of the Act. For the year 1939 the A Corporation sustained a net loss of $2,500 on all contracts and subcontracts for any complete naval vessel or any portion thereof coming within the scope of the Act and completed within the calendar year 1939. For the year 1939 the A Corporation also sustained a net loss of $1,800 on all other contracts and subcontracts coming within the scope of the Act which were completed within the calendar year 1939. For purposes of Federal income tax, the net income of the A Corporation for the year 1940 amounted to $96,000, which amount included the net profit of $40,000 upon the contracts entered into on September 1, 1939, and March 10, 1940. For the year 1940 the A Corporation paid Federal income taxes amounting to $19,200. The excess profit liability of the A Corporation for 1940 is payable with respect to the contracts for portions of a naval vessel which were completed in 1940. The loss of $10,000 on other contracts completed in 1940 and the net loss of $1,800 for 1939 on contracts and subcontracts for naval aircraft do not enter into the computation of such liability. Accordingly, the excess profit liability of the A Corporation for 1940 is $10,800 computed as follows:

Total contract prices:		
Contract No. 1	$200,000	
Contract No. 2	40,000	
		$240,000
Less: Cost of performing contracts:		
Contract No. 1	155,000	
Contract No. 2	45,000	
		200,000
Net profit on contracts		40,000
Less: 10 per cent of total contract prices (10 per cent of $240,000)	$24,000	
Net loss from 1939	2,500	
		26,500
Excess profit for year 1940		13,500
Less: Credit for Federal income taxes (Federal income tax on $13,500 at rates for 1940)		2,700
Amount of excess profit payable to the United States		10,800

SEC. 17.7. *Manner of determining liability with respect to contracts or subcontracts for complete naval aircraft or portions thereof.*—If in an income-taxable year ending after April 3, 1939, a contracting party completes one or more contracts or subcontracts coming within the scope of the Act and entered into for the construction or manufacture of any complete naval aircraft or any portion thereof, the amount of excess profit to be paid to the United States with respect to all such contracts and subcontracts completed within the income-taxable year shall be computed as follows:

The first step is to ascertain the total contract prices of all such contracts and subcontracts completed by the contracting party within the income-taxable year. As to total contract prices, see sections 17.1 and 17.8 of these regulations.

The second step is to ascertain the cost of performing such contracts and subcontracts (see section 17.9 of these regulations) and to deduct such cost from the total contract prices of such contracts and subcontracts as computed in the first step.

The amount remaining after such subtraction is the amount of net profit or net loss upon such contracts and subcontracts completed within the income-taxable year.

The third step, in case there is a net profit upon such contracts and subcontracts, is to subtract from the amount of such net profit as computed in the second step the sum of—

(1) An amount equal to 12 per cent of the total contract prices of such contracts and subcontracts completed within the income-taxable year;

(2) The amount of any net loss which was sustained in a prior income-taxable year with respect to contracts or subcontracts for the construction or manufacture of any complete naval aircraft or any portion thereof, and which is allowable as a credit in determining the excess profit for the income-taxable year with respect to contracts and subcontracts entered into for the construction or manufacture of complete naval aircraft or any portion thereof (see paragraph (*b*) of section 17.10 of these regulations); and

(3) The amount of any deficiency in profit which was sustained in a prior income-taxable year with respect to contracts or subcontracts entered into for the construction or manufacture of any complete naval aircraft or any portion thereof, and which is allowable as a credit in determining the excess profit for the income-taxable year with respect to contracts and subcontracts entered into for the construction or manufacture of complete naval aircraft or any portion thereof (see paragraph (*c*) of section 17.10 of these regulations).

The amount remaining after such subtraction is the amount of excess profit for the income-taxable year with respect to contracts and subcontracts entered into for the construction or manufacture of complete naval aircraft or any portion thereof.

The fourth step is to ascertain the amount of credit allowed for Federal income taxes paid or remaining to be paid upon the amount of such excess profit as computed in the third step (see section 17.11 of these regulations) and then subtract from the amount of such excess profit the amount of credit for Federal income taxes.

The amount remaining after this subtraction is the amount of excess profit to be paid to the United States by the contracting party for the income-taxable year with respect to contracts and subcontracts entered into for the construction or manufacture of complete naval aircraft or any portion thereof and completed within the income-taxable year.

The application of the provisions of this section of the regulations may be illustrated by the following example:

Example: On September 1, 1939, the B Corporation, which keeps its books and makes its Federal income tax returns on a calendar year basis, entered into a contract with the Secretary of the Navy for the construction of aircraft coming within the scope of the Act, the total contract price of which was $200,000. On March 10, 1940, the B Corporation entered into another such contract, the total contract price of which was $40,000. Both contracts were completed within the calendar year 1940, the first at a cost of $155,000 and the second at a cost of $45,000. During the year 1940 the B Corporation also completed at a loss of $10,000 two contracts entered into for the construction or manufacture of portions of a naval vessel coming within the scope of the Act. For the year 1939 the B Corporation sustained a net loss of $2,500 and a deficiency in profit of $1,000 on all contracts and subcontracts for naval aircraft coming within the scope of the Act and completed within the calendar

year 1939. For the year 1939 the B Corporation also sustained a net loss of $1,800 on all other contracts and subcontracts coming within the scope of the Act which were completed within the calendar year 1939. For purposes of the Federal income tax, the net income of the B Corporation for the year 1940 amounted to $96,000 which amount included the net profit of $40,000 upon the contracts entered into on September 1, 1939, and March 10, 1940. For the year 1940 the B Corporation paid Federal income taxes amounting to $19,200. The excess profit liability of the B Corporation for 1940 is payable with respect to the contracts for naval aircraft which were completed in 1940. The loss of $10,000 on other contracts completed in 1940 and the net loss of $1,800 for 1939 on contracts and subcontracts other than for naval aircraft do not enter into the computation of such liability. Accordingly, the excess profit liability of the B Corporation for 1940 is $6,700 computed as follows:

Total contract prices:		
Contract No. 1	$200,000	
Contract No. 2	40,000	
		$240,000
Less: Cost of performing contracts:		
Contract No. 1	155,000	
Contract No. 2	45,000	
		200,000
Net profit on contracts		40,000
Less: 12 per cent of total contract prices (12 per cent of $240,000)	$28,800	
Net loss from 1939	2,500	
Deficiency in profit from 1939	1,000	
		32,300
Excess profit for year 1940		7,700
Less: Credit for Federal income taxes (Federal income tax on $7,700 at rates for 1940)		1,000
Amount of excess profit payable to the United States		6,700

SEC. 17.8. *Total contract price.*—The total contract price of a particular contract or subcontract (see section 17.1 of these regulations) may be received in money or its equivalent. If something other than money is received, only the fair market value of the thing received, at the date of receipt, is to be included in determining the amount received. Bonuses earned for bettering performance and penalties incurred for failure to meet the contract guarantees are to be regarded as adjustments of the original contract price. Trade or other discounts granted by a contracting party in respect of a contract or subcontract performed by such party are also to be deducted in determining the true total contract price of such contract or subcontract.

SEC. 17.9. *Cost of performing a contract or subcontract.*—(*a*) *General rule.*—The cost of performing a particular contract or subcontract shall be the sum of (1) the direct costs, including therein expenditures for materials, direct labor and direct expenses, incurred by the contracting party in performing the contract or subcontract; and (2) the proper proportion of any indirect costs (including therein a reasonable proportion of management expenses) incident to and necessary for the performance of the contract or subcontract.

(*b*) *Elements of cost.*—No definitions of the elements of cost may be stated which are of invariable application to all contractors and subcontractors. In general, the elements of cost may be defined for purposes of the Act as follows:

(1) Manufacturing cost, which is the sum of factory cost (see paragraph (*c*) of this section) and other manufacturing cost (see paragraph (*d*) of this section);

(2) Miscellaneous direct expenses (see paragraph (*e*) of this section);

(3) General expenses, which are the sum of indirect engineering expenses, usually termed "engineering overhead" (see paragraph (*f*) of this section) and expenses of distribution, servicing and administration (see paragraph (*g*) of this section); and

(4) Guarantee expenses (see paragraph (*h*) of this section).

(*c*) *Factory cost.*—Factory cost is the sum of the following:

(1) *Direct materials.*—Materials, such as those purchased for stock and subsequently issued for contract operations and those acquired under subcontracts,

which become a component part of the finished product or which are used directly in fabricating, converting or processing such materials or parts.

(2) *Direct productive labor.*—Productive labor, usually termed "shop labor," which is performed on and is properly chargeable directly to the article manufactured or constructed pursuant to the contract or subcontract, but which ordinarily does not include direct engineering labor (see subparagraph (3) of this paragraph).

(3) *Direct engineering labor.*—The compensation of professional engineers and other technicists (including reasonable advisory fees), and of draftsmen, properly chargeable directly to the cost of the contract or subcontract.

(4) *Miscellaneous direct factory charges.*—Items which are properly chargeable directly to the factory cost of performing the contract or subcontract but which do not come within the classifications in subparagraphs (1), (2), and (3) of this paragraph, as, for example, royalties which the contracting party pays to another party and which are properly chargeable to the cost of performing the contract or subcontract (but see paragraph (*d*) of this section).

(5) *Indirect factory expenses.*—Items, usually termed "factory overhead," which are not directly chargeable to the factory cost of performing the contract or subcontract but which are properly incident to and necessary for the performance of the contract or subcontract and consist of the following:

(A) *Labor.*—Amounts expended for factory labor, such as supervision and inspection, clerical labor, timekeeping, packing and shipping, stores supply, services of tool crib attendants, and services in the factory employment bureau, which are not chargeable directly to productive labor of the contract or subcontract.

(B) *Materials and supplies.*—The cost of materials and supplies for general use in the factory in current operations, such as shop fuel, lubricants, heat-treating, plating, cleaning and anodizing supplies, nondurable tools and gauges, stationery (such as time tickets and other forms), and boxing and wrapping materials.

(C) *Service expenses.*—Factory expenses of a general nature, such as those for power, heat and light (whether purchased or produced), ventilation and air-conditioning and operation and maintenance of general plant assets and facilities.

(D) *Fixed charges and obsolescence.*—Recurring charges with respect to property used for manufacturing purposes of the contract or subcontract, such as premiums for fire and elevator insurance, property taxes, rentals and allowances for depreciation of such property, including maintenance and depreciation of reasonable stand-by equipment; and depreciation and obsolescence of special equipment and facilities necessarily acquired primarily for the performance of the contract or subcontract. In making allowances for depreciation, consideration shall be given to the number and length of shifts.

(E) *Miscellaneous indirect factory expenses.*—Miscellaneous factory expenses not directly chargeable to the factory cost of performing the contract or subcontract, such as purchasing expenses; ordinary and necessary expenses of rearranging facilities within a department or plant; employees' welfare expenses; premiums or dues on compensation insurance; employers' payments to unemployment, old age and social security Federal and State funds not including payments deducted from or chargeable to employees or officers; pensions and retirement payments to factory employees; factory accident compensation (as to self-insurance, see paragraph (*g*) of this section); but not including any amounts which are not incident to services, operations, plant, equipment or facilities involved in the performance of the contract or subcontract.

(*d*) *Other manufacturing cost.*—Other manufacturing cost as used in paragraph (*b*) of this section includes items of manufacturing costs which are not properly or satisfactorily chargeable to factory costs (see paragraph (*c*) of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or subcontract, as for instance, payments of royalties and amortization of the cost of designs purchased and patent rights over their useful life; and "deferred" or "unliquidated" experimental and development charges. For example, in case experimental and development costs have been properly deferred or capitalized and are amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contract or subcontract. In the case of general experimental

and development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or subcontract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract.

(*e*) *Miscellaneous direct expenses.*—Miscellaneous direct expenses as used in paragraph (*b*) of this section include—

(1) *Cost of installation and construction.*—Cost of installation and construction includes the cost of materials, labor and expenses necessary for the erection and installation prior to the completion of the contract and after the delivery of the product or material manufactured or constructed pursuant to the contract or subcontract.

(2) *Sundry direct expenses.*—Items of expense which are properly chargeable directly to the cost of performing a contract or subcontract and which do not constitute guarantee expenses (see paragraph (*h*) of this section) or direct costs classified as factory cost or other manufacturing cost (see paragraphs (*c*) and (*d*) of this section), such as premiums on performance or other bonds required under the contract or subcontract; State sales taxes imposed on the contracting party; freight on outgoing shipments; fees paid for wind tunnel and model basin tests; demonstration and test expenses; crash insurance premiums; traveling expenses. In order for any such item to be allowed as a charge directly to the cost of performing a contract or subcontract, (1) a detailed record shall be kept by the contracting party of all items of a similar character, and (2) no item of a similar character which is properly a direct charge to other work shall be allowed as a part of any indirect expenses in determining the proper proportion thereof chargeable to the cost of performing the contract or subcontract. As to allowable indirect expenses, see paragraphs (*c*)(5), (*f*), (*g*), and (*j*) of this section.

(*f*) *Indirect engineering expenses.*—Indirect engineering expenses, usually termed "engineering overhead," which are treated in this section as a part of general expenses in determining the cost of performing a contract or subcontract (see paragraph (*b*) of this section), comprise the general engineering expenses which are incident to and necessary for the performance of the contract or subcontract, such as the following:

(1) *Labor.*—Reasonable fees of engineers employed in a general consulting capacity, and compensation of employees for personal services to the engineering department, such as supervision, which is properly chargeable to the contract or subcontract, but which is not chargeable as direct engineering labor (see paragraph (*c*)(3) of this section).

(2) *Material.*—Supplies for the engineering department, such as paper and ink for drafting and similar supplies.

(3) *Miscellaneous expenses.*—Expenses of the engineering department, such as (A) maintenance and repair of engineering equipment, and (B) services purchased outside of the engineering department for blue printing, drawing, computing, and like purposes.

(*g*) *Expenses of distribution, servicing, and administration.*—Expenses of distribution, servicing, and administration, which are treated in this section as a part of general expenses in determining the cost of performing a contract or subcontract (see paragraph (*b*) of this section), comprehend the expenses incident to and necessary for the performance of the contract or subcontract, which are incurred in connection with the distribution and general servicing of the contracting party's products and the general administration of the business, such as—

(1) *Compensation for personal services of employees.*—The salaries of the corporate and general executive officers and the salaries and wages of administrative clerical employees and of the office service employees such as telephone operators, janitors, cleaners, watchmen, and office equipment repairmen.

(2) *Bidding and general selling expenses.*—Bidding and general selling expenses which by reference to all the pertinent facts and circumstances reasonably constitute a part of the cost of performing a contract or subcontract. The treatment of bidding and general selling expenses as a part of general ex-

penses in accordance with this paragraph is in lieu of any direct charges which otherwise might be made for such expenses. The term "bidding expenses" as used in this section includes all expenses in connection with preparing and submitting bids.

(3) *General servicing expenses.*—Expenses which by reference to all the pertinent facts and circumstances reasonably constitute a part of the cost of performing a contract or subcontract and which are incident to delivered or installed articles and are due to ordinary adjustments or minor defects; but including no items which are treated as a part of guarantee expenses (see paragraph (*h*) of this section) or as a part of direct costs, such as direct materials, direct labor, and other direct expense.

(4) *Other expenses.*—Miscellaneous office and administrative expenses, such as stationery and office supplies; postage; repair and depreciation of office equipment; contributions to local charitable or community organizations to the extent constituting ordinary and necessary business expenses; employees' welfare expenses; premiums and dues on compensation insurance; employers' payments to unemployment, old age, and social security Federal and State funds not including payments deducted from or chargeable to employees or officers; pensions and retirement payments to administrative office employees and accident compensation to office employees (as to self-insurance, see the following subparagraph).

Subject to the exception stated in this subparagraph, in cases where a contracting party assumes its own insurable risks (usually termed "self-insurance"), losses and payments will be allowed in the cost of performing a contract or subcontract only to the extent of the actual losses suffered or payments incurred during, and in the course of, the performance of the contract or subcontract and properly chargeable to such contract or subcontract. If, however, a contracting party assumes its own insurable risks (*a*) for compensation paid to employees for injuries received in the performance of their duties, or (*b*) for unemployment risks in States where insurance is required, there may be allowed as a part of the cost of performing a contract or subcontract a reasonable portion of the charges set up for purposes of self-insurance under a system of accounting regularly employed by the contracting party, as determined by the Commissioner of Internal Revenue, at rates not exceeding the lawful or approved rates of insurance companies for such insurance, reduced by amounts representing the acquisition cost in such companies, provided the contracting party adopts and consistently follows this method with respect to self-insurance in connection with all contracts and subcontracts subsequently performed by him.

Allowances for interest on invested capital are not allowable as costs of performing a contract or subcontract.

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: Entertainment expenses; dues and memberships other than of regular trade associations; donations except as otherwise provided above; losses on other contracts; profits or losses from sales or exchanges of capital assets; extraordinary expenses due to strikes or lockouts; fines and penalties; amortization of unrealized appreciation of values of assets; expenses, maintenance and depreciation of excess facilities (including idle land and building, idle parts of a building, and excess machinery and equipment) vacated or abandoned, or not adaptable for future use in performing contracts or subcontracts; increases in reserve accounts for contingencies, repairs, compensation insurance (except as above provided with respect to self-insurance) and guarantee work; Federal and State income and excess-profits taxes and surtaxes; 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; interest incurred or earned; bond discount or finance charges; premiums for life insurance on the lives of officers; legal and accounting fees in connection with reorganizations, security issues, capital stock issues, and the prosecution of claims against the United States (including income tax matters); taxes and expenses on issues and transfers of capital stock; losses on investments; bad debts; and expenses of collection and exchange.

In order that the cost of performing a contract or subcontract may be accounted for clearly, the amount of any excess profits repayable to the United States pursuant to the Act should not be charged to or included in such cost.

(*h*) *Guarantee expenses.*—Guarantee expenses include the various items of factory cost, other manufacturing cost, cost of installation and construction,

indirect engineering expenses and other general expenses (see paragraphs (*c*) to (*g*), inclusive, of this section) which are incurred after delivery or installation of the article manufactured or constructed pursuant to the particular contract or subcontract and which are incident to the correction of defects or deficiencies which the contracting party is required to make under the guarantee provisions of the particular contract or subcontract. If the total amount of such guarantee expenses is not ascertainable at the time of filing the report required to be filed with the collector of internal revenue (see section 17.16 of these regulations) and the contracting party includes any estimated amount of such expenses as part of the claimed total cost of performing the contract or subcontract, such estimated amount shall be separately shown on the report and the reasons for claiming such estimated amount shall accompany the report; but only the amount of guarantee expenses actually incurred will be allowed. If the amount of guarantee expenses actually incurred is greater than the amount (if any) claimed on the report and the contracting party has made an overpayment of excess profit, a refund of the overpayment shall be made in accordance with the provisions of section 17.19 of these regulations. If the amount of guarantee expenses actually incurred is less than the amount claimed on the report and an additional amount of excess profit is determined to be due, the additional amount of excess profit shall be assessed and paid in accordance with the provisions of section 17.19 of these regulations.

(*i*) *Unreasonable compensation.*—The salaries and compensation for services which are treated as a part of the cost of performing a contract or subcontract include reasonable payments for salaries, bonuses, or other compensation for services. As a general rule, bonuses paid to employees (and not to officers) in pursuance of a regularly established incentive bonus system may be allowed as a part of the cost of performing a contract or subcontract.

The test of allowability is whether the aggregate compensation paid to each individual is for services actually rendered incident to, and necessary for, the performance of the contract or subcontract, and is reasonable. Excessive or unreasonable payments whether in cash, stock, or other property ostensibly as compensation for services shall not be included in the cost of performing a contract or subcontract.

(*j*) *Allocation of indirect costs.*—No general rule applicable to all cases may be stated for ascertaining the proper proportion of the indirect costs to be allocated to the cost of performing a particular contract or subcontract. Such proper proportion depends upon all the facts and circumstances relating to the performance of the particular contract or subcontract. Subject to a requirement that all items which have no relation to the performance of the contract or subcontract shall be eliminated from the amount to be allocated, the following methods of allocation are outlined as acceptable in a majority of cases:

(1) *Factory indirect expenses.*—The allowable indirect factory expenses (see paragraph (*c*)(5) of this section) shall ordinarily be allocated or "distributed" to the cost of the contract or subcontract on the basis of the proportion which the direct productive labor (see paragraph (*c*)(2) of this section) attributable to the contract or subcontract bears to the total direct productive labor of the production department or particular section thereof during the period within which the contract or subcontract is performed, except that if the indirect factory expenses are incurred in different amounts and in different proportions by the various producing departments consideration shall be given to such circumstances to the extent necessary to make a fair and reasonable determination of the true profit and excess profit.

(2) *Engineering indirect expenses.*—The allowable indirect engineering expenses (see paragraph (*f*) of this section) shall ordinarily be allocated or "distributed" to the cost of the contract or subcontract on the basis of the proportion which the direct engineering labor attributable to the contract or subcontract (see paragraph (*c*)(3) of this section) bears to the total direct engineering labor of the engineering department or particular section thereof during the period within which the contract or subcontract is performed. If the expenses of the engineering department are not sufficient in amount to require the maintenance of separate accounts, the engineering indirect costs may be included in the indirect factory expenses (see paragraph (*c*)(5) of this section) and allocated or distributed to the cost of performing the contract or subcontract as a part of such expenses, provided the proportion so allocated or distributed is proper under the facts and circumstances relating to the performance of the particular contract or subcontract.

(3) *Administrative expenses (or "overhead").*—The allowable expenses of administration (see paragraph (*g*) of this section) or other general expenses except indirect engineering expenses, bidding and general selling expenses, and general servicing expenses shall ordinarily be allocated or distributed to the cost of performing a contract or subcontract on the basis of the proportion which the sum of the manufacturing cost (see paragraph (*b*) of this section) and the cost of installation and construction (see paragraph (*e*) of this section) attributable to the particular contract or subcontract bears to the sum of the total manufacturing cost and the total cost of installation and construction during the period within which the contract or subcontract is performed.

(4) *Bidding, general selling, and general servicing expenses.*—The allowable bidding and general selling expenses and general servicing expenses (see paragraph (*g*) (2) and (3) of this section) shall ordinarily be allocated or distributed to the cost of performing a contract or subcontract on the basis of—

(*i*) The proportion which the contract price of the particular contract or subcontract bears to the total sales made (including contracts or subcontracts completed) during the period within which the particular contract or subcontract is performed, or

(*ii*) The proportion which the sum of the manufacturing cost (see paragraph (*b*) of this section) and the cost of installation and construction (see paragraph (*e*) of this section) attributable to the particular contract or subcontract bears to the sum of the total manufacturing cost and the total cost of installation and construction during the period within which the contract or subcontract is performed,

except that special consideration shall be given to the relation which certain classes of such expenses bear to the various classes of articles produced by the contracting party in each case in which such consideration is necessary in order to make a fair and reasonable determination of the true profit and excess profit. See section 17.14 of these regulations.

SEC. 17.10. *Credits for net loss and deficiency in profit in computing excess profit.*—(*a*) *Net loss on contracts and subcontracts for naval vessels or portions thereof.*—In the case of contracts or subcontracts for the construction or manufacture of any complete naval vessel or any portion thereof coming within the scope of the Act which are completed within an income-taxable year ending after April 3, 1939, the term "net loss" as used in the Act and in these regulations means the amount by which the total costs of performing all such contracts and subcontracts completed within such income-taxable year exceeds the total contract prices of such contracts and subcontracts. Such net loss sustained by a contracting party for an income-taxable year ending after April 3, 1939, is allowable as a credit in computing the contracting party's excess profit on contracts and subcontracts for the construction or manufacture of any complete naval vessel or any portion thereof which are completed within the next succeeding income-taxable year.

(*b*) *Net loss on contracts and subcontracts for naval aircraft or portion thereof.*—In the case of contracts or subcontracts for the construction or manufacture of any complete naval aircraft or any portion thereof coming within the scope of the Act which are completed within an income-taxable year ending after April 3, 1939, the term "net loss" as used in the Act and in these regulations means the amount by which the total costs of performing all such contracts and subcontracts completed within such income-taxable year exceeds the total contract prices of such contracts and subcontracts. Such net loss sustained by a contracting party for an income-taxable year ending after April 3, 1939, is allowable as a credit in computing the contracting party's excess profit on contracts and subcontracts for the construction or manufacture of any complete naval aircraft or any portion thereof which are completed within the four next succeeding income-taxable years.

(*c*) *Deficiency in profit.*—The term "deficiency in profit" as used in the Act and in these regulations relates only to contracts and subcontracts coming within the scope of the Act which are for the construction or manufacture of any complete naval aircraft or any portion thereof and are completed within an income-taxable year ending after April 3, 1939. As so used, the term "deficiency in profit" means the amount by which 12 per cent of the total contract prices of such contracts and subcontracts which are completed by a particular contracting party within the income-taxable year exceeds the net profit upon such contracts and subcontracts. A deficiency in profit sustained

by a contracting party with respect to such contracts and subcontracts for the construction or manufacture of complete naval aircraft or any portion thereof and completed within any income-taxable year ending after April 3, 1939, is allowable as a credit in computing the contracting party's excess profit on contracts and subcontracts for the construction or manufacture of complete naval aircraft or any portion thereof which are completed within the four next succeeding income-taxable years.

(*d*) *Claim for credit.*—Credit for a deficiency in profit or a net loss may be claimed in the contracting party's annual report of profit filed with the collector of internal revenue (see section 17.16 of these regulations), but it shall be supported by separate schedules for each contract or subcontract involved showing total contract prices, costs of performance and pertinent facts relative thereto, together with a summarized computation of the deficiency in profit or net loss. The deficiency in profit or net loss claimed is subject to verification and adjustment. As to preservation of books and records, see section 17.14 of these regulations. A deficiency in profit or net loss sustained on contracts and subcontracts completed within one income-taxable year may not be considered in computing a net loss or deficiency in profit sustained on contracts and subcontracts completed within another income-taxable year.

The provisions of this section of the regulations may be illustrated by the following examples:

Example (1): For the calendar year 1939 the A Corporation, which keeps its books and makes its Federal income tax returns on a calendar year basis, sustained a net loss of $50,000 upon all contracts and subcontracts coming within the scope of the Act which were entered into for the construction or manufacture of any complete naval vessel or any portion thereof and were completed within the calendar year 1939. For the calendar year 1940 the A Corporation had a net profit of $30,000 upon all such contracts and subcontracts completed within the year 1940. It also had a net profit of $10,000 upon other contracts completed within that year, all such contracts being for naval aircraft coming within the scope of the Act. For the calendar year 1941 the corporation had a net profit of $25,000 upon contracts completed within that year. The net loss of $50,000 sustained in 1939 may be taken as a credit against the net profit of $30,000 realized in 1940 upon the contracts for the construction or manufacture of complete naval vessels or portions thereof completed within that year; but the excess of $20,000 ($50,000 minus $30,000) may not be taken as a credit in computing the excess profit realized upon the other contracts completed in 1940 at a net profit of $10,000 or as a credit in computing the excess profit upon the contracts completed within the year 1941 at a net profit of $25,000.

Example (2): For the calendar year 1939 the B Corporation, which keeps its books and makes its Federal income tax returns on a calendar year basis, sustained a net loss of $10,000 and a deficiency in profit of $35,000 upon all contracts and subcontracts for naval aircraft and portions thereof coming within the scope of the Act and completed within that year. On all contracts and subcontracts for naval aircraft coming within the scope and completed within the calendar year 1940 the B Corporation realized a net profit which was $25,000 in excess of 12 per cent of the total contract prices of such contracts and subcontracts. On all contracts and subcontracts for naval aircraft coming within the scope of the Act and completed within the calendar year 1941 the B Corporation realized a net profit which was $20,000 in excess of 12 per cent of the total contract prices of such contracts. The net loss of $10,000 and deficiency in profit of $35,000 (or a total of $45,000) sustained in 1939 with respect to contracts and subcontracts for naval aircraft completed within that year may be taken as a credit to the extent of $25,000 in computing the excess profit on the contracts and subcontracts for naval aircraft completed in 1940. The remainder of such net loss and such deficiency in profit ($45,000 minus $25,000 or $20,000) may be taken as a credit in computing the excess profit realized on the contracts and subcontracts for naval aircraft completed in the year 1941.

SEC. 17.11. *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 1938, and Chapter 1 and Subchapter A of Chapter 2 of the Internal Revenue Code, and the excess-profits taxes imposed by

section 602 of the Revenue Act of 1938, and Subchapter B of Chapter 2 of the Internal Revenue Code. 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 accordingly adjusted.

SEC. 17.12. *Failure of contractor to require agreement by subcontractor.*— Every contract or subcontract coming within the scope of the Act is required by the Act to contain, among other things, an agreement by the contracting party to make no subcontract unless the subcontractor agrees—

(*a*) To make a report, as described in the Act, under oath to the Secretary of the Navy upon the completion of the subcontract;

(*b*) To pay into the Treasury excess profit, as determined by the Treasury Department, in the manner and amounts specified in the Act;

(*c*) To make no subdivision of the subcontract for the same article or articles for the purpose of evading the provisions of the Act;

(*d*) That the manufacturing spaces and books of its own plant, affiliates, and subdivisions shall at all times be subject to inspection and audit as provided in the Act.

If a contracting party enters into a subcontract with a subcontractor who fails to make such agreement, such contracting party shall, in addition to its liability for excess profit determined on contracts or subcontracts performed by it, be liable for any excess profit determined to be due the United States on the subcontract entered into with such subcontractor. In such event, however, the excess profit to be paid to the United States in respect of the subcontract entered into with such subcontractor shall be determined separately from any contracts or subcontracts performed by the contracting party entering into the subcontract with such subcontractor.

SEC. 17.13. *Evasion of excess profit.*—Section 3 of the Act provides that the contracting party shall agree to make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of the Act. If any such subdivision or subcontract is made it shall constitute a violation of the agreement provided for in the Act, and the cost of completing a contract or subcontract by a contracting party which violates such agreement shall be determined in a manner necessary clearly to reflect the true excess profit of such contracting party.

SEC. 17.14. *Books of account and records.*—It is recognized that no uniform method of accounting can be prescribed for all contracting parties subject to the provisions of the Act. Each contracting party is required by law to make a report of its true profit and excess profit. Such party must, therefore, maintain such accounting records as will enable it to do so. See section 17.9 of these regulations. Among the essentials are the following:

(1) The profit or loss upon a particular contract or subcontract shall be accounted for and fully explained in the books of account separately on each contract or subcontract.

(2) Any cost accounting methods, however standard they may be and regardless of long continued practice, shall be controlled by, and be in accord with, the objectives and purposes of the Act and of any regulations prescribed thereunder.

(3) The accounts shall clearly disclose the nature and amount of the different items of cost of performing a contract or subcontract.

In cases where it has been the custom priorly to use so-called "normal" rates of overhead expense or administrative expenses, or "standard" or "normal" prices of material or labor charges, no objection will be made to the use temporarily during the period of performing the contract or subcontract of such methods in charging the contract or subcontract, if the method of accounting employed is such as clearly to reflect, in the final determination upon the books of account, the actual profit derived from the performance of the contract or subcontract and if the necessary adjusting entries are entered upon the books and they explain in full detail the revisions necessary to accord with the facts. As to the elements of cost, see section 17.9 of these regulations.

All books, records, and original evidences of costs (including, for example, 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, deficiency in 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 distribution of costs to the contract or subcontract.

SEC. 17.15. *Report to Secretary of the Navy.*—Upon the completion of a contract or a subcontract coming within the scope of the Act and these regulations, the contracting party is required to make a report, under oath, to the Secretary of the Navy. As to the date of completion of a contract or subcontract, see section 17.5 of these regulations. The Act requires that such report shall be in the form prescribed by the Secretary of the Navy and shall state the total contract price, the cost of performing the contract, the net income from such contract, and the per centum such income bears to the contract price. The contracting party shall also include as a part of such report a statement showing—

(1) The manner in which the indirect costs were determined and allocated to the cost of performing the contract or subcontract (see section 17.9 of these regulations);

(2) The name and address of every subcontractor with whom a subcontract was made, the object of such subcontract, the date when completed and the amount thereof; and

(3) The name and address of each affiliate or other organization, trade or business owned or controlled directly or indirectly by the same interests as those who so own or control the contracting party, together with a statement showing in detail all transactions which were made with such affiliate or other organization, trade or business and are pertinent to the determination of the excess profit.

A copy of the report required to be made to the Secretary of the Navy is required to be transmitted by the contracting party to the Secretary of the Treasury. Such copy shall not be transmitted directly to the Secretary of the Treasury but shall be filed as a part of the annual report. See section 17.16 of these regulations.

SEC. 17.16. *Annual reports for income-taxable years.*—(*a*) *General requirements.*—Every contracting party completing a contract or subcontract within the contracting party's income-taxable year ending after April 3, 1939, shall file, with the collector of internal revenue for the collection district in which the contracting party's Federal income tax return is required to be filed, annual reports on the prescribed forms of the profit and excess profit on all contracts and subcontracts coming within the scope of the Act. If any contracts or subcontracts so completed by the contracting party were entered into for the construction or manufacture of any complete naval vessel or any portion thereof, the profit and excess profit on all such contracts and subcontracts completed within the income-taxable year ending after April 3, 1939, shall be computed in accordance with the provisions of section 17.6 of these regulations. If any contracts or subcontracts so completed by the contracting party were entered into for the construction or manufacture of any complete naval aircraft or any portion thereof, the profit and excess profit on all such contracts and subcontracts completed within the income-taxable year ending after April 3, 1939, shall be computed in accordance with the provisions of section 17.7 of these regulations. There shall be included as a part of the annual report a statement, preferably in columnar form, showing separately for each contract or subcontract completed by the contracting party within the income-taxable year and covered by the report, the total contract price, the cost of performing the contract or subcontract, and resulting profit or loss on each contract or subcontract together with a summary statement showing in detail the computation of the net profit or net loss upon each group of contracts and subcontracts covered by the report and the amount of the excess profit, if any, with respect to each group of contracts and subcontracts covered by the report. A copy of the report made to the Secretary of the Navy (see section 17.15 of these regulations) with respect to each contract or subcontract covered in the annual report shall be filed as a part of such annual report. In case the income-

taxable year of the contracting party is a period of less than 12 months (see section 17.1 of these regulations), the reports required by this section shall be made for such period and not for a full year.

(*b*) *Time for filing annual reports.*—Annual reports of contracts and subcontracts completed by a contracting party within an income-taxable year ending after April 3, 1939, shall be filed on or before the 15th day of the ninth month following the close of the contracting party's income-taxable year. It is important that the contracting party render on or before the due date annual reports as nearly complete and final as it is possible for the contracting party to prepare. An extension of time granted the contracting party for filing its Federal income tax return does not serve to extend the time for filing the annual reports required by this section. Authority consistent with authorizations for granting extensions of time for filing Federal income tax returns is hereby delegated to the various collectors of internal revenue for granting extensions of time for filing the reports required by this section. Application for extensions of time for filing such reports should be addressed to the collector of internal revenue for the district in which the contracting party files its Federal income tax returns and must contain a full recital of the causes for the delay.

SEC. 17.17. *Payment of excess profit liability.*—The amount of the excess profit liability to be paid to the United States shall be paid on or before the due date for filing the report with the collector of internal revenue. See section 17.16 of these regulations. At the option of the contracting party, the amount of the excess profit liability may be paid in four equal installments instead of in a single payment, in which case the first installment is to be paid on or before the date prescribed for the payment of the excess profit as a single payment, the second installment on or before the 15th day of the third month, the third installment on or before the 15th day of the sixth month, and the fourth installment on or before the 15th day of the ninth month, after such date.

SEC. 17.18. *Liability of surety.*—The surety under contracts entered into after the amendment of section 3(b) of the Act on June 25, 1936, shall not be liable for payment of excess profit due the United States in respect of such contracts.

SEC. 17.19. *Determination of liability for excess profit, interest, and penalties; assessment, collection, payment, refunds.*—The duty of determining the correct amount of excess profit liability on contracts and subcontracts coming within the scope of the Act is upon the Commissioner of Internal Revenue. Under section 3(b) of the Act, as amended, and section 651 of the Internal Revenue Code, all provisions of law (including the provisions of law relating to interest, penalties, and refunds) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934 and not inconsistent with section 3 of the Act are applicable with respect to the assessment, collection, or payment of excess profits on contracts and subcontracts coming within the scope of the Act and to refunds of overpayments of profits into the Treasury under the Act. Claims by a contracting party for the refund of an amount of excess profit, interest, penalties, and additions to such excess profit shall conform to the general requirements prescribed with respect to claims for refund of overpayments of taxes imposed by Title I of the Revenue Act of 1934 and, if filed on account of any additional costs incurred pursuant to guarantee provisions in a contract, shall be supplemented by a statement under oath showing the amount and nature of such costs and all facts pertinent thereto.

Administrative procedure for the determination, assessment, and collection of excess profit liability under section 3 of the Act, sections 650 and 651 of the Internal Revenue Code, and these regulations, and the examination of reports and claims in connection therewith will be prescribed from time to time by the Commissioner of Internal Revenue.

SEC. 17.20. *Applicability of Treasury Decision 4723, as amended.*—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 Secretary of the Treasury and approved June 3, 1937, by the Secretary of the Navy (C. B. 1937–1, 531), 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), and as further amended by Treasury Decision 4897, approved April 5, 1939, by the Acting Secretary of the Treasury and approved April 24, 1939, by the

Acting Secretary of the Navy (C. B. 1939–1 (Part 1), 404), is hereby superseded to the extent inconsistent with the foregoing regulations. Treasury Decision 4723, as amended, shall remain in full force and effect with respect to all contracts and subcontracts completed prior to the contracting party's first income-taxable year ending after April 3, 1939.

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved June 16, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

Approved June 23, 1939.

CHARLES EDISON,
Acting Secretary of the Navy.

(Filed with the Division of the Federal Register June 24, 1939, 12.43 p. m.)

1939–49–10114
I. T. 3338

Form of "agreement" to be used by a subcontractor subject to section 3 of the Vinson Act, as amended.

Advice is requested relative to the form of "agreement" to be used by a subcontractor subject to section 3 of the Vinson Act, as amended.

Particular inquiry is made as to (1) whether, in the case of a corporation, the agreement to be bound by the provisions of section 3 of the Vinson Act, as amended, should take the form of a written acknowledgment signed by a properly constituted officer of the subcontractor, or whether mere performance under a subcontract is sufficient for the purpose of the statute; and (2) whether the use of a rubber stamp placed upon a purchase order acknowledgment form and initialed by a clerk in the subcontractor's organization would be considered an adequate form of agreement.

The form of the agreement is not material but there must be an agreement of record by the subcontractor to comply with the prescribed stipulations. For example, the amount of the subcontract award should be shown and it should be stated that the subcontractor agrees to the provisions of section 3 of the Vinson Act, as amended.

In lieu of a formal agreement between the prime contractor and the subcontractor, properly executed by officers of both contracting parties (under seal where necessary), the Bureau will interpose no objection to the use of a rubber stamp impression, properly authenticated, placed by an officer or employee of the subcontractor upon the purchase order of the prime contractor which clearly indicates an acceptance of the order and the agreement of the subcontractor to be bound by the provisions of section 3 of the Vinson Act, as amended.

It should be understood, however, that the question of whether each order received by the subcontractor from the prime contractor in an amount not exceeding $10,000 is an actual *bona fide* separate and distinct subcontract, and not a subdivision made for the purpose of evading the provisions of section 3 of the Vinson Act, as amended, must be determined upon the ultimate findings and the particular facts in each case. (See I. T. 2930, C. B. XIV–2, 533 (1935).)

1939–27–9906
T. D. 4909

TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 16.—EXCESS PROFITS ON ARMY CONTRACTS FOR AIRCRAFT.

Regulations under section 14 of the Act of April 3, 1939, and other provisions.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY OF THE TREASURY,
Washington, D. C.

WAR DEPARTMENT,
OFFICE OF THE SECRETARY OF WAR,
Washington, D. C.

To Officers and Employees of the Treasury Department, the War Department, and Others Concerned:

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SECTION 16.0. *Introductory.*—(*a*) Section 14 of the Act entitled "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," approved April 3, 1939 (Public, No. 18, Seventy-sixth Congress, first session; (C. B. 1939–1), (Part 1), 430), provides:

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.

(*b*) Section 3 of the Act entitled "An Act to establish the composition of the United States Navy with respect to the categories of vessels limited by the treaties signed at Washington, February 6, 1922, and at London, April 22, 1930, at the limits prescribed by those treaties; to authorize the construction of certain naval vessels; and for other purposes," approved 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), and as further amended by the Act of April 3, 1939 (Public, No. 18, Seventy-sixth Congress, first session; C. B. 1939–1 (Part 1), 430), reads as follows:

SEC. 3. The Secretary of the Navy is hereby directed to submit annually to the Bureau of the Budget estimates for the construction of the foregoing vessels and aircraft; and there is hereby authorized to be appropriated such sums as may be necessary to carry into effect the provisions of this Act: *Provided*, That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

(a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.

(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices 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, 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, but the surety under such contracts shall not be liable for the payment of such excess profit: *Provided*, That if there is a net loss on all such contracts or subcontracts for the construction and/or manufacture of any complete naval vessel or portion thereof completed by the particular contractor or subcontractor within any income taxable year, such net loss shall be allowed as a credit in determining the excess profit, if any, for the next succeeding income taxable year, 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 if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under

the usual methods employed under the internal-revenue laws to collect Federal income taxes: *Provided further,* That all provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury of overpayments of excess profits into the Treasury: *And provided further,* That this section shall not apply to contracts or subcontracts for scientific equipment used for communication, target detection, navigation, and fire control as may be so designated by the Secretary of the Navy, and the Secretary of the Navy shall report annually to the Congress the names of such contractors and subcontractors affected by this provision, together with the applicable contracts and the amounts thereof: *And provided further,* That the income-taxable years shall be such taxable years beginning after December 31, 1935, except that the above provisos relating to the assessment, collection, payment, or refunding of excess profit to or by the Treasury shall be retroactive to March 27, 1934.

(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.

Pursuant to the authority prescribed by section 14 of the Act of April 3, 1939 (Public, No. 18, Seventy-sixth Congress, first session), and section 3 of the Act of March 27, 1934, as amended, the following regulations are hereby prescribed:

SECTION 16.1. *Definitions.*—As used in these regulations the term—

(*a*) "*Act*" means the Act of April 3, 1939 (Public, No. 18, Seventy-sixth Congress, first session; C. B. 1939–1 (Part 1), 430), together with the applicable provisions of 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), and as further amended by the Act of April 3, 1939 (Public No. 18, Seventy-sixth Congress, first session: C. B. 1939–1 (Part 1), 430).

(*b*) "*Person*" includes an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture or other unincorporated organization or group, through or by means of which any business, financial operation, or venture is carried on.

(*c*) "*Contract*" means an agreement made by authority of the Secretary of War for the construction or manufacture of any complete aircraft or any portion thereof for the Army.

(*d*) "*Contractor*" means a person entering into a direct contract with the Secretary of War or his duly authorized representative.

(*e*) "*Subcontract*" means an agreement entered into by one person with another person for the construction or manufacture of any complete aircraft

or any portion thereof for the Army, the prime contract for such aircraft or portion thereof having been entered into between a contractor and the Secretary of War or his duly authorized representative.

(*f*) "*Subcontractor*" means any person other than a contractor entering into a subcontract.

(*g*) "*Contracting party*" means a contractor or subcontractor as the case may be.

(*h*) "*Contract price*" or "*total contract price*" means the amount or total amount to be received under a contract or subcontract as the case may be.

(*i*) "*Income-taxable year*" means the calendar year, the fiscal year ending during such calendar year, or the fractional part of such calendar or fiscal year, upon the basis of which the contracting party's net income is computed and for which its income tax returns are made for Federal income tax purposes.

SEC. 16.2. *Contracts and subcontracts under which excess profit liability may be incurred.*—Except as otherwise provided with respect to contracts or subcontracts for certain scientific equipment (see section 16.3 of these regulations), every contract awarded for an amount exceeding $10,000 and entered into after the enactment of the Act of April 3, 1939, for the construction or manufacture of any complete aircraft or any portion thereof for the Army, is subject to the provisions of the Act relating to excess profit liability. Any subcontract made with respect to such a contract and involving an amount in excess of $10,000 is also within the scope of the Act. If a contracting party places orders with another party, aggregating an amount in excess of $10,000, for articles or materials which constitute a part of the cost of performing the contract or subcontract, the placing of such orders shall constitute a subcontract within the scope of the Act, unless it is clearly shown that each of the orders involving $10,000 or less is a bona fide separate and distinct subcontract and not a subdivision made for the purpose of evading the provisions of the Act.

SEC. 16.3. *Contracts or subcontracts for scientific equipment.*—No excess profit liability is incurred upon a contract or subcontract entered into after the enactment of the Act of April 3, 1939, if at the time or prior to the time such contract or subcontract is made it is designated by the Secretary of War as being exempt under the provisions of the Act pertaining to scientific equipment used for communication, target detection, navigation, and fire control.

SEC. 16.4. *Completion of contract defined.*—The date of delivery of the aircraft or portion thereof covered by the contract or subcontract shall be considered the date of completion of the contract or subcontract unless otherwise determined jointly by the Secretary of War and the Secretary of the Treasury or their duly authorized representatives. Except as otherwise provided in the preceding sentence, the replacement of defective parts of delivered articles or the performance of other guarantee work in respect of such articles will not operate to extend the date of completion. As to the treatment of the cost of such work as a cost of performing a contract or subcontract, see section 16.8(*h*) of these regulations. As to a refund in case of adjustment due to any subsequently incurred additional costs, see section 16.18 of these regulations. If a contract or subcontract is at any time canceled or terminated, it is completed at the time of the cancellation or termination.

SEC. 16.5. *Manner of determining liability.*—*The first step* in the determination of the excess profit to be paid to the United States by a contracting party with respect to contracts and subcontracts completed within an income-taxable year is to ascertain the total contract prices of all contracts and subcontracts completed by the contracting party within the income-taxable year. As to total contract prices, see section 16.7 of these regulations.

The second step is to ascertain the cost of performing such contracts and subcontracts and to deduct such cost from the total contract prices of such contracts and subcontracts as computed in the first step. See section 16.8 of these regulations.

The amount remaining after such subtraction is the amount of net profit or net loss upon the contracts and subcontracts completed within the income-taxable year.

The third step, in case there is a net profit upon such contracts and subcontracts, is to subtract from the amount of such net profit as computed in the second step the sum of—

(1) An amount equal to 12 per cent of the total contract prices of the contracts and subcontracts completed within the income-taxable year;

(2) The amount of any net loss sustained in a prior income-taxable year and allowable as a credit in determining the excess profit for the income-taxable year (see section 16.9 of these regulations); and

(3) The amount of any deficiency in profit sustained in a prior income-taxable year and allowable as a credit in determining the excess profit for the income-taxable year (see section 16.9 of these regulations).

The amount remaining after such subtraction is the amount of excess profit for the income-taxable year.

The fourth step is to ascertain the amount of credit allowed for Federal income taxes paid or remaining to be paid upon the amount of such excess profit (see section 16.10 of these regulations) and then subtract from the amount of such excess profit the amount of credit for Federal income taxes.

The amount remaining after this subtraction is the amount of excess profit to be paid to the United States by the contracting party for the income-taxable year.

SEC. 16.6. *Computation of excess profit liability.*—The application of the provisions of section 16.5 of these regulations may be illustrated by the following example:

Example: On September 1, 1939, the B Corporation which keeps its books and makes its Federal income tax returns on a calendar year basis entered into a contract coming within the scope of the Act, the total contract price of which was $200,000. On March 10, 1940, the corporation entered into another such contract, the total contract price of which was $40,000. Both contracts were completed within the calendar year 1940, the first at a cost of $155,000 and the second at a cost of $45,000. During the year 1939 the B Corporation sustained a net loss of $2,500 and a deficiency in profit of $1,000 on contracts and subcontracts entered into after April 3, 1939, and completed within the income-taxable year 1939. For purposes of the Federal income tax, the net income of the B Corporation for the year 1940 amounted to $96,000, which included the total net profit of $40,000 upon the two contracts. For the year 1940 the B Corporation paid a Federal income tax of $13,240 upon its entire net income. The excess profit liability is $6,700, computed as follows:

Total contract prices:		
Contract No. 1	$200,000	
Contract No. 2	40,000	
		$240,000
Less: Cost of performing contracts:		
Contract No. 1	155,000	
Contract No. 2	45,000	
		200,000
Net profit on contracts		40,000
Less: 12 per cent of total contract prices (12 per cent of $240,000)	$28,000	
Net loss from 1939	2,500	
Deficiency in profit from 1939	1,000	
		32,300
Excess profit for year 1940		7,700
Less: Credit for Federal income taxes (Federal income tax on $7,700 at the rates for 1940)		1,000
Amount of excess profit payable to the United States		6,700

SEC. 16.7. *Total contract price.*—The total contract price of a particular contract or subcontract (see section 16.1 of these regulations) may be received in money or its equivalent. If something other than money is received, only the fair market value of the thing received, at the date of receipt, is to be included in determining the amount received. Bonuses earned for bettering performance and penalties incurred for failure to meet the contract guarantees are to be regarded as adjustments of the original contract price. Trade or other discounts granted by a contracting party in respect of a contract or subcontract performed by such party are also to be deducted in determining the true total contract price of such contract or subcontract.

SEC. 16.8. *Cost of performing a contract or subcontract.*—(*a*) *General rule.*—The cost of performing a particular contract or subcontract shall be the sum

of (1) the direct costs, including therein expenditures for materials, direct labor and direct expenses, incurred by the contracting party in performing the contract or subcontract; and (2) the proper proportion of any indirect costs (including therein a reasonable proportion of management expenses) incident to and necessary for the performance of the contract or subcontract.

(*b*) *Elements of cost.*—No definitions of the elements of cost may be stated which are of invariable application to all contractors and subcontractors. In general, the elements of cost may be defined for purposes of the Act as follows:

(1) Manufacturing cost, which is the sum of factory cost (see paragraph (*c*) of this section) and other manufacturing cost (see paragraph (*d*) of this section);

(2) Miscellaneous direct expenses (see paragraph (*e*) of this section);

(3) General expenses, which are the sum of indirect engineering expenses, usually termed "engineering overhead" (see paragraph (*f*) of this section), and expenses of distribution, servicing, and administration (see paragraph (*g*) of this section); and

(4) Guarantee expenses (see paragraph (*h*) of this section).

(*c*) *Factory cost.*—Factory cost is the sum of the following:

(1) *Direct materials.*—Materials, such as those purchased for stock and subsequently issued for contract operations and those acquired under subcontracts, which become a component part of the finished product or which are used directly in fabricating, converting or processing such materials or parts.

(2) *Direct productive labor.*—Productive labor, usually termed "shop labor," which is performed on and is properly chargeable directly to the article manufactured or constructed pursuant to the contract or subcontract, but which ordinarily does not include direct engineering labor (see subparagraph (3) of this paragraph).

(3) *Direct engineering labor.*—The compensation of professional engineers and other technicists (including reasonable advisory fees), and of draftsmen, properly chargeable directly to the cost of the contract or subcontract.

(4) *Miscellaneous direct factory charges.*—Items which are properly chargeable directly to the factory cost of performing the contract or subcontract but which do not come within the classifications in subparagraphs (1), (2), and (3) of this paragraph, as for example, royalties which the contracting party pays to another party and which are properly chargeable to the cost of performing the contract or subcontract (but see paragraph (*d*) of this section).

(5) *Indirect factory expenses.*—Items, usually termed "factory overhead," which are not directly chargeable to the factory cost of performing the contract or subcontract but which are properly incident to and necessary for the performance of the contract or subcontract and consist of the following:

(A) *Labor.*—Amounts expended for factory labor, such as supervision and inspection, clerical labor, timekeeping, packing and shipping, stores supply, services of tool crib attendants, and services in the factory employment bureau, which are not chargeable directly to productive labor of the contract or subcontract.

(B) *Materials and supplies.*—The cost of materials and supplies for general use in the factory in current operations, such as shop fuel, lubricants, heat-treating, plating, cleaning and anodizing supplies, nondurable tools and gauges, stationery (such as time tickets and other forms), and boxing and wrapping materials.

(C) *Service expenses.*—Factory expenses of a general nature, such as those for power, heat and light (whether purchased or produced), ventilation and air-conditioning and operation and maintenance of general plant assets and facilities.

(D) *Fixed charges and obsolescence.*—Recurring charges with respect to property used for manufacturing purposes of the contract or subcontract, such as premiums for fire and elevator insurance, property taxes, rentals and allowances for depreciation of such property, including maintenance and depreciation of reasonable stand-by equipment; and depreciation and obsolescence of special equipment and facilities necessarily acquired primarily for the performance of the contract or subcontract. In making allowances for depreciation, consideration shall be given to the number and length of shifts.

(E) *Miscellaneous indirect factory expenses.*—Miscellaneous factory expenses not directly chargeable to the factory cost of performing the contract or subcontract, such as purchasing expenses; ordinary and necessary expenses of rearranging facilities within a department or plant; employees' welfare expenses; premiums or dues on compensation insurance; employers' payments to unemployment, old age and social security Federal and State funds not including payments deducted from or chargeable to employees or officers; pensions and re-

tirement payments to factory employees; factory accident compensation (as to self-insurance, see paragraph (*g*) of this section); but not including any amounts which are not incident to services, operations, plant, equipment or facilities involved in the performance of the contract or subcontract.

(*d*) *Other manufacturing cost.*—Other manufacturing cost as used in paragraph (*b*) of this section includes items of manufacturing costs which are not properly or satisfactorily chargeable to factory costs (see paragraph (*c*) of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or subcontract, as for instance, payments of royalties and amortization of the cost of designs purchased and patent rights over their useful life; and "deferred" or "unliquidated" experimental and development charges. For example, in case experimental and development costs have been properly deferred or capitalized and are amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contract or subcontract. In the case of general experimental and development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or subcontract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract.

(*e*) *Miscellaneous direct expenses.*—Miscellaneous direct expenses as used in paragraph (*b*) of this section include—

(1) *Cost of installation and construction.*—Cost of installation and construction includes the cost of materials, labor and expenses necessary for the erection and installation prior to the completion of the contract and after the delivery of the product or material manufactured or constructed pursuant to the contract or subcontract.

(2) *Sundry direct expenses.*—Items of expense which are properly chargeable directly to the cost of performing a contract or subcontract and which do not constitute guarantee expenses (see paragraph (*h*) of this section) or direct costs classified as factory cost or other manufacturing cost (see paragraphs (*c*) and (*d*) of this section), such as premiums on performance or other bonds required under the contract or subcontract; State sales taxes imposed on the contracting party; freight on outgoing shipments; fees paid for wind tunnel and model basin tests; demonstration and test expenses; crash insurance premiums; traveling expenses. In order for any such item to be allowed as a charge directly to the cost of performing a contract or subcontract, (1) a detailed record shall be kept by the contracting party of all items of a similar character, and (2) no item of a similar character which is properly a direct charge to other work shall be allowed as a part of any indirect expenses in determining the proper proportion thereof chargeable to the cost of performing the contract or subcontract. As to allowable indirect expenses, see paragraphs (*c*)(5), (*f*), (*g*), and (*j*) of this section.

(*f*) *Indirect engineering expenses.*—Indirect engineering expenses, usually termed "engineering overhead," which are treated in this section as a part of general expenses in determining the cost of performing a contract or subcontract (see paragraph (*b*) of this section), comprise the general engineering expenses which are incident to and necessary for the performance of the contract or subcontract, such as the following:

(1) *Labor.*—Reasonable fees of engineers employed in a general consulting capacity, and compensation of employees for personal services to the engineering department, such as supervision, which is properly chargeable to the contract or subcontract, but which is not chargeable as direct engineering labor (see paragraph (*c*)(3) of this section).

(2) *Material.*—Supplies for the engineering department, such as paper and ink for drafting and similar supplies.

(3) *Miscellaneous expenses.*—Expenses of the engineering department, such as (A) maintenance and repair of engineering equipment, and (B) services purchased outside of the engineering department for blue printing, drawing, computing, and like purposes.

(*g*) *Expenses of distribution, servicing, and administration.*—Expenses of distribution, servicing, and administration, which are treated in this section as a part of general expenses in determining the cost of performing a contract or subcontract (see paragraph (*b*) of this section), comprehend the expenses incident to and necessary for the performance of the contract or subcontract, which are incurred in connection with the distribution and general servicing of the contracting party's products and the general administration of the business, such as—

(1) *Compensation for personal services of employees.*—The salaries of the corporate and general executive officers and the salaries and wages of administrative clerical employees and of the office services employees such as telephone operators, janitors, cleaners, watchmen and office equipment repairmen.

(2) *Bidding and general selling expenses.*—Bidding and general selling expenses which by reference to all the pertinent facts and circumstances reasonably constitute a part of the cost of performing a contract or subcontract. The treatment of bidding and general selling expenses as a part of general expenses in accordance with this paragraph is in lieu of any direct charges which otherwise might be made for such expenses. The term "bidding expenses" as used in this section includes all expenses in connection with preparing and submitting bids.

(3) *General servicing expenses.*—Expenses which by reference to all the pertinent facts and circumstances reasonably constitute a part of the cost of performing a contract or subcontract and which are incident to delivered or installed articles and are due to ordinary adjustments or minor defects; but including no items which are treated as a part of guarantee expenses (see paragraph (*h*) of this section) or as a part of direct costs, such as direct materials, direct labor, and other direct expense.

(4) *Other expenses.*—Miscellaneous office and administrative expenses, such as stationery and office supplies; postage; repair and depreciation of office equipment; contributions to local charitable or community organizations to the extent constituting ordinary and necessary business expenses; employees' welfare expenses; premiums and dues on compensation insurance; employers' payments to unemployment, old age, and social security Federal and State funds not including payments deducted from or chargeable to employees or officers; pensions and retirement payments to administrative office employees and accident compensation to office employees (as to self-insurance, see the following subparagraph).

Subject to the exception stated in this subparagraph, in cases where a contracting party assumes its own insurable risks (usually termed "self-insurance"), losses and payments will be allowed in the cost of performing a contract or subcontract only to the extent of the actual losses suffered or payments incurred during, and in the course of, the performance of the contract or subcontract and properly chargeable to such contract or subcontract. If, however, a contracting party assumes its own insurable risks (*a*) for compensation paid to employees for injuries received in the performance of their duties, or (*b*) for unemployment risks in States where insurance is required, there may be allowed as a part of the cost of performing a contract or subcontract a reasonable portion of the charges set up for purposes of self-insurance under a system of accounting regularly employed by the contracting party, as determined by the Commissioner of Internal Revenue, at rates not exceeding the lawful or approved rates of insurance companies for such insurance, reduced by amounts representing the acquisition cost in such companies, provided the contracting party adopts and consistently follows this method with respect to self-insurance in connection with all contracts and subcontracts subsequently performed by him.

Allowances for interest on invested capital are not allowable as costs of performing a contract or subcontract.

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: Entertainment expenses; dues and memberships other than of regular trade associations; donations except as otherwise provided above; losses on other contracts; profits or losses from sales or exchanges of capital assets; extradordinary expenses due to strikes or lockouts; fines and penalties; amortization of unrealized appreciation of values of assets; expenses, maintenance, and depreciation of excess facilities (including idle land and building, idle parts of a building, and excess machinery and equipment) vacated or abandoned, or not adaptable for future use in performing contracts or sub-

contracts; increases in reserve accounts for contingencies, repairs, compensation insurance (except as above provided with respect to self-insurance), and guarantee work; Federal and State income and excess-profits taxes and surtaxes; 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; interest incurred or earned; bond discount or finance charges; premiums for life insurance on the lives of officers; legal and accounting fees in connection with reorganizations, security issues, capital stock issues, and the prosecution of claims against the United States (including income tax matters); taxes and expenses on issues and transfers of capital stock; losses on investments; bad debts; and expenses of collection and exchange.

In order that the cost of performing a contract or subcontract may be accounted for clearly, the amount of any excess profits repayable to the United States pursuant to the Act should not be charged to or included in such cost.

(*h*) *Guarantee expenses.*—Guarantee expenses include the various items of factory cost, other manufacturing cost, cost of installation and construction, indirect engineering expenses, and other general expenses (see paragraphs (*c*) to (*g*), inclusive, of this section) which are incurred after delivery or installation of the article manufactured or constructed pursuant to the particular contract or subcontract and which are incident to the correction of defects or deficiencies which the contracting party is required to make under the guarantee provisions of the particular contract or subcontract. If the total amount of such guarantee expenses is not ascertainable at the time of filing the report required to be filed with the collector of internal revenue (see section 16.15 of these regulations) and the contracting party includes any estimated amount of such expenses as part of the claimed total cost of performing the contract or subcontract, such estimated amount shall be separately shown on the report and the reasons for claiming such estimated amount shall accompany the report; but only the amount of guarantee expenses actually incurred will be allowed. If the amount of guarantee expenses actually incurred is greater than the amount (if any) claimed on the report and the contracting party has made an overpayment of excess profit, a refund of the overpayment shall be made in accordance with the provisions of section 16.18 of these regulations. If the amount of guarantee expenses actually incurred is less than the amount claimed on the report and an additional amount of excess profit is determined to be due, the additional amount of excess profit shall be assessed and paid in accordance with the provisions of section 16.18 of these regulations.

(*i*) *Unreasonable compensation.*—The salaries and compensation for services which are treated as a part of the cost of performing a contract or subcontract include reasonable payments for salaries, bonuses, or other compensation for services. As a general rule, bonuses paid to employees (and not to officers) in pursuance of a regularly established incentive bonus system may be allowed as a part of the cost of performing a contract or subcontract.

The test of allowability is whether the aggregate compensation paid to each individual is for services actually rendered incident to, and necessary for, the performance of the contract or subcontract, and is reasonable. Excessive or unreasonable payments whether in cash, stock, or other property ostensibly as compensation for services shall not be included in the cost of performing a contract or subcontract.

(*j*) *Allocation of indirect costs.*—No general rule applicable to all cases may be stated for ascertaining the proper proportion of the indirect costs to be allocated to the cost of performing a particular contract or subcontract. Such proper proportion depends upon all the facts and circumstances relating to the performance of the particular contract or subcontract. Subject to a requirement that all items which have no relation to the performance of the contract or subcontract shall be eliminated from the amount to be allocated, the following methods of allocation are outlined as acceptable in a majority of cases:

(1) *Factory indirect expenses.*—The allowable indirect factory expenses (see paragraph (*c*) (5) of this section) shall ordinarily be allocated or "distributed" to the cost of the contract or subcontract on the basis of the proportion which the direct productive labor (see paragraph (*c*) (2) of this section) attributable to the contract or subcontract bears to the total direct productive labor of the production department or particular section thereof during the period within which the contract or subcontract is performed, except that if the indirect factory expenses are incurred in different amounts and in different proportions

by the various producing departments consideration shall be given to such circumstances to the extent necessary to make a fair and reasonable determination of the true profit and excise profit.

(2) *Engineering indirect expenses.*—The allowable indirect engineering expenses (see paragraph (*f*) of this section) shall ordinarily be allocated or "distributed" to the cost of the contract or subcontract on the basis of the proportion which the direct engineering labor attributable to the contract or subcontract (see paragraph (*c*)(3) of this section) bears to the total direct engineering labor of the engineering department or particular section thereof during the period within which the contract or subcontract is performed. If the expenses of the engineering department are not sufficient in amount to require the maintenance of separate accounts, the engineering indirect costs may be included in the indirect factory expenses (see paragraph (*c*)(5) of this section) and allocated or distributed to the cost of performing the contract or subcontract as a part of such expenses, provided the proportion so allocated or distributed is proper under the facts and circumstances relating to the performance of the particular contract or subcontract.

(3) *Administrative expenses (or "overhead").*—The allowable expenses of administration (see paragraph (*g*) of this section) or other general expenses except indirect engineering expenses, bidding and general selling expenses, and general servicing expenses shall ordinarily be allocated or distributed to the cost of performing a contract or subcontract on the basis of the proportion which the sum of the manufacturing cost (see paragraph (*b*) of this section) and the cost of installation and construction (see paragraph (*e*) of this section) attributable to the particular contract or subcontract bears to the sum of the total manufacturing cost and the total cost of installation and construction during the period within which the contract or subcontract is performed.

(4) *Bidding, general selling, and general servicing expenses.*—The allowable bidding and general selling expenses and general servicing expenses (see paragraph (*g*) (2) and (3) of this section) shall ordinarily be allocated or distributed to the cost of performing a contract or subcontract on the basis of—

(*i*) The proportion which the contract price of the particular contract or subcontract bears to the total sales made (including contracts or subcontracts completed) during the period within which the particular contract or subcontract is performed, or

(*ii*) The proportion which the sum of the manufacturing cost (see paragraph (*b*) of this section) and the cost of installation and construction (see paragraph (*e*) of this section) attributable to the particular contract or subcontract bears to the sum of the total manufacturing cost and the total cost of installation and construction during the period within which the contract or subcontract is performed,

except that special consideration shall be given to the relation which certain classes of such expenses bear to the various classes of articles produced by the contracting party in each case in which such consideration is necessary in order to make a fair and reasonable determination of the true profit and excess profit. See section 16.13 of these regulations.

SEC. 16.9. *Credit for net loss or for deficiency in profit in computing excess profit.*—The term "net loss" as used in the Act and as applied to contracts and subcontracts coming within these regulations means the amount by which the total costs of performing all such contracts and subcontracts entered into after April 3, 1939, and completed by a particular contracting party within the income-taxable year exceeds the total contract prices of such contracts and subcontracts. As to the meaning of income-taxable year, see section 16.1 of these regulations.

The term "deficiency in profit" as used in the Act and as applied to contracts and subcontracts coming within these regulations means the amount by which 12 per cent of the total contract prices of all such contracts and subcontracts entered into after April 3, 1939, and completed by a particular contracting party within the income-taxable year exceeds the net profit upon all such contracts and subcontracts.

A net loss or a deficiency in profit sustained by a contracting party for an income-taxable year is allowable as a credit in computing the contracting party's excess profit on contracts and subcontracts coming within these regulations and completed during the four next succeeding income-taxable years. Credit for such a net loss or deficiency in profit may be claimed in the contracting party's annual report of profit filed with the collector of internal

revenue (see section 16.15 of these regulations), but it shall be supported by separate schedules for each contract or subcontract involved showing total contract prices, costs of performance and pertinent facts relative thereto, together with a summarized computation of the net loss or deficiency in profit. The net loss or deficiency in profit claimed is subject to verification and adjustment. As to preservation of books and records, see section 16.13 of these regulations.

Net loss or deficiency in profit sustained on contracts and subcontracts completed within one income-taxable year may not be considered in computing net loss or deficiency in profit sustained on contracts and subcontracts completed within another income-taxable year.

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

Example: The A Corporation, which keeps its books and makes its Federal income tax returns on a calendar year basis, entered into and completed contracts for aircraft for the Army coming within the scope of the Act as follows: Contracts were completed within the calendar year 1939 on which the A Corporation sustained a net loss of $30,000 and a deficiency in profit of $10,000; contracts totaling $175,000 were completed in 1940 at a cost of $155,000, the A Corporation thereby realizing a net profit of $20,000 but sustaining a deficiency in profit of $1,000 (i. e., 12 per cent of $175,000, or $21,000, less $20,000); contracts totaling $400,000 were completed in 1941 at a cost of $300,000, or at a net profit of $100,000. After deducting from the net profit of $100,000 for the year 1941 the amount of $48,000 (i. e., 12 per cent of the total contract prices of $400,000), there remains $52,000 in excess profit on the contracts completed in the year 1941. The net loss of $30,000 and the deficiency in profit of $10,000 sustained in 1939 and the deficiency in profit of $1,000 sustained in 1940 may be deducted from such $52,000 in determining the amount of excess profit payable by the A Corporation for the year 1941 with respect to the contracts completed in such year.

SEC. 16.10. *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 1938, and Chapter 1 and Subchapter A of Chapter 2 of the Internal Revenue Code, and the excess-profits taxes imposed by section 602 of the Revenue Act of 1938 and Subchapter B of Chapter 2 of the Internal Revenue Code. 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.

SEC. 16.11. *Failure of contractor to require agreement by subcontractor.*—Every contract or subcontract coming within the scope of the Act and these regulations is required by the Act to contain, among other things, an agreement by the contracting party to make no subcontract unless the subcontractor agrees—

(*a*) To make a report, as described in the Act, under oath to the Secretary of War upon the completion of the subcontract;

(*b*) To pay into the Treasury excess profit, as determined by the Treasury Department, in the manner and amounts specified in the Act;

(*c*) To make no subdivision of the subcontract for the same article or articles for the purpose of evading the provisions of the Act;

(*d*) That the manufacturing spaces and books of its own plant, affiliates, and subdivisions shall at all times be subject to inspection and audit as provided in the Act.

If a contracting party enters into a subcontract with a subcontractor who fails to make such agreement, such contracting party shall, in addition to its liability for excess profit determined on contracts or subcontracts performed by it, be liable for any excess profit determined to be due the United States on the subcontract entered into with such subcontractor. In such event, however, the excess profit to be paid to the United States in respect of the subcontract entered into with such subcontractor shall be determined separately from any contracts or subcontracts performed by the contracting party entering into the subcontract with such subcontractor.

SEC. 16.12. *Evasion of excess profit.*—Section 3 of the Act of March 27, 1934, as amended, provides that the contracting party shall agree to make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of the Act. If any such subdivision or subcontract is made it shall constitute a violation of the agreement provided for in the Act, and the cost of completing a contract or subcontract by a contracting party which violates such agreement shall be determined in a manner necessary clearly to reflect the true excess profit of such contracting party.

SEC. 16.13. *Books of account and records.*—It is recognized that no uniform method of accounting can be prescribed for all contracting parties subject to the provisions of the Act. Each contracting party is required by law to make a report of its true profits and excess profit. Such party must, therefore, maintain such accounting records as will enable it to do so. See section 16.8 of these regulations. Among the essentials are the following:

(1) The profit or loss upon a particular contract or subcontract shall be accounted for and fully explained in the books of account separately on each contract or subcontract.

(2) Any cost accounting methods, however standard they may be and regardless of long continued practice, shall be controlled by, and be in accord with, the objectives and purposes of the Act and of any regulations prescribed thereunder.

(3) The accounts shall clearly disclose the nature and amount of the different items of cost of performing a contract or subcontract.

In cases where it has been the custom priorly to use so-called "normal" rates of overhead expense or administrative expenses, or "standard" or "normal" prices of material or labor charges, no objection will be made to the use temporarily during the period of performing the contract or subcontract of such methods in charging the contract or subcontract, if the method of accounting employed is such as clearly to reflect, in the final determination upon the books of account, the actual profit derived from the performance of the contract or subcontract and if the necessary adjusting entries are entered upon the books and they explain in full detail the revisions necessary to accord with the facts. As to the elements of cost, see section 16.8 of these regulations.

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, deficiency in 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.

SEC. 16.14. *Report to Secretary of War.*—Upon the completion of a contract or subcontract coming within the scope of the Act and these regulations, the contracting party is required to make a report, under oath, to the Secretary of War. As to the date of completion of a contract or subcontract, see section 16.4 of these regulations. Such report shall be in the form prescribed by the Secretary of War and shall state the total contract price, the cost of performing the contract, the net income from such contract, and the per centum such income bears to the contract price. The contracting party shall also include as a part of such report a statement showing—

(1) The manner in which the indirect costs were determined and allocated to the cost of performing the contract or subcontract (see section 16.8 of these regulations);

(2) The name and address of every subcontractor with whom a subcontract was made, the object of such subcontract, the date when completed and the amount thereof; and

(3) The name and address of each affiliate or other organization, trade, or business owned or controlled directly or indirectly by the same interests as those who so own or control the contracting party, together with a statement showing

in detail all transactions which were made with such affiliate or other organization, trade, or business and are pertinent to the determination of the excess profit.

A copy of the report required to be made to the Secretary of War is required to be transmitted by the contracting party to the Secretary of the Treasury. Such copy shall not be transmitted directly to the Secretary of the Treasury but shall be filed as a part of the annual report. See section 16.15 of these regulations.

SEC. 16.15. *Annual reports for income-taxable years.*—(*a*) *General requirements.*—Every contracting party completing a contract or subcontract within the contracting party's income-taxable year ending after April 3, 1939, shall file with the collector of internal revenue for the collection district in which the contracting party's Federal income tax returns are required to be filed an annual report on the prescribed form of the profit and excess profit on all contracts and subcontracts coming within the scope of the Act and these regulations and completed within the particular income-taxable year. There shall be included as a part of such report a statement, preferably in columnar form, showing separately for each such contract or subcontract completed by the contracting party within the income-taxable year the total contract price, the cost of performing the contract or subcontract, and the resulting profit or loss on each contract or subcontract together with a summary statement showing in detail the computation of the net profit or net loss upon all contracts and subcontracts completed within the income-taxable year and the amount of the excess profit, if any, for the income-taxable year covered by the report. A copy of the report made to the Secretary of War (see section 16.14 of these regulations) with respect to each contract or subcontract covered in the annual report, shall be filed as a part of such annual report. In case the income-taxable year of the contracting party is a period of less than 12 months (see section 16.1 of these regulations), the report required by this section shall be made for such period and not for a full year.

(*b*) *Time for filing annual reports.*—Annual reports of contracts and subcontracts coming within the scope of the Act and these regulations completed by a contracting party within an income-taxable year must be filed on or before the 15th day of the ninth month following the close of the contracting party's income-taxable year. It is important that the contracting party render on or before the due date an annual report as nearly complete and final as it is possible for the contracting party to prepare. An extension of time granted the contracting party for filing its Federal income tax return does not serve to extend the time for filing the annual report required by this section. Authority consistent with authorizations for granting extensions of time for filing Federal income tax returns is hereby delegated to the various collectors of internal revenue for granting extensions of time for filing the reports required by this section. Application for extensions of time for filing such reports should be addressed to the collector of internal revenue for the district in which the contracting party files its Federal income tax returns and must contain a full recital of the causes for the delay.

SEC. 16.16. *Payment of excess profit liability.*—The amount of the excess profit liability to be paid to the United States shall be paid on or before the due date for filing the report with the collector of internal revenue. See section 16.15 of these regulations. At the option of the contracting party, the amount of the excess profit liability may be paid in four equal installments instead of in a single payment, in which case the first installment is to be paid on or before the date prescribed for the payment of the excess profit as a single payment, the second installment on or before the 15th day of the third month, the third installment on or before the 15th day of the sixth month, and the fourth installment on or before the 15th day of the ninth month, after such date.

SEC. 16.17. *Liability of surety.*—The surety under contracts entered into with the Secretary of War for the construction or manufacture of any complete aircraft or any portion thereof for the Army shall not be liable for payment of excess profit due the United States in respect of such contracts.

SEC. 16.18. *Determination of liability for excess profit, interest, and penalties; assessment, collection, payment, refunds.*—The duty of determining the correct amount of excess profit liability on contracts and subcontracts coming within the scope of the Act and these regulations is upon the Commissioner of Internal Revenue. Under section 3(b) of the Act of March 27, 1934, as last amended, all provisions of law (including the provisions of law relating to interest, penalties, and refunds) applicable with respect to the taxes imposed by Title I of the

Revenue Act of 1934 and not inconsistent with section 3 of the Act of March 27, 1934, as last amended, are applicable with respect to the assessment, collection, or payment of excess profits on contracts and subcontracts coming within the scope of the Act and these regulations and to refunds of overpayments of profits into the Treasury under the Act. Claims by a contracting party for the refund of an amount of excess profit, interest, penalties, and additions to such excess profit shall conform to the general requirements prescribed with respect to claims for refund of overpayments of taxes imposed by Title I of the Revenue Act of 1934 and, if filed on account of any additional costs incurred pursuant to guarantee provisions in a contract, shall be supplemented by a statement under oath showing the amount and nature of such costs and all facts pertinent thereto.

Administrative procedure for the determination, assessment, and collection of excess profit liability under the Act and these regulations and the examination of reports and claims in connection therewith will be prescribed from time to time by the Commissioner of Internal Revenue.

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved June 16, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

Approved June 28, 1939.

LOUIS JOHNSON,
Acting Secretary of War.

(Filed with the Division of the Federal Register June 29, 1939, 12.03 p. m.)

MANUFACTURE AND TAX-PAYMENT OF FERMENTED MALT LIQUORS.

REGULATIONS 18 (1934), ARTICLE XXVII: Exportation, free of tax, of fermented malt liquors. 1939–33–9964 T. D. 4919

Exportation, free of tax, of fermented malt liquors to Guam and American Samoa.

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

To District Supervisors and Others Concerned:

Section 408 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress) provides as follows:

Section 3361(b) of the Internal Revenue Code is amended by adding a comma and the words "Guam, and American Samoa" after the words "Puerto Rico."

Pursuant to authority conferred by section 3791(a)(1), Internal Revenue Code, paragraph 30 of Article XXVII, Regulations 18, approved October 25, 1934, is hereby amended to read as follows:

PAR. 30. Fermented malt liquors may be removed from the place of manufacture or storage for export to a foreign country without the payment of tax. Shipments to the Panama Canal Zone have the same status as exportations to foreign countries. The law provides for shipment of fermented malt liquor without the payment of tax to the Philippine Islands, Puerto Rico, Guam, American Samoa, and the Virgin Islands. The provisions of these regulations, and the forms prescribed, in respect to the removal of fermented malt liquor, free of tax, for exportation to foreign countries, apply to like removals and shipments to the Philippine Islands, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Panama Canal Zone. Hawaii and Alaska are Territories of the United States, and all shipments thereto must be tax-paid before withdrawal from the brewery premises.

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved August 9, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 11, 1939, 11.13 a. m.)

PRODUCTION, FORTIFICATION, TAX-PAYMENT, ETC., OF WINE.

REGULATIONS 7 (1937), ARTICLE XXVII: Exportation of wine free of tax. 1939–35–9989 T. D. 4926

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 178.

Shipment of wine, free of tax, to Guam and American Samoa.

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

To District Supervisors and Others Concerned:

Section 408 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress) provides as follows:

Section 3361(b) of the Internal Revenue Code is amended by adding a comma and the words "Guam" and "American Samoa" after the words "Puerto Rico."

Pursuant to authority conferred by section 3791(a)1 of the Internal Revenue Code, paragraph 143, Article XXVII, Regulations No. 7, approved October 6, 1937 (section 178.143 of the Code of Federal Regulations), is amended to read as follows:

PAR. 143. *Shipments to American possessions.*—The provisions of these regulations, and the forms prescribed, in respect to the removal of wines, free of tax for exportation to foreign countries, apply to like removals and shipments to the Philippine Islands, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Panama Canal Zone. Hawaii and Alaska are Territories of the United States, and all shipments of domestic wines thereto must be tax-paid before withdrawal from bonded wineries or other bonded premises, unless transferred in bond to a bonded winery or storeroom located in one of those Territories.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 21, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 23, 1939, 11.13 a. m.)

DISTILLED SPIRITS.

ARTICLE XVIII, GAUGING MANUAL (1938): Allowance for loss of spirits while in warehouse. ARTICLE XVII: Soakage or absorption. 1939–41–10058 T. D. 4949

Losses of brandy and fruit spirits from packages filled from storage tanks in bonded warehouses prior to June 26, 1936.

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

To District Supervisors and Others Concerned:

The Act of August 4, 1939 (Public, No. 264, Seventy-sixth Congress), provides as follows:

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to make allowances for losses by leakage and evaporation in accordance with section 2901, Internal Revenue Code, upon withdrawal of packages of brandy or fruit spirits now deposited in internal-revenue bonded warehouses, which were filled from storage tanks in bonded warehouses prior to June 26, 1936.

Pursuant to the foregoing provision of law and the authority contained in section 3176 of the Internal Revenue Code, allowance for losses by leakage and evaporation will be made in accordance with section 2901, Internal Revenue Code, and the applicable provisions of Article XVIII of the Gauging Manual (1938), as extended by Treasury Decision 4885 [C. B. 1939–1 (Part 1), 396], upon regauge for withdrawal of packages of brandy or fruit spirits now deposited in internal revenue bonded warehouses, which were filled from storage tanks in bonded warehouses prior to June 26, 1936. The period for which allowance will be made will be calculated from the date of filling of the packages to the date of regauge for withdrawal. Allowance for increase in tare by reason of soakage or absorption will be given such packages in accordance with Article XVII of the Gauging Manual.

GUY T. HELVERING,
Commissioner.

Approved October 2, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register October 3, 1939, 12.34 p. m.)

1939–39–10035
T. D. 4944

Shipment of distilled spirits, free of tax, to Guam and American Samoa.

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

To District Supervisors and Others Concerned:

Section 408 of the Revenue Act of 1939 (Public, No. 155, Seventy-sixth Congress) provides as follows:

Section 3361(b) of the Internal Revenue Code is amended by adding a comma and the words "Guam, and American Samoa" after the words "Puerto Rico."

By virtue of the foregoing provision of law, and pursuant to authority conferred by section 3791(a)1, Internal Revenue Code, distilled spirits may be withdrawn free of tax from distilleries and internal revenue bonded warehouses for shipment to Guam and American Samoa under the rules and regulations governing the shipment of distilled spirits, free of tax, to the Philippines, Puerto Rico, the Virgin Islands, and the Panama Canal Zone.

GUY T. HELVERING,
Commissioner.

Approved September 20, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register September 22, 1939, 12.53 p. m.)

BOTTLING OF DISTILLED SPIRITS IN BOND.

REGULATIONS 6, SECTIONS 45–62 (added). 1939–34–9967
T. D. 4924

Bottling distilled spirits in bond for export.—Amending Regulations No. 6.

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

To District Supervisors and Others Concerned:

Pursuant to authority in sections 2903 to 2906, inclusive, and section 2910, Internal Revenue Code, Regulations No. 6, Bottling of Distilled Spirits in Bond, approved June 3, 1938, as amended, are hereby further amended by adding thereto sections 45 to 62, inclusive, to read as follows:

SEC. 45. *Distilled spirits which may be bottled in bond for export.*—Under the provisions of sections 2903 to 2906, inclusive, of the Internal Revenue Code, distilled spirits which have remained in wooden containers for at least four years from the date of original gauge as to fruit brandy, or original entry as to other spirits (except gin for export) and have been duly entered for withdrawal for bottling in bond for export and have been duly gauged and the required marks, brands, and export stamps affixed to the packages containing the same, may be removed to the bottling house for bottling in bond for export. Such spirits may be reduced in the bottling tank by the addition of pure water only to not less than 80 per centum proof.

Pursuant to the provisions of section 2910 of the Internal Revenue Code, gin of not less than 80 per centum proof may at any time within eight years after entry in bond be bottled in bond for export.

SEC. 46. *Application for withdrawal of spirits for bottling for export.*—Whenever spirits are to be withdrawn from an internal revenue bonded warehouse for bottling in bond for immediate exportation, application for withdrawal therefrom will be made on Form 206. If the spirits are to be withdrawn for bottling for temporary storage before exportation, application for withdrawal will be made on Form 655.

SEC. 47. *Size and kind of bottles.*—Distilled spirits may be bottled in bond for export in the following sized bottles and no others:

1 quart.
⅘ quart.
1 pint.
½ pint.
Less than ½ pint.[1]

[1] Bottles of less than ½ pint capacity may be of size desired.

Bottles must be filled as nearly as possible to conform to the amount stated to be contained therein but in no case may the amount of spirits contained in any bottle vary from the amount intended or stated to be contained therein more than 2 per cent. Bottles to be used for bottling distilled spirits in bond for export shall be tested as to capacity in accordance with the provisions of section 37 of these regulations.

Liquor bottles as defined in Regulations 13 may be used, but will not be required in bottling distilled spirits in bond for export.

SEC. 48. *Denominations of export strip stamps.*—Export strip stamps will be provided in the following denominations only:

1 quart.
⅘ quart.
1 pint.
½ pint.
Less than ½ pint.

SEC. 49. *Number of export stamps in sheet.*—Export strip stamps of "Less than ½ pint" denomination will be issued 50 in a sheet. Export strip stamps of all other denominations will be issued 42 in a sheet. Requisitions for stamps by proprietors of warehouses must be made for full sheets. Stamps less than a full sheet may not be sold by a collector.

SEC. 50. *Requisitioning, shipping, and overprinting export strip stamps.*—Export strip stamps will be requisitioned, shipped, and overprinted in the manner provided in sections 16, 18, 19, and 20 of these regulations for requisitioning, shipping, and overprinting of strip stamps for distilled spirits bottled in bond for domestic consumption, except that in overprinting export strip stamps the proof at which the spirits are to be bottled will be printed on the stamps in addition to the other required data.

SEC. 51. *Record of export stamps, Form 1606.*—The storekeeper-gauger will keep a separate record, marked "Export," on Form 1606 of the number of each denomination of export strip stamps received by him during the month, the number turned over to the proprietor for overprinting and returned to him, the number used during the month, and the number on hand at the beginning and close of the month. A summary statement (Part 2 of Form 1606) of such record shall be prepared and forwarded to the district supervisor each month as provided by the insiructions on the form.

SEC. 52. *Labeling of distilled spirits bottled for export.*—All bottles containing distilled spirits bottled in bond for export shall have securely affixed thereto a label showing the following information:

1. Kind of spirits.
2. Name of actual bona fide distiller, or the name of the individual, firm, partnership, corporation, or association in whose name the spirits were produced and warehoused.
3. Proof of the spirits.
4. The words "Bottled in bond for export."

The caution notice prescribed in section 23 for spirits bottled in bond for domestic consumption will not be required on spirits bottled for export.

SEC. 53. *Construction of cases for spirits bottled in bond for export.*—Cases constructed according to the specifications set forth in sections 27 and 28, or in accordance with specifications which may be approved hereafter, may be used for packaging spirits bottled in bond for export.

SEC. 54. *Capacity of cases.*—Spirits bottled in bond for export shall be packed in cases to contain not less than 2 wine gallons nor more than 5 wine gallons each.

SEC. 55. *Numbering of cases.*—Each case containing distilled spirits bottled in bond for export will be given a serial number. The series of numbers in use for numbering cases containing spirits bottled for domestic consumption will be continued in numbering cases containing spirits bottled in bond for export. Remnant cases will be given the same serial number as the last full case containing spirits in the same bottling lot followed by the letter "R."

SEC. 56. *Marking cases for spirits bottled for export.*—The Government side of cases used for packaging distilled spirits bottled in bond for export will be marked as provided in section 30(*a*) for distilled spirits bottled in bond for domestic consumption, and in addition thereto the number and capacity of the bottles contained therein, the wine and proof gallon contents, the words "For Export from U. S. A.," the name of the domestic port from which, and the foreign port to which, the spirits are to be shipped, and the date of withdrawal for exportation, will be

plainly burned, embossed, printed, or stenciled thereon in letters and figures of not less than one-half inch in height. The marks and brands will be placed on the cases in the following manner and order:

SERIAL No. 100 — 12 1-quart bottles

JOHN BARLEYCORN & CO.

Distillery No. 564. — Louisville, Ky.

Bottled at Internal Revenue Bonded Warehouse No. 300—Ky.	John Doe U. S. Storekeeper-Gauger Insp. June 5, 1939	3.00 wine gals. 2.40 proof gals. 80 proof

Made Fall, 1934 — Bottled Spring, 1939

For Export from U. S. A.

NEW YORK TO LONDON June 6, 1939

SEC. 57. *Application for export strip stamps.*—Application will be made on Form 1515 (Part 1), in duplicate, to the storekeeper-gauger for the necessary export strip stamps to cover the bottles of spirits to be filled. If the number and denomination of stamps requested by the proprietor are necessary to cover the quantity of spirits to be bottled, the storekeeper-gauger will issue the stamps and make the necessary entry on his record of stamps, Form 1606. Upon completion of the bottling, the details of the statement "Cases filled," Part 2 of Form 1515, will be filled in by the storekeeper-gauger in accordance with the instructions on the form, and one copy with the cut-out portions of the export barrel stamps attached thereto will be forwarded to the district supervisor. Appropriate entry will also be made of the cases filled on Form 206 or Form 655 in accordance with the instructions on the form.

SEC. 58. *Affixing of export strip stamps, use of caps, cups, and cartons.*—Export strip stamps must be securely affixed to the bottles in the same manner as strip stamps are required to be affixed to spirits bottled in bond for domestic consumption. The provisions of section 38 of these regulations, respecting the affixing of strip stamps, and the use of cups, caps, seals, and cartons on bottles so stamped, shall apply to spirits bottled for export.

SEC. 59. *Remnants.*—Where the spirits remaining in a bottling tank are found to be less than the quantity necessary to constitute a full case of bottled spirits, the spirits so remaining shall be immediately drawn off, bottled and cased. Such remnant may be tax-paid for domestic consumption, or may be removed to the export storage warehouse for storage until the next lot of spirits of the same kind, produced by the same distiller during the same year and distilling season are dumped for bottling for exportation, at which time the remnant case may be returned to the bottling house and the bottles used for filling a complete case, or, if the spirits are of the age and proof required for domestic bottled in bond spirits, the remnant case may be deposited in the bonded warehouse for subsequent disposition in the manner provided by regulations for the disposition of remnant cases of spirits bottled in bond for domestic purposes.

Indicia bottles must be used in the event the remnant is to be drawn off into bottles of a capacity of one-half pint or greater for tax-payment or for return to the bonded warehouse for subsequent disposition as bottled in bond spirits. The bottles must be stamped with red strip stamps, unless the spirits are 100 degrees proof and have remained in wooden containers for at least four years from the date of original gauge as to fruit brandy, or original entry as to other spirits, in which event they may be stamped with domestic bottled in bond stamps. The bottles must also be properly labeled. The cases containing the remnant bottles must be marked and branded as required by the respective regulations governing the bottling of tax-paid spirits or spirits bottled in bond for domestic purposes. Bottles in remnant cases deposited in the export storage warehouse must be strip stamped and labeled with export labels and the case containing same must be marked and branded as prescribed by these regulations for marking cases of spirits bottled in bond for export, except as to the date of withdrawal and the names of the ports.

In all cases where a remnant is disposed of as heretofore provided, notation will be made in Part 2 of Form 1515 and on Form 206 or Form 655, as the case may be, showing the disposition made of such remnant.

SEC. 60. *Tax-payment of losses in bottling and remnants.*—Losses in bottling spirits for export will be reported on Form 1607 for tax-payment, as provided in section 39 of these regulations. The tax will be paid on remnant cases which it is desired to remove for domestic consumption, pursuant to application on Form 1519, properly modified for the purpose. However, such remnant will be removed immediately upon completion of the bottling to the tax-paid room.

SEC. 61. *Remnant cases returned to bottling house.*—When remnant cases are to be returned to the bottling house from the export storage warehouse for use in filling a complete case, they will be included in the application, Form 206, or Form 655, covering the withdrawal of bulk containers for bottling for export.

SEC. 62. *Records.*—Export bottling transactions will be reported on the storekeeper-gauger's monthly return, Form 1516, and the district supervisor's monthly account, Form 1517, respectively, as provided in sections 41 and 42, and in accordance with the instructions on the respective forms.

These sections shall be effective on and after October 1, 1939.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 15, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 17, 1939, 12.43 p. m.)

MISCELLANEOUS.

1939–27–9904
T. D. 4907

Designation of acting district supervisor.

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

To District Supervisors:

Section 22, Title 5, U. S. C., 1934 edition, provides as follows:

22. *Departmental regulations.*—The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Pursuant to the above-quoted provision of law the following regulations are prescribed:

An assistant supervisor or other qualified employee shall be designated by the district supervisor to act as district supervisor during the temporary absence or disability of the district supervisor, provided, however, that the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit may designate the person who shall act as district supervisor, in which event his designation shall be in lieu of, or shall supersede, that of the district supervisor. In the event there is no district supervisor for the district the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit shall designate an acting district supervisor.

The designation of an acting district supervisor shall be in writing over the signature of the district supervisor or the Deputy Commissioner of Internal Revenue, as the case may be, addressed to the person so designated, and shall

show the effective date thereof and the period such person is authorized to act as district supervisor. Upon completion of duty as acting district supervisor, the person so designated shall be relieved in writing over the signature of the district supervisor or the Deputy Commissioner of Internal Revenue, as the case may be, the effective date of relief from further duty as acting district supervisor being shown. Signed copies of letters of designation and relief shall be filed in the office of the district supervisor and the office of the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit as a permanent record.

All regulations, orders, or instructions inconsistent herewith are hereby revoked.

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved June 26, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register June 27, 1939, 2.47 p. m.)

INDUSTRIAL ALCOHOL.

REGULATIONS 3 (Alcohol), ARTICLE 146–A: Sale of denatured alcohol, denatured rum and articles. 1939–35–9990 T. D. 4928

Sales of denatured alcohol, denatured rum and articles.—(Amendment of Regulations No. 3.)

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

To District Supervisors and Others Concerned:

Pursuant to the authority in sections 3105(a), 3124(a)(6), and 3111, Internal Revenue Code, article 146–A of Regulations No. 3 is hereby amended by striking out the following paragraph:

No person shall sell denatured alcohol, denatured rum, or any substance or preparation in the manufacture of which denatured alcohol or denatured rum is used, under circumstances from which he might reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes.—

and substituting in lieu thereof the following:

No person shall sell denatured alcohol, denatured rum, or any substance or preparation made with or containing denatured alcohol or denatured rum, for use, or for sale for use, for beverage purposes; nor shall he sell any of such products under circumstances from which it might reasonably appear that it is the intention of the purchaser to procure the same for sale or use for beverage purposes.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 23, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register August 25, 1939; 10.20 a. m.)

LIQUOR TAXING ACT OF 1934.

1939-27-9905
T. D. 4908

Strip stamps.—(Amendment of Treasury Decision 4418 [C. B. XIII-1, 522 (1934)], as amended.)

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

To District Supervisors and Others Concerned:

Pursuant to the authority in section 2803(d), Internal Revenue Code, paragraph 9 of Treasury Decision 4418, as amended, is hereby amended by striking out the following paragraph:

Every person emptying any bottle stamped under the provisions of Title 2 of the Liquor Taxing Act of 1934, shall, at the time of emptying such bottle, destroy the stamp thereon,

and substituting in lieu thereof the following:

The stamp required to be placed on containers of distilled spirits by section 2803(a), Internal Revenue Code, shall be destroyed upon the opening of the container for the purpose of emptying the contents or any part thereof: *Provided*, That a portion of the stamp shall be left attached to the container while any part of the contents remain therein.

HAROLD N. GRAVES,
Acting Commissioner of Internal Revenue.

Approved June 27, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register June 29, 1939, 10.05 a. m.)

INTERNAL REVENUE CODE.

1939-42-10067
T. D. 4952

TITLE 26—INTERNAL REVENUE.—CHAPTER I, PART 317.

Regulations relating to the tax imposed by the Act approved March 1, 1893, as amended, with respect to certain hydraulic mining.[1]

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

To Collectors of Internal Revenue and Others Concerned:

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SECTION 317.0. *Introductory.*—(*a*) The Act entitled "An Act to create the California Debris Commission and regulate hydraulic mining in the State of California," approved March 1, 1893, as amended (27 Stat., 507; 34 Stat., 1001; 48 Stat., 1118), provides in part as follows:

> That a commission is hereby created, to be known as the California Debris Commission, consisting of three members. * * *
>
> SEC. 3. That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin River systems in the State of California. * * *
>
> SEC. 8. That for the purposes of this Act "hydraulic mining" and "mining by the hydraulic process," are hereby declared to have the meaning and application given to said terms in said State.
>
> SEC. 9. That the individual proprietor or proprietors, or in case of a corporation its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section 3 hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply with law and the rules prescribed by said commission.
>
> * * * * * * *
>
> SEC. 13. That in case a majority of the members of said commission, within 30 days after the time so fixed, concur in the decision in favor of the petitioner or petitioners, the said commission shall thereupon make an order directing the methods and specifying in detail the manner in which operations shall proceed in such mine or mines; * * *.
>
> SEC. 23. Upon the construction by the said commission of dams or other works for the detention of debris from hydraulic mines and the issuing of the order provided for by this Act to any individual, company, or corporation to work any mine or mines by hydraulic process, the individual, company, or corporation operating thereunder working any mine or mines by hydraulic process, the debris from which flows into or is in whole or in part restrained by such dams or other works erected by said commission, shall pay for each cubic yard mined from

[1] Sections 317.0 to 317.8 are issued under the authority contained in section 23, 27 Stat., 510, as amended by section 2, 48 Stat., 1118, and chapter 653, 52 Stat., 1040; 33 U. S. C., 683, and Sup. IV; and section 3791 of the Internal Revenue Code (53 Stat., Part 1), and interpret said section 23, 27 Stat., 510, as amended.

the natural bank a tax equal to the total capital cost of the dam, reservoir, and rights of way divided by the total capacity of the reservoir for the restraint of debris, as determined in each case by the California Debris Commission, which tax shall be paid annually on a date fixed by said commission and in accordance with regulations to be adopted by the Secretary of the Treasury, and the Treasurer of the United States is hereby authorized to receive the same. * * *

(*b*) The Internal Revenue Code provides in part:

SEC. 3603. NOTICE REQUIRING RECORDS, STATEMENTS, AND SPECIAL RETURNS.

Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records as the Commissioner deems sufficient to show whether or not such person is liable to tax.

* * * * * * *

SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

(a) AUTHORITY OF COLLECTOR.—If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise.

(b) AUTHORITY OF COMMISSIONER.—In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise—

(1) TO MAKE RETURN.—Make a return, or

(2) TO AMEND COLLECTOR'S RETURN.—Amend any return made by a collector or deputy collector.

(c) LEGAL STATUS OF RETURNS.—Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

(d) ADDITIONS TO TAX.—

(1) FAILURE TO FILE RETURN.—In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax: *Provided*, That in the case of a failure to make and file a return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after August 30, 1935, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per centum in the aggregate.

(2) FRAUD.—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

* * * * *

(e) COLLECTION OF ADDITIONS TO TAX.—The amount added to any tax under paragraphs (1) and (2) of subsection (d) shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax.

(f) DETERMINATION AND ASSESSMENT.—The Commissioner shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section.

* * * * * * *

SEC. 3614. EXAMINATION OF BOOKS AND WITNESSES.

(a) TO DETERMINE LIABILITY OF THE TAXPAYER.—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.

* * * * * * *

SEC. 3616. PENALTIES.

Whenever any person—

(a) FALSE RETURNS.—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or,

(b) NEGLECT TO OBEY SUMMONS.—Being duly summoned to appear to testify, or to appear and produce books as required under section 3615, neglects to appear or to produce said books—he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * * * *

SEC. 3632. AUTHORITY TO ADMINISTER OATHS, TAKE TESTIMONY, AND CERTIFY.

(a) INTERNAL REVENUE PERSONNEL.—

(1) PERSONS IN CHARGE OF ADMINISTRATION OF INTERNAL REVENUE LAWS GENERALLY.—Every collector, deputy collector, internal revenue agent, and internal revenue officer assigned to duty under an internal revenue agent, is authorized to administer oaths and to take evidence touching any part of the administration of the internal revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken.

* * * * *

SEC. 3655. NOTICE AND DEMAND FOR TAX.

(a) DELIVERY.—Where it is not otherwise provided, the collector shall in person or by deputy, within 10 days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof.

(b) ADDITION TO TAX FOR NONPAYMENT.—If such person does not pay the taxes, within 10 days after the service or the sending by mail of such notice, it shall be the duty of the collector or his deputy to collect the said taxes with a penalty of 5 per centum additional upon the amount of taxes, and interest at the rate of 6 per centum per annum from the date of such notice to the date of payment; * * *.

* * * * * * *

SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.

(a) TO TAXPAYERS.—

(1) ASSESSMENTS AND COLLECTIONS GENERALLY.—Except as otherwise provided by law in the case of income, estate, and gift taxes, the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.

* * * * *

SEC. 3791. RULES AND REGULATIONS.

(a) AUTHORIZATION—

* * * * *

(2) IN CASE OF CHANGE IN LAW.—The Commissioner may make all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue. * * *

SEC. 317.1. *Scope of regulations.*—These regulations deal with the tax imposed with respect to certain hydraulic mining, the debris from which flows into or is in whole or in part restrained by dams or other works erected for the detention of debris by the California Debris Commission in the area drained by the Sacramento and San Joaquin River systems in the State of California.

More specifically these regulations apply to hydraulic mining the debris from which flows into or is in whole or in part restrained by debris dams or other works erected or to be erected by the California Debris Commission on tributaries of the Sacramento River as follows: (*a*) the debris dam or works known as "North Fork" on the North Fork of the American River, just above the confluence of the North and Middle Forks of the American River, located in Placer County, State of California; (*b*) the debris dam or works known as "Upper Narrows" on the Yuba River, just above the confluence of the Yuba and Feather Rivers, located in Nevada and Yuba Counties, State of California; and (*c*) the debris dam or works known as "Ruck-a-Chucky" on the Middle Fork of the American River, just above the confluence of the Middle and North Forks of the American River, located in Placer and Eldorado Counties, State of California.

SEC. 317.2. *Definitions.*—As used in these regulations:

(*a*) The term "Act" means "An Act to create the California Debris Commission and regulate hydraulic mining in the State of California" approved March 1, 1893, as amended (27 Stat., 507; 34 Stat., 1001; 48 Stat., 1118).

(*b*) The term "person" means an individual, a trust, estate, partnership, company or corporation.

(*c*) The term "Secretary" means the Secretary of the Treasury.

(*d*) The term "Commissioner" means the Commissioner of Internal Revenue.

(*e*) The term "collector" means the collector of internal revenue.

(*f*) The terms "hydraulic mining" and "mining by the hydraulic process" shall have the meaning and application given said terms in the State of California.

(*g*) The term "taxable year" means the 12-month period ending on August 31 of each year for which the tax imposed by the Act is payable.

SEC. 317.3. *Rates of tax.*—Under the Act the California Debris Commission will determine and prescribe with respect to each debris dam or other works the rate of tax payable in the area served by the particular debris dam or works. The Secretary of War will notify the Secretary of the Treasury of the rate of tax fixed with respect to each debris dam or works as such rate becomes known.

The tax is payable annually on the basis of the number of cubic yards mined from the natural bank by the hydraulic process during the taxable year.

SEC. 317.4. *Liability for the tax.*—Liability for tax attaches to any person engaged at any time during the taxable year in hydraulic mining in an area served by any of the debris dams or other works identified in section 317.1 if the debris from such mining operations is in whole or in part restrained by any of such debris dams or works.

SEC. 317.5. *Ascertainment of quantity mined.*—Each person engaged in hydraulic mining operations within the scope of the tax shall make or cause to be made appropriate surveys of the premises on which such hydraulic mining operations are conducted for the purpose of determining the cubic yardage mined from the natural bank. Such surveys shall be made at the beginning and end of hydraulic mining operations in each taxable year by a licensed engineer or other qualified agency having prior approval of the California Debris Commission, and shall conform to requirements prescribed by the California Debris Commission.

SEC. 317.6. *Returns.*—Every person liable for tax for any taxable year shall prepare for such year a return in triplicate on Form 1 (California Debris) in accordance with the instructions thereon and in accordance with these regulations.

The return shall show the identity of the particular dam or other works restraining debris from the mine; the name and location of the mine; the name and address of the person to whom the California Debris Commission has issued a license to operate the mine; the number and date of the license; the name and address of the owner of the mine; the dates on which hydraulic mining operations began and ended during the taxable year for which the return is made; the number of cubic yards mined by the hydraulic process at the mine during the taxable year; the rate of tax per cubic yard determined by the California Debris Commission applicable to the particular mine; the amount of tax due and payable (cubic yards mined multiplied by the rate of tax per cubic yard).

With each return there must be submitted a supporting affidavit of the person who made the surveys at the mine for the mining season covered by the return (see section 317.5), stating that such surveys were made in accordance with requirements prescribed by the California Debris Commission.

The return shall be made under oath and verified before an officer duly authorized to administer oaths.

SEC. 317.7. *Due date and place for filing returns and paying tax.*—The return for each taxable year shall be filed in triplicate with, and the tax shall be paid to, the collector at San Francisco, Calif., on or before September 30 of each year. The tax is due and payable on such date without assessment by the Commissioner or notice from the collector.

SEC. 317.8. *Penalties and interest.*—In the case of failure to file a return within the prescribed time, a certain percentage of the amount of the tax is added to the tax unless the return is later filed and failure to file the return within the prescribed time is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect. The amount to be added to the tax is 5 per cent if the failure is for not more than 30 days, with an additional 5 per cent for each additional 30 days or fraction thereof during which failure continues, not to exceed 25 per cent in the aggregate.

Where assessment is made, and payment is not made within 10 days after the issuance of the first notice and demand (Form 17), there will accrue under section 3655 of the Internal Revenue Code a 5 per cent penalty and interest at the rate of 6 per cent per annum computed upon the entire assessment from the date of issuance of Form 17 until date of payment.

If a claim for abatement is filed with the collector within 10 days after the date of the issuance of the first notice and demand, the 5 per cent penalty does not attach. If the assessment is not paid within 10 days after receipt of notice of rejection of the claim, the 5 per cent penalty applies. The filing of the claim does not stay the running of interest, which continues to run for the full period that intervenes between the date of the first notice and demand and the date of payment.

If a false or fraudulent return be willfully made, the penalty under section 3612 of the Internal Revenue Code is 50 per cent of the total tax due. For other penalties see section 3616 of the Internal Revenue Code.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved and adopted October 11, 1939.

JOHN W. HANES,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register October 12, 1939, 12.50 p. m.)

MISCELLANEOUS

OLEOMARGARINE.

1939–27–9903
MS. 215

Schedule of oleomargarine produced and materials used during the month of May, 1939, as compared with May, 1938.

	May, 1939.	May, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 22,578,516	[2] 28,377,717
Total withdrawn tax-paid	22,806,168	28,715,892
Ingredient schedule of uncolored oleomargarine:		
Babassu oil	1,320,730	684,246
Beef fat	22,384	
Coconut oil	2,937,713	7,706,158
Corn oil	23,695	11,461
Cottonseed oil	6,772,514	9,939,309
Derivative of glycerine	53,417	79,359
Lecithin	5,290	6,425
Milk	4,468,069	5,478,801
Neutral lard	73,577	109,285
Oleo oil	987,278	1,335,924
Oleo stearine	288,927	273,502
Oleo stock	73,087	151,392
Palm oil	540	
Palm kernel oil	7,543	469,926
Peanut oil	194,105	256,795
Rice oil		18,260
Salt	975,501	1,163,317
Soda (benzoate of)	9,708	10,557
Soya bean oil	5,526,001	2,045,934
Vitamin concentrate	1,109	1,151
Total	23,741,188	29,741,802
Total production of colored oleomargarine	[3] 120,044	[4] 122,361
Total withdrawn tax-paid	20,796	38,340
Ingredient schedule of colored oleomargarine:		
Babassu oil	2,589	
Coconut oil	26,498	53,024
Color	101	129
Corn oil	3	2
Cottonseed oil	8,015	18,482
Cottonseed stearine	780	
Derivative of glycerine	474	290
Lecithin	2	2
Milk	30,420	29,911
Neutral lard	3,541	5,055
Oleo oil	13,108	17,965
Oleo stearine	1,000	1
Oleo stock	20	246
Palm kernel oil	72	234
Peanut oil	48	69
Salt	7,526	6,378
Soda (benzoate of)	43	74
Soya bean oil	42,022	7,354
Vitamin concentrate	1	
Total	136,263	139,216

[1] Of the amount produced, 35,055 pounds were reworked.
[2] Of the amount produced, 20,573 pounds were reworked.
[3] Of the amount produced, 1,824 pounds were reworked.
[4] Of the amount produced, 127 pounds were reworked.

1939–31–9940
MS. 216

Schedule of oleomargarine produced and materials used during the month of June, 1939, as compared with June, 1938.

	June, 1939.	June, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 21,030,442	[2] 27,816,727
Total withdrawn tax-paid	20,729,401	27,854,024
Ingredient schedule of uncolored oleomargarine:		
Babassu oil	1,104,573	453,942
Beef fat	14,530	
Coconut oil	2,120,921	7,392,601
Corn oil	21,094	4,451
Cottonseed oil	6,702,223	9,476,549
Derivative of glycerine	49,408	60,909
Lecithin	5,547	6,382
Milk	4,093,818	5,266,285
Neutral lard	81,705	114,883
Oleo oil	997,320	1,384,079
Oleo stearine	259,907	297,774
Oleo stock	114,521	190,769
Palm kernel oil		259,006
Peanut oil	166,581	385,826
Salt	919,007	1,143,134
Soda (benzoate of)	8,784	10,776
Soya bean oil	5,435,208	2,619,596
Vitamin concentrate	1,194	1,073
Total	22,096,341	29,068,035
Total production of colored oleomargarine	[3] 80,150	[4] 120,988
Total withdrawn tax-paid	15,840	32,758
Ingredient schedule of colored oleomargarine:		
Babassu oil	1,768	176
Coconut oil	7,726	40,522
Color	100	110
Corn oil	1	
Cottonseed oil	6,233	25,574
Cottonseed stearine	120	
Derivative of glycerine	303	301
Lecithin	4	1
Milk	17,921	26,666
Neutral lard	3,275	5,560
Oleo oil	11,430	20,935
Oleo stearine	338	900
Oleo stock	4	375
Palm kernel oil		367
Peanut oil	138	157
Salt	4,440	7,233
Soda (benzoate of)	33	34
Soya bean oil	34,610	9,016
Vitamin concentrate	1	1
Total	88,475	137,328

[1] Of the amount produced, 26,028 pounds were reworked.
[2] Of the amount produced, 27,488 pounds were reworked.
[3] Of the amount produced, 376 pounds were reworked.
[4] Of the amount produced, 120 pounds were reworked.

1939-36-10002
MS. 217

Schedule of oleomargarine produced and materials used during the month of July, 1939, as compared with July, 1938.

	July, 1939.	July, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 19,159,532	[2] 25,407,924
Total withdrawn tax-paid	20,099,144	25,643,679
Ingredient schedule of uncolored oleomargarine:		
Babassu oil	1,332,131	1,085,612
Beef fat	11,900	
Coconut oil	1,522,418	6,306,672
Corn oil	18,205	2,105
Cottonseed oil	5,518,396	8,158,560
Derivative of glycerine	48,308	51,722
Lecithin	4,880	6,654
Milk	3,849,754	4,764,264
Neutral lard	109,305	92,160
Oleo oil	850,486	1,074,471
Oleo stearine	244,853	313,980
Oleo stock	56,742	166,235
Palm oil		450
Palm kernel oil		263,317
Peanut oil	186,354	289,688
Salt	838,666	1,065,756
Soda (benzoate of)	7,744	11,538
Soya bean oil	5,592,082	2,959,423
Vitamin concentrate	760	880
Total	20,192,964	26,613,487
Total production of colored oleomargarine	[3] 102,674	[4] 104,368
Total withdrawn tax-paid	14,836	27,695
Ingredient schedule of colored oleomargarine:		
Babassu oil	40	40
Coconut oil	36,943	23,918
Color	53	82
Cottonseed oil	3,116	22,032
Derivative of glycerine	255	267
Lecithin	61	
Milk	20,108	22,815
Neutral lard	2,148	4,704
Oleo oil	9,032	15,491
Oleo stearine	875	600
Oleo stock	43	26
Palm kernel oil		228
Peanut oil	43	
Salt	5,561	6,145
Soda (benzoate of)	27	29
Soya bean oil	32,677	20,090
Total	110,982	116,467

[1] Of the amount produced, 41,065 pounds were reworked.
[2] Of the amount produced, 39,115 pounds were reworked.
[3] Of the amount produced, 348 pounds were reworked.
[4] Of the amount produced, 32 pounds were reworked.

1939-40-10049
MS. 218

Schedule of oleomargarine produced and materials used during the month of August, 1939, as compared with August, 1938.

	August, 1939.	August, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 21,498,284	[2] 28,593,710
Total withdrawn tax-paid	21,192,548	28,343,269
Ingredient schedule of uncolored oleomargarine:		
Babassu oil	1,344,719	1,201,618
Beef fat	19,700	
Coconut oil	1,728,178	7,238,795
Corn oil	21,886	
Cottonseed oil	6,980,869	9,065,906
Derivative of glycerine	53,687	55,886
Lecithin	6,119	6,978
Milk	4,292,998	5,455,258
Neutral lard	123,051	98,883
Oleo oil	1,048,166	987,185
Oleo stearine	273,608	239,858
Oleo stock	58,053	155,819
Palm kernel oil		202,055
Peanut oil	253,954	281,713
Salt	950,883	2,001,427
Soda (benzoate of)	8,844	10,768
Soya bean oil	5,537,605	3,635,081
Vitamin concentrate	1,214	1,050
Total	22,703,534	30,638,280
Total production of colored oleomargarine	[3] 110,169	124,227
Total withdrawn tax-paid	13,584	27,910
Ingredient schedule of colored oleomargarine:		
Babassu oil	925	
Coconut oil	34,497	43,061
Color	76	114
Cottonseed oil	5,317	19,982
Cottonseed stearine	120	
Derivative of glycerine	247	269
Lecithin	51	3
Milk	21,970	27,836
Neutral lard	1,953	4,273
Oleo oil	11,614	19,911
Oleo stearine	1,050	900
Oleo stock	1,162	580
Palm kernel oil		290
Peanut oil	37	130
Salt	6,564	7,396
Soda (benzoate of)	36	26
Soya bean oil	35,653	15,055
Vitamin concentrate	1	1
Total	121,273	139,827

[1] Of the amount produced, 28,047 pounds were reworked.
[2] Of the amount produced, 32,287 pounds were reworked.
[3] Of the amount produced, 864 pounds were reworked.

1939–44–10081
MS. 219

Schedule of oleomargarine produced and materials used during the month of September, 1939, as compared with September, 1938.

	September, 1939.	September, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 27,996,826	[2] 32,280,582
Total withdrawn tax-paid	27,897,887	31,967,202
Ingredient schedule of uncolored oleomargarine:		
Babassu oil	1,408,942	871,242
Coconut oil	3,084,624	8,667,307
Corn oil	34,880	
Cottonseed oil	9,028,238	10,236,664
Cottonseed stearine	9,180	
Derivative of glycerine	63,458	151,961
Lecithin	7,643	8,785
Milk	5,275,388	6,190,187
Neutral lard	112,384	110,563
Oleo oil	848,002	1,093,992
Oleo stearine	329,319	273,543
Oleo stock	62,822	118,035
Palm kernel oil		113,472
Peanut oil	258,102	330,247
Salt	1,190,929	1,291,013
Soda (benzoate of)	12,192	12,316
Soya bean oil	7,337,913	4,274,614
Soya bean stearine		9,165
Vitamin concentrate	1,379	1,147
Total	29,065,395	33,754,253
Total production of colored oleomargarine	[3] 107,675	[4] 106,260
Total withdrawn tax-paid	20,484	33,236
Ingredient schedule of colored oleomargarine:		
Babassu oil	145	
Coconut oil	28,681	44,131
Color	79	122
Corn oil	1	
Cottonseed oil	6,046	9,660
Cottonseed stearine	480	
Derivative of glycerine	306	244
Lecithin	67	3
Milk	21,391	25,784
Neutral lard	2,711	4,135
Oleo oil	13,940	15,910
Oleo stearine		150
Oleo stock	1,568	189
Palm kernel oil		105
Peanut oil	115	148
Salt	5,065	6,755
Soda (benzoate of)	39	66
Soya bean oil	33,423	17,373
Soya bean stearine		9
Vitamin concentrate	2	1
Total	114,059	124,785

[1] Of the amount produced, 13,414 pounds were reworked.
[2] Of the amount produced, 20,085 pounds were reworked.
[3] Of the amount produced, 1,640 pounds were reworked.
[4] Of the amount produced, 2,480 pounds were reworked.

1939–50–10119
MS. 220

Schedule of oleomargarine produced and materials used during the month of October, 1939, as compared with October, 1938.

	October, 1939.	October, 1938.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 23, 634, 661	[2] 30, 973, 690
Total withdrawn tax-paid	23, 650, 040	31, 788, 000
Ingredient schedule of uncolored oleomargarine:		
Babassu oil	988, 136	638, 216
Coconut oil	2, 122, 001	8, 371, 732
Corn oil	21, 711	
Cottonseed oil	8, 674, 982	10, 367, 167
Derivative of glycerine	57, 120	80, 401
Lecithin	6, 870	7, 485
Milk	4, 502, 862	6, 219, 379
Neutral lard	84, 348	105, 983
Oleo oil	602, 937	1, 008, 012
Oleo stearine	236, 212	343, 718
Oleo stock	69, 517	121, 720
Palm kernel oil		75, 044
Peanut oil	197, 034	214, 977
Salt	1, 031, 280	1, 367, 955
Soda (benzoate of)	9, 935	11, 868
Soya bean oil	5, 940, 916	3, 922, 715
Soya bean stearine		10, 495
Vitamin concentrate	1, 421	970
Total	24, 547, 282	32, 867, 837
Total production of colored oleomargarine	[3] 150, 154	[4] 118, 472
Total withdrawn tax-paid	26, 041	36, 302
Ingredient schedule of colored olemargarine:		
Coconut oil	44, 926	48, 089
Color	158	131
Corn oil	15	
Cottonseed oil	13, 523	13, 343
Derivative of glycerine	395	280
Lecithin	60	3
Milk	34, 843	27, 897
Neutral lard	3, 400	3, 840
Oleo oil	17, 161	18, 162
Oleo stock	1, 719	425
Palm kernel oil		256
Peanut oil	77	30
Salt	8, 729	6, 333
Soda (benzoate of)	55	66
Soya bean oil	41, 205	15, 280
Soya bean stearine		36
Vitamin concentrate	2	2
Total	166, 268	134, 173

[1] Of the amount produced, 14,379 pounds were reworked.
[2] Of the amount produced, 14,666 pounds were reworked.
[3] Of the amount produced, 5,022 pounds were reworked.
[4] Of the amount produced, 500 pounds were reworked.

TOBACCO.

1939-28-9913
T. 60

Statement of manufactured tobacco produced, by classes, during the month of April, 1939, as compared with April, 1938.

	April, 1939.	April, 1938.
	Pounds.	*Pounds.*
Plug	4,075,854	4,374,732
Twist	425,507	366,253
Fine-cut chewing	324,963	365,662
Scrap chewing	3,023,411	3,492,609
Smoking	15,044,877	16,362,831
Total	22,894,612	24,962,087

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

1939-31-9939
T. 61

Statement of manufactured tobacco produced, by classes, during the month of May, 1939, as compared with May, 1938.

	May, 1939.	May, 1938.
	Pounds.	*Pounds.*
Plug	4,973,571	4,615,093
Twist	533,545	434,053
Fine-cut chewing	395,198	394,228
Scrap chewing	3,501,236	3,550,736
Smoking	17,746,697	16,771,863
Total	27,150,247	25,765,973

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

1939-35-9985
T. 62

Statement of manufactured tobacco produced, by classes, during the month of June, 1939, as compared with June, 1938.

	June, 1939.	June, 1938.
	Pounds.	*Pounds.*
Plug	4,652,401	5,036,500
Twist	483,727	460,211
Fine-cut chewing	460,748	426,956
Scrap chewing	3,916,703	4,141,994
Smoking	17,979,150	17,118,098
Total	27,492,729	27,183,759

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

1939–40–10043
T. 63

Statement of manufactured tobacco produced, by classes, during the month of July, 1939, as compared with July, 1938.

	July, 1939.	July, 1938.
	Pounds.	*Pounds.*
Plug	4, 293, 934	4, 701, 279
Twist	405, 001	426, 201
Fine-cut chewing	400, 288	378, 379
Scrap chewing	3, 089, 307	5, 443, 308
Smoking	15, 261, 007	14, 005, 301
Total	23, 449, 537	24, 954, 468

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

1939–44–10080
T. 64

Statement of manufactured tobacco produced, by classes, during the month of August, 1939, as compared with August, 1938.

	August, 1939.	August, 1938.
	Pounds.	*Pounds.*
Plug	5, 152, 871	5, 139, 627
Twist	559, 543	536, 722
Fine-cut chewing	407, 821	408, 665
Scrap chewing	4, 345, 762	3, 708, 811
Smoking	19, 356, 896	17, 962, 129
Total	29, 822, 893	27, 755, 954

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

1939–49–10116
T. 65

Statement of manufactured tobacco produced, by classes, during the month of September, 1939, as compared with September, 1938.

	September, 1939.	September, 1938.
	Pounds.	*Pounds.*
Plug	4, 470, 588	5, 023, 424
Twist	481, 926	433, 438
Fine-cut chewing	348, 371	402, 900
Scrap chewing	3, 521, 475	3, 655, 429
Smoking	17, 503, 308	17, 812, 217
Total	26, 325, 668	27, 327, 408

NOTE.—These figures are subject to revision until published in the Commissioner's annual report.

1939-42-10065
Mim. 4963

Procedure relating to consideration by the Bureau of requests by taxpayers for rulings or advice on matters affecting tax liability.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., September 27, 1939.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, Other Officials and Employees of the Bureau of Internal Revenue, and Others Concerned:

1. The Bureau is receiving a large number of requests from taxpayers and their counsel for rulings and advice upon questions which relate to the character and extent of tax liabilities resulting from prospective as well as consummated transactions. The Bureau will function on such requests as indicated below:

2. Rulings will be made on prospective transactions only where the law or regulations provide for a determination by the Commissioner of the effect of a proposed transaction for tax purposes, as in the case of a transfer coming under the provisions of sections 1250–1253 of the Internal Revenue Code, or an exchange coming under the provisions of section 112(i) of the Internal Revenue Code, or in connection with the execution of a closing agreement under the provisions of section 3760 of the Internal Revenue Code with respect to a taxable period ending subsequent to the date of the agreement. The Commissioner will exercise his discretionary power to enter into a closing agreement for a taxable period ending subsequent to the date thereof only where such exercise is in the interests of a wise administration of the revenue system. The established policy of the Bureau in not complying with requests for rulings on prospective transactions will continue to be followed except in the instances hereinabove provided.

3. A request received from a taxpayer or his representative for a ruling on a question involving an issue in a return or returns filed for a year or years with respect to which the period of limitation on assessment or refund of income or excess-profits taxes has not expired will be referred to the internal revenue agent in charge having jurisdiction of the return or returns for appropriate action on the request and consideration in connection with the examination of such return or returns. It is not intended, however, in such cases to prevent the internal revenue agent in charge from seeking advice or information from Washington before taking action.

4. The established policy of giving advice upon requests of taxpayers or their representatives on questions relating to the character and extent of tax liabilities resulting from consummated transactions affecting a return to be filed will be continued under the following circumstances:

(*a*) The complete facts relative to the transaction, together with a copy of each contract, or other document, necessary to present the question, must be given.

(*b*) The names of all the real parties interested must be stated regardless of who presents the question, whether an interested party, attorney, accountant, or other representative.

(*c*) The request must be signed by the taxpayer, or in case he is represented by an attorney or agent, the request must be accompanied by properly executed power of attorney.

5. A copy of a letter addressed to a taxpayer will not be furnished to his attorney or agent unless the Bureau is specifically authorized to do so by the taxpayer.

GUY T. HELVERING,
Commissioner.

1939–30–9925
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, *June 24, 1939.*

TITLE 31—MONEY AND FINANCE: TREASURY.—SUBTITLE A, PART 10.—REGULATIONS RELATING TO THE PRACTICE OF ATTORNEYS AND AGENTS.

Section 3 of Department Circular No. 230 (revised) of October 1, 1936, revised to read as follows:

Section 10.3 is hereby supplemented by adding at the end thereof the following:

(*i*) The qualifications for enrollment stated in subsection (a) 1 and 2 (beginning with the word "Persons" and ending with the word "accountants") are prerequisites for *general* enrollment for practice before the Treasury Department.

However, *special* enrollment for the presentation of matters before a particular bureau or division may be effected in the following manner: An applicant for such special enrollment shall present his qualifications to the Committee. The Committee shall prescribe an examination for such applicant. If the Committee is satisfied that the applicant is possessed of the qualifications necessary to enable him to render valuable services to claimants and other persons before the particular bureau or division before which he is seeking authorization to practice, it shall issue to the applicant an appropriate special enrollment card.

Moreover, authority for the presentation of a *particular matter* before the Treasury Department may be effected in the following manner: An applicant for such authority shall present his qualifications to the Committee. If the Committee is satisfied that the applicant is possessed of the qualifications necessary to enable him to render valuable services to his principal in the presentation of the particular matter before the Treasury Department, it shall issue to the applicant an appropriate letter of authority. Such a letter of authority shall not be necessary, except in the case of matters before the Bureau of Internal Revenue, if the officer or employee of the bureau or division before whom appearance is made is satisfied that the person appearing is not under orders of suspension or disbarment from the Treasury Department and is so clearly qualified that application to the Committee would be a useless formality.

Nothing in this subsection shall authorize any procedure to permit a person to act as a customhouse broker without compliance with the requirements of Department Circular No. 559 (Rules and Regulations Relating to Customhouse Brokers), nor limit the rights granted by such Circular No. 559 to customhouse brokers to represent their clients before the Treasury Department.

STEPHEN B. GIBBONS,
Acting Secretary of the Treasury.

[Filed with the Division of the Federal Register June 24, 1939, 11.03 a. m.]

1939-30-9924
Mim. 4886

Powers of attorney in income, profits, estate, and gift tax cases.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 23, 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:

1. Effective immediately the responsibilities and duties heretofore assumed by the Public Relations Division of the Bureau in respect of powers of attorneys filed in income, profits, estate, and gift tax cases will be transferred to and assumed by the internal revenue agent in charge having jurisdiction of the case.

2. Appropriate files will be established in the several offices, and agents and attorneys representing taxpayers on income, profits, estate, and gift tax cases and contracting parties on Vinson Act excess profit cases will be required to file powers of attorney in the office of the internal revenue agent in charge in which the case is under consideration, and sufficient authenticated copies will be required to permit the placing of a copy with the return or report for each tax year under consideration.

3. Upon the transfer of a case from the office of one internal revenue agent in charge to that of another internal revenue agent in charge, the original power of attorney will be transferred with the case record.

4. Powers of attorney now on file in the Bureau authorizing appearances in respect of years not barred by the statute of limitations will be forwarded as soon as possible to the appropriate field divisions.

5. The files of powers of attorney maintained in the agents' offices will be available for the information of and aid to Technical Staff offices.

6. Attention is invited to the provisions of Department Circular No. 230 (Revised), Laws and Regulations Governing the Recognition of Agents, Attorneys, and Other Persons Representing Claimants Before the Treasury Department (C. B. XV-2, 541 (1936)), as amended, and Conference and Practice Requirements, Bureau of Internal Revenue (Revised) (C. B. XIV-2, 584 (1935)).

7. Correspondence relating to the provisions of this mimeograph should refer to the number thereof and the symbols IT:F.

MILTON E. CARTER,
Acting Commissioner.

1939-48-10108

CONFERENCE AND PRACTICE REQUIREMENTS, BUREAU OF INTERNAL REVENUE, REVISED AUGUST, 1939.

QUALIFICATIONS FOR CONFERENCE.

I. Conferences may be accorded only to taxpayers or their duly authorized representatives. Any individual taxpayer, or member of a partnership, executor or administrator of an estate, trustee of a trust, or officer of a corporation, or fully authorized regular employee of an individual, partnership, estate, trust, or corporation may appear for himself or for such individual, partnership, estate, trust, or corporation solely upon adequate identification. This rule also applies to an individual, a partnership, an estate or trust, or a corporation with respect to the liability of the individual, partnership, estate or trust, or corporation as a transferee of property of a taxpayer and to a fiduciary with respect to the liability of the fiduciary under section 3467 of the Revised Statutes, as amended (U. S. C., Title 31, section 192). All other persons appearing as attorneys or agents, including attorneys or agents of transferees or fiduciaries, must exhibit evidence that the requirements of Department Circular No. 230 (revised), which contains the statutes and regulations governing practice before the Treasury Department, have been complied with, and must also conform with the following requirements:

POWER OF ATTORNEY TO BE FILED AND EVIDENCE OF ENROLLMENT TO BE SUBMITTED BEFORE RECOGNITION IS ACCORDED.

II. No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim, or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney, or a certified copy thereof, from his principal in proper form authorizing him to prosecute the case, claim, or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. In the event, however, that an attorney or agent presents himself for conference who is not familiar with this requirement, or who can show that he has not had reasonable opportunity to obtain a power of attorney from his client, or who has not applied for enrollment, but is able to produce such evidence as will reasonably convince the Bureau's representative that he has authority to represent the taxpayer, such attorney or agent may be heard with the understanding that a power of attorney in proper form and evidence of enrollment will be promptly forwarded to the Bureau, and that until such power of attorney and evidence of enrollment shall have been filed information will not be disclosed to such attorney or agent relative to the Bureau's attitude in respect of the issues raised or to any other matter relating to the taxpayer's case.

POWER OF ATTORNEY TO BE FILED PRIOR TO FINAL DETERMINATION OF TAX LIABILITY.

III. No power of attorney will be accepted which is filed after final determination of the tax liability, unless the power of attorney recites that the principal is cognizant of such settlement and of the amount of deficiency or overassessment determined. (See also title "Checks in payment of refunds," paragraph XXI herein.)

POWER OF ATTORNEY NOT REQUIRED IN CERTAIN CASES PENDING BEFORE THE UNITED STATES BOARD OF TAX APPEALS.

IV. In a docketed petition before the Board, it is considered that the petitioner and the Commissioner stand in the position of parties litigant before a quasi judicial body. The Board of Tax Appeals has its own rules of practice and procedure, and its own rules respecting admission to practice before it. A Staff division in the decentralized areas is authorized to deal with the counsel of record before the Board in a petition docketed by the Board. Therefore, correspondence in connection with Board dockets will, ordinarily, be addressed to counsel of record before the Board; and in any event the position of the Bureau is that such

counsel of record shall receive copies of any correspondence, or be advised as to the general nature of any communications, which for good and sufficient reason may be addressed direct to the taxpayer.

In all cases handled by the decentralized offices of the Technical Staff, other than cases docketed before the Board, the customary power of attorney will be required.

Power of Attorney Requirements.

V. Any power of attorney offered in evidence in any case will be accepted only if it is in regular form. Only one power of attorney shall be in effect in any case and there shall be included in such power of attorney the names and addresses of all attorneys or agents to whom the taxpayer has delegated authority to represent him.

A. TECHNICAL LANGUAGE UNNECESSARY.

It is considered necessary in all cases that the power of attorney contain language to convey the principal's intention, though not necessarily in strictly legal form.

B. ATTESTATION OF EXECUTION OF INSTRUMENT OR WITNESSES THERETO.

The power of attorney must be executed before a notary public, or, in lieu thereof, witnessed by two disinterested individuals. The notarial seal must be affixed unless such seal is not required under the laws of the State wherein the power of attorney is executed. No attorney or agent as notary public shall take acknowledgments, administer oaths, certify papers, or perform any official act in connection with matters pending before the Bureau in which he is employed as counsel, attorney, or agent, or in which he may be in any way interested. (See Act of June 29, 1906, 34 Stat., 622.)

C. EXTENT OF AUTHORITY DELEGATED.

The authority delegated to an attorney or agent in a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts.

(A) EXPRESS AUTHORITY REQUIRED FOR CERTAIN ACTS.

Express authority to do the following acts must be granted and shown in the power of attorney or such acts will be considered beyond the scope of the agent's authority:

1. To receive but not to indorse and collect checks in settlement of any refund. (See section 3477 of Revised Statutes, which prohibits assignments of claims or portions thereof, and title "Checks in payment of refunds," paragraph XXI herein.)
2. To delegate authority or to substitute another agent or attorney.
3. To execute consents agreeing to a later determination and assessment of taxes than is provided by statute of limitations.
4. To execute closing agreements relative to the tax liability.

D. SIGNATURE OF GRANTOR.

The power of attorney should be signed as follows:

a. In the case of an individual taxpayer, by such individual.

b. In the case of any taxable year for which a joint return was made by a husband and wife, by both husband and wife, except that either spouse may sign for the other if duly authorized in writing so to act.

c. In the case of a partnership, either by all members or in the name of the partnership by one of the partners duly authorized to act.

d. In the case of a corporation by an officer of the corporation having authority to bind same and be attested by the secretary of the corporation over the corporate seal.

1. A power of attorney granted by a corporation should state whether or not the corporation has a seal, and the seal should be affixed to the power in all cases where one is used by the corporation. If the power of attorney shows that the corporation has no seal, a certified copy of a resolution duly passed by the

board of directors of the corporation giving its officers authority to sign the same should be submitted.

2. If the officer who signs the power of attorney is also secretary, another officer of the corporation, preferably the president, vice president, or treasurer, must also sign the instrument so that two different individuals' signatures will appear thereon.

e. In the case of an association, the same requirements shall apply as in the case of a corporation.

f. Special cases:

If the taxpayer is—

Dissolved,
Insolvent,
Deceased,

or has a similar status, the additional requirements beginning with paragraph XV herein should be followed.

E. CERTIFICATION OF COPIES OF POWERS OF ATTORNEY AND EVIDENCE FILED IN CONNECTION THEREWITH.

The certification of copies of powers of attorney or papers or documents filed in connection therewith must be made by a notary public, or other proper official, who should state that he has personally compared the copy with the original and finds it to be a true and correct copy. This certification applies to all copies of powers of attorney and related papers, including printed and photostatic copies.

F. CERTAIN POWERS OF ATTORNEY TO BE FILED IN FIELD OFFICES.

Powers of attorney covering income, profits, estate, and gift tax cases, also Vinson Act cases, shall be filed in the office of the internal revenue agent in charge in which the case is under consideration, accompanied by sufficient authenticated copies thereof for attachment to the return for each tax year under consideration.

Fee statements respecting contingent or partially contingent fee agreements required to be filed by attorneys and agents under the provisions of paragraph (*y*), section 2, Department Circular No. 230, revised, effective October 1, 1936, as amended (see C. B. 1937–2, page 645), should be filed with the internal revenue agent having the case under consideration.

SUBSTITUTION OF ATTORNEYS OR AGENTS.

VI. Substitution of attorneys or agents may be effected only where the power of attorney, under which the attorney or agent of record is acting, expressly confers the right of substitution. Such attorney or agent, if in good standing before the Department, may, by a duly executed substitute power of attorney, substitute another or others in his stead. The Bureau reserves the right to refuse recognition to a substituted attorney or agent where, in its opinion, such substitution will only delay the final adjustment of the case. Furthermore, the Bureau will not accept a substitute power of attorney granted by an attorney or agent, who is acting under a substitute power of attorney from the attorney or agent of record, unless specific authority is granted in the principal's power of attorney to the attorney or agent of record to pass on to his substitute the right of substitution. (See also title "Checks in payment of refunds," paragraph XXI herein.)

NEW POWER OF ATTORNEY REQUIRED WHEN NEW OR ADDITIONAL ATTORNEYS OR AGENTS RETAINED.

VII. In any case in which a power of attorney has been filed and the taxpayer subsequently desires to authorize other or additional attorneys or agents to represent him before the Bureau with respect to the same case, a new power of attorney must be filed, which shall include the names of all attorneys or agents who are authorized to act for such taxpayer. Such new power of attorney shall contain a clause specifically revoking any and all powers of attorney previously filed with respect to the same case. The revocation of an authority to prosecute a matter before the Bureau shall in no case be effective, so far as the Bureau is concerned, before due notice in writing has been given the

Bureau, and the filing of evidence of notification of the revocation to the attorney or agent whose power has been revoked. Where consideration of a matter has been held in abeyance awaiting the furnishing of evidence for which a call has been made on an attorney or agent, failure on his part to take action thereon within three months from the date on which consideration of the matter was suspended may be deemed by the administrative officer before whom the case is pending cause for refusal to further recognize the authority of the attorney or agent. Such administrative officer shall, however, give written notice of such refusal to the client of such attorney or agent, and shall state briefly the reason such action has been taken.

EVIDENCE REQUIRED TO SUBSTANTIATE FACTS ALLEGED IN CONFERENCES.

VIII. No reduction in taxes proposed nor increases in allowance of claims shall be made unless the evidence upon which such action is taken is submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer.

The sworn statement of facts must be submitted at least five days before the conference date except as hereinafter provided, and must meet all the issues raised by the Bureau which the taxpayer desires to contest. If the sworn statement of facts is not submitted at least five days before the conference, then it must be accompanied by a sworn statement setting out specifically the reasons for not having complied with the 5-day rule. Nothing herein shall preclude the taxpayer from submitting additional or supporting evidence within a reasonable time after the conference.

Every affidavit, agreement, brief, or statement of facts prepared or filed by an attorney or agent as argument or evidence in the matter of a claim or tax matter pending before the Bureau shall have thereon a statement signed by such attorney or agent showing whether or not he prepared such document and whether or not the attorney or agent knows of his own knowledge that the facts contained therein are true.

CONFERENCE TO BE PREARRANGED.

IX. Conferences with taxpayers or their representatives will not ordinarily be held without previous arrangement. Cases in which taxpayers or their representatives can submit some unusual reason for requesting an immediate conference without previous arrangement will be given consideration by Bureau officials charged with the arrangement of conferences, who may, if the circumstances warrant, make an exception to the rule.

In order that the case under consideration may be closed at one conference, if at all possible, the requirements of paragraph VIII of this circular to the effect that the brief submitted in advance of conference must meet all issues raised will be strictly enforced, and another conference will not be granted on the same case except to meet new issues raised by the Bureau in the course of the first conference which could not have been anticipated prior to such conference.

RECOGNITION OF UNENROLLED EMPLOYEES OF QUALIFIED ATTORNEYS OR AGENTS.

X. Unenrolled employees of enrolled attorneys or agents will not be recognized in any matter by offices of the Bureau except for the purpose of filing papers or securing information as to the status of cases. Recognition for the latter purpose will be given only when the employee presents in each case written authority from his employer to act as the latter's substitute in obtaining the information desired regarding status and when the power of attorney of his employer in each case provides for the substitution of such employee. To facilitate recognition of such employees, it is requested that the employee present at the time of making inquiry concerning any case the receipt for the power of attorney issued to his employer by the taxpayer in that case and the receipt for the substitute power of attorney issued to him. (These receipts are furnished if requested when the powers of attorney are filed.)

POWERS OF ATTORNEY AND ENROLLMENT REQUIRED OF AGENTS AND ATTORNEYS HANDLING MATTERS BY CORRESPONDENCE.

XI. Where recognition is desired through correspondence with the Department, enrollment and power of attorney requirements must be met by attorneys or agents even though no actual appearance is made before the Department. If a

proper power of attorney is filed authorizing only one of the following acts by the attorney or agent, enrollment will not be required:

Authority to sign but not to prosecute any claim of the taxpayer.

Authority to inspect or receive copies of returns where Executive order or regulations permit such action by agent.

The Commissioner reserves the right to withhold making the above exceptions in any specific case.

If the power of attorney authorizes the attorney or agent to do one or both of the above acts and some other act or acts, enrollment will be considered necessary, notwithstanding that the agent or attorney does not expect to use all of the power conferred upon him.

SPECIFIC AUTHORITY REQUIRED IN VINSON ACT CASES.

A power of attorney authorizing an attorney or agent to represent a taxpayer before the Bureau of Internal Revenue in connection with income tax matters will not be recognized by the Bureau as evidence of an attorney's or agent's authority to act as representative for a contractor or subcontractor in connection with excess profit liability under section 3 of the Vinson Act (48 Stat., 503), as amended, as applied to Navy contracts and contracts for aircraft for the Army, and to subcontracts made with respect to such contracts. In such cases a separate power of attorney must be secured specifically authorizing the attorney or agent to appear in behalf of his client.

LETTERS ARRANGING CONFERENCES TO ADVISE OF REQUIREMENTS.

XII. Letters arranging conferences will apprise the taxpayer or his representative of the requirements as to powers of attorney, the necessity of being enrolled to practice before the Department, and to whom he should apply for enrollment, unless it is known that the addressee is aware of the requirements. Owing to the expense involved, it will not be the practice, except in rare cases, to incorporate the above requirements in telegrams. Where sufficient time intervenes between the date of the telegram and the conference the telegram will be confirmed by letter and conference requirements stated.

PRACTITIONERS MUST CONDUCT THEMSELVES IN AN ETHICAL MANNER.

XIII. Attorneys or agents representing taxpayers before the Bureau are expected at all times to conduct themselves in an ethical manner, and will be held strictly accountable for the withholding of known material information or for any deliberately false or misleading statement.

"* * * whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000 or imprisoned not more than ten years, or both." (Section 80, Title 18, United States Code.)

"Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." (Section 3793(b)1 of the Internal Revenue Code.)

For gross misconduct the Commissioner may refuse to recognize any person as an attorney or agent in any particular case.

Attempting to influence the conduct of any official or employee of the Bureau in any case or other proceeding pending before the Bureau by the use of threats, false accusations, duress, or by the offer of any special inducement or promise

of advantage, or by the bestowing of gifts or favors upon officials or employees before whom an attorney or agent is appearing, is considered grounds for disbarment from practice before the Treasury Department.

"Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, * * *, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years." (Section 91, Title 18, United States Code.)

EFFECT OF PREVIOUS CONNECTION WITH THE TREASURY DEPARTMENT.

XIV. No enrolled attorney or agent shall be permitted to appear before the Treasury Department in connection with any matter to which such attorney or agent gave personal consideration or as to the facts of which he gained personal knowledge while in the service of the Treasury Department. Likewise no such enrolled attorney or agent shall aid or assist another in any such matter, and no attorney or agent shall receive assistance in any such matter from one formerly in the service of the Treasury Department who possesses such personal knowledge.

No former officer, clerk, or employee of the Treasury Department shall act as attorney or agent, or as the employee of an attorney or agent, in any matter or controversy pending in such Department during the period of his employment therein within two years after the termination of such employment unless he shall first obtain the written consent thereto of the Secretary of the Treasury or his duly authorized representative. This consent will not be granted unless it appears (1) that such employment is not prohibited by Title 5, section 99, United States Code, or other law, or by the regulations of the Treasury Department; (2) that the applicant was not, during the period of two years immediately preceding the date of application, employed in the particular section (departmental or field) in which was pending the matter or controversy, to handle which consent is sought. In the event that the applicant formerly occupied an administrative position, such as head of a bureau, unit, division, or section, or was employed as a reviewer or conferee or in an advisory capacity, such applicant will be required to file an affidavit to the effect that he has no knowledge of the facts involved in such matter or controversy which was gained by him while he was employed in the Department, and that he is not now associated with, and will not be associated with any former employee who has gained knowledge of the case while employed by the Treasury Department. The statements contained in such affidavit shall not be sufficient if disproved by an examination of the files and records pertaining to the case. Applications for consent should be directed to the Committee on Enrollment and Disbarment on Form 901 and should state the former connection with the Department of the applicant and identify the matter or controversy in which the applicant desires to appear. The applicant shall be promptly advised as to his privilege to appear in the particular matter or controversy, and this notice shall be filed by him in the record of the case.

INSTRUCTIONS FOR EXECUTION OF POWER OF ATTORNEY IN SPECIAL CASES WHICH MUST BE MET IN ADDITION TO GENERAL REQUIREMENTS.

XV. *Dissolved partnership.*—A power of attorney to act with respect to matters involving the affairs of a dissolved partnership must be signed by all of the former partners. In case some of the partners are dead, their legal representatives must sign in their stead. (See paragraph XVIII.) If, however, under the laws of the particular State, the surviving partners at the time of

the execution of the power of attorney have exclusive right to the control and possession of the firm's assets for the purpose of winding up its affairs, their signatures alone will be sufficient. If only the surviving partners sign the power of attorney, a copy of the pertinent provisions of the State law under which they claim authority, exclusive of the legal representatives of the deceased partners, should be noted and citation given thereto.

XVI. *Dissolved corporations.*—If a liquidating trustee, or trustee under dissolution, has been appointed, or if a trustee derives authority under a statute of the State in which the corporation was organized, the power of attorney should be executed by such trustee. If there is more than one trustee, all must join unless it is established that less than all have authority to act in the premises. The power of attorney must be accompanied by a copy of the instrument under which the trustee derives his authority, properly authenticated, or if the authority is derived under a State statute, the statute should be cited and quoted, and an affidavit by a third party, setting forth the facts required by the statute as a precedent to the vesting of the authority in said trustee must be furnished. It must also appear in the case of any trustee that his authority has not been terminated. If there is no trustee. then a power of attorney executed before a notary public by a sufficient number of individuals to make up a representation of a majority in the voting stock of the corporation at the date of dissolution will be accepted for purposes of conference and correspondence relating to the tax liability in the particular case. Such instrument must show the total number of outstanding shares of voting stock at the date of dissolution and the number held by each signatory to the power of attorney. The instrument must also contain positive averments as to the nonexistence of any trustee, and the date of dissolution must appear.

XVII. *Insolvent taxpayer.*—A certificate from the court having jurisdiction over the insolvent should be furnished showing the appointment and qualification of the trustee or receiver, and it should appear that the authority has not terminated. In cases pending before a district court of the United States an authenticated copy of the order approving the bond of the trustee will meet this requirement. If an attorney has been appointed under authority of court for the trustee or receiver, a copy of the court order appointing such attorney (where he is to represent the trustee) should be furnished. If no attorney has been appointed, the trustee or receiver should execute the power of attorney, the acknowledgment or witnessing thereof to be the same as in the case of an individual, and the above-described evidence showing the appointment of the trustee or receiver furnished therewith. If the trustee or receiver does not wish to appoint an attorney, he will be recognized upon establishing his authority in the manner above described.

XVIII. *Deceased taxpayer.*—The executor or administrator should execute the power of attorney, which must be accompanied by a short-form certificate (or authenticated copies of letters testamentary or letters of administration) showing that his authority is in full force and effect at the time such evidence is submitted. The executor or administrator will be recognized in his own right if he does not wish to appoint an attorney or agent, upon submission of the above-described court certificate, and such executor or administrator is not required to be enrolled to practice. In the event that the executor has been discharged and a trustee under the will is acting, the power of attorney must come from the trustee, and evidence of the discharge of the executor and of the appointment of the trustee must be submitted with the power of attorney. In such cases, where the executor is discharged and the estate is distributed to the residuary legatees, the power of attorney must come from the residuary legatee or legatees, and be accompanied by a statement from the court certifying to the discharge of the executor and naming the residuary legatees and indicating the proper share to which each is entitled. In the event that the decedent died intestate and the administrator had been discharged or none was ever appointed, the power of attorney must come from the distributees and be accompanied by evidence of the discharge of the administrator, if one had been appointed, and affidavits and such other evidence as can be adduced tending to show the relationship to the deceased of the signatories to the power of attorney and the right of each of them to the respective shares claimed under the law of the domicile of the deceased.

XIX. *Guardians and other fiduciaries appointed by a court of record.*—The power of attorney should be executed by the fiduciary and must be accom-

panied by a court certificate or court order showing that such fiduciary has been appointed and that his appointment has not been terminated.

XX. *Trustee under deed, declaration, etc.*—Powers of attorney must be executed by the trustee and be accompanied by documentary evidence of the authority of the trustee to act. Such evidence may be either a copy of the trust instrument, properly certified, or a certified copy of extracts from the trust instrument, showing—

a. Date of instrument.

b. That it is or is not of record in any court.

c. The beneficiaries.

d. The appointment of the trustee, the authority granted, and such other information as may be necessary to show that such authority extends to Federal tax matters.

e. That the trust has not been terminated, and that the trustee appointed thereby is still acting.

Self-serving affidavits by the trustee in this connection are not acceptable. In the event that the trustee appointed in the original trust instrument is no longer acting and has been replaced by another trustee, documentary evidence of the appointment of the new trustee must be submitted. In cases where there are more than one trustee appointed, all must join, unless it is shown that less than all have authority to act.

XXI. *Checks in payment of refunds.*—The Bureau is not bound to deliver any check in payment of refund of internal-revenue taxes, penalties, or interest to a representative of any taxpayer acting under authority evidenced by a power of attorney. However, it will be the general policy of the Bureau to mail such checks in care of an enrolled attorney or agent who has filed power of attorney from the principal, specifically authorizing him to receive but not to indorse such check, provided that such power of attorney shall have been filed in sufficient time for the section or division preparing the certificate of overassessment to show thereon the mailing address as "care of" the attorney or agent. Where an attorney or agent has more than one address, request to mail the check to another address than is shown in the power of attorney will not be granted unless the address shown in the power of attorney is no longer that of the attorney or agent. In the event that a power of attorney is filed specifically authorizing more than one attorney or agent to receive checks on the taxpayer's behalf, and such attorneys or agents have different addresses, the Bureau will not mail the check in care of any of the attorneys or agents named in the power of attorney but will mail the check direct to the taxpayer, unless a statement is furnished, signed by all of the attorneys or agents named in the power of attorney, requesting that the check be mailed in care of one of their number. Furthermore, it will be the policy of the Bureau not to mail checks in payment of refunds to an attorney or agent who holds authority to receive such check by reason of a substitute power of attorney obtained from the attorney or agent designated by the taxpayer.

Where there is a contest between members of a dissolved firm or between two or more attorneys or agents acting under the same power of attorney as to which one is entitled to prosecute a matter pending before the Bureau or to receive a draft, warrant, or check, the client only shall thereafter be recognized, unless the members or survivors of the dissolved firm, or the contesting attorneys or agents, file an agreement signed by all designating which of them shall be entitled to prosecute such matter or to receive the said draft, warrant, or check. In no case shall the delivery of a final draft, warrant, or check to the client be delayed more than 60 days by reason of failure to file such agreement. Deliveries of all checks in payment of refunds will be made by or through the office of the collector to whom the tax was paid.

REQUIREMENTS APPLICABLE TO FIELD OFFICES.

XXII. The foregoing conference and practice requirements apply to all offices in the Internal Revenue Service.

GUY T. HELVERING, *Commissioner.*

LEGISLATION.

1939–45–10085

H. R. 6635. PUBLIC, NO. 379, SEVENTY-SIXTH CONGRESS. [CHAPTER 666, FIRST SESSION.]

An Act to amend the Social Security Act, and for other purposes.

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 "Social Security Act Amendments of 1939."

* * * * * * *

TITLE VI—AMENDMENTS TO THE INTERNAL REVENUE CODE.

SEC. 601. Section 1400 of the Internal Revenue Code is amended to read as follows:

"SEC. 1400. RATE OF TAX.

"In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426(a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:

"(1) With respect to wages received during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

"(2) With respect to wages received during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

"(3) With respect to wages received during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

"(4) With respect to wages received after December 31, 1948, the rate shall be 3 per centum."

SEC. 602. (a) Section 1401(c) of the Internal Revenue Code is amended to read as follows:

"(c) ADJUSTMENTS.—If more or less than the correct amount of tax imposed by section 1400 is paid with respect to any payment of remuneration, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as may be prescribed by regulations made under this subchapter."

(b) Such section 1401 is further amended by adding at the end thereof the following new subsection:

"(d) SPECIAL REFUND.—If by reason of an employee rendering service for more than one employer during any calendar year after the calendar year 1939, the wages of the employee with respect to employment during such year exceed $3,000, the employee shall be entitled to a refund of any amount of tax, with respect to such wages, imposed by section 1400, deducted from such wages and paid to the collector, which exceeds the tax with respect to the first $3,000 of such wages paid. Refund under this section may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax; except that no such refund shall be made unless (1) the employee makes a claim, establishing his right thereto, after the calendar year in which the employment was performed with respect to which refund of tax is claimed, and (2) such claim is made within two years after the calendar year in which the wages are paid with respect to which refund of tax is claimed. No interest shall be allowed or paid with respect to any such refund."

SEC. 603. Part I of Subchapter A of Chapter 9 of the Internal Revenue Code is amended by adding at the end thereof the following new section:

"SEC. 1403. RECEIPTS FOR EMPLOYEES.

"(a) REQUIREMENT.—Every employer shall furnish to each of his employees a written statement or statements, in a form suitable for retention by the employee, showing the wages paid by him to the employee after December 31, 1939. Each statement shall cover a calendar year, or one, two, three, or four calendar quarters, whether or not within the same calendar year, and shall

show the name of the employer, the name of the employee, the period covered by the statement, the total amount of wages paid within such period, and the amount of the tax imposed by section 1400 with respect to such wages. Each statement shall be furnished to the employee not later than the last day of the second calendar month following the period covered by the statement, except that, if the employee leaves the employ of the employer, the final statement shall be furnished on the day on which the last payment of wages is made to the employee. The employer may, at his option, furnish such a statement to any employee at the time of each payment of wages to the employee during any calendar quarter, in lieu of a statement covering such quarter; and, in such case, the statement may show the date of payment of the wages, in lieu of the period covered by the statement.

"(b) PENALTY FOR FAILURE TO FURNISH.—Any employer who willfully fails to furnish a statement to an employee in the manner, at the time, and showing the information, required under subsection (a), shall for each such failure be subject to a civil penalty of not more than $5."

SEC. 604. Section 1410 of the Internal Revenue Code is amended to read as follows:

"SEC. 1410. RATE OF TAX.

"In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:

"(1) With respect to wages paid during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

"(2) With respect to wages paid during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

"(3) With respect to wages paid during the calendar years 1946, 1947, and 1948, the rate shall be 2½ per centum.

"(4) With respect to wages paid after December 31, 1948, the rate shall be 3 per centum."

SEC. 605. Section 1411 of the Internal Revenue Code is amended to read as follows:

"SEC. 1411. ADJUSTMENT OF TAX.

"If more or less than the correct amount of tax imposed by section 1410 is paid with respect to any payment of remuneration, proper adjustments with respect to the tax shall be made, without interest, in such manner and at such times as may be prescribed by regulations made under this subchapter."

SEC. 606. Effective January 1, 1940, section 1426 of the Internal Revenue Code is amended to read as follows:

"SEC. 1426. DEFINITIONS.

"When used in this subchapter—

"(a) WAGES.—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—

"(1) 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;

"(2) The amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer which makes provision for his employees generally or for a class or classes of his employees (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death, provided the employee (i) has not the option to receive, instead of provision for such death benefit, any part of such payment or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employer, and (ii) has not the right, under the provisions of the plan or system or policy of insurance providing for such

death benefit, to assign such benefit, or to receive a cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his employment with such employer;

"(3) The payment by an employer (without deduction from the remuneration of the employee) (A) of the tax imposed upon an employee under section 1400 or (B) of any payment required from an employee under a State unemployment compensation law; or

"(4) Dismissal payments which the employer is not legally required to make.

"(b) EMPLOYMENT.—The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

"(1) Agricultural labor (as defined in subsection (h) of this section);

"(2) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority;

"(3) Casual labor not in the course of the employer's trade or business;

"(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

"(5) Service performed on or in connection with a vessel not an American vessel by an employee, if the employee is employed on and in connection with such vessel when outside the United States;

"(6) Service performed in the employ of the United States Government, or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1410 by virtue of any other provision of law;

"(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 1410;

"(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

"(9) Service performed by an individual as an employee or employee representative as defined in section 1532;

"(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 101, if—

"(i) the remuneration for such service does not exceed $45, or

"(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, or

"(iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university;

" (B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101(1);

" (C) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (i) no part of its net earnings inures (other than through such payments) to the

benefit of any private shareholder or individual, and (ii) 85 per centum or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses;

"(D) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if (i) admission to membership in such association is limited to individuals who are officers or employees of the United States Government, and (ii) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual;

"(E) Service performed in any calendar quarter in the employ of a school, college, or university, not exempt from income tax under section 101, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed $45 (exclusive of room, board, and tuition);

"(11) Service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

"(12) Service performed in the employ of an instrumentality wholly owned by a foreign government—

"(A) If the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

"(B) If the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

"(13) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law;

"(14) Service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except (A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States); or

"(15) Service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

"(c) INCLUDED AND EXCLUDED SERVICE.—If the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection the term 'pay period' means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by paragraph (9) of subsection (b).

"(d) EMPLOYEE.—The term 'employee' includes an officer of a corporation.

"(e) STATE.—The term 'State' includes Alaska, Hawaii, and the District of Columbia.

"(f) PERSON.—The term 'person' means an individual, a trust or estate, a partnership, or a corporation.

"(g) AMERICAN VESSEL.—The term 'American vessel' means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State.

"(h) AGRICULTURAL LABOR.—The term 'agricultural labor' includes all services performed—

"(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

"(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

"(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

"As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards."

SEC. 607. Subchapter A of Chapter 9 of the Internal Revenue Code is amended by adding at the end thereof the following new section:

"SEC. 1432. This subchapter may be cited as the 'Federal Insurance Contributions Act'."

SEC. 608. Section 1600 of the Internal Revenue Code is amended to read as follows:

"SEC. 1600. RATE OF TAX.

"Every employer (as defined in section 1607(a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607(b)) paid by him during the calender year with respect to employment (as defined in section 1607(c)) after December 31, 1938."

SEC. 609. Section 1601 of the Internal Revenue Code is amended to read as follows:

"SEC. 1601. CREDITS AGAINST TAX.

"(a) CONTRIBUTIONS TO STATE UNEMPLOYMENT FUNDS.—

"(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.

"(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

"(3) The credit against the tax for any taxable year shall be permitted only for contributions paid on or before the last day upon which the taxpayer is required under section 1604 to file a return for such year; except that credit shall be permitted for contributions paid after such last day but before July 1 next following such last day, but such credit shall not exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid on or before such last day. The preceding provisions of this subdivision shall not apply to the credit against the tax of a taxpayer for any taxable year if such taxpayer's assets, at any time during the period from such last day for filing a return for such year to June 30 next following such last day, both dates inclusive, are in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

"(4) Upon the payment of contributions into the unemployment fund of a State which are required under the unemployment compensation law of that State with respect to remuneration on the basis of which, prior to such payment into the proper fund, the taxpayer erroneously paid an amount as contributions under another unemployment compensation law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made on the date the return for the taxable year was filed under section 1604.

"(5) Refund of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under this section, may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund.

"(b) ADDITIONAL CREDIT.—In addition to the credit allowed under subsection (a), a taxpayer may credit against the tax imposed by section 1600 for any taxable year an amount, with respect to the unemployment compensation law of each State certified for the taxable year as provided in section 1602 (or with respect to any provisions thereof so certified), equal to the amount, if any, by which the contributions required to be paid by him with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to the highest rate applied thereunder in the taxable year to any person having individuals in his employ, or to a rate of 2.7 per centum, whichever rate is lower.

"(c) LIMIT ON TOTAL CREDITS.—The total credits allowed to a taxpayer under this subchapter shall not exceed 90 per centum of the tax against which such credits are allowable."

SEC. 610. (a) Section 1602 of the Internal Revenue Code is amended to read as follows:

"SEC. 1602. CONDITIONS OF ADDITIONAL CREDIT ALLOWANCE.

"(a) STATE STANDARDS.—A taxpayer shall be allowed an additional credit under section 1601(b) with respect to any reduced rate of contributions permitted by a State law, only if the Board finds that under such law—

"(1) No reduced rate of contributions to a pooled fund or to a partially pooled account, is permitted to a person (or group of persons) having individuals in his (or their) employ except on the basis of his (or their) experience with respect to unemployment or other factors bearing a direct relation to unemployment risk during not less than the three consecutive years immediately preceding the computation date;

"(2) No reduced rate of contributions to a guaranteed employment account is permitted to a person (or a group of persons) having individuals in his (or their) employ unless (A) the guaranty of remuneration was fulfilled in the year preceding the computation date; and (B) the balance of such account amounts to not less than 2½ per centum of that part of the pay roll or pay rolls for the three years preceding the computation date by which

contributions to such account were measured; and (C) such contributions were payable to such account with respect to three years preceding the computation date;

"(3) Such lower rate, with respect to contributions to a separate reserve account, is permitted only when (A) compensation has been payable from such account throughout the preceding calendar year, and (B) such account amounts to not less than five times the largest amount of compensation paid from such account within any one of the three preceding calendar years, and (C) such account amounts to not less than 7½ per centum of the total wages payable by him (plus the total wages payable by any other employers who may be contributing to such account) with respect to employment in such State in the preceding calendar year.

"(4) Effective January 1, 1942, paragraph (3) of this subsection is amended to read as follows:

" '(3) No reduced rate of contributions to a reserve account is permitted to a person (or group of persons) having individuals in his (or their) employ unless (A) compensation has been payable from such account throughout the year preceding the computation date, and (B) the balance of such account amounts to not less than five times the largest amount of compensation paid from such account within any one of the three years preceding such date, and (C) the balance of such account amounts to not less than 2½ per centum of that part of the pay roll or pay rolls for the three years preceding such date by which contributions to such account were measured, and (D) such contributions were payable to such account with respect to the three years preceding the computation date.'

"(b) CERTIFICATION BY THE BOARD WITH RESPECT TO ADDITIONAL CREDIT ALLOWANCE.—

"(1) On December 31 in each taxable year, the Board shall certify to the Secretary of the Treasury the law of each State (certified with respect to such year by the Board as provided in section 1603) with respect to which it finds that reduced rates of contributions were allowable with respect to such taxable year only in accordance with the provisions of subsection (a) of this section.

"(2) If the Board finds that under the law of a single State (certified by the Board as provided in section 1603) more than one type of fund or account is maintained, and reduced rates of contributions to more than one type of fund or account were allowable with respect to any taxable year, and one or more of such reduced rates were allowable under conditions not fulfilling the requirements of subsection (a) of this section, the Board shall, on December 31 of such taxable year, certify to the Secretary of the Treasury only those provisions of the State law pursuant to which reduced rates of contributions were allowable with respect to such taxable year under conditions fulfilling the requirements of subsection (a) of this section, and shall, in connection therewith, designate the kind of fund or account, as defined in subsection (c) of this section, established by the provisions so certified. If the Board finds that a part of any reduced rate of contributions payable under such law or under such provisions is required to be paid into one fund or account and a part into another fund or account, the Board shall make such certification pursuant to this paragraph as it finds will assure the allowance of additional credits only with respect to that part of the reduced rate of contributions which is allowed under provisions which do fulfill the requirements of subsection (a) of this section.

"(3) The Board shall, within 30 days after any State law is submitted to it for such purpose, certify to the State agency its findings with respect to reduced rates of contributions to a type of fund or account, as defined in subsection (c) of this section, which are allowable under such State law only in accordance with the provisions of subsection (a) of this section. After making such findings, the Board shall not withhold its certification to the Secretary of the Treasury of such State law, or of the provisions thereof with respect to which such findings were made, for any taxable year pursuant to paragraph (1) or (2) of this subsection unless, after reasonable notice and opportunity for hearing to the State agency, the Board finds the State law no longer contains the provisions specified in subsection (a) of this section or the State has, with respect to such taxable year, failed to comply substantially with any such provision.

"(c) DEFINITIONS.—As used in this section—

"(1) RESERVE ACCOUNT.—The term 'reserve account' means a separate account in an unemployment fund, maintained with respect to a person (or group of persons) having individuals in his (or their) employ, from which account, unless such account is exhausted, is paid all and only compensation payable on the basis of services performed for such person (or for one or more of the persons comprising the group).

"(2) POOLED FUND.—The term 'pooled fund' means an unemployment fund or any part thereof (other than a reserve account or a guaranteed employment account) into which the total contributions of persons contributing thereto are payable, in which all contributions are mingled and undivided, and from which compensation is payable to all individuals eligible for compensation from such fund.

"(3) PARTIALLY POOLED ACCOUNT.—The term 'partially pooled account' means a part of an unemployment fund in which part of the fund all contributions thereto are mingled and undivided, and from which part of the fund compensation is payable only to individuals to whom compensation would be payable from a reserve account or from a guaranteed employment account but for the exhaustion or termination of such reserve account or of such guaranteed employment account. Payments from a reserve account or guaranteed employment account into a partially pooled account shall not be construed to be inconsistent with the provisions of paragraph (1) or (4) of this subsection.

"(4) GUARANTEED EMPLOYMENT ACCOUNT.—The term 'guaranteed employment account' means a separate account, in an unemployment fund, maintained with respect to a person (or group of persons) having individuals in his (or their) employ who, in accordance with the provisions of the State law or of a plan thereunder approved by the State agency.

"(A) guarantees in advance at least 30 hours of work, for which remuneration will be paid at not less than stated rates, for each of 40 weeks (or if more, one weekly hour may be deducted for each added week guaranteed) in a year, to all the individuals who are in his (or their) employ in, and who continue to be available for suitable work in, one or more distinct establishments, except that any such individual's guaranty may commence after a probationary period (included within the 11 or less consecutive weeks immediately following the first week in which the individual renders services), and

"(B) gives security or assurance, satisfactory to the State agency, for the fulfillment of such guaranties, from which account, unless such account is exhausted or terminated, is paid all and only compensation, payable on the basis of services performed for such person (or for one or more of the persons comprising the group), to any such individual whose guaranteed remuneration has not been paid (either pursuant to the guaranty or from the security or assurance provided for the fulfillment of the guaranty), or whose guaranty is not renewed and who is otherwise eligible for compensation under the State law.

"(5) YEAR.—The term 'year' means any 12 consecutive calendar months.

"(6) BALANCE.—The term 'balance', with respect to a reserve account or a guaranteed employment account, means the amount standing to the credit of the account as of the computation date; except that, if subsequent to January 1, 1940, any moneys have been paid into or credited to such account other than payments thereto by persons having individuals in their employ, such term shall mean the amount in such account as of the computation date less the total of such other moneys paid into or credited to such account subsequent to January 1, 1940.

"(7) COMPUTATION DATE.—The term 'computation date' means the date, occurring at least once in each calendar year and within 27 weeks prior to the effective date of new rates of contributions, as of which such rates are computed.

"(8) REDUCED RATE.—The term 'reduced rate' means a rate of contributions lower than the standard rate applicable under the State law, and the term 'standard rate' means the rate on the basis of which variations therefrom are computed."

SEC. 611. Paragraphs (1), (3), and (4) of section 1603(a) of the Internal Revenue Code are amended to read as follows:

"(1) All compensation is to be paid through public employment offices or such other agencies as the Board may approve;

"(3) All money received in the unemployment fund shall (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 1606(b)) immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904 of the Social Security Act (49 Stat. 640; U. S. C., 1934 ed., Title 42, sec. 1104);

"(4) All money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b);"

SEC. 612. Section 1604(b) of the Internal Revenue Code is amended to read as follows:

"(b) EXTENSION OF TIME FOR FILING.—The Commissioner may extend the time for filing the return of the tax imposed by this subchapter, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than 90 days."

SEC. 613. Section 1606 of the Internal Revenue Code is amended to read as follows:

"SEC. 1606. INTERSTATE COMMERCE AND FEDERAL INSTRUMENTALITIES.

"(a) No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.

"(b) The legislature of any State may require any instrumentality of the United States (except such as are (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1600 by virtue of any other provision of law), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Board under section 1603 and (except as provided in section 5240 of the Revised Statutes, as amended, and as modified by subsection (c) of this section) to comply otherwise with such law. The permission granted in this subsection shall apply (1) only to the extent that no discrimination is made against such instrumentality, so that if the rate of contribution is uniform upon all other persons subject to such law on account of having individuals in their employ, and upon all employees of such persons, respectively, the contributions required of such instrumentality or the individuals in its employ shall not be at a greater rate than is required of such other persons and such employees, and if the rates are determined separately for different persons or classes of persons having individuals in their employ or for different classes of employees, the determination shall be based solely upon unemployment experience and other factors bearing a direct relation to unemployment risk, and (2) only if such State law makes provision for the refund of any contributions required under such law from an instrumentality of the United States or its employees for any year in the event said State is not certified by the Board under section 1603 with respect to such year.

"(c) Nothing contained in section 5240 of the Revised Statutes, as amended, shall prevent any State from requiring any national banking association to render returns and reports relative to the association's employees, their remuneration and services, to the same extent that other persons are required to render like returns and reports under a State law requiring contributions to an unemployment fund. The Comptroller of the Currency shall, upon receipt of a copy of any such return or report of a national banking association from, and upon request of, any duly authorized official, body, or commission of a State, cause an examination of the correctness of such return or report to be made at the time of the next succeeding examination of such association, and shall thereupon transmit to such official, body, or commission a complete statement of his findings respecting the accuracy of such returns or reports.

"(d) No person shall be relieved from compliance with a State unemployment compensation law on the ground that services were performed on land or

premises owned, held, or possessed by the United States, and any State shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States."

SEC. 614. Effective January 1, 1940, section 1607 of the Internal Revenue Code is amended to read as follows:

"SEC. 1607. DEFINITIONS.

"When used in this subchapter—

"(a) EMPLOYER.—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 employed by him in employment for some portion of the day (whether or not at the same moment of time) was 8 or more.

"(b) WAGES.—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—

"(1) 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;

"(2) The amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer which makes provision for his employees generally or for a class or classes of his employees (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death, provided the employee (i) has not the option to receive, instead of provision for such death benefit, any part of such payment or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employer, and (ii) has not the right, under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit, or to receive a cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his employment with such employer;

"(3) The payment by an employer (without deduction from the remuneration of the employee) (A) of the tax imposed upon an employee under section 1400 or (B) of any payment required from an employee under a State unemployment compensation law; or

"(4) Dismissal payments which the employer is not legally required to make.

"(c) EMPLOYMENT.—The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

"(1) Agricultural labor (as defined in subsection (l));

"(2) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority;

"(3) Casual labor not in the course of the employer's trade or business;

"(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

"(5) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother;

"(6) Service performed in the employ of the United States Government or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1600 by virtue of any other provision of law;

"(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more

States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 1600;

"(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

"(9) Service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act;

"(10) (A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 101, if—

"(i) the remuneration for such service does not exceed $45, or

"(ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, or

"(iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university;

"(B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101(1);

"(C) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (i) no part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (ii) 85 per centum or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses;

"(D) Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if (i) admission to membership in such association is limited to individuals who are officers or employees of the United States Government, and (ii) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual;

"(E) Service performed in any calendar quarter in the employ of a school, college, or university, not exempt from income tax under section 101, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed $45 (exclusive of room, board, and tuition);

"(11) Service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);

"(12) Service performed in the employ of an instrumentality wholly owned by a foreign government—

"(A) If the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

"(B) If the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

"(13) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law;

"(14) Service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission; or

"(15) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

"(d) INCLUDED AND EXCLUDED SERVICE.—If the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection the term 'pay period' means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by paragraph (9) of subsection (c).

"(e) STATE AGENCY.—The term 'State agency' means any State officer, board, or other authority, designated under a State law to administer the unemployment fund in such State.

"(f) UNEMPLOYMENT FUND.—The term 'unemployment fund' means a special fund, established under a State law and administered by a State agency, for the payment of compensation. Any sums standing to the account of the State agency in the Unemployment Trust Fund established by section 904 of the Social Security Act, as amended, shall be deemed to be a part of the unemployment fund of the State, and no sums paid out of the Unemployment Trust Fund to such State agency shall cease to be a part of the unemployment fund of the State until expended by such State agency. An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year, or such portion of the year as the unemployment fund was in existence, no part of the moneys of such fund was expended for any purpose other than the payment of compensation (exclusive of expenses of administration) and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b).

"(g) CONTRIBUTIONS.—The term 'contributions' means payments required by a State law to be made into an unemployment fund by any person on account of having individuals in his employ, to the extent that such payments are made by him without being deducted or deductible from the remuneration of individuals in his employ.

"(h) COMPENSATION.—The term 'compensation' means cash benefits payable to individuals with respect to their unemployment.

"(i) EMPLOYEE.—The term 'employee' includes an officer of a corporation.

"(j) STATE.—The term 'State' includes Alaska, Hawaii, and the District of Columbia.

"(k) PERSON.—The term 'person' means an individual, a trust or estate, a partnership, or a corporation.

"(l) AGRICULTURAL LABOR.—The term 'agricultural labor' includes all service performed—

"(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

"(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

"(3) In connection with the production or harvesting of maple sirup or maple sugar or any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or

in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

"As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards."

SEC. 615. Subchapter C of Chapter 9 of the Internal Revenue Code is amended by adding at the end thereof the following new section:

"SEC. 1611. This subchapter may be cited as the 'Federal Unemployment Tax Act'."

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TITLE VIII—AMENDMENTS TO TITLE XI OF THE SOCIAL SECURITY ACT.

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SEC. 802. Title XI of such Act is further amended by adding at the end thereof the following new sections:

"DISCLOSURE OF INFORMATION IN POSSESSION OF BOARD.

"SEC. 1106. No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act or the Federal Insurance Contributions Act or under regulations made under authority thereof, which has been transmitted to the Board by the Commissioner of Internal Revenue, or of any file, record, report, or other paper, or any information, obtained at any time by the Board or by any officer or employee of the Board in the course of discharging the duties of the Board, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Board or from any officer or employee of the Board, shall be made except as the Board may by regulations prescribe. Any person who shall violate any provision of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both.

"PENALTY FOR FRAUD.

"SEC. 1107. (a) Whoever, with the intent to defraud any person, shall make or cause to be made any false representation concerning the requirements of this Act, the Federal Insurance Contributions Act, or the Federal Unemployment Tax Act, or of any rules or regulations issued thereunder, knowing such representations to be false, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both.

"(b) Whoever, with the intent to elicit information as to the date of birth, employment, wages, or benefits of any individual (1) falsely represents to the Board that he is such individual, or the wife, parent, or child of such individual, or the duly authorized agent of such individual, or of the wife, parent, or child of such individual, or (2) falsely represents to any person that he is an employee or agent of the United States, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both."

TITLE IX—MISCELLANEOUS PROVISIONS.

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SEC. 902. (a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

(1) Before the sixtieth day after the date of the enactment of this Act;

(2) On or after such sixtieth day, with respect to wages paid after the fortieth day after such date of enactment;

(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

(b) Upon the payment of contributions into the unemployment fund of a State which are required under the unemployment compensation law of that State with respect to remuneration on the basis of which, prior to such payment into the proper fund, the taxpayer erroneously paid an amount as contributions under another unemployment compensation law, the payment into the proper fund shall, for purposes of credit against the tax imposed by section 901 of the Social Security Act for the calendar years 1936, 1937, and 1938, respectively, be deemed to have been made at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions with respect to services subject to such other law, the payment into the proper fund shall, for purposes of credit against the tax, be deemed to have been made on the date the return for the taxable year was filed under section 905 of the Social Security Act.

(c) The provisions of the Social Security Act in force prior to February 11, 1939 (except the provisions limiting the credit to amounts paid before the date of filing returns) shall apply to allowance of credit under subsections (a), (b), and (h), and the terms used in such subsections shall have the same meaning as when used in Title IX of the Social Security Act prior to such date. The total credit allowable against the tax imposed by section 901 of such Act for the calendar years 1936, 1937, and 1938, respectively, shall not exceed 90 per centum of such tax.

(d) Refund of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under subsections (a), (b), and (h), may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund.

(e) Notwithstanding the provisions of section 1601(a)(2) of the Internal Revenue Code, as amended, credit shall be permitted under such section 1601, against the tax for the taxable year in which remuneration is paid for services rendered during a prior year, for the amounts of contributions with respect to such remuneration which have not been credited against the tax for any prior taxable year. Credit shall be permitted under this subsection only against the tax for the years 1940, 1941, and 1942, and only for contributions with respect to remuneration for services rendered after December 31, 1938.

(f) No tax shall be collected under Title VIII or IX of the Social Security Act or under the Federal Insurance Contributions Act or the Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1940, which are described in subparagraphs (11) and (12) of sections 1426(b) and 1607(c) of the Internal Revenue Code, as amended, and any such tax heretofore collected (including penalty and interest with respect thereto, if any), shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. No payment shall be made under Title II of the Social Security Act with respect to services rendered prior to January 1, 1940, which are described in subparagraphs (11) and (12) of section 209(b) of such Act, as amended.

* * * * * * *

(h) Notwithstanding the provision of section 907(f) of the Social Security Act limiting the term "contributions" to payments required by a State law, credit shall be permitted against the tax imposed by section 901 of such Act for

the calendar year 1936 or 1937, for so much of any payments made as contributions for such year into the unemployment fund of a State which are held by the highest court of such State not to be required payments under the unemployment compensation law of such State if they are not returned to the taxpayer. So much of such payments as are not so returned shall be considered to be "contributions" for the purposes of section 903 of such Act. The periods of limitations prescribed by section 3312(a) of the Internal Revenue Code shall not begin to run, in the case of the tax for such year of any taxpayer to whom any such payment is returned, until the last such payment is returned to the taxpayer.

(i) No part of the tax imposed by the Federal Unemployment Tax Act or by Title IX of the Social Security Act, whether or not the taxpayer is entitled to a credit against such tax, shall be deemed to be a penalty or forfeiture within the meaning of section 57j of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended.

SEC. 903. Section 1430 of the Internal Revenue Code is amended by striking out "3762" and inserting in lieu thereof "3661."

SEC. 904. Effective January 1, 1940, section 1428 of the Internal Revenue Code is amended by striking out "paragraphs (9) and (10)" and inserting in lieu thereof "paragraph (9)."

SEC. 905. (a) No service performed at any time during the calendar year 1939 by any individual shall, by reason of the individual having attained the age of 65, be excepted from employment as defined in section 1426(b) of Subchapter A of Chapter 9 of the Internal Revenue Code. Paragraph (4) of such section (which excepts such service from employment) is repealed as of the effective date thereof, and paragraph (4) of section 811(b) of the Social Security Act is repealed as of January 1, 1939. The tax on employees imposed by section 1400 of such subchapter and the tax on employers imposed by section 1410 of such subchapter, and the provisions of law applicable to such taxes, shall apply with respect to remuneration paid after December 31, 1938, for service which, by reason of the enactment of this section, constitutes employment as so defined.

(b) Notwithstanding any other provision of law, no employer shall be liable for the tax on any employee, imposed by section 1400 of such subchapter (unless the employer collects such tax from the employee), with respect to service performed before the date of enactment of this Act which constitutes employment by reason of the enactment of this section, except to the extent that the employer has under his control at any time on or after the ninetieth day after such date amounts of remuneration earned at any time by the employee.

* * * * * * *

SEC. 909. Subsection (h) of section 5 of the Home Owners' Loan Act of 1933, as amended, is amended by inserting after the words "United States," where they first appear in such subsection, the following: "(except the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code with respect to wages paid after December 31, 1939, for employment after such date)."

SEC. 910. (a) The provisions of section 213(f) of the Revenue Act of 1939 shall apply without regard to the exception therein provided, if (1) the taxpayer in the determination referred to in such exception is a corporation, (2) such determination is by a decision of the Board of Tax Appeals or of a court, (3) under the law applicable to the taxable year in which the exchange occurred, the basis of the property, acquired upon the exchange from the taxpayer by the party assuming a liability of the taxpayer or acquiring the property subject to a liability, is the cost to such party of the property acquired upon the exchange, and (4) the taxpayer in pursuance of the plan of reorganization effected a complete liquidation immediately subsequent to the exchange.

(b) No overpayment determined to have been made for any taxable year by reason of the provisions of paragraph (a) of this section shall be refunded or credited unless a claim for refund is filed within the period of limitations otherwise provided by law for filing a claim for refund for such taxable year, or within one year from the date of enactment of the Revenue Act of 1939, whichever of such periods expires the later. No interest shall be allowed or paid on the amount of any overpayment refunded or credited by reason of the provisions of this section.

SEC. 911. Subsection (d) of section 602 of the Revenue Act of 1936, as amended, (relating to floor stocks adjustment) is amended by striking out "January 1, 1937," and inserting in lieu thereof "January 1, 1940."

Approved, August 10, 1939.

1939–39–10028

PUBLIC, NO. 259, SEVENTY-SIXTH CONGRESS. (CHAPTER 417, FIRST SESSION [H. R. 6746].)

An Act To amend certain provisions of the Merchant Marine and Shipping Acts, to further the development of the American merchant marine, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *.

SEC. 7. Title V of such Act, as amended, is amended by adding at end thereof a new section to read as follows:

SEC. 510. * * *.

(e) No gain shall be recognized to the owner for the purpose of Federal income taxes in the case of a transfer of an obsolete vessel to the Commission under the provisions of this section. The basis for gain or loss upon a sale or exchange and for depreciation under the applicable Federal income-tax laws of a new vessel acquired as contemplated in this section shall be the same as the basis of the obsolete vessel or vessels exchanged for credit upon the acquisition of such new vessel, increased in the amount of the cost of such vessel (other than the cost represented by such obsolete vessel or vessels) and decreased in the amount of loss recognized upon such transfer.

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Approved August 4, 1939.

COMMITTEE REPORTS.

1939-40-10044

THE PUBLIC SALARY TAX ACT OF 1939.

[House of Representatives Report No. 26, Seventy-sixth Congress, First Session.]

[February 7, 1939.]

Mr. Doughton, from the Committee on Ways and Means, submitted the following report [to accompany H. R. 3790]:

The Committee on Ways and Means, to whom was referred the bill (H. R. 3790) relating to the taxation of the compensation of public officers and employees, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

The need for such a bill was set forth by the President in his message dated April 25, 1938, and again in his message dated January 19, 1939. In these messages he pointed out that a fair and effective income tax ought to subject compensation of those who earn their livelihood from government to the same burdens as compensation from private employment. In his message of January 19, 1938, he also pointed out that, in the interest of equity and justice, immediate legislation is required to prevent recent judicial decisions from operating in such a retroactive fashion as to impose tax liability for past years on State, local, and other employees who, in good faith, believed their compensation for such years was exempt from Federal tax.

The bill subjects to Federal income tax for taxable years beginning after December 31, 1938, the compensation of all State and local officers and employees; grants consent to the States to tax the compensation received after December 31, 1938, by Federal officers and employees; and, in accordance with the President's message, relieves from Federal income taxation for taxable years commencing prior to January 1, 1939, the compensation of certain State and local officers and employees.

For many years the exemption from Federal income taxes of State and local officers and employees has aroused widespread public criticism and disapproval. Similarly, the exemption of the compensation of Federal officers and employees from income taxes imposed under the authority of the various States has been widely condemned.

These exemptions, which are not provided expressly in the Constitution, have been thought to be required by the decisions of the Supreme Court, based upon the implications of the Constitution. Several recent decisions of the Supreme Court, particularly at the October, 1937, term, have considered the subject of intergovernmental tax immunities. These decisions make it clear that many of the assumptions heretofore entertained as to the scope of these tax immunities are erroneous. They indicate that there is no constitutional objection to the nondiscriminatory taxation, under the Federal income tax, of the compensation of officers and employees of the various States and their political subdivisions, agencies, and instrumentalities. This view is fortified by the opinion of the Supreme Court in the case of *Helvering* v. *Gerhardt* (304 U. S., 405 (1938) [Ct. D. 1343, C. B. 1938-1, 246]). A comprehensive study of the taxation of State and local officers and employees made by the Department of Justice indicates that such taxation of compensation is constitutional.

This bill therefore provides in a clear and unequivocal manner for such taxation. If there are any possible doubts as to the validity of this taxation, the bill thus enables the issue to be squarely presented to the Supreme Court.

The validity of the application of income taxes imposed under the authority of the various States to the compensation of officers and employees of the Federal Government, however, may be governed by other considerations. There are certain indications in the case of *McCulloch* v. *Maryland* (4 Wheat., 316 (1819)), which were repeated in the Gerhardt case, that while State and local officers and employees may be subjected to Federal income tax, Federal officers and employees may not, without the consent of the United States, be subjected to income taxation under the authority of the various States. Your committee believes that it is essential to a fair solution of the problem presented by intergovernmental tax immunities that Federal officers and employees should, like

other individuals, be subject to income taxation under the authority of the States. The bill, therefore, contains an express consent to such taxation. The provisions heretofore referred to appear in Title I of the bill.

Information presented to the committee indicates that in the year 1937 there were approximately 2,600,000 State and local officers and employees and 1,200,000 Federal officers and employees and that the State and Federal pay rolls were $3,600,000,000 and $1,900,000,000, respectively. The committee has been informed that the average level of salaries paid by State and local governments is comparatively low so that the inclusion of the compensation of such employees in gross income subject to the Federal income tax is not expected to result in the addition of more than $16,000,000 annually to the Federal revenues. Inasmuch as there is considerable diversity in the provisions of the various State income tax laws, it is extremely difficult to estimate the probable effect on State revenues of the imposition of State income taxes upon compensation received by Federal officers and employees.

As a consequence of the Gerhardt decision of the Supreme Court it now appears that a considerable number of State and local officers and employees who heretofore believed in good faith that they were not subject to Federal income taxation may now be required to pay Federal income tax for past years. If no returns were filed by such persons, this liability may extend back for a period of more than 12 years. Since these persons, as a class, are dependent upon their salaries for support, and are not prepared to meet such a heavy liability, your committee believes that relief should be given to such officers and employees. Title II of the bill therefore provides that assessment of tax against such officers and employees for prior years shall not be made and also provides for refunds of tax paid.

Proper restrictions are inserted in the bill to insure that the limitations upon assessment and provisions for refund in Title II will not apply in the case of those groups of State and local employees whose liability for Federal income tax was established some years ago. Since these employees have been regularly paying Federal income tax and therefore were in no way surprised by the recent decisions of the Court, your committee believes that it would be improper to relieve such employees of their tax liability for past years.

The scope of the relief granted by Title II and the method of affording such relief therein provided have been devised as an integral part of the complete treatment of the problem with respect to both the future and the past. In view of this interrelation between Titles I and II, it is imperative that the bill be passed in its entirety. Any separation of Title I would require a reexamination of the scope and functioning of Title II. Moreover, your committee realizes that the relief accorded in Title II will render moot certain cases now pending which, if they were allowed to proceed to final decision, would settle important phases of the problem of intergovernmental tax immunities. The disadvantages of such abandonment of pending litigation, however, are outweighed by the fact that future taxation of all State and local salaries is clearly established by the express legislation in Title I.

A description of the provisions of the bill in detail now follows:

TITLE I. PROSPECTIVE TAXATION OF PUBLIC EMPLOYEES.

Section 1: Section 1 of the bill amends section 22(a) of the Revenue Act of 1938 (which defines gross income) by providing expressly that there shall be included in gross income, salaries, wages, or 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." Under this amendment the wages, salaries, and compensation of all officers and employees of the respective States and of their political subdivisions and agencies and instrumentalities, without exception, are included in gross income. The committee recognizes that the language of section 22(a) as it previously existed was broad enough to include in gross income the compensation of such officers and employees. The Treasury Department, however, believing the compensation of some of these officers and employees to be constitutionally exempt has, until recently, by administrative action treated their compensation as nontaxable. This administrative action, followed by repeated reenactment of the statutory provisions without change, might lead to the contention that Congress by such reenactment had exempted such State and local officers and employees. This contention would only serve to confuse the issue of the constitutionality of the future taxation of all State and local officers and employees. To eliminate the

possibility of such confusion, therefore, your committee recommends amendment of the Revenue Act of 1938 to insert the proposed language so that there can be no doubt whatever of the intention of Congress that all State and local officers and employees, without exception, shall be subject to Federal income tax for taxable years beginning after December 31, 1938. It is not to be inferred from this amendment, however, that those groups of State and local officers and employees from whom Federal income taxes have previously been collected were not subject to tax under the language of section 22(a) in earlier Revenue Acts or in the Revenue Act of 1938 as it existed prior to the amendment proposed in the bill.

The bill contains no express provision subjecting Federal officers and employees to Federal taxation for the reason that such a provision is unnecessary. The uniform construction of the definition of gross income in all Revenue Acts has been that they are subject to tax and their liability to Federal tax is established beyond question.

Section 2: Section 116(b) of the Revenue Act of 1938 provides for the exemption from Federal income tax of compensation of teachers in educational institutions employed by Alaska or Hawaii, or any political subdivision thereof. Since all teachers employed by the States will be subject to Federal income tax under section 1 of the bill, it is believed proper to eliminate the exemption referred to so that teachers in the Territories of Alaska and Hawaii will be subject to tax to the same extent as teachers in the various States. Section 2, therefore, provides that section 116(b) of the Revenue Act of 1938 shall not apply to any taxable year beginning after December 31, 1938.

Section 3: In order to facilitate reciprocal taxation as between State and Federal Governments, your committee believes that the United States should expressly consent to the taxation of the compensation of its officers and employees. Section 3 of the bill therefore provides that the United States 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.

It will be noted that the consent extends to taxation not only by the State but also by other duly constituted taxing authorities, of the compensation of Federal officers and employees. Under this provision if any local governmental units have authority to and do impose income taxes, tax may be imposed upon such compensation subject to the jurisdiction of such units.

The consent is not intended to operate, nor could it operate, as a consent to any taxation to which as individuals these officers and employees are entitled to object either under the provisions of the Federal Constitution or of the constitutions or statutes of the respective States. For example, the consent has no effect upon the rights of an officer of the Federal Government to object that the imposition of a State tax upon him is invalid under the fourteenth amendment. Thus he may urge that a particular tax is invalid as to him because of an unreasonable classification, or the lack of geographical jurisdiction to tax, or for other reasons. Similarly, the consent has no effect upon the rights which such officers and employees possess as individuals under the various State constitutions and laws. To protect the Federal Government against the unlikely possibility of State and local taxation of compensation of Federal officers and employees which is aimed at, or threatens the efficient operation of, the Federal Government, the consent is expressly confined to taxation which does not discriminate against such officers or employees because of the source of their compensation. Inasmuch as section 1 relating to State and local officers and employees applies only with respect to years beginning after December 31, 1938, section 3 consents to taxation of Federal officers and employees only with respect to compensation received after December 31, 1938.

Title II. Retroactive Relief to Certain State and Local Officers and Employees.

This title affords relief to employees of States of the Union and their local governments who have not been paying Federal income tax and in many cases have not even filed returns, but who may, under *Helvering* v. *Gerhardt*, be subject to Federal income tax for past years. However, there are certain

groups of State and local employees, particularly those engaged in proprietary functions (such as the operation of State liquor stores), who have for a number of years regularly paid Federal tax because their liability was fully established at an earlier date. It would be unfair and inequitable to relieve this group of employees from tax liability which was in no way a surprise to them and which they paid without question. It is therefore undesirable to relieve, in blanket fashion, all State and local officers and employees from liability for income tax in earlier years. Since the groups who should not be relieved have regularly paid their income tax and it has been currently assessed, while those who have been surprised by the Gerhardt case and who should be given relief have, in most cases, not paid their tax and have not been assessed, the general plan of Title II is to provide that assessments previously made shall not be disturbed but that no new assessments shall be made.

Title II applies only to State and local officers and employees and not to other persons having dealings with State and local governments, since the taxability of the compensation of such other persons has long been recognized. Such persons are generally held to be independent contractors for purposes of Federal income taxation. Their liability for such tax has been clearly established since the case of *Metcalf & Eddy* v. *Mitchell* (1926) (269 U. S., 514 [T. D. 3824, C. B. V–1, 218 (1926)]) and they are not officers and employees within the meaning of this bill.

Section 201: Section 201 applies to Federal income tax (including interest, additions to tax, and additional amounts), for taxable years beginning prior to January 1, 1938, 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.

Subsection (a) provides that income tax attributable to the compensation of such officers and employees for years beginning prior to January 1, 1938, which was not assessed prior to January 1, 1939, shall not be assessed and no proceeding in court for the collection thereof shall be begun or prosecuted.

Subsection (b) provides that if any such income tax for such years is assessed after December 31, 1938, the assessment shall be abated and any amount collected in pursuance thereof shall be credited or refunded in the same manner as in the case of an income tax erroneously collected. This provision thus authorizes the refund of any tax assessed against State and local officers and employees for any taxable year beginning prior to January 1, 1938, if assessment is made after 1938.

In a relatively small number of cases State and local officers and employees who are in all respects analogous to the groups given relief under section 201 (a) and (b) have paid their tax but have contested their liability by way of claim for refund rather than by contesting a deficiency asserted against them. It would be inequitable to deny relief to these people who have paid their taxes and at the same time grant relief to similarly situated persons who have not paid their taxes. Section 201(c) therefore provides for credit or refund to such persons of income tax, for any taxable year beginning prior to January 1, 1938, attributable to compensation received as a State or local officer or employee, if the tax has been collected on or before the date of enactment of the bill, in the following cases:

(1) where a claim for refund of such amount was filed before January 19, 1939 (the date of the President's message), and was not disallowed on or before the date of the enactment of this bill;

(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 bill;

(3) where a suit for the recovery of such amount is pending on the date of the enactment of this bill; 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 bill.

It is believed that the foregoing cases include virtually all State and local officers and employees who are entitled to relief from liability and who have paid their tax. In general, subsection (c) does not include those State and local officers and employees who are not entitled to relief, such as those engaged in proprietary functions, because, their liability having been previously clearly established, they have not filed claims for refund or otherwise asserted their rights in any of the ways described in this subsection.

Section 202: As has been stated, section 201 applies only with respect to income tax for taxable years beginning prior to January 1, 1938. Your committee believes, however, that it is fair and equitable to relieve State and local officers and employees in the groups which are entitled to relief from income tax liability for taxable years commencing during 1938. Section 202 accomplishes this result without at the same time relieving from liability the groups of State and local officers and employees, such as those engaged in proprietary functions, whose liability for Federal income tax was long previously established. It provides that a State or local officer or employee who did not include his compensation received as such in his return for a taxable year beginning during 1937, shall not include in gross income for a taxable year beginning in 1938 compensation received as such an officer or employee. Obviously, if an individual did not file a return he did not include his compensation in his return. Under this provision a person who, for the first time, becomes during 1938 an officer or employee of a State or political subdivision or agency or instrumentality thereof will be exempt from income tax for his taxable year beginning in 1938 with respect to his compensation received as such. This section also provides that although a State or local officer or employee included his compensation in gross income for a taxable year beginning during 1937, he shall be exempt from tax for the taxable year beginning during 1938, if he is entitled under section 201 to obtain credit or refund of the tax paid for the taxable year beginning during 1937.

Section 203: Sections 201 and 202 afford relief to virtually all State and local officers and employees equitably entitled thereto for taxable years beginning prior to 1939. It is possible, however, that there may be a few cases, not ascertainable at this time, which are not covered by these sections. For example, a public-school teacher may have paid tax on his compensation for the taxable year 1937 and, although intending to contest his liability therefor, had not filed claim for refund before January 19, 1939 (and therefore is not given relief by section 201). Since those public employees who did not pay tax are relieved from liability by sections 201 and 202, similar relief should be granted in the case of the teacher who paid his tax. Likewise, an employee of the Port of New York Authority who paid tax with respect to his compensation, but who had not filed claim for refund before January 19, 1939, should be given relief. Section 203, therefore, authorizes the Commissioner, under regulations prescribed by him with the approval of the Secretary, to grant relief by way of credit or refund. Such credit or refund under this section is to be made only if the State or local officer or employee files a claim therefor after January 18, 1939, and the Commissioner finds that disallowance of the claim would result in the application of the doctrines in the case of *Helvering* v. *Gerhardt* extending the classes of officers and employees subject to Federal taxation. Such relief may be granted by the Commissioner with respect to claims for refund for a taxable year beginning during 1938 as well as all taxable years prior thereto, subject to the qualification of section 204.

Section 204: Section 204 provides that the claims for refund, suits, or petitions to the Board referred to in the preceding sections are subject to the statute of limitations properly applicable thereto.

Section 205: This section provides that "compensation" as used in sections 201, 202, and 203 shall not include compensation to the extent that it is paid directly or indirectly by the United States or any agency or instrumentality thereof.

Section 206: This section provides that the terms used in the bill shall have the same meaning as when used in Title I of the Revenue Act of 1938.

Section 207: This section provides for the separability of the titles of the bill.

1939–40–10045

PUBLIC SALARY TAX ACT OF 1939.

[Senate Report No. 112, Seventy-sixth Congress, First Session. Calendar No. 118.]

[February 24, 1939.]

Mr. Brown, from the Committee on Finance, submitted the following report [to accompany H. R. 3790]:

The Committee on Finance, to whom was referred the bill (H. R. 3790) relating to the taxation of the compensation of public officers and employees, having con-

sidered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

A desire to obtain the end toward which this legislation is directed has been felt generally since the adoption of the graduated income tax. It has been widely conceded that a fair and effective income tax ought to subject the compensation of public officers and employees to the same general burden of taxation as is borne by private citizens.

The need for this legislation was emphasized by the President in his message dated April 25, 1938, and again in his message dated January 19, 1939. In addition to pointing out the equity involved in subjecting the future salaries of those who earn their livelihood in governmental service to the income-tax laws of the Nation and of the several States, the President, in his message dated January 19, 1939, drew attention to the requirement of immediate legislation to prevent recent judicial decisions from operating in such a retroactive fashion as to impose tax liability for past years on State, local, and other employees who, in good faith, believed their compensation for such years was exempt from Federal tax.

Title I of the bill subjects to Federal income tax for taxable years beginning after December 31, 1938, the compensation of all State and local officers and employees and grants consent to the States to tax the compensation received after December 31, 1938, by Federal officers and employees. Title II, in accordance with the President's message, relieves from Federal income taxation for taxable years commencing prior to January 1, 1939, the compensation of such State and local officers and employees as were affected by recent Court decisions.

The scope of the relief granted by Title II and the method of affording such relief therein provided have been devised as an integral part of the complete treatment of the problem with respect to both the future and the past. In view of this interrelation between Titles I and II, it is imperative that the bill be passed in its entirety. Any separation of Title I would require a reexamination of the scope and functioning of Title II. Moreover, your committee realizes that the relief accorded in Title II will render moot certain cases now pending which, if they were allowed to proceed to final decision, would settle important phases of the problem of intergovernmental tax immunities. The disadvantages of such abandonment of pending litigation, however, are outweighed by the fact that future taxation of all State and local salaries is clearly established by the express legislation in Title I.

The entire problem of intergovernmental immunity, with respect to income taxation, has been under the scrutiny of the Special Committee on Taxation of Governmental Securities and Salaries under the chairmanship of Mr. Brown. This committee was established by Senate Resolution 303 (Seventy-fifth Congress, third session) and consists of three members of the Committee on Finance (Mr. Byrd, Mr. Townsend, and Mr. Brown) and three members of the Committee on the Judiciary (Mr. Logan, Mr. Austin, and Mr. Miller).

Considerable testimony, both written and oral, has been presented to this special committee at hearings beginning on January 18, 1939, and ending February 16, 1939. Many briefs and memoranda were received on various phases of the problem of intergovernmental tax immunities. However, this material, as well as the oral testimony dealt almost exclusively with the question of the taxation of bond interest. That committee is not yet prepared to make a recommendation with regard to this question. Similarly, your committee expresses no opinion upon the taxation of interest from governmental securities. It believes, as does the special committee, that the problems involved in the two phases of this question present separate and distinct economic and legal aspects and that the Supreme Court may uphold the present bill on grounds different from those applicable to the taxation of bond interest.

Legal authorities, both for and against the President's proposal, agree that there is a real and substantial distinction between the two. This was brought out by questions propounded by the chairman of the special committee to witnesses appearing at the hearing. For example, Mr. Epstein, representing the attorneys general of the various States, in response to such a question, stated:

"The taxation of salaries may not impede the actual operation of the Government, and, as has been pointed out by Mr. Justice Stone, it does not follow that the taxation of the salary of an official would mean the nonperformance of his services, and it does not mean that the State would lose revenues, or that you would have to increase his salary.

"The taxation of interest on bonds takes an entirely different turn, and has an effect on the borrowing power of the State. So, you have there a basis for distinction."

Further evidence of the existence of such a distinction is shown from the majority opinion in *James* v. *Dravo Contracting Co.* (302 U. S., 134), decided December 6, 1937. While this case dealt with the compensation of independent contractors, it clearly draws a distinction between compensation for services and bond interest. Speaking for the majority of the Court, Mr. Chief Justice Hughes said:

"There is no ineluctable logic which makes the doctrine of immunity with respect to Government bonds applicable to the earnings of an independent contractor rendering services to the Government. That doctrine recognizes the direct effect of a tax which 'would operate on the power to borrow before it is exercised' (*Pollock* v. *Farmers Loan & Trust Co.*, supra) and which would directly affect the Government's obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the Government to investors in its securities and its ability to maintain its credit—considerations which are not found in connection with contracts made from time to time for the services of independent contractors * * *."

ECONOMIC ASPECTS.

At the present time, Federal employees are subject to Federal income taxes, but are exempt from State income taxes. State and local employees, on the other hand, are subject to State income taxes, but are exempt from Federal income taxes, unless engaged in proprietary functions. Persons in private employment are subject to both Federal and State taxes. The number of public officers and employees has grown rapidly during the past few years. Combined Federal, State, and local employees for the year 1937 amounted to 3,800,000 and received compensation in the total amount of $5,500,000,000. This combined number represents 12 per cent of the number of persons receiving wages and salaries, 13 per cent of the total wages and salaries received, and approximately 9 per cent of the national income.

There were approximately 2,600,000 State and local employees in 1937, representing a total annual pay roll for that year of $3,600,000,000. Many of these employees have salaries below the personal exemptions allowed for income-tax purposes. It is estimated that for 1937, 1,000,000 or 40 per cent received $1,000 or less and approximately 2,300,000 or 90 per cent received $2,500 or less. Thus, 90 per cent of State and local employees, if married, would not be subject to the Federal income tax. In addition, the bill would not result in imposing any further burden upon the large number of these State and local employees who are engaged in proprietary functions and are, therefore, subject to the existing Federal income tax.

From the standpoint of revenue, the exemption of State and local employees from the Federal income tax is of minor importance. It is estimated that the total Federal revenue to be derived from taxing such employees as are now exempt will not amount to more than $16,000,000 annually. However, there are individual cases of special tax privilege which show the unfairness and inequities produced by this exemption. In State and local governments, there are approximately 16,000 employees with annual salaries of over $5,000, including 1,300 with salaries of over $10,000. In case of some of the higher officers, the salaries reach $20,000, $25,000, and even larger amounts. It seems unfair to extend such tax exemption to this class of our citizens when a minor clerk, bookkeeper, or mechanic employed by a private business concern is expected to pay income taxes to both Federal and State Governments. The benefit from tax-exempt salaries is especially great if the recipients have other income, since, in such case, the salary would be subject to surtax in brackets according to the amount of the total income. These public employees are citizens of the United States and it seems hard to believe that requiring them to pay the same taxes that all other citizens pay will interfere with the functions they perform on behalf of State and local governments.

The same situation applies with respect to the Federal employees. They, too, should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits which are accorded to persons engaged in private occupations. Little information has been received as to the revenue to be derived by the State and local governments from the taxation of Federal employees. The diversity in the structures of the various State income taxes, coupled with the difficulties of estimating the number of Federal

employees within the taxing jurisdiction, preclude accurate estimate. In 1937 there were approximately 1,200,000 Federal employees receiving $1,900,000,000 in annual compensation. Although a salary distribution for the entire group is not available, information furnished with respect to 400,000 regular full-time civil-service employees show that approximately 6 per cent of that group received less than $1,000 and 82 per cent less than $2,500, annually. On the average, Federal employees would very possibly pay higher State income taxes than State and local employees would pay Federal income taxes. This is indicated by the fact that the personal exemptions accorded by State income taxes are, in many cases, below those provided by the Federal law and also by the fact that Federal salaries in the low and middle salary range group are generally higher than those paid by State and local governments. It is believed that these employees should share in the cost of their State and local governments to the same extent as private employees.

The unfairness of this tax exemption becomes more apparent with the increased number of States which are adopting personal income taxes. At the present time, 31 States impose personal income taxes on wages and salaries, and the Federal Government receives 23 per cent of its revenue from the income tax. Many of these employees who formerly shared in the cost of their State and local governments through the payment of property taxes and other indirect taxes have been relieved of liability where the income tax has been substituted for other forms of taxation.

Employees of governments receive all the benefits of government which their fellow citizens do, and consequently they should also bear their fair share of its costs. The elimination of the tax exemption privilege would not menace the operations of governmental units, but its existence does threaten the progressive income tax principle of "from each according to his ability to pay." Moreover, it discriminates among persons having the same actual income and offers to government no measurable compensating advantages. The unfair consequences of tax-exempt salaries when judged by present standards of social justice require that they be promptly abolished by legislation if this can be done under the Constitution.

CONSTITUTIONAL ASPECTS.

The committee has given particular attention to the constitutional problems involved in the proposal to include in the Federal income tax the salaries paid by States and their local subdivisions to their officers and employees. There is no corresponding problem with respect to the State taxation of the salaries paid to Federal officers and employees, since Congress apparently has power to waive any immunity which might attach to its employees.

It is recognized that there is some doubt as to whether Congress has the power to subject to the Federal income tax the salaries of the governor or other officers of a State performing functions which could not be performed by a private individual. However, your committee believes that there is sufficient probability that the measure will be held constitutional to justify its enactment.

Such a course of action has had the approval of the Supreme Court. In *Evans* v. *Gore* (1920) (253 U. S., 245 [C. B. 3, 93 (1920)]), the Supreme Court held unconstitutional a provision in the Revenue Act of 1919 taxing the salaries of Federal judges then in office, notwithstanding the specific prohibition in Article III of the Constitution against diminishing the compensation of judges during their term of office.

Speaking for the majority, Mr. Justice Van Devanter called attention to the fact that Congress had regarded the provision as of uncertain constitutionality and had intended the question should be submitted to and settled by the Supreme Court. The opinion cites the House and Senate reports, as well as the statement of the chairman of the House committee in asking the adoption of the provision who said in part that "every man who has a doubt about this can very well vote for it and take the advice * * * that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it" (56 Cong. Rec., 10370, quoted in 253 U. S. at 248, n. 1).

This bill will present a clear-cut issue for determination by the Supreme Court.

The doctrine of intergovernmental immunity does not come from the language of the Constitution itself, but stems from the decision of the Court in the famous case of *McCulloch* v. *Maryland* (4 Wheat., 316) (1819). Maryland had enacted legislation designed to penalize the Bank of the United States in the operation of branches in Maryland. The legislation provided that if any bank established a branch office without State authority, any notes issued thereby must be in specified denominations and must be printed on stamped paper purchased at prescribed rates from the treasurer of the Western Shore. The bank could escape this requirement only by the payment, in advance, of $15,000. The Court held this legislation invalid on the ground that the States were powerless to hinder or obstruct the functions of the Federal Government. The plan was so devised as to make it applicable only to the Bank of the United States, as that bank was the only bank that had established branches in the State without State authority. Thus, its effect was to apply in a discriminatory manner toward the Bank of the United States. It should be noted that the Court did not rest its decision on discrimination and that the Court subsequently rejected the argument that this case protected Federal instrumentalities only from discrimination and not from general taxation. However, Mr. Justice Stone, speaking for the majority in *Helvering* v. *Gerhardt* (304 U. S., 405) (1938) [Ct. D. 1343, C. B. 1938–1, 246], emphasized the existence of discrimination as a vital factor in the McCulloch case.

The next case in this series of precedents was *Dobbins* v. *Commissioner* (16 Pet., 435) (1842). The facts were that Daniel Dobbins, a captain in the United States Revenue Service, was in command of a United States revenue cutter in the Erie Station in Pennsylvania. He was rated and assessed as a citizen and resident of Erie County for county taxes upon his office as captain in such United States service. The Court held that the tax was invalid, as it was not competent for the State legislature to lay a tax on the salary or emoluments of an officer of the United States. This decision was justified upon the theory that a governmental officer was a means or instrumentality employed for carrying out the legitimate powers of the Federal Government with which the States could not interfere by taxation or otherwise, and that such officer's salary was inseparably connected with the office; that, if the officer, as such, was exempt, the salary assigned to him for his maintenance while holding office was also, for like reasons, equally exempt.

The Supreme Court, relying on the McCulloch and Dobbins cases, ruled in the case of *Collector* v. *Day* (11 Wall., 113) (1870), that this immunity was reciprocal in character and that, therefore, Congress had no power under the Constitution to lay the Federal income tax upon the compensation of a State probate judge. This decision did not rest upon any constitutional right of a State officer to be exempt from a nondiscriminatory Federal tax; nor was the purpose of the immunity to confer a personal privilege upon the State officer. The reason for the invalidity of the tax was that it was regarded as burdening the functions of State government, the Court going on to say:

"It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the State, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operation is subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" (Page 127.)

When this case was decided, it was thought to apply to all State officers and employees. Later, the Government took the position that the immunity doctrine applied only to employees engaged in the exercise of essential governmental functions and this view was upheld by the Supreme Court. The decision in *Collector* v. *Day* has not been overruled, but the application of its doctrine has been considerably limited by later decisions.

For example, in *Helvering* v. *Powers* (293 U. S., 214 (1934) [Ct. D. 900, C. B. XIII–2, 213 (1934)]), it was held that the compensation of members of the board of trustees of the Boston Elevated Railway was subject to taxation by the Federal Government on the ground that such an activity constituted a departure from the usual governmental functions, even though the enterprise was

undertaken for what the States conceive to be a public benefit. For the same reason, employees of State liquor stores have been held subject to Federal taxation. In *Metcalf & Eddy* v. *Mitchell* (269 U. S., 514 (1926) [T. D. 3824, C. B. V–1, 218 (1926)]), the Supreme Court held that consulting engineers engaged to advise State and political subdivisions with reference to water and sewerage projects were not State's officers or employees but independent contractors and, therefore, subject to the Federal net income tax. And in the Dravo case (302 U. S., 134), the Court even held that the compensation of an independent contractor, working for the Federal Government in West Virginia, was subject to the State's 2 per cent gross receipts tax. However, it should be noted that the Federal Government conceded that the tax, even though it increased its costs, did not hinder or impede its function.

To the same effect is the case of *Silas Mason Co.* v. *Washington* (302 U. S., 186) (1937), holding that a gross receipts tax imposed by the State could be applied to the amounts received by a contractor performing, under contract with the Federal Government, work on the Grand Coulee Dam in Washington.

Then, in 1937, in *Brush* v. *Commissioner* (300 U. S., 352) [Ct. D. 1212, C. B. 1937–1, 217] the Court found that the maintenance of the New York water supply system was an essential governmental function, and that the Federal income tax could not be applied to the compensation of an engineer employed in this activity. However, under the Treasury regulations there applicable, the salaries of State and local officers and employees engaged in essential governmental functions were specifically exempt, and, as the Government did not challenge this regulation, the pertinent question was not before the Court. The Court in *Helvering* v. *Gerhardt* (304 U. S., 405 [Ct. D. 1343, C. B. 1938–1, 246]), confined the decision in the Brush case to that Treasury regulation.

The next case of importance was that of *Helvering* v. *Therrell* (303 U. S., 218) (1938) [Ct. D. 1316, C. B. 1938–1, 243]. Here the employees involved were attorneys or liquidators, appointed by State comptrollers, or like officers, for work in the liquidation of closed financial institutions. Their compensation came from the assets of the closed institution being liquidated, although the work was carried on by statutory authority under a department of the State government and was under the direction and control of State officers. Their compensation was held to be subject to the Federal income tax.

Finally, we reach the Gerhardt case (403 U. S., 405) (1938) which held that employees of the New York Port Authority were subject to the Federal income tax. The reasoning of the Court in the Gerhardt case indicates that if a State is performing a function which could have been undertaken by a private person, the employees of the State engaged in the performance of such function are not immune from the Federal taxing power. Under this theory it seems that school teachers, State hospital employees, and other employees performing functions which are not indispensable to the existence of the State government are subject to the Federal income tax. Furthermore, the Court indicates that it has never ruled expressly on the precise question whether the Constitution grants immunity from Federal income tax to the salaries of State employees performing at the expense of the State services of the character ordinarily carried on by private citizens. This leaves open the question as to whether or not a stenographer, a bookkeeper, or a person who is not an officer of a State or political subdivision is entitled to exemption from the Federal income tax.

The reasoning of the Court in the Gerhardt case may be summarized as follows: By granting immunity beyond the necessity of protecting the State, the burden of the immunity is thrown upon the National Government with benefit only to a privileged class of taxpayers. While the State might possibly be affected by the tax, the burden on the State is so speculative and uncertain that if allowed it would restrict the Federal taxing power without affording any corresponding tangible protection to the State government. The taxpayers are citizens of the United States, and bound to contribute to its support. Even if the States should have to raise their salaries, the tax does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as States. To insure its continued existence, it is not ordinarily necessary to confer on the State a competitive advantage over private persons.

The Court in the Gerhardt case did not overrule *Collector* v. *Day*, which involved the salary of an officer engaged in the performance of an indispensable function of the State which could not be delegated to private individuals.

However, the Gerhardt case certainly narrowed the application of the immunity rule. The only basis for the immunity doctrine is the protection which it affords the continued existence of the State. It is believed that there is considerable support for the proposition that the Court will overrule or distinguish *Collector* v. *Day*, and hold that a nondiscriminatory Federal net income tax applying to all citizens, public as well as private, will not burden the functions of State or local governments. The reasons why the Court may not now feel obliged to follow *Collector* v. *Day* are as follows:

1. In *Collector* v. *Day*, the Court held the Federal income tax, enacted during the Civil War, unconstitutional as applied to the salary of a judge of a State court. The Civil War Income Tax Acts provided a quite limited number of deductions from gross income. The so-called net income tax there enacted, accordingly, rather closely approximated a tax upon gross income. The tax would, therefore, much more probably be applied to each dollar of the salary paid Judge Day than would be the case under modern income-tax legislation. The importance of this distinction is well illustrated by the recent decision of the Court in *Hale* v. *State Board* (302 U. S., 95 (1937)). There the Court said, in reference to a net income tax imposed by the State, that it was not necessarily in violation of the State statute exempting its bonds from taxation. Among other reasons for this, Mr. Justice Cardozo said, was that—

"The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed."

2. The Civil War Income Acts were a novelty in fiscal legislation. The ordinary burdens of government were met largely, in the case of the Federal Government, through excise taxes; and, in the case of the State governments, through property as well as excise taxes. Faced by the emergency of the Civil War, the Congress directed the tax at income. The feeling of the State officers who were taxed and of the judges who considered its validity must have been measurably influenced by the exceptional nature of the tax. To tax income received from a State would seem much like taxing the State itself. To-day, however, the Court has said, in relation to a claim for tax immunity on the part of an employee of the New York Port Authority, that: "The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the National Government" (*Helvering* v. *Gerhardt*, 304 U. S., 405 [supra]).

3. The statute construed in *Collector* v. *Day* afforded no reciprocal right to the States to tax the salaries of Federal employees. In this respect, it might be said to be discriminatory against the States. The proposed legislation does permit the States to tax Federal salaries.

4. *Collector* v. *Day* was decided in 1870. Since that time, the Supreme Court has not invalidated a Federal net income tax on a State officer or employee, with the possible exception of the Brush case, which was placed upon the failure of the Government to challenge a Treasury regulation, since amended, which exempted salaries paid "in connection with an essential governmental function."

5. The reasoning contained in the decisions referred to as narrowing the application of the doctrine laid down in *Collector* v. *Day*, cited supra, clearly indicates that the determination of whether or not such a tax unduly burdens State functions is as much an economic as a legal question. Just when a nondiscriminatory income tax, laid by one government upon the compensation of the employees of another governing body, becomes a restraining or hampering influence is a matter of practical effect and susceptibility to economic measurement.

In this connection, Mr. Justice Stone, speaking for the majority of the Court in the Gerhardt case, and in referring to the principle emphasized in these cases which limit the immunity doctrine, said:

"The other principle exemplified by those cases where the tax laid upon individuals affects the State only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the States is so speculative and uncertain that if allowed it would restrict the Federal taxing power without affording any corresponding tangible protection to the State government; even though the function be thought important enough to demand immunity from a tax upon the State itself, it is not necessarily protected from a tax which may well be substantially or entirely absorbed by private persons."

And further:

"The State and National Governments must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a State government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents to the organization within the same territory of two governments, each possessed of the taxing power."

It should be kept in mind that the proposal before us provides only for nondiscriminatory taxation of the compensation of public employees and is reciprocal in nature. Thus, whatever burden might be passed on to one government because of the taxation of its employees' compensation by another governmental unit would, in a measure at least, be offset by the converse application of the proposal.

It is believed that the bill will afford to the Court a proper opportunity to redefine and clarify the limits to which governments may go in subjecting the compensation of public employees to taxation.

6. Some of the members of your committee believe that, even if these arguments are not convincing to the Court, the legislation might nevertheless be upheld under the plain language of the sixteenth amendment giving Congress the power to tax income "from whatever source derived." Language substantially identical to that phrase has been used in prior Revenue Acts. The Department of Justice study, page 152, points out:

"the same words in substantially identical phrasing were used in the Civil War income tax laws and in the Income Tax Act of 1894. In each instance they were used to include income from all sources. In the Civil War Acts the words included income from the so-called immune sources, as shown by the decision in *Collector* v. *Day*. These words, as used in the Act of 1894, included interest from State and municipal bonds, as shown by the decision in the Pollock case. The words income from 'all sources,' used in the Corporate Excise Tax Act of 1909, embraced interest from State and municipal bonds as shown by the decision in *Flint* v. *Stone Tracy Co.*"

Some mention may also be made of the fact that Governor Hughes opposed the ratification of the sixteenth amendment, because this language gave the power to tax municipal securities. Senators Borah and Root disputed this interpretation in the amendment, and considerable public attention was directed to this issue in the course of the ratification of the amendment. Almost a quarter of the messages of the State governors, recommending ratification or rejection of the sixteenth amendment, discussed the interpretation placed upon it by Governor Hughes. Most of these governors either agreed with the interpretation of Governor Hughes or stated that they were not sure whether Governor Hughes or Senator Borah was correct, but that the amendment should, nonetheless, be ratified. From this evidence, it can not be said that the country ratified the amendment without the knowledge of the Hughes interpretation.

It is true that the Supreme Court in several cases, notably in *Evans* v. *Gore* (253 U. S., 245), has said that the sixteenth amendment did not extend the taxing power of the Congress, but merely removed the need for apportionment. But in this case the reasoning was not necessary to reach the decision of the Court, and the scope of the sixteenth amendment was not contested by counsel for the Government.

This discussion of the scope of the sixteenth amendment, it may be repeated, is not necessarily the view of the full committee, but merely the views of some of its members.

In conclusion, your committee believes that whatever opinions may be held as to the constitutionality of this proposal, there are reasons for believing that the Supreme Court may uphold the legislation. It is the law of the Supreme Court that its opinion upon the construction of the Constitution is always open to discussion and that its judicial authority depends altogether upon the force of the reasoning by which it is supported. (*The Passenger Cases*, 283 per Taney, C. J., at 473.) The Court has recently demonstrated that, to quote Mr. Justice Brandeis in his dissenting opinion in *Burnet* v. *Coronado Oil & Gas Co.* (1932) (285 U. S., 393, at 405), it "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences is appropriate also in the judicial

function." It was in this dissenting opinion that Justice Brandeis listed 30 occasions upon which the Supreme Court had overruled earlier decisions. In the recent case of *Helvering* v. *Mountain Producers Corporation* (1938) (303 U. S., 376 [Ct. D. 1321, C. B. 1938–1, 343]), the view expressed by Justice Brandeis in his dissenting opinion in the Coronado Oil & Gas Co. case was adopted by the Supreme Court and that case, as well as the earlier case of *Gillespie* v. *Oklahoma* (257 U. S., 501 (1921)), were specifically overruled.

A description of the provisions of the bill in detail now follows:

TITLE I. PROSPECTIVE TAXATION OF PUBLIC EMPLOYEES.

Section 1: Section 1 of the bill amends the definition of gross income so as to include in it salaries, wages, or compensation "for personal services as an officer or employee of the State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing." Under the amendment, the wages, salaries, and compensation of all officers and employees of the respective States and of their political subdivisions and agencies and instrumentalities, without exception, are to be included in gross income for taxable periods beginning after December 31, 1938. Whether or not the language of section 22(a) as it exists in the present law is broad enough to include in gross income the compensation of such officers and employees is not believed by the committee to be an important issue. The committee believes that it is desirable to amend the statute to remove all doubts, so that any presentation of the constitutional question with respect to taxation of Government employees will not be fettered by any problem of statutory construction.

It is not to be inferred from this amendment, however, that those groups of State and local officers and employees from whom Federal income taxes have previously been collected were not subject to tax under the language of section 22(a) in earlier Revenue Acts or in the Revenue Act of 1938.

The committee amendment to the section is purely technical. After the bill passed the House, the new Internal Revenue Code became law. It supersedes the 1938 Revenue Act for taxable years beginning in 1939 and thereafter. The committee amendment makes the necessary change so that the Code rather than the 1938 Act is amended.

The bill contains no express provision subjecting Federal officers and employees to Federal taxation for the reason that such a provision is unnecessary. The uniform construction of the definition of gross income in all Revenue Acts has been that they are subject to tax and their liability to Federal tax is established beyond question.

Section 2: Section 2 eliminates the exemption from Federal income tax of compensation of teachers in educational institutions employed by Alaska or Hawaii, or any political subdivision thereof. Since all teachers employed by the States will be subject to Federal income tax under section 1 of the bill, it is believed proper to eliminate the exemption referred to so that teachers in the Territories of Alaska and Hawaii will be subject to tax to the same extent as teachers in the various States. The committee amendment makes the change in law applicable to the new Code rather than the 1938 Act.

Section 3: In order to facilitate reciprocal taxation as between State and Federal Governments, your committee believes that the United States should expressly consent to the taxation of the compensation of its officers and employees. Section 3 of the bill therefore provides that the United States 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.

It will be noted that the consent extends to taxation not only by the State but also by other duly constituted taxing authorities of the compensation of Federal officers and employees. Under this provision if any local governmental units have authority to and do impose income taxes, tax may be imposed upon such compensation subject to the jurisdiction of such units.

The consent is not intended to operate, nor could it operate, as a consent to any taxation to which as individuals these officers and employees are entitled

to object either under the provisions of the Federal Constitution or of the constitutions or statutes of the respective States. For example, the consent has no effect upon the rights of an officer of the Federal Government to object that the imposition of a State tax upon him is invalid under the fourteenth amendment. Thus he may urge that a particular tax is invalid as to him because of an unreasonable classification, or the lack of geographical jurisdiction to tax, or for other reasons. Similarly, the consent has no effect upon the rights which such officers and employees possess as individuals under the various State constitutions and laws. To protect the Federal Government against the unlikely possibility of State and local taxation of compensation of Federal officers and employees which is aimed at, or threatens the efficient operation of, the Federal Government, the consent is expressly confined to taxation which does not discriminate against such officers or employees because of the source of their compensation. Inasmuch as section 1, relating to State and local officers and employees, applies only with respect to years beginning after December 31, 1938, section 3 consents to taxation of Federal officers and employees only with respect to compensation received after December 31, 1938.

TITLE II. RETROACTIVE RELIEF TO CERTAIN STATE AND LOCAL OFFICERS AND EMPLOYEES.

This title affords relief to employees of States of the Union and their local governments who have not been paying Federal income tax and in many cases have not even filed returns, but who may, under *Helvering* v. *Gerhardt*, be subject to Federal income tax for past years. However, there are certain groups of State and local employees, particularly those engaged in proprietary functions (such as the operation of State liquor stores, municipal power plants, etc.), who have for a number of years regularly paid Federal tax because their liability was fully established at an earlier date. It would be unfair and inequitable to relieve this group of employees from tax liability which was in no way a surprise to them and which they paid without question. It is therefore undesirable to relieve, in blanket fashion, all State and local officers and employees from liability for income tax in earlier years. Since the groups who should not be relieved have regularly paid their income tax and it has been currently assessed, while those who have been surprised by the Gerhardt case and who should be given relief have, in most cases, not paid their tax and have not been assessed, the general plan of Title II is to provide that assessments previously made shall not be disturbed but that no new assessments shall be made.

Title II applies only to State and local officers and employees and not to other persons having dealings with State and local governments, since the taxability of the compensation of such other persons has long been recognized. Such persons are generally held to be independent contractors for purposes of Federal income taxation. Their liability for such tax has been clearly established since the case of *Metcalf & Eddy* v. *Mitchell* (1926) (269 U. S., 514), and they are not officers and employees within the meaning of this bill.

Section 201: Section 201 applies to Federal income tax (including interest, additions to tax, and additional amounts), for taxable years beginning prior to January 1, 1938, 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.

Subsection (a) provides that income tax attributable to the compensation of such officers and employees for years beginning prior to January 1, 1938, which was not assessed prior to January 1, 1939, shall not be assessed and no proceeding in court for the collection thereof shall be begun or prosecuted.

Subsection (b) provides that if any such income tax for such years is assessed after December 31, 1938, the assessment shall be abated and any amount collected in pursuance thereof shall be credited or refunded in the same manner as in the case of an income tax erroneously collected. This provision thus authorizes the refund of any tax assessed against State and local officers and employees for any taxable year beginning prior to January 1, 1938, if assessment is made after 1938.

In a relatively small number of cases State and local officers and employees who are in all respects analogous to the groups given relief under section 201 (a) and (b) have paid their tax but have contested their liability by way of claim for refund rather than by contesting a deficiency asserted against

them. It would be inequitable to deny relief to these people who have paid their taxes and at the same time grant relief to similarly situated persons who have not paid their taxes. Section 201(c) therefore provides for credit or refund to such persons of income tax, for any taxable year beginning prior to January 1, 1938, attributable to compensation received as a State or local officer or employee, if the tax has been collected on or before the date of enactment of the bill, in the following cases:

(1) where a claim for refund of such amount was filed before January 19, 1939 (the date of the President's message), and was not disallowed on or before the date of the enactment of this bill;

(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 bill;

(3) where a suit for the recovery of such amount is pending on the date of the enactment of this bill; 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 bill.

It is believed that the foregoing cases include virtually all State and local officers and employees who are entitled to relief from liability and who have paid their tax. In general, subsection (c) does not include those State and local officers and employees who are not entitled to relief, such as those engaged in proprietary functions, because, their liability having been previously clearly established, they have not filed claims for refund or otherwise asserted their rights in any of the ways described in this subsection.

Section 202: As has been stated, section 201 applies only with respect to income tax for taxable years beginning prior to January 1, 1938. Your committee believes, however, that it is fair and equitable to relieve State and local officers and employees in the groups which are entitled to relief from income-tax liability for taxable years commencing during 1938. Section 202 accomplishes this result without at the same time relieving from liability the groups of State and local officers and employees, such as those engaged in proprietary functions, whose liability for Federal income tax was long previously established. It provides that a State or local officer or employee who did not include his compensation received as such in his return for a taxable year beginning during 1937, shall not include in gross income for a taxable year beginning in 1938 compensation received as such an officer or employee. Obviously, if an individual did not file a return he did not include his compensation in his return. Under this provision a person who, for the first time, becomes during 1938 an officer or employee of a State or political subdivision or agency or instrumentality thereof will be exempt from income tax for his taxable year beginning in 1938 with respect to his compensation received as such. This section also provides that although a State or local officer or employee included his compensation in gross income for a taxable year beginning during 1937, he shall be exempt from tax for the taxable year beginning during 1938, if he is entitled under section 201 to obtain credit or refund of the tax paid for the taxable year beginning during 1937.

Section 203: Sections 201 and 202 afford relief to virtually all State and local officers and employees equitably entitled thereto for taxable years beginning prior to 1939. It is possible, however, that there may be a few cases, not ascertainable at this time, which are not covered by these sections. For example, a public-school teacher may have paid tax on his compensation for the taxable year 1937 and, although intending to contest his liability therefor, had not filed claim for refund before January 19, 1939 (and therefore is not given relief by section 201). Since those public employees who did not pay tax are relieved from liability by sections 201 and 202, similar relief should be granted in the case of the teacher who paid his tax. Likewise, an employee of the Port of New York Authority who paid tax with respect to his compensation, but who had not filed claim for refund before January 19, 1939, should be given relief. Section 203, therefore, authorizes the Commissioner, under regulations prescribed by him with the approval of the Secretary, to grant relief by way of credit or refund. Such credit or refund under this section is to be made only if the State or local officer or employee files a claim therefor after January 18, 1939, and the Commissioner finds that disallowance of the claim would result in the application of the doctrines in the case of *Helvering* v.

Gerhardt extending the classes of officers and employees subject to Federal taxation. It should be noted that included in the classes of employees to whom the Commissioner may give relief under this section will be employees of the type involved in the case of *Helvering* v. *Therrell* (303 U. S., 218), since the decision in the Gerhardt case clarified and restated the basis for the liability for such persons for Federal income tax. Such relief may be granted by the Commissioner with respect to claims for refund for a taxable year beginning during 1938 as well as all taxable years prior thereto, subject to the qualification of section 204.

Section 204: Section 204 provides that the claims for refund, suits, or petitions to the Board referred to in the preceding sections are subject to the statute of limitations properly applicable thereto.

Section 205: This section provides that "compensation" as used in sections 201, 202, and 203 shall not include compensation to the extent that it is paid directly or indirectly by the United States or any agency or instrumentality thereof. The effect of this definition is to grant relief not only in the ordinary case in which the compensation of the officer or employee is paid in the form of a salary but also in cases where compensation is derived from fees. In a number of States, State and local officers receive their compensation in the form of charges and fees which are collected from litigants, banks, and others with respect to whom the officer exercises a State function such as that of a master in chancery or a liquidator of a bank or insurance company. They are just as truly State and local officers as if they were paid a salary and the relief is therefore made applicable to them.

Section 206: This section provides that the terms used in the bill shall have the same meaning as when used in Title I of the Revenue Act of 1938. The committee amendment to the section makes the meaning of terms used in the Internal Revenue Code applicable.

Section 207: This section provides for the separability of the titles of the bill.

1939-40-10046

TAXATION OF THE COMPENSATION OF PUBLIC OFFICERS AND EMPLOYEES.

[House of Representatives Report No. 390, Seventy-sixth Congress, First Session.]

[April 10, 1939.]

Mr. Doughton, from the committee of conference, submitted the following conference report [to accompany H. R. 3790]:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 3790) relating to the taxation of the compensation of public officers and employees, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

* * * * * * *

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE.

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 3790) relating to the taxation of the compensation of public officers and employees, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

Amendment No. 1: The Senate amendment is clerical; and the House recedes.

Amendments Nos. 2, 3, 4, and 10: The Senate amendments make the changes in existing law proposed by the bill amendments to the new Internal Revenue Code rather than to the Revenue Act of 1938. The House recedes.

Amendment No. 5: The Senate amendment provides that the compensation of judges of courts of the United States who took office on or before June 6, 1932, shall be included in gross income for Federal income-tax purposes for tax-

able years beginning after December 21, 1938. The present law subjects to Federal income taxation the compensation of so-called "constitutional" judges taking office after June 6, 1932, and the compensation of so-called "legislative" judges whether appointed on, before, or after June 6, 1932. The amendment adds to the class of taxable judges only so-called constitutional judges appointed on or before June 6, 1932, because they are the only group of judges now exempt. There is no comparable provision in the House bill. The House recedes.

Amendment No. 6: The Senate amendment changes a section number; and the House recedes.

Amendments Nos. 7 and 8: The Senate amendments expressly include within the provisions of the House bill under which consent was granted to the taxation by State and local taxing authorities of compensation of Federal officers received after December 31, 1938, Senators and Representatives, and judges and officers of courts. The House bill had the effect of consenting to the taxation of such persons. The conference agreement inserts a clarifying definition which provides that for the purposes of the bill the term "officer or employee" includes a member of a legislative body and a judge or officer of a court. This would, of course, include Senators and Representatives as well as Federal judges and court officers and make them subject to State taxation to the same extent as other Federal officers. It would also include members of the State legislatures, State judges, and court officers, and make them subject to Federal taxation to the same extent as other State officers. The House recedes with such an amendment on amendment No. 7, and the Senate recedes on amendment No. 8.

Amendment No. 9: Under the House bill credit or refund of tax for years prior to January 1, 1939, was to be made in the case of State and local officers who filed claim after January 18, 1939, if the Commissioner found that to disallow the claim would be to apply the doctrine of the Gerhardt case, which extended the classes of such persons subject to Federal income tax. The Senate amendment adds the cases of *Helvering* v. *Therrell* and *Graves* v. *O'Keefe*. The effect of the amendment is to permit the same relief to be given to the classes of persons as to whom the power to tax was extended by these cases as was given by the House bill to those classes who by reason of the doctrines of the Gerhardt case were brought within Federal taxing power. The House recedes.

Amendment No. 11: The Senate amendment provides that State and local taxing authorities shall not collect any tax after the date of the enactment of the Act on the compensation received before January 1, 1939, by officers and employees of the United States or its agencies. An exception to the provision permits collection of tax on such compensation if the person is an officer or employee of a corporate agency or instrumentality of the United States the majority of the voting stock of which is not owned by or on behalf of the United States. There is no comparable provision in the House bill. The House recedes with an amendment which embodies the substance of the Senate amendment with clarifying changes. The first change is to make certain that the Territories and possessions (Hawaii, Puerto Rico, the Philippines, etc.) will not subject Federal officials to tax for years prior to 1939. The second change is one which is designed to define more precisely the corporate agencies of the United States whose employees may not be subjected to tax for back years. Under the conference agreement, in order for the employees to be relieved, the corporation must be one which is exempt from Federal income tax and also it must be either a corporation the majority of the stock of which is owned by the United States or a corporation a majority of the board of directors of which may be selected by the United States. It is believed that the effect of the conference agreement is to leave undisturbed the taxation of employees of instrumentalities of the United States which are essentially private corporations enjoying certain Federal privileges who have heretofore been generally regarded as subject to State taxation.

Amendment No. 12: The Senate amendment provides that after the Secretary of the Treasury has determined and proclaimed that it is the policy of any State to collect tax from persons who are officers or employees of the United States or its agencies, on account of compensation received by them prior to January 1, 1939, the relief granted by Title II to the officers and employees of that State or its subdivisions or agencies shall no longer apply. In making the determination as to whether or not the State is taxing Federal employees,

taxation by the State of officers or employees of a corporate agency or instrumentality a majority of the voting stock of which is not owned by or on behalf of the United States is to be ignored. Thus, taxing such persons by the State will not result in the denial of relief to State and local officers. There is no comparable provision in the House bill. The House recedes with an amendment similar to that made by the conference agreement under amendment No. 11, the effect of which is to describe more precisely the corporate agencies of the United States which are to be disregarded in ascertaining the policy of the State with respect to taxing Federal officials.

Amendment No. 13: The Senate amendment provides that judges of the Supreme Court and other constitutional judges who took office on or before June 6, 1932 (the date of the enactment of the Revenue Act of 1932), shall not be subject to income tax under the Revenue Act of 1938 or any prior Revenue Act. This is a clarifying amendment to make certain that Supreme Court and circuit and district judges (including the court of appeals and district court judges of the District of Columbia) will not be subject to Federal taxation for years prior to 1939. The taxation of judges of so-called legislative courts is unaffected by the amendment. There is no comparable provision in the House bill. The House recedes.

Amendment No. 14: The Senate amendment changes a section number. The House recedes with an amendment making a further change in section number.

R. L. DOUGHTON,
THOS. H. CULLEN,
JOHN W. MCCORMACK,
JERE COOPER,
ALLEN T. TREADWAY,
FRANK CROWTHER,
HAROLD KNUTSON,
Managers on the part of the House.

1939-30-9926

THE REVENUE BILL OF 1939.

[House of Representatives Report No. 855, Seventy-sixth Congress, First Session.]

[June 16, 1939.]

Mr. Doughton, from the Committee on Ways and Means, submitted the following report [to accompany H. R. 6851]:

The Committee on Ways and Means, to whom was referred the bill (H. R. 6851) to provide revenue, equalize taxation, and for other purposes, having had the same under consideration, report it back unanimously to the House with amendments and recommend that the bill as amended do pass.

The committee amendments are as follows:

Page 11, lines 1 and 2, strike out "In the case of a corporation, for" and insert "For."

Page 11, line 21, after "(d)" insert "(1), (2), (3), and (4)."

Page 12, strike out lines 6 and 7 and insert:

"(d) (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction);"

Page 13, line 3, strike out the period, insert a semicolon, and after line 3 insert:

"(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business."

Page 30, line 11, strike out "with interest coupons or in registered form."

The bill has two major objectives. The first is to remove from the existing corporate income-tax structure such business deterrents and tax irritants as may be possible to consider at this time. Its second purpose is to extend the temporary excise taxes and the postal rates.

With regard to its first purpose, this bill is a further step in a program begun by the Revenue Act of 1938. The report of the Committee on Ways and Means on the revenue bill of 1938, stated the purpose of that bill to be—

"to improve our existing revenue system, to remove inequities, to equalize the tax burden, and to stimulate business activity, and to accomplish this without reducing the revenue which would be obtained by existing law under present conditions."

Since the passage of that Act and the correction of the faults then apparent in our tax structure, further inequities have become evident and attention has been drawn to a number of instances where our existing tax laws act as a deterrent to a free flow of business activity. In addition, our existing law contains certain tax "irritants" which are relatively unimportant from the point of view of revenue but are burdensome and irritating to taxpayers.

In attempting to rectify these faults, however, your committee has been narrowly restricted by two very compelling factors. The first of these is the element of time. While the question of tax revision has been under discussion for several months, the Committee on Ways and Means and its Subcommittee on Internal Revenue Taxation, have been continuously engaged since February 1 in perfecting amendments to the Social Security Act. These changes were adopted by the House as recently as June 10. These changes, in addition to liberalizing social security benefits, made substantial tax revisions under which business will be relieved of approximately $1,710,000,000 in pay-roll taxes during the next three years. Moreover, since the present bill would extend the temporary excise taxes, the majority of which expire under existing law on June 30, and the postal rates, this legislation should become law before July 1 if a serious loss of revenue is to be averted.

The second urgent restriction under which this revision has been undertaken is the necessity of accomplishing the desired result without injuring the revenue-producing capacity of our tax system. At the same time, it was imperative that care be taken to guard against the reopening of the possibility of tax avoidance.

Due to these limitations, it has been necessary to confine the revision to those matters, which in the opinion of your committee, require immediate correction.

Your committee began public hearings on May 27, at which time the Secretary of the Treasury appeared and stressed the desirability of making certain changes in our corporate income-tax structure, which, it was thought, would encourage business activity and a freer flow of capital into productive enterprise. He drew attention to two types of desirable changes, the first of which he considered urgent and recommended that immediate action be taken with respect thereto. The second type he considered to be no less important but not so in need of immediate remedy as the first. The hearings were concluded on June 5, and the suggested tax proposals were referred to the Subcommittee on Internal Revenue Taxation, composed of Mr. Cooper of Tennessee, chairman, Messrs. McCormack of Massachusetts, Disney of Oklahoma, Buck of California, Duncan of Missouri, Boehne of Indiana, Treadway of Massachusetts, Crowther and Reed of New York, and Woodruff of Michigan and Chairman Doughton, ex officio. With the cooperation of the Treasury Department, the staff of the Joint Committee on Internal Revenue Taxation and the Office of the Legislative Counsel, the subcommittee met and considered the proposals before it, relative to the corporation income tax. It reported its findings to the full committee in the form of a draft of the present bill.

The need for revenue legislation at this session of Congress arises from several circumstances. Some of the miscellaneous internal revenue taxes expire June 30, 1939; others expire July 31, 1939; the rates of still others will automatically be reduced on June 30, 1939. In his Budget message of January 3, 1939, the President recommended the extension of these miscellaneous internal revenue taxes and stated that "* * * the revenue from such taxes or its equivalent is necessary for the financing of the Budget for 1940." Furthermore, the corporation income taxes will expire and will not apply to any taxable year beginning after December 31, 1939.

Businessmen, economists, and others, as well as the Secretary and the Under Secretary of the Treasury, have called the committee's attention to the fact that some features of the present tax structure interfere with the full operation of business and discourage industrial enterprise. Since the Government needs

additional revenue and since, in the long run, this need can be best met only through increased business activity and increased national income, your committee feels that every effort should be made to afford all legitimate and necessary incentives to private enterprise.

While one purpose of the bill as reported is to stimulate business activity, the committee has sought to accomplish this without endangering the productivity of the existing tax structure. According to the best information the committee has been able to secure, it appears reasonably certain that the revenues of the Government will not be reduced appreciably under the present bill.

The representations made to the committee by various witnesses appearing before it covered a wide range of tax subjects. The bill now reported, however, incorporates only those revisions which appear to be particularly urgent. The time at the disposal of your committee during the present session of Congress is inadequate to afford sufficient study to permit a complete revision of the revenue structure.

SUMMARY OF CHANGES IN TAX STRUCTURE.

The bill makes the following changes in the corporate tax structure:

1. Corporations are permitted to carry over their net operating business losses for a period of two years. This provision will take effect with respect to taxable years beginning after December 31, 1939. However, a corporation which has sustained a net operating business loss in 1939 will be permitted to carry over such operating net loss in reduction of its income for 1940 and, if such net loss is in excess of its income for 1940, to carry over such excess in reduction of its income for 1941.

2. Corporations are given the right to increase their capital stock tax valuations for the fiscal years ending June 30, 1939, and June 30, 1940, but not to decrease such value for such years. Under the existing law, corporations are entitled to a new declaration (either lowering or raising their capital stock value) for capital stock tax purposes for the fiscal year ending June 30, 1941.

3. In lieu of the tax now imposed upon corporations with incomes above $25,000, there is imposed a flat corporate tax of 18 per cent. This new rate will take effect with respect to taxable years beginning after December 31, 1939. The present corporation tax containing the undistributed profits tax feature will be allowed to expire, as such tax does not apply to taxable years beginning after December 31, 1939.

4. Corporations with incomes of $25,000 or less are subject to the graduated rates on small corporations provided by existing law.

5. A notch provision is provided to prevent corporations from being heavily taxed by reason of having incomes slightly in excess of $25,000. If it were not for this notch provision, a corporation with an income of $25,001 would have its tax increased over $900 by reason of having $1 more in taxable income. Since the classification between large and small corporations is based upon normal-tax net income instead of net income, the notch is greatly simplified as compared to the one in existing law.

6. Banks, insurance companies, China Trade Act corporations, and corporations in the possessions of the United States are taxed like other corporations. That is, those with normal-tax net incomes of $25,000 and less receive the benefit of the graduated rates applicable to small corporations, while those with normal-tax net incomes in excess of $25,000 are taxed under the notch or at a flat rate of 18 per cent, whichever method results in the lesser tax.

7. Foreign corporations engaged in a trade or business within the United States and mutual investment companies are taxed at a flat rate of 18 per cent, regardless of the amount of their income.

8. Foreign corporations not engaged in a trade or business within the United States are taxed at the rates provided for in existing law. Under the existing law, this type of corporation is taxed upon fixed or determinable income at a rate of 15 per cent, except that in the case of dividends the rate is 10 per cent. In the case of a contiguous country, the 10 per cent rate on dividends may be reduced by treaty to a rate not less than 5 per cent. Thus, the existing law is continued in this bill.

9. Corporations in bankruptcy or receivership, joint-stock land banks, and rental housing corporations are treated under the bill like other corporations. The special treatment accorded to them under the existing law made necessary by the undistributed-profits tax has been abandoned.

10. The $2,000 limitation applicable to the capital losses of corporations has been repealed except with respect to domestic personal holding companies and foreign personal holding companies. In lieu of this provision, the bill allows capital losses on assets held for more than 18 months to be applied in full against ordinary net income for the taxable year in which the loss was realized. In the case of capital losses on assets held for not more than 18 months, the bill provides that they may be applied only against capital gains on assets held not more than 18 months. If the losses from the sale or exchange of such assets held for not more than 18 months exceed the gains from such short-term transactions the excess loss if not in excess of the net income, may be carried over into the following taxable year and may be applied against short-term capital gains of such year. This is the same treatment accorded individuals under existing law in the case of short-term capital losses. These provisions are applicable only with respect to taxable years beginning after December 31, 1939.

11. The bill also makes certain administrative changes which afford relief both to the Government and the taxpayer. Briefly, these are as follows:

(*a*) A corporation which establishes to the satisfaction of the Commissioner that it is in an unsound financial condition may redeem its bonds, notes, or other evidence of indebtedness in existence on June 1, 1939, at less than their face value without the recognition of gain if such redemption occurs after the enactment of the bill and in a taxable year beginning prior to January 1, 1943. This provision will materially aid railroads and other corporations whose bonds can be purchased at the present time at less than their face value, giving them an incentive to liquidate their indebtedness. Proper safeguards prevent the provisions from being utilized by corporations in a sound financial condition to drive the price of their bonds down in the market.

(*b*) A provision which permits corporations to continue bona fide business reorganizations without being subject to taxation immediately upon such reorganization by reason of the assumption by one corporation of the debts of the other in the process of reorganization. This provision affords relief both to the Government and to the taxpayer. This change was made in view of the *Hendler case* (303 U. S., 564).

(*c*) A modification of the limitations on the foreign tax credit to make it less difficult for American corporations to transact business abroad. The limitations on the allowance of a credit for taxes paid to foreign countries were placed in the law to make it certain that the Federal Government would receive its full tax on the income from United States sources. It was not intended for the American tax to apply against the income from foreign sources unless the foreign tax rate was less than the tax rate imposed by the United States. Due to a technical change (inserted in the Revenue Act of 1934 and continued in subsequent Acts) making the allowance for intercompany dividends, and interest on Government obligations subject to surtax a credit against net income instead of a deduction from gross income, American corporations operating abroad do not get a full credit for the taxes paid to a foreign country on their foreign income. This makes it difficult for American corporations to compete abroad with foreign corporations. Both the Treasury Department and the State Department requested that immediate steps be taken to correct this situation. By reason of the nature of the tax imposed by section 102, relating to corporations improperly accumulating income to avoid surtax on their shareholders, it is not believed that the credit for taxes paid to foreign countries should be permitted to diminish such tax, and the bill so provides.

(*d*) A provision amending the Federal lien law to provide that such lien shall not be valid as against any mortgagee, pledgee, or purchaser of a negotiable security for full consideration if the mortgagee, pledgee, or purchaser was without knowledge of the existence of the lien. It was inserted to overcome the effect of the Rosenfield decision (District Court, Eastern District of Michigan, December 8, 1938).

(*e*) A provision validating a Treasury regulation of long standing which required that where a stock dividend was declared the basis of the original shares be apportioned between those shares and the dividend stock for computing the gain or loss on the sale thereof. In one case, the Supreme Court held that where a taxpayer had received a dividend of common stock on its preferred stock, no part of the cost of the old stock could be allocated to the

dividend stock in determining gain or loss (*Koshland* v. *Helvering*, 298 U. S., 441). In another case where the converse situation was presented, the Court held that no part of the cost of the original stock could be allocated to the dividend stock and therefore the cost basis of the dividend stock was zero (*Helvering* v. *Gowran*, 320 U. S., 238 [Ct. D. 1292, C. B. 1938–1, 300]).

These decisions may affect adversely either the Government or the taxpayer, depending upon the particular stock sold by the taxpayer. The bill corrects this situation by ratifying the Treasury regulations dealing with this point.

(*f*) Several minor technical changes. One of these makes a special provision in Subchapter A, Chapter 2 (relating to personal holding companies), so that the gross income of insurance companies other than life or mutual which is specially defined in section 204 and is in part a net income, will be comparable, for the purposes of Subchapter A, to the gross income of ordinary corporations. Another change exempts from stamp tax on transfers of worthless stock from an executor or administrator to a legatee, heir, or distributee.

(*g*) An exemption from the income tax is granted to voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to members of such associations or their dependents, if no part of their net earnings inures (other than through such payments) to the benefit of any private individual or shareholder and the membership is composed solely of Federal officers or employees.

The present law does not grant an exemption to associations of this character where more than 15 per cent of the income does not consist of amounts collected for the sole purpose of making such benefit payments and meeting expenses.

It appears that some of these associations, especially in the case of postal employees, by investment of a certain part of their funds are unable to meet the exemption test of existing law. This change is applicable to taxable years beginning after December 31, 1938.

12. The bill extends for two years the temporary excise taxes which, under existing law, expire at the end of June or July of this year. It also extends for two years the 3-cent postal rate on nonlocal first-class mail. The bill also extends for two years the power of the President to modify postage rates on other than first-class matter.

In the interest of equity, the committee, in the bill as reported, has recommended an amendment under which individuals and partners are allowed a 2-year carry-over of losses. This carry-over is substantially the same as that which was granted to them under the Revenue Act of 1928.

Your committee has given consideration to section 102, relating to corporations improperly accumulating surplus. This section was considerably strengthened in the Revenue Act of 1938 by requiring the taxpayer by a clear preponderance of the evidence to prove the absence of any purpose to avoid surtaxes upon shareholders after it has been determined that the earnings and profits have been unreasonably accumulated. This shifts the burden of proof to the taxpayer in such cases. So short a time has elapsed since the enactment of the Revenue Act of 1938 after the filing of returns under such Act that the Treasury has been unable to furnish your committee with data as to the effectiveness of the changes made in the 1938 Act. This situation will be studied and if it develops that the 1938 provision is not accomplishing the purposes intended, further effort will be made to correct the situation in the near future.

EXPLANATION OF PRINCIPAL CHANGES.

1. *Corporation tax rates.*—The bill divides corporations into two main classes:

a. Corporations with normal-tax net incomes of not more than $25,000.

b. Corporations with normal-tax net incomes in excess of $25,000.

(*a*) Small corporations: With respect to the first class, the bill adopts the rates under existing law applicable to small corporations. The dividing line between small and large corporations is fixed at $25,000. The rates of tax applicable to these small corporations under the bill are as follows:

12½ per cent on first $5,000 of normal-tax net income.
14 per cent on next $15,000 of normal-tax net income.
16 per cent on next $5,000 of normal-tax net income.

These corporations were not subject to any undistributed profits tax under the Revenue Act of 1938. This group comprises about 90 per cent of all corpora-

tions filing taxable returns. The effective rate of tax applicable to such corporations, as well as the amount of the tax, is shown by the following table:

Net income.	Tax, 1938 Act.	Effective rate on net income, 1938 Act.
		Per cent.
$500	$62.50	12.5
1,000	125.00	12.5
1,500	187.50	12.5
2,000	250.00	12.5
2,275	284.38	12.5
2,500	312.50	12.5
3,000	375.00	12.5
3,500	437.50	12.5
4,000	500.00	12.5
4,500	562.50	12.5
5,000	625.00	12.5
6,000	765.00	12.8
7,000	905.00	12.9
8,000	1,045.00	13.1
9,000	1,185.00	13.2
10,000	1,325.00	13.3
12,000	1,605.00	13.4
15,000	2,025.00	13.5
18,000	2,445.00	13.6
20,000	2,725.00	13.6
22,000	3,045.00	13.8
25,000	3,525.00	14.1

Consideration was given to changing this system of taxing small corporations by means of a specific credit of $2,000. However, it was found that such a plan would completely exempt corporations with normal-tax net income not in excess of $2,000 and would increase the tax on corporations with normal-tax net incomes above $7,000. Other plans were also considered but as they had the effect of increasing the tax on these small corporations over that in the existing law, it was thought best to continue the existing rates. These rates are the same as those contained in the House bill of 1938 and were agreed to by the Senate in conference.

(*b*) Large corporations: In the case of corporations with normal-tax net incomes of more than $25,000, it is proposed to levy a flat corporate tax of 18 per cent. Under existing law, these corporations are subject to a tax ranging from 16½ to 19 per cent, depending upon the amount of dividend distribution. By this method, a corporation which distributes all of its earnings will pay a tax of 16½ per cent, where a corporation which retains all of its earnings will pay a tax of 19 per cent. The differential of 2½ per cent between 16½ and 19 per cent is referred to as the "undistributed profits tax." While this tax produces little revenue and has little effect on business, it has acquired prominence as a psychological irritant largely because of the widespread emotional criticism which has been directed against it. Your committee, therefore, is of the opinion that this feature of the corporation tax should be discontinued upon its expiration.

(*c*) Corporations with incomes slightly in excess of $25,000: In the case of corporations with net incomes slightly in excess of $25,000, it is deemed advisable to apply a "notch" provision to prevent undue hardship. For example, a corporation with a normal-tax net income of $25,000 would pay a tax of $3,525. If there were no notch provision, the corporation with a normal tax net income of $25,001 would pay a tax of $4,500.18. Thus a $1 increase of taxable income would result in an increase of tax of $975.18. By making the classification between small and large corporations depend upon normal tax net income, which is the net income reduced by the credit for intercompany dividends, and interest on governmental obligations subject to surtax, your committee found it possible to eliminate the complicated features of the notch provision of existing law. The following table shows that a corporation will come out of the notch at $31,964:

NOTCH PROVISION.

Rates:	Cumulative.
First $5,000, at 12½ per cent, $625	$625
Next $15,000, at 14 per cent, $2,100	2,725
Next $5,000, at 16 per cent, $800	3,525

Tax on first $25,000 income is $3,525.
Normal tax net income over $25,000; proposed rate, 18 per cent.
Notch: $3,525 tax on $25,000 plus 32 per cent over $25,000.

Income.	Tax under notch.	Tax at 18 per cent.	Income.	Tax under notch.	Tax at 18 per cent.
$25,001	$3,525.32	$4,500.18	$30,000	$5,125.00	$5,400.00
$25,300	3,621.00	4,554.00	$31,000	5,445.00	5,580.00
$25,500	3,685.00	4,590.00	$31,500	5,605.00	5,670.00
$26,000	3,845.00	4,680.00	$31,800	5,701.00	5,724.00
$27,000	4,165.00	4,860.00	$31,964	5,754.00	5,754.00
$28,000	4,485.00	5,040.00	$32,000	5,765.00	5,760.00
$29,000	4,805.00	5,220.00	$33,000	6,085.00	5,940.00

(d) Special corporations: There are certain corporations which under existing law are accorded special treatment. Under existing law, corporations in bankrupcy and receivership, joint-stock land banks, and rental housing corporations are entitled to a credit of 2½ per cent of their adjusted net income. This credit had the effect of making these corporations exempt from the 2½ per cent "undistributed-profits tax feature" of the existing law. Since under the bill, the undistributed-profits tax has been eliminated, these corporations will receive the same treatment as ordinary corporations.

The following corporations were subject under existing law to a flat rate of tax of 16½ per cent, regardless of the amount of their net income: Banks, China Trade Act corporations, insurance companies, and corporations in possessions of the United States. Under the bill, these corporations will be subject to the same rates applicable to other corporations, that is, if their normal-tax net income is $25,000, or less, they will be subject to the small corporation rates. If their normal-tax net income is above $25,000, they will be subject to the "notch provision" or the flat corporation rate, whichever results in the lesser tax.

Mutual investment companies under existing law are subject to a flat rate of 16½ per cent, regardless of the amount of their net income. However, they are not allowed any credit for dividends received but do get a credit for dividends paid. As to these companies, the existing law is not changed except that a rate of 18 per cent is substituted for the flat rate of 16½ per cent.

Foreign corporations engaged in a trade or business within the United States are taxed under existing law at the rate of 19 per cent, regardless of the amount of their net income. Since, under the bill, the maximum rate imposed upon domestic corporations is 18 per cent, it is necessary to make the rate on these corporations 18 per cent, in order not to interfere with treaty obligations. In the case of a foreign corporation not engaged in a trade or business in the United States, the rate of tax under existing law is 15 per cent, except that in the case of dividends the rate is 10 per cent and such dividend rate may be reduced by treaty to a rate not less than 5 per cent in the case of a contiguous country. The bill does not change the rates of tax under existing law as to foreign corporations not engaged in a trade or business in the United States.

2. *Net loss carry-over.*—The bill, together with the committee amendments, permits taxpayers to carry over net operating business losses for a period of two years. Prior to the Revenue Act of 1932, such 2-year carry-over was allowed. No net loss has ever been allowed for a greater period than two years. In the Revenue Act of 1932, the 2-year net loss carry-over was reduced to one year and in the National Industrial Recovery Act the net loss carry-over was entirely eliminated. As a result of the elimination of this carry-over, a business with alternating profit and loss is required to pay higher taxes over a period of years than a business with stable profits, although the average income of the two firms is equal. New enterprises and the capital goods industries are especially subject to wide fluctuations in earnings. It is, therefore,

believed that the allowance of a net operating business loss carry-over will greatly aid business and stimulate new enterprises. This net loss carry-over will apply to net operating losses occurring in 1939 and subsequent years. The 1939 net operating losses may be applied against the net income for 1940 and, if in excess of that net income, may be carried over and applied against the net income for 1941. This affords permanent relief to taxpayers as net operating losses for any future year may be carried over into the next two succeeding years. An example will show the necessity for such a provision.

Suppose a corporation, over the 3-year period 1939–41, shows the following:

Net operating loss for 1939	$2,000,000
Normal-tax net income for 1940	1,000,000
Normal-tax net income for 1941	1,000,000

Looking at this 3-year period, it will be seen that the corporation has not made any profit. However, assuming a flat rate of 18 per cent, it would be required to pay a tax of $360,000 if there were no provision for a net loss carry-over. Under the bill, a corporation in such a case would not be required to pay an income tax.

3. *$2,000 capital loss limitation.*—Section 117(d) of existing law provides that losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such exchanges. This limitation does not apply to the loss resulting from the sale by banks or trust companies of bonds or other evidences of indebtedness issued by the United States, States, or corporations, with interest coupons or in registered form, to the extent that such loss does not exceed the par or face value of the instrument. It also does not apply to losses from the sale or exchange of property which is not a capital asset. Capital assets do not include:

(1) Property which would be properly included in inventory if on hand at the close of the taxable year;

(2) Property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business; or

(3) Property used in a trade or business which is subject to depreciation.

A corporation which is regularly engaged in the purchase of goods and the resale to customers is not subject to this limitation with respect to such goods.

A corporation which is a dealer in securities, that is, one which is a merchant of securities, which buys securities and sells them to customers, is not subject to this limitation with respect to losses from such sales.

A corporation is not subject to this limitation with respect to property which is subject to depreciation. Corporation X purchased a machine in 1936 for $50,000. It had a life of 10 years, so that the annual deduction would be $5,000 a year; at the end of the fifth year a new machine was installed and the old machine was sold for $7,500. The loss would be the difference between $7,500 and $25,000, the depreciated cost, or $17,500. This loss is allowed to the corporation under the change made in the Revenue Act of 1938. However, the $2,000 limitation would apply to losses on sale of property, not subject to depreciation, including losses arising from the sale of real property to the extent that such loss is allocable to the land, as distinguished from depreciable improvements upon the land.

In lieu of this provision of existing law, the bill provides the following plan. Gains or losses from the sale or exchange of capital assets by corporations are divided into two groups:

(*a*) Short-term (held for not more than 18 months): A corporation which sustains a short-term capital loss will be permitted to apply such short-term capital loss only against short-term capital gains for the same taxable year and not against other income of the corporation for that year. If there is a net short-term capital loss in the taxable year, that is, if the short-term losses exceed the short-term gains, the net short-term capital loss (in an amount not in excess of the net income for such year) may be carried over into the next taxable year and applied against the short-term capital gains for such year.

(*b*) Long-term (held for more than 18 months): In the case of a net long-term capital loss, that is, the excess of the long-term capital losses over the long-term capital gains, a corporation may apply such long-term capital net loss against its other income for the same taxable year in which the loss was sustained.

The capital loss changes have no application to the surtax imposed upon domestic personal holding companies or to the computation of the income of a foreign personal holding company. For the purpose of the surtax imposed upon

domestic personal holding companies, losses from sales or exchanges of capital assets shall be allowed, as under existing law, only to the extent of $2,000 plus the gains from such sales or exchanges. In the case of foreign personal holding companies, the existing law is also continued.

Your committee's proposal will remove a tax irritant which has handicapped many corporations. It will have the effect, in general, of placing corporations more nearly on a parity with individuals with respect to capital losses. By the removal of the $2,000 limitation, the necessity of allocating losses between depreciable and nondepreciable property will be eliminated. Traders and other corporations that buy and sell property on their own account will be entitled to offset their net long-term losses against their ordinary income. The speculator will be prevented from offsetting speculative gains against ordinary income for the reason that losses from the sale or exchange of property held for 18 months or less can only be applied against gains from the sale or exchange of such property held for the same period. It is believed that this provision of the bill will materially aid as a stimulant to business recovery.

4. *Capital-stock tax and excess-profits tax.*—The existing law provides a capital stock tax of $1 per $1,000 upon the declared value of the capital stock. Domestic insurance companies are exempt from the tax as well as corporations which are exempt from the income tax. Under section 601(f)1 of the Revenue Act of 1938, reenacted in section 1202(a)1 of the Internal Revenue Code, corporations subject to this tax were given the right to declare a new value for capital stock tax purposes every three years beginning with the year ending June 30, 1938. In the case of corporations subject to the capital stock tax for the fiscal year ending June 30, 1938, a new declaration of value will not be permitted until the year ending June 30, 1941. In order to secure a reasonable valuation for capital stock tax purposes, the existing law provides for an excess-profits tax computed upon a certain part of the net income of the corporation in excess of the adjusted declared value. The excess-profits tax rates are as follows:

	Rate per cent.
Net income in excess of 10 per cent and not in excess of 15 per cent of the adjusted declared value	6
Net income in excess of 15 per cent of the adjusted declared value	12

The excess-profits tax is imposed with respect to the income-tax taxable year of the corporation ending after the close of the capital stock tax year.

In commenting upon this feature of our tax system, the Secretary of the Treasury in his appearance before your committee on May 27, 1939, referred to it as a "tax irritant" with the following statement:

"Under the present law the capital stock tax is based upon a declared capital stock value which the taxpayer may revise every three years. The declared value may be any figure that the taxpayer desires to submit, regardless of the actual value of the stock. The excess-profits tax applies to profits in excess of 10 per cent of such a declared value. The taxes are thus not really taxes on the value of capital stock or on excessive profits. Their major defect is that they operate very erratically. The tax liability they impose depends on the taxpayer's ability to forecast profits for the next three years as well as upon the amount of profits actually realized during each of the three years. Forecasts of earnings are particularly difficult to make in the case of new businesses and those with unstable incomes such as the capital goods industries, with the result that taxes imposed on such businesses are at times inordinately high."

The revenue from the capital stock tax and the excess-profits tax by calendar years for the period 1934 to 1938, inclusive, is as follows:

Revenue from capital stock tax and excess-profits tax, by calendar years 1934–38, inclusive.

Year.	Capital stock.	Excess profits.	Total.
1934	$91,088,000	$5,407,000	$96,415,000
1935	93,887,000	7,212,000	101,099,000
1936	137,069,000	23,313,000	160,382,000
1937	140,691,000	24,661,000	165,352,000
1938	127,467,000	44,446,000	171,913,000

It will be seen that the revenue derived from such a tax ranged from $160,000,000 to approximately $172,000,000 during the last three calendar years. To repeal such taxes at this time would force an increase in the corporate income-tax rate of approximately 3 per cent to make up for the loss in revenue. Moreover, it would require the net income corporations to assume liability for the capital stock tax collected under existing law from deficit corporations. It is, therefore, deemed unwise by your committee to repeal the capital stock tax and the excess-profits tax.

As the main hardship arising from this feature of the tax law is due to the fact that a corporation is unable to forecast its profits accurately over a 3-year period, it is believed that the situation can be remedied by permitting those corporations which declared a too low value for capital stock tax purposes to increase such value for the capital stock tax years ending June 30, 1939, and June 30, 1940. This will permit corporations that have been unable to forecast their profits accurately to be relieved of a large excess-profits tax liability for the excess-profits tax years ending after June 30, 1939, and June 30, 1940, respectively. Since corporations are entitled to a new declaration for the capital stock tax year ending June 30, 1941, this will afford them relief from any hardship arising from an underestimate of profits for at least a 3-year period. That the relief granted by the committee plan is real and substantial is shown by the following table:

Comparison, capital stock and excess-profits taxes.

$100,000 NET INCOME.

Declared value.	Capital-stock tax.	Excess-profits tax.		Total excess-profits tax.	Total capital stock and excess-profits taxes.
		6 per cent.	12 per cent.		
$200,000	$200	$600	$8,400	$9,000	$9,200
$400,000	400	1,200	4,800	6,000	6,400
$600,000	600	1,800	1,200	3,000	3,600
$800,000	800	1,200	0	1,200	2,000
$1,000,000	1,000	0	0	0	1,000

$200,000 NET INCOME.

$400,000	$400	$1,200	$16,800	$18,000	$18,400
$600,000	600	1,800	13,200	15,000	15,600
$800,000	800	2,400	9,600	12,000	12,800
$1,000,000	1,000	3,000	6,000	9,000	10,000
$1,200,000	1,200	3,600	2,400	6,000	7,200
$1,400,000	1,400	3,600	0	3,600	5,000
$2,000,000	2,000	0	0	0	2,000

$300,000 NET INCOME.

$600,000	$600	$1,800	$25,200	$27,000	$27,600
$800,000	800	2,400	21,600	24,000	24,800
$1,000,000	1,000	3,000	18,000	21,000	22,000
$1,500,000	1,500	4,500	9,000	13,500	15,000
$2,000,000	2,000	9,000	0	9,000	11,000
$3,000,000	3,000	0	0	0	3,000

$500,000 NET INCOME.

$50,000	$50	$150	$59,100	$59,250	$59,300
$100,000	100	300	58,200	58,500	58,600
$200,000	200	600	56,400	57,000	57,200
$500,000	500	1,500	51,000	52,500	53,000
$800,000	800	2,400	45,600	48,000	48,800
$1,000,000	1,000	3,000	42,000	45,000	46,000
$1,500,000	1,500	4,500	33,000	37,500	39,000
$2,000,000	2,000	6,000	24,000	30,000	32,000
$4,000,000	4,000	6,000	0	6,000	10,000
$5,000,000	5,000	0	0	0	5,000

Comparison, capital stock and excess-profits taxes—Continued.

$600,000 NET INCOME.

Declared value.	Capital-stock tax.	Excess-profits tax.		Total excess-profits tax.	Total capital stock and excess-profits taxes.
		6 per cent.	12 per cent.		
$50,000	$50	$150	$71,100	$71,250	$71,300
$100,000	100	300	70,200	70,500	70,600
$200,000	200	600	68,400	69,000	69,200
$500,000	500	1,500	63,000	64,500	65,000
$800,000	800	2,400	57,600	60,000	60,800
$1,000,000	1,000	3,000	54,000	57,000	58,000
$1,500,000	1,500	4,500	45,000	49,500	51,000
$2,000,000	2,000	6,000	36,000	42,000	44,000
$4,000,000	4,000	12,000	0	12,000	16,000
$5,000,000	5,000	6,000	0	6,000	11,000
$6,000,000	6,000	0	0	0	6,000

$800,000 NET INCOME.

$50,000	$50	$150	$95,100	$95,250	$95,300
$100,000	100	300	94,200	94,500	94,600
$200,000	200	600	92,400	93,000	93,200
$500,000	500	1,500	87,000	88,500	89,000
$800,000	800	2,400	81,600	84,000	84,800
$1,000,000	1,000	3,000	78,000	81,000	82,000
$1,500,000	1,500	4,500	69,000	73,500	75,000
$2,000,000	2,000	6,000	60,000	66,000	68,000
$5,000,000	5,000	15,000	6,000	21,000	26,000
$8,000,000	8,000	0	0	0	8,000

$1,000,000 NET INCOME.

$100,000	$100	$300	$118,200	$118,500	$118,600
$200,000	200	600	116,400	117,000	117,200
$500,000	500	1,500	111,000	112,500	113,000
$800,000	800	2,400	105,600	108,000	108,800
$1,500,000	1,500	4,500	93,000	97,500	99,000
$2,000,000	2,000	6,000	84,000	90,000	92,000
$3,000,000	3,000	9,000	66,000	75,000	78,000
$5,000,000	5,000	15,000	30,000	45,000	50,000
$7,500,000	7,500	15,000	0	15,000	22,500
$10,000,000	10,000	0	0	0	10,000

It will be seen that under the foregoing table a corporation with a net income of $100,000 which declared a capital stock value of $200,000 is liable to a capital stock and excess-profits tax of $9,200. By increasing such value to $1,000,000, its tax liability from this source may be reduced to $1,000. A corporation with a $1,000,000 net income and a declared value of $100,000 is subject to a total capital stock tax and excess-profits tax liability of $118,600. It may reduce this liability to an amount as low as $10,000 by increasing its capital stock tax value. But, of course, these corporations will have to pay ordinary corporation taxes.

5. *Extension of excise taxes and postal rates.*—Under the provisions of existing law, certain temporary excise taxes will terminate at midnight, June 30, 1939; certain others will terminate at midnight, July 31, 1939; and certain others will be effective only at reduced rates or with increased exemptions after June 30, 1939. In addition, the postal rate on nonlocal first-class mail will be reduced from 3 cents to 2 cents after June 30, 1939.

If the temporary taxes, the temporary increase in rates or decreased exemptions, and the temporary increased rate on nonlocal first-class mail are permitted to lapse at this time, a loss in revenue of over $600,000,000 will occur. This data will be given in greater detail hereafter in this report.

These temporary provisions originated in the Revenue Act of 1932 and have been extended three times. The last extension was approved June 29, 1937. Of those taxes then in effect, the following were repealed by the Revenue Act of 1938:

(1) Tax on tooth and mouth washes, dentifrices, tooth pastes, and toilet soaps (rate—5 per cent).
(2) Tax on furs (rate—10 per cent).
(3) Tax on phonograph records (rate—10 per cent).
(4) Tax on sporting goods (rate—10 per cent).
(5) Tax on cameras (rate—10 per cent).
(6) Tax on chewing gum (rate—2 per cent).
(7) Tax on brewers' wort (rate—15 cents per pound).
Tax on malt sirup, and so forth (rate—3 cents per pound).
(8) Tax on sales of produce for future delivery (rate—3 cents per $100 in value).
(9) Tax on matches (except fancy wooden matches) (rate—2 cents per thousand).

By the repeal of these taxes, a saving estimated by the Treasury at approximately $30,000,000 annually was made available to the consumers of the commodities upon which the burden of these taxes fell.

In addition to the temporary excises repealed by the Revenue Act of 1938, the following had already been repealed by prior legislation: (1) Tax on soft drinks; (2) tax on candy; (3) tax on boats; (4) tax on checks; (5) tax on jewelry; and (6) tax on grape concentrates. In the last year in which these six taxes were all in effect, the fiscal year 1934, they produced an aggregate revenue in excess of $55,100,000.

Those temporary provisions which are still effective but which will expire in June and July of this year, and the estimated revenue to be derived therefrom in 1940 if these provisions are extended, are shown in the following table, prepared by the Treasury Department:

Estimated revenue in the fiscal year 1940[1] from certain excise taxes which either automatically terminate or are subject to automatic rate reductions after June 30 or July 31, 1939, unless extended by Congress.

Tax source:	*Estimated revenue assuming taxes are extended.*
Stamp taxes—	
Issues of securities, bond transfers, and deeds of conveyance	$25,000,000
Stock transfers	29,500,000
Manufacturers' excise taxes—	
Lubricating oils	33,400,000
Gasoline	210,500,000
Electrical energy	39,600,000
Tires and inner tubes	38,200,000
Toilet preparations	11,300,000
Automobile trucks	7,700,000
Passenger automobiles and motorcycles	57,000,000
Parts and accessories for automobiles	8,900,000
Radio sets	6,900,000
Mechanical refrigerators	9,900,000
Firearms, shells, and cartridges	3,400,000
Matches	0
Miscellaneous taxes—	
Telegraph, telephone, radio, and cable facilities, leased wires, etc	23,600,000
Transportation of oil by pipe line	11,800,000
Admissions to theaters, concerts, cabarets, etc	19,200,000
Import taxes on petroleum, coal, lumber, and copper	8,400,000
Total	544,300,000

[1] Based upon the estimates appearing in the President's Budget message of Jan. 3, 1939.
Source: Treasury Department, Division of Research and Statistics, June 14, 1939.

Your committee recommends that these temporary provisions be extended for a period of two years and it also recommended that the 3-cent rate now applicable to nonlocal first-class mail matter be extended for a period of two years. These temporary provisions are not regarded as ideal ingredients of our tax structure, but because their administration has been perfected, and because our economy has been adjusted to them, it is deemed inadvisable to sacrifice at this time the revenue they produce.

The temporary tax on firearms, shells, and cartridges is made a permanent tax under the bill. The proceeds of this tax are now available for wildlife conservation work and it is believed that this work will be severely handicapped if the tax is allowed to expire within the next two years.

Your committee is sensible of the general undesirability of these taxes, but their extension for two years will not preclude action by the Congress to remove or revise them earlier if the condition of the revenue permits. In addition, the power granted to the President under existing law to reduce the rates on nonlocal first-class mail matter is extended for a period of two years. Thus if the President finds that after a survey that conditions so warrant, he can reduce the 3-cent rate at any time.

If these temporary provisions were not extended at this time and the loss was required to be made up from corporation income taxes, the proposed rate of 18 per cent would have to be increased to over 28 per cent in order to secure the same amount of revenue.

In this connection, in his Budget message of January 3, 1939, the President recommended:

"*Temporary miscellaneous internal-revenue taxes.*—I recommend that the Congress take steps by suitable legislation to extend the miscellaneous internal-revenue taxes which under existing law will expire next June and July, and also to maintain the current rates of those taxes which would otherwise be reduced next June. I consider that the revenue from such taxes or its equivalent is necessary for the financing of the Budget for 1940."

With regard to the necessity of continuing the 3-cent postal rate, the President, in the same message, stated:

"*Postal receipts.*—The estimates of appropriations for the Postal Service included in the 1940 Budget are predicated upon the enactment of legislation to provide for the continuance during the fiscal year of the 3-cent postage rate for first-class mail other than for local delivery. While the Government collects more than it spends on first-class mail, the Postal Service is not self-supporting because it carries other classes of mail at less than cost, as shown in the tabular footnote on page XXV."

In addition, the following letter from the Postmaster General points out the necessity of continuing the 3-cent postal rate:

POST OFFICE DEPARTMENT,
Washington, D. C., February 21, 1939.

Hon. WILLIAM B. BANKHEAD,
Speaker, House of Representatives, Washington, D. C.

MY DEAR MR. BANKHEAD: The postage rate of 3 cents an ounce now applicable to letters and other first-class matter mailed for other than local delivery will expire on June 30, 1939, and the former 2-cent rate will automatically be restored in the absence of new legislation continuing the 3-cent rate.

According to the Department's cost ascertainment, the revenues for the fiscal year 1938 would have been approximately $95,700,000 less if the 3-cent rate had not been in effect during that year and in that event there would have been an estimated net deficiency of more than $90,000,000 after taking into consideration the nonpostal items representing certain free services and subsidies for which the Department receives only a book credit. The showing for the fiscal year 1939 will be approximately the same and it is believed that without legislation continuing the 3-cent rate after July 1, 1939, the Department will be confronted with the possibility of a net deficiency of around $100,000,000 in the fiscal years 1940 and 1941.

In view of these circumstances it is deemed essential that the present 3-cent rate for first-class matter be continued at least two years longer.

There is hereto attached a draft of a resolution which is believed will accomplish the desired end, and the enactment thereof or of a similar measure is recommended.

It has been ascertained from the Bureau of the Budget that this report is in accord with the program of the President.

Very truly yours,

JAMES A. FARLEY,
Postmaster General.

DETAILED DISCUSSION OF CERTAIN TECHNICAL PROVISIONS OF THE BILL.

NET OPERATING LOSS DEDUCTION.

Section 211 of the bill, with the committee amendments, adds to the Internal Revenue Code sections 23(s) and 122, which provide that in computing net income for the taxable year taxpayers shall be allowed to deduct operating losses incurred in the two preceding taxable years. Such a deduction is available to all taxpayers except for the purposes of section 102, relating to the surtax on corporations improperly accumulating surplus, Supplement P, relating to foreign personal holding companies, Supplement Q, relating to mutual investment companies, and Subchapter A of Chapter 2, relating to personal holding companies.

The net operating loss deduction is first available in a taxable year beginning after December 31, 1939.

The net operating loss deduction is the net operating loss carry-over reduced by certain adjustments intended to prevent net losses from being used as a deduction by the taxpayer where he is not suffering any economic loss by reason of the fact that his income contains nontaxable items (as in the case of percentage depletion, exempt interest on State and local bonds, and, with respect to corporations, intercorporate dividends, and interest on partially exempt Federal obligations).

For the purpose of ascertaining the first, second, or third preceding taxable year, a fractional part of a year which is a taxable year under section 48(a), is a preceding taxable year.

The net operating loss for any taxable year is the excess of deductions allowed by Chapter 1 over the gross income for such year, with the exceptions and limitations provided by section 122(d).

The exceptions and limitations provided in section 122(d) are for the purpose of insuring that only an economic loss will be taken into account. It is provided that in computing gross income, wholly tax-exempt interest, diminished by the amount of interest paid or accrued not allowed as a deduction by section 23(b), relating to interest on indebtedness incurred or continued to purchase or carry certain tax-exempt obligations, shall be included, and that in computing net income or a net operating loss on the basis of such gross income—

(1) The deduction for depletion shall not exceed the amount which would be allowable if computed without reference to discovery value or to percentage depletion under section 114(b) (2), (3), or (4);

(2) No net operating loss deduction shall be allowed;

(3) The deduction on account of long-term capital losses shall not exceed the amount of the long-term capital gains, and the deduction on account of short-term capital losses shall not exceed the amount of the short-term capital gains;

(4) In the case of a taxpayer other than a corporation, allowable deductions not attributable to a trade or business regularly carried on by the taxpayer are allowed only to the extent of the gross income not derived from the trade or business.

The following example will illustrate the operation of the net operating loss deduction:

The X Corporation has the following items of income and deductions for the year 1940: Gross income as defined in section 22 of $400,000, included in which are long-term capital gains of $50,000 and short-term capital gains of $25,000; interest wholly exempt from tax of $35,000: deductions of $600,000, included in which are long-term capital losses of $60,000 and short-term capital losses of $25,000 and a deduction for percentage depletion of $75,000, which is $70,000 in excess of what would be allowable on cost; interest of $15,000 paid on indebtedness incurred to purchase tax-free obligations, not allowed as a deduction under section 23(b).

On the basis of these facts the X Corporation has a net operating loss for the year 1940 of $100,000, computed as follows:

Gross income as defined in section 22	$400,000	
Plus:		
Tax-exempt interest	35,000	
Less interest paid	15,000	
	20,000	
Gross income adjusted as required by section 122(d)		$420,000
Ordinary deductions	$600,000	
Less:		
Excess of percentage depletion over cost	70,000	
Excess of long-term capital losses over gains	10,000	
	80,000	
		520,000
Net operating loss		100,000

Assume further that for the year 1939 the X Corporation had a net operating loss of $30,000, for the year 1941 a net income (computed with the adjustments required by section 122(d)) of $75,000, and for the year 1942 a net income (computed with the adjustments required by section 122(d)) of $450,000 and a normal-tax net income (computed without a net operating loss deduction) of $445,000. The net operating loss deduction available to the X Corporation for the year 1942 is $50,000, computed as follows:

Net operating loss for 1941		None
Net operating loss for 1940	$100,000	
Less:		
Net income for 1941	75,000	
Minus net operating loss for 1939	30,000	
	45,000	
Net operating loss for 1940 adjusted as required by section 122 (b) (2)		$55,000
Net operating loss carry-over to 1942		55,000
Less:		
Net income for 1942	$450,000	
Minus normal-tax net income for 1942	445,000	
		5,000
Net operating loss deduction for 1942		50,000

Assumption of Liabilities in Tax-Free Exchanges.

It has long been the policy in our income-tax law to give due consideration to the exigencies of business in connection with corporate reorganizations by postponing, in certain specifically described instances, the recognition of gain realized in such transactions. In general, if gain is realized in such a transaction, nonrecognition of the entire gain is allowed only where, under the specifically defined circumstances, the taxpayer transfers property and receives in exchange therefor stock or securities in a corporation which is a party to the reorganization. If, in addition to such stock or securities, other property or money is received, gain is recognized to the extent of such other property or money.

The recent Supreme Court case of *United States* v. *Hendler* (303 U. S., 564 (1938)) has been broadly interpreted to require that, if a taxpayer's liabilities are assumed by another party in what is otherwise a tax-free reorganization, gain is recognized to the extent of the assumption. In typical transactions changing the form or entity of a business it is not customary to liquidate the liabilities of the business and such liabilities are almost invariably assumed by the corporation which continues the business. Your committee therefore believes that such a broad interpretation as is indicated above will largely nullify the

provisions of existing law which postpone the recognition of gain in such cases. To enable bona fide transactions of this type to be carried on without the recognition of gain, the committee has recommended section 213 of the bill.

Section 213(a) of the bill amends section 112 of the Internal Revenue Code by adding a new subsection (k) which provides that in transactions otherwise within section 112(b) (4) or (5), or 112(c) or (d) (in so far as they relate to exchanges under section 112(b) (4) or (5)) gain shall not be recognized to the transferor on account of the assumption of liabilities or the transfer of property subject to liability. It is expressly provided that this provision shall not apply where it appears that the principal purpose of the taxpayer whose liabilities are assumed or who transfers property subject to a liability was a purpose to avoid Federal income tax on the exchange, or if not such purpose, was not a bona fide business purpose. In such cases, if a taxpayer's liabilities are assumed or he transfers property subject to a liability, the amount of the assumption or the amount of such liability shall be considered as money received by the taxpayer upon the exchange and gain, to the extent thereof, will be recognized. If in a suit or proceeding a taxpayer has the burden of proving that the assumption or acquisition is *not* to be considered as money received by him, such burden shall be sustained only if the taxpayer sustains the burden by the clear preponderance of the evidence.

The definition of "reorganization" as contained in section 112(g)1 of the Internal Revenue Code is amended by section 213(b) of the bill. Clause (B) of this definition now provides that in order for the transaction to constitute a reorganization, the acquisition of properties therein described must be in exchange *solely* for voting stock. Section 213(b) provides that if the corporation acquiring the properties assumes liabilities of the party from whom the properties are acquired, or takes the property subject to a liability, such assumption of liabilities, or taking subject to a liability, shall be disregarded in determining whether the properties are received in exchange solely for voting stock. This is true whether or not under the provisions of subsection (k) the transferor is considered to have received money on account of the assumption of liability or taking subject to liability.

Section 213(c) of the bill amends section 112(b)5 of the Internal Revenue Code to provide the proper rule for determining whether the stock received in an exchange by two or more persons is "in proportion to his interest in the property prior to the exchange" in cases involving assumption of liabilities. For this purpose, the amendment requires that the amount of the liabilities assumed shall be considered as stock or securities received by the transferor. The rule is not applicable if under the amendment provided by section 213(a) the assumption of indebtedness is considered as money.

Section 213(d) of the bill amends section 113(a)6 of the Internal Revenue Code to provide that in the determination of the basis under that section any liabilities of the taxpayer assumed by the transferee or to which the transferred property is subject shall be considered as money received by the taxpayer upon the exchange and hence is applicable in reduction of the basis of the property received by the taxpayer on the exchange. This provision applies whether or not the assumption of the liability or the taking subject to the liability is considered money under section 112(k). No amendment is made to section 113(a) (7) or (8), because the payment by the transferee of the liabilities assumed, or to which the property was subject, does not give rise to any increase or adjustment of the basis of the property transferred.

Section 213(e) of the bill provides that these amendments of the Internal Revenue Code shall be applicable to taxable years beginning after December 31, 1938.

Section 213 (f), (g), (h), and (i) of the bill contain provisions which will achieve, in the case of an exchange governed by the Revenue Act of 1924 and subsequent Acts up to and including the 1938 Act, a result similar to that required for future years under the amendments to section 112 of the Internal Revenue Code.

The amendments to the Code and the retroactive application of similar provisions to prior Revenue Acts taken together establish a system under which the treatment of recognition of gain and determination of basis will be under uniform equitable rules for the periods covered. Since transactions entered into under such Acts were made under the understanding of the law that such assumptions of, and taking subject to, liabilities did not give rise to recognizable gain, it is necessary, in order to prevent hardship on taxpayers

and to prevent tax avoidance, to provide retroactively for the application of the rules above provided. There is, however, no necessity under the retroactive subsections that the taxpayer prove that the assumption of, or taking subject to, liabilities was not for tax-avoidance purposes or was a bona fide business purpose. Moreover, where under a final determination of tax liability, by a closing agreement or a decision of the Board of Tax Appeals or a court, if the decision has become final or the agreement is made, before the ninetieth day after the date of the enactment of the bill, gain was recognized on account of assumption of a liability or taking subject to a liability such determination is not disturbed and the basis of the transferor and the basis of the transferee will be increased by the amount of gain so recognized.

STOCK DIVIDENDS AND STOCK RIGHTS.

Great confusion exists under the present law with respect to the basis for computing gain or loss upon the sale or exchange of stock or stock rights acquired in nontaxable distributions and with respect to the basis for computing gain or loss upon the sale or exchange of stock upon which such distributions have been made. The Revenue Acts from 1921 to 1934, inclusive, provided that a stock dividend should not be subject to tax. The uniform construction applied to such Acts was that the basis in the taxpayer's hands of the stock in respect of which a distribution in stock or rights to acquire stock of the distributing corporation was made was to be allocated between such stock and the stock or rights distributed.

However, in *Koshland* v. *Helvering* (298 U. S., 441) and *Helvering* v. *Gowran* (302 U. S., 238), the Supreme Court denied the validity of this construction with respect to stock, the distribution of which constituted income within the meaning of the sixteenth amendment, and held that no part of the cost of the stock in respect of which the distribution was made is to be allocated to the stock or rights distributed. Under these decisions, the basis of the stock or rights distributed is zero, and the basis of the stock in respect of which the distribution was made is the same as it would be if no such distribution had been made. This rule would, in many cases, produce gross inequities for taxpayers and the Government alike. For example, a taxpayer might have sold the stock in respect of which the distribution was made in a year with respect to which a claim for refund of tax is barred by the statute of limitations. If he computed gain or loss in good faith upon the allocated basis then believed applicable, and if he now wishes to sell the stock distributed to him, to assign a zero basis to such stock would preclude him from recovering tax-free a part of his cost. Conversely, if in a prior year with respect to which the assertion of a deficiency in tax is barred by the statute he had sold the stock distributed to him, computing gain or loss upon an allocated basis, to assign a full cost basis to the stock in respect of which the distribution was made would enable him to recover tax-free more than his cost.

The provisions of the bill relating to stock dividends and rights are designed to afford a clear and unequivocal statutory basis, with respect to both past and future taxable years, for the rule of allocation upon which taxpayers, the Treasury Department, and Congress have alike relied.

Section 214 adds a new paragraph (19) to section 113(a) of the Internal Revenue Code. Subparagraph (A) of section 113(a)19 sets forth the general rule of allocation. In the case of stock in a corporation or rights to acquire such stock, acquired by the taxpayer after February 28, 1913, in a distribution by such corporation (designated in the bill as new stock), and in the case of stock in respect of which such distribution was made (designated in the bill as old stock), the basis of both the old and new stock shall, in the shareholder's hands, be determined in taxable years beginning after December 31, 1938, by allocating between the old stock and the new stock the adjusted basis of the old stock. Such allocation is to be made under regulations which shall be prescribed by the Commissioner, with the approval of the Secretary. The definition of new stock is designed to include stock or rights of the distributing corporation received in a distribution with respect to which the shareholder had an option to receive money or other property instead of such stock. Subject to certain exceptions hereinafter described, the rule of allocation is applicable in all cases in whch the new stock was acquired in a taxable year beginning before January 1, 1936. In cases in which the new stock was acquired in a taxable year beginning after December 31, 1935, the

rule of allocation is only applicable if the distribution of the new stock did not constitute income to the shareholder within the meaning of the sixteenth amendment. If the new stock was acquired in a taxable year beginning after December 31, 1935, and its distribution did constitute income to the shareholder within the meaning of the sixteenth amendment, it is not exempt, under section 115(f) of the Revenue Act of 1936 and subsequent Acts, from taxation as a dividend upon receipt. Under these Acts the basis of the new stock is fair market value at the time of distribution, and the basis of the old stock is its adjusted basis without allocation, so the bill makes no provision for allocation of basis in such case.

Subparagraph (B) provides, in general, that where the new stock consisted of stock rights which were sold in a taxable year beginning before January 1, 1939, and the entire amount of the proceeds of the sale were included in gross income for such year, the basis of the old stock shall be determined without reference to the rule of allocation prescribed by subparagraph (A). Taxpayers receiving nontaxable stock rights have for many years been granted the option to include the entire proceeds of the sale of such rights in gross income, rather than to allocate to the rights a part of the basis of the old stock. Under the bill, this option will not be available in the case of rights sold in taxable years beginning after December 31, 1938. Taxpayers who in the past have exercised this option have in effect assigned a zero basis to such rights, and it would therefore be inequitable to compel them to reduce the basis of their old stock on account of the acquisition of such rights. However, where the taxpayer has, at any time before the enactment of the bill, asserted, by claim for refund or credit or otherwise, that any part of the proceeds of the sale of the rights should be excluded from gross income for the year of their sale, the basis of the old stock must be determined in accordance with the rule of allocation. If the entire amount of the proceeds of the sale of the rights was included in gross income for the year of sale, and the taxpayer has not asserted prior to the enactment of the bill that such proceeds should be excluded from gross income for such year, then in no event, after the date of enactment of the bill, is any part of such proceeds ever to be excluded from gross income for such year.

Subparagraph (C) provides that the rule of allocation shall not apply if the new stock was acquired in a taxable year beginning before January 1, 1936, and there was included as a dividend, in gross income for such year, an amount on account of such stock, which amount was not, before the date of enactment of the bill, excluded from gross income for such year. Thus, where the taxpayer erroneously, or as a result of a court decision, included the value of the new stock in gross income as a dividend in the year of its receipt, the basis of the old and the new stock are to be determined without reference to the rule of allocation. In such cases, of course, the basis of the new stock will be its fair market value at the time of the distribution.

Subparagraph (D) provides that the rule of allocation shall not apply if the new stock or old stock was sold or otherwise disposed of in a taxable year beginning before January 1, 1936, and the basis (determined by a decision of a court or the Board of Tax Appeals, or a closing agreement, and the decision or closing agreement became final before the ninetieth day after the date of enactment of the bill) for determining gain or loss on such sale or other disposition was ascertained by a method other than that of allocation. This provision insures that in the very small number of cases in which court decisions or closing agreements have required that other than an allocated basis be used in computing gain or loss upon the sale or other disposition of either old or new stock, the taxpayers involved will be enabled to recover tax-free their full cost, and no more than their full cost, upon a subsequent sale or other disposition of old or new stock which they may have retained.

The amendment made to section 115(d) of the Internal Revenue Code by section 214 of the bill is merely declaratory of existing law. It makes clear that the basis of old stock shall not be reduced under section 115(d) by the value of a distribution of stock or rights which is exempted by the statute from taxation as a dividend whether or not such distribution was out of earnings or profits accumulated after February 28, 1913, or out of earnings or profits of the taxable year. No amendment is made to section 113(b)1(D) since, if a part of the basis of the old stock is allocated to the new stock, no further adjustment of the basis of the old stock on account of the distribution of the new stock would be proper.

Section 214(c) of the bill also applies the above rules with respect to allocation of the basis of old or new stock for the purposes of the Revenue Act of 1938 and the prior Revenue Acts. The retroactive provisions of subsection (d) are indispensable to the adequate functioning of the prospective relief afforded by subsection (a). For example, if the rule of allocation were only prescribed with respect to taxable years beginning after December 31, 1938, a taxpayer who in 1938 sold his new stock and was compelled by the decisions referred to previously to compute gain or loss upon a zero basis will not have recovered his full cost tax-free if in a prior year he had sold his old stock and had, under the rule then believed applicable, assigned to such old stock an allocated basis. Subsections (a) and (d), taken together, form a unified scheme whereby complete equity is achieved regardless of when the new or old stock is sold. In general, an allocated basis, relied upon in the past by taxpayers and the Government alike, is prescribed in all cases except those in which a different basis was determined by adjudication, or by the taxpayer's action in conformity with the Treasury regulations which, in special cases, provided for other than an allocated basis. In these latter cases, under the bill the basis of any stock remaining shall be determined upon the same principles as those which governed the determination of the basis of the stock previously sold. Your committee therefore believes that section 214 contains a completely proper and equitable solution to the confusion now existing with respect to basis in stock dividend cases.

Discharge of Indetedness.

Section 215(a) amends section 22(b) of the Internal Revenue Code (relating to exclusions from gross income) by adding a new paragraph (9) covering income from discharge of corporate indebtedness. The new paragraph provides that the amount of income of a corporate taxpayer attributable to the discharge within the taxable year of its indebtedness or indebtedness for which it is liable (as, for example, in the case of a debt arising from an assumption of liability of another corporation) is to be excluded from gross income, provided (1) the Commissioner is satisfied that such taxpayer was at the time of such discharge in an unsound financial condition and (2) such taxpayer consents to regulations prescribed under the new section 113(b)3 of the Code, relating to reduction of basis, in effect at the time of the filing of the return.

It is not necessary, for the purposes of section 215, that a corporation must establish that its liabilities exceed its assets or it is unable to meet its current obligations as they fall due. Under the section, if a taxpayer could show the Commissioner that its obligations were selling in a free market at prices substantially below their issue price and below the market price of similar issues of similar businesses, it would be highly indicative of its unsound financial condition.

If as a result of the discharge of indebtedness there remains unamortized premium, the amount of the income attributable to such premium is excluded from gross income; and if as a result of the discharge of indebtedness there remains unamortized discount, the amount of the deduction attributable to such discount must be disallowed as a deduction. The unamortized premium and unamortized discount is to be computed as of the first day of the taxable year in which the discharge of indebtedness took place.

The relief accorded corporate taxpayers under the amendment is limited to corporate indebtedness which is evidenced by a "security," in existence on June 1, 1939. Under the bill and the committee amendments, a "security" is defined as being a bond, debenture, note, or certificate, or other evidence of indebtedness.

As a corollary to the amendment made by subsection (a), subsection (b) adds a new paragraph (3) to section 113(b) of the Internal Revenue Code, relating to the adjusted basis of property. The new paragraph provides that if an amount is excluded from gross income of a corporate taxpayer under the amendment made by subsection (a), the basis of the taxpayer's property held by it at any time during the taxable year in which a discharge of indebtedness occurred shall be subject to reduction.

The Commissioner is given authority to prescribe regulations, with the approval of the Secretary, which will set forth rules under which the adjustment to basis shall be made. It is a condition upon the taxpayer's receiving the privilege of excluding the amount of income attributable to the discharge of indebtedness from gross income that when filing its return it consents to the regulations, which are in effect relating to adjustment of basis. The amount

of such adjustment can never exceed the total amount excluded from gross income reduced by the deduction for unamortized discount disallowed. Assume, for example, that the taxpayer has outstanding one issue of bonds sold at a premium and one issue of bonds sold at a discount. Both issues are discharged by payment less than the face value of the obligations. Assume, further, that under the new section 22(b)9 there is excluded from gross income $1,000 attributable to income arising from the discharge; there is excluded from gross income the amount of $100 for unamortized premium; and there is disallowed a deduction of $50 for unamortized discount. The total reduction in basis can not exceed $1,050.

It is not necessary that the regulations so prescribed by the Commissioner require a reduction in basis of all the property held by the taxpayer during the taxable year in question. The Commissioner is permitted not to reduce basis or to allocate all or a part of the reduction to some property and a part or none to other property and the amount of reduction to be allocated to a particular property may be fixed by him. Whatever reduction in basis is required under the Commissioner's regulations, it is to be made as of the 1st day of the taxable year in which the discharge occurred except that where property the basis of which is to be reduced is acquired subsequent to such 1st day, then the adjustment is to take effect as of the time it was acquired by the taxpayer during the taxable year.

Wherever a discharge of indebtedness is accomplished by the transfer by the debtor of property in kind, such as by the issue of its own stock, the difference between the amount of the obligation discharged and the value of the property transferred is the amount which may be excluded from gross income and applied in reduction of basis.

The amendments made by section 215 of the bill are applicable only to taxable years beginning after December 31, 1938. They are not applicable to discharges of corporate indebtedness occurring prior to the date of the enactment of the bill. They are also not applicable to a discharge occurring in any taxable year beginning after December 31, 1942. They likewise do not apply to any discharge of corporate indebtedness occurring in any proceeding under section 77B, or under Chapter X or XI, of the Bankruptcy Act of 1898, as amended, since such discharges are governed by other provisions of law.

Tax Liens on Securities.

Section 3672 of the Internal Revenue Code provides in effect that the tax lien imposed under section 3670 of the Code shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector in the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, or in the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated if the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory, or in the office of the clerk of the District Court of the United States for the District of Columbia if the property subject to the lien is situated in the District of Columbia. Section 401 of the bill reenacts such section (designating it as subsection (a)) and makes no other than the declaratory one of expressly including pledgees within the section.

The chief purpose of section 401 is to amend section 3672 by adding a new subsection (b) dealing with securities. It provides that even though notice of the tax lien imposed by section 3670 has been filed by the collector, the lien is not valid with respect to securities mortgaged, pledged, or purchased for an adequate and full consideration in money or money's worth, if at the time of the mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien. The term "security" is defined to mean certain corporate obligations (including those issued by a government or political subdivision thereof), share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; any negotiable instrument issued by any individual, corporation, or other legal entity; or money. The provisions of the subsection are applicable with respect to mortgages, pledges, and purchases whenever occurring and regardless of when the lien arises, but if the liability of the mortgagee, pledgee, or purchaser has been established by a

judgment which becomes final before the date of enactment of the bill, the amendment does not apply.

The new provisions dealing with securities are considered necessary because of a recent decision of a district court (*United States* v. *Rosenfield*, E. D. Mich., 1938, 26 F. Supp., 433). This case held that a bona fide purchaser for value of shares of stock from a seller against whom a notice of lien for Federal income taxes had been duly filed prior to the sale took subject to the lien even though the purchaser did not have notice or knowledge of such lien. While it is true that the filing of the notice of the tax lien may constitute notice in the case of real property, it is inequitable for the statute to provide that it constitutes notice as regards securities. For example, when a broker purchases a security for his customer on the exchange, it is obviously impossible for him to check all the offices in which a notice of the tax lien may be duly filed to determine whether the security is subject to such lien. A like situation exists with respect to over-the-counter and direct transactions in securities. An attempt to enforce such liens on recorded notice would in many cases impair the negotiability of securities and seriously interfere with business transactions. The adoption of the amendment will remove an existing hardship without causing any undue loss of revenue.

Tax on Transfers of Worthless Securities by Executor, etc.

The present law imposes a stamp transfer tax on the delivery or transfer of shares or certificates of stock. Usually, an executor or administrator is required under the law or by the terms of the will to deliver or transfer to the persons lawfully entitled to them the shares or certificates formerly belonging to the decedent. To impose a transfer tax equal to or in excess of the value of the securities under these circumstances, as now required under existing law, does not seem equitable. Section 402 of the bill proposes to amend section 1802(b) of the Internal Revenue Code so as to exempt such deliveries or transfers in the future if the value of the securities is not greater than the amount of the tax that would otherwise be imposed on the delivery or transfer.

1939–30–9920

REVENUE BILL OF 1939.

[Senate Report No. 648, Seventy-sixth Congress, First Session. Calendar No. 699.]

[June 21 (legislative day, June 15), 1939.]

Mr. Harrison, from the Committee on Finance, submitted the following report [to accompany H. R. 6851]:

The Committee on Finance, to whom was referred the bill (H. R. 6851) to provide revenue, equalize taxation, and for other purposes, having had the same under consideration, report favorably thereon with certain amendments and, as amended, recommend that the bill do pass.

The House bill made the following changes in existing law:

1. Taxpayers are permitted to carry over their net operating business losses for a period of two years. This provision will take effect with respect to taxable years beginning after December 31, 1939. However, a taxpayer which has sustained a net operating business loss in 1939 will be permitted to carry over such operating net loss in reduction of its income for 1940 and, if such net loss is in excess of its income for 1940, to carry over such excess in reduction of its income for 1941.

2. Corporations are given the right to increase their capital stock tax valuations for the fiscal years ending June 30, 1939, and June 30, 1940, but not to decrease such value for such years. Under the existing law, corporations are entitled to a new declaration (either lowering or raising their capital stock value) for capital stock tax purposes for the fiscal year ending June 30, 1941.

3. In lieu of the tax now imposed upon corporations with incomes above $25,000, there is imposed a flat corporate tax of 18 per cent. This new rate will take effect with respect to taxable years beginning after December 31, 1939. The present corporation tax containing the undistributed-profits tax feature will be allowed to expire, as such tax does not apply to taxable years beginning after December 31, 1939.

4. Corporations with incomes of $25,000 or less are subject to the graduated rates on small corporations provided by existing law.

5. A notch provision is provided to prevent corporations from being heavily taxed by reason of having incomes slightly in excess of $25,000. If it were not for this notch provision, a corporation with an income of $25,001 would have its tax increased over $900 by reason of having $1 more in taxable income. Since the classification between large and small corporations is based upon normal-tax net income instead of net income, the notch is greatly simplified as compared to the one in existing law.

6. Banks, insurance companies, China Trade Act corporations, and corporations in the possessions of the United States are taxed like other corporations. That is, those with normal-tax net incomes of $25,000 and less receive the benefit of the graduated rates applicable to small corporations, while those with normal-tax net income in excess of $25,000 are taxed under the notch or at a flat rate of 18 per cent, whichever method results in the lesser tax.

7. Foreign corporations engaged in a trade or business within the United States and mutual investment companies are taxed at a flat rate of 18 per cent, regardless of the amount of their income.

8. Foreign corporations not engaged in a trade or business within the United States are taxed at the rates provided for in existing law. Under the existing law, this type of corporation is taxed upon fixed or determinable income at a rate of 15 per cent, except that in the case of dividends the rate is 10 per cent. In the case of a contiguous country, the 10 per cent rate on dividends may be reduced by treaty to a rate not less than 5 per cent. Thus, the existing law is continued in this bill.

9. Corporations in bankruptcy or receivership, joint-stock land banks, and rental housing corporations are treated under the bill like other corporations. The special treatment accorded to them under the existing law made necessary by the undistributed-profits tax has been abandoned.

10. The $2,000 limitation applicable to the capital losses of corporations has been repealed except with respect to domestic personal holding companies and foreign personal holding companies. In lieu of this provision, the bill allows capital losses on assets held for more than 18 months to be applied in full against ordinary net income for the taxable year in which the loss was realized. In the case of capital losses on assets held for not more than 18 months, the bill provides that they may be applied only against capital gains on assets held not more than 18 months. If the losses from the sale or exchange of such assets held for not more than 18 months exceed the gains from such short-term transactions the excess loss if not in excess of the net income, may be carried over into the following taxable year and may be applied against short-term capital gains of such year. This is the same treatment accorded individuals under existing law in the case of short-term capital losses. These provisions are applicable only with respect to taxable years beginning after December 31, 1939.

11. The bill also makes certain administrative changes which afford relief both to the Government and the taxpayer. Briefly, these are as follows:

(*a*) A corporation which establishes to the satisfaction of the Commissioner that it is in an unsound financial condition may redeem its bonds, notes, or other evidence of indebtedness in existence on June 1, 1939, at less than their face value without the recognition of gain if such redemption occurs after the enactment of the bill and in a taxable year beginning prior to January 1, 1943. This provision will materially aid railroads and other corporations whose bonds can be purchased at the present time at less than their face value, giving them an incentive to liquidate their indebtedness. Proper safeguards prevent the provisions from being utilized by corporations in a sound, financial condition to drive the price of their bonds down in the market.

(*b*) A provision which permits corporations to continue bona fide business reorganizations without being subject to taxation immediately upon such reorganization by reason of the assumption by one corporation of the debts of the other in the process of reorganization. This provision affords relief both to the Government and to the taxpayer. This change was made in view of the *Hendler case* (303 U. S., 564).

(*c*) A modification of the limitations on the foreign tax credit to make it less difficult for American corporations to transact business abroad. The limitations on the allowance of a credit for taxes paid to foreign countries were placed in the law to make it certain that the Federal Government would receive its full tax on the income from United States sources. It was not intended for the

American tax to apply against the income from foreign sources unless the foreign tax rate was less than the tax rate imposed by the United States. Due to a technical change (inserted in the Revenue Act of 1934 and continued in subsequent Acts) making the allowance for intercompany dividends, and interest on Government obligations subject to surtax a credit against net income instead of a deduction from gross income, American corporations operating abroad do not get a full credit for the taxes paid to a foreign country on their foreign income. This makes it difficult for American corporations to compete abroad with foreign corporations. Both the Treasury Department and the State Department requested that immediate steps be taken to correct this situation. By reason of the nature of the tax imposed by section 102, relating to corporations improperly accumulating income to avoid surtax on their shareholders, it is not believed that the credit for taxes paid to foreign countries should be permitted to diminish such tax, and the bill so provides.

(*d*) A provision amending the Federal lien law to provide that such lien shall not be valid as against any mortgagee, pledgee, or purchaser of a negotiable security for full consideration if the mortgagee, pledgee, or purchaser was without knowledge of the existence of the lien. It was inserted to overcome the effect of the Rosenfield decision (District Court, Eastern District of Michigan, December 8, 1938).

(*e*) A provision validating a Treasury regulation of long standing which required that where a stock dividend was declared the basis of the original shares to be apportioned between those shares and the dividend stock for computing the gain or loss on the sale thereof. In one case, the Supreme Court held that where a taxpayer had received a dividend of common stock on its preferred stock, no part of the cost of the old stock could be allocated to the dividend stock in determining gain or loss (*Koshland* v. *Helvering*, 298 U. S., 441). In another case where the converse situation was presented, the Court held that no part of the cost of the original stock could be allocated to the dividend stock and therefore the cost basis of the dividend stock was zero. (*Helvering* v. *Gowran*, 320 U. S., 238 [Ct. D. 1292, C. B. 1938–1, 300].)

These decisions may affect adversely either the Government or the taxpayer, depending upon the particular stock sold by the taxpayer. The bill corrects this situation by ratifying the Treasury regulations dealing with this point.

(*f*) Several minor technical changes. One of these makes a special provision in Subchapter A, Chapter 2 (relating to personal holding companies) so that the gross income of insurance companies other than life or mutual which is specially defined in section 204 and is in part a net income, will be comparable, for the purposes of Subchapter A, to the gross income of ordinary corporations. Another change exempts from stamp tax on transfers of worthless stock from an executor or administrator to a legatee, heir, or distributee.

(*g*) An exemption from the income tax is granted to voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to members of such associations or their dependents, if no part of their net earnings inures (other than through such payments) to the benefit of any private individual or shareholder and the membership is composed solely of Federal officers or employees.

12. The bill extends for two years the temporary excise taxes which, under existing law, expire at the end of June or July of this year. It also extends for two years the 3-cent postal rate on nonlocal first-class mail. The bill also extends for two years the power of the President to modify postage rates on other than first-class matter.

Your committee approve these changes and recommend the following additional provisions:

Explanation of Substantive Committee Amendments.

Section 3. Tax on toilet preparations.

Section 3 of the bill, as reported, adds to the section imposing tax on toilet preparations two new provisions. The first provides that sales by a manufacturer to a selling corporation of an article subject to tax as a toilet preparation shall be prima facie presumed to be otherwise than at arm's length if either the manufacturer or the selling corporation owns more than 75 per cent of the stock of the other, or if more than 75 per cent of the stock of both the manufacturing and selling corporations is owned by the same persons in sub-

stantially the same proportions. Sales by a manufacturer to a selling corporation in all other cases shall be prima facie presumed to be at arm's length.

The second amendment made by the section provides a rule for determining the price for which an article subject to the toilet preparations tax is sold. This amendment provides that whether or not the sale is at arm's length the charge for coverings and containers shall be included only if they are furnished by the actual manufacturer, and the charge incident to placing the article in condition ready for shipment shall be included only if performed by the actual manufacturer. It also provides that whether or not the sale is an arm's-length transaction wholesalers' salesmen's commissions and costs and expenses of selling shall be excluded from the price if the amount is established to the satisfaction of the Commissioner of Internal Revenue. The amendment also provides that a transportation, delivery, insurance, or other charge shall be so excluded if established to the satisfaction of the Commissioner in cases in which the transaction is not an arm's-length transaction.

SECTION 214. STOCK DIVIDENDS AND STOCK RIGHTS.

The amendments made by subsection (c) and (f) to section 214 of the bill provide that under all Revenue Acts, in determining the period for which a taxpayer has held stock or rights to acquire stock received upon a stock-dividend distribution, there shall, under regulations prescribed by the Commissioner with the approval of the Secretary, be included the period prior to such distribution for which he held the stock upon which such distribution was made, if the basis of the stock or rights so distributed is determined by the rule of allocation.

SECTION 215. DISCHARGE OF INDEBTEDNESS.

This section of the House bill which adds a new paragraph (9) to section 22(b) of the Internal Revenue Code (relating to exclusions from gross income) is retained in the reported bill, except with a modification which is presently explained. The House bill provides that the amount of income of a corporate taxpayer attributable to the discharge within the taxable year of certain of its indebtedness or indebtedness for which it is liable is to be excluded from gross income, if (1) the Commissioner of Internal Revenue is satisfied that such taxpayer was in an unsound financial condition at the time of such discharge and (2) such taxpayer consents to regulations prescribed under the new section 113(b)3 of the Code, relating to reduction of basis, in effect at the time of the filing of the return.

Many corporations (such as railroads) that will endeavor to bring themselves under the provisions of the new paragraph (9) are corporations that have had, and continue to have, considerable dealings with the Federal Government, where the financial condition of such corporations is an important factor in such dealings. It seems desirable to utilize information obtained by various agencies of the Government and thus relieve the Commissioner of Internal Revenue from the necessity of making an independent finding in each case as to the financial condition of the corporate taxpayer. To carry out this policy, a committee amendment to this section provides that a corporation may obtain the benefits of the new paragraph (9) if it can establish that it was in an unsound financial condition at the time of the discharge of its indebtedness, by the presentation of a certification to the Commissioner by any Federal agency which is authorized to make loans on behalf of the United States to such corporation, or by any Federal agency authorized to exercise regulatory power over such corporation.

SECTION 218. EMPLOYEES' TRUSTS.

Under existing law, for taxable years beginning after December 31, 1938, an employees' trust is exempt from income tax only if at any time before the pension liabilities with respect to employees under the trust have been satisfied, it is impossible for any part of the trust fund, including principal and income, to be used for, or diverted to, purposes other than the exclusive benefit of employees. This is a change, introduced by section 165 of the Revenue Act of 1938, over prior law, which permitted an employees' trust to be exempt from income tax even though it was possible for the employer to revoke or alter the trust at any time.

Your committee believes that it is advisable to allow employers additional time in which to revise their pension trust plans. Accordingly, this section of the bill amends section 165 of the Internal Revenue Code so as to make the provisions of clause (2) of subsection (a) thereof inapplicable to a taxable year beginning prior to January 1, 1940. This amendment merely has the effect of postponing for one year the effective date of the change made by section 165 of the Revenue Act of 1938 and carried over into the Internal Revenue Code.

SECTION 219. INVENTORIES.

Section 219 of the bill, as reported, provides an optional method of taking inventories of goods, which is a substitute for the comparable provision of existing law, adopted in 1938. Under existing law the optional method may be used only by tanners and producers and processors of nonferrous metals. Under the bill the option is extended to all taxpayers who use it, apply for it, and use it consistently, regardless of the business in which the taxpayer is engaged. Under section 22(c), the Commissioner has the power to prescribe the method, and section 219 of the bill reaffirms the power.

The method is to treat the goods remaining on hand at the close of the taxable year, for the purposes of determining the cost of those sold during the year, as being, first, those included in the opening inventory of the taxable year in the order of acquisition of the goods to the extent of the goods so included; and second, those acquired in the taxable year. When this method is used the inventory must be taken at cost. The goods in the opening inventory of the first taxable year in which the method is used for tax purposes (which is the closing inventory of the previous year) must be considered to have been acquired at the same time, and their cost is to be ascertained by averaging their cost. Goods acquired in the taxable year may be treated as having been acquired in the order of their acquisition and so valued, or their cost may be averaged, or any other proper method of valuation may be used with respect to such goods, depending on whatever is the proper treatment under the circumstances.

If a taxpayer elects to use the method, he must specify the goods with respect to which the method is to be used. The taxpayer must show that he, for the period the method is to be used for tax purposes, has used no other method for certain business purposes, such as income statements, applications for bank loans, and reports to shareholders. But if, for these purposes, the taxpayer values such goods at market rather than cost he is still able to use the method for tax purposes.

The Commissioner is given power to prescribe regulations in order that the use of the method with respect to the goods will clearly reflect income, and he may prescribe that the taxpayer use the method, with respect to goods other than those specified in the application, if the Commissioner deems it necessary in order clearly to reflect income.

To remain qualified to use the method, the taxpayer must continue to use it for tax and the business purposes indicated above. The Commissioner may, however, permit him to change. The Commissioner may require him to change to a different method if the taxpayer changes; but even if the taxpayer does change to a different method for other purposes, the Commissioner may require him to continue to use the method for tax purposes. The change, when the taxpayer changes to a different method (either because he is permitted or required to do so), is subject to regulations of the Commissioner in order that the use of the other method and the change to it may clearly reflect income.

SECTION 220. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF FIVE YEARS OR MORE.

It has been considered a hardship to tax fully the compensation of writers, inventors, and others who work for long periods of time without pay and then receive their full compensation upon the completion of their undertaking. Under existing law, such persons have their income for the whole period aggregated into the final year. This results in two inequities: First, only the deductions, expenses, and credits of the final year are chargeable against the compensation for the full period; second, under our graduated surtax, the taxpayer is subjected to a considerably greater burden because of the aggregation of his compensation.

Section 220 of the bill provides that with respect to compensation for personal services rendered by an individual over a period of five or more years and which is paid only on the completion of such services the tax attributable to such compensation shall not be more than the aggregate of taxes which would have been paid had the income been received in equal portions in each of the years in the period. The provision is applicable only to cases where the compensation is required to be included in gross income of the individual for any taxable year beginning after December 31, 1938. However, there is no requirement relative to the year in which such services were commenced so long as the year in which the compensation is paid meets the above standard.

SECTION 221. EXTENSION OF TIME WITH RESPECT TO ORDERS OF SECURITIES AND EXCHANGE COMMISSION.

In the 1938 Revenue Act it was provided that certain transactions arising out of the simplification or geographical integration of public utility holding company systems might be accomplished under the Revenue Act by treating some of the transactions as tax-free exchanges and making various adjustments of the basis of property according to the special treatment provided in Supplement R. Under the 1938 Act (and the Internal Revenue Code) such transactions had to be in conformity with orders of the Securities and Exchange Commission issued before January 1, 1940, or orders supplementary to such orders. The amendment made by section 221 extends from January 1, 1940, to January 1, 1941, the time during which such an order may be made.

SECTION 222. RENEWAL OF INDEBTEDNESS.

Section 27(a)4 of the Internal Revenue Code and the Revenue Act of 1938 allow, for undistributed-profits tax purposes, a credit for amounts used or set aside to pay or retire indebtedness existing at the close of business on December 31, 1937, and evidenced by a bond, note, debenture, certificate of indebtedness, mortgage, or deed of trust, issued by the corporation and in existence at the close of business on December 31, 1937, or by a bill of exchange accepted by a corporation prior to, and in existence at, the close of business on such date. Section 222 of the bill amends the Code and the 1938 Act, the effect of which is that indebtedness shall not be deemed to be outside the provisions of section 27(a)4 of such Acts merely because, at the time payments are made or amounts are set aside, the indebtedness is evidenced by a renewal obligation issued after December 31, 1937. This amendment does not alter the requirement of existing law relative to the time before which the indebtedness must have been incurred and the manner in which it was evidenced at the close of business on December 31, 1937. Under the bill, the renewal obligation need not be one of the type of instruments enumerated in the existing law, and a renewal of a renewal obligation is qualified if the original indebtedness was.

SECTION 223. COMMODITY CREDIT LOANS.

The attention of your committee has been drawn to the fact that loans by the Commodity Credit Corporation to producers of agricultural commodities, on the security of such commodities, though in form loans, should be treated for income-tax purposes as though such commodities had been sold in the year of the loan for the amount of the loan. Nevertheless, existing law requires them to be treated as loans, with the result that when the pledged commodities are eventually sold taxpayers are required to take up a large amount of income and, in addition, will not longer have available to them their deductions on account of production expenses. In order to avoid this harsh result, section 223 of the bill adds a new section 49 to the Internal Revenue Code, giving taxpayers an election to treat such loans as income. An election once so made is binding as to all future years unless the Commissioner's approval is obtained to a change of method. Section 223 also adds a new section 113(b)1(G), providing for proper adjustments of basis in the event it ever becomes material to compute gain or loss upon a subsequent sale or other disposition of such commodities.

Subsections (d) and (e) make similar provision relative to the computation of income and the adjustment of basis under the Revenue Acts of 1934, 1936, and 1938, with proper safeguards.

SECTION 224. CHARITABLE CONTRIBUTIONS TO POSSESSIONS AND CHARITIES IN POSSESSIONS.

This amendment broadens sections 23(o) and 23(q) of the Internal Revenue Code so as to allow deductions to individuals and corporations for contributions made to any possession of the United States or to any corporation, trust, or community chest, fund, or foundation created or organized in, or under the laws of, any possession of the United States subject to the qualifications and limitations now provided by law with respect to other contributions.

SECTION 225. PAN-AMERICAN TRADE CORPORATIONS.

Section 225 of the reported bill extends benefits to American corporations engaged solely in the active conduct of a trade or business in Central or South America which are affiliated with another American corporation engaged in the active conduct of a trade or business within the United States. The amendment permits such corporations (including the parent corporation) to file consolidated returns. It has been found impracticable for a parent corporation having many interests in Central or South America to carry on business there in its own name. As a matter of economy and efficiency it is necessary to organize a subsidiary corporation to act in its place. These subsidiary corporations, while organized within the United States, conduct their operations entirely outside of the United States and therefore do not compete with American companies operating within the United States. Your committee is of the opinion that it is a wise policy to encourage the formation of such corporations for the purpose of stimulating American trade abroad. Proper safeguards are inserted to make it clear that the relief granted by this section will not apply unless both the parent corporation and the subsidiary corporations are actively engaged in a trade or business (not mere holding companies) and the subsidiary companies do not receive any gross income from sources within the United States.

SECTION 226. DEDUCTIONS OF INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL.

Under existing law insurance companies other than life or mutual must include in gross income, in addition to other items, all items which constitute gross income in the case of ordinary corporations. Such companies are not, however, allowed in full the deductions allowed under section 23 to ordinary corporations. The amendment made by section 226 allows such deductions in full by removing the limitation now contained in section 204(c)10.

SECTION 228. COMPUTATION OF DIVIDEND CARRY-OVER FOR PERSONAL HOLDING COMPANY TAX.

Under existing law, a personal holding company receives a dividend carry-over only for the dividends declared in excess of its adjusted net income. This results in denying to a personal holding company the full carry-over where its adjusted net income has been reduced through the payment of Federal taxes which are allowed as a deduction for the purpose of computing the tax on personal holding companies. Section 228 of the reported bill corrects this situation by allowing the dividend carry-over for purposes of the surtax on personal holding companies to be determined on the basis of the dividends in excess of the adjusted net income minus the deduction allowed for Federal taxes under the personal holding company provisions.

SECTION 401. TAX LIENS ON SECURITIES.

The only changes made in this section by the reported bill are in the new subsection (b) dealing with securities. The House bill provides that even though notice of the tax lien imposed by section 3670 of the Internal Revenue Code has been filed by the collector in the prescribed manner, such lien shall

not be valid with respect to securities mortgaged, pledged, or purchased, if at the time such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien. In such cases the mortgage, pledge, or purchase must be for a full and adequate consideration, but such consideration would be considered as given if a security is accepted in satisfaction of, or as security for, a preexisting obligation. Section 3186 of the Revised Statutes, as amended, was codified in part as section 3670 of the Internal Revenue Code. Prior to the effective date of section 3670 of the Code, February 11, 1939, the general tax lien (corresponding to the lien imposed under section 3670 after the enactment of the Code) was imposed under section 3186 of the Revised Statutes, as amended.

The reported bill expressly extends the provisions of the new subsection (b) to the lien imposed under section 3186 of the Revised Statutes, as amended. The reported bill makes no change in the definition of the term "security." The House bill provides that the new subsection (b) shall apply, regardless of the time when the mortgage, pledge, or purchase was made or the lien arose, except where the lien has been enforced by a civil action which has become final before the date of enactment of the bill. Tax liens are now enforced by distraint or by a civil action. Prior to the enactment of the Code, such liens were enforced by distraint or by a suit in equity. To include those methods of enforcement, the reported bill expressly includes a proceeding or suit in the above-mentioned exception. The exception is applicable only if the proceeding, suit, or civil action to enforce the lien has become final before the date of enactment of the bill.

SECTION 403. CREDITS AGAINST ESTATE TAX OF TAX PAID TO POSSESSIONS.

Under existing law no credit is allowed against the Federal estate tax for death taxes paid to Puerto Rico or the Philippines. The existing law confines the credit to death taxes paid to the States, Territories, and the District of Columbia. This operates unjustly in the case of American citizens who are residents of the Philippines or who are residents of the United States but own property in the Philippines or Puerto Rico. The Philippine death taxes have a maximum rate of from 27 to 85 per cent, according to the relationship of the heirs.

Your committee are of the opinion that the same credit should be allowed for death taxes paid to the possessions of the United States as is allowed for death taxes paid to the States, the Territories, or the District of Columbia, and section 403 of the bill so provides.

SECTION 404. RETURNS OF ATTORNEYS AS TO FOREIGN CORPORATIONS.

Under section 3604(a) of the Internal Revenue Code, attorneys who counsel or advise with respect to the formation or reorganization of foreign corporations are required to file a return with the Commissioner of Internal Revenue within 30 days after the rendering of such advice. The return must set forth such information of the attorney regarding the purpose and affairs of the corporation as the Commissioner may prescribe. However, the section does not require the divulging of privileged communications between attorney and client.

Section 404 relieves attorneys at law who in their practice advise clients from filing any return with respect to the advice they give or the information they receive in the attorney-client relationship. The amendment is effective as of the date of the enactment of the Revenue Code, so that the relief is retroactive.

SECTION 405. EXTENSION OF DATE FOR FILING CLAIMS FOR REFUND OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Section 903 of the Revenue Act of 1936 required claims for refund of taxes paid under the Agricultural Adjustment Act to be filed before July 1, 1937. As the 1936 Act was approved on June 22, 1936, claimants were allowed only a year and eight days in which to file their claims.

Section 405 of the bill would extend the period during which such claims may be filed from July 1, 1937, to January 1, 1940.

[NOTE.—The House of Representatives having accepted the changes made by the Senate to the bill (H. R. 6851), there was no conference necessary thereon and therefore no conference report.)

1939–52–10126A

CONSOLIDATE AND CODIFY THE INTERNAL REVENUE LAWS OF THE UNITED STATES.

[House of Representatives Report No. 6, Seventy-sixth Congress, First Session.]

[JANUARY 20, 1939.]

Mr. Doughton, from the Committee on Ways and Means, submitted the following report [to accompany H. R. 2762]:

The Committee on Ways and Means, to whom was referred the bill (H. R. 2762) to consolidate and codify the internal revenue laws of the United States, having had the same under consideration, unanimously report it back to the House without amendment and recommend that the bill do pass.

THE NEED OF AN INTERNAL REVENUE CODE.

The need for enactment into absolute law of a codification of internal revenue laws has long been recognized. The last such enactment was in 1874, when the Revised Statutes were adopted. If the need for enactment into law of a codification was recognized in 1874, when only 17 volumes of the Statutes at Large had been published and our internal revenue was derived almost entirely from taxes on liquor and tobacco, that need must be much greater today, when 34 additional volumes have been published and our internal revenue is derived from more than a hundred separate sources.

The United States Code is itself the culmination of more than 30 years' effort. Due to the mass of legislation contained in that Code, it was thought best by the Congress to put it through a testing period before its enactment into law. It was, therefore, made only prima facie evidence of the law, and scrutiny of it was invited for the purpose of correcting errors, eliminating obsolete matter, and restatement.

The review and correction of the internal revenue title was begun by the staff of the Joint Committee on Internal Revenue Taxation after the enactment of the Revenue Act of 1928. The first edition of the work was published in 1930 and the second, in 1933. The second edition was substituted for title 26 of the United States Code and became, therefore, prima facie evidence of the law.

It has now been nearly 13 years since the United States Code was enacted as prima facie law and more than 8 years since the first edition of the Internal Revenue Code was published by the staff of the joint committee. However, because the internal revenue title is not the law, but only prima facie evidence thereof, it can not be relied upon and it is still necessary to go to the many volumes of the Statutes at Large to determine what the law actually is. The great mass of internal revenue legislation since 1873, scattered through 34 volumes of the Statutes at Large, makes such a recourse an exceedingly difficult undertaking, even for the most experienced lawyer. Statutes are repeated in subsequent Acts in almost identical language, with no reference to prior Acts or any expressed intention to amend or repeal. Provisions of a permanent character are included in riders and provisos and are hidden in various Acts. Amendments are often involved and obscure. Inconsistencies and duplications abound.

The only practical way to determine with certainty that the Internal Revenue Code is actually the law is to enact it, as was done with the Revised Statutes of 1873. It is believed that it has had a sufficient testing period to make it acceptable as free from error.

In the preparation of this edition valued aid has been rendered by the Treasury Department. The work performed there has been under the immediate supervision and direction of Mr. Preston C. Alexander, chairman of the Chief Counsel's Committee, and Mr. Wallace Streater, of the Interpretative Division. The original work of comparing the text of the Code with the basic law was divided among some 25 or 30 attorneys in the Chief Counsel's office, whose recommendations passed through the respective division heads or their assistants to Messrs. Alexander and Streater for the final review. Appreciation is expressed of the services of all who collaborated, whose number is too large to permit the mention here of each by name.

Grateful acknowledgment is also made of helpful suggestions received from the Department of Justice.

In this connection, Mr. James W. Morris, Assistant Attorney General, made the following comment as to the desirability of the enactment of this codification into law:

"I am glad to learn that the long-realized need of a codification which will be recognized as the law rather than as merely prima facie evidence thereof is probably soon to be filled. This need has been especially impressed upon the Tax Division of the Department of Justice inasmuch as the function of handling revenue litigation rests with it.

"It is evident that the confusion existing by reason of the number of Revenue Acts, containing in many instances the same basic provisions, to which reference must be made in the handling of cases arising under the various Acts, constitutes a burden to the courts and counsel alike. Furthermore, several of these statutory provisions have been amended by Executive order, but, since such changes have not appeared on the face of the statutes it has been necessary to refer to the Executive orders to ascertain their nature and extent. The proposed codification will be particularly helpful in that it eliminates these sources of confusion.

"I am confident that the enactment of the codification will be a definite step toward obtaining clarity, certainty, and simplicity in our revenue laws and will be of substantial aid to this division in the handling of revenue litigation."

This Code contains all the law of a general and permanent character relating exclusively to internal revenue in force on January 2, 1939. In addition, it contains the internal revenue law relating to temporary taxes, the occasion for which arises after the enactment of the Code. The following should be noted in connection with the general character of the Code:

First. It makes no changes in existing law.

Second. It makes liberal use of catchwords, headlines, different types, indentations, and other typographical improvements.

Third. By a system of cross-references, it correlates not only its own provisions but also provisions of the United States Code not relating exclusively to internal revenue.

Fourth. To obviate confusion with the law itself, the cross-references are in type different from that containing the law.

Fifth. It is arranged with a view of giving prominence to matters which concern the ordinary transactions of the ordinary classes of taxpayers.

The preparation of this Code began with the collection and examination of all original statutes relating to internal revenue, without reference to the United States Code. This procedure allowed an independent check to be made subsequently against that Code. The next step was the elimination of obsolete matter and those temporary provisions relating to taxes the occasion for which arose prior to the effective date of the Code. The most striking examples of the temporary laws which are omitted are the income tax provisions of the Revenue Act of 1936 and prior Revenue Acts. While these provisions remain in force for the purpose of administering the taxes for the earlier years, they do not affect the current tax situation.

After the elimination of the obsolete and temporary provisions from the whole body of internal revenue law, the remaining provisions were checked against the United States Code. The care in the preparation of the United States Code and in the present codification gives assurance of the accuracy of the final product. Moreover, every provision has been carefully reviewed and checked by the Treasury Department and conferences have been held and agreements reached on all issues.

There are many laws of a general character which, though relating to internal revenue, apply also to other objects. To codify such laws under internal revenue, however, would disrupt the entire title structure of the United States Code and render complete codification of Federal law impossible. In only a few instances has any provision been taken from any title of the United States Code other than the internal revenue title, and then only for the reason that such provision relates exclusively to internal revenue. The great value of the United States Code is thus preserved. Moreover, detailed cross-references compensate for any deficiency due to such a procedure by acquainting the reader both with the general subject of the provision referred to and its location in the United States Code.

The final step was to arrange the Code in a logical and convenient manner. There are six subtitles. Subtitle A contains those taxes over which the United States Board of Tax Appeals has jurisdiction. These include income, estate, and gift taxes.

Subtitle B contains the miscellaneous taxes.

Subtitle C contains the temporary taxes.

Subtitle D contains the general administrative provisions.

Subtitle E contains the personnel provisions.

Subtitle F contains provisions relating to the Joint Committee on Internal Revenue Taxation.

The purpose of this arrangement is to make the subtitles as far as possible complete in themselves. For example, those interested solely in provisions relating to income, estate, or gift taxes need concern themselves only with subtitles A and D, and may disregard the provisions relating to tobacco, liquor, and other miscellaneous taxes, which are included in subtitle B, as well as the provisions relating to temporary taxes in subtitle C. In subtitle D, all general administrative provisions have been collected.

The chapter arrangement is based both upon the importance of the tax from a revenue standpoint and the number of persons affected. The plan for the arrangement of provisions in the income tax chapter follows the Revenue Act of 1938 and consists of the collection of the provisions under two classifications, general provisions and supplemental provisions. The general provisions are those which apply to the ordinary transactions of the ordinary classes of taxpayers. In the main, the supplemental provisions are those which apply to the extraordinary classes of taxpayers or to the extraordinary transactions of the ordinary classes of taxpayers. Special administrative provisions are included in the supplemental provisions. This same scheme is applied to the chapters on the estate and gift taxes. The chapter on the United States Board of Tax Appeals is included in subtitle A for the reason that the jurisdiction of the Board is confined to the taxes in that subtitle.

Subtitle B contains the miscellaneous taxes, such as the employment taxes arising under the Social Security Act and the Carriers Taxing Act of 1937, the taxes on tobacco and liquor, admissions and dues, issues and transfers of stocks, issues of bonds, etc. The arrangement of these chapters gives prominence to matters of chief interest to the taxpayer; that is, liability to tax, rate, payment, and other obligations and duties imposed upon the taxpayer. The special administrative provisions follow and the penalty and forfeiture provisions are grouped together so as to be readily located.

In Subtitle C the temporary taxes are included. Among those are the manufacturers' excise tax, the tax on telegraph and telephone messages, and the tax on electrical energy, which by express provision of the law expire on a specified date.

Subtitle D contains the administrative provisions of a general character. The arrangement of this subtitle follows the usual course of procedure in tax administration—that is, information, returns, assessment, collection, and refund.

Subtitle E contains the provisions relating to personnel. The provisions relating to appointment, salary, powers, and duties of internal revenue officials and employees are logically and systematically arranged.

1939–52–10126B

CONSOLIDATE AND CODIFY THE INTERNAL REVENUE LAWS OF THE UNITED STATES.

[Senate Report No. 20, Seventy-sixth Congress, First Session. Calendar No. 19.]

[JANUARY 30, 1939.]

Mr. George, from the Committee on Finance, submitted the following report [to accompany H. R. 2762]:

The Committee on Finance, to whom was referred the bill (H. R. 2762) to consolidate and codify the internal revenue laws of the United States, having had the same under consideration, unanimously report it back to the Senate without amendment and recommend that the bill do pass.

DESCRIPTION OF THE CODE.

This Code contains all the law of a general and permanent character relating exclusively to internal revenue in force on January 2, 1939. In addition, it contains the internal revenue law relating to temporary taxes, the occasion for which arises after the enactment of the Code. The following should be noted in connection with the general character of the Code:

First. It makes no changes in existing law.

Second. The Code will be the law and not merely prima facie evidence thereof. This will give a new starting point behind which it will not be necessary to search to determine the law as to current taxes. It will then be necessary only to look to subsequent legislation, which would be amendatory of the Code itself.

Third. The Code is prospective in its application. For example, in the case of the income tax, the Code applies only to taxable years beginning after December 31, 1938. In the case of taxable years beginning prior to January 1, 1939, the income tax provisions of the Code will have no application, but the applicable provisions of the Revenue Act of 1938 and prior Revenue Acts will govern. In the case of the estate tax, the Code will apply only to estates of decedents dying after the date of its enactment, the existing Revenue Acts continuing to apply to estates of decedents dying on or prior to such date. In the case of the gift tax, the Code will apply only to the calendar year 1940 and subsequent calendar years, leaving such taxes for prior calendar years to be governed by the applicable provisions of the Gift Tax Act of 1932. In the case of the Social Security taxes, the Code will apply to the calendar year 1939 and subsequent calendar years, leaving the prior years still under the Society Security Act.

As to the existing temporary taxes, the Code applies only where the occasion for the tax arises after the effective date specified in the Code. For instance, the Code will apply to automobiles sold on and after the first day of the calendar month occurring next after its enactment and automobiles sold prior to that date will be subject to the provisions of the Revenue Act of 1932. Also, the Code will apply to sugar manufactured on or after the first day of that calendar month occurring next after the enactment of the Code, but in the case of sugar manufactured prior to that date, the existing law will apply. The following table shows the effective date of the various chapters of the Code:

Chapter.	Subject.	Application or effective date.
1	Income tax	Taxable years beginning after Dec. 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 Dec. 31, 1938.
	Unjust enrichment	Taxable years ending during the calendar year 1939, and subsequent taxable years.
3	Estate tax	Estates of decedents dying after the date of the enactment of the Code.
4	Gift tax	Calendar years 1940 and subsequent calendar years.
5	Board of Tax Appeals	The day following the date of the enactment of the Code.
6	Capital-stock tax	Year ending June 30, 1939, and subsequent years.
7	Tax on transfers to avoid income tax	The day following the date of the enactment of the Code.
8	Alaskan railroads tax	Taxable years beginning after Dec. 31, 1938.
9	Employment taxes	Calendar year 1939 and subsequent calendar years.[1]
10	Admissions and dues	First day of the first calendar month beginning after the enactment of the Code.
11	Documents, other instruments, and playing cards.	The day following the date of the enactment of the Code.
12	Safe-deposit boxes	First day of the first calendar month beginning after the enactment of the Code.
13	Circulation other than of national banks.	June 1, 1939.
14	Cotton futures	The day following the date of the enactment of the Code.
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.

[1] So in original. Should be Subchapters A and B, effective on April 1, 1939, and Subchapter C on January 1, 1939.

Chapter.	Subject.	Application or effective date.
21	Coconut and other vegetable oils	First day of the first calendar month beginning after the enactment of the Code.
22	Fish, animal, and vegetable oils	Do.[2]
23	Narcotics	Do.[2]
24	White phosphorous matches	Do.[2]
25	Firearms:	
	Pistols and revolvers	Do.[3]
	Machine guns and short-barreled firearms.	The day after the date of the enactment of the Code.
26	Liquor	Do.
27	Occupational taxes	Taxable years[4] beginning on or after the day following the enactment of the Code.
28	Provisions common to miscellaneous taxes.	The day following the date of the enactment of the Code.
29	Manufacturers' excise and import taxes:	
	Excise taxes	The first day of the first calendar month beginning after the enactment of the Code.
	Import taxes	The day following the date of the enactment of the Code.
30	Transportation and communication	The first day of the first calendar month beginning after the enactment of the Code.
31	Documents and other instruments	The day following the date of the enactment of the Code.[5]
32	Sugar:	
	Manufacture	The first day of the first calendar month beginning after the enactment of the Code.
	Importation	The day following the date of the enactment of the Code.
33	Coal	The first day of the first calendar month beginning after the enactment of the Code.
34	Information and returns	The day following the date of the enactment of the Code.
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 Office of the 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-gagers	Do.
45	Internal revenue inspectors	Do.
46	Miscellaneous provisions	Do.

[2] So in original. Should be the day following the date of the enactment of the Code.
[3] So in original. Should be the 1st day of the first calendar month beginning after the enactment of the Code.
[4] So in original. Should be taxable periods.
[5] So in original. The following addition should have been made: "and on the 1st day of the first calendar month beginning after the enactment of the Code."

Fourth. The Code will not have any effect upon pending cases, suits, or controversies. All existing rights and liabilities are preserved.

Fifth. The Code repeals only such laws and parts of laws as are codified therein. It is believed that this Code, which is the result of intensive research extending over a period of 10 years, admits no reasonable doubt of its accuracy, but if it should develop that any provision has been improperly omitted, such provision is not repealed, but still remains the law. Likewise, temporary and obsolete provisions which are omitted from the Code are not repealed by it. Moreover, no provision of law corresponding to that contained in the Code is repealed until the corresponding Code provision becomes effective.

Sixth. If any error is found in the Code, it can be remedied by amendatory legislation. Conceding the possibility of error, it is the opinion of your committee that the interests of the Government and the taxpayer alike would be best served by the adoption of the Code as absolute law and the legislative correction of any errors that may be found in it. Such a procedure would be far less burdensome upon the parties concerned than the making of the Code prima facie law, thereby subjecting it to rebuttal upon the production of the original statute. This last procedure would compel both the Government and the taxpayer to make a thorough search of the numerous Statutes at Large in every case to establish that the prima facie law was in fact the law, thereby resulting in perpetuating the confusion which increases with each new edition of the Statutes at Large.

Seventh. The Code makes liberal use of catchwords, headlines, different types, indentations, and other typographical improvements.

Eighth. To obviate confusion with the law itself, the cross-references in the Code are in type different from that containing the law.

Ninth. The Code is arranged with a view of giving prominence to matters which concern the ordinary transactions of the ordinary classes of taxpayers.

The internal revenue laws were first codified in the Revised Statutes of 1873, Title XXXV, which was made absolute law. A perfected edition of the Revised Statutes was prepared in 1878, but is only prima facie, not absolute law. In the years 1897 to 1907 a commission was engaged by Congress to codify the Federal laws, but the work was never completed. Subsequently, Hon. Edward C. Little prepared a codification of Federal laws which was embodied in a bill which passed the House of Representatives but failed of action in the Senate. The internal revenue laws were again codified in title 26 of the United States Code, which was enacted as prima facie law in 1926. Scrutiny of the Code was invited in its preface for the purpose of correcting errors.

In 1930 the Joint Committee on Internal Revenue Taxation published a complete substitute for title 26 of the United States Code, containing all the law of a permanent character, relating exclusively to internal revenue, in force on December 1, 1930. This was not a mere duplication of the old title, for, in addition to correcting errors and eliminating obsolete matter, certain omitted provisions were added and the title completely rearranged in a manner considered logical and useful.

In 1933 a new edition was published containing the internal revenue laws in force on July 16, 1932. This edition was substituted for title 26 of the United States Code, and in its present form is prima facie law. A third edition was published in 1938, containing the internal revenue laws in force at the beginning of that year. The staff of the Joint Committee on Internal Revenue Taxation, with the cooperation and assistance of the Treasury Department, has brought the Internal Revenue Code up to date by the present edition.

It has now been nearly 13 years since the United States Code was enacted as prima facie law and more than 8 years since the first edition of the Internal Revenue Code was published by the staff of the joint committee. However, because the internal revenue title is not the law, but only prima facie evidence thereof, it can not be relied upon and it is still necessary to go to the many volumes of the Statutes at Large to determine what the law actually is. The great mass of internal revenue legislation since 1873, scattered through 34 volumes of the Statutes at Large, makes such a recourse an exceedingly difficult undertaking, even for the most experienced lawyer.

The only practical way to determine with certainty that the Internal Revenue Code is actually the law is to enact it, as was done with the Revised Statutes of 1873. It is believed that it has had a sufficient testing period to make it acceptable as free from error.

In the preparation of this edition valued aid has been rendered by the Treasury Department. The work performed there has been under the immediate supervision and direction of Mr. Preston C. Alexander, chairman of the Chief Counsel's Committee, and Mr. Wallace Streater, of the Interpretative Division. The original work of comparing the text of the Code with the basic law was divided among some 25 or 30 attorneys in the Chief Counsel's office, whose recommendations passed through the respective division heads or their assistants to Messrs. Alexander and Streater for the final review. Appreciation is expressed of the services of all who collaborated, whose number is too large to permit the mention here of each by name.

Grateful acknowledgment is also made of helpful suggestions received from the Department of Justice.

In a letter to Hon. Pat Harrison, chairman of the Joint Committee on Internal Revenue Taxation, dated December 22, 1938, Mr. James W. Morris, assistant attorney general, stated:

DEPARTMENT OF JUSTICE,
Washington, December 22, 1938.

Hon. PAT HARRISON,
Chairman, Joint Committee on Internal Revenue Taxation,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR HARRISON: In a recent conversation with Mr. Stam, chief of the staff of the joint committee, I was advised of the progress of the proposed codification of the revenue laws which has been undertaken by the committee.

I am glad to learn that the long realized need of a codification which will be recognized as the law rather than as merely prima facie evidence thereof is

probably soon to be filled. This need has been especially impressed upon the Tax Division of the Department of Justice in as much as the function of handling revenue litigation rests with it.

It is evident that the confusion existing by reason of the number of Revenue Acts, containing in many instances the same basic provisions, to which reference must be made in the handling of cases arising under the various Acts, constitutes a burden to the courts and counsel alike. Furthermore, several of these statutory provisions have been amended by Executive order, but, since such changes have not appeared on the face of the statutes it has been necessary to refer to the Executive orders to ascertain their nature and extent. The proposed codification will be particularly helpful in that it eliminates these sources of confusion.

I am confident that the enactment of the codification will be a definite step toward obtaining clarity, certainty, and simplicity in our revenue laws and will be of substantial aid to this Division in the handling of revenue litigation.

The staff of the joint committee deserves to be commended for its valuable contribution to the tax law.

Very truly yours,

JAMES W. MORRIS,
Assistant Attorney General.

In a letter from George M. Morris, Esquire, Chairman of the Standing Committee on Federal Taxation of the American Bar Association, dated January 24, 1939, Mr. Morris said:

"An examination of the codification of the Internal Revenue Laws as prepared by the staff of the Joint Committee on Internal Revenue, indicates that a highly sensible idea has been brought to a most satisfactory fruition.

"Unless one has had experience handling questions which involve the statutes treating with our internal revenue for a span of years (not at all an unusual experience in tax disputes), he can have little idea of the difficulty of achieving certainty as to what the applicable statute law is. If for taxpayers and their counsel these difficulties and uncertainties can be eliminated, the reduction of expense of tax controversies, and even the elimination of such controversies, should be greatly furthered.

"Not only does it seem highly advisable that this painstakingly prepared codification should be enacted into law but it should be apparent that the sooner such action is taken the more beneficial will be the effect, particularly in the consideration of any revenue legislation during the present session of Congress. An intelligent consideration of any proposal for change would seem to require an assured knowledge of the law which it is proposed to change."

1939–35–9986

SOCIAL SECURITY ACT AMENDMENTS OF 1939.

[House of Representatives Report No. 728, Seventy-sixth Congress, First Session.]

[June 2, 1939.]

Mr. Doughton, from the Committee on Ways and Means, submitted the following report [to accompany H. R. 6635]:

* * * * * * *

GENERAL STATEMENT.

DIVISIONS OF THE BILL.

This bill amends the Social Security Act and certain sections of Subchapters A and C of Chapter 9 of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

The bill is divided into nine titles:

* * * * * * *

Title VI—Amendments to the Internal Revenue Code (provisions formerly in Titles VIII and IX of the Social Security Act).

* * * * * * *

Title VIII—Amendments to Title XI of the Social Security Act (general provisions).

Title IX—Miscellaneous amendments.

SUMMARY OF PRINCIPAL CONTENTS OF BILL.

TAXES.

1. The old-age insurance tax has been frozen at 1 per cent on the worker and 1 per cent on the employer for the three years 1940, 1941, and 1942 as against the 1½ per cent rates on each under the present Act. This will save employers and workers about $275,000,000 in 1940, or a total of $825,000,000 in the three years.

2. Provision is made so that the States may reduce their unemployment-insurance contributions if a certain reserve fund has been attained and minimum benefit standards have been provided. All except about five States will be able to take advantage of this change during 1940. This may save employers from $200,000,000 to $250,000,000 during 1940 if the States reduce their contribution rates from an average of 2.7 to 2 per cent.

3. Only the first $3,000 an employer pays an employee for a year is taxed under the unemployment-compensation provisions. This is already the case in old-age insurance. This will save employers about $65,000,000 a year.

4. Provision is made for refunds and abatements to employers who paid their 1936, 1937, and 1938 unemployment-compensation contributions late to the States. This will save employers about $15,000,000.

5. Thus the savings above mentioned, through 1940, may aggregate some $580,000,000. In addition, such savings for the ensuing two years may amount to approximately $1,130,000,000. This represents total savings of approximately $1,710,000,000.

* * * * * * *

COVERAGE.

1. Certain services, including services for agricultural and horticultural associations, voluntary employees' beneficiary associations, local or ritualistic services for fraternal beneficiary societies, and services of employees earning nominal amounts (less than $45 per quarter) of nonprofit institutions exempt from income tax, are exempted from old-age insurance and unemployment compensation in order to eliminate the nuisance cases of inconsequential tax payments.

2. The term "agricultural labor" is defined so as to clarify its meaning and to extend the exemption to certain types of service which, although not at present exempt, are an integral part of farming activities.

3. About 1,100,000 additional persons (seamen, bank employees, and employed persons age 65 and over) are brought under the old-age insurance system and about 200,000 under unemployment insurance (chiefly bank employees).

* * * * * * *

ADMINISTRATION.

1. A Federal old-age and survivor insurance trust fund is created for safeguarding the insurance benefit funds. The Secretary of the Treasury, the Secretary of Labor, and the Chairman of the Social Security Board are made trustees of this fund.

2. Provision is made to restrict the use of information concerning recipients of State old-age assistance (particularly their names and addresses) to purposes directly connected with the administration of old-age assistance. This is designed to prevent the use of such information for political and commercial purposes.

3. Other amendments are recommended to simplify and clarify administration of the law.

HISTORY OF LEGISLATION.

The Social Security Act became law on August 14, 1935, after many months of deliberation in Congress. The bill was passed by an overwhelming majority in both the House and the Senate, the votes being 372 to 33 and 77 to 6, respectively. The insurance provisions of the Act (substantially as reported out by this committee) were upheld by the United States Supreme Court in the cases of *Steward Machine Co.* v. *Davis* (301 U. S., 548); *Helvering* v. *Davis* (301 U. S., 619); and *Carmichael* v. *Southern Coal Co.* (301 U. S., 495).

The enactment of the Social Security Act marked a new era, the Federal Government accepting, for the first time, responsibility for providing a systematic program of protection against economic and social hazards. Though admittedly

not perfect or all-inclusive, the Social Security Act did embrace the broadest program for social security ever launched at one time by any government.

* * * * * * *

Unemployment compensation.—The incentives provided in the Social Security Act stimulated rapid passage of State unemployment compensation laws. Before the Act was passed, only 1 State, Wisconsin, had a going system of unemployment insurance; now all the 48 States and Alaska, Hawaii, and the District of Columbia have approved laws. Benefits are already being paid to unemployed covered workers under all but two of these laws; the last two States (Illinois and Montana) will start benefit payments on July 1 of this year. More than 27,500,000 workers are covered by these laws and about 3,800,000 temporarily unemployed workers received benefits amounting to nearly $400,000,000 during the year 1938. In addition, about $145,000,000 has been paid to unemployed workers during the first four months of 1939.

Old-age insurance.—The full effect of the Federal old-age insurance program will not be felt until monthly benefits begin to be paid. In the meantime, however, the Social Security Board has established wage-record accounts for nearly 44,000,000 persons, of whom more than 32,000,000 have already had wages reported in either 1937 or 1938, thus enabling these individuals to build up rights to protection for themselves and their dependents upon a sound basis. In addition, lump-sum benefits, amounting to 3½ per cent of accumulated covered earnings, totaling about $17,200,000, have been paid up to April 30, 1939, to or on behalf of nearly 345,000 who reached age 65 or died.

Revision of Social Security Act.—Tremendous as is the scope of this program, it was recognized from the beginning that changes would have to be made as experience and study indicated lines of revision and improvement. Congress, therefore, expressly provided in the Social Security Act that the Social Security Board should study and make recommendations as to methods of providing more effective economic security.

Further to facilitate necessary revision, an Advisory Council on Social Security was created in May, 1937. It was composed of outstanding citizens representing employers, employees, and the public. The Advisory Council spent more than a year in study and deliberation and transmitted its final report and recommendations on December 19, 1938.

The recommendations of the Social Security Board, based upon three years of intensive study, were submitted to the President of the United States on December 30, 1938. The President transmitted the Board's report to Congress, with a special message on January 16, 1939. The President's message and the Board's report were then referred to this committee.

The committee held extended public hearings on these recommendations and alternative proposals relating to social security, including more than 90 bills introduced in the House. These hearings lasted from February 1 to April 7, during which period the committee sat 48 days and took 2,500 pages of testimony. Among the 164 individuals who testified in person there were 3 Senators, 41 Congressmen, 14 Government officials (Federal and State), 21 labor representatives, 27 employer representatives, 16 economists, and 42 others, representing themselves or various organized groups of citizens. Many of these witnesses filed supplementary statements for the record. Some 20 or 30 other statements from individuals unable to appear before the committee in person were also placed in the record.

Since the conclusion of the public hearings these various proposals have received the constant attention of the committee. Executive sessions have been held over a period of six weeks. The committee has realized the importance of this subject and has taken seriously its responsibility to recommend to Congress the best possible legislation for supplementing and improving our system of social security. The committee therefore recommends immediate enactment of this bill.

General Purpose and Scope of Amendments.

The present bill aims to strengthen and extend the principles and objectives of the Social Security Act. The foundations of a permanent program have been laid and it seems wise to build upon the present structure.

Old-age insurance, unemployment compensation, and public assistance are now accepted as permanent in our fabric of social services. The present bill is designed to widen the scope and to improve the adequacy and the administration

of these programs without altering their essential features. Benefits will continue to be payable as a matter of right to workers covered by the insurance programs; aid will continue to be related to need under the assistance programs.

* * * * * * *

FINANCING.

Certain amendments are proposed which affect the financial framework of the old-age insurance system. First, the old-age reserve account is changed to a Federal old-age and survivor insurance trust fund with the Secretary of the Treasury, the Secretary of Labor, and the Chairman of the Social Security Board, all ex officio, acting as a board of trustees. The board of trustees will supervise the fund and will report to Congress annually and whenever the trust fund becomes unduly small or exceeds three times the highest annual expenditure anticipated in the ensuing 5-fiscal-year period. The Secretary of the Treasury will serve as managing trustee of the fund. All assets credited to the reserve account as of January 1, 1940, are transferred to the trust fund when the reserve account is abolished on that date. It is further proposed that an amount equal to the full amount of the old-age insurance taxes collected in the future be permanently appropriated to the trust fund. Provision is made for the administrative costs of the plan to be met from the trust fund.

The method of investing that portion of the trust fund not needed for current claims or administrative purposes will be like that now provided in the case of the unemployment trust fund. Instead of a minimum 3 per cent interest on the investments of the present old-age reserve account, the Federal old-age and survivor insurance trust fund, like the unemployment trust fund, will earn interest at the current average rate of interest borne by all outstanding interest-bearing obligations composing the public debt. At the present time the rate of interest being paid to the unemployment trust fund is 2½ per cent.

The present tax schedule is amended so that the current rate of 1 per cent on employers and 1 per cent on employees is continued until 1943. This postponement in the tax step-up will save employers and workers about $275,000,000 for 1940 or a total of $825,000,000 for the three years 1940, 1941, and 1942. However, no change is made in the tax schedule thereafter. The rates will still increase to 2 per cent in 1943, 2½ per cent in 1946, and 3 per cent in 1949 and thereafter.

The result of the committee's recommendations with respect to taxes and benefits on the size of the reserve and the amount of the benefit payments is shown in table 6. It should be noted that the maximum reserve built up in the period shown will be between seven and eight billion dollars. It should also be noted that the size of the reserve will conform closely to the recommendation of the Secretary of the Treasury of an "eventual reserve amounting to not more than three times the highest prospective annual benefits in the ensuing five years."

TABLE 6.—*Progress of reserve under the intermediate retirement estimate of benefit disbursements with interest at 2½ per cent. Tax rate at 2 per cent until Jan. 1, 1943, and thereafter following the present schedule.*

[In millions of dollars.]

	1940	1941	1942	1943	1944	1945	1950	1955
Net tax receipts (gross receipts minus administrative expenses)	$501	$505	$504	$919	$1,067	$1,078	$1,751	$1,849
Loss benefit payments	88	211	350	508	598	713	1,389	1,930
Net cash receipts, Government	413	294	154	411	469	365	362	−81
Add interest at 2½ per cent	41	51	58	66	79	91	153	190
Total addition to fund	454	345	212	477	548	456	515	109
Fund at end of year	1,884	2,229	2,441	2,918	3,466	3,922	6,449	7,752

NOTE.—Fund at end of 1939 is estimated to be $1,430,000,000. The benefit payments exceed the net tax receipts in 1954.

It should be clearly understood that the estimates presented are subject to a margin of error. Changes in average wages, death rates, birth rates, the rate of retirement, the proportion of the aged in the total population, and shifts

between insured and uninsured groups may result in substantial changes in these figures in the future. It is impossible, therefore, to predict accurately the future trends of all the factors influencing the long-run aspects of the old-age insurance program. The further one projects estimates of future income and benefit payments, the greater is the margin of error. Constant study and frequent revaluations are, therefore, essential for the long-run financing of our social insurance system. This is one of the reasons why the committee has recommended that the board of trustees make an annual report to Congress on the actuarial status of the system, and report to Congress whenever the trust fund is unduly small, or exceeds three times the highest annual expenditures expected in the next 5-fiscal-year period.

According to the best expert information available to the committee, the estimates presented here are reasonable approximations of the income and outgo of the insurance plan for the next 15 years. The actual figures will no doubt vary somewhat from those shown in table 6. However, the benefit payments shown, although based upon an intermediate estimate as regards rate of retirement, probably represent maximum amounts payable under the provisions of the bill. A serious downswing in business conditions might increase the rate of old-age retirement and decrease the estimated amount of tax receipts, but such variations would probably not alter the fact that the contributions and interest will cover all benefit payments for the next 10 to 15 years. It is only when consideration is given to the income and outgo of the system for 40 to 45 years, or even more, that it becomes quite impossible to predict the future status of the system.

Table 6 shows that the annual contributions from workers and employers will probably be sufficient until 1955 to meet all the annual benefit payments under the revised plan. If the original actuarial assumptions of 1935 prove to be correct, it is possible that benefits for all time to come can be financed from the present schedule of taxes and the interest from the fund, even with the recommended postponement of the tax step-up until 1943. However, upon the basis of additional data developed since 1935, it would appear that the actuarial calculations of 1935 represent a minimum estimate of the future costs. Therefore, it is possible that the annual cost of the benefits may begin to exceed the annual tax collections about 1955 or even somewhat sooner.

Only after experience has been obtained in paying benefits for several years will we have a better picture of the probable future development of the system. Even then continual change will be necessary in the estimates due to the many variable factors which go into making such estimates.

In making the changes in the present plan the committee has kept constantly in mind the fact that, while disbursements for benefits are relatively small in the early years of the program, far larger total disbursements are inevitable in the future.

The plan recommended by this committee is designed to safeguard workers, employers, and the general public. In fact the committee believes the revised plan is a much safer one than the present plan. As has already been pointed out, while the annual costs under the revised plan are greater in the early years of operation, the future annual costs of the benefits when the system reaches maturity are materially lower than under the present law and the over-all average cost is kept about the same. Consequently, it is believed that there is not the same danger as exists in the present benefit schedule, the cost of which, while deceptively small in the early years, mounts very steeply as the years progress.

Unforeseen contingencies may, however, change the entire operation of the plan. It is important, therefore, that Congress be kept fully informed of the probable future obligations being incurred under the insurance plan as well as the public-assistance plans. Each generation may then meet the situation before it in such manner as it deems best.

If future annual pay-roll tax collections plus available interest are insufficient to meet future annual benefits it will be necessary, in order to pay the promised benefits, to increase the pay-roll tax or provide for the deficiency out of other general taxes, or do both. Broadening the coverage of the system to bring in those persons now excluded will not only make the system more effective in providing protection but also strengthen its actuarial base by still further eliminating the possibility of unearned benefits to the worker who moves from uninsured to insured employment.

COVERAGE.

Four years ago, when the old-age insurance program was being planned, it was expected that the Act as passed would provide old-age security for about half of the gainful workers in the country. It was realized, of course, that many workers who might not be insured under the Act at any one time would later obtain protection by shifting into insured occupations. It was generally supposed, however, that the group so shifting would be small compared with the great mass of workers, who, throughout their working life, would remain continuously either in the insured category or in the uninsured category.

Operation of the Act shows that the extent of migration, temporary or permanent, from uninsured to insured employment is far greater than was assumed by the President's Committee on Economic Security in 1935. As a consequence of the migration, a much larger proportion of the total population of the United States will qualify under the contributory system for old-age benefits than had been expected.

The most important excluded groups are agricultural labor, domestic service, and certain nonprofit organizations; here the committee decided unanimously that it would be unwise to remove the exemptions from these three groups at the present time. The present bill does, however, extend old-age insurance coverage to some 1,100,000 more workers by removing the exemption of maritime employment, wages earned after 65, and certain Federal instrumentalities such as national banks and State banks which are members of the Federal Reserve System.

In order to eliminate the nuisance of inconsequential tax payments the bill excludes certain services performed for fraternal benefit societies and other nonprofit institutions exempt from income tax, and certain other groups. While the earnings of a substantial number of persons are excluded by this recommendation, the total amount of earnings involved is undoubtedly very small. No estimate is available of the number of persons or amount of earnings so excluded. The intent of the amendment is to exclude those persons and those organizations in which the employment is part-time or intermittent and the total amount of earnings is only nominal, and the payment of the tax is inconsequential and a nuisance. The benefit rights built up are also inconsequential. Many of those affected, such as students and the secretaries of lodges, will have other employment which will enable them to develop insurance benefits. This amendment, therefore, should simplify the administration for the worker, the employer, and the Government.

Seven other coverage amendments are proposed. They are as follows:

1. *Agricultural labor.*—The present Act excludes "agricultural labor" from coverage. The bill continues the exemption of agricultural labor and defines the term so as to clarify its meaning and to extend the meaning to certain services which are an integral part of farming activities. These provisions are explained in detail in a subsequent part of this report, in connection with the definition of "agricultural labor" as defined in section 209(1) of the bill.

2. *Exclusion of payments to employer welfare plans.*—The term "wages" is amended so as to exclude from tax payments made by an employer on account of a retirement, sickness, or accident disability plan, or for medical and hospitalization expenses in connection with sickness or accident disability. Dismissal wages which the employer is not legally required to make, and payments by an employer of the worker's Federal insurance contributions or a contribution required of the worker under a State unemployment-compensation law are also excluded from tax. This will save employers time and money but what is more important is that it will eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost.

3. *Definition of "employee."*—The bill includes a definition of the term "employee" designed to cover salesmen not already covered by the Act.

4. *State employment.*—The exemption relating to employment by State instrumentalities is so defined as to apply only to an instrumentality wholly owned by the State or political subdivision, or tax exempt under the Constitution.

5. *Foreign governments.*—Provision is made for the exemption of foreign governments, and their instrumentalities under certain conditions, from the old-age insurance taxes.

6. *Family employment.*—Service performed by an individual for his son, daughter, wife, or husband, and service by a child under 21 for his parent, is

excluded so as to make the old-age insurance coverage identical in this respect with unemployment compensation coverage.

7. *Included and excluded services.*—The law is changed with respect to services of an employee performing both included and excluded employment for the same employer so that the services which predominate in a pay period determine his status with that employer for that period.

ADMINISTRATIVE CHANGES.

1. A provision is included requiring employers to furnish employees a statement, which they may retain, showing the amount of taxes deducted from their wages under the old-age insurance system.

2. Provision is made for making more equitable the recovery by the Federal Government of incorrect payments to individuals.

3. Provision is made respecting the practice of attorneys and agents before the Board.

4. Detailed provisions have been added relating to rules and regulations, hearings, and decisions with respect to insurance benefits, procedure for judicial review of the Board's decisions, and delegation of authority by the Board.

5. Provision is made for giving an opportunity for a hearing to a wage earner or interested individual with respect to any entry, omission, or revision of the Board's wage record within four years after the year any wages were paid or alleged to be paid, and as to the finality of the record.

6. Subchapter A, Chapter 9, of the Internal Revenue Code (formerly Title VIII of the Social Security Act) is given the short title "Federal Insurance Contributions Act."

* * * * * * *

OTHER UNEMPLOYMENT COMPENSATION CHANGES.

Under the proposed State-wide reduction plan, described above, employers would still be allowed to obtain their full 90 per cent credit against the Federal pay-roll tax. The Federal tax would remain at 3 per cent, but additional credits would be provided for all employers in States which were in a position to reduce their contribution rates below 2.7 per cent.

This State-wide reduction plan would not alter present individual experience rating provisions. The States which could make general tax reductions after building up the necessary reserve fund and raising their minimum benefit standards, might still allow further contribution reductions to individual employers with favorable employment experience. States which did not meet the new minimum benefit standards or whose reserve fund was inadequate, could continue under their present laws, with or without individual employer experience rating systems, provided they maintained contribution rates, producing a total amount equal to 2.7 per cent of the taxable pay rolls. The bill provides that the provisions with respect to maintenance of the average 2.7 per cent will not go into effect until January 1, 1942, with respect to a pooled fund or to a partially pooled account or to a separate reserve account. Those States which do not wish to take advantage of the horizontal reduction plan but wish to maintain the individual employer experience rating system would do so without having to make any legislative changes at this time.

Further saving to employers would be effected by the proposed amendment granting relief to employers who paid their State unemployment-compensation contributions for the years 1936, 1937, and 1938 too late to qualify for the Federal credit. Employers who pay their delinquent taxes for these years before the sixtieth day after the enactment of these amendments would receive full credit against their Federal taxes for 1936, 1937, and 1938. This would amount to an aggregate sum of about $15,000,000. Further the provisions as to loss of credit on account of future delinquency would be relaxed by (1) increasing from 60 to 90 days the maximum period for which the Commissioner of Internal Revenue is permitted to grant an extension for the filing of Federal tax returns, and (2) by providing that employers who pay their taxes after January 31 but before July 1 next following the close of the taxable year would lose only 10 per cent of their allowable credit.

Another of the amendments would result in a saving to employers as well as in considerable simplification of reporting procedures. This is the amendment

to limit unemployment-compensation taxes to the first $3,000 of annual wages. Such a limitation already exists in the case of old-age insurance and there are distinct advantages to providing a uniform tax base for both programs. It is estimated that this new limitation would result in a saving to employers of about $65,000,000 a year.

Again in the interests of simplification and uniform reporting, the present bill proposes to change the tax base for unemployment compensation from "wages payable" to the "wages paid" definition used in old-age insurance.

Many of the same changes in coverage are provided in this bill with respect to unemployment compensation as have already been discussed under old-age insurance. The cases involving taxes of small consequence, which would be exempt under old-age insurance, would also be exempt from the Federal Unemployment Tax Act. The agricultural-labor exemption is defined and extended as in old-age insurance. The bill proposes to extend coverage to one of the groups now excluded, namely, employees of certain Federal instrumentalities such as national banks, and State bank members of the Federal Reserve System. This amendment would bring about 200,000 additional persons under the unemployment-compensation program, provided the States amend their laws accordingly.

Provision is made in section 902(h) of the bill granting relief to taxpayers and States in those cases in which the highest court of a State has held contributions paid under the State unemployment compensation law for 1936 or 1937 not to have been validly required under such law. This provision is to take care of the situation in North Carolina where the State supreme court recently held that the provisions of the State law requiring contributions for 1936 were invalid because they were retroactive. The effect of the proposed amendment is to enable North Carolina to keep about $3,000,000 in its reserve fund for use in the payment of unemployment compensation benefits.

Other changes affecting unemployment compensation are:

1. Authorization is given to the States to make their unemployment-compensation laws applicable to services performed on land or premises owned, held, or possessed by the United States Government, such as services performed as employees of hotels in national parks. Congress has already enacted a statute giving the States authority to apply their workmen's compensation laws to such employees.

2. The language excluding State instrumentalities is defined as in old-age insurance so that the exemption applies only to an instrumentality wholly owned by the State or political subdivision, as well as those exempt from tax under the Constitution.

3. As in old-age insurance, the definition of "wages" is amended so as to exclude from tax the payments made by an employer on account of a retirement, sickness, or accident disability plan, or for medical or hospitalization expense in connection with sickness or accident disability. Dismissal wages, which the employer is not legally required to pay, and payments by an employer of the worker's Federal insurance contributions, or a contribution required of the worker under a State unemployment-compensation law are also excluded from tax.

4. Provision is made, as in old-age insurance, for the exemption of foreign governments and their instrumentalities from the unemployment-compensation tax.

5. The law is changed with respect to services of an employee performing both included and excluded employment for the same employer so that the services which predominate in a pay period determine his status with that employer for the period. The same provision is made in connection with old-age insurance.

6. The "merit rating" or "individual employer experience rating" provisions are clarified.

7. A provision has been inserted requiring the State laws to provide for the expenditure of Federal grants for the administration of their unemployment compensation laws in accordance with the Federal Act and requiring the replacement of any moneys lost or expended for other purposes.

8. Extension of time is given for the allowance of credit against the Federal tax in cases where the employer has paid his State tax on time but has paid it to the wrong State.

9. The time is also extended in those cases where taxpayer's assets are in the custody or control of a receiver, trustee, or other fiduciary under the control of a court.

10. The "tax on employers of eight or more" now contained in Subchapter C of Chapter 9 of the Internal Revenue Code (formerly Title IX of the Social Security Act) is given the short title "Federal Unemployment Tax Act."

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GENERAL.

Two amendments of a general character have been recommended by the committee. These are:

1. An amendment to prohibit the disclosure of information obtained by the Board or its employees except under certain restricted conditions related to proper administration.

2. Penalties are provided for certain frauds and for impersonation in securing information concerning an individual's date of birth, employment, wages, or benefits of any individual.

DETAILED EXPLANATION OF THE BILL.

SHORT TITLE.

Section 1 of the bill provides that the Act may be cited as the "Social Security Act Amendments of 1939."

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TITLE VI—AMENDMENTS TO THE INTERNAL REVENUE CODE.

FEDERAL INSURANCE CONTRIBUTIONS ACT.

TAXES UNDER SECTIONS 1400 AND 1410 OF THE INTERNAL REVENUE CODE (FORMERLY SECTIONS 801 AND 804 OF THE SOCIAL SECURITY ACT).

Sections 601 and 604: Under the existing provisions of sections 1400 and 1410 of the Internal Revenue Code (formerly sections 801 and 804, respectively, of the Social Security Act) the rate of tax on employees and the rate of tax on employers are each scheduled to increase on January 1, 1940, from 1 per cent of the wages to 1½ per cent, with a further increase of ½ per cent at the expiration of succeeding 3-year periods until the maximum rate of 3 per cent on employees and 3 per cent on employers is reached in 1949. Under the amendment the increase scheduled for January 1, 1940, would be eliminated, and the rate of each tax would be as follows:

	Per cent.
For the calendar years 1939, 1940, 1941, and 1942	1
For the calendar years 1943, 1944, and 1945	2
For the calendar years 1946, 1947, and 1948	2½
For the calendar year 1949 and subsequent calendar years	3

A further change is made by this amendment. Sections 1400 and 1410 of the Internal Revenue Code now provide that the rate of tax applicable to wages is the rate in effect at the time of the performance of the services for which the wages are paid. This will unnecessarily complicate the making of returns and the collection of the taxes in later years when the rate of tax has been increased. For example, in 1943 the rate of tax increases from 1 per cent to 2 per cent. Thus, wages which are paid in 1943 for services performed in 1942 will be subject to the 1 per cent rate, while wages paid in 1943 for services performed in that year will be subject to the 2 per cent rate. Provision must therefore be made in the return for 1943 for the reporting of wages subject to the different rates, and, in auditing the returns, it will be necessary to ascertain not merely the time when the wages were paid and received, but also the year of the rendition of the services for which the wages are paid. If employers have failed to make the proper distinction, many refunds and additional assessments will doubtless be necessary and confusion will result. Under the amendment the rate applicable would be the rate in effect at the time that the wages are paid and received without reference to the rate which was in effect at the time the services were performed.

ADJUSTMENTS OF OVERPAYMENT AND UNDERPAYMENT OF EMPLOYEES' TAX.

Section 602: Present section 1401(c) of the Internal Revenue Code (formerly section 802(b) of the Social Security Act) is designed to permit the employer to adjust, without interest, overpayments and underpayments of employees' tax without the necessity in the former case of requiring the filing of a claim for refund and in the latter case of the making of a demand by the collector for the additional tax. The existing provisions of the section require that the adjustment be made in connection with subsequent wage payments. The different types of situations obtaining at the time the error is discovered and should be corrected are numerous. For example, the employee may be continuously employed and receiving remuneration at regular intervals, or he may be entitled to no remuneration for some time to come, or if he is entitled to remuneration, it may not be taxable because his service is rendered temporarily, or for an indefinite time, in a foreign country, or because he has already received $3,000 from the employer for services rendered during the calendar year, the maximum taxable remuneration under section 1426(a) of the Internal Revenue Code (formerly section 811(a) of the Social Security Act), or the employee's connection with the employer who made the error may have been severed. Moreover, undercollections require a procedure different from that in the case of overcollections. The use of the term "wage payments" causes difficulty since the term "wages" has a restricted meaning for the purpose of this tax. Furthermore, it may prove desirable in certain circumstances to provide for adjustments at times other than in connection with subsequent payments of remuneration to the individual. This amendment, by use of the word "remuneration" instead of "wage" and by leaving the manner and time of the adjustment to be prescribed by regulations, will enable the administrative officers to meet the varied situations which arise.

RECEIPTS FOR EMPLOYEES.

Section 603: This section amends Subchapter A of Chapter 9 of the Internal Revenue Code (formerly Title VIII of the Social Security Act) by inserting a new section in such subchapter. Subsection (a) of the new section requires every employer to furnish each employee with a written statement or statements, in a form suitable for retention by the employee, showing the taxable wages paid to the employee after December 31, 1939, for services rendered in his employ, and the amount of tax imposed by section 1400 with respect to such wages. In addition, the names of the employer and employee, and the period covered by the statement, are to be shown. Each statement, or receipt, must cover one or more, but not more than four, calendar quarters. Under existing Treasury regulations the employer is required to file a return for each calendar quarter with the collector of internal revenue, showing the amount of wages paid to each employee. By requiring the receipts to cover one or more calendar quarters, the employer is enabled, in making out such receipts, to use the amounts of wages of each employee as shown on the copies of the quarterly returns which the employer retains. Returns, under existing Treasury regulations, must be filed with the collector within the calendar month following the close of the quarter. The section gives employers an additional month within which to furnish their employees with the receipts. However, when an employee leaves the employ of the employer, the final receipt, covering the period from the termination of the period covered by the last preceding receipt furnished the employee, is to be given the employee when the final payment of wages is made to him. If the employer chooses, he may under the section furnish a receipt to an employee at the time of each payment of wages during a calendar quarter, in lieu of covering in a single receipt the total wages paid to the employee during such quarter.

Subsection (b) provides that any employer who willfully fails to furnish a statement to an employee in the manner, at the time, and showing the information, required under subsection (a), shall for each such failure be subject to a civil penalty of not more than $5.

TAXES UNDER SECTION 1410 OF THE INTERNAL REVENUE CODE (FORMERLY SECTION 804 OF THE SOCIAL SECURITY ACT).

Section 604: See section 601, supra.

ADJUSTMENT OF EMPLOYERS' TAX.

Section 605: The amendment made by this section to section 1411 of the Internal Revenue Code (formerly section 805 of the Social Security Act), relating to adjustments of employers' tax, is intended to accomplish the same purpose as the corresponding amendment to section 1401(c) of the Code, relating to adjustments of employees' tax. See section 602, supra.

DEFINITIONS.

Section 606: This section, effective January 1, 1940, amends section 1426 of the Internal Revenue Code, containing definitions applicable in the case of the old-age insurance taxes.

Definition of wages.—Section 1426(a): This subsection continues the present definition of wages, but excludes certain payments heretofore included. Paragraph (2) excludes all payments made by the employer to or on behalf of an employee or former employee, under a plan or system providing for retirement benefits (including pensions), or disability benefits (including medical and hospitalization expenses), but not life insurance. These payments will be excluded even though the amount or possibility of such payments is taken into consideration in fixing the amount of remuneration and even though such payments are required, either expressly or impliedly, by the contract of employment. Since it is the practice of some employers to provide for such payments through insurance or the establishment and maintenance of funds for the purpose, the premiums or insurance payments and the payments made into or out of any fund will likewise be excluded from wages. Paragraph (3) expressly excludes from wages the payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of the employee's tax imposed by section 1400 of the Internal Revenue Code (formerly section 801 of the Social Security Act) and employee contributions under State unemployment compensation laws. Paragraph (4) excludes dismissal payments which the employer is not legally obligated to make.

Definition of employment.—Section 1426(b): This term is defined to mean any service performed prior to January 1, 1940, which constituted employment as defined in this section prior to such date; and to mean any service performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States or (B) on or in connection with an American vessel (defined in subsection (h)) under a contract of service entered into within the United States or during the performance of which the vessel touches a port therein, if the employee is employed on and in connection with the vessel when outside the United States. No substantive change in existing law is effected by the introductory paragraph of this provision except the extension of the definition to include service on American vessels. This extension is designed to include, with the qualifications noted, all service which is attached to or connected with the vessel (e. g., service by officers and members of the crew and other employees such as those of concessionaires). Individuals who are passengers on the vessel in the generally accepted sense, such as an employee of an American department store going abroad, will not be included because such service has no connection with the vessel. Service performed on or in connection with an American vessel within the United States will be on the same basis as regards inclusion as other service performed within the United States.

Under existing law service performed within the United States (which otherwise constitutes employment) is covered irrespective of the citizenship or residence of the employer or employee. The amendment makes clear that this will be true also in the case of maritime service covered by the amendment, regardless of wheather performed within or without the United States. The basic

reasons which caused the original coverage to be made without distinctions on account of citizenship or residence apply in the case of seamen. The number of foreign seamen who may be employed on American vessels engaged in trade is limited under our shipping laws.

The definition of the term "employment" under the amendment, as applied to service rendered prior to January 1, 1940, retains the exemptions contained in the present law. The definition applicable to service rendered on and after that date continues unchanged some of the present exemptions, revises, others, and adds certain additional ones.

Paragraph (1) continues the exception of agricultural labor, but a new subsection (i) defines the term for purposes of the exclusion.

Paragraph (2) continues the present exception of domestic service in a private home, but adds to the exception such service in a local college club, or local chapter of a college fraternity or sorority (not including alumni clubs or chapters). Thus services of cook, waiter, chambermaid, and the house mother, performed for these local clubs and chapters, are exempt.

Paragraph (3) continues the present exception of casual labor not in the course of the employer's trade or business.

A new paragraph (4) excludes service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his parent. This exclusion is already contained in the Federal unemployment tax provisions of the existing law. The old paragraph (4), which excluded service performed by an individual who has attained the age of 65, is repealed.

Paragraphs (5) to (13), inclusive, are identical with the same paragraphs in section 209(b) of the Social Security Act. For detailed analysis of such paragraphs see pages 46–49 of this report. [The material referred to is as follows:

[Paragraph (5), which takes the place of the existing exclusion of service on documented vessels, excludes service performed on or in connection with a vessel not an American vessel, if the employee is employed on and in connection with such vessel when outside the United States. This provision excludes all service, although performed within the United States, which is rendered by an employee who was rendering service on and in connection with such a vessel upon its entry into the United States or who is rendering such service upon departure of the vessel from the United States. Thus, officers and members of the crew and other employees whose service is rendered both on and in connection with the vessel (such as employees of concessionaires and others whose service is similarly connected with the vessel) when on its voyage are excluded even though the vessel is within the United States, if they come into or go out of the United States with the vessel.

[Paragraph (6) continues the exemption of service performed in the employ of the United States but, with respect to instrumentalities of the United States, limits the exemption to those instrumentalities which are (A) wholly owned by the United States or (B) exempt from the tax imposed by section 1410 of the Internal Revenue Code (formerly section 804 of the Social Security Act) by virtue of any other provision of law. The change in this provision brings within this title of the Act certain Federal instrumentalities not falling within clause (A) or (B), above, such as national banks.

[Paragraph (7) continues the exemption of service for State governments, their subdivisions and instrumentalities, but limits the exemption with respect to instrumentalities so that it applies only to an instrumentality which is wholly owned by a State or political subdivision or which would be immune from the tax imposed by section 1410 of the Internal Revenue Code (formerly section 804 of the Social Security Act) by the Constitution. The amendment thus narrows the present exemption and in no case broadens it.

[Paragraph (8) continues the exemption of religious, charitable, scientific, literary, or educational organizations, but brings the language of the exemption into conformity with the corresponding exemption from income tax under section 101(6) of the Internal Revenue Code, by adding a specific disqualifying clause applicable where any substantial part of the activities of the organization is carrying on propaganda or otherwise attempting to influence legislation.

[Paragraph (9) continues without change the present provisions of law exempting services of employees covered by the railroad-retirement system. This provision leaves unchanged the exemption of the service of an individual in the employ of an employer subject to the railroad retirement system even though the individual receives remuneration in a form, e. g., tips, not recognized as

compensation under the Railroad Retirement Act and Subchapter B of Chapter 9 of the Internal Revenue Code (formerly the Carriers Taxing Act of 1937), and leaves unchanged the inclusion of service in case it is performed by an employee in the segregable nonrailroad activities of an employer where segregation of the railroad activities from nonrailroad activities is found necessary in the interpretation and administration of the laws relating to the social security system and the railroad retirement system.

[Paragraph (10) provides several new exclusions from employment. Clause (A) exempts certain service in any calendar quarter performed in the employ of an organization exempt from income tax under section 101 of the Internal Revenue Code, if (i) the remuneration for such service does not exceed $45; or (ii) without regard to amount of remuneration, if the service is performed in connection with the collection of dues or premiums (away from the home office) for a fraternal beneficiary society, order, or association, or is ritualistic service (wherever performed) in connection with such an organization; or (iii), without regard to amount of remuneration, if the service is performed by a student enrolled and regularly attending classes at a school, college, or university. Organizations so exempt from income tax and thus within this provision include the following: Certain labor, agricultural, and horticultural organizations, mutual savings banks, fraternal beneficiary societies, building and loan associations, cooperative banks, credit unions, cemetery companies, business leagues, chambers of commerce, real estate boards, boards of trade, civic leagues, local associations of employees, social clubs, local benevolent life insurance associations, mutual irrigation and telephone companies, farmers' or other mutual hail, cyclone, casualty, or fire insurance companies or associations, farmers' cooperative marketing and purchasing associations, corporations organized to finance crop operations, voluntary employees' beneficiary associations, and religious or apostolic associations or corporations.

[Paragraph (10), clause (B), excepts service in the employ of an agricultural or horticultural organization, regardless of the amount of remuneration. These organizations are identical with agricultural and horticultural organizations exempt from income tax under section 101(1) of the Internal Revenue Code.

[Paragraph (10), clause (C), excepts service in the employ of a voluntary employees' beneficiary association, providing for payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (i) no part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (ii) 85 per cent or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses. This exemption is identical with that of these organizations under section 101(16) of the Internal Revenue Code and will have the same scope.

[Paragraph (10), clause (D), excepts all service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if (i) admission to membership in such association is limited to individuals who are employees of the United States Government, and (ii) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

[Paragraph (10), clause (E), excepts service performed in any calendar quarter in the employ of a school, college, or university, not exempt from income tax, if such service is performed by a student enrolled and regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed $45. In determining the remuneration, for purposes of the $45 limitation, the value of room, board, and tuition, if furnished by the school, college, or university as part of the remuneration, would be excluded.

[A calendar quarter is any period of three calendar months ending on March 31, June 30, September 30, or December 31.

[Paragraph (11) excepts service performed in the employ of a foreign government, and paragraph (12) similarly excepts, on a basis of reciprocity, service performed in the employ of an instrumentality wholly owned by a foreign government. These paragraphs are, by section 902(f) of the bill, made retroactively effective to the date of the enactment of the Social Security Act.

[Paragraph (13) excepts service performed as a student nurse in the employ of a hospital or a nurse's training school by an individual who is enrolled and is regularly attending classes in such a school chartered or approved pursuant to State law; and service performed as an interne (as distinguished from a resident doctor) in the employ of a hospital by an individual who has completed

a four years' course in a medical school chartered or approved pursuant to State law.]

Section 1426(c): This subsection relates to an employee who has both included and excluded service for the same employer during a pay period. It provides that if one-half or more of the services constitutes included employment, all of such service will be included; but that if less than one-half constitutes included employment, all will be excluded.

The provision does not apply to the service of an employee in a pay period if any of the service of the employee in the pay period is covered under Subchapter B of Chapter 9 of the Internal Revenue Code (formerly the Carriers Taxing Act of 1937).

Definition of employee.—Section 1426(d): This definition is identical with the definition in section 1101(a)6 of the Social Security Act, which is applicable to Title II (see section 801 of the bill). The amendment to the definition relates to salesmen. In some instances where remuneration is by way of commission and the services are performed away from the place of business of the person for whom they are performed, the individual performing the services is held to be an employee, while in others he is held not to be an employee. A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors insurance system in making coverage determinations. The tests for determining the relationship laid down in cases relating to tort liability and to the common-law concept of master and servant should not be narrowly applied. In certain cases even the most liberal view as to the existence of the employer-employee relationship will fall short of covering individuals who should be covered, for example, certain classes of salesmen. In the case of salesmen, it is thought desirable to extend coverage even where all of the usual elements of the employer-employee relationship are wholly lacking and where accordingly even under the liberal application of the law the court would not ordinarily find the existence of the master-and-servant relationship. It is the intention of this amendment to set up specific standards so that individuals performing services as salesmen may be uniformly covered without the necessity of applying any of the usual tests as to the relationship of employer and employee.

A salesman in business as a broker or factor is excluded if the services are performed as part of such business, and, in furtherance of such business, similar services are performed for other persons and one or more employees of such salesman perform a substantial part of such services; and an individual whose services as a salesman are casual services, not in the course of such individual's principal trade, business, or occupation, is not included in the definition.

This definition is not intended to affect the employer-employee status of a salesman and the employee of such salesman. Thus, the business chauffeur who has been an employee of a salesman will remain solely the employee of such salesman.

Definition of employer.—Section 1426(e): This new definition is for the purpose of making clear that the extension of the broadened employee concept also broadens the employer concept. Thus, where a salesman is held to be an employee, the person for whom the salesman performs the services is the employer. For example, an insurance solicitor who executes a contract with an insurance company under which he performs services as a salesman would be the employee of the insurance company and not of the general agent of the company.

Section 1426 (f) and (g), defining the terms "State" and "person," respectively, makes no change in the existing definitions of those terms.

Definitions of American vessel and agricultural labor.—Subsections (h) and (i) of section 1426 are identical with subsections (d) and (l) of section 209 of the Social Security Act. For detailed analysis of such subsections see pages 49 and 51 of this report. [The material referred to is as follows:

[*Definition of American vessel.*—Section 209(d): This term is defined to mean any vessel documented or numbered under the laws of the United States; and also to include any vessel neither so documented nor numbered nor documented under the laws of any foreign country while the crew is in the employ only of citizens or residents of the United States or corporations organized under the laws of the United States or of any State.

* * * * * * *

[*Definition of "agricultural labor."*—Section 209(1): The present law exempts "agricultural labor" without defining the term. It has been difficult to delimit the application of the term with the certainty required for administration and for general understanding by employers and employees affected.

[Your committee believes that greater exactness should be given to the exception and that it should be broadened to include as "agricultural labor" certain services not at present exempt, as such services are an integral part of farming activities. In the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones.

[Paragraph (1) of this subsection exempts service performed on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, feeding, and management of live stock, bees, poultry, and fur-bearing animals. Such services are exempt under existing law only if performed in the employ of the owner or tenant of the farm on which they are rendered. Services performed on a farm in connection with the raising, feeding, and management of fur-bearing animals, such as foxes, not now exempted, will be exempt under paragraph (1). This paragraph also continues the existing exclusion of services performed on a farm in the raising or harvesting of horticultural commodities, including flowers and nursery products, such as young fruit trees, ornamental plants, and shrubs.

[Paragraph (2) of the subsection excepts services in the employ of the owner (whether or not such owner is in possession) or tenant of a farm in connection with the operation, management, or maintenance of such farm, if the major part of those services are performed on a farm. Under this language certain services are to be regarded as agricultural even though they are not performed in conducting any of the operations referred to in paragraph (1). Services performed in connection with the "operation, management, or maintenance" of a farm may include, for example, services performed by carpenters, painters, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semiskilled workers whose services contribute in any way to the proper conduct of the farm or farms operated by their employer. Some of these services at present constitute covered employment under some circumstances but not under other circumstances. It is stipulated that the services referred to in this paragraph must be performed in the employ of the owner or tenant of the farm so that the exemption will not extend to services performed by such persons as employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties.

[Paragraph (3) extends the exception to services performed in connection with certain specified products and operations. Ordinarily these services are performed on a farm or are of such a character as to warrant no different treatment than is accorded services performed in connection with farming activities. In order that a uniform rule may be applied in the case of these services, they will be excepted whether or not performed on a farm or in the employ of the owner or tenant of a farm. In the case of maple sap, the exemption will extend to services in connection with the processing of the sap into maple sugar or maple sirup, but not in the subsequent blending or other processing of such sugar or sirup with other products. Under the present exception services performed in connection with the production of maple sirup or maple sugar do not constitute "agricultural labor." Similarly, the existing exception does not extend to services performed in connection with the growing, harvesting, processing, packing, and transporting to market of oleoresin, gum spirits of turpentine, and gum resin. Under this paragraph, however, the exception will apply to services performed in connection with the production or harvesting of crude gum (oleoresin) from a living tree and of the following products as processed only by the original producer of the crude gum (oleoresin): Gum spirits of turpentine and gum resin, as defined in the Agricultural Marketing Act, as amended. Services performed in connection with any hatching of poultry and in connection with the ginning of cotton will also be excepted. Services performed in connection with the raising or harvesting of mushrooms constitute "agricultural labor" under existing law, only when performed on a farm. The fact that mushrooms are not usually grown under ordinary field conditions but are grown in cellars, caves, barns, or in sheds specially constructed for the

purpose has resulted in the employees of some growers being covered while employees of others are not. Under this paragraph all such services will be excepted.

[Paragraph (4) of the subsection extends the exemption to service (though not performed in the employ of the owner or tenant of a farm) performed in the handling, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity, provided such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of the paragraph, however, do not extend to services performed in connection with commercial canning or commercial freezing, nor to services performed in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. The expression "as an incident to ordinary farming operations" is, in general, intended to cover all services of the character described in the paragraph which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group, as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group. The expression also includes the delivery of such commodity to the place where, in the ordinary and natural course of the particular kind of farming operations involved, the commodity accumulates in storage for distribution into the usual channels of commerce and consumption. To the extent that such farmers, organizations, or groups engage in the handling, etc., of commodities other than those of their own production or that of their members, such handling, etc., is not regarded as being carried on "as an incident to ordinary farming operations." In such a case the rules set forth in subsection (c) of this section apply.

[In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute "agricultural labor" even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting or grading of citrus fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

[Since the services referred to in this paragraph must be rendered in the actual handling, drying, etc., of the commodity, the paragraph does not exempt services performed by stenographers, bookkeepers, clerks, and other office employees in the employ of farmers, farmers' cooperative organizations or groups, or commercial handlers. To the extent that services of this character are performed in the employ of the owner or tenant of a farm, however, and are rendered in major part on a farm, they may be exempt under the provisions of paragraph (2).

[The last sentence of the subsection makes it clear that the term "farm" as used in this subsection has a broad and comprehensive meaning. The term, for example, includes fur-bearing animal farms. Under present law, services performed in connection with the operation of such farms constitute covered employment. The term also includes greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, regardless of their location. Under the existing exception, labor performed in some greenhouses is excepted while labor in others is not. The inclusion of greenhouses of the kind specified, within the meaning of the term "farm," will make for a more uniform treatment of greenhouse labor and lessen the administrative difficulties which this class of cases presents. Greenhouses used primarily for purposes such as storage or display purposes or for the fabrication of wreaths and corsages (usually in connection with the operation of a retail establishment) do not, of course, come within the exception.]

SHORT TITLE.

Section 607: This section inserts a new section in Subchapter A of Chapter 9 of the Internal Revenue Code which provides that the subchapter may be cited as the "Federal Insurance Contributions Act."

FEDERAL UNEMPLOYMENT TAX ACT.

TAXES UNDER SECTION 1600 OF THE INTERNAL REVENUE CODE (FORMERLY SECTION 901 OF THE SOCIAL SECURITY ACT).

Section 608: This amendment changes the basis for determining tax liability under Subchapter C of Chapter 9 of the Internal Revenue Code (formerly Title IX of the Social Security Act) from "wages payable" to "wages paid." That subchapter is thus brought into conformity with Subchapter A of Chapter 9 (formerly Title VIII of the Social Security Act), which also imposes a tax on "wages paid." Wages, for the purpose of these taxes, are considered paid when they are actually paid, or when they are constructively paid, i. e., credited to the account of, or set apart for, the wage earner so that they may be drawn upon by him at any time although not then actually reduced to possession.

Under the existing law wages are "payable" with respect to employment during a calendar year, even though the amount of wages is not fixed and no right exists to enforce payment at any time during that year. Thus a bonus paid in 1939 for services performed in 1938 constitutes "wages payable" for 1938, even though the amount of the bonus may not have been known in 1938 and no obligation to pay it existed in that year.

In cases in which remuneration for services of an employee in a particular year is based on a percentage of profits, or on future royalties, the amount of which can not be determined until long after the close of the year, the employer has been required to estimate unascertained amounts and pay taxes and contributions on that basis. If he has overestimated, subsequent corrections on the return must be made with consequent refunds. If the employer has underestimated, additional taxes may become due and he may also be compelled to pay additional State contributions, which are usually not allowable as credit because not timely paid. The attendant difficulties and confusion cause a burden on employers and administrative authorities alike. The placing of this tax on the "wages paid" basis will relieve this situation.

With both the old-age insurance tax and the unemployment-compensation tax on the wages paid basis, the keeping of records by employers will be simplified.

The new basis of taxation will apply to all wages for services rendered after the beginning of 1939. In so far as the amendment would be retroactive with respect to the year 1939, it would not increase the tax liability of any taxpayer.

CREDIT AGAINST TAX.

Section 609: This section relates only to the tax with respect to services rendered in 1939 and thereafter.

Contributions to State unemployment funds.—Section 1601(a): The present section 1601(a) of the Internal Revenue Code (formerly section 902 of the Social Security Act) provides that a taxpayer may credit against the Federal tax only contributions paid by him under a State law "with respect to employment," as defined in section 1607 of the Code (formerly section 907 of the Act). Since the definition of employment in section 1607 restricts the meaning of the term to certain types of service, the taxpayer is not given credit for contributions made under a State law with respect to services not covered by the Federal law. Subdivision (1) eliminates the references in existing law to "employment," thus allowing the taxpayer to credit against the tax the contributions which he is required to pay, and which he actually pays, under a State law. The amendment also includes a requirement that credit shall be allowed only for contributions to an unemployment fund which has been maintained during the taxable year as specified in the amendment to section 1607(f) of the Internal Revenue Code. (See section 614, infra.)

Subdivision (2) provides that credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such year. This effects no substantive change in the present law.

Subdivision (3) liberalizes existing law by giving employers more time within which to pay their contributions to the State and secure credit therefor against the Federal tax. Under existing law credit is allowable only for contributions with respect to the taxable year paid to the State before the due date of the Federal return for such year. The amendment permits full credit for contribu-

tions paid on (as well as before) the due date. The amendment further permits a credit for contributions paid after the due date of the Federal return but on or before June 30 next following the due date, but this credit is not to exceed 90 per cent of the amount which would have been allowable as credit on account of such contributions if they had been paid on or before the due date. For example, if an employer's gross liability for Federal tax at the 3 per cent rate is $100, and his liability for the same year for State contributions is also $100, and he paid such contributions on or before the due date of the Federal return, he would be entitled to the maximum credit (under the limitation provided in section 1601(c)) of 90 per cent of the Federal tax, or $90, and his net Federal tax would be $10. If, however, the employer paid the $100 in contributions after the due date but not later than June 30 next following, his credit would be 90 per cent of $90, or $81, and his net Federal tax would be $19. No credit is allowable for contributions paid after June 30.

Thus, substantial relief is given employers for 1939 and future years. Your committee is of the opinion that further liberalization of the conditions under which this credit would be allowable might endanger the orderly functioning of the system. It is desirable not to remove the aid provided in existing law to the State unemployment-compensation systems which has been secured through the inducement to employers to pay their State contributions promptly. Furthermore, any change should be avoided which would impede the audit of the Federal returns or delay final determination of the taxpayer's liability beyond a reasonable time after the returns are filed. In proposing this amendment consideration has been given these factors as well as to the need for liberalization in favor of the taxpayers.

Certain exceptions to the foregoing general rule are made in the amendment, however, to meet cases of genuine hardship.

Subdivision (3) removes the time limitation for payment of State contributions in those cases where the assets of the taxpayer are in the custody or control of a court at any time beginning with the due date and ending with the next following June 30, both dates inclusive.

Subdivision (4) grants relief in cases of payments made through mistake under the wrong unemployment-compensation law. In such a case payment under the proper State law with respect to the remuneration in question will be deemed, for the purposes of credit against the Federal tax, to have been made on the date of the erroneous payment. If the taxpayer's experience under the law of the wrong State had entitled him to cease paying any contributions for services subject to that law and by reason thereof the taxpayer had actually paid no contributions with respect to the remuneration in question, payment to the proper State will be treated, for such tax-credit purposes, as having been made on the date on which the Federal tax return was actually filed.

Subdivision (5) provides for refund of any tax (including any penalties and interest) which has been collected but with respect to which credit allowable under this section has not been taken. The law (including statutes of limitations) applicable in the case of erroneous or illegal collection of tax will apply to such refunds. No interest will be paid on any such refund.

Additional credit.—Section 1601(b) (formerly section 909(a) of the Social Security Act): This amendment changes in some particulars the existing law, relating to additional credit allowance.

It expressly conditions the allowance of an additional credit upon certification of the State law under section 1603(c) of the Internal Revenue Code (formerly section 903(b) of the Social Security Act) and under the proposed amendment to section 1602(c). (See section 610, infra.)

It extends the additional credit to reduced rates of contributions required under a State law with respect to employment not covered by the Federal tax, thus bringing this subsection into conformity in that regard with the proposed amendment of subsection (a) (relating to contributions to State unemployment funds).

Under the amendment, additional credit allowance will be based on the difference between the amount of contributions the taxpayer was required to pay under the State law and the amount he would have paid had he been subject under such State law to a rate of 2.7 per cent, rather than on the difference between the amount the taxpayer actually paid under the State law and the highest rate applicable "from time to time" throughout the taxable year. This change, in addition to measuring the credit by 2.7 per cent of the pay roll with respect to which contributions are required under the State law, also eliminates the possible

necessity for measuring additional credits in terms of periods of less than one year.

Limit on total credit.—Section 1601(c) restates the existing law limiting total credits against the Federal tax to not in excess of 90 per cent of such tax. Since both the provision with respect to credits for contributions actually paid and the provisions with respect to additional credits are now included in one section of the law as subsections (a) and (b), respectively, it is unnecessary to include the limitation separately in respect to each subsection.

CONDITIONS OF ADDITIONAL CREDIT ALLOWANCE.

Section 610(a): This subsection amends the provisions of existing law (section 1602 of the Internal Revenue Code, formerly section 910 of the Social Security Act) relating to the requirements with respect to additional credit allowance.

The terms "employers," "employment," and "wages," which are defined in section 1607 and have special meanings not applicable here, are replaced by terms such as "persons having individuals in their employ," "services," and "remuneration," in order to make the requirements of this subsection more easily understandable in their application to State laws whose coverage differs from that of the Federal law. The phrase "person (or group of persons)" has been used in the standards with respect to all types of State funds, to make clear that a State law may measure, for individual experience rating purposes, either an individual employer's record, or may permit two or more employers to combine their records and be treated, for experience rating purposes, as if they were a single legal entity. Several verbal changes are suggested in this subsection in the interest of clarity.

In order to facilitate the administration of provisions in State laws allowing variations in rates of contributions, the term "computation date," defined in subsection (d)(7) of the Code, has been adopted, and the phrase "year preceding the computation date" substituted for terms such as "preceding year" and "year," to permit the States to compute reduced rates as of a date prior to the date on which such reduced rates will become effective.

State standards.—Section 1602(a) of the Code is amended by adding a new standard with respect to the allowance of additional credit, which requires that irrespective of the type of fund maintained under the State law, the State law will contain provisions whereby variations in rates of contributions as between different employers will be so computed as to yield, with respect to each year, a total amount of contributions substantially equivalent to 2.7 per cent of the total pay rolls of employers, subject to the contribution requirements of the State law. Fluctuations in pay rolls from year to year preclude the computation of rates in such a manner as to yield an exact amount. Your committee believes that this new standard with respect to individual employer experience rating is essential to protect the fundamental purposes of the Federal tax credit system for providing unemployment compensation. Because it is an additional standard, State laws under which particular types of funds are maintained will be required to comply with this over-all standard as well as the applicable standards prescribed in paragraph (2), (3), or (4) of this subsection. The effective date of this new standard is postponed, under section 610(b) of the bill with respect to the standards prescribed in paragraphs (2) and (4), to permit States to conform therewith without incurring the expense of special legislative sessions (section 610(b), infra).

Paragraph (2) incorporates the standards of existing law applicable to a pooled fund or partially pooled account, except that the phrase "years of compensation experience" in the present law has been replaced by a broader phrase permitting the use of an employer's "experience with respect to unemployment" or an employer's experience with respect to "other factors bearing a direct relation to unemployment risk" as a basis for individual experience rating under a pooled fund. This change is made in order to extend the possible bases by which State laws may measure eligibility for reductions in employers' rates of contributions to a pooled fund, thus adding flexibility to the present law. Because of this change, the definition of the phrase "year of compensation experience" in subsection (d) (old subsection (c)) of this section is no longer necessary.

Paragraphs (3), (4), and (5): The reserve requirements with respect to reserve accounts (under the amended new paragraph (4) to become effective January 1, 1942) and guaranteed employment accounts have been restated in terms of 2½ per cent of the pay roll for three years, rather than 7½ per cent of the pay roll for one year. The term "pay roll" includes only the pay roll subject to the

contribution requirements of the State law. This basis of measuring an employer's reserve or guaranteed employment account is more equitable from both the point of view of the employer and the State, since it permits the averaging of pay-roll experience over three years and avoids the unreasonable fluctuations in rates which may occur if pay rolls are substantially increased or decreased for a particular year. Because the standard rate of contributions under most laws is 2.7 per cent (a very few State laws require a standard rate of 3 per cent), employers could not accumulate a reserve equal to 7½ per cent of their annual pay roll in less than three years, except in very unusual situations. Hence, it is believed that the change in the reserve requirement to 2½ per cent of pay rolls for three years in place of 7½ per cent of pay roll for one year will not, in practical effect, alter the present reserve requirements. The additional requirement with respect to three years of contributions is deemed necessary to clarify the provision relating to reserves equal to 2½ per cent of the pay roll for three years. Unless the employer has actually been subject to the contribution requirements of the State law for three years, the provision measuring the reserve in terms of 2½ per cent of pay rolls for the three preceding years would operate to reduce the reserve requirements. Under these two paragraphs, an employer may not be permitted a reduced rate of contributions to his guaranteed employment account unless he has fulfilled his guaranty with respect to the preceding year, and an employer may not be permitted a reduced rate of contributions to his reserve account unless compensation has been payable from his account throughout the preceding year.

Paragraph (5) incorporates the new standards with respect to individual reserve accounts. In order to permit States maintaining such accounts to conform therewith without incurring the expense of special legislative sessions, these new standards will not become effective until January 1, 1942. Prior to that date, the standards in paragraph (4), which incorporate the present law, will be applicable.

Other State standards.—Section 1602(b): This is a new subsection providing greater flexibility to the States with respect to the allowance of reduced rates of contributions on the basis of which additional credits against the Federal tax will be allowed. Without regard to this subsection a State may allow reduced rates under individual employer experience rating systems in conformity with the standards in subsection (a) of this section. In addition, under the option provided by this subsection, a State may adopt either of two alternative courses of action if it meets the standards set forth in paragraphs (1) and (2) of this subsection: (1) It may reduce all employers' rates uniformly; or (2) it may vary individual employers' rates of contributions under experience rating provisions which comply with the applicable standards in paragraph (2) or (3) or (4) of subsection (a) (paragraph (3) of this subsection) but without so calculating the respective rates as to secure an annual yield of an amount substantially equivalent to 2.7 per cent of the State pay roll, the requirement of paragraph (1) of subsection (a) of this section.

The two standards contained in this subsection relate to the amount in the State unemployment compensation fund as of the computation date and the compensation payable under the State law as of the date the reduced rate is effective.

Under paragraph (1) the amount in the State fund, as of the date that amount is determined, must at least equal one and one-half times the highest amount paid into such fund up to some date prior to the effective date of the new rate with respect to any one of the 10 preceding calendar years, or one and one-half times the highest amount of compensation paid out of such fund within any one of the 10 preceding calendar years, whichever amount is greater. This paragraph does not require that either contributions or compensation shall have been payable under the State law for 10 calendar years.

Under paragraph (2) the State law must provide for the payment of compensation to otherwise eligible individuals in accordance with the following general standards or in accordance with general standards which are substantially equivalent thereto:

(A) Within a compensation period of not more than 52 consecutive weeks any such individual will be entitled to receive a total amount of compensation equal to not less than (i) sixteen times his weekly rate of compensation for a week of total unemployment, or (ii) one-third of the individual's total earnings for insured work during a base period of not less than 52 weeks, whichever is less;

(B) The waiting period with respect to each compensation period described under clause (A) may not exceed two calendar weeks of total unemployment

or two periods of total unemployment of seven consecutive days each. Such weekly or 7-day waiting periods need not be consecutive. This section is not applicable to periods for which an individual may be disqualified for compensation;

(C) The weekly rates of compensation for total unemployment will be related to the individual's full-time weekly earnings for insured work during a period to be prescribed in the State law. Such a period may be a single week, representative of the individual's customary full-time weekly earnings, may be several such representative weeks occurring within a longer prescribed period, or the State law may secure such a relation to such full-time weekly earnings by formulae (such as a reasonable fraction of total wages for insured work during that calendar quarter in the individual's base period in which such wages were highest) which will produce a reasonable approximation of such full-time weekly earnings. Such weekly rates of compensation may not be less than: (i) $5 per week if such full-time weekly earnings were $10 or less; (ii) 50 per cent of such earnings if they were more than $10 but not more than $30; and (iii) $15 per week if such earnings were more than $30; and

(D) Compensation will be paid to an otherwise eligible individual who, by reason of some involuntary unemployment during a week, earns less than his weekly rate of compensation. The amount of such compensation will at least equal the difference between the individual's weekly rate of compensation for total unemployment and his actual earnings for such week.

Certification by the Board with respect to additional credit allowance.—Section 1602(c): This is a new subsection, requiring the Social Security Board to certify to the Secretary of the Treasury, in the same manner as it certifies State laws under section 1603(c), State laws which it finds comply with the requirements of subsection (a) or (b) of this section. Provision is made for partial certification where two kinds of funds are maintained under the same State law, one of which fails to comply with subsection (a) or (b) of this section, or where a contribution is divided between two kinds of funds under a State law, so that additional credits will be allowed only with respect to reduced rates allowed in compliance with the requirements of this section.

Under these provisions a State law which complies in all respects with the requirements of this section will receive an unqualified certification. In some States, provision is made for the maintenance of two parallel systems (such as a reserve account system and a guaranteed employment account system). In such States, some employers may be covered by the one system and other employers may be covered by the other. In such States there would be no difficulty in certifying one system, even though the other failed to comply with the requirements of this section, and the Board would accordingly be directed to do so by subsection (c)(2). In other States, contributions with respect to particular wage payments are required to be divided between two kinds of funds (such as the requirement that a part of each employer's contribution be credited to his own reserve account and a part to a "partially pooled" fund which is operated as a reinsurance fund). If in this type of situation the provisions of the State law with respect to one or the other such fund do not comply with the requirements of this section, the Board is directed to make such certification as will permit the allowance of additional credits only with respect to those reduced rates which have been allowed in accordance with the requirements of this section.

In addition, this new subsection includes a paragraph requiring the Social Security Board to advise the States, in the same manner as it advises the States of its findings under section 1603, whether or not their laws comply with the requirements of this section; after finding such compliance, the Board may thereafter deny certification of a State law for additional credit purposes only after prior notice and opportunity for hearing to the State, and only if it finds the State law no longer contains the applicable provisions specified in subsection (a) or (b) or the State has failed to comply substantially with any such provision. The present subsection (b) of this section is eliminated because its purpose is achieved by the foregoing provisions.

Definitions.—Section 1602(d): Paragraphs (1) and (4) of this subsection are amended to make clear that from a particular employer's reserve account or guaranteed employment account, all compensation payable on the basis of services performed for him and only compensation payable on the basis of services performed for him, is to be paid. This incorporates in part the exception clause in the present definition of a pooled fund, i. e., that compensation may not be

paid from a partial pool or reinsurance fund unless the reserve account or guaranteed employment account of the employer on the basis of whose services the benefit claimant had earned his benefit rights, is exhausted or terminated.

The present paragraph (2) is revised and divided into paragraphs (2) and (3) in order to distinguish more clearly between a fully pooled fund and a partially pooled (or reinsurance) fund. The new paragraph (3) permits the maintenance of a partially pooled fund in connection with a guaranteed employment account, as well as in connection with a separate reserve account. The definition of the partially pooled account also makes clear that a State may, without endangering its compliance with the definitions of the term "reserve account" and "guaranteed employment account," provide for transfers from reserve accounts or guaranteed employment accounts to a partially pooled account. Several State laws now provide for such transfers.

Paragraph (4) (old paragraph (3)) amends the present law to permit guarantees of employment to be operative only with respect to individuals who continue to be available for suitable work in the guaranteed establishment. This provision is deemed necessary because under the present provision it is not clear whether employers are relieved from their guarantees with respect to individuals who quit voluntarily, or are unable to work because of some incapacity, or are out on strike, etc. This paragraph is also amended to make clear the general understanding with respect to its requirements concerning the probationary service period, i. e., that the probationary period must be served within a continuous period immediately following the employee's first week of service and may not be claimed repeatedly with respect to intermittent periods of employment which never exceed 12 consecutive weeks. The last clause of this definition is amended to clarify the point that guaranteed remuneration and unemployment compensation are not the same, and that the guaranteed remuneration is not to be payable out of the guaranteed employment account.

Paragraph (5) (old paragraph (4)) deletes the definition of the term "year of compensation experience," because that term is no longer used in paragraph (2) (old paragraph (1)) of section 1602(a). The definition of the term "year," in this paragraph, is designed to permit States to allow reduced rates on the basis of 12 consecutive months, as well as on the basis of a calendar year.

Paragraph (6), defining the term "balance," is a new definition added to make clear that the amount of the reserve required to be accumulated by employers with respect to whom a reserve account or a guaranteed employment account is maintained, is to be made up of payments by such employers and may not be made up of employee contributions or funds from other sources. If employee contributions are required under a State law which provides for the maintenance of reserve accounts or guaranteed employment funds, such contributions may be payable into the reinsurance fund. The exception contained in this definition, which permits the inclusion within a "balance" of payments other than payments by employers if made to a reserve account or guaranteed employment account prior to January 2, 1939, is designed to relieve the States of complicated computations where payments, other than payments by employers, have been paid to such accounts during early months of the State's experience.

Paragraph (7) defines the term "computation date" to include any date occurring within 27 weeks prior to the date that a reduced rate goes into effect. As above indicated, this provision is designed to give the States ample time within which to make their computations with respect to variations in rates of contributions. Such computations are to be made at least once in each calendar year.

Paragraph (8), defining the term "reduced rate," is designed to make clear that the requirements of subsections (a) and (b) are not applicable to a reduction from an increased rate to a standard rate, i. e., situations in which employers with bad employment experience have been required to pay increased rates and are subsequently permitted to pay the standard or normal rate.

Section 610(b): This subsection of the bill, referred to in connection with section 1602(a)1 of the Internal Revenue Code, is necessary in order to permit employers who are allowed reduced rates of contributions under State laws which conform with the present standards, to secure additional credits on the basis thereof and to avoid requiring States to convene special sessions of their legislatures in order to conform their laws with the new standard in section 1602(a)1 of the Code. This section of the bill postpones the

application of that new standard with respect to pooled funds, partially pooled accounts, and individual reserve accounts, until January 1, 1942, thereby allowing ample time for all States to enact necessary amendatory legislation at the next regular sessions of their respective legislatures.

PROVISIONS OF STATE UNEMPLOYMENT COMPENSATION LAWS.

Section 611: The changes made in paragraphs (1), (3), and (4) of section 1603(a) of the Internal Revenue Code (formerly section 903(a) of the Social Security Act) by this section correspond to those made in paragraphs (2), (4), and (5) of section 303(a) of the Social Security Act by section 302, supra.

EXTENSION OF TIME FOR FILING TAX RETURNS UNDER SUBCHAPTER C OF CHAPTER 9 OF THE INTERNAL REVENUE CODE.

Section 612: This section amends section 1604(b) of the Internal Revenue Code to authorize a longer extension of time for filing the return of the Federal unemployment tax. Existing law permits an extension of as much as 60 days. The amendment would provide an additional 30 days, or 90 days in all. The extensions under section 1604(b) are granted under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. An employer finding it impossible to make his return on January 31, the due date prescribed in section 1604(a), or to pay his State contributions by that date, may make application in accordance with such rules and regulations for an extension of time for filing his Federal return. If granted, the employer has until the extended due date, as granted, to make his return and pay his State contributions. No delinquency penalty will be incurred for late filing and no loss of credits will be suffered if the return is filed, and the contributions paid to the State, on or before such extended due date.

INTERSTATE OR FOREIGN COMMERCE AND FEDERAL INSTRUMENTALITIES.

Section 613: This section designates existing section 1606 of the Internal Revenue Code (formerly section 906 of the Social Security Act) as subsection (a). A clarifying amendment to the provision makes it clear beyond any possible doubt that an employer engaged in foreign commerce is on the same basis as respects authority of a State to require payments into an unemployment fund as employers engaged in interstate commerce.

This section also amends section 1606 by adding subsections (b) and (c), relating to Federal instrumentalities, and (d), relating to employment on lands held by the Government.

Subsection (b) confers on State legislatures authority to require instrumentalities of the United States (except those wholly owned by the United States or exempt from the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code (formerly sections 804 and 901, respectively, of the Social Security Act) by any other provision of law) to comply with State unemployment compensation laws. Under this amendment the States would be able to cover under their unemployment compensation systems national banks and certain other Federal instrumentalities. Protection against any possible discrimination against instrumentalities of the United States is afforded by the two provisos, which make the permission to require compliance with the State law conditional upon equality of treatment and upon the approval and certification of the State law under section 1603 of the Internal Revenue Code (formerly section 903 of the Social Security Act).

Subsection (c) makes provision for examination by the Comptroller of the Currency of returns and reports made to the States by national banks.

Subsection (d) authorizes the States to cover under their unemployment compensation laws services performed upon land held by the Federal Government, such as services for hotels located in national parks.

DEFINITIONS.

Section 614: This section, effective January 1, 1940, amends section 1607 of the Internal Revenue Code, containing definitions applicable in the case of the Federal unemployment tax.

Definition of employer.—Section 1607(a): No change from existing law is made in this definition.

Definition of wages.—Section 1607(b): This subsection continues the present definition of wages but excludes certain payments heretofore included. Para-

graph (1) excludes 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. Paragraph (2) excludes all payments made by the employer to or on behalf of an employee or former employee, under a plan or system providing for retirement benefits (including pensions), or disability benefits (including medical and hospitalization expenses), but not life insurance. These payments will be excluded even though the amount or possibility of such payments is taken into consideration in fixing the amount of remuneration and even though such payments are required, either expressly or impliedly, by the contract of employment. Since it is the practice of some employers to provide for such payments through insurance or the establishment and maintenance of funds for the purpose, the premiums or insurance payments and the payments made into or out of any fund will likewise be excluded from wages. Paragraph (3) expressly excludes from wages the payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of the employee's tax imposed by section 1400 of the Internal Revenue Code (formerly section 801 of the Social Security Act) and employee contributions under State unemployment compensation laws. Paragraph (4) excludes dismissal payments which the employer is not legally obligated to make.

Definition of employment.—Section 1607(c): The amendments made here conform this definition to the definitions contained in amended section 209(b) of the Social Security Act and amended section 1426(b) of the Internal Revenue Code (formerly section 811(b) of the Social Security Act), with the exception of maritime service.

The definition of the term "employment" under the amendment, as applied to service rendered prior to January 1, 1940, retains the exemptions contained in the present law. The definition applicable to service rendered on and after that date continues unchanged some of the present exemptions, revises others, and adds certain additional ones. No substantive change in existing law is effected by the introductory paragraph of the definition.

Paragraph (1) continues the exception of agricultural labor, but a new subsection (l) defines the term for purposes of the exclusion.

Paragraph (2) continues the present exception of domestic service in a private home, but adds to the exception such service in a local college club or local chapter of a college fraternity or sorority (not including alumni clubs or chapters). Thus services of cook, waiter, chambermaid, and the housemother, performed for these local clubs and chapters, are exempt.

Paragraph (3) adds an exception of casual labor not in the course of the employer's trade or business. This exception is already contained in amended section 209(b) of the Social Security Act and amended section 1426(b) of the Internal Revenue Code.

Paragraph (4) continues the existing exception of service performed as an officer or member of the crew of a vessel on the navigable waters of the United States.

Paragraph (5) continues the existing exception of service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother.

Paragraph (6) continues the exemption of service performed in the employ of the United States, but with respect to instrumentalities of the United States, limits the exemption to those instrumentalities which are (A) wholly owned by the United States or (B) exempt from the tax imposed by section 1600 of the Internal Revenue Code (formerly section 901 of the Social Security Act) by virtue of any other provision of law. The change in this provision brings within the unemployment tax provisions certain Federal instrumentalities not falling within clause (A) or (B) above, such as national banks.

Paragraph (7) continues the exemption of service for State governments, their subdivisions and instrumentalities, but limits the exemption with respect to instrumentalities so that it applies only to an instrumentality which is wholly owned by a State or political subdivision or which would be immune from the tax imposed by section 1600 of the Internal Revenue Code (formerly section 901 of the Social Security Act) by the Constitution. The amendment thus narrows the present exemption and in no case broadens it.

Paragraph (8) continues the exemption of religious, charitable, scientific, literary, or educational organizations, but brings the language of the exemption

into conformity with the corresponding exemption from income tax under section 101(6) of the Internal Revenue Code, by adding a specific disqualifying clause applicable where any substantial part of the activities of the organization is carrying on propaganda or otherwise attempting to influence legislation.

Paragraph (9) excepts services of employees covered by the railroad unemployment insurance system. This provision leaves unchanged the exemption of the service of an individual in the employ of an employer subject to such system even though the individual receives remuneration in a form (e. g., tips) not recognized as compensation under the Railroad Unemployment Insurance Act, and leaves unchanged the inclusion of service in case it is performed by an employee in the segregable nonrailroad activities of an employer where segregation of the railroad activities from nonrailroad activities is found necessary in the interpretation and administration of the laws relating to the social security system and the railroad unemployment insurance system.

Paragraphs (10) to (13), inclusive, are identical with the same paragraphs in section 209(b) of the Social Security Act. For detailed analysis of such paragraphs see pages 47–49[1] of this report.

Section 1607(d): This section relates to an employee who has both included and excluded service for the same employer during a pay period. It provides that if one-half or more of the services constitutes included employment, all of such service will be included; but that if less than one-half constitutes included employment, all will be excluded. The provision does not apply to the service of an employee in a pay period if any of the service of the employee in the pay period is covered under the railroad unemployment-insurance system.

Section 1607(e), defining "State agency," makes no change in the existing definition of that term.

Definition of unemployment fund.—Section 1607(f): This definition is amended by adding two new sentences. The first of these added sentences is a clarifying amendment providing that all sums standing to the credit of the State in the (Federal) unemployment trust fund and money withdrawn from that fund by the State but unexpended shall constitute a part of the State fund. This removes any possible doubt whether such moneys remain a part of the State fund. The second added sentence provides that an unemployment fund shall be deemed to be maintained during a taxable year only if no part of the moneys of such fund was expended for purposes other than payment of unemployment compensation and refunds of sums erroneously paid into the fund. This provision, in conjunction with an amendment to section 1601(a) (see supra, section 609), makes it clear that an employer is entitled to credit against the Federal tax only so long as the State uses its fund for a proper purpose.

Definition of contributions.—Section 1607(g): This provision is changed so as to avoid use of defined terms and thus to include in the term "contributions" payments required by a State law with respect to services not covered by the Federal law.

Definition of compensation.—Section 1607(h): No change in existing law is made in this definition.

Definition of employee.—Section 1607(i): The term "employee" is defined as in existing law to include an officer of a corporation. Although the term is not broadened with respect to salesmen as was done in the definition for purposes of old-age insurance coverage, the tests for determining the employer-employee relationship laid down in cases relating to tort liability and to the common-law concept of master and servant should not be narrowly applied.

By the amendment to subsection (c), contained in paragraph (10)(A) thereof, uncompensated officers of any organization exempt from income tax under section 101 of the Internal Revenue Code are excluded from the count in determining whether the organization is an employer of eight or more and liable for the tax. However, uncompensated officers of corporations not so exempt are not excluded for purposes of such determination merely because they are uncompensated.

Section 1607 (j) and (k), defining the terms "State" and "person," respectively, make no change in the existing definitions of those terms.

Definition of agricultural labor.—Section 1607(l) is identical with section 209(l) of the Social Security Act. For detailed analysis of such section see page 51[2] of this report.

[1] See pages 549–551, this Bulletin.
[2] See pages 551–553, this Bulletin.

Section 615. This section inserts a new section in Subchapter C of Chapter 9 of the Internal Revenue Code which provides that the subchapter may be cited as the "Federal Unemployment Tax Act."

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TITLE VIII—AMENDMENTS TO TITLE XI OF THE SOCIAL SECURITY ACT.

DEFINITION OF EMPLOYEE AND OF EMPLOYER.

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The amendments to the definition of employee relate to salesmen. In some instances where remuneration is by way of commission and the services are performed away from the place of business of the person for whom they are performed, the individual performing the services is held to be an employee, while in others he is held not to be an employee.

A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors insurance system in making coverage determinations. The tests for determining the relationship laid down in cases relating to tort liability and to the common-law concept of master and servant should not be narrowly applied. In certain cases even the most liberal view as to the existence of the employer-employee relationship will fall short of covering individuals who should be covered, for example, certain classes of salesmen.

In the case of salesmen, it is thought desirable to extend coverage even where all of the usual elements of the employer-employee relationship are wholly lacking and where accordingly even under the liberal application of the law the court would not ordinarily find the existence of the master-and-servant relationship.

It is the intention of this amendment to set up specific standards so that individuals performing services as salesmen may be uniformly covered without the necessity of applying any of the usual tests as to the relationship of employer and employee.

A salesman in business as a broker or factor is excluded if the services are performed as part of such business, and, in furtherance of such business, similar services are performed for other persons and one or more employees of such salesman perform a substantial part of such services; and an individual whose services as a salesman are casual services, not in the course of such individual's principal trade, business, or occupation, is not included in the definition. This definition is not intended to affect the employer-employee status of a salesman and the employee of such salesman. Thus, the business chauffeur who has been an employee of a salesman will remain solely the employee of such salesman.

The definition of employer is to follow the definition of employee. It is for the purpose of making clear that the extension of the broadened employee concept also broadens the employer concept. Thus, where a salesman is held to be an employee, the person for whom the salesman performs the services is the employer. For example, an insurance solicitor who executes a contract with an insurance company under which he performs services as a salesman would be the employee of the insurance company and not of the general agent of the company.

PENALTY SECTIONS.

Section 802: This section amends Title XI of the Social Security Act by adding the following two sections:

Disclosure of information in possession of Board.—Section 1106: This section prohibits the disclosure, except pursuant to Board regulations, of any returns or statements filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act or the Federal Insurance Contributions Act, or regulations thereunder, which have been transmitted by the Commissioner to the Board. The prohibition against disclosure, except pursuant to Board regulations, also extends to any file, record, report, paper, or information obtained by the Board or any of its officers or employees in the course of official duties, and any such material obtained by any person from the Board or any of its officers or employees. Violation of the prohibition is punishable as a misdemeanor.

Penalty for fraud and misuse of Board's name.—Section 1107(a) provides that anyone who makes any false representation, with intent to defraud any person,

knowing the representation to be false, concerning the requirements of this Act, or the Federal Insurance Contributions Act, or the Federal Unemployment Tax Act, shall be guilty of a misdemeanor.

Section 1107(b) provides that anyone who, with intent to obtain information as to the date of birth, employment, wages, or benefits of any individual, falsely represents to the Board that he is such individual or the wife, parent, or child of such individual, or such individual's agent, or the agent of such wife, parent, or child, or falsely represents to any person that he is an employee or agent of the United States, shall be guilty of a misdemeanor.

TITLE IX—MISCELLANEOUS PROVISIONS.

Section 901: This section makes clear that the amendment of Title III of the Social Security Act and section 1603 of the Internal Revenue Code shall not be construed to amend or alter those provisions of the Railroad Unemployment Insurance Act which provide limited exceptions to the provisions of sections 303(a) (4) and (5) of the Social Security Act and 1603(a) (3) and (4) of the Internal Revenue Code.

Section 902: Subsections (a), (b), (c), and (d) substantially liberalize the conditions of allowance of credit against the Federal unemployment tax imposed by Title IX of the Social Security Act for the years 1936, 1937, and 1938. Your committee recognizes that the periodical granting of relief after the close of the taxable year affected would destroy the effectiveness of the conditions of allowance of the credit provided in permanent law and would prove costly in that it would call for the reopening and reconsideration of cases previously closed, the adjustment of claims, the abatement of assessments, and the payment of refunds. However, the need should not arise in the future for granting relief of the type provided in the present section, since substantial liberalization for 1939 and subsequent years is provided in section 609 of the bill, amending section 1601(a) of the Internal Revenue Code.

Subsection (a) provides for the allowance of credit against the tax for 1936, 1937, or 1938, for contributions paid to the State for such year before the sixtieth day after the date of enactment of this Act. Under section 810 of the Revenue Act of 1938 taxpayers were allowed credit against the tax for 1936 for contributions paid before July 27, 1938. Since a few taxpayers did not take advantage of that relief provision, it is felt desirable to include credit against the tax for 1936 in the present provisions. Thus, the same final date for paying contributions to the State, in order to secure credit against the tax—namely, the fifty-ninth day after the date of enactment of this Act—is provided for the tax for each of the three past years during which the tax has been in effect.

Under clause (2) of subsection (a) credit is allowable for contributions paid on or after the sixtieth day after the date of enactment of this Act with respect to wages paid after the fortieth day after such date of enactment. This is designed to permit credit in cases in which, because the "wages payable" basis of the tax for the years 1936, 1937, and 1938 is still retained, credit would otherwise be lost since some wages are still being paid with respect to those years, and it may not be possible to estimate the amount thereof or the amount thereof may have been underestimated.

Clause (3) of subsection (a) permits credit for contributions paid to the State, without regard to the date of payment, if the assets of the taxpayer are in the custody or control of a fiduciary appointed by, or under the control of, a court of competent jurisdiction at any time during the 59-day period following the date of enactment.

Subsection (b) of this section makes the same provision with respect to the taxable years 1936, 1937, and 1938 as are made in section 1601(a)4 of the Internal Revenue Code, as amended, for the taxable year 1939 and thereafter for cases in which the taxpayer pays his contributions to the wrong State. (See section 609, supra.)

Subsection (c) preserves the definitions of section 907 of the Social Security Act, the 90 per cent maximum credit against the Federal tax, and other provisions of Title IX of the Social Security Act, essential to the operation of the relief provisions in subsections (a), (b), and (h) of this section for the taxable years 1936, 1937, and 1938.

Subsection (d) provides for refund of any tax (including penalties and interest) which has been collected but with respect to which credit is allowable under this

section. The law (including statutes of limitations) applicable in the case of erroneous or illegal collection of tax will apply to such refunds. No interest will be paid on any such refund.

Subsection (e) of this section is designed to permit credit against the tax for the years 1940, 1941, and 1942 if in those years wages are paid for services rendered after December 31, 1938, but during a year prior to that in which payment occurs, and contributions with respect to such wages have not been credited against the tax for any prior taxable year. This provision relieves cases of hardship which might arise by reason of the change in the basis of the Federal tax from "wages payable" to "wages paid." (See section 608, supra.)

Subsection (f) is designed to make retroactive to the date of enactment of the Social Security Act the exemptions from Federal insurance and unemployment compensation coverage contained, respectively, in amended sections 209(b) (11) and (12) of the Social Security Act and amended sections 1426 (b) (11) and (12) and 1607(c) (11) and (12) of the Internal Revenue Code of service in the employ of foreign governments and certain of their instrumentalities. If any tax (including interest and penalties) has been collected with respect to service thus exempt, it is to be refunded, without allowance of interest, in accordance with the provisions of law (including statutes of limitations) applicable in the case of erroneous or illegal collection of the tax.

Subsection (g) provides that no lump-sum payments shall be made under the provisions of section 204 of the Social Security Act after the date of the enactment of this bill, except to the estate of an individual who dies prior to January 1, 1940.

Subsection (h) grants relief to taxpayers as well as States in cases in which the highest court of a State has held contributions paid under the State law with respect to the taxable years 1936 or 1937 not to have been required payments under the State law. For example, certain States enacted their unemployment compensation laws during the latter portion of 1936, levying contributions thereunder retroactively with respect to services performed on and after January 1 of that year. State taxpayers in good faith paid such contributions and claimed and received credit therefor against their Federal tax. If some time later, the retroactive imposition of such contributions is held by the highest court of such State to have been invalid, such taxpayers may be entitled to refunds under the State law, but by virtue of that fact, such taxpayers also become liable for the full Federal tax with respect to such year.

Under this subsection, so much of any such payments as are not refunded to the taxpayer may be credited against the tax imposed by section 901 of the Social Security Act for the calendar year 1936 or 1937. Moreover, if, in the example cited, the State had paid benefits with respect to unemployment occurring during 1938, this section safeguards the status of the State law under section 903 of the Social Security Act by providing that so much of such payments as are not returned to the taxpayer shall be considered "contributions" for the purposes of that section. This section also postpones the periods of limitations prescribed by section 3312(a) of the Internal Revenue Code in the case of the tax for 1936 or 1937 of any such taxpayer to whom any such payment is returned, until the last such payment is returned to the taxpayer.

Section 903: This section amends section 1430 of the Internal Revenue Code by striking out the reference therein to section 3762 of the Code and inserting in lieu thereof a reference to section 3661. The change merely corrects a typographical error made in section 1430 when the Code was enacted.

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1939–37–10010

SOCIAL SECURITY ACT AMENDMENTS OF 1939.

[Senate Report No. 734, Seventy-sixth Congress, First Session.]

[July 7 (legislative day, July 6), 1939.]

Mr. King (for Mr. Harrison), from the Committee on Finance, submitted the following report [to accompany H. R. 6635]:

* * * * * * *

GENERAL STATEMENT.

DIVISIONS OF THE BILL.

This bill amends the Social Security Act and certain sections of Subchapters A and C of Chapter 9 of the Internal Revenue Code (formerly Titles VIII and IX of the Social Security Act).

The bill is divided into nine titles:

* * * * * * *

Title VI—Amendments to the Internal Revenue Code (provisions formerly in Titles VIII and IX of the Social Security Act).

* * * * * * *

Title VIII—Amendments to Title XI of the Social Security Act (general provisions).

Title IX—Miscellaneous amendments.

SUMMARY OF PRINCIPAL CONTENTS OF BILL.

TAXES.

1. The old-age insurance tax has been frozen at 1 per cent on the worker and 1 per cent on the employer for the three years 1940, 1941, and 1942 as against the 1½ per cent rates on each under the present Act. This will save employers and workers about $275,000,000 in 1940, or a total of $825,000,000 in the three years.

2. Only the first $3,000 an employer pays an employee for a year is taxed under the unemployment-compensation provisions. This is already the case in old-age insurance. This will save employers about $65,000,000 a year.

3. Provision is made for refunds and abatements to employers who paid their 1936, 1937, and 1938 unemployment-compensation contributions late to the States. This will save employers about $15,000,000.

4. Thus the savings above mentioned, through 1940, may aggregate some $355,000,000. In addition, such savings for the ensuing two years may amount to approximately $550,000,000. This represents total savings of approximately $905,000,000.

* * * * * * *

COVERAGE.

1. Certain services, including services for agricultural and horticultural associations, voluntary employees' beneficiary associations, local or ritualistic services for fraternal beneficiary societies, and services of employees earning nominal amounts (less than $45 per quarter) of nonprofit institutions exempt from income tax, are exempted from old-age insurance and unemployment compensation in order to eliminate the nuisance cases of inconsequential tax payments.

2. The term " agricultural labor " is defined so as to clarify its meaning and to extend the exemption to certain types of service which, although not at present exempt, are an integral part of farming activities.

3. About 1,100,000 additional persons (seamen, bank employees, and employed persons age 65 and over) are brought under the old-age insurance system and about 200,000 under unemployment insurance (chiefly bank employees).

* * * * * * *

ADMINISTRATION.

1. A Federal old-age and survivor insurance trust fund is created for safeguarding the insurance benefit funds. The Secretary of the Treasury, the Secretary of Labor, and the Chairman of the Social Security Board are made trustees of this fund.

2. Provision is made to restrict the use of information concerning recipients of State old-age assistance (particularly their names and addresses) to purposes directly connected with the administration of old-age assistance. This is designed to prevent the use of such information for political and commercial purposes.

3. Other amendments are recommended to simplify and clarify administration of the law.

HISTORY OF LEGISLATION.

The Social Security Act became law on August 14, 1935, after many months of deliberation in Congress. The bill was passed by an overwhelming majority in both the House and the Senate, the votes being 372 to 33 and 77 to 6, respectively. The insurance provisions of the present Act were upheld by the United States Supreme Court in the cases of *Steward Machine Co.* v. *Davis* (301 U. S., 548); *Helvering* v. *Davis* (301 U. S., 619); and *Carmichael* v. *Southern Coal Co.* (301 U. S., 495).

The enactment of the Social Security Act marked a new era, the Federal Government accepting, for the first time, responsibility for providing a systematic program of protection against economic and social hazards. Though admittedly not perfect or all-inclusive, the Social Security Act did embrace the broadest program for social security ever launched at one time by any government.

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Unemployment compensation.—The incentives provided in the Social Security Act stimulated rapid passage of State unemployment compensation laws. Before the Act was passed, only 1 State, Wisconsin, had a going system of unemployment insurance; now all the 48 States and Alaska, Hawaii, and the District of Columbia have approved laws. Benefits are already being paid to unemployed covered workers under all but 2 of these laws; in the last 2 States (Illinois and Montana) benefits became payable on July 1 of this year. More than 27,500,000 workers are covered by these laws and about 3,800,000 temporarily unemployed workers received benefits amounting to nearly $400,000,000 during the year 1938. In addition, about $228,000,000 has been paid to unemployed workers during the first six months of 1939.

Old-age insurance.—The full effect of the Federal old-age insurance program will not be felt until monthly benefits begin to be paid. In the meantime, however, the Social Security Board has established wage-record accounts for over 44,000,000 persons, of whom more than 32,000,000 have already had wages reported in either 1937 or 1938, thus enabling these individuals to build up rights to protection for themselves and their dependents upon a sound basis. In addition, lump-sum benefits, amounting to 3½ per cent of accumulated covered earnings, totaling about $18,712,000, have been paid up to May 30, 1939, to or on behalf of over 363,000 persons who reached age 65 or died.

Revision of Social Security Act.—Tremendous as is the scope of this program, it was recognized from the beginning that changes would have to be made as experience and study indicated lines of revision and improvement. Congress, therefore, expressly provided in the Social Security Act that the Social Security Board should study and make recommendations as to methods of providing more effective economic security.

Further to facilitate necessary revision, an Advisory Council on Social Security was created in May, 1937. It was composed of outstanding citizens representing employers, employees, and the public. The Advisory Council spent more than a year in study and deliberation and transmitted its final report and recommendations on December 19, 1938.

The recommendations of the Social Security Board, based upon three years of intensive study, were submitted to the President of the United States on December 30, 1938. The President transmitted the Board's report to Congress, with a special message on January 16, 1939.

The Committee on Ways and Means of the House of Representatives held extended public hearings on these recommendations and alternative proposals relating to social security. The bill was referred to this committee on June 12, 1939. All witnesses who requested to be heard were allowed to appear in public hearings and their statements and testimony appear in the printed hearings.

GENERAL PURPOSE AND SCOPE OF AMENDMENTS.

The present bill aims to strengthen and extend the principles and objectives of the Social Security Act. The foundations of a permanent program have been laid and it seems wise to build upon the present structure.

Old-age insurance, unemployment compensation, and public assistance are now accepted as permanent in our fabric of social services. The present bill is designed to widen the scope and to improve the adequacy and the administration of these programs without altering their essential features. Benefits will continue to be payable as a matter of right to workers covered by the insurance programs; aid will continue to be related to need under the assistance programs.

* * * * * * *

FINANCING.

Certain amendments are proposed which affect the financial framework of the old-age insurance system. First, the old-age reserve account is changed to a Federal old-age and survivors insurance trust fund with the Secretary of the Treasury, the Secretary of Labor, and the Chairman of the Social Security Board, all ex officio, acting as a board of trustees. The board of trustees will supervise the fund and will report to Congress annually and whenever the trust fund becomes unduly small or exceeds three times the highest annual expenditure anticipated in the ensuing 5-fiscal-year period. The Secretary of the Treasury will serve as managing trustee of the fund. All assets credited to the reserve account as of January 1, 1940, are transferred to the trust fund when the reserve account is abolished on that date. It is further proposed that an amount equal to the full amount of the old-age insurance taxes collected in the future be permanently appropriated to the trust fund. Provision is made for the administrative costs of the plan to be met from the trust fund.

The method of investing that portion of the trust fund not needed for current claims or administrative purposes will be like that now provided in the case of the unemployment trust fund. Instead of a minimum 3 per cent interest on the investments of the present old-age reserve account, the Federal old-age and survivors insurance trust fund, like the unemployment trust fund, will earn interest at the current average rate of interest borne by all oustanding interest-bearing obligations composing the public debt. At the present time the rate of interest being paid to the unemployment trust fund is 2½ per cent.

The present tax schedule is amended so that the current rate of 1 per cent on employers and 1 per cent on employees is continued until 1943. This postponement in the tax step-up will save employers and workers about $275,000,000 for 1940, or a total of $825,000,000 for the three years 1940, 1941, and 1942. However, no change is made in the tax schedule thereafter. The rates will still increase to 2 per cent in 1943, 2½ per cent in 1946, and 3 per cent in 1949 and thereafter.

The result of the changes from existing law with respect to taxes and benefits on the size of the reserve and the amount of the benefit payments is shown in table 6. It should be noted that the maximum reserve built up in the period shown will be between six and seven billion dollars. It should also be noted that the size of the reserve will conform closely to the recommendation of the Secretary of the Treasury of an "eventual reserve amounting to not more than three times the highest prospective annual benefits in the ensuing five years."

TABLE 6.—*Progress of reserve under the intermediate retirement estimate of benefit disbursements with interest at 2½ per cent. Tax rate at 2 per cent until Jan. 1, 1943, and thereafter following the present schedule.*

[In millions of dollars.]

	1940	1941	1942	1943	1944	1945	1950	1955
Net tax receipts (gross receipts minus administrative expenses) [1]	501	505	504	919	1,067	1,078	1,751	1,849
Less benefit payments	[2] 114	298	431	583	667	776	1,422	1,930
Net cash receipts to Government	387	207	73	336	400	302	329	−81
Add interest at 2½ per cent	41	49	54	61	71	82	136	169
Total addition to fund	428	256	127	397	471	384	465	88
Fund at end of year	1,871	2,127	2,254	2,651	3,122	3,506	5,737	6,871

[1] Does not include any adjustment for refunds to employees who receive more than $3,000 in wages from covered employment in any one calendar year.

[2] Includes estimated 10 million payable in 1940 for lump-sum claims previously incurred.

NOTE.—The fund at the end of 1939 is estimated to be $1,443,000,000. Benefit payments exceed net tax receipts in 1954.

It should be clearly understood that the estimates presented are subject to a margin of error. Changes in average wages, death rates, birth rates, the rate of retirement, the proportion of the aged in the total population, and shifts between insured and uninsured groups may result in substantial changes in these figures in the future. It is impossible, therefore, to predict accurately the future trends of all the factors influencing the long-run aspects of the old-

age insurance program. The further one projects estimates of future income and benefit payments, the greater is the margin of error. Constant study and frequent revaluations are, therefore, essential for the long-run financing of our social insurance system. This is one of the reasons why the bill provides that the board of trustees make an annual report to Congress on the actuarial status of the system, and report to Congress whenever the trust fund is unduly small, or exceeds three times the highest annual expenditures expected in the next 5-fiscal-year period.

According to the best expert information available to the committee, the estimates presented here are reasonable approximations of the income and outgo of the insurance plan for the next 15 years. The actual figures will no doubt vary somewhat from those shown in table 6. However, the benefit payments shown, although based upon an intermediate estimate as regards rate of retirement, probably represent maximum amounts payable under the provisions of the bill. A serious downswing in business conditions might increase the rate of old-age retirement and decrease the estimated amount of tax receipts, but such variations would probably not alter the fact that the contributions and interest will cover all benefit payments for the next 10 to 15 years. It is only when consideration is given to the income and outgo of the system for 40 to 45 years, or even more, that it becomes quite impossible to predict the future status of the system.

Table 6 shows that the annual contributions from workers and employers will probably be sufficient until 1955 to meet all the annual benefit payments under the revised plan. If the original actuarial assumptions of 1935 prove to be correct, it is possible that benefits for all time to come can be financed from the present schedule of taxes and the interest from the fund, even with the recommended postponement of the tax step-up until 1943. However, upon the basis of additional data developed since 1935, it would appear that the actuarial calculations of 1935 represent a minimum estimate of the future costs. Therefore, it is possible that the annual cost of the benefits may begin to exceed the annual tax collections about 1955 or even somewhat sooner.

Only after experience has been obtained in paying benefits for several years will we have a better picture of the probable future development of the system. Even then continual change will be necessary in the estimates due to the many variable factors which go into making such estimates.

In making the changes in the present plan the committee has kept constantly in mind the fact that, while disbursements for benefits are relatively small in the early years of the program, far larger total disbursements are inevitable in the future.

The plan provided for in the bill is designed to safeguard workers, employers, and the general public. In fact, your committee agrees with the House that the revised plan is a much safer one than the present plan. As has already been pointed out, while the annual costs under the revised plan are greater in the early years of operation, the future annual costs of the benefits when the system reaches maturity are materially lower than under the present law and the over-all average cost is kept about the same. Consequently, it is believed that there is not the same danger as exists in the present benefit schedule, the cost of which, while deceptively small in the early years, mounts very steeply as the years progress.

Unforeseen contingencies may, however, change the entire operation of the plan. It is important, therefore, that Congress be kept fully informed of the probable future obligations being incurred under the insurance plan as well as the public-assistance plans. Each generation may then meet the situation before it in such manner as it deems best.

If future annual pay-roll tax collections plus available interest are insufficient to meet future annual benefits it will be necessary, in order to pay the promised benefits, to increase the pay-roll tax or provide for the deficiency out of other general taxes, or do both. Broadening the coverage of the system to bring in those persons now excluded will not only make the system more effective in providing protection but also strengthen its actuarial base by still further eliminating the possibility of unearned benefits to the worker who moves from uninsured to insured employment.

COVERAGE.

Four years ago, when the old-age insurance program was being planned, it was expected that the Act as passed would provide old-age security for about

half of the gainful workers in the country. It was realized, of course, that many workers who might not be insured under the Act at any one time would later obtain protection by shifting into insured occupations. It was generally supposed, however, that the group so shifting would be small compared with the great mass of workers, who, throughout their working life, would remain continuously either in the insured category or in the uninsured category.

Operation of the Act shows that the extent of migration, temporary or permanent, from uninsured to insured employment is far greater than was assumed by the President's Committee on Economic Security in 1935. As a consequence of the migration, a much larger proportion of the total population of the United States will qualify under the contributory system for old-age benefits than had been expected.

The most important excluded groups are agricultural labor, domestic service, and certain nonprofit organizations; here your committee agrees with the House that it would be unwise to remove the exemptions from these three groups at the present time. The present bill does, however, extend old-age insurance coverage to some 1,100,000 more workers by removing the exemption of maritime employment, wages earned after 65, and certain Federal instrumentalities such as national banks and State banks which are members of the Federal Reserve System.

In order to eliminate the nuisance of inconsequential tax payments the bill excludes certain services performed for fraternal benefit societies and other nonprofit institutions exempt from income tax, and certain other groups. While the earnings of a substantial number of persons are excluded by this recommendation, the total amount of earnings involved is undoubtedly very small. No estimate is available of the number of persons or amount of earnings so excluded. The intent of the amendment is to exclude those persons and those organizations in which the employment is part-time or intermittent and the total amount of earnings is only nominal, and the payment of the tax is inconsequential and a nuisance. The benefit rights built up are also inconsequential. Many of those affected, such as students and the secretaries of lodges, will have other employment which will enable them to develop insurance benefits. This amendment, therefore, should simplify the administration for the worker, the employer, and the Government.

Nine other amendments to the coverage provisions are included in the bill. They are as follows:

1. *Agricultural labor.*—The present Act excludes "agricultural labor" from coverage. The bill continues the exemption of agricultural labor and defines the term so as to clarify its meaning and to extend the meaning to certain services which are an integral part of farming activities. These provisions are explained in detail in a subsequent part of this report, in connection with the definition of "agricultural labor" as defined in section 209(1) of the bill.

2. *Exclusion of payments to employer welfare plans.*—The term "wages" is amended so as to exclude from tax payments made by an employer on account of a retirement, annuity, sickness, death or accident disability plan, or for medical and hospitalization expenses in connection with sickness or accident disability. Dismissal wages which the employer is not legally required to make, and payments by an employer of the worker's Federal insurance contributions or a contribution required of the worker under a State unemployment-compensation law are also excluded from tax. This will save employers time and money but what is more important is that it will eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost.

3. *Fishing.*—The bill exempts services performed in fishing and certain related activities, and also an officer or member of the crew of any sail vessel or any other vessel of less than 400 tons.

4. *Newsboys.*—The bill exempts services performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

5. *State employment.*—The exemption relating to employment by State instrumentalities is so defined as to apply only to an instrumentality wholly owned by the State or political subdivision, or tax exempt under the Constitution.

6. *Foreign governments.*—Provision is made for the exemption of foreign governments, and their instrumentalities under certain conditions, from the old-age-insurance taxes.

7. *Family employment.*—Service performed by an individual for his son, daughter, wife, or husband, and service by a child under 21 for his parent, is excluded so as to make the old-age-insurance coverage identical in this respect with unemployment compensation coverage.

8. *Included and excluded services.*—The law is changed with respect to services of an employee performing both included and excluded employment for the same employer so that the services which predominate in a pay period determine his status with that employer for that period.

9. *Multiple employment.*—The bill provides for a refund without interest to employees who earn wages in covered employment in excess of $3,000 from more than one employer in any given calendar year. The claim for refund must be made to the Bureau of Internal Revenue of the Treasury Department within two years after the calendar year in which the wages are paid with respect to which the refund is claimed.

ADMINISTRATIVE CHANGES.

1. A provision is included requiring employers to furnish employees a statement, which they may retain, showing the amount of taxes deducted from their wages under the old-age-insurance system.

2. Provision is made for making more equitable the recovery by the Federal Government of incorrect payments to individuals.

3. Provision is made respecting the practice of attorneys and agents before the Board.

4. Detailed provisions have been added relating to rules and regulations, hearings, and decisions with respect to insurance benefits, procedure for judicial review of the Board's decisions, and delegation of authority by the Board.

5. Provision is made for giving an opportunity for a hearing to a wage earner or interested individual with respect to any entry, omission, or revision of the Board's wage record within four years after the year any wages were paid or alleged to be paid, and as to the finality of the record.

6. Subchapter A, Chapter 9, of the Internal Revenue Code (formerly Title VIII of the Social Security Act) is given the short title "Federal Insurance Contributions Act."

UNEMPLOYMENT COMPENSATION.

* * * * * * *

Your committee have eliminated from the bill certain amendments to the unemployment-insurance provisions which were contained in the House bill. In general, the two amendments which have been deleted by your committee are as follows:

1. The provision requiring that States shall collect an average of 2.7 per cent of pay rolls; and

2. The State-wide reduction plan allowing States to reduce contributions if they meet certain minimum reserve and benefit standards.

Your committee have not included these two provisions in the bill after hearing from the administrators of several State unemployment-compensation agencies who opposed these two provisions in the House bill. Your committee feel that there has not been enough time to develop sufficient experience in the field of unemployment compensation upon which to base an intelligent decision with respect to a reduction in the contribution rates or the insertion of minimum benefit standards at this particular time.

In view of this fact your committee feel that the wisest policy is to continue the present provisions with respect to unemployment insurance until such time as a thorough study of the benefit experience of the various States will yield practical results.

The bill contains, however, certain amendments designed to simplify administration for employers and the Government and to clarify certain technical aspects of the present Act.

Employers will save an aggregate amount of about $15,000,000 by virtue of the provision granting relief to those employers who paid their State unemployment-compensation contributions for the years 1936, 1937, and 1938 too late to qualify for the Federal credit. Employers who pay their delinquent taxes for these years before the sixtieth day after the enactment of these amendments would receive full credit against their Federal taxes for 1936, 1937, and 1938. Further the provisions as to loss of credit on account of future delinquency

would be relaxed by (1) increasing from 60 to 90 days the maximum period for which the Commissioner of Internal Revenue is permitted to grant an extension for the filing of Federal tax returns, and (2) by providing that employers who pay their taxes after January 31 but before July 1 next following the close of the taxable year would lose only 10 per cent of their allowable credit.

Another of the amendments would result in a saving to employers as well as in considerable simplification of reporting procedures. This is the amendment to limit unemployment-compensation taxes to the first $3,000 of annual wages. Such a limitation already exists in the case of old-age insurance and there are distinct advantages to providing a uniform tax base for both programs. It is estimated that this new limitation would result in a saving to employers of about $65,000,000 a year.

Again in the interests of simplification and uniform reporting, the present bill proposes to change the tax base for unemployment compensation from "wages payable" to the "wages paid" definition used in old-age insurance.

Many of the same changes in coverage are provided in this bill with respect to unemployment compensation as have already been discussed under old-age insurance. The cases involving taxes of small consequence, which would be exempt under old-age insurance, would also be exempt from the Federal Unemployment Tax Act. The agricultural-labor exemption is defined and extended as in old-age insurance. The bill proposes to extend coverage to one of the groups now excluded, namely, employees of certain Federal instrumentalities such as national banks, and State bank members of the Federal Reserve System. This amendment would bring about 200,000 additional persons under the unemployment-compensation program, provided the States amend their laws accordingly.

Provision is made in section 902(h) of the bill granting relief to taxpayers and States in those cases in which the highest court of a State has held contributions paid under the State unemployment compensation law for 1936 or 1937 not to have been validly required under such law. This provision is to take care of the situation in North Carolina where the State supreme court recently held that the provisions of the State law requiring contributions for 1936 were invalid because they were retroactive. The effect of the proposed amendment is to enable North Carolina to keep about $3,000,000 in its reserve fund for use in the payment of unemployment compensation benefits.

Other changes affecting unemployment compensation are:

1. Authorization is given to the States to make their unemployment-compensation laws applicable to services performed on land or premises owned, held, or possessed by the United States Government, such as services performed as employees of hotels in national parks. Congress has already enacted a statute giving the States authority to apply their workmen's compensation laws to such employees.

2. The language excluding State instrumentalities is defined as in old-age insurance so that the exemption applies only to an instrumentality wholly owned by the State or political subdivision, as well as those exempt from tax under the Constitution.

3. As in old-age insurance, the definition of "wages" is amended so as to exclude from tax the payments made by an employer on account of a retirement annuity, sickness, death, or accident disability plan, or for medical or hospitalization expense in connection with sickness or accident disability. Dismissal wages, which the employer is not legally required to pay, and payments by an employer of the worker's Federal insurance contributions, or a contribution required of the worker under a State unemployment-compensation law are also excluded from tax.

4. Provision is made, as in old-age insurance, for the exemption of foreign governments and their instrumentalities from the unemployment-compensation tax.

5. Provision is made for the exemption of services performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such services performed by such individual for such person are performed for remuneration solely by way of commission.

6. Provision is made for the exemption of services performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

7. The law is changed with respect to services of an employee performing both included and excluded employment for the same employer so that the services which predominate in a pay period determine his status with that employer for the period. The same provision is made in connection with old-age insurance.

8. The "merit rating" or "individual employer experience rating" provisions are clarified.

9. A provision has been inserted requiring the State laws to provide for the expenditure of Federal grants for the administration of their unemployment compensation laws in accordance with the Federal Act and requiring the replacement of any moneys lost or expended for other purposes.

10. Extension of time is given for the allowance of credit against the Federal tax in cases where the employer has paid his State tax on time but has paid it to the wrong State.

11. The time is also extended in those cases where taxpayer's assets are in the custody or control of a receiver, trustee, or other fiduciary under the control of a court.

12. The "tax on employers of eight or more" now contained in Subchapter C of Chapter 9 of the Internal Revenue Code (formerly Title IX of the Social Security Act) is given the short title "Federal Unemployment Tax Act."

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GENERAL.

Two amendments of a general character are contained in the bill. These are:

1. An amendment to prohibit the disclosure of information obtained by the Board or its employees except under certain restricted conditions related to proper administration.

2. Penalties are provided for certain frauds and for impersonation in securing information concerning an individual's date of birth, employment, wages, or benefits of any individual.

DETAILED EXPLANATION OF THE BILL.

SHORT TITLE.

Section 1 of the bill provides that the Act may be cited as the "Social Security Act Amendments of 1939."

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TITLE VI—AMENDMENTS TO THE INTERNAL REVENUE CODE.

FEDERAL INSURANCE CONTRIBUTIONS ACT.

TAXES UNDER SECTIONS 1400 AND 1410 OF THE INTERNAL REVENUE CODE (FORMERLY SECTIONS 801 AND 804 OF THE SOCIAL SECURITY ACT).

Sections 601 and 604: Under the existing provisions of sections 1400 and 1410 of the Internal Revenue Code (formerly sections 801 and 804, respectively, of the Social Security Act) the rate of tax on employees and the rate of tax on employers are each scheduled to increase on January 1, 1940, from 1 per cent of the wages to 1½ per cent, with a further increase of ½ per cent at the expiration of succeeding 3-year periods until the maximum rate of 3 per cent on employees and 3 per cent on employers is reached in 1949. Under the amendment the increase scheduled for January 1, 1940, would be eliminated, and the rate of each tax would be as follows:

	Per cent.
For the calendar years 1939, 1940, 1941, and 1942	1
For the calendar years 1943, 1944, and 1945	2
For the calendar years 1946, 1947, and 1948	2½
For the calendar year 1949 and subsequent calendar years	3

A further change is made by this amendment. Sections 1400 and 1410 of the Internal Revenue Code now provide that the rate of tax applicable to wages is the rate in effect at the time of the performance of the services for which the wages are paid. This will unnecessarily complicate the making of returns and the collection of the taxes in later years when the rate of tax has been increased. For example, in 1943 the rate of tax increases from 1 per cent to 2 per cent. Thus, wages which are paid in 1943 for services performed in 1942 will be subject to the 1 per cent rate, while wages paid in 1943 for services performed in that

year will be subject to the 2 per cent rate. Provision must therefore be made in the return for 1943 for the reporting of wages subject to the different rates, and, in auditing the returns, it will be necessary to ascertain not merely the time when the wages were paid and received, but also the year of the rendition of the services for which the wages are paid. If employers have failed to make the proper distinction, many refunds and additional assessments will doubtless be necessary and confusion will result. Under the amendment the rate applicable would be the rate in effect at the time that the wages are paid and received without reference to the rate which was in effect at the time the services were performed.

ADJUSTMENTS OF OVERPAYMENT AND UNDERPAYMENT OF EMPLOYEES' TAX, AND SPECIAL REFUNDS OF EMPLOYEES' TAX.

Section 602(a): Present section 1401(c) of the Internal Revenue Code (formerly section 802(b) of the Social Security Act) is designed to permit the employer to adjust, without interest, overpayments and underpayments of employees' tax without the necessity in the former case of requiring the filing of a claim for refund and in the latter case of the making of a demand by the collector for the additional tax. The existing provisions of the section require that the adjustment be made in connection with subsequent wage payments. The different types of situations obtaining at the time the error is discovered and should be corrected are numerous. For example, the employee may be continuously employed and receiving remuneration at regular intervals, or he may be entitled to no remuneration for some time to come, or if he is entitled to remuneration, it may not be taxable because his service is rendered temporarily, or for an indefinite time, in a foreign country, or because he has already received $3,000 from the employer for services rendered during the calendar year, the maximum taxable remuneration under section 1426(a) of the Internal Revenue Code (formerly section 811(a) of the Social Security Act), or the employee's connection with the employer who made the error may have been severed. Moreover, undercollections require a procedure different from that in the case of overcollections. The use of the term "wage payments" causes difficulty since the term "wages" has a restricted meaning for the purpose of this tax. Furthermore, it may prove desirable in certain circumstances to provide for adjustments at times other than in connection with subsequent payments of remuneration to the individual. This amendment, by use of the word "remuneration" instead of "wage" and by leaving the manner and time of the adjustment to be prescribed by regulations, will enable the administrative officers to meet the varied situations which arise.

Section 602(b): Your committee has added this subsection to section 602 of the House bill, which would add a new subsection (d) to section 1401 of the Internal Revenue Code. Under existing law, remuneration received by an employee with respect to employment during any calendar year is taxable up to and including $3,000 received by the employee from each employer he may have during the year. Hence, an employee who has more than one employer may be required to pay the old-age-insurance employee's tax on aggregate wages in excess of $3,000. The committee believe this bears harshly on the individual having more than one employer during a calendar year, and has accordingly incorporated an amendment which permits the employee to obtain a refund, without interest, of the tax paid on the aggregate in excess of $3,000 earned after December 31, 1939, provided a timely claim is filed. For administrative reasons the committee has not disturbed the liability of the employee having more than one employer for tax on each $3,000 of wages from each employer or the requirement that each employer shall deduct the employee's tax from wages which he pays his employee within the $3,000 maximum. No ground for relief exists in the case of the employer's tax. Each employer will and should be liable for tax with respect to the first $3,000 paid to each employee notwithstanding the employee may be receiving, or may later in the year receive, wages from another employer. No refund is authorized in any case unless the employee's tax with respect to at least $3,000 of wages for employment during the calendar year has been actually deducted and paid to the collector of internal revenue.

RECEIPTS FOR EMPLOYEES.

Section 603: This section amends Subchapter A of Chapter 9 of the Internal Revenue Code (formerly Title VIII of the Social Security Act) by inserting a new section in such subchapter. Subsection (a) of the new section requires

every employer to furnish each employee with a written statement or statements, in a form suitable for retention by the employee, showing the taxable wages paid to the employee after December 31, 1939, for services rendered in his employ, and the amount of tax imposed by section 1400 with respect to such wages. In addition, the names of the employer and employee, and the period covered by the statement, are to be shown. Each statement, or receipt, must cover one or more, but not more than four, calendar quarters. Under existing Treasury regulations the employer is required to file a return for each calendar quarter with the collector of internal revenue, showing the amount of wages paid to each employee. By requiring the receipts to cover one or more calendar quarters, the employer is enabled, in making out such receipts, to use the amounts of wages of each employee as shown on the copies of the quarterly returns which the employer retains. Returns, under existing Treasury regulations, must be filed with the collector within the calendar month following the close of the quarter. The section gives employers an additional month within which to furnish their employees with the receipts. However, when an employee leaves the employ of the employer, the final receipt, covering the period from the termination of the period covered by the last preceding receipt furnished the employee, is to be given the employee when the final payment of wages is made to him. If the employer chooses, he may under the section furnish a receipt to an employee at the time of each payment of wages during a calendar quarter, in lieu of covering in a single receipt the total wages paid to the employee during such quarter.

Subsection (b) provides that any employer who willfully fails to furnish a statement to an employee in the manner, at the time, and showing the information, required under subsection (a), shall for each such failure be subject to a civil penalty of not more than $5.

TAXES UNDER SECTION 1410 OF THE INTERNAL REVENUE CODE (FORMERLY SECTION 804 OF THE SOCIAL SECURITY ACT).

Section 604: See section 601, supra.

ADJUSTMENT OF EMPLOYERS' TAX.

Section 605: The amendment made by this section to section 1411 of the Internal Revenue Code (formerly section 805 of the Social Security Act), relating to adjustments of employers' tax, is intended to accomplish the same purpose as the corresponding amendment to section 1401(c) of the Code, relating to adjustments of employees' tax. See section 602(a), supra.

DEFINITIONS.

Section 606: This section, effective January 1, 1940, amends section 1426 of the Internal Revenue Code, containing definitions applicable in the case of the old-age insurance taxes.

Definition of wages.—Section 1426(a): This subsection continues the present definition of wages, clarifies it in certain respects, and excludes certain payments heretofore included. Paragraph (2) in the House bill excludes all payments made by the employer to or on behalf of an employee or former employee, under a plan or system providing for retirement benefits (including pensions) or disability benefits (including medical and hospitalization expenses), but not life insurance. Your committee have added an exclusion of payments on account of death (including life insurance) where it is clear that the employee while living does not have certain rights and options. Generally, such payments are excluded under existing law if the employee does not have those rights and options, but it is deemed desirable for purposes of certainty to provide an express exclusion. The payments under paragraph (2) of the House bill and under the bill, as amended, will be excluded even though the amount or possibility of such payments is taken into consideration in fixing the amount of remuneration and even though such payments are required, either expressly or impliedly, by the contract of employment. Since it is the practice of some employers to provide for such payments through insurance or the establishment and maintenance of funds for the purpose, the premiums or insurance payments and the payments made into or out of any fund will likewise be excluded from wages. Your committee has made no change in paragraphs (3) and (4) of the House bill. Paragraph (3), which merely clarifies existing

law, expressly excludes from wages the payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of the employee's tax imposed by section 1400 of the Internal Revenue Code (formerly section 801 of the Social Security Act) and employee contributions under State unemployment compensation laws. Paragraph (4) excludes dismissal payments which the employer is not legally obligated to make.

Definition of employment.—Section 1426(b): This term is defined to mean any service performed prior to January 1, 1940, which constituted employment as defined in this section prior to such date; and to mean any service performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States or (B) on or in connection with an American vessel (defined in subsection (h)) under a contract of service entered into within the United States or during the performance of which the vessel touches a port therein, if the employee is employed on and in connection with the vessel when outside the United States. No substantive change in existing law is effected by the introductory paragraph of this provision except the extension of the definition to include service on American vessels. This extension is designed to include, with the qualifications noted, all service which is attached to or connected with the vessel (e. g., service by officers and members of the crew and other employees such as those of concessionaires). Individuals who are passengers on the vessel in the generally accepted sense, such as an employee of an American department store going abroad, will not be included because such service has no connection with the vessel. Service performed on or in connection with an American vessel within the United States will be on the same basis as regards inclusion as other service performed within the United States.

Under existing law service performed within the United States (which otherwise constitutes employment) is covered irrespective of the citizenship or residence of the employer or employee. The amendment makes clear that this will be true also in the case of maritime service covered by the amendment, regardless of whether performed within or without the United States. The basic reasons which caused the original coverage to be made without distinctions on account of citizenship or residence apply in the case of seamen. The number of foreign seamen who may be employed on American vessels engaged in trade is limited under our shipping laws.

The definition of the term "employment" under the amendment, as applied to service rendered prior to January 1, 1940, retains the exemptions contained in the present law. The definition applicable to service rendered on and after that date continues unchanged some of the present exemptions, revises others, and adds certain additional ones.

Paragraph (1) continues the exception of agricultural labor, but a new subsection (h) defines the term for purposes of the exclusion.

Paragraph (2) continues the present exception of domestic service in a private home, but adds to the exception such service in a local college club, or local chapter of a college fraternity or sorority (not including alumni clubs or chapters). Thus services of cook, waiter, chambermaid, and the house mother, performed for these local clubs and chapters, are exempt.

Paragraph (3) continues the present exception of casual labor not in the course of the employer's trade or business.

A new paragraph (4) excludes service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his parent. This exclusion is already contained in the Federal unemployment tax provisions of the existing law. The old paragraph (4), which excluded service performed by an individual who has attained the age of 65, is repealed. (See section 905(a) of the bill, which makes such repeal effective January 1, 1939.)

Paragraphs (5) to (15), inclusive, are identical with the same paragraphs in section 209(b) of the Social Security Act. For detailed analysis of such paragraphs see the explanation of such section 209(b) in this report. [The material referred to is as follows:

[Paragraph (5), which takes the place of the existing exclusion of service on documented vessels, excludes service performed on or in connection with a vessel not an American vessel, if the employee is employed on and in connection with such vessel when outside the United States. This provision excludes all service, although performed within the United States, which is rendered by an employee who was rendering service on and in connection with such a vessel

upon its entry into the United States or who is rendering such service upon departure of the vessel from the United States. Thus, officers and members of the crew and other employees whose service is rendered both on and in connection with the vessel (such as employees of concessionaires and others whose service is similarly connected with the vessel) when on its voyage are excluded even though the vessel is within the United States, if they come into or go out of the United States with the vessel.

[Paragraph (6) continues the exemption of service performed in the employ of the United States but, with respect to instrumentalities of the United States, limits the exemption to those instrumentalities which are (A) wholly owned by the United States or (B) exempt from the tax imposed by section 1410 of the Internal Revenue Code (formerly section 804 of the Social Security Act) by virtue of any other provision of law. The change in this provision brings within this title of the Act certain Federal instrumentalities not falling within clause (A) or (B), above, such as national banks.

[Paragraph (7) continues the exemption of service for State governments, their subdivisions and instrumentalities, but limits the exemption with respect to instrumentalities so that it applies only to an instrumentality which is wholly owned by a State or political subdivision or which would be immune from the tax imposed by section 1410 of the Internal Revenue Code (formerly section 804 of the Social Security Act) by the Constitution. The amendment thus narrows the present exemption and in no case broadens it.

[Paragraph (8) continues the exemption of religious, charitable, scientific, literary, or educational organizations, but brings the language of the exemption into conformity with the corresponding exemption from income tax under section 101(6) of the Internal Revenue Code, by adding a specific disqualifying clause applicable where any substantial part of the activities of the organization is carrying on propaganda or otherwise attempting to influence legislation.

[Paragraph (9) continues without change the present provisions of law exempting services of employees covered by the railroad retirement system. This provision leaves unchanged the exemption of the service of an individual in the employ of an employer subject to the railroad retirement system even though the individual receives remuneration in a form, e. g., tips, not recognized as compensation under the Railroad Retirement Act and Subchapter B of Chapter 9 of the Internal Revenue Code (formerly the Carriers Taxing Act of 1937), and leaves unchanged the inclusion of service in case it is performed by an employee in the segregable nonrailroad activities of an employer where segregation of the railroad activities from nonrailroad activities is found necessary in the interpretation and administration of the laws relating to the social security system and the railroad retirement system.

[Paragraph (10) provides several new exclusions from employment. Clause (A) exempts certain service in any calendar quarter performed in the employ of an organization exempt from income tax under section 101 of the Internal Revenue Code, if (i) the remuneration for such service does not exceed $45; or (ii) without regard to amount of remuneration, if the service is performed in connection with the collection of dues or premiums (away from the home office) for a fraternal beneficiary society, order, or association, or is ritualistic service (wherever performed) in connection with such an organization; or (iii), without regard to amount of remuneration, if the service is performed by a student enrolled and regularly attending classes at a school, college, or university. Organizations so exempt from income tax and thus within this provision include the following: Certain labor, agricultural, and horticultural organizations, mutual savings banks, fraternal beneficiary societies, building and loan associations, cooperative banks, credit unions, cemetery companies, business leagues, chambers of commerce, real estate boards, boards of trade, civic leagues, local associations of employees, social clubs, local benevolent life insurance associations, mutual irrigation and telephone companies, farmers' or other mutual hail, cyclone, casualty, or fire insurance companies or associations, farmers' cooperative marketing and purchasing associations, corporations organized to finance crop operations, voluntary employees' beneficiary associations, and religious or apostolic associations or corporations.

[Paragraph (10), clause (B), of the House bill excepts service in the employ of an agricultural or horticultural organization, regardless of the amount of remuneration. The committee report of the Ways and Means Committee states that these organizations are identical with agricultural and horticultural organizations exempt from income tax under section 101(1) of the Internal

Revenue Code. The proposed amendment of your committee would be to clarify the provision.

[Paragraph (10), clause (C), excepts service in the employ of a voluntary employees' beneficiary association, providing for payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (i) no part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (ii) 85 per cent or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses. This exemption is identical with that of these organizations under section 101(16) of the Internal Revenue Code and will have the same scope.

[Paragraph (10), clause (D), of the House bill excepts all service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries, if (i) admission to membership in such association is limited to individuals who are employees of the United States Government, and (ii) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual. The proposed amendment is merely clarifying.

[Paragraph (10), clause (E), excepts service performed in any calendar quarter in the employ of a school, college, or university, not exempt from income tax, if such service is performed by a student enrolled and regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed $45. In determining the remuneration, for purposes of the $45 limitation, the value of room, board, and tuition, if furnished by the school, college, or university as part of the remuneration, would be excluded.

[A calendar quarter is any period of three calendar months ending on March 31, June 30, September 30, or December 31.

[Paragraph (11) excepts service performed in the employ of a foreign government, and paragraph (12) similarly excepts, on a basis of reciprocity, service performed in the employ of an instrumentality wholly owned by a foreign government. These paragraphs are, by section 902(f) of the bill, made retroactively effective to the date of the enactment of the Social Security Act.

[Paragraph (13) excepts service performed as a student nurse in the employ of a hospital or a nurse's training school by an individual who is enrolled and is regularly attending classes in such a school chartered or approved pursuant to State law; and service performed as an interne (as distinguished from a resident doctor) in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law.

[Paragraph (14) is a new paragraph proposed by your committee. This amendment would exclude fishermen from coverage. It would also exclude officers and members of crews (even though not fishermen) of any vessel less than 400 tons or of any sail vessel regardless of tonnage if the vessel is engaged in specified fishing activities. The tonnage of vessels will be determined by methods employed for determining tonnage for the purpose of registry.

[Paragraph (15) is a new paragraph proposed by your committee, which would exclude services performed by an individual under the age of 18 in making street sales of newspapers, and in making house-to-house delivery of newspapers or shopping news, including handbills and other similar types of advertising material. It does not include the handling of newspapers and advertising material prior to time they are turned over to the individual who makes the sale, the house-to-house, or other final distribution.]

Section 1426(c): This subsection relates to an employee who has both included and excluded service for the same employer during a pay period. It provides that if one-half or more of the services constitutes included employment, all of such service will be included; but that if less than one-half constitutes included employment, all will be excluded.

The provision does not apply to the service of an employee in a pay period if any of the service of the employee in the pay period is covered under Subchapter B of Chapter 9 of the Internal Revenue Code (formerly the Carriers Taxing Act of 1937). The amendment proposed by your committee to the last sentence of this subsection is merely clarifying.

Definitions of employee and employer.—The House proposal to extend coverage to salesmen who are not employees has been stricken out by the committee. It is

believed inexpedient to change the existing law which limits coverage to employees. This action of the committee renders unnecessary the new definition of employer which was contained in subsection (e) of section 1426 as passed by the House. Subsection (e) is therefore stricken, and subsequent subsections of section 1426 have been relettered.

Section 1426 (e) and (f), defining the terms "State" and "person," respectively, makes no change in the existing definitions of those terms.

Definitions of American vessel and agricultural labor.—Subsections (g) and (h) of section 1426 are identical with subsections (d) and (l) of section 209 of the Social Security Act. For detailed analysis see discussion of those subsections in this report. [The material referred to is as follows:

[*Definition of American vessel.*—Section 209(d): This term is defined to mean any vessel documented or numbered under the laws of the United States; and also to include any vessel neither so documented nor numbered nor documented under the laws of any foreign country while the crew is in the employ only of citizens or residents of the United States or corporations organized under the laws of the United States or of any State.

* * * * * * *

[*Definition of "agricultural labor."*—Section 209(l): The present law exempts "agricultural labor" without defining the term. It has been difficult to delimit the application of the term with the certainty required for administration and for general understanding by employers and employees affected.

[Your committee believes that greater exactness should be given to the exception and that it should be broadened to include as "agricultural labor" certain services not at present exempt, as such services are an integral part of farming activities. In the case of many of such services, it has been found that the incidence of the taxes falls exclusively upon the farmer, a factor which, in numerous instances, has resulted in the establishment of competitive advantages on the part of large farm operators to the detriment of the smaller ones.

[The definition of "agricultural labor" contained in the bill as reported by the committee is in substantially the same form as in the House bill; however, the committee does recommend some changes designed to further clarify the extent of the exemption.

[Paragraph (1) of this subsection exempts service performed on a farm, in the employ of any person, in cultivating the soil, or in raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of live stock, bees, poultry, and fur-bearing animals and other wildlife. Such services are exempt under existing law only if performed in the employ of the owner or tenant of the farm on which they are rendered. Services performed on a farm in the raising, feeding, and management of fur-bearing animals, such as foxes, not now exempted, will be exempt under paragraph (1). This paragraph also continues the existing exclusion of services performed on a farm in the raising or harvesting of horticultural commodities, including flowers and nursery products, such as young fruit trees, ornamental plants, and shrubs.

[Paragraph (2) of the subsection excepts services in the employ of the owner (whether or not such owner is in possession) or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, if the major part of those services are performed on a farm. Under this language certain services are to be regarded as agricultural even though they are not performed in conducting any of the operations referred to in paragraph (1). Services exempt under this paragraph may include, for example, services performed by carpenters, painters, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semiskilled workers whose services contribute in any way to the proper conduct of the farm or farms operated by their employer. Some of these services at present constitute covered employment under some circumstances but not under other circumstances. It is stipulated that the services referred to in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm so that the exemption will not extend to services performed by such persons as employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties.

[Paragraph (3) extends the exception to services performed in connection with certain specified products and operations. Ordinarily these services are performed on a farm or are of such a character as to warrant no different

treatment than is accorded services performed in connection with farming activities. In order that a uniform rule may be applied in the case of these services, they will be excepted whether or not performed on a farm or in the employ of the owner or tenant of a farm. In the case of maple sap, the exemption will extend to services in connection with the processing of the sap into maple sugar or maple sirup, but not in the subsequent blending or other processing of such sugar or sirup with other products. Under the present exception services performed in connection with the production of maple sirup or maple sugar do not constitute "agricultural labor." Similarly, the existing exception does not extend to services performed in connection with the growing, harvesting, processing, packing, and transporting to market of oleoresin, gum spirits of turpentine, and gum resin. Under this paragraph, however, the exception will apply to services performed in connection with the production or harvesting of crude gum (oleoresin) from a living tree and of the following products as processed only by the original producer of the crude gum (oleoresin): Gum spirits of turpentine and gum resin, as defined in the Agricultural Marketing Act, as amended. Services performed in connection with any hatching of poultry and in connection with the ginning of cotton will also be excepted. Services performed in connection with the raising or harvesting of mushrooms constitute "agricultural labor" under existing law, only when performed on a farm. The fact that mushrooms are not usually grown under ordinary field conditions but are grown in cellars, caves, barns, or in sheds specially constructed for the purpose has resulted in the employees of some growers being covered while employees of others are not. Under this paragraph all such services will be excepted. Service performed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes will also be excepted under this paragraph. Thus, all service performed in the employ of an organization operating exclusively for the purpose of supplying water to farms would be exempt. Most of such organizations are exempt under the present law as governmental agencies. The others are usually nonprofit companies formed by the farmers who use the water.

[Paragraph (4) of the subsection extends the exemption to service (though not performed in the employ of the owner or tenant or other operator of a farm) performed in the handling, planting, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity, provided such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of the paragraph, however, do not extend to services performed in connection with commercial canning or commercial freezing, nor to services performed in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. The expression "as an incident to ordinary farming operations" is, in general, intended to cover all services of the character described in the paragraph which are ordinarily performed by the employees of a farmer or by employees of a farmers' cooperative organization or group, as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such organization or group. The expression also includes the delivery of such commodity to the place where, in the ordinary and natural course of the particular kind of farming operations involved, the commodity accumulates in storage for distribution into the usual channels of commerce and consumption. To the extent that such farmers, organizations, or groups, engage in the handling, etc., of commodities other than those of their own production or that of their members, such handling, etc., is not regarded as being carried on "as an incident to ordinary farming operations." In such a case the rules set forth in subsection (c) of this section apply.

[In the case of fruits and vegetables, however, whether or not of a perishable nature, services performed in the handling, drying, packing, etc., of those commodities constitute "agricultural labor" even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of such fruits or vegetables for market. Under this portion of the paragraph, for example, services performed in the sorting, grading, or storing of fruits or in the cleaning of beans, as an incident to their preparation for market, will be excepted irrespective of whether performed in

the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

[Since the services referred to in this paragraph must be rendered in the actual handling, drying, etc., of the commodity, the paragraph does not exempt services performed by stenographers, bookkeepers, clerks, and other office employees in the employ of farmers, farmers' cooperative organizations or groups, or commercial handlers. To the extent that services of this character are performed in the employ of the owner or tenant of a farm, however, and are rendered in major part on a farm, they may be exempt under the provisions of paragraph (2).

[The last sentence of the subsection makes it clear that the term "farm" as used in this subsection has a broad and comprehensive meaning. The term, for example, includes fur-bearing animal farms. Under present law, services performed in connection with the operation of such farms constitute covered employment. The term also includes greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, regardless of their location. Under the existing exception, labor performed in some greenhouses is excepted while labor in others is not. The inclusion of greenhouses of the kind specified, within the meaning of the term "farm," will make for a more uniform treatment of greenhouse labor and lessen the administrative difficulties which this class of cases presents. Greenhouses used primarily for purposes such as storage or display purposes or for the fabrication of wreaths and corsages (usually in connection with the operation of a retail establishment) do not, of course, come within the exception.]

SHORT TITLE.

Section 607: This section inserts a new section in Subchapter A of Chapter 9 of the Internal Revenue Code which provides that the subchapter may be cited as the "Federal Insurance Contributions Act."

FEDERAL UNEMPLOYMENT TAX ACT.

TAXES UNDER SECTION 1600 OF THE INTERNAL REVENUE CODE (FORMERLY SECTION 901 OF THE SOCIAL SECURITY ACT).

Section 608: This amendment changes the basis for determining tax liability under Subchapter C of Chapter 9 of the Internal Revenue Code (formerly Title IX of the Social Security Act) from "wages payable" to "wages paid." That subchapter is thus brought into conformity with Subchapter A of Chapter 9 (formerly Title VIII of the Social Security Act), which also imposes a tax on "wages paid." Wages, for the purpose of these taxes, are considered paid when they are actually paid, or when they are constructively paid, i. e., credited to the account of, or set apart for, the wage earner so that they may be drawn upon by him at any time although not then actually reduced to possession.

Under the existing law wages are "payable" with respect to employment during a calendar year, even though the amount of wages is not fixed and no right exists to enforce payment at any time during that year. Thus a bonus paid in 1939 for services performed in 1938 constitutes "wages payable" for 1938, even though the amount of the bonus may not have been known in 1938 and no obligation to pay it existed in that year.

In cases in which remuneration for services of an employee in a particular year is based on a percentage of profits, or on future royalties, the amount of which can not be determined until long after the close of the year, the employer has been required to estimate unascertained amounts and pay taxes and contributions on that basis. If he has overestimated, subsequent corrections on the return must be made with consequent refunds. If the employer has underestimated, additional taxes may become due and he may also be compelled to pay additional State contributions, which are usually not allowable as credit because not timely paid. The attendant difficulties and confusion cause a burden on employers and administrative authorities alike. The placing of this tax on the "wages paid" basis will relieve this situation.

With both the old-age-insurance tax and the unemployment-compensation tax on the wages paid basis, the keeping of records by employers will be simplified.

The new basis of taxation will apply to all wages for services rendered after the beginning of 1939. In so far as the amendment would be retroactive with respect to the year 1939, it would not increase the tax liability of any taxpayer.

CREDIT AGAINST TAX.

Section 609: This section relates only to the tax with respect to services rendered in 1939 and thereafter.

Contributions to State unemployment funds.—Section 1601(a): The present section 1601(a) of the Internal Revenue Code (formerly section 902 of the Social Security Act) provides that a taxpayer may credit against the Federal tax only contributions paid by him under a State law "with respect to employment," as defined in section 1607 of the Code (formerly section 907 of the Act). Since the definition of employment in section 1607 restricts the meaning of the term to certain types of service, the taxpayer is not given credit for contributions made under a State law with respect to services not covered by the Federal law. Subdivision (1) eliminates the references in existing law to "employment," thus allowing the taxpayer to credit against the tax the contributions which he is required to pay, and which he actually pays, under a State law. The amendment also includes a requirement that credit shall be allowed only for contributions to an unemployment fund which has been maintained during the taxable year as specified in the amendment to section 1607(f) of the Internal Revenue Code. (See section 614, infra.)

Subdivision (2) provides that credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such year. This effects no substantive change in the present law.

Subdivision (3) liberalizes existing law by giving employers more time within which to pay their contributions to the State and secure credit therefor against the Federal tax. Under existing law credit is allowable only for contributions with respect to the taxable year paid to the State before the due date of the Federal return for such year. The amendment permits full credit for contributions paid on (as well as before) the due date. The amendment further permits a credit for contributions paid after the due date of the Federal return but on or before June 30 next following the due date, but this credit is not to exceed 90 per cent of the amount which would have been allowable as credit on account of such contributions if they had been paid on or before the due date. For example, if an employer's gross liability for Federal tax at the 3 per cent rate is $100, and his liability for the same year for State contributions is also $100, and he paid such contributions on or before the due date of the Federal return, he would be entitled to the maximum credit (under the limitation provided in section 1601(c)) of 90 per cent of the Federal tax, or $90, and his net Federal tax would be $10. If, however, the employer paid the $100 in contributions after the due date but not later than June 30 next following, his credit would be 90 per cent of $90, or $81, and his net Federal tax would be $19. No credit is allowable for contributions paid after June 30.

Thus, substantial relief is given employers for 1939 and future years. The Committee on Finance agrees with the House that further liberalization of the conditions under which this credit would be allowable might endanger the orderly functioning of the system. It is desirable not to remove the aid provided in existing law to the State unemployment-compensation systems which has been secured through the inducement to employers to pay their State contributions promptly. Furthermore, any change should be avoided which would impede the audit of the Federal returns or delay final determination of the taxpayer's liability beyond a reasonable time after the returns are filed. In proposing this amendment consideration has been given these factors as well as to the need for liberalization in favor of the taxpayers.

Certain exceptions to the foregoing general rule are made in the amendment, however, to meet cases of genuine hardship.

Subdivision (3) removes the time limitation for payment of State contributions in those cases where the assets of the taxpayer are in the custody or control of a court at any time beginning with the due date and ending with the next following June 30, both dates inclusive.

Subdivision (4) grants relief in cases of payments made through mistake under the wrong unemployment-compensation law. In such a case payment under the proper State law with respect to the remuneration in question will be deemed, for the purposes of credit against the Federal tax, to have been made on the date of the erroneous payment. If the taxpayer's experience under the law of the wrong State had entitled him to cease paying any contributions for services subject to that law and by reason thereof the taxpayer had actually paid no contributions with respect to the remuneration in question, payment

to the proper State will be treated, for such tax-credit purposes, as having been made on the date on which the Federal tax return was actually filed.

Subdivision (5) provides for refund of any tax (including any penalties and interest) which has been collected but with respect to which credit allowable under this section has not been taken. The law (including statutes of limitations) applicable in the case of erroneous or illegal collection of tax will apply to such refunds. No interest will be paid on any such refund.

Additional credit.—Section 1601(b) (formerly section 909(a) of the Social Security Act): This amendment changes in some particulars the existing law, relating to additional credit allowance.

It expressly conditions the allowance of an additional credit upon certification of the State law under section 1603(c) of the Internal Revenue Code (formerly section 903(b) of the Social Security Act) and under the proposed amendment to section 1602(c). (See section 610, infra.)

It extends the additional credit to reduced rates of contributions required under a State law with respect to employment not covered by the Federal tax, thus bringing this subsection into conformity in that regard with the proposed amendment of subsection (a) (relating to contributions to State unemployment funds).

Under the amendment, additional credit allowance will be based on the difference between the amount of contributions the taxpayer was required to pay under the State law and the amount he would have paid if throughout the taxable year he had been subject to the highest rate applied under the State law in the taxable year to any employer, or to a rate of 2.7 per cent, whichever rate is lower. This change, in addition to measuring the credit by the applicable per cent of the pay roll with respect to which contributions are required under the State law, also eliminates the possible necessity for measuring additional credits in terms of periods of less than one year. The elimination of the new section 1602(b) of the Code, contained in the House bill, has made unnecessary the House bill amendment of this section, establishing only 2.7 per cent of the pay roll as the measure for additional credit allowances.

Limit on total credit.—Section 1601(c) restates the existing law limiting total credits against the Federal tax to not in excess of 90 per cent of such tax. Since both the provision with respect to credits for contributions actually paid and the provisions with respect to additional credits are now included in one section of the law as subsections (a) and (b), respectively, it is unnecessary to include the limitation separately in respect to each subsection.

CONDITIONS OF ADDITIONAL CREDIT ALLOWANCE.

Section 610: This subsection amends the provisions of existing law (section 1602 of the Internal Revenue Code; formerly section 910 of the Social Security Act) relating to the requirements with respect to additional credit allowance.

The terms "employers," "employment," and "wages," which are defined in section 1607 and have special meanings not applicable here, are replaced by terms such as "persons having individuals in their employ," "services," and "remuneration," in order to make the requirements of this subsection more easily understandable in their application to State laws whose coverage differs from that of the Federal law. The phrase "person (or group of persons)" has been used in the standards and definitions with respect to all types of State funds, to make clear that a State law may measure, for individual experience rating purposes, either an individual employer's record, or may permit two or more employers to combine their records and be treated, for experience rating purposes, as if they were a single legal entity. Several verbal changes are suggested in this subsection in the interest of clarity.

In order to facilitate the administration of provisions in State laws allowing variations in rates of contributions, the term "computation date," defined in subsection (c)(7) of this section of the Code, has been adopted, and the phrase "year preceding the computation date" substituted for terms such as "preceding year" and "year," to permit the States to compute reduced rates as of a date prior to the date on which such reduced rates will become effective.

State standards.—The House bill amended section 1602(a) of the Code by adding a new standard with respect to the allowance of additional credit, which requires that irrespective of the type of fund maintained under the State law, the State law will contain provisions whereby variations in rates of contributions as between different employers will be so computed as to yield, with respect to each year, a total amount of contributions substantially equivalent to

2.7 per cent of the total pay rolls of employers, subject to the contribution requirements of the State law. Your committee has deleted this new standard because it believes that at this time, the addition of a new standard with respect to individual employer experience rating is premature.

Paragraph (1): In order to permit States which have pooled fund unemployment compensation laws to allow variations in rates of contributions at an earlier date, the committee has changed this paragraph as amended in the House bill, to permit the allowance of reduced rates of contributions under pooled fund laws on the basis of one rather than three years of experience by an employer with respect to unemployment or other factors bearing a direct relation to unemployment risk, but only after compensation has been payable under the State law with respect to such employer for one year. In other respects this paragraph incorporates the standards of existing law applicable to a pooled fund or partially pooled account, except that the phrase "years of compensation experience" in the present law has been replaced by a broader phrase permitting the use of an employer's "experience with respect to unemployment" or an employer's experience with respect to "other factors bearing a direct relation to unemployment risk" as a basis for individual experience rating under a pooled fund. This change is made in order to extend the possible bases by which State laws may measure eligibility for reductions in employers' rates of contributions to a pooled fund, thus adding flexibility to the present law. Because of this change, the definition of the phrase "year of compensation experience" in subsection (c) of this section of the Code is no longer necessary.

Paragraphs (2), (3), and (4): The reserve requirements with respect to reserve accounts (under the amended new paragraph (3) to become effective January 1, 1942) and guaranteed employment accounts have been restated in terms of 2½ per cent of the pay roll for three years, rather than 7½ per cent of the pay roll for one year. The term "pay roll" includes only the pay roll subject to the contribution requirements of the State law. This basis of measuring an employer's reserve or guaranteed employment account as more equitable from both the point of view of the employer and the State, since it permits the averaging of pay-roll experience over three years and avoids the unreasonable fluctuations in rates which may occur if pay rolls are substantially increased or decreased for a particular year. Because the standard rate of contributions under most laws is 2.7 per cent (a very few State laws require a standard rate of 3 per cent), employers could not accumulate a reserve equal to 7½ per cent of their annual pay roll in less than three years, except in very unusual situations. Hence, it is believed that the change in the reserve requirement to 2½ per cent of pay rolls for three years in place of 7½ per cent of pay roll for one year will not, in practical effect alter the present reserve requirements. The additional requirement with respect to three years of contributions is deemed necessary to clarify the provision relating to reserves equal to 2½ per cent of the pay roll for three years. Unless the employer has actually been subject to the contribution requirements of the State law for three years, the provision measuring the reserve in terms of 2½ per cent of pay rolls for the three preceding years would operate to reduce the reserve requirements. Under these two paragraphs, an employer may not be permitted a reduced rate of contributions to his guaranteed employment account unless he has fulfilled his guaranty with respect to the preceding year, and an employer may not be permitted a reduced rate of contributions to his reserve account unless compensation has been payable from his account throughout the preceding year.

Paragraph (4) incorporates the new standards with respect to individual reserve accounts. In order to permit States maintaining such accounts to conform therewith without incurring the expense of special legislative sessions, these new standards will not become effective until January 1, 1942. Prior to that date, the standards in paragraph (3), which incorporate the present law, will be applicable.

The House bill added a new subsection (b) to section 1602 of the Code, under which a State would be permitted to adopt either of two alternative courses of action if its law meets the standards set forth in paragraphs (1) and (2) of the new subsection: (1) It might reduce all employers' rates uniformly; or (2) it might vary individual employers' rates of contributions under experience rating provisions which comply with the applicable standards in paragraph (2) or (3) or (4) of subsection (a) of this section as amended in the House bill, but without so calculating the respective rates as to secure an annual yield of an amount substantially equivalent to 2.7 per cent of the State pay roll, the

requirement of paragraph (1) of subsection (a) of this section as amended in the House bill. The Finance Committee has deleted this new subsection because it believes that the States' short experience in the payment of compensation and lack of experience in the actual operation of their present provisions for variations in rates of contributions does not warrant substantial changes in the Federal standards.

Certification by the Board with respect to additional credit allowance.—Section 1602(b): This is a new subsection, requiring the Social Security Board to certify to the Secretary of the Treasury, in the same manner as it certifies State laws under section 1603(c), State laws which it finds comply with the requirements of subsection (a) of this section. Provision is made for partial certification where two kinds of funds are maintained under the same State law, one of which fails to comply with subsection (a) of this section, or where a contribution is divided between two kinds of funds under a State law, so that additional credits will be allowed only with respect to reduced rates allowed in compliance with the requirements of this section.

Under these provisions a State law which complies in all respects with the requirements of this section will receive an unqualified certification. In some States, provision is made for the maintenance of two parallel systems (such as a reserve account system and a guaranteed employment account system). In such States, some employers may be covered by the one system and other employers may be covered by the other. In such States there would be no difficulty in certifying one system, even though the other failed to comply with the requirements of this section, and the Board would accordingly be directed to do so by paragraph (2) of this subsection. In other States, contributions with respect to particular wage payments are required to be divided between two kinds of funds (such as the requirement that a part of each employer's contribution be credited to his own reserve account and a part to a "partially pooled" fund which is operated as a reinsurance fund). If in this type of situation the provisions of the State law with respect to one or the other such fund do not comply with the requirements of this section, the Board is directed to make such certification as will permit the allowance of additional credits only with respect to those reduced rates which have been allowed in accordance with the requirements of this section.

In addition, this new subsection includes a paragraph requiring the Social Security Board to advise the States, in the same manner as it advises the States of its findings under section 1603, whether or not their laws comply with the requirements of this section; after finding such compliance, the Board may thereafter deny certification of a State law for additional credit purposes only after prior notice and opportunity for hearing to the State, and only if it finds the State law no longer contains the applicable provisions specified in subsection (a) or the State has failed to comply substantially with any such provision. The present subsection (b) of this section is eliminated because its purpose is achieved by the foregoing provisions.

Definitions.—Section 1602(c): Paragraphs (1) and (4) of this subsection are amended to make clear that from a particular employer's reserve account or guaranteed employment account, all compensation payable on the basis of services performed for him and only compensation payable on the basis of services performed for him, is to be paid. This incorporates in part the exception clause in the present definition of a pooled fund, i. e., that compensation may not be paid from a partial pool or reinsurance fund unless the reserve account or guaranteed employment account of the employer on the basis of whose services the benefit claimant had earned his benefit rights, is exhausted or terminated.

The present paragraph (2) is revised and divided into paragraphs (2) and (3) in order to distinguish more clearly between a fully pooled fund and a partially pooled (or reinsurance) fund. The new paragraph (3) permits the maintenance of a partially pooled fund in connection with a guaranteed employment account, as well as in connection with a separate reserve account. The definition of the partially pooled account also makes clear that a State may, without endangering its compliance with the definitions of the term "reserve account" and "guaranteed employment account," provide for transfers from reserve accounts or guaranteed employment accounts to a partially pooled account. Several State laws now provide for such transfers.

Paragraph (4) (old paragraph (3)) amends the present law to permit guarantees of employment to be operative only with respect to individuals who continue to be available for suitable work in the guaranteed establishment. This

provision is deemed necessary because under the present provision it is not clear whether employers are relieved from their guarantees with respect to individuals who quit voluntarily, or are unable to work because of some incapacity, or are out on strike, etc. This paragraph is also amended to make clear the general understanding with respect to its requirements concerning the probationary service period, i. e., that the probationary period must be served within a continuous period immediately following the employee's first week of service and may not be claimed repeatedly with respect to intermittent periods of employment which never exceed 12 consecutive weeks. The last clause of this definition is amended to clarify the point that guaranteed remuneration and unemployment compensation are not the same, and that the guaranteed remuneration is not to be payable out of the guaranteed employment account.

Paragraph (5) (old paragraph (4)) deletes the definition of the term "year of compensation experience," because that term is no longer used in paragraph (1) of section 1602(a). The definition of the term "year," in this paragraph, is designed to permit States to allow reduced rates on the basis of 12 consecutive months, as well as on the basis of a calendar year.

Paragraph (6), defining the term "balance," is a new definition added to make clear that the amount of the reserve required to be accumulated by employers with respect to whom a reserve account or a guaranteed employment account is maintained, is to be made up of payments by such employers and may not be made up of employee contributions or funds from other sources. If employee contributions are required under a State law which provides for the maintenance of reserve accounts or guaranteed employment funds, such contributions may be payable into the reinsurance fund. The exception contained in this definition, which permits the inclusion within a "balance" of payments other than payments by employers if made to a reserve account or guaranteed employment account prior to January 2, 1940, is designed to relieve the States of complicated computations where payments, other than payments by employers, have been paid to such accounts during early months of the State's experience.

Your committee has advanced this date one year beyond that prescribed in the House bill in order to avoid a hardship in one State.

Paragraph (7) defines the term "computation date" to include any date occurring within 27 weeks prior to the date that a reduced rate goes into effect. As above indicated, this provision is designed to give the States ample time within which to make their computations with respect to variations in rates of contributions. Such computations are to be made at least once in each calendar year.

Paragraph (8), defining the term "reduced rate," is designed to make clear that the requirements of subsection (a) are not applicable to a reduction from an increased rate to a standard rate, i. e., situations in which employers with bad employment experience have been required to pay increased rates and are subsequently permitted to pay the standard or normal rate.

Section 610(b) of the House bill has been rendered unnecessary by the committee amendment deleting from the House bill, the new Federal standard incorporated in section 1602(a)1 of the Code.

PROVISIONS OF STATE UNEMPLOYMENT COMPENSATION LAWS.

Section 611: The changes made in paragraphs (1), (3), and (4) of section 1603(a) of the Internal Revenue Code (formerly section 903(a) of the Social Security Act) by this section correspond to those made in paragraphs (2), (4), and (5) of section 303(a) of the Social Security Act by section 302, supra.

EXTENSION OF TIME FOR FILING TAX RETURNS UNDER SUBCHAPTER C OF CHAPTER 9 OF THE INTERNAL REVENUE CODE.

Section 612: This section amends section 1604(b) of the Internal Revenue Code to authorize a longer extension of time for filing the return of the Federal unemployment tax. Existing law permits an extension of as much as 60 days. The amendment would provide an additional 30 days, or 90 days in all. The extensions under section 1604(b) are granted under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. An employer finding it impossible to make his return on January 31, the due date prescribed in section 1604(a), or to pay his State contributions by that date, may make application in accordance with such rules and regulations for an extension of time for filing his Federal

return. If granted, the employer has until the extended due date, as granted, to make his return and pay his State contributions. No delinquency penalty will be incurred for late filing and no loss of credits will be suffered if the return is filed, and the contributions paid to the State, on or before such extended due date.

INTERSTATE OR FOREIGN COMMERCE AND FEDERAL INSTRUMENTALITIES.

Section 613: This section designates existing section 1606 of the Internal Revenue Code (formerly section 906 of the Social Security Act) as subsection (a). A clarifying amendment to the provision makes it clear beyond any possible doubt that an employer engaged in foreign commerce is on the same basis as respects authority of a State to require payments into an unemployment fund as employers engaged in interstate commerce.

This section also amends section 1606 by adding subsections (b) and (c), relating to Federal instrumentalities, and (d), relating to employment on lands held by the Government.

Subsection (b) as passed by the House confers on State legislatures authority to require instrumentalities of the United States (except those wholly owned by the United States or exempt from the taxes imposed by sections 1410 and 1600 of the Internal Revenue Code (formerly sections 804 and 901, respectively, of the Social Security Act) by any other provision of law) to comply with State unemployment compensation laws. Since only the unemployment tax is involved, your committee has stricken from the House bill the reference to the old-age tax imposed by section 1410. Under this amendment the States would be able to cover under their unemployment compensation systems national banks and certain other Federal instrumentalities. Protection against any possible discrimination against instrumentalities of the United States is afforded by the two provisos, which make the permission to require compliance with the State law conditional upon equality of treatment and upon the approval and certification of the State law under section 1603 of the Internal Revenue Code (formerly section 903 of the Social Security Act).

Subsection (c) makes provision for examination by the Comptroller of the Currency of returns and reports made to the States by national banks.

Subsection (d) authorizes the States to cover under their unemployment compensation laws services performed upon land held by the Federal Government, such as services for hotels located in national parks.

DEFINITIONS.

Section 614: This section, effective January 1, 1940, amends section 1607 of the Internal Revenue Code, containing definitions applicable in the case of the Federal unemployment tax.

Definition of employer.—Section 1607(a): The House made no change from existing law in this definition. Your committee have inserted a clarifying amendment providing expressly that, in determining whether a person employs eight or more employees, only those employees employed in employment (as defined in section 1607(c)) are to be counted.

Definition of wages.—Section 1607(b): This subsection continues the present definition of wages, clarifies it in certain respects and excludes certain payments heretofore included. Paragraph (1) excludes 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. Paragraph (2) in the House bill excludes all payments made by the employer to or on behalf of an employee or former employee, under a plan or system providing for retirement benefits (including pensions), or disability benefits (including medical and hospitalization expenses), but not life insurance. Your committee has added an exclusion of payments on account of death (including life insurance) where it is clear that the employee while living does not have certain rights and options. Generally, such payments are excluded under existing law if the employee does not have those rights and options, but it is deemed desirable for purposes of certainty to provide an express exclusion. The payments under paragraph (2) of the House bill and under the bill, as amended, will be excluded even though the amount or possibility of such payments is taken into consideration in fixing the amount of remuneration and even

though such payments are required, either expressly or impliedly, by the contract of employment. Since it is the practice of some employers to provide for such payments through insurance or the establishment and maintenance of funds for the purpose, the premiums or insurance payments and the payments made into or out of any fund will likewise be excluded from wages. Your committee has made no change in paragraphs (3) and (4) of the House bill. Paragraph (3), which merely clarifies existing law, expressly excludes from wages the payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of the employee's tax imposed by section 1400 of the Internal Revenue Code (formerly section 801 of Social Security Act) and employee contributions under State unemployment compensation laws. Paragraph (4) excludes dismissal payments which the employer is not legally obligated to make.

Definition of employment.—Section 1607(c): The definition of the term "employment" under the amendment, as applied to service rendered prior to January 1, 1940, retains the exemptions contained in the present law. The definition applicable to service rendered on and after that date continues unchanged some of the present exemptions, revises others, and adds certain additional ones. No substantive change in existing law is effected by the introductory paragraph of the definition.

Paragraph (1) continues the exception of agricultural labor, but a new subsection (1) defines the term for purposes of the exclusion.

Paragraph (2) continues the present exception of domestic service in a private home, but adds to the exception such service in a local college club or local chapter of a college fraternity or sorority (not including alumni clubs or chapters). Thus services of cook, waiter, chambermaid, and the housemother, performed for these local clubs and chapters, are exempt.

Paragraph (3) adds an exception of casual labor not in the course of the employer's trade or business. This exception is already contained in amended section 209(b) of the Social Security Act and amended section 1426(b) of the Internal Revenue Code.

Paragraph (4) continues the existing exception of service performed as an officer or member of the crew of a vessel on the navigable waters of the United States.

Paragraph (5) continues the existing exception of service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of 21 in the employ of his father or mother.

Paragraph (6) continues the exemption of service performed in the employ of the United States, but with respect to instrumentalities of the United States, limits the exemption to those instrumentalities which are (A) wholly owned by the United States or (B) exempt from the tax imposed by section 1600 of the Internal Revenue Code (formerly section 901 of the Social Security Act) by virtue of any other provision of law. The change in this provision brings within the unemployment tax provisions certain Federal instrumentalities not falling within clause (A) or (B) above, such as national banks.

Paragraph (7) continues the exemption of service for State governments, their subdivisions and instrumentalities, but limits the exemption with respect to instrumentalities so that it applies only to an instrumentality which is wholly owned by a State or political subdivision or which would be immune from the tax imposed by section 1600 of the Internal Revenue Code (formerly section 901 of the Social Security Act) by the Constitution. The amendment thus narrows the present exemption and in no case broadens it.

Paragraph (8) continues the exemption of religious, charitable, scientific, literary, or educational organizations, but brings the language of the exemption into conformity with the corresponding exemption from income tax under section 101(6) of the Internal Revenue Code, by adding a specific disqualifying clause applicable where any substantial part of the activities of the organization is carrying on propaganda or otherwise attempting to influence legislation.

Paragraph (9) excepts services of employees covered by the railroad unemployment insurance system. This provision leaves unchanged the exemption of the service of an individual in the employ of an employer subject to such system even though the individual receives remuneration in a form (e. g., tips) not recognized as compensation under the Railroad Unemployment Insurance Act, and leaves unchanged the inclusion of service in case it is performed by an employee in the segregable nonrailroad activities of an employer where segregation of the railroad activities from nonrailroad activities is found necessary in

the interpretation and administration of the laws relating to the social security system and the railroad unemployment insurance system.

Paragraphs (10) to (13), inclusive, are identical with the same paragraphs in section 209(b) of the Social Security Act. For detailed analysis see the explanation of such paragraphs in this report.[1]

Paragraph (14) eliminates from coverage insurance agents and solicitors if the remuneration for which they perform their services is on a commission basis solely. If any part of such remuneration is a fixed salary the agent or solicitor is covered and the tax is computed on the basis of his aggregate remuneration (for example, salary or salary plus commissions). No similar exclusion is made from coverage under the Federal Insurance Contributions Act.

Paragraph (15) is identical with paragraph (15) of section 209(b) of the Social Security Act. For detailed analysis see the explanation of that section in this report.[2]

Section 1607(d): This section relates to an employee who has both included and excluded service for the same employer during a pay period. It provides that if one-half or more of the services constitutes included employment, all of such service will be included; but that if less than one-half constitutes included employment, all will be excluded. The provision does not apply to the service of an employee in a pay period if any of the service of the employee in the pay period is covered under the railroad unemployment-insurance system. The amendment made by your committee to the last sentence is merely clarifying.

Section 1607(e), defining "State agency," makes no change in the existing definition of that term.

Definition of unemployment fund.—Section 1607(f): This definition is amended by adding two new sentences. The first of these added sentences is a clarifying amendment providing that all sums standing to the credit of the State in the (Federal) unemployment trust fund and money withdrawn from that fund by the State but unexpended shall constitute a part of the State fund. This removes any possible doubt whether such moneys remain a part of the State fund. The second added sentence provides that an unemployment fund shall be deemed to be maintained during a taxable year only if no part of the moneys of such fund was expended for purposes other than payment of unemployment compensation and refunds of sums erroneously paid into the fund. This provision, in conjunction with an amendment to section 1601(a) (see supra, section 609), makes it clear that an employer is entitled to credit against the Federal tax only so long as the State uses its fund for a proper purpose.

Definition of contributions.—Section 1607(g): This provision is changed so as to avoid use of defined terms and thus to include in the term "contributions" payments required by a State law with respect to services not covered by the Federal law.

Definition of compensation.—Section 1607(h): No change in existing law is made in this definition.

Definition of employee.—Section 1607(i): The term "employee" is defined as in existing law to include an officer of a corporation.

By the amendment to subsection (c), contained in paragraph (10)(A) thereof, uncompensated officers of any organization exempt from income tax under section 101 of the Internal Revenue Code are excluded from the count in determining whether the organization is an employer of eight or more and liable for the tax. However, uncompensated officers of corporations not so exempt are not excluded for purposes of such determination merely because they are uncompensated.

Section 1607(j) and (k), defining the terms "State" and "person," respectively, make no change in the existing definitions of those terms.

Definition of agricultural labor.—Section 1607(l) is identical with section 209(l) of the Social Security Act. For detailed analysis see discussion of that section in this report.[3]

Section 615: This section inserts a new section in Subchapter C of Chapter 9 of the Internal Revenue Code which provides that the subchapter may be cited as the "Federal Unemployment Tax Act."

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[1] See pages 576–578, this Bulletin.
[2] See pages 576–578, this Bulletin.
[3] See pages 579–581, this Bulletin.

TITLE VIII—AMENDMENTS TO TITLE XI OF THE SOCIAL SECURITY ACT.

DEFINITIONS.

Section 801: This section amends the definition of "State" contained in section 1101(a) of the Social Security Act so as to include Puerto Rico for the purposes of Titles V (except section 531) and VI of such Act.

The House proposal to extend coverage to salesmen who are not employees has been stricken out by the committee. It is believed inexpedient to change the existing law which limits coverage to employees. This action of the committee renders unnecessary the new definition of employer which was contained in paragraph (6) of subsection (a) of section 1101 as amended by the House. Paragraph (6) of subsection (a) of the present law therefore would remain unchanged under the committee proposal, and paragraph (7) of that subsection as added by the House, would be eliminated.

PENALTY SECTIONS.

Section 802: This section amends Title XI of the Social Security Act by adding the following two sections:

Disclosure of information in possession of Board.—Section 1106: This section prohibits the disclosure, except pursuant to Board regulations, of any returns or statements filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act or the Federal Insurance Contributions Act, or regulations thereunder, which have been transmitted by the Commissioner to the Board. The prohibition against disclosure, except pursuant to Board regulations, also extends to any file, record, report, paper, or information obtained by the Board or any of its officers or employees in the course of official duties, and any such material obtained by any person from the Board or any of its officers or employees. Violation of the prohibition is punishable as a misdemeanor.

Penalty for fraud and misuse of Board's name.—Section 1107(a) provides that anyone who makes any false representation, with intent to defraud any person, knowing the representation to be false, concerning the requirements of this Act, or the Federal Insurance Contributions Act, or the Federal Unemployment Tax Act, shall be guilty of a misdemeanor.

Section 1107(b) provides that anyone who, with intent to obtain information as to the date of birth, employment, wages, or benefits of any individual, falsely represents to the Board that he is such individual or the wife, parent, or child of such individual, or such individual's agent, or the agent of such wife, parent, or child, or falsely represents to any person that he is an employee or agent of the United States, shall be guilty of a misdemeanor.

TITLE IX—MISCELLANEOUS PROVISIONS.

Section 901: This section makes clear that the amendment of Title III of the Social Security Act and section 1603 of the Internal Revenue Code shall not be construed to amend or alter those provisions of the Railroad Unemployment Insurance Act which provide limited exceptions to the provisions of section 303(a) (4) and (5) of the Social Security Act and 1603(a) (3) and (4) of the Internal Revenue Code.

Section 902: Subsections (a), (b), (c), and (d) substantially liberalize the conditions of allowance of credit against the Federal unemployment tax imposed by Title IX of the Social Security Act for the years 1936, 1937, and 1938. This committee agree with the House that the periodical granting of relief after the close of the taxable year affected would destroy the effectiveness of the conditions of allowance of the credit provided in permanent law and would prove costly in that it would call for the reopening and reconsideration of cases previously closed, the adjustment of claims, the abatement of assessments, and the payment of refunds. However, the need should not arise in the future for granting relief of the type provided in the present section since substantial liberalization for 1939 and subsequent years is provided in section 609 of the bill, amending section 1601(a) of the Internal Revenue Code.

Subsection (a) provides for the allowance of credit against the tax for 1936, 1937, or 1938, for contributions paid to the State for such year before the sixtieth day after the date of enactment of this Act. Under section 810 of the Revenue Act of 1938 taxpayers were allowed credit against the tax for 1936 for contributions paid before July 27, 1938. Since a few taxpayers did not take

advantage of that relief provision, it is felt desirable to include credit against the tax for 1936 in the present provisions. Thus, the same final date for paying contributions to the State, in order to secure credit against the tax—namely, the fifty-ninth day after the date of enactment of this Act—is provided for the tax for each of the three past years during which the tax has been in effect.

Under clause (2) of subsection (a) credit is allowable for contributions paid on or after the sixtieth day after the date of enactment of this Act with respect to wages paid after the fortieth day after such date of enactment. This is designed to permit credit in cases in which, because the "wages payable" basis of the tax for the years 1936, 1937, and 1938 is still retained, credit would otherwise be lost since some wages are still being paid with respect to those years, and it may not be possible to estimate the amount thereof or the amount thereof may have been underestimated.

Clause (3) of subsection (a) permits credit for contributions paid to the State, without regard to the date of payment, if the assets of the taxpayer are in the custody or control of a fiduciary appointed by, or under the control of, a court of competent jurisdiction at any time during the 59-day period following the date of enactment.

Subsection (b) of this section makes the same provision with respect to the taxable years 1936, 1937, and 1938 as are made in section 1601(a)4 of the Internal Revenue Code, as amended, for the taxable year 1939 and thereafter for cases in which the taxpayer pays his contributions to the wrong State. (See section 609, supra.)

Subsection (c) preserves the definitions of section 907 of the Social Security Act, the 90 per cent maximum credit against the Federal tax, and other provisions of Title IX of the Social Security Act, essential to the operation of the relief provisions in subsections (a), (b), and (h) of this section for the taxable years 1936, 1937, and 1938.

Subsection (d) provides for refund of any tax (including penalties and interest) which has been collected but with respect to which credit is allowable under this section. The law (including statutes of limitations) applicable in the case of erroneous or illegal collection of tax will apply to such refunds. No interest will be paid on any such refund.

Subsection (e) of this section is designed to permit credit against the tax for the years 1940, 1941, and 1942 if in those years wages are paid for services rendered after December 31, 1938, but during a year prior to that in which payment occurs, and contributions with respect to such wages have not been credited against the tax for any prior taxable year. This provision relieves cases of hardship which might arise by reason of the change in the basis of the Federal tax from "wages payable" to "wages paid." (See section 608, supra.)

Subsection (f) is designed to make retroactive to the date of enactment of the Social Security Act the exemptions from Federal insurance and unemployment compensation coverage contained, respectively, in amended sections 209(b) (11) and (12) of the Social Security Act and amended sections 1426(b) (11) and (12) and 1607(c) (11) and (12) of the Internal Revenue Code of service in the employ of foreign governments and certain of their instrumentalities. If any tax (including interest and penalties) has been collected with respect to service thus exempt, it is to be refunded, without allowance of interest, in accordance with the provisions of law (including statutes of limitations) applicable in the case of erroneous or illegal collection of the tax.

Subsection (g) provides that no lump-sum payments shall be made under the provisions of section 204 of the Social Security Act after the date of the enactment of this bill, except to the estate of an individual who dies prior to January 1, 1940.

In the case of individuals dying prior to January 1, 1940, the lump-sum payments provided under sections 203 and 204 of the present Act will be payable to the estate (or to the persons entitled thereto under State law) whether application for such payment is filed prior to January 1, 1940, or on or after January 1, 1940.

Subsection (h) grants relief to taxpayers as well as States in cases in which the highest court of a State has held contributions paid under the State law with respect to the taxable years 1936 or 1937 not to have been required payments under the State law. For example, certain States enacted their unemployment compensation laws during the latter portion of 1936, levying contributions thereunder retroactively with respect to services performed on and after January 1 of that year State taxpayers in good faith paid such contributions

and claimed and received credit therefor against their Federal tax. If some time later, the retroactive imposition of such contributions is held by the highest court of such State to have been invalid, such taxpayers may be entitled to refunds under the State law, but by virtue of that fact, such taxpayers also become liable for the full Federal tax with respect to such year.

Under this subsection, so much of any such payments as are not refunded to the taxpayer may be credited against the tax imposed by section 901 of the Social Security Act for the calendar year 1936 or 1937. Moreover, if, in the example cited, the State had paid benefits with respect to unemployment occurring during 1938, this section safeguards the status of the State law under section 903 of the Social Security Act by providing that so much of such payments as are not returned to the taxpayer shall be considered "contributions" for the purposes of that section. This section also postpones the periods of limitations prescribed by section 3312(a) of the Internal Revenue Code in the case of the tax for 1936 or 1937 of any such taxpayer to whom any such payment is returned, until the last such payment is returned to the taxpayer.

Subsection (i) has been added by your committee. The Federal unemployment tax is a uniform tax on employers of eight or more levied at the rate of 3 per cent of their taxable pay rolls. If the conditions prescribed by the law imposing such tax are satisfied, an employer may credit against the tax the amount of contributions, which he has paid or has been relieved from paying into a State unemployment fund, not exceeding 90 per cent of the Federal tax against which such contributions are credited. If those conditions are not satisfied, the employer is liable for the full 3 per cent tax. Several district courts have held that the collection of the full 3 per cent Federal tax (without allowance of the 90 per cent credit) from a bankrupt estate, which failed to qualify for credit, is not prohibited by section 57j of the Bankruptcy Act, as amended, which section provides that debts owing to the United States "as a penalty or forfeiture shall not be allowed." However, some district courts have held otherwise. Subsection (i) effects no substantive change in the law but is designed to set at rest the question involved by expressly providing that no part of the tax imposed by the Federal Unemployment Tax Act or by Title IX of the Social Security Act shall be deemed a penalty or forfeiture within the meaning of section 57j of the Bankruptcy Act, as amended. The new subsection does not affect the liberalization in subsection (a), or in section 1601(a)3 of the Federal Unemployment Tax Act, of the conditions for credit in the case of an employer whose assets are in the custody of a court.

Section 903: This section amends section 1430 of the Internal Revenue Code by striking out the reference therein to section 3762 of the Code and inserting in lieu thereof a reference to section 3661. The change merely corrects a typographical error made in section 1430 when the Code was enacted.

Section 904: This amendment to the House bill merely conforms the reference in section 1428 of the Internal Revenue Code to the revision of the numbering of the paragraphs in section 1426(b) of the Code.

Section 905: This amendment to the House bill would include in the measure of the employer's and employee's taxes, wages paid, with respect to employment after December 31, 1938, to employees who have attained age 65. The liability of the employer for the employee's tax with respect to service performed prior to the enactment of this Act is limited, however, to the amount of wages in the control of the employer at any time after 90 days after the enactment of the Act. This confines the employer's liability for the employee's tax to situations where ample opportunity exists for the employer to deduct the employee's tax from his employee's wage.

Section 906: This is a new section which the committee has added to the House bill to relieve certain States from an undue hardship which would otherwise result from the failure on the part of such States' legislatures to enact necessary legislation within the time required under the Railroad Unemployment Insurance Act, approved June 25, 1938. Under that Act, the Social Security Board is required to determine for each State certain sums described in the Act as the State's "preliminary amount" and the State's "liquidating amount." These sums represent an approximation of the difference between the total amount collected by the State from railroad employers who have ceased to be subject to the State laws and have become subject to the Railroad Unemployment Insurance Act, and the total amount of compensation paid by the States on the basis of wages earned from such employers. The Railroad Act requires the Social Security Board to withhold administrative grants under

Title III of the Social Security Act from each State whose first regular legislative session after the date of enactment of that Act did not authorize the timely filing by the State of its authorization and direction to the Secretary of the Treasury to transfer from the State's account the unemployment trust fund to the railroad unemployment insurance account in the unemployment trust fund, the sums as determined by the Social Security Board.

The committee has been advised that in a limited number of States, regular legislative sessions which convened during 1939 have adjourned without enacting the necessary legislation required under the Railroad Unemployment Insurance Act and without making any provision for financing the administrative expenses of their unemployment compensation laws during the period with respect to which the Social Security Board is required to withhold from them grants under Title III of the Social Security Act. In order to permit the continued administration of the unemployment compensation laws in each of these few States, this section extends until 30 days after the close of such States' next regular legislative session, the time within which such States may effect the necessary transfers of funds. The net effect of this postponement will not deprive the railroad unemployment insurance account of any moneys to which it is entitled under the present provisions of the Railroad Unemployment Insurance Act. The section will apply only to States in which the first regular legislative session which began after June 25, 1938, has adjourned prior to 30 days after the date of enactment of this Act. This limitation is necessary in order that States whose first regular legislative sessions which begin after June 25, 1938, and after the date of enactment of this Act, will not be authorized to postpone the enactment of the legislation required under the Railroad Unemployment Insurance Act.

Section 907 is a new amendment proposed because in the case of persons 65 or over there may be benefit credits because of wages earned during any part of 1939. This amendment would provide that where the employee's tax has not been deducted from the employee over 65 and where the employer has not made any tax payment for his employment in 1939, deduction of an amount equal to the employee's tax without interest would be made from his monthly benefits or other benefits payable with respect to his wages.

1939–37–10011

SOCIAL SECURITY ACT AMENDMENTS OF 1939.

[House of Representatives Report No. 1461, Seventy-sixth Congress, First Session.]

Mr. Doughton, from the committee of conference, submitted the following conference report [to accompany H. R. 6635]:

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STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE.

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 6635) to amend the Social Security Act, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

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Amendment No. 9: The House bill provided that the administrative expenses of the Social Security Board and the Treasury Department for the administration of Title II and Title VIII of the Social Security Act, and the Federal Insurance Contributions Act, should be estimated monthly by the chairman of the Board and the managing trustee of the Federal old-age and survivors trust fund. The managing trustee was directed to pay each month from the trust fund into the Treasury as miscellaneous receipts the amount so estimated. The Senate amendment provides that such amount shall be estimated quarterly and that such payments shall be covered into the Treasury as repayments to the account for reimbursement of expenses incurred in connection with the administration of such Titles II and VIII and such Federal Insurance Contributions Act. The amendment also provides that such repayments shall not be available for expenditure but shall be carried to the surplus fund of the Treasury. If the payments made by the trust fund to the Treasury for such cost of administration were covered into the Treasury as provided in the House bill, the

receipts and expenditures would be overstated in the account of the Treasury by the amounts so deposited. Collections, when originally received, are classified in the Treasury accounts as "social security taxes," and subsequently, under the House bill, a portion would be deposited as "miscellaneous receipts," thus overstating actual receipts. Also, when funds are expended from appropriations for such administration, such items would be shown as expenditures under "Social Security Board" and "departmental," and the reimbursements for such expenses from the trust fund would also be shown as expenditures, unless such items are deposited as repayments instead of miscellaneous receipts. The Senate amendment cures this administrative problem. The House recedes.

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Amendments Nos. 26 and 27: Under the House bill as under existing law, employees who worked for more than one employer in a year and who have a total salary from such employers of more than $3,000 are taxable upon the first $3,000 of such salaries from each employer. These Senate amendments provide that no more than $3,000 total remuneration for any calendar year after 1939 is counted for benefit purposes. (See amendment No. 85 for special tax refund on such salaries in excess of $3,000.) The House recedes.

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Amendments Nos. 29 and 30: These amendments exclude from the definition of wages payments made by an employer under certain conditions on behalf of his employees on account of death (including life insurance) where it is clear that the employee, while living, does not have certain rights and options. These slight changes from existing law are effective as to wages from employment after 1939. The House recedes.

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Amendment No. 35: Under present law services performed by an individual after he attains age 65 are not counted for benefits under Title II nor are they taxed under the Federal Insurance Contributions Act. The House bill provided that such services performed after 1939 would be counted as employment and taxed the wages for such services after such year. The Senate amendment provides that such services performed after 1938 by such an individual shall be counted as employment. (Amendment No. 173 taxes such wages and amendment No. 175 deducts from any benefit under Title II an amount equal to 1 per cent of any wages paid to any such individual for services performed in 1939 if taxes on such wages were not paid.) The House recedes.

Amendment No. 36: The House bill exempted from the definition of employment service performed in the employ of an agricultural or horticultural organization. The Senate amendment clarifies this exemption to make certain that these organizations are identical with agricultural and horticultural organizations exempt from income tax under section 101(1) of the Internal Revenue Code. The House recedes.

Amendments Nos. 37 and 38: These amendments made a clarifying change to bring this provision into conformity with a similar provision contained in the Revenue Act of 1939. The House recedes.

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Amendment No. 40: This amendment would exclude fishermen from coverage. It would also exclude officers and members of crews (even though not fishermen) of any vessel less than 400 tons, or of any sail vessel regardless of tonnage if the vessel is engaged in the specified fishing activities. There was no comparable provision in the House bill. The House recedes with an amendment which exempts from coverage service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except (*a*) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (*b*) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States).

Amendment No. 41: This amendment excludes service performed by an individual under the age of 18 in making street sales of newspapers, and in making house-to-house deliveries of newspapers and shopping news, including handbills and other similar types of advertising material. It does not include the han-

dling of newspapers and advertising material prior to the time they are turned over to the individual who makes the sale, the house-to-house, or other final distribution. There was no comparable provision in the House bill. The House recedes.

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Amendments Nos. 57 and 58: The House bill defined agricultural labor to include all services performed on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity. These Senate amendments struck out the words "connection with." The conference action restores such words; and the Senate recedes.

Amendments Nos. 59, 60, 62, 63, and 66: These amendments make clarifying changes to the definition of agricultural labor. The House recedes.

Amendment No. 61: This amendment includes in the definition of agricultural labor service performed on a farm with respect to other wildlife in the same manner and to the same extent as service performed with respect to fur-bearing animals. The House recedes with a clarifying amendment.

Amendment No. 64: This amendment includes within the term "agricultural labor" service performed in the employ of the owner or tenant or other operator of a farm, in connection with the maintenance of the tools and equipment on such farm. It also includes service performed in the employ of any such owner, tenant, or other operator in salvaging timber or clearing land of brush or other debris left by a hurricane. Both amendments are subject to the limitation contained in the bill that the major part of such service must be performed on a farm. The House recedes.

Amendment No. 65: This amendment includes as agricultural labor, in addition to the services included in the House bill, service performed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes. The House recedes.

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Amendment No. 85: Under existing law, remuneration received by an employee with respect to employment during any calendar year is taxable up to and including $3,000 received by the employee from each employer he may have during the year. Hence, an employee who has more than one employer may be required to pay the old-age insurance employees' tax on aggregate wages in excess of $3,000. The Senate amendment permits the employee to obtain a refund, without interest, of the tax paid on the aggregate in excess of $3,000 earned after December 31, 1939, provided a timely claim is filed. This amendment is complementary to amendment No. 27. There was no comparable provision in the House bill. The House recedes.

Amendments Nos. 86 and 87: These amendments exclude from the definition of wages payments made by an employer under certain conditions on behalf of his employees on account of death (including life insurance) where it is clear that the employee, while living, does not have certain rights and options. The House recedes.

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Amendment No. 89: The House bill exempted from the definition of employment service performed in the employ of an agricultural or horticultural organization. The Senate amendment clarifies this exemption to make certain that these organizations are identical with agricultural and horticultural organizations exempt from income tax under section 101(1) of the Internal Revenue Code. The House recedes.

Amendments Nos. 90 and 91: These amendments make a clarifying change to bring this provision into conformity with a similar provision contained in the Revenue Act of 1939. The House recedes.

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Amendment No. 93: This amendment would exclude fishermen from coverage. It would also exclude officers and members of crews (even though not fishermen) of any vessel less than 400 tons, or of any sail vessel regardless of tonnage if the vessel is engaged in the specified fishing activities. There was no comparable provision in the House bill. The House recedes with an amendment which exempts from coverage service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and

vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except (*a*) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (*b*) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States).

Amendment No. 94: This amendment excludes service performed by an individual under the age of 18 in making street sales of newspapers, and in making house-to-house deliveries of newspapers and shopping news, including handbills and other similar types of advertising material. It does not include the handling of newspapers and advertising material prior to the time they are turned over to the individual who makes the sale, the house-to-house, or other final distribution. There was no comparable provision in the House bill. The House recedes.

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Amendments Nos. 97 and 98: The House bill extended coverage to certain salesmen who are not employees. The Senate amendment strikes out this extension of coverage and also strikes out the new definition of employer as such definition was rendered unnecessary if the extension of coverage to such salesmen is not retained in the bill. It is believed inexpedient to change the existing law which limits coverage to employees. The House recedes.

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Amendments Nos. 103 and 104: The House bill defined agricultural labor to include all services performed on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity. These Senate amendments struck out the words "connection with." The conference action restores such words; and the Senate recedes.

Amendments Nos. 105, 106, 108, 109, and 112: These amendments make clarifying changes to the definition of agricultural labor. The House recedes.

Amendment No. 107: This amendment includes in the definition of agricultural labor service performed on a farm with respect to other wildlife in the same manner and to the same extent as service performed with respect to fur-bearing animals. The House recedes with a clarifying amendment.

Amendment No. 110: This amendment includes within the term "agricultural labor" service performed in the employ of the owner or tenant or other operator of a farm, in connection with the maintenance of the tools and equipment on such farm. It also includes service performed in the employ of any such owner, tenant, or other operator in salvaging timber or clearing land of brush or other debris left by a hurricane. Both amendments are subject to the limitation contained in the bill that the major part of such service must be performed on a farm. The House recedes.

Amendment No. 111: This amendment includes as agricultural labor, in addition to the services included in the House bill, service performed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes. The House recedes.

Amendments Nos. 113 and 114: Under the House bill, the additional credit allowance was based upon the amount, if any, by which contributions required to be paid by a taxpayer with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to a rate of 2.7 per cent. These Senate amendments were made necessary by reason of amendment No. 126, which eliminates the new section 1602(b) of the Code contained in the House bill. These amendments base the additional credit allowance on the difference between the amount of contributions the taxpayer was required to pay under the State law and the amount he would have paid if throughout the taxable year he had been subject to the highest rate applied under the State law in the taxable year to any employer, or to a rate of 2.7 per cent, whichever rate is lower. The House recedes.

Amendment No. 115: The House bill amended section 1602(a) of the Internal Revenue Code by adding a new standard with respect to allowance of additional credit, which required that, irrespective of the type of fund maintained under the State law, such law must contain provisions whereby variations in rates of contributions as between different employers will be so computed as to yield, with respect to each year, a total amount of contributions substantially equivalent to 2.7 per cent of the total of pay rolls of employers subject to the contribution

requirements of the State law. The Senate amendment deletes this new standard. The House recedes.

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Amendments Nos. 117 and 118: Under the House bill, States which have pooled fund unemployment compensation laws would have been allowed to vary rates of contributions and allow reduced rates of contributions on the basis of three years of experience by an employer with respect to unemployment or other factors bearing a direct relation to unemployment risk. The Senate amendments change the three years to two years and further provide that such reduction under pooled fund laws will be allowed only after compensation has been payable under the State law with respect to such employer for the two consecutive years immediately preceding the computation date. The Senate recedes.

Amendment No. 126: The House bill added a new subsection (b) to section 1602 of the Internal Revenue Code. Under this subsection a State would have been permitted to adopt either of two alternative courses of action if its law met the standards set forth in paragraphs (1) and (2) of the new subsection: (1) It might reduce all employers' rates uniformly; or (2) it might vary individual employers' rates of contributions under experience rating provisions which complied with the applicable standards in paragraph (2), (3), or (4) of subsection (a) of such section 1602, but without so calculating the respective rates as to secure an annual yield of an amount substantially equivalent to 2.7 per cent of the State pay roll. The Senate amendment deletes this new subsection. The House recedes.

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Amendments Nos. 137 and 138: Under the House bill the term balance was defined to make clear that the amount of the reserve required to be accumulated by employers with respect to whom a reserve account or a guaranteed employment account is maintained, is to be made up of payments by such employers and may not be made up of employee contributions or funds from other sources. The exception contained in this definition, which permits the inclusion within a "balance" of payments other than payments by employers if made to a reserve account or guaranteed employment account prior to January 2, 1939, is designed to relieve the States of complicated computations where payments, other than payments by employers, had been paid to such accounts during the early months of the State's experience. These Senate amendments advance the date one year beyond that prescribed in the House bill. The House recedes.

Amendment No. 139: Subsection (b) of section 610 of the House bill, which is deleted by this amendment, has been rendered unnecessary because of Senate amendment No. 115 which deleted from the House bill the average 2.7 per cent contribution rate requirement. The House recedes.

Amendment No. 140: The House bill conferred on State legislatures the authority to require instrumentalities of the United States, except those wholly owned by the United States or exempt from the taxes imposed by section 1410 or 1600 of the Internal Revenue Code, to comply with State unemployment compensation laws. The Senate amendment strikes out the reference to the old-age tax imposed by section 1410 since only the unemployment tax imposed by section 1600 is involved. The House recedes.

Amendment No. 141: This is a clarifying amendment to make clear that in determining whether a person employs eight or more employees, only those employees employed in employment (as defined in section 1607(c) of the Internal Revenue Code) are to be counted. The House recedes.

Amendments Nos. 142 and 143: These amendments exclude from the definition of wages payments made by an employer under certain conditions on behalf of his employees on account of death (including life insurance) where it is clear that the employee, while living, does not have certain rights and options. The House recedes.

Amendment No. 144: The House bill exempted from the definition of employment service performed in the employ of an agricultural or horticultural organization. The Senate amendment clarifies this exemption to make certain that these organizations are identical with agricultural and horticultural organizations exempt from income tax under section 101(1) of the Internal Revenue Code. The House recedes.

Amendments Nos. 145 and 146: These amendments make a clarifying change to bring this provision into conformity with a similar provision contained in the Revenue Act of 1939. The House recedes.

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Amendment No. 149: This amendment eliminates from the Federal Unemployment Tax Act insurance agents and solicitors if the remuneration for which they perform their services is on a commission basis solely. There was no comparable provision in the House bill. The House recedes.

Amendment No. 150: This amendment excludes service performed by an individual under the age of 18 in making street sales of newspapers, and in making house-to-house deliveries of newspapers and shopping news, including handbills and other similar types of advertising material. It does not include the handling of newspapers and advertising material prior to the time they are turned over to the individual who makes the sale, the house-to-house, or other final distribution. There was no comparable provision in the House bill. The House recedes.

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Amendments Nos. 153 and 154: The House bill defined agricultural labor to include all services performed on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity. These Senate amendments struck out the words "connection with." The conference action restores such words; and the Senate recedes.

Amendments Nos. 155, 156, 158, 159, and 162: These amendments make clarifying changes to the definition of agricultural labor. The House recedes.

Amendment No. 157: This amendment includes in the definition of agricultural labor service performed on a farm with respect to other wildlife in the same manner and to the same extent as service performed with respect to fur-bearing animals. The House recedes with a clarifying amendment.

Amendment No. 160: This amendment includes within the term "agricultural labor" service performed in the employ of the owner or tenant or other operator of a farm, in connection with the maintenance of the tools and equipment on such farm. It also includes service performed in the employ of any such owner, tenant, or other operator in salvaging timber or clearing land of brush or other debris left by a hurricane. Both amendments are subject to the limitation contained in the bill that the major part of such service must be performed on a farm. The House recedes.

Amendment No. 161: This amendment includes as agricultural labor, in addition to the services included in the House bill, service performed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes. The House recedes.

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Amendment No. 167: This amendment is complementary to amendments Nos. 97 and 98. Under section 606 of the House bill certain salesmen were included as employees for purposes of the old-age insurance tax, and by section 801 were included as employees for the purpose of receiving benefits under Title II. Senate amendments Nos. 97 and 98 struck out such extension of coverage for purposes of the tax and this amendment strikes out such extension for purposes of the benefits under Title II. It is believed inexpedient to change the existing law which limits coverage to employees. The House recedes.

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Amendment No. 171: This is a technical amendment to set at rest certain conflicting district court decisions, and provides that the collection of the full 3 per cent Federal tax (without allowance of the 90 per cent credit) from a bankrupt estate, which failed to qualify for credit, is not prohibited by section 57j of the Bankruptcy Act, as amended, which section provides that debts owing to the United States as a penalty or forfeiture shall not be allowed. There was no comparable provision in the House bill. The House recedes.

Amendment No. 172: This amendment merely conforms the reference in section 1428 of the Internal Revenue Code to the revision of the numbers of the paragraphs in section 1426(b) of such Code. The House recedes.

Amendment No. 173: This amendment is complementary to amendment No. 35 and imposes the old-age insurance tax on wages paid after December 31, 1938, with respect to employment after such date, to employees who have attained the age of 65. It provides that the liability of the employer for the employees' tax with respect to service performed prior to the enactment of this Act is limited to the amount of remuneration of such employee in the control of the employer at any time on or after 90 days after the enactment of this Act. There was no comparable provision in the House bill. The House recedes.

Amendment No. 174: This amendment extends the time within which certain States may effect the transfer of certain funds from the State's account in the unemployment trust fund to the railroad unemployment insurance account in the unemployment trust fund. This postponement will not deprive the railroad unemployment insurance account of any moneys to which it is entitled under the present provisions of the Railroad Unemployment Insurance Act. There was no comparable provision in the House bill. The House recedes.

Amendment No. 175: This amendment is complementary to amendments Nos. 35 and 173. It provides that where the employees' tax with respect to the year 1939 has not been deducted from the employee over 65 and where the employer has not paid the employee's tax for such employee's employment in 1939, deduction of an amount equal to the employee's tax, without interest, would be made from his monthly benefits or other benefits payable with respect to his wages. There was no comparable provision in the House bill. The House recedes.

Amendment No. 176: This amendment authorizes the establishment of an advisory council on unemployment insurance to study certain specified matters concerning unemployment insurance and make a report thereon. There was no comparable provision in the House bill. The Senate recedes.

Amendment No. 177: This amendment authorizes the establishment of an advisory council on disability insurance to make a study of disability insurance and report thereon. There was no comparable provision in the House bill. The Senate recedes.

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Amendment No. 179: This amendment extends coverage to individuals employed by certain Federal savings and loan associations affiliated with the Federal Home Loan Banks, who would otherwise be excluded from the old-age insurance benefits, the Federal Insurance Contributions Act, and the Federal Unemployment Tax Act, since under the Home Owners' Loan Act they are exempt from taxes imposed by the United States. There was no comparable provision in the House bill. The House recedes.

Amendment No. 180: This amendment relates to section 213(f) of the Revenue Act of 1939, which deals with the assumption of liability in certain tax-free exchanges. There is no comparable provision in the House bill. Section 213(f) of the Revenue Act of 1939 retroactively amended the Revenue Acts of 1924 through 1938 to provide that the assumption of a liability or the acquisition of property subject to a liability in certain tax-free exchanges should not result in gain to be taxed at the time of the exchange, except in cases where by a previous decision of a court or of the Board of Tax Appeals, or under a closing agreement, gain was recognized to the transferor of property in the tax-free exchange by reason of such an assumption or acquisition by the transferee. The Senate amendment removes from that exception a case in which gain was recognized to a corporate transferor by a court or Board decision, the basis to the transferee of the property acquired by it in the exchange was fixed at cost under the applicable Revenue Act, and the corporate taxpayer liquidated immediately subsequent to the exchange. As the period of limitations may have expired with respect to the filing of a refund claim in such a case, the amendment provides one year from the date of enactment of the Revenue Act of 1939 within which to file a refund claim. The House recedes with an amendment which provides that no interest shall be allowed or paid on the amount of any overpayment refunded or credited by reason of the provisions of this section.

Amendment No. 181: This amendment extends the time to December 31, 1939, for the filing of claims for refunds under subsection (d) of section 602 of the Revenue Act of 1936, as amended. There was no comparable provision in the House bill. The House recedes.

Amendment No. 182: This amendment provides that after 1940 the provisions of the Social Security Act shall not be applicable to foreign-born aliens. It also provides for refunds of any taxes they may have paid under such Act, and that any employer using alien labor shall pay a special privilege tax equivalent to that collected from American citizens. Subsection (b) of the amendment prohibits the payment of any old-age insurance benefit to any individual while such individual is not a resident of the United States or its possessions unless such individual resides within 50 miles of the United States. There was no comparable provision in the House bill. The Senate recedes.

The managers on the part of the House desire to state that the changes made by this bill with respect to agricultural labor do not take effect until January 1,

1940, and therefore have no effect whatsoever on any litigation now in the courts with respect to what constitutes agricultural labor under present law.

The managers on the part of the House also desire to state that there are two very important proposals to which the conferees gave a great deal of attention. These are the so-called Connally amendment, providing for greater Federal matching in the case of old-age assistance, and the Massachusetts plan which would enable the States to make a State-wide reduction in unemployment compensation contribution rates under certain conditions. The conferees believe that a comprehensive study of the subject matter covered by these two proposals should be undertaken which will enable the Congress to deal more intelligently with the problems involved than is possible at the present time.

R. L. DOUGHTON,
THOS. H. CULLEN,
JOHN W. MCCORMACK,
JERE COOPER,
ALLEN T. TREADWAY,
FRANK CROWTHER,
THOMAS A. JENKINS,
Managers on the part of the House.

1939–47–10098

THE SOCIAL SECURITY BILL.

[House of Representatives Report No. 615, Seventy-fourth Congress, First Session.]

[April 5, 1935.]

Mr. Doughton, from the Committee on Ways and Means, submitted the following report [to accompany H. R. 7260]:

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PART I. GENERAL STATEMENT.

CONTENTS OF BILL.

This bill provides for various grants-in-aid to the States; establishes a Federal old-age benefit system and a Social Security Board; and imposes certain taxes, hereinafter described.

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Title VIII: An income tax, measured by a certain percentage of wages (beginning with 1 per cent in 1937 and increasing to 3 per cent by 1949), is levied on most wage earners, with certain large groups, such as domestic servants and agricultural laborers, exempted. An excise tax, measured at the same rates on wages paid, is levied on employers, with similar exemptions. These taxes first take effect on January 1, 1937.

Title IX: An excise tax is levied on employers of 10 or more persons (with certain exemptions), measured by 1 per cent of wages payable for 1936 and increasing to 3 per cent by 1938. This tax goes into effect on January 1, 1936, and is first payable a year later. Credits against the tax are allowed for contributions which the taxpayer may have made to State unemployment funds under State unemployment compensation laws.

Title X: This title contains general definitions and miscellaneous provisions applying to the whole Act.

HISTORY OF LEGISLATION.

Legislation on the subject of social security was promised the country in a Presidential message of June 8, 1934, in which he said:

"Our task of reconstruction does not require the creation of new and strange values. It is rather the finding of the way once more to known, but to some degree forgotten, ideals and values. If the means and details are in some instances new, the objectives are as permanent as human nature.

"Among our objectives I place the security of the men, women, and children of the Nation first.

"This security for the individual and for the family concerns itself primarily with three factors. People want decent homes to live in; they want to locate them where they can engage in productive work; and they want some safeguard against misfortunes which can not be wholly eliminated in this man-made world of ours."

Subsequently, the President (by Executive order) created the Committee on Economic Security, composed of the Secretary of Labor (chairman), the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, and the Federal Emergency Relief Administrator, instructing the committee to study the entire problem and to make recommendations which might serve as the basis for consideration of legislation by the present Congress.

The Committee on Economic Security devoted six months to this study in which it was assisted by a staff of specialists and by 14 advisory groups, representative of every interest concerned with the problems of economic security, including capital, labor, and the general public. * * * The committee made a unanimous report to the President in January of this year, which the President transmitted to both Houses of the Congress, with his indorsement of the legislation recommended therein, in a special message on January 17, 1935 the concluding paragraphs of which were as follows:

"The establishment of sound means toward a greater future economic security of the American people is dictated by a prudent consideration of the hazards involved in our national life. No one can guarantee this country against the dangers of future depressions but we can reduce these dangers. We can eliminate many of the factors that cause economic depressions, and we can provide the means of mitigating their results. This plan for economic security is at once a measure of prevention and a method of alleviation.

"We pay now for the dreadful consequence of economic insecurity—and dearly. This plan presents a more equitable and infinitely less expensive means of meeting these costs. We can not afford to neglect the plain duty before us. I strongly recommend action to attain the objectives sought in this report."

These recommendations were incorporated in H. R. 4120, on which this committee held extended hearings from January 21 to February 12, at which more than 1,000 pages of testimony were taken. Since the conclusion of the hearings the measure has received the constant attention of the committee until the present moment, and numerous changes in the content and form were agreed upon. These changes involved a complete revision resulting in the drafting and introduction of H. R. 7260, herewith recommended for passage.

PURPOSE AND SCOPE.

The need for legislation on the subject of social security is apparent at this time. On every hand the lack of such security is evidenced by human suffering, weakened morale, and increased public expenditures.

This situation necessitates two complementary courses of action: We must relieve the existing distress and should devise measures to reduce destitution and dependency in the future.

Thus far in the depression, we have merely attempted to relieve existing distress, but the time has come for a more comprehensive and constructive attack on insecurity. The foundations of such a program are laid in the present bill.

Work for the employables on relief is contemplated in the work-relief bill; a second vital part of the program for security is presented in this bill. The bill is designed to aid the States in taking care of the dependent members of their population, and to make a beginning in the development of measures which will reduce dependency in the future. It deals with four major subjects: Old-age security, unemployment compensation, security for children, and public health. These subjects are all closely related, all being concerned with major causes of dependency. Together they constitute an important step in a well-rounded, unified, long-range program for social security.

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UNEMPLOYMENT COMPENSATION.

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The failure of the States to enact unemployment insurance laws is due largely to the fact that to do so would handicap their industries in competition

with the industries of other States. The States have been unwilling to place this extra financial burden upon their industries. A uniform, Nation-wide tax upon industry, thus removing this principal obstacle in the way of unemployment insurance, is necessary before the States can go ahead. Such a tax should make it possible for the States to enact this socially desirable legislation.

This is one of the purposes of Title IX of this bill. In this title a tax is imposed upon employers throughout the country against which a credit is allowed of up to 90 per cent of the tax for contributions made by employers to unemployment compensation funds established pursuant to State law.

That this tax is imposed on employers is indicative of the conviction that employers should bear at least a part of the cost of unemployment compensation, just as they bear the cost of workmen's compensation. Each State is, of course, free to assess not only employers but employees; and in this connection it may be noted that in European countries, and under the law recently passed by the State of Washington, employees are required to contribute.

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TAXES.

There are three taxes imposed in the bill:

(1) An income tax on wage earners, beginning in the year 1937 at a rate of 1 per cent of wages, and increasing to 3 per cent in 1949. Large groups of wage earners are, for administrative reasons, excluded from the operation of this tax, but more than one-half of the total number of gainful workers are covered.

TABLE VIII.—*Estimate of number of employees covered under the tax provided in Title VIII.*

[Based upon 1930 Census.]

Total number of gainful workers		48,830,000
Total number of owners, operators, self-employed (including the professions)		12,087,000
Total of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers)		9,389,000
Total number of workers in eligible occupations		27,354,000
Excluded:		
Casuals	500,000	
Over 65	1,050,000	
		1,550,000
Estimated coverage		25,804,000

(2) An excise tax on employers, with certain exemptions, based on wages paid. This tax, like the income tax imposed in this title, will become operative in 1937 at 1 per cent of wages, increasing thereafter; and again, for administrative reasons, there are numerous exemptions.

TABLE IX.—*Revenue estimates (from taxes on employees and employers imposed by Title VIII, sections 801 and 804).*[1]

Combined rate of tax.	Fiscal year received into Treasury.	Estimated fiscal year receipts.	Combined rate of tax.	Fiscal year received into Treasury.	Estimated fiscal year receipts.
2 per cent	1937	$278,800,000	4 per cent	1944	$1,185,900,000
2 per cent	1938	560,200,000	4 per cent	1945	1,196,900,000
2 per cent	1939	565,600,000	5 per cent	1946	1,359,400,000
3 per cent	1940	714,600,000	5 per cent	1947	1,523,300,000
3 per cent	1941	864,800,000	5 per cent	1948	1,536,900,000
3 per cent	1842	873,000,000	6 per cent	1949	1,706,300,000
4 per cent	1943	1,028,800,000	6 per cent	1950	1,877,200,000

[1] Each of the two taxes is estimated to produce one-half of the total receipts shown.

(3) An excise tax on employers who maintain comparatively large establishments, levied in Title IX and mentioned heretofore in this report, in connection with the discussion of unemployment compensation.

TABLE X.—*Estimate of number of employees covered under the tax provided in Title IX.*

[Based upon 1930 Census.]

Total number of gainful workers	48, 830, 000
Total number of owners, operators, self-employed (including the professions)	12, 087, 000
Total number of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers)	9, 389, 000
Total number of workers in eligible occupations	27, 354, 000
Estimated number of workers attached to establishments with nine or less employees	5, 400, 000
Estimated number of workers attached to establishments of 10 and more employees (including unemployed) April, 1930	21, 954, 000
Average 1936 (4 per cent increase)	22, 858, 000

The actual number of employees covered by the tax would be considerably smaller than 22,858,000 due to unemployment. All workers employed during a part of the year, however, in establishments covered by the tax, would be covered with respect to that employment.

TABLE XI.—*Revenue estimates (from tax on employers of 10 or more under Title IX, with no allowance for 90 per cent credit).*

Calendar year with respect to which tax is levied.	Fiscal year received into Treasury.	Estimated receipts.	Rate of tax.	Calendar year with respect to which tax is levied.	Fiscal year received into Treasury.	Estimated receipts.	Rate of tax.
			Per cent.				*Per cent.*
1936	1937	$228, 000, 000	1	1940	1941	$820, 000, 000	3
1937	1938	501, 000, 000	2	1942	1943	846, 000, 000	3
1938	1939	786, 000, 000	3	1945	1946	872, 000, 000	3
1939	1940	803, 000, 000	3	1950	1951	906, 000, 000	3

NOTE.—The tax levied by Title IX is subject to a credit of 90 per cent of the amount of such tax for contributions into State unemployment funds. Therefore the minimum amount of revenue each year from this tax will be 10 per cent of the above amounts. What part of the above estimates, greater than 10 per cent of same, will be retained by the Treasury is problematical, being dependent on the number of States enacting unemployment insurance laws, and the rates and coverage thereof.

Practically no objections have been made to the imposition of the taxes levied in this bill. What objections have been offered overlook the fact that the initial rates are very low. The only tax in the year 1936 (which is not payable until 1937) is the 1 per cent excise tax on employers of 10 or more employees against which a credit is allowed for payments made under State unemployment compensation laws. In 1937 the other taxes will also come into operation, but only at the rate of 1 per cent upon employers.

Excise taxes measured by pay roll will normally be added to prices. But again, the effects are often exaggerated. The direct labor cost of all manufactured commodities represents on the average about 21 per cent of the value of the product. Taxes of 1, 2, and 3 per cent, and even the ultimate 6 per cent (not reached until 1949) will, thus, increase the selling price not by these percentages, but by much less than these figures.

Taxes on pay rolls and wages are imposed in all unemployment-compensation systems the world over. Taxes on pay rolls for this purpose are justified because unemployment compensation is a legitimate part of the costs of production, as has long been recognized in the case of workmen's compensation for industrial accidents (the costs of which are, likewise, always computed on a pay-roll basis). Unemployment compensation belongs in the same category with wages, and it is no more than right that the consumers should bear this cost, as is the case with all other costs of production.

In this connection it must not be forgotten that employers and consumers must ultimately foot a large part of the bill for the relief of destitution. Federal, State, and local taxes and public indebtedness have been greatly increased by the tremendous problem of relief. This program will necessarily reduce this

great load for public taxes now required for relief purposes. If the measures we propose will reduce dependency, as we expect, the burden upon employers and consumers may well be smaller than it is at present.

CONCLUSION.

The proposals in this bill are forward looking. This bill is not to be considered a cure-all, nor a complete measure for economic security. It will doubtless have to be supplemented in the course of time, as has been the history of all other major new legislation. But it makes a beginning toward economic security which has been long overdue.

This beginning is made along lines which are in accord with our American institutions and traditions. It is not class legislation, but a measure which will benefit the entire public. While humanely providing for those in distress, it does not proceed upon the destructive theory that the citizens should look to the Government for everything. On the contrary, it seeks to reduce dependency and to encourage thrift and self-support.

From the governmental point of view this bill contemplates a united attack upon economic insecurity by the Federal and State Governments. It does not vest dictatorial powers in any Federal officials.

Of all major countries the United States is the last to give serious consideration to a comprehensive system of social insurance and related measures for economic security. The experience of this country in the trying years of the depression has amply demonstrated the need for making a sound beginning in the development of such a program. As the President recommended, this bill should by all means be enacted into law at this session.

PART II. EXPLANATION OF THE BILL.

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TITLE VIII. TAXES WITH RESPECT TO EMPLOYMENT.

This title levies two taxes. The first is an income tax on employees and the second an excise tax on employers.

INCOME TAX ON EMPLOYEES.

Section 801: This section imposes a tax upon the income of every individual measured by the wages received by him with respect to employment after December 31, 1936. The tax does not apply to all wages but only applies to wages as defined in section 811 of the bill. Likewise section 811 restricts the application of the tax to employment as therein defined. The rates of tax are as follows:

	Per cent.
For the calendar years 1937, 1938, and 1939	1
For the calendar years 1940, 1941, and 1942	1½
For the calendar years 1943, 1944, and 1945	2
For the calendar years 1946, 1947, and 1948	2½
For the calendar year 1949 and subsequent calendar years	3

DEDUCTION OF TAX FROM WAGES.

Section 802(a): This subsection requires the employees' tax to be collected at the source by requiring the employer to deduct the tax from the employee's wages at the time they are paid. To insure collection of the tax, the employer is made personally liable for it. His liability attaches to the correct amount of tax which he is required to deduct from the employee's wages, regardless of the amount actually deducted. To protect the employer, he is indemnified against any claims and demands with respect to that part of the wages of the employee which he withheld, up to the correct amount withheld and paid to the United States.

Section 802(b): In case the tax is underpaid or overpaid, adjustments are permitted to be made in connection with subsequent wage payments made by the employer to the employee. For instance, if the employee receives a salary of $100 per month for the calendar year 1937 and the employer by a mistake deducts 80 cents instead of $1, assuming this to be the correct amount of the

tax, the tax to be deducted from the next wage payment of the employee will be $1.20 instead of $1. On the other hand, if the employer deducts from the first wage payment in the same example $1.20 instead of $1, the tax to be deducted from the next wage payment will be 80 cents instead of $1. Such adjustments are to be made in accordance with regulations to be prescribed under this title.

DEDUCTIBILITY FROM INCOME TAX.

Section 803: Under section 23(c) of the Revenue Act of 1934 Federal income taxes are not allowed as a deduction in computing the income tax imposed by that Act. Since the tax on employees is a Federal income tax, this section makes it clear that such a tax is not deductible in computing the income tax imposed by the Revenue Act of 1934 or in computing a corresponding income tax imposed under any subsequent Revenue Act.

EXCISE TAX ON EMPLOYERS.

Section 804: This section imposes an excise tax upon every employer for the privilege of having individuals in his employ. The tax is measured by the wages paid to employees after December 31, 1936, with respect to employment after that date. As in the case of the tax on employees, the rate of tax on employers is as follows:

	Per cent.
For the calendar years 1937, 1938, and 1939	1
For the calendar years 1940, 1941, and 1942	1½
For the calendar years 1943, 1944, and 1945	2
For the calendar years 1946, 1947, and 1948	2½
For the calendar year 1949 and subsequent calendar years	3

Like the tax on employees under section 801, this tax does not apply to all wages or employments but only to those defined as such in section 811.

ADJUSTMENTS IN CASE OF MISTAKE BY EMPLOYER.

Section 805: This section permits the employer to correct errors in the tax reported in connection with any wage payment made to his employees by making proper adjustments in connection with subsequent wage payments. It is similar in principle to section 802(b) and the adjustments are to be made under regulations to be prescribed under this title.

REFUNDS AND DEFICIENCIES.

Section 806: This section relates to the tax imposed with respect to both employers and employees. If any part of the employer's or employee's tax is underpaid or overpaid and the error can not be adjusted in connection with subsequent payments, the underpayment is to be collected or the overpayment refunded under regulations prescribed under this title. Situations of this character will usually arise when an employee leaves the service of the employer so that it is impossible to make adjustments in subsequent wage payments.

COLLECTION AND PAYMENT OF TAXES.

Section 807(a): This subsection requires the tax due from employers and employees to be collected by the Bureau of Internal Revenue and to be deposited in the Treasury as internal-revenue collections.

Section 807(b): This subsection gives the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, authority to collect the taxes imposed with respect both to employers and employees by stamps, coupons, tickets, books, or other devices, or by requiring the making and filing of returns. The administrative provisions relating to the tax on pistols and revolvers imposed by section 600 of the Revenue Act of 1926, as well as the provisions relating to the stamp taxes imposed by section 800 of that Act, are also applicable to the taxes provided under this title with respect to both employers and employees. The administrative provisions are, therefore, not confined to those contained in sections 600 and 800 of the Revenue Act of 1926, but embrace all administrative provisions not otherwise inconsistent, applicable to the taxes imposed by such sections. For instance, the periods of limitation upon

assessment and collection set forth under section 1109 of the Revenue Act of 1926, as amended, also apply to the taxes levied under this title. Likewise the periods of limitation upon refunds and credits prescribed in section 3228 of the Revised Statutes will apply to the taxes under this title. If the tax or any part thereof is not paid when due, the unpaid portion will bear interest at the rate of 1 per cent per month from the time the tax became due until paid. The Board of Tax Appeals has no jurisdiction over these taxes. If they are not paid when due, they may be collected by distraint as provided in section 3187 of the Revised Statutes, leaving the taxpayer to his remedy by way of claim and suit for refund. In order that the employer, who collects and withholds the tax due from the employee, may be treated as a trustee or proceeded against by distraint, the provisions of section 607 of the Revenue Act of 1934 are also made to apply to this title. Section 607 of the Revenue Act of 1934 impresses the amount of taxes withheld or collected with a trust and makes applicable for the enforcement of the Government's claim the administrative provisions for assessing and collecting taxes.

For administrative reasons, a fractional part of a cent is disregarded unless it amounts to one-half cent or more, in which event it is treated as 1 cent. This corresponds to a similar provision appearing in the Revenue Acts.

RULES AND REGULATIONS.

Section 808: This section gives the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, authority to make and publish rules and regulations for the enforcement of this title.

SALE OF STAMPS BY POSTMASTERS.

Section 809: This section authorizes the sale of stamps, coupons, or other devices prescribed for the collection or payment of the taxes under this title by the various postmasters of the United States. The postmasters are required to deposit the receipts from such sales with the Postmaster General and render accounts to him at such time and in such form as he shall prescribe. The Postmaster General is given authority to require a bond from the various postmasters receiving such stamps or other devices in such increased amount as he may find necessary to protect the interests of the Government. The Postmaster General is required to transfer the receipts from the sale of such stamps or other devices monthly to the Treasury as internal revenue collections.

PENALTIES.

Section 810(a): This subsection imposes a fine of $10,000, or imprisonment for not more than six months, or both, for using, transferring, exchanging, or pledging any stamp or other device prescribed by the Commissioner of Internal Revenue for the collection or payment of the taxes under this title in any manner except as authorized by law or regulations made thereunder.

Section 810(b): This subsection imposes a fine of $5,000, or imprisonment for not more than five years, or both, in the following cases where there is an intent to defraud: (1) Altering, forging, or counterfeiting any stamp or other device prescribed by the Commissioner of Internal Revenue for the collection or payment of taxes due under this title; (2) using, selling, lending, or having in possession any such altered, forged, or counterfeited stamp or other device; and (3) making, using, selling, or having possession of any material in imitation of the material used in the manufacture of such stamp or other device.

DEFINITIONS.

Section 811(a): This subsection defines "wages." Wages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, such as room, board, etc. The term "wages" does not necessarily apply to the total remuneration received from the employer by the employee; the term includes only the first $3,000 of wages received by an employee from his employer with respect to employment during the calendar year. The following example will illustrate how the rule applies: Employer A pays employee B a salary of $500 a month beginning with the calendar year 1937. At the end of the sixth month B has received from his employer $3,000.

The balance of his salary for 1937 is not subject to taxation either with respect to the employer's tax or the employee's tax. However, this is only the case where the employee continues in the employment of the same employer throughout the year. If the employee leaves the service of employer A on June 30, 1937, and enters the service of employer C on that date and continues with employer C at the same salary throughout the remainder of the year, both employer C and employee B will be liable for the tax in respect of the wages received during the remaining portion of the calendar year 1937.

Section 811(b): This subsection defines the term "employment" as any service of whatever nature performed within the United States by an employee for his employer. It should be noted in this connection that section 1001(a)6 includes in the definition of "employee" an officer of a corporation. For instance, resident and nonresident aliens performing services within the United States are subject to the tax under this title. On the other hand, service performed outside the United States, whether by a citizen of the United States or by a nonresident alien, is not subject to the tax. The term "United States" is defined in section 1001(a)2 to include the States, Alaska, Hawaii, and the District of Columbia. Due to the difficulties in collecting the tax in the case of certain kinds of employment, the following services are exempt from taxation even though performed within the United States: (1) Agricultural labor; (2) domestic service in a private home; (3) casual labor not in the course of the employer's trade or business. This would not exempt casual labor performed in the course of an employer's trade or business. For instance, if a department store employed emergency help during the rush season in connection with its trade or business, the services performed by such help would not be exempt from taxation under this title; (4) services performed by an officer or a member of a crew on a vessel documented under the laws of the United States or of any foreign country are also exempt from the taxes imposed by this title. The administrative difficulty of following the wages of officers and seamen of crews was regarded as almost insurmountable. For instance, unless this exemption were granted, it would be necessary to keep track of the wages of Chinese coolies working on American ships.

Exemption from taxation under this title is also granted in the case of Federal and State or political subdivision employees.

Services performed in the employ of religious, charitable, scientific, literary, or educational institutions, no part of the net earnings of which inures to the benefit of any private shareholder or individual, are also exempt from the tax imposed by this title. For the purpose of determining whether such an organization is exempt, the use to which the income is applied is the ultimate test of the exemption rather than the source from which the income is derived. For instance, if a church owns an apartment building from which it derives income which is devoted to religious, charitable, educational, or scientific purposes, it will not be denied the exemption. The organizations which will be exempt from such taxes are churches, schools, colleges, and other educational institutions not operated for private profit, the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Salvation Army, and other organizations which are exempt from income tax under section 101(6) of the Revenue Act of 1932.

Exemption is likewise granted from taxation under this title in the case of individuals who have attained the age of 65 years.

Tax IX. Tax on Employers of 10 or More.

This title levies upon employers an excise tax payable annually, measured by wages, and allows each taxpayer to credit against his tax the amount of contributions he has paid under State unemployment compensation laws.

IMPOSITION OF TAX.

Section 901: An annual excise tax is imposed on each employer (as defined in section 907) on the privilege of having individuals in his employ. His tax, payable annually, will be at a rate of 1 per cent of the total wages payable by him with respect to employment (as defined in section 907) in the calendar year 1936. This means that the tax is measured by wages which are payable as remuneration for services performed during that calendar year, regardless of the time when the actual payment is made.

The rate of tax, after being 1 per cent for the year 1936, shall increase to 2 per cent for 1937, and 3 per cent thereafter.

CREDIT AGAINST TAX.

Section 902: A taxpayer may credit against his tax the total amount of contributions he has paid to State unemployment compensation funds in accordance with State unemployment compensation laws. The credit against the tax measured by wages payable with respect to employment in a calendar year will be allowed only for contributions which themselves are paid (before the date for filing the tax return under this title for such year) with respect to employment in such year.

The total credit which a taxpayer may claim against his tax for any year shall not be more than 90 per cent of the tax. Thus if the tax is $100 the total credit which may be claimed can not be more than $90, even though the total amount of contributions may be greater than that.

CERTIFICATION OF STATE LAWS.

Section 903: (a) Credit shall be allowed only for contributions made under the laws of States certified for the taxable year under section 903.

(b) If any State law, submitted to the Social Security Board, fulfills the conditions enumerated in this section, the Board shall within 30 days approve the law, and shall notify the State governor of its action. On December 31 of each year, each State which has an approved law shall be certified by the Board to the Secretary of the Treasury, unless in the meantime the Board finds that the State has changed its law in some material respect, or has failed substantially to fulfill any of the enumerated conditions. The Board is under the duty to warn the governor of the State whenever it has reason to believe that in spite of having an approved law a State may not be certified at the end of the year.

A State law to be approved must provide that:

(1) All unemployment compensation is to be paid through public-employment offices in the State.

(2) No compensation shall be payable with respect to any day of unemployment occurring before the expiration of two years after the first day of the first period with respect to which contributions are required. For example, if March 15, 1936, is the beginning of the first period with respect to which contributions are required under the State law, then no compensation may be paid for any day of unemployment occurring before March 15, 1938.

(3) All the money paid into the State unemployment fund (whether paid as contributions for employers or paid in by employees or contributed by the State itself) shall promptly be paid over to the Secretary of the Treasury to the credit of the unemployment trust fund established by section 904.

(4) All the money withdrawn from the unemployment trust fund by the State agency shall be used solely in the payment of compensation; none of it may be used to meet administrative costs.

(5) A person otherwise eligible for compensation shall not be denied it on the ground that he has refused to take a new job when his denial is due to the fact that the position offered to him is vacant directly to a strike, lockout, or other labor dispute, or is due to the fact that the wages, hours, or other conditions of the work offered are substantially less favorable than those prevailing for similar work in the locality, or that, as a condition of taking or retaining the new job, he would have to join a company union, or would have to resign from a labor organization, or would have to agree not to join a labor organization.

(6) The State law must contain a provision indicating that any rights, privileges or immunities conferred under it may be taken away by the subsequent amendment or repeal of the law.

UNEMPLOYMENT TRUST FUND.

Section 904: Subsection (a) of this section establishes in the Treasury of the United States a trust fund with the Secretary of the Treasury as trustee and with the respective State agencies, administering the State unemployment compensation laws, as beneficiaries of the trust. The Secretary of the Treasury is directed to receive and hold in such fund all moneys deposited with him or with any Federal reserve bank or member bank of the Federal Reserve System designated by him to receive such deposits, by such State agencies.

Under subsection (b) it is the duty of the Secretary of the Treasury to invest the fund (except such part as is, in his opinion, required to meet current withdrawals) in interest-bearing obligations of the United States or in obligations

guaranteed as to both principal and interest by the United States. In order to provide suitable investments for this purpose, authority is given for the issuance of special obligations to the fund from time to time as required. Such obligations shall bear an interest rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public debt; except that where such average rate is not a multiple of one-eighth of 1 per cent, the rate of interest shall be the multiple of one-eighth of 1 per cent next lower than such average rate. In addition to such special obligations, outstanding obligations may be purchased at the market price, and original issues may be acquired at par, if the yield thereupon will be not less than the yield which would be required in the case of special obligations. Such special obligations (under the provisions of subsection (c)) may be redeemed at par plus accrued interest, while all other obligations may be sold at the market price.

Subsections (d) and (e) provide that the fund shall be invested as a single fund, but that the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly to each such account a proportionate part of the earnings of the fund for such quarter.

The Secretary of the Treasury (under subsection (f)) is directed to pay out of the amount to the credit of a State agency such amounts as the State agency shall duly requisition, not to exceed the amount standing to the credit of such State agency.

ADMINISTRATION, REFUNDS, AND PENALTIES.

Section 905: Subsection (a) of this section provides that the tax shall be collected by the Bureau of Internal Revenue and shall be paid into the Treasury as internal-revenue collections.

Subsection (b) requires returns of the tax to be made by each employer not later than January 31 of each year in respect to employment in the preceding calendar year.

Subsection (c) makes the returns filed under this title open to inspection according to the rules laid down for income-tax returns under the Revenue Act of 1926.

Subsection (d) allows the taxpayer to pay his tax in equal quarterly installments as is the case with the Federal income tax.

Subsection (e) gives the Commissioner the right to give extensions of time for the payment of tax or installments thereof, and subsection (f) provides that in the payment of tax a fractional part of a cent shall not be counted unless it amounts to one-half cent or more, in which case it shall be counted as 1 cent.

INTERSTATE COMMERCE.

Section 906: This section provides that no person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.

DEFINITIONS.

Section 907: The definitions set up by this section are very important in connection with the application and scope of the entire title. They are as follows:

(*a*) Employer: The term "employer" includes only those persons who, in each of at least 20 weeks in the year, have a total number of 10 or more employees. This means that if on 1 day a week for 20 weeks (which need not be consecutive) there are 10 employees, the employer is covered. The employees (who need not necessarily be the same people) need not all be employed at the same moment; it is enough if during the day the total number is at least 10. The employees are not counted unless they are employed in "employment" as defined in this section.

(*b*) Wages: The term "wages" is defined to mean all remuneration for employment, including the cash value of all remuneration paid in any other medium than cash. That is, in addition to money payments, it includes payments in kind, rent, food, lodging, etc.

(*c*) The term "employment" is defined to mean any service performed within the United States by an employee for his employer with the following exceptions:

(1) Agricultural labor.
(2) Domestic service in a private home.
(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States. (This does not exempt the services of longshoremen and others who work in connection with loading vessels.)
(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under 21 in the employ of his parent.
(5) Service performed in the employ of the United States Government or of an instrumentality of the United States.
(6) Service performed in the employ of a State, or political subdivision thereof, or an instrumentality of one or more States or political subdivisions.
(7) Service performed in the employ of corporations or organizations organized exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which accrue to any private individual or shareholder.
If the service is within the excepted classes, the employer is exempt from tax on the wages payable with respect to such service.
(*d*) The term "State agency" is defined to mean any State officer, board, or other authority, designated under a State law to administer the State unemployment fund.
(*e*) The term "unemployment fund" is defined to mean a special fund, established by State law and administered by a State agency, for the payment of unemployment compensation. It is required that the assets of the fund be mingled and undivided, and that no separate account be maintained with respect to any person.
(*f*) The term "contributions" is defined to mean payments required to be made by an employer under a State law into an unemployment fund, except that any payments which have been or may be deducted from the wages of the individuals in his employ are not to be considered as contributions under the definition.
(*g*) The term "compensation" is defined to mean cash benefits payable to individuals with respect to their unemployment.

RULES AND REGULATIONS.

Section 908: This section authorizes and directs the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make and publish such rules and regulations for the enforcement of this title as are necessary. The exception is made, however, that the authorization and direction above noted do not apply to section 903, relating to certification of State laws, and to section 904, relating to the unemployment trust fund.

TITLE X. GENERAL PROVISIONS.

DEFINITIONS.

Section 1001 contains definitions of "State," "United States," "person," "corporation," "shareholder," and "employee."
Section 1001(d) provides that nothing in this Act shall be construed as authorizing any Federal official in carrying out the provisions of this Act to take charge, in violation of the law of a State, of any child over the objection of the parents.

RULES AND REGULATIONS.

Section 1002 provides for the making of regulations by the Secretary of the Treasury, the Secretary of Labor, and the Social Security Board, respectively, for carrying out the functions with which each is charged.

SEPARABILITY.

Section 1003 is the usual separability clause.

RESERVATION OF POWER.

Section 1004 reserves to Congress the right to alter, amend, or repeal any portion of the Act.

SHORT TITLE.

Section 1005 provides that the Act may be cited as the "Social Security Act."

1939-48-10106

THE SOCIAL SECURITY BILL.

[Senate Report No. 628, Seventy-fourth Congress, First Session.]

[May 13 (calendar day, May 20), 1935.]

Mr. Harrison, from the Committee on Finance, submitted the following report [to accompany H. R. 7260]:

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PART I. GENERAL STATEMENT.

CONTENTS OF THE BILL.

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Title VIII. Taxes with respect to employment.
Title IX. Tax upon employers of four or more.

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Title XII. General provisions.

As the titles of the bill indicate, it consists of a series of related measures designed as a unified, well-rounded program of attack upon the principal causes of insecurity in our economic life. These measures may be divided into five broad fields: (1) Old-age security, (2) unemployment compensation, (3) aid to dependent children, (4) public health measures, and (5) aid to the blind.

The principal causes of destitution and want of millions of American families, forcing them to rely upon public charity for an existence, are well known. They are unemployment, dependency in old age, loss of the wage earner of the family, and illness. Upon these major causes of dependency this bill makes a unified attack. Each measure is closely related to the others, and together they constitute a broad, practicable plan to safeguard the security of the American family.

The pressing need for social security legislation at this time is apparent on every hand. For the last five years we have been paying a frightful cost of insecurity in the toll of human suffering, weakened morale of our people, and mounting public expenditures for public charity. So far in the depression we have taken emergency steps, designed to relieve distress, and to take care of the immediate situation. The time has come for a comprehensive, constructive program to avoid the repetition of such a disaster in the future. The foundation for such a program is laid in this bill.

HISTORY OF THE LEGISLATION.

Nearly a year ago, on June 8, 1934, the President, in a message to the Congress, announced his intention to present at this session of Congress a program for social security. Shortly afterward, by Executive order, he created the Committee on Economic Security, consisting of the Secretary of Labor (chairman), the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, and the Federal Emergency Relief Administrator. This committee was instructed to study the whole aspect of insecurity in our economic life, and to make recommendations. Since that time the Committee on Economic Security has carried on extensive studies of the various problems involved, assisted by a staff of specialists and by 14 advisory groups of citizens, representing the various interests of society in security legislation. The Committee had the advice of many outstanding citizens of broad experience and expert information in the several aspects of the problem.

On January 17 of this year the President transmitted to both Houses of Congress the unanimous report of the Committee on Economic Security, with a message endorsing the recommendations made therein. Identical bills incorporating these recommendations were introduced in both Houses, upon which the Ways and Means Committee of the House and the Senate Finance Committee held extended public hearings in January and February. At these hearings representatives of all interests concerned were given a full opportunity to present their views. The published hearings of the Finance Committee of the Senate upon this measure

contain some 1,350 pages of printed testimony, and the hearings of the Ways and Means Committee of the House are of similar length. For more than four months this measure has been under active consideration in both Houses of Congress. Few legislative measures have ever received such thorough and extended consideration. H. R. 7260, passed by the House on April 19 of this year, is herewith reported with the following principal changes:

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6. The coverage of the tax upon employers in Title IX has been changed from employers having 10 or more employees, within 20 weeks during the year, to 4 or more employees, within 13 weeks during any year. This change has been made to avoid substantial administrative problems in connection with employers who may attempt to avoid the tax, and also to extend its coverage.

7. The requirement that State unemployment compensation funds shall be of the "pooled" type, in which all funds are mingled and undivided, as a condition to qualify for the credit against the Federal tax under Title IX, has been stricken. This will permit States to enact whatever type of unemployment compensation law they desire.

8. Two new sections have been inserted (909 and 910) to give additional credit to employers who, under State laws, are permitted to lower their rates of compensation because of favorable employment experience. These sections are designed to permit States to give an incentive to employers to stabilize employment.

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UNEMPLOYMENT COMPENSATION.

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Unemployment compensation is financed the world over through contributions measured as a percentage of pay roll. These contributions are required either from the employers alone, the employers and employees, or the employers, employees, and the State. While pay-roll contributions of this kind have sometimes been called "sales taxes" they are no more sales taxes than premiums paid for workmen's compensation insurance, which likewise are always measured on a pay-roll basis. Sales taxes are taxes upon consumption for the general support of Government, and are wholly unlike pay-roll contributions for unemployment compensation. Partial compensation during a relatively short period following unemployment, while a workman is seeking other employment or waiting to return to his old job, is very properly to be regarded as a part of the legitimate costs of production, to be paid for by the consumers.

This bill does not set up a Federal unemployment compensation system. What it seeks to do is merely to make it possible for the States to establish unemployment compensation systems and to stimulate them to do so. This objective is carried out through grants-in-aid to the States (in Title III) for the administration of unemployment compensation laws and through the imposition of a uniform pay-roll tax on employers (in Title IX) against which a credit is allowed for contributions made by them to unemployment compensation funds set up pursuant to State law.

The rate of the Federal tax is 1 per cent for the year 1936, 2 per cent for 1937, and 3 per cent in 1938 and thereafter. No tax will actually be payable, however, until 1937. Against the tax a credit is allowed up to 90 per cent of the tax for contributions to State unemployment compensation funds, which are established under laws which meet the conditions prescribed in section 903. These conditions do not prescribe what sort of unemployment compensation laws the States shall enact; they are intended merely to make certain that the States actually have unemployment compensation laws, rather than mere relief measures. In States which have genuine unemployment compensation laws the employers can present as a credit against the Federal tax the contributions which they have made to the unemployment compensation funds of these States. This credit, however, is allowed only up to 90 per cent of the Federal tax, 10 per cent being payable into the Federal Treasury in any event.

This tax offset device is modeled after the provision in the Federal estate tax law, under which a credit is allowed up to 80 per cent of the Federal tax for

amounts paid under State inheritance tax laws. With a uniform tax and this offset device, employers in all States will be put in an equal competitive position. No State can gain any advantage through failing to establish an unemployment compensation system. This provision will equalize competitive conditions and thus enable States to enact unemployment compensation laws without handicapping their industries.

The interest throughout the country in unemployment compensation is such that it is to be expected that nearly all States will enact unemployment compensation laws within a very short time. Five States already have such laws and in 10 or more States the legislatures are still in session and are prepared to act upon this subject as soon as the Federal bill has become law. In other States action can be taken in special sessions to be held later in the year. That this involves no great hardship is indicated by the fact that in 1933, 35 States had special sessions of their legislatures, and 32 in 1934.

Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington. The States may or may not add employee contributions to those required from the employers. Of the five States which have thus far enacted unemployment compensation laws, two require employee contributions, and three do not. Likewise, the States may determine their own compensation rates, waiting periods, and maximum duration of benefits. Such latitude is very essential because the rate of unemployment varies greatly in different States, being twice as great in some States as in others.

Under the bill, as we recommend that it be amended, the States will also have freedom of choice with regard to the type of unemployment compensation law they wish to enact. Three different types are represented in the five laws thus far enacted. In the New York and the Washington laws, there is a pooled unemployment insurance fund, in which all contributions are commingled and from which payments of compensation are made to unemployed workmen without reference to the employer for whom they work.

Utah and Wisconsin have unemployment compensation laws of the individual employer account type. In these laws the contributions of each employer are segregated, and payments of compensation therefrom are made only to workmen of these particular employers who become involuntarily unemployed. New Hampshire has still another type, providing for a pooled unemployment insurance fund from which all payments are made, but in which the employers' contributions are segregated (for accounting purposes only) and charged with their own costs, with a view toward readjustment of the rate of contributions which these respective employers must make to the pooled fund in accordance with their own experience. Under the House bill, all States are required to have pooled unemployment insurance funds. This would compel New Hampshire, Utah, and Wisconsin to drop their present laws and start all over again. In Wisconsin, it would require the return of the $5,000,000 collected during the past year for unemployment compensation purposes to the employers from whom collected, the workmen in that State losing the advantages of these reserves already accumulated.

There are good arguments to be made in favor of each of these types of unemployment compensation laws. In accordance with the entire spirit of the Social Security Act, we believe that the Federal Government should not attempt to dictate to the States which type of unemployment compensation law they should adopt. The amendment we suggest to the House bill will eliminate all such dictation and leave the States free to decide for themselves which type best suits their peculiar conditions.

To effectively carry out this purpose, we propose, as a further amendment, a provision that the Federal Government shall recognize credits in the form of lower contribution rates which may be granted by the States to employers who have stabilized their employment. Provisions for such credits are included in the New Hampshire, Utah, and Wisconsin laws. The Committee on Economic Security recommended that such credits should be recognized in the Federal law, subject to certain restrictions. The House eliminated this part of the committee's proposals, consistent with its determination to permit only one type of unemployment compensation law, namely, the pooled-fund type. As we deem it desirable to permit the States freedom of choice in this respect, we also

believe that the Federal law should provide for recognition of credits allowed by the States to employers who have regularized their employment. In his message dealing with the subject of social security, the President urged that unemployment compensation should be set up under conditions which will tend toward the regularization of employment. All unemployment can not be prevented by any employers, but many employers can do much more than they have done in the past to regularize employment. Everyone will agree that it is much better to prevent unemployment than to compensate it.

The same fundamental idea that unemployment compensation should be set up under conditions which will tend toward the stabilization of the employment, rather than the reverse, underlies another important feature of the plan recommended—that of vesting in the Federal Government the responsibility for the investment of all unemployment reserve funds. This method of handling the reserve funds was suggested by the President in his message of June 8, 1934, and again in his social security message of January 17, 1935. It was included in the House bill, and has not been changed by any amendment that we recommend.

The plan contemplated is that contributions to State unemployment compensation funds, whether of the pooled or individual employer account type, shall be deposited in the United States Treasury in a trust fund in which a separate account is to be maintained for each State which has an unemployment compensation law. The money so deposited is to be invested by the Treasury, and interest is to be paid thereon at a rate equal to the average rate of interest borne by all interest-bearing obligations of the United States, adjusted to the multiple of one-eighth of 1 per cent next lower to such average rate. The Treasury may invest these funds either in outstanding obligations of the United States or obligations which are guaranteed as to principal and interest by the United States, or may issue special nonnegotiable obligations bearing the specified rate of interest. When these reserve funds have to be liquidated, the Treasury does not necessarily have to sell the securities but can acquire them for the United States, or, in the case of the nonnegotiable certificates, merely cancel them as they are paid. The States can draw upon the unemployment trust fund solely for unemployment compensation purposes, but it is intended that they shall be able to get the amounts standing to their credit as needed.

It is contemplated that the withdrawals will be rather large amounts, the Treasury serving merely as the banker and trustee of the funds, while the States will make the actual payments of compensation to the individuals entitled thereto.

This method of handling the unemployment reserve funds recognizes the fact that demands upon such reserve funds will vary greatly with changing economic conditions. They will be drawn upon most heavily in the early stages of depression. At such times, if the reserve funds are not handled as required in this bill, it would be necessary to sell the securities in which they are invested. In the early stages of depression there is almost certain to be a glut in the security market. If at such times it is necessary to sell the securities in which the unemployment reserve funds are invested at any price they will bring, considerable losses are almost certain to be sustained and the net effect will be to increase the tendency toward deflation. Had unemployment compensation been inaugurated in 1922 throughout the country with a 3 per cent contribution rate, the reserve funds which would have been available when the depression set in in 1929 would have totaled at least $2,500,000,000. The dumping on the market of such an amount in securities in a period when there is already a pronounced tendency toward deflation, would offset any open-market operations of the Federal Reserve Board to maintain credit stability.

The plan provided in the bill avoids all of these difficulties. Securities will not have to be dumped on the markets in order that the reserve funds may be liquidated. Instead of increasing the tendency toward deflation, the handling of the reserve funds in the manner provided in the bill will make possible their use to promote stability. When depression sets in, the funds can be liquidated without actual sale of the securities on the markets, and, since they will be used to pay compensation to unemployed workmen, the net effect will be to maintain purchasing power without any offsetting effects toward deflation.

The proposals relating to unemployment compensation, viewed as a whole, are, we believe, practical and distinctly worth putting into operation. The depression has demonstrated how very costly it is to make no provisions for future unemployment. This country has expended far more for unemployment relief during this depression than the total expenditures of all other countries that

have unemployment compensation systems during the entire time these systems were in operation. Unemployment compensation will not completely eliminate the necessity for unemployment relief. To the extent, however, that unemployment reserves are accumulated, they will reduce the necessity for relief. In normal periods, unemployment compensation will provide a sufficient safeguard for most of the unemployment that will occur, and in depression periods, will very materially reduce the burden of relief costs. It will tend to maintain purchasing power at times when most needed, and should encourage the regularization of employment.

Unemployment compensation, under the plan we propose, will not involve any impossible burdens on employers, or materially increase costs to consumers. No Federal tax will be payable under Title IX until 1937, and the rate then will be only 1 per cent of the pay roll. The maximum rate under this title will be 3 per cent, which will not come into operation until the third year. Since this rate is computed upon the pay roll, it affects only the labor item in the cost of production. For all manufactured goods, the direct labor costs, as shown by the Census of Manufactures of 1933, averaged only 21 per cent of the value of the manufactured products. The total labor cost, including all stages of production and distribution, amounts to less than two-thirds of the consumer's cost. However, large groups of workers (agricultural workers, employees in small establishments, etc.) embracing approximately one-half of all gainful workers will not be brought under unemployment compensation. This means that, on the average, a 1 per cent contribution rate for unemployment compensation purposes will increase costs to the consumers by only about one-third of 1 per cent. Such small increased costs may well be offset by reductions in costs brought about through regularizing employment and maintaining the purchasing power of unemployed workers.

The present is a most opportune moment for launching unemployment compensation in this country. Not only is there great interest in the subject, but with improving industrial conditions, there is every prospect that considerable reserves can be built up in the next years. While many workmen are still unemployed, the turnover rate in industry is now much less than in the best years of the past decade. Should the establishment of unemployment compensation funds be delayed, the reserves which will be available when the next crisis comes will be correspondingly lessened and the burden of relief costs increased.

Unemployment compensation in this country has been long delayed. The principal explanation is that the States have not been able to establish unemployment-compensation laws because, in doing so, they would have been compelled to handicap their industries in competition with those of other States not having such laws. Under the plan proposed in this bill, this handicap will be removed, and it will be possible to set up unemployment-compensation laws through State action.

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TAXES.

Two types of taxes are levied in Title VIII, namely, (1) an income tax upon employees, and (2) an excise tax upon employers based upon wages paid. The provisions of these taxes are summarized in Table VIII and the estimated number of employees covered and the revenue receipts are given in the tables following.

TABLE VIII.—*Summary of provisions relating to taxes under Title VIII.*

COVERAGE (SECTION 811 (B)).

Employment in any service performed within the United States, Alaska, and Hawaii, or upon vessels documented under the laws of the United States, except:

1. Agricultural labor.
2. Domestic service in a private home.
3. Casual labor not in the course of employer's business.
4. Employees of the United States Government.
5. Employees of a State or political subdivision.
6. Employees of institutions operated for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, and which are not operated for profit.

RATES (WAGES OF ANY INDIVIDUAL IN EXCESS OF $3,000 PER YEAR NOT COUNTED).

Income tax on employees (section 801):	Per cent.
1937, 1938, and 1939	1
1940, 1941, and 1942	1½
1943, 1944, and 1945	2
1946, 1947, and 1948	2½
1949 and thereafter	3

Income tax on employees collected by employer by deducting the tax from wages. (Section 802a.)

Excise tax on employers (section 804):	Per cent.
1937, 1938, and 1939	1
1940, 1941, and 1942	1½
1943, 1944, and 1945	2
1946, 1947, and 1948	2½
1949 and thereafter	3

FEDERAL ADMINISTRATION.

Taxes collected by Bureau of Internal Revenue under direction of Secretary of Treasury and paid into United States Treasury as internal-revenue collections (section 807a).

Taxes collected either by making and filing returns or by stamps, coupons, tickets, books, or other reasonable devices or methods as prescribed by the Commissioner of Internal Revenue, who furnishes to the Postmaster General a suitable quantity to be kept on sale at post offices (section 809).

TABLE IX.—*Estimate of number of employees covered under the tax provided in Title VIII.*

[Based upon 1930 Census.]

Total number of gainful workers		48,830,000
Total number of owners, operators, self-employed (including the professions)		12,087,000
Total of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers)		9,389,000
Total number of workers in eligible occupations		27,354,000
Excluded:		
Casuals	500,000	
Over 65	1,050,000	
		1,550,000
Estimated coverage		25,804,000

TABLE X.—*Revenue estimates (from taxes on employees and employers imposed by Title VIII, sections 801 and 804).*[1]

Combined rate of tax.	Fiscal year received into Treasury.	Estimated fiscal year receipts.	Combined rate of tax.	Fiscal year received into Treasury.	Estimated fiscal year receipts.
2 per cent	1937	$278,800,000	4 per cent	1944	$1,185,900,000
2 per cent	1938	560,200,000	4 per cent	1945	1,196,900,000
2 per cent	1939	565,600,000	5 per cent	1946	1,359,400,000
3 per cent	1940	714,600,000	5 per cent	1947	1,523,300,000
3 per cent	1941	864,800,000	5 per cent	1948	1,536,900,000
3 per cent	1942	873,000,000	6 per cent	1949	1,706,300,000
4 per cent	1943	1,028,800,000	6 per cent	1950	1,877,200,000

[1] Each of the two taxes is estimated to produce one-half of the total receipts shown.

Title IX provides an excise tax upon employers of four or more employees, with certain classes exempted, starting at 1 per cent of wages paid in 1936, 2 per cent in 1937, and 3 per cent in 1938, and thereafter. A credit of up to 90 per cent of this tax is allowable for payments into State unemployment compensation funds meeting certain conditions. The details of this tax are set forth in the second part of this report, and the operation of the tax is discussed under the section above on unemployment compensation. The estimated number of employees covered and the revenue receipts are given in the tables below.

TABLE XI.—*Estimate of number of employees covered under the tax provided in Title IX.*

[Based upon 1930 Census.]

Total number of gainful workers	48,830,000
Total number of owners, operators, self-employed (including the professions)	12,087,000
Total of workers excluded because of occupation (farm labor, domestics, teachers, and governmental and institutional workers)	9,389,000
Total number of workers in eligible occupations	27,354,000
Estimated number of workers attached to establishments with 3 or less employees	2,600,000
Estimated number of workers attached to establishments of 4 and more employees (including unemployed) April, 1930	24,754,000
Average 1936 (4 per cent increase)	25,744,000

The actual number of employees covered by the tax would be considerably smaller than 25,744,000 due to unemployment. All workers employed during a part of the year, however, in establishments covered by the tax, would be covered with respect to that employment.

TABLE XII.—*Revenue estimates (from tax on employers of 4 or more under Title IX, with no allowance for 90 per cent credit).*

Calendar year with respect to which tax is levied.	Fiscal year received into Treasury.	Estimated receipts.	Rate of tax.
			Per cent.
1936	1937	$247,000,000	1
1937	1938	596,000,000	2
1938	1939	826,000,000	3
1939	1940	831,000,000	3
1940	1941	838,000,000	3
1942	1943	849,000,000	3
1945	1946	876,000,000	3
1950	1951	908,000,000	3

NOTE.—The tax levied by Title IX is subject to a credit of 90 per cent of the amount of such tax for contributions into State unemployment funds. Therefore the minimum amount of revenue each year from this tax will be 10 per cent of the above amounts. What part of the above estimates, greater than 10 per cent of same, will be retained by the Treasury is problematical, being dependent on the number of States enacting unemployment insurance laws, and the rates and coverage ther-

CONCLUSION.

The depression has demonstrated the great cost to the public, as well as to the victims, of the failure to make timely provision for social security. The vast amount of human suffering and the enormous relief costs, which inevitably will result in increased taxes, show conclusively the folly of failure to give thought to the security of men, women, and children.

Complete security is unattainable and it well may be doubted whether absolute security is desirable. That we must have a greater degree of security than has prevailed heretofore, however, if our social order is to endure, is tragically evident.

In the words of the President, a complete program of economic security, "because of many lost years, will take many future years to fulfill." The Social Security Act will not usher in the millennium. Like all major new legislation, it will doubtless, in the course of time, have to be supplemented and changed in many material respects. But, it represents a beginning which has long been overdue and whose effects, as far as they can be foreseen, will be distinctly beneficial.

There is nothing revolutionary in any of the innovations in this bill. Every measure proposed has been tested by world experience and found practical. And every measure proposed is in accord with the tried American institutions and traditions. Again to quote the President, we seek security "through tested liberal traditions, through processes which contain all the deep essentials of that republican form of government first given to a troubled world by the United States."

The Social Security Act has been evolved after thorough consideration and represents a minimum of what the American people have a right to expect from this Congress in the way of providing a greater measure of security. In our opinion it is, fundamentally, a sound measure which will go far toward realizing "the ambition of the individual to obtain for him and his a proper security, a reasonable leisure, and a decent living throughout life."

PART II. EXPLANATION OF THE BILL.

* * * * * * *

TITLE VIII. TAXES WITH RESPECT TO EMPLOYMENT.

This title levies two taxes. The first is an income tax on employees and the second an excise tax on employers.

INCOME TAX ON EMPLOYEES.

Section 801: This section imposes a tax upon the income of every individual measured by the wages received by him with respect to employment after December 31, 1936. The tax does not apply to all wages but only applies to wages as defined in section 811 of the bill. Likewise section 811 restricts the application of the tax to employment as therein defined. The rates of tax are as follows:

	Per cent.
For the calendar years 1937, 1938, and 1939	1
For the calendar years 1940, 1941, and 1942	1½
For the calendar years 1943, 1944, and 1945	2
For the calendar years 1946, 1947, and 1948	2½
For the calendar year 1949 and subsequent calendar years	3

DEDUCTION OF TAX FROM WAGES.

Section 802(a): This subsection requires the employees' tax to be collected at the source by requiring the employer to deduct the tax from the employee's wages at the time they are paid. To insure collection of the tax, the employer is made personally liable for it. His liability attaches to the correct amount of tax which he is required to deduct from the employee's wages, regardless of the amount actually deducted. To protect the employer, he is indemnified against any claims and demands with respect to that part of the wages of the employee which he withheld, up to the correct amount withheld and paid to the United States.

Section 802(b): In case the tax is underpaid or overpaid, adjustments are permitted to be made in connection with subsequent wage payments made by the employer to the employee. For instance, if the employee receives a salary of $100 per month for the calendar year 1937 and the employer by a mistake deducts 80 cents instead of $1, assuming this to be the correct amount of the tax, the tax to be deducted from the next wage payment of the employee will be $1.20 instead of $1. On the other hand, if the employer deducts from the first wage payment in the same example $1.20 instead of $1 the tax to be deducted from the next wage payment will be 80 cents instead of $1. Such adjustments are to be made in accordance with regulations to be prescribed under this title.

DEDUCTIBILITY FROM INCOME TAX.

Section 803: Under section 23(c) of the Revenue Act of 1934 Federal income taxes are not allowed as a deduction in computing the income tax imposed by that Act. Since the tax on employees is a Federal income tax, this section makes it clear that such a tax is not deductible in computing the income tax imposed by the Revenue Act of 1934 or in computing a corresponding income tax imposed under any subsequent Revenue Act.

EXCISE TAX ON EMPLOYERS.

Section 804: This section imposes an excise tax upon every employer for the privilege of having individuals in his employ. The tax is measured by the wages paid to employees after December 31, 1936, with respect to employment after that date. As in the case of the tax on employees, the rate of tax on employers is as follows:

	Per cent.
For the calendar years 1937, 1938, and 1939	1
For the calendar years 1940, 1941, and 1942	1½
For the calendar years 1943, 1944, and 1945	2
For the calendar years 1946, 1947, and 1948	2½
For the calendar year 1949 and subsequent calendar years	3

Like the tax on employees under section 801, this tax does not apply to all wages or employments but only to those defined as such in section 811.

ADJUSTMENTS IN CASE OF MISTAKE BY EMPLOYER.

Section 805: This section permits the employer to correct errors in the tax reported in connection with any wage payment made to his employees by making proper adjustments in connection with subsequent wage payments. It is similar in principle to section 802(b) and the adjustments are to be made under regulations to be prescribed under this title.

REFUNDS AND DEFICIENCIES.

Section 806: This section relates to the tax imposed with respect to both employers and employees. If any part of the employer's or employee's tax is underpaid or overpaid and the error can not be adjusted in connection with subsequent payments, the underpayment is to be collected or the overpayment refunded under regulations prescribed under this title. Situations of this character will usually arise when an employee leaves the service of the employer so that it is impossible to make adjustments in subsequent wage payments.

COLLECTION AND PAYMENT OF TAXES.

Section 807(a): This subsection requires the tax due from employers and employees to be collected by the Bureau of Internal Revenue and to be deposited in the Treasury as internal-revenue collections.

Section 807(b): This subsection gives the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, authority to collect the taxes imposed with respect both to employers and employees by stamps, coupons, tickets, books, or other devices, or by requiring the making and filing of returns. The administrative provisions relating to the tax on pistols and revolvers imposed by section 600 of the Revenue Act of 1926, as well as the provisions relating to the stamp taxes imposed by section 800 of that Act, are also applicable to the taxes provided under this title with respect to both employers and employees. The administrative provisions are, therefore, not confined to those contained in sections 600 and 800 of the Revenue Act of 1926, but embrace all administrative provisions not otherwise inconsistent, applicable to the taxes imposed by such sections. For instance, the periods of limitation upon assessment and collection set forth under section 1109 of the Revenue Act of 1926, as amended, also apply to the taxes levied under this title. Likewise the periods of limitation upon refunds and credits prescribed in section 3228 of the Revised Statutes will apply to the taxes under this title. If the tax or any part thereof is not paid when due, the unpaid portion will bear interest at the rate of one-half of 1 per cent per month from the time the tax became due until paid. The Board of Tax

Appeals has no jurisdiction over these taxes. If they are not paid when due, they may be collected by distraint as provided in section 3187 of the Revised Statutes, leaving the taxpayer to his remedy by way of claim and suit for refund. In order that the employer, who collects and withholds the tax due from the employee, may be treated as a trustee or proceeded against by distraint, the provisions of section 607 of the Revenue Act of 1934 are also made to apply to this title. Section 607 of the Revenue Act of 1934 impresses the amount of taxes withheld or collected with a trust and makes applicable for the enforcement of the Government's claim the administrative provisions for assessing and collecting taxes.

For administrative reasons, a fractional part of a cent is disregarded unless it amounts to one-half cent or more, in which event it is treated as 1 cent. This corresponds to a similar provision appearing in the Revenue Acts.

RULES AND REGULATIONS.

Section 808: This section gives the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, authority to make and publish rules and regulations for the enforcement of this title.

SALE OF STAMPS BY POSTMASTERS.

Section 809: This section authorizes the sale of stamps, coupons, or other devices prescribed for the collection or payment of the taxes under this title by the various postmasters of the United States. The postmasters are required to deposit the receipts from such sales with the Postmaster General and render accounts to him at such time and in such form as he shall prescribe. The Postmaster General is given authority to require a bond from the various postmasters receiving such stamps or other devices in such increased amount as he may find necessary to protect the interests of the Government. The Postmaster General is required to transfer the receipts from the sale of such stamps or other devices monthly to the Treasury as internal revenue collections.

DEFINITIONS [SIC] PENALTIES.

Section 810(a): This subsection imposes a fine of $10,000, or imprisonment for not more than six months, or both, for using, transferring, exchanging, or pledging any stamp or other device prescribed by the Commissioner of Internal Revenue for the collection or payment of the taxes under this title in any manner except as authorized by law or regulations made thereunder.

Section 810(b): This subsection imposes a fine of $5,000, or imprisonment for not more than five years, or both, in the following cases where there is an intent to defraud: (1) Altering, forging, or counterfeiting any stamp or other device prescribed by the Commissioner of Internal Revenue for the collection or payment of taxes due under this title; (2) using, selling, lending, or having in possession any such altered, forged, or counterfeited stamp or other device; and (3) making, using, selling, or having possession of any material in imitation of the material used in the manufacture of such stamp or other device.

DEFINITIONS.

Section 811(a): This subsection defines "wages." Wages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, such as room, board, etc. The term "wages" does not necessarily apply to the total remuneration received from the employer by the employee; the term includes only the first $3,000 of wages received by an employee from his employer with respect to employment during the calendar year. The following example will illustrate how the rule applies: Employer A pays employee B a salary of $500 a month beginning with the calendar year 1937. At the end of the sixth month B has received from his employer $3,000. The balance of his salary for 1937 is not subject to taxation either with respect to the employer's tax or the employee's tax. However, this is only the case where the employee continues in the employment of the same employer throughout the year. If the employee leaves the service of employer A on June 30, 1937, and enters the service of employer C on that date and continues with employer C at the same salary throughout the remainder of the year, both employer C and employee B

will be liable for the tax in respect of the wages received during the remaining portion of the calendar year 1937.

Section 811(b): This subsection defines the term "employment" as any service of whatever nature performed within the United States or on an American vessel by an employee for his employer. It should be noted in this connection that section 1001(a)6 includes in the definition of "employee" an officer of a corporation. For instance, resident and nonresident aliens performing services within the United States are subject to the tax under this title. On the other hand, service performed outside the United States (unless on an American vessel), whether by a citizen of the United States or by a nonresident alien, is not subject to the tax. The term "United States" is defined in section 1001(a)2 to include the States, Alaska, Hawaii, and the District of Columbia. Due to the difficulties in collecting the tax in the case of certain kinds of employment, the following services are exempt from taxation even though performed within the United States: (1) Agricultural labor; (2) domestic service in a private home; (3) casual labor not in the course of the employer's trade or business. This would not exempt casual labor performed in the course of an employer's trade or business. For instance, if a department store employed emergency help during the rush season in connection with its trade or business, the services performed by such help would not be exempt from taxation under this title.

Exemption from taxation under this title is also granted in the case of Federal and State or political subdivision employees.

Services performed in the employ of religious, charitable, scientific, literary, humane, or educational institutions, no part of the net earnings of which inures to the benefit of any private shareholder or individual, are also exempt from the tax imposed by this title. For the purpose of determining whether such an organization is exempt, the use to which the income is applied is the ultimate test of the exemption rather than the source from which the income is derived. For instance, if a church owns an apartment building from which it derives income which is devoted to religious, charitable, educational, humane, or scientific purposes, it will not be denied the exemption. The organizations which will be exempt from such taxes are churches, schools, colleges, and other educational institutions not operated for private profit, the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Salvation Army, and other organizations which are exempt from income tax under section 101(6) of the Revenue Act of 1932.

The committee amended the House bill, so that service on an American vessel is now considered as employment under this title; and further amended the House bill so that individuals over 65 years of age are not exempt from taxation under this title.

Title IX. Tax on Employers of Four or More.

This title levies upon employers an excise tax payable annually, measured by wages, and allows each taxpayer to credit against his tax the amount of contributions he has paid under State unemployment compensation laws.

IMPOSITION OF TAX.

Section 901: An annual excise tax is imposed on each employer (as defined in section 907) on the privilege of having individuals in his employ. His tax, payable annually, will be at a rate of 1 per cent of the total wages payable by him with respect to employment (as defined in section 907) in the calendar year 1936. This means that the tax is measured by wages which are payable as remuneration for services performed during that calendar year, regardless of the time when the actual payment is made.

The rate of tax, after being 1 per cent for the year 1936, shall increase to 2 per cent for 1937, and 3 per cent thereafter.

CREDIT AGAINST TAX.

Section 902: A taxpayer may credit against his tax the total amount of contributions he has paid to State unemployment compensation funds in accordance with State unemployment compensation laws. The credit against the tax measured by wages payable with respect to employment in a calendar year will be allowed only for contributions which themselves are paid (before the date

for filing the tax return under this title for such year) with respect to employment in such year.

The total credit which a taxpayer may claim against his tax for any year shall not be more than 90 per cent of the tax. Thus if the tax is $100 the total credit which may be claimed can not be more than $90, even though the total amount of contributions may be greater than that. Credit shall be allowed only for contributions made under the laws of States certified for the taxable year under section 903.

CERTIFICATION OF STATE LAWS.

Section 903(a): A State law to be approved must provide that—

(1) Unemployment compensation is to be paid through public employment offices in the State, to the extent that such offices exist and are designated by the State for the purpose. Under the House bill, unemployment compensation was required to be paid through public employment offices in the State.

(2) No compensation shall be payable with respect to any day of unemployment occurring before the expiration of two years after the first day of the first period with respect to which contributions are required. For example, if March 15, 1936, is the beginning of the first period with respect to which contributions are required under the State law, then no compensation may be paid for any day of unemployment occurring before March 15, 1938.

(3) All the money paid into the State unemployment fund (whether paid as contributions for employers or paid in by employees or contributed by the State itself) shall promptly be paid over to the Secretary of the Treasury to the credit of the unemployment trust fund established by section 904.

(4) All the money withdrawn from the unemployment trust fund by the State agency shall be used solely in the payment of compensation; none of it may be used to meet administrative costs.

(5) A person otherwise eligible for compensation shall not be denied it on the ground that he has refused to take a new job when his denial is due to the fact that the position offered to him is vacant due directly to a strike, lockout, or other labor dispute, or is due to the fact that the wages, hours, or other conditions of the work offered are substantially less favorable than those prevailing for similar work in the locality, or that, as a condition of taking or retaining the new job, he would have to join a company union, or would have to resign from a labor organization, or would have to agree not to join a labor organization.

(6) The State law must contain a provision indicating that any rights, privileges, or immunities conferred under it may be taken away by the subsequent amendment or repeal of the law.

(b) If any State law, submitted to the Social Security Board, fulfills the conditions enumerated in this section, the Board shall within 30 days approve the law, and shall notify the State governor of its action. On December 31 of each year, each State which has an approved law shall be certified by the Board to the Secretary of the Treasury, unless in the meantime the Board finds that the State has changed its law in some material respect, or has failed substantially to fulfill any of the enumerated conditions. The Board is under the duty to warn the governor of the State whenever it has reason to believe that in spite of having an approved law a State may not be certified at the end of the year.

UNEMPLOYMENT TRUST FUND.

Section 904: Subsection (a) of this section establishes in the Treasury of the United States a trust fund with the Secretary of the Treasury as trustee and with the respective State agencies, administering the State unemployment compensation laws, as beneficiaries of the trust. The Secretary of the Treasury is directed to receive and hold in such fund all moneys deposited with him or with any Federal reserve bank or member bank of the Federal Reserve System designated by him to receive such deposits, by such State agencies.

Under subsection (b) it is the duty of the Secretary of the Treasury to invest the fund (except such part as is, in his opinion, required to meet current withdrawals) in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. In order to provide suitable investments for this purpose, authority is given for the issuance of special obligations to the fund from time to time as required. Such obligations shall bear an interest rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the

public debt; except that where such average rate is not a multiple of one-eighth of 1 per cent, the rate of interest shall be the multiple of one-eighth of 1 per cent next lower than such average rate. In addition to such special obligations, outstanding obligations may be purchased at the market price, and original issues may be acquired at par, if the yield thereupon will be not less than the yield which would be required in the case of special obligations. Such special obligations (under the provisions of subsection (c)) may be redeemed at par plus accrued interest, while all other obligations may be sold at the market price.

Subsections (d) and (e) provide that the fund shall be invested as a single fund, but that the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly to each such account a proportionate part of the earnings of the fund for such quarter.

The Secretary of the Treasury (under subsection (f)), is directed to pay out of the amount to the credit of a State agency such amounts as the State agency shall duly requisition, not to exceed the amount standing to the credit of such State agency.

ADMINISTRATION, REFUNDS, AND PENALTIES.

Section 905: Subsection (a) of this section provides that the tax shall be collected by the Bureau of Internal Revenue and shall be paid into the Treasury as internal-revenue collections.

Subsection (b) requires returns of the tax to be made by each employer not later than January 31 of each year in respect to employment in the preceding calendar year.

Subsection (c) makes the returns filed under this title open to inspection according to the rules laid down for income-tax returns under the Revenue Act of 1926.

Subsection (d) allows the taxpayer to pay his tax in equal quarterly installments as is the case with the Federal income tax.

Subsection (e) gives the Commissioner the right to give extensions of time for the payment of tax or installments thereof, and subsection (f) provides that in the payment of tax a fractional part of a cent shall not be counted unless it amounts to one-half cent or more in which case it shall be counted as 1 cent.

INTERSTATE COMMERCE.

Section 906: This section provides that no person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the State law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.

DEFINITIONS.

Section 907: The definitions set up by this section are very important in connection with the application and scope of the entire title. They are as follows:

(a) Employer: The term "employer" includes only those persons who, in each of at least 13 weeks in the year, have a total number of 4 or more employees. (In the House bill it was 20 weeks and 10 or more employees.) This means that if on 1 day a week for 13 weeks (which need not be consecutive) there are 4 employees, the employer is covered. The employees (who need not necessarily be the same people) need not all be employed at the same moment; it is enough if during the day the total number is at least 4. The employees are not counted unless they are employed in "employment" as defined in this section.

(b) Wages: The term "wages" is defined to mean all remuneration for employment, including the cash value of all remuneration paid in any other medium than cash. That is, in addition to money payments, it includes payments in kind, rent, food, lodging, etc.

(c) The term "employment" is defined to mean any service performed within the United States by an employee for his employer with the following exceptions:

(1) Agricultural labor.

(2) Domestic service in a private home.

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States. (This does not exempt the services of longshoremen and others who work in connection with loading vessels.)

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under 21 in the employ of his parent.

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States.

(6) Service performed in the employ of a State, or political subdivision thereof, or an instrumentality of one or more States or political subdivisions.

(7) Service performed in the employ of corporations or organizations organized exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which accrue to any private individual or shareholder.

If the service is within the excepted classes, the employer is exempt from tax on the wages payable with respect to such service.

(d) The term "State agency" is defined to mean any State officer, board, or other authority, designated under a State law to administer the State unemployment fund.

(e) The term "unemployment fund" is defined to mean a special fund, established by State law and administered by a State agency, for the payment of unemployment compensation. A committee amendment strikes out the requirement of the House bill that the assets of the fund be mingled and undivided, and that no separate account be maintained with respect to any person.

(f) The term "contributions" is defined to mean payments required to be made by an employer under a State law into an unemployment fund, except that any payments which have been or may be deducted from the wages of the individuals in his employ are not to be considered as contributions under the definition.

(g) The term "compensation" is defined to mean cash benefits payable to individuals with respect to their unemployment.

RULES AND REGULATIONS.

Section 908: This section authorizes and directs the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make and publish such rules and regulations for the enforcement of this title as are necessary. The exception is made, however, that the authorization and direction above noted do not apply to section 903, relating to certification of State laws, and to section 904, relating to the unemployment trust fund.

ALLOWANCE OF ADDITIONAL CREDIT.

Section 909: The committee has added this section, and its companion section 910, to the House bill. Subsection (a) provides that a taxpayer under section 901 may, for 1938 or any taxable year thereafter, obtain an additional credit against his tax, under certain conditions. Let us assume, for the purpose of giving a relatively simple example, that he carries on business in only one State. He will credit against the tax the amount of his contributions under the law of that State; and, under this new section, he will also credit the amount by which his contributions are less than they would have been if he had been contributing at the maximum rate in the State. The additional credit, however, is limited by not allowing it to exceed the difference between the actual amount paid and the amount he would have paid at a 2.7 per cent rate; and subsection (b) also provides for limiting the additional credit to the proper difference allowed by the State law, diminishing it if the employer has failed to make any of the contributions required of him.

In figuring what contributions the employer would have paid at the maximum rate, the highest rate applicable to any employer each time when contributions are payable is the rate considered.

Subsection (c) provides that even if an employer is getting credit under section 902 and additional credit under this section, he shall never credit against tax more than 90 per cent of the tax.

CONDITIONS OF ADDITIONAL CREDIT ALLOWANCE.

Section 910: This section places restrictions on the allowance of the additional credit under section 909.

(1) The taxpayer whose case was considered in the discussion of section 909 may have been contributing to a pooled fund in the State. If he is contributing at a lower rate than that imposed on other employers in the State, he will get

the additional credit; but only if he has had at least three years of compensation experience under the State law, and only if his lower rate is fixed as a result of his comparatively favorable experience. A State rate might, therefore, vary at the outset among different employers or industries, but the additional credit would not be given until the compensation experience of the favored employer had justified the variation.

(2) The taxpayer may have guaranteed the employment of his employees, and be contributing to a guaranteed employment account maintained by the State agency. In this case, if he claimed the additional credit under section 909, he would get it only if his guaranty had been fulfilled, and only if his guaranteed employment account amounted to at least 7½ per cent of his guaranteed pay roll.

(3) The taxpayer may be contributing to a separate reserve account, from which benefits are payable only to his employees. If he claims the additional credit under section 909, it would be allowed only if, in the preceding year, those of his employees who became unemployed and were eligible for compensation received compensation from the reserve account. Furthermore, the additional credit would be allowed only if the reserve account amounted to 7½ per cent of his pay roll, and was at least five times larger than the amount paid out from it, in compensation, in that year (among the three preceding years) when the greatest amount was thus paid out from it.

Subsection (c) defines terms used in this section; the committee having added sections 909 and 910 as a new and distinct addition superimposed upon the title, these definitions were placed here rather than in section 907.

(1) "Reserve account" is defined as a separate account in a State unemployment fund, from which compensation is payable only to the former employees of the employers contributing to the account. The account may be maintained with respect to one employer or a group of employers.

(2) "Pooled fund" is an unemployment fund (or part of such a fund, if some employers are maintaining separate accounts in the fund) in which all contributions are mingled and undivided. Compensation is payable from it regardless of whether the claimant was formerly in the employ of an employer contributing to the pooled fund; but where some employers in the State have reserve accounts, their former employees get compensation from the pooled fund only if the reserve accounts are exhausted.

(3) "Guaranteed employment account" is, like a reserve account, a separate account in an unemployment fund, but it can be maintained only with respect to certain employers. Compensation is payable from it to those of such employer's employees who, having been guaranteed employment, nevertheless become unemployed due to a failure to fulfill the guaranty, or become unemployed at the end of the year for which the guaranty was made, due to the nonrenewal of the guaranty. To be a "guaranteed employment account," such separate account would have to be maintained with respect to an employer who had guaranteed the wages of all of his employees (or, if he maintains more than one distinct business establishment, of all the employees in at least one such establishment), for at least 40 weeks in a 12-month period. The wages guaranteed should be for at least 30 hours a week; but if 41 weeks, for instance, were guaranteed instead of 40, the weekly hours guaranteed could be cut from 30 to 29; and if 42 weeks were guaranteed, only 28 hours' wages per week would need to be guaranteed. While ordinarily all the employees would have to be covered, the employer would not have to extend the guaranty to any new employee until the latter had served a probationary period of not more than 12 consecutive weeks.

(4) "Year of compensation experience," used only in relation to an employer, is defined as any calendar year during which, at all times in the year, a former employee of such employer, if there was one who was eligible for compensation, could receive compensation under the State law.

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TITLE XII. GENERAL PROVISIONS.

DEFINITIONS.

Section 1201 contains definitions of "State," "United States," "person," "corporation," "shareholder," and "employee."

Section 1201(d) provides that nothing in this Act shall be construed as authorizing any Federal official in carrying out the provisions of this Act to take charge, in violation of the law of a State, of any child over the objection of the parents.

RULES AND REGULATIONS.

Section 1202 provides for the making of regulations by the Secretary of the Treasury, the Secretary of Labor, and the Social Security Board, respectively, for carrying out the functions with which each is charged.

SEPARABILITY.

Section 1203 is the usual separability clause.

RESERVATION OF POWER.

Section 1204 reserves to Congress the right to alter, amend, or repeal any portion of the Act.

SHORT TITLE.

Section 1205 provides that the Act may be cited as the "Social Security Act."

1939–48–10107

SOCIAL SECURITY BILL.

[House of Representatives Report No. 1540, Seventy-fourth Congress, First Session.]

[July 16, 1935.]

Mr. Doughton, from the committee of conference, submitted the following conference report [to accompany H. R. 7260]:

* * * * * * *

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE.

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 7260) to provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

* * * * * * *

Amendment No. 15: The House bill in defining the term "employment," as used in Title II relating to the payment of Federal old-age benefits, excepted service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. The Senate amendment adds to the list of purposes "or hospital" as a clarifying amendment. The Senate recedes, the conferees omitting this language as surplusage, based on the fact that the Internal Revenue Bureau has uniformly construed language in the income-tax laws, identical with that found in the House bill, as exempting hospitals not operated for profit, and also on the fear that the insertion of the words added by the Senate amendment might interfere with the continuation of the long-continued construction of the income-tax law.

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Amendments Nos. 75 and 77: The House bill excepted from the term "employment," as used in Title VIII imposing certain excise taxes, 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 Senate amendments strike out this exception and expressly include within the definition of "employment" service performed as an officer or member of the crew of a vessel documented under the laws of the United States. The Senate recedes.

Amendment No. 76: The House bill excepted from the term "employment," as used in Title VIII relating to certain excise taxes, service performed by an indi-

vidual who has attained the age of 65. The Senate amendment strikes out this exception. The Senate recedes.

Amendments Nos. 78, 79, and 80: These are amendments to paragraph numbers. The Senate recedes.

Amendment No. 81: The House bill in defining the term "employment," as used in Title VIII imposing certain excise taxes, excepted service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. The Senate amendment adds to the list of purposes "or hospital" as a clarifying amendment. The Senate recedes in conformity with the action on amendment No. 15.

Amendment No. 82: This amendment excepts from the definition of "employment," as used in Title VIII relating to certain excise taxes, service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for the prevention of cruelty to children or animals. The House recedes.

Amendment No. 85: This is a change in a title heading. The House recedes with an amendment to conform to the action on amendment No. 91.

Amendments Nos. 86 and 87: The House bill provided as one of the conditions for the approval of a State law for unemployment compensation that the law must provide that all compensation is to be paid through public employment offices in the State. The Senate amendment changes this requirement so that compensation must be paid through public employment offices in the State to the extent that such offices exist and are designated by the State for the purpose. The Senate recedes on amendment No. 86 and the House recedes on amendment No. 87 with an amendment changing the language of the amendment. The effect of the action of the conferees is to provide that the Board shall not approve any State law unless the law provides that all compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve.

Amendment No. 88: The House bill provided that the Social Security Board shall certify each State whose unemployment compensation law is approved, except that it shall not certify any State which, after notice and opportunity for hearing to the State agency, the Board finds has changed its law so that it no longer contains the provisions specified in the bill or has failed substantially to comply with such provisions. The Senate amendment provides that the notice and opportunity for hearing must be "reasonable." The House recedes.

Amendment No. 89: This amendment provides that if the excise tax imposed by Title IX is not paid when due there shall be added as part of the tax interest at the rate of one-half of 1 per cent per month from the date the tax became due until paid. Under the House bill the rate of interest was 1 per cent per month. The House recedes.

Amendments Nos. 90 and 91: The House bill provided that the term "employment," as used in Title IX, should 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 10 or more. The Senate amendments reduce the number of days from 20 to 13, and the number of individuals from 10 to 4. The Senate recedes on amendment numbered 90, and the House recedes on amendment numbered 91 with an amendment fixing the number of individuals at eight.

Amendment No. 92: The House bill in defining the term "employment," as used in Title IX relating to certain excise taxes, excepted service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual. The Senate amendment adds to the list of purposes "or hospital" as a clarifying amendment. The Senate recedes in conformity with the action on amendment No. 15.

Amendment No. 93: This amendment excepts from the definition of "employment" as used in Title IX, imposing certain excise taxes, service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for the prevention of cruelty to children or animals. The House recedes.

Amendment No. 94: Under the House bill in Title IX providing for a tax on employers with a credit against the tax of contributions paid into an employment

fund under a State law, the term "unemployment fund" was defined as a fund, "all the assets of which are mingled and undivided and in which no separate account is maintained with respect to any person"; in other words, requiring a "pooled" fund. The Senate amendment strikes out this requirement leaving it to the State to define the character of its special fund. The House recedes.

Amendment No. 95: This is a clerical amendment. The House recedes.

Amendments Nos. 96 and 97: Amendment No. 96 provides that a taxpayer under section 901 (unemployment excise tax) may, for 1938, or any taxable year thereafter, obtain an additional credit against his tax, under certain conditions. A taxpayer carrying on business in a State will credit against the tax the amount of his contributions under the law of that State; and, under this new section, he will also credit the amount by which his contributions are less than they would have been if he had been contributing at the maximum rate in the State. The additional credit, however, is limited by not allowing it to exceed the difference between the actual amount paid and the amount he would have paid at a 2.7 per cent rate; and the amendment also provides for limiting the additional credit to the proper difference allowed by the State law, diminishing it if the employer has failed to make any of the contributions required of him. In figuring what contributions the employer would have paid at the maximum rate, the highest rate applicable to any employer each time when contributions are payable is the rate considered. The amendment also provides that even if an employer is getting credit under section 902 and additional credit under this section, he shall never credit against tax more than 90 per cent of the tax.

Amendment No. 97 places restrictions on the allowance of the additional credit.

(1) A taxpayer who has been contributing to a pooled fund and is allowed a lower rate than that imposed on other employers in the State will get the additional credit only if he has had three years' compensation experience under the State law, and only if the lower rate is fixed as a result of his comparatively favorable experience.

(2) The taxpayer may have guaranteed the employment of his employees, and be contributing to a guaranteed employment account maintained by the State agency. In this case, if he claimed the additional credit under section 909, he would get it only if his guaranty had been fulfilled, and only if his guaranteed employment account amounted to at least 7½ per cent of his guaranteed pay roll.

(3) The taxpayer may be contributing to a separate reserve account from which benefits are payable only to his employees. If he claims the additional credit under section 909, it would be allowed only if, in the preceding year, those of his employees who became unemployed and were eligible for compensation received compensation from the reserve account. Furthermore, the additional credit would be allowed only if the reserve account amounted to 7½ per cent of his pay roll, and was at least five times larger than the amount paid out from it, in compensation, in that year (among the three preceding years) when the greatest amount was thus paid out from it.

The amendment also defines terms used in this section:

(1) "Reserve account" is defined as a separate account in a State unemployment fund, from which compensation is payable only to the former employees of the employers contributing to the account. The account may be maintained with respect to one employer or a group of employers.

(2) "Pooled fund" is an unemployment fund (or part of such a fund, if some employers are maintaining separate accounts in the fund) in which all contributions are mingled and undivided. Compensation is payable from it regardless of whether the claimant was formerly in the employ of an employer contributing to the pooled fund; but where some employers in the State have reserve accounts, their former employees get compensation from the pooled fund only if the reserve accounts are exhausted.

(3) "Guaranteed employment account" is, like a reserve account, a separate account in an unemployment fund, but it can be maintained only with respect to certain employers. Compensation is payable from it to those of such employer's employees who, having been guaranteed employment, nevertheless become unemployed due to a failure to fulfill the guaranty, or become unemployed at the end of the year for which the guaranty was made, due to the nonrenewal of the guaranty. To be a "guaranteed employment account," such separate account would have to be maintained with respect to an employer who had guaranteed the wages of all of his employees (or, if he maintains more than one distinct business establishment, of all the employees in at least one such establishment), for at least 40 weeks in a 12-month period. The wages guaranteed should be

for at least 30 hours a week; but if 41 weeks, for instance, were guaranteed instead of 40, the weekly hours guaranteed could be cut from 30 to 29; and if 42 weeks were guaranteed, only 28 hours' wages per week would need to be guaranteed. While ordinarily all the employees would have to be covered, the employer would not have to extend the guaranty to any new employee until the latter had served a probationary period of not more than 12 consecutive weeks.

(4) "Year of compensation experience," used only in relation to an employer, is defined as any calendar year during which, at all times in the year, a former employee of such employer, if there was one who was eligible for compensation, could receive compensation under the State law.

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The House recedes from its disagreement to the amendment of the Senate to the title of the bill.

On amendments Nos. 17, 67, 68, 83, and 84 (dealing with the exemption of private pension plans in Titles II and VIII) the conferees are unable to agree.

R. L. DOUGHTON,
SAM B. HILL,
THOS. H. CULLEN,
ALLEN T. TREADWAY,
ISAAC BACHARACH,
Managers on the part of the House.

1939–45–10086

CARRIERS TAXING ACT OF 1937.

[Senate Report No. 818, Seventy-fifth Congress, First Session.]

[June 15 (calendar day, June 28), 1937.]

Mr. Clark, from the Committee on Finance, submitted the following report [to accompany H. R. 7589]:

The Committee on Finance, to whom was referred the bill (H. R. 7589) to levy an excise tax upon carriers and certain other employers and an income tax upon their employees, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

The provisions of the bill are fully explained in House Report No. 1071, which is incorporated herein and made a part of this report.

[House of Representatives Report No. 1071, Seventy-fifth Congress, First Session.]

[June 21, 1937.]

Mr. Doughton, from the Committee on Ways and Means, submitted the following report [to accompany H. R. 7589]:

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CONTENTS OF THE BILL.

The bill provides for a system of excise taxes to be levied on carriers and certain other employers, and an income tax on the employees of those employers, as well as an income tax on certain persons who are the representatives of certain of the employees who are affected by this Act. The bill is defined into 13 sections, as follows:

1. Definitions.
2. Income tax on employees.
3. Excise tax on employers.
4. Refunds and deficiencies.
5. Income tax on employee representatives.
6. Deductibility from income tax.
7. Collection and payment of taxes.
8. Court jurisdiction.
9. Social Security Act.
10. Separability.
11. Repeal of prior tax Act.
12. Rules and regulations.
13. Short title.

HISTORY OF LEGISLATION.

There is now in effect an Act having a similar purpose, which became law on August 29, 1935. The taxes under the Act signed on that day expired on February 28, 1937; early in this session of Congress a bill was passed extending the limiting date on the taxes to June 30, 1938.

In January, 1936, substantially all major railroads of the country filed a bill of complaint in what is now the United States District Court of the District of Columbia praying for an injunction against the collector of internal revenue to prevent his collecting or taking any steps to collect the taxes under the Act. On June 30, 1936, the petition of the railroads was granted and the collector of internal revenue was enjoined against making any tax collections from those who were plaintiffs in the litigation. While some relatively small payments of taxes have been made, most of the employers who were subject to tax, in addition to those who were plaintiffs, have not made any payments of taxes and thus far the Bureau of Internal Revenue has made no effort to enforce collection against anyone. While most employers have made deductions of taxes under the Act from the compensation of their employees, these amounts have not been paid into the Treasury, but have been paid into special accounts, subject to the order of the district court.

The pending bill has received the indorsement of both the labor organizations and the carriers, expressed in hearings before the committee. Before proceeding to a detailed discussion of the legislation we wish to commend both the carriers and the employees upon the great ability they have shown to adjust matters of this sort through normal process of collective bargaining. The agreement as to this measure constitutes a landmark in the history of industrial relations in this country.

MAJOR CHANGES WHICH THE BILL WOULD EFFECT IN EXISTING LEGISLATION.

The pending measure would bring about three major changes, as compared with the present Carrier's Tax Act. First of all, there is set up a permanent schedule of taxation. This has been possible because of the availability of studies of the railroad industry, which were not in a form of use when the legislation was originally enacted. Second, the rates for the early years have been lowered, as compared to the existing rate. The total tax rate, one-half of which is an excise tax on employers, the other an income tax on employees, has been fixed in present legislation at 7 per cent. In the pending bill the rate is fixed at 5½ per cent for the 3-year period beginning January 1, 1937, and rising by one-half of 1 per cent steps at three intervals, remaining at a level of 7½ per cent on and after January 1, 1949. In terms of yields, however, the rate of yield "in perpetuity" of the pending bill is equivalent of a flat 7.11 per cent pay roll, as compared with the 7 per cent rate in effect under existing legislation. There is precedent for the adoption of the graduated tax rate to be found in the tax sections of the Social Security Act, particularly Title VIII, where steps of one-half of 1 per cent at intervals of three years are to be found just as in the pending bill. Third, the effective date of the measure has been changed from March 1, 1936, to January 1, 1937. Because of this change in date, the tax yield of the two will be substantially identical "in perpetuity."

Finally, the scope of the existing tax legislation has been changed in such way as to bring into the coverage substantially all those who are intimately associated with the operation of United States railroads. This has been done first by extending coverage to all employees of United States railroads, irrespective of the location of their employment, whether in this or in other countries. Second, the standard railroad organizations are now to be included as employers and all the employees of these organizations will, of course, be brought within the scope of the statute. While it seems clear that it is the intent of the present Act to embrace within its scope the various railroad associations, the matter is now to be made clear beyond question by a specific inclusion of such organizations.

REVENUE FROM TAXES IMPOSED.

The yield of revenue under this bill will vary with the rising tax rates and with the amount of the pay roll not exceeding $300 a month to any individual paid by the employers subject to the Act. As already stated, the taxes begin on January 1, 1937, at an aggregate rate of 5½ per cent of taxable pay roll and rise by one-half per cent at 3-year intervals to a level of 7½ per cent for 1949 and thereafter. Counting 15 as the ultimate level of taxes, the relative yield, other things being equal, will be 11 for the years 1937, 1938, and 1939, 12 for

the years 1940, 1941, and 1942, 13 for the years 1943, 1944, and 1945, 14 for the years 1946, 1947, and 1948, and 15 for the years 1949 and thereafter.

The amount of pay rolls for more than 90 per cent of the employers covered by the Act (measuring the proportion in terms of employees affected) have long been reported to the Interstate Commerce Commission. In recent years the total pay rolls of the steam railroads, sleeping-car, and express companies have been as follows:

1927	$3,126,668,000	1933	$1,554,203,000
1928	3,122,648,000	1934	1,682,290,000
1929	3,191,913,000	1935	1,823,684,000
1930	2,820,394,000	1936 (partially estimated)	2,050,000,000
1931	2,322,061,000		
1932	1,678,796,000		

In addition to the pay rolls included in this tabulation, the scope of the Act embraces railroad labor organizations, railroad traffic and similar associations, the employees of American lines in Canada, electric lines, private-car companies, and certain ferries, grain elevators, transfer companies, and other companies owned or controlled by carriers and performing certain services in the transportation of passengers or property by railroad. Except for electric lines, which report approximately $25,000,000 a year pay roll to the Interstate Commerce Commission, the data on employment of these other employers are rather fragmentary. It seems probable, however, that these other employers constitute, in terms of employment, from 7½ to 10 per cent of the industry.

The total pay rolls of employers under the scope of the Act have been rising since 1933. For the first quarter of 1937, the pay rolls of railroad, sleeping-car, and express companies were about $535,000,000, which would indicate a total taxable pay roll for the calendar year of about $2,240,000,000 and a total taxable pay roll for all employers subject to the Act of more than $2,350,000,000.

The compensation, for a single individual, in excess of $300 a month is not taxable. A study of employers not covered by this Act, having pay rolls of approximately $1,700,000,000 in the 12 months ending June 30, 1935, showed that compensation of $300 per individual per month or less constituted 98.27 per cent of the total pay roll. It would seem clear, therefore, that the taxable pay roll during the present year will run close to $2,300,000,000.

The present period is one of rising wages. Negotiations are currently in progress between the railroad labor organizations and managements concerning a request by the former for a substantial increase in compensation. During the next few years certainly there is every indication that pay rolls will be substantially larger than at the present time. Taking into account a period of years and considering the possibilities of ups and downs, it is a reasonable estimate that the pay roll subject to tax under this bill will average $2,200,000,000. On the basis of that estimate, the taxes will be as follows:

Calendar year—		Calendar year—	
1937	$121,000,000	1944	$143,000,000
1938	121,000,000	1945	143,000,000
1939	121,000,000	1946	154,000,000
1940	132,000,000	1947	154,000,000
1941	132,000,000	1948	154,000,000
1942	132,000,000	1949 and thereafter	165,000,000
1943	143,000,000		

It is assumed that the taxes will be collected quarterly and that they will be paid into the Treasury during the month following the end of the quarter. Since the quarters are calendar quarters, there would be, under this assumption, only one tax payment in the fiscal year 1937. In the fiscal years 1940, 1943, 1946, and 1949 there would be three payments at old rates and one at the new rate in effect on January 1 of each of those years. Estimated taxes on a fiscal year basis would, therefore, be:

Fiscal year—		Fiscal year—	
1937	$30,250,000	1944	$143,000,000
1938	121,000,000	1945	143,000,000
1939	121,000,000	1946	145,750,000
1940	123,750,000	1947	154,000,000
1941	132,000,000	1948	154,000,000
1942	132,000,000	1949	156,750,000
1943	134,750,000	1950 and thereafter	165,000,000

These estimates, of course, assume a uniform pay roll. The possibilities are that at least during the next few years the pay roll will be larger than estimated and tax collections, of course, would be correspondingly higher. The estimates make allowance for the possibility that the initial average may be brought down by fluctuations in the future.

PART II. EXPLANATION OF THE BILL.

The following explanation is in large part a comparison of the provisions of this bill with the corresponding provisions of the present Carriers Taxing Act which will be repealed upon the enactment of this bill.

Section 1(a), as amended, will substitute for the definition of "carrier" a definition of "employer." The term "employer" will include companies which are embraced in the term "carrier" in the present Act and in addition "railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and by-laws of such organizations."

The present Act embraces within its scope "any company which may be directly or indirectly owned (by a carrier) or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such 'carrier.'" Under this language coverage extends to a company which is owned or controlled in common by several companies. Exclusions have been extended to casual service and the casual operation of equipment or facilities. In addition to trucking service, it is intended to exclude employees of a contractor who may, for example, be occasionally employed by a "carrier" to repair a depot or a bridge. Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or de facto. De facto control may be exercised not only by direct ownership of stock, but by means of agreements, licenses and other devices which insure that the operation of the company is conducted in the interests of the carrier.

By these changes there are brought within the scope of the Act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States.

Section 1(b) of the bill defines the term "employee" so as to make it clear that any person in the service of an employer as defined in section 1(a) is to be considered an employee regardless of where he performs his services. It is also made clear that employees of local lodges or divisions of national labor organizations are not to be included as employees, unless they were in the service of or in the employment relation to such carrier on or after August 29, 1935.

Section 1(c) defines the term "employee representative." In the present Act, the subsection defining the term "employee" defines also the term "employee representative." This inclusion of "representative" and "employee" is artificial and causes confusion. This unnecessary repetition of the term "employee" is dispensed with by the provision of a separate definition of "employee representative."

Section 1(d) defines the term "service," placing the emphasis on the rendition of service, for compensation rather than upon the actual receipt of compensation. A person is in service and is an employee irrespective of where the service is rendered, except that in the case of an employer not conducting the principal part of its business in the United States a person is in service only when he is rendering service to such an employer within the United States.

Section 1(e) defines the term "compensation." The changes from the definition in the Act of 1935 accomplishes the following purposes:

1. The phraseology makes it clear that what is significant is that compensation has been earned by the employee, not that it has been actually received by him.

2. It is made clear that compensation received by an employee in respect of months during which he was ill or on vacation is to be included in the computation of the employee's tax liability.

3. The provision specifically excludes tips or the amount of taxes on the employees' remuneration paid by the employer without deduction from the employees' pay.

Section 1(f) defines the term "United States."

Section 1(g) defines the term "company."

Section 1(h) makes it clear that the term "employee" includes an officer of an employer.

Section 1(i) defines the term "carrier."

Section 1(j) defines the term "person."

The proposed tax bill would omit definitions of "effective date" and "enactment date" such as are contained in the present tax Act, as they are not needed.

Section 2(a) specifies the income tax on employees. These taxes are to be levied at the following rates on compensation not in excess of $300 in any calendar month earned by the employee after December 31, 1936. The rates are as follows with respect to the compensation earned during the indicated calendar years:

Tax rate as per cent of taxable compensation.

1937, 1938, and 1939	2¾
1940, 1941, and 1942	3
1943, 1944, and 1945	3¼
1946, 1947, and 1948	3½
1949 and subsequently	3¾

Section 2(b) requires that the employer of the taxpayer shall deduct the amount of the tax from the compensation as and when paid. The Act contemplates that the tax shall apply only to $300 in any one month, even though the individual taxpayer may be in the service of more than one employer. The Commissioner of Internal Revenue is to make regulations which will accomplish this intent.

Section 2(c) provides for the adjustment of tax payments made or failed to be made in error.

Section 3 provides for an excise tax on employers.

Section 3(a) sets tax rates on the total taxable pay roll at the same rate as the taxes on the compensation of individuals.

Section 3(b) provides for the adjustment of erroneous tax payments.

Section 4 provides for the refund of taxes if more than the correct amount has been paid, or the collection of underpayments, in the manner prescribed by regulation made by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

Section 5 provides for an income tax on employee representatives. This tax is exactly twice the rate of the income tax on employees. It is provided that the compensation of an employee representative shall be determined in the same manner and with the same effect as if the employee organization by which such employee representative is employed were an employer as defined in section 1(a).

Section 6 has no corresponding provision in the present tax Act. In section 803 of the Social Security Act, the policy is laid down that the income taxes on employees therein shall not be allowed as a deduction to the taxpayer in computing his net income for the purposes of the income tax imposed by Title I of the Revenue Act of 1934 or by any Act of Congress in substitution therefor. The policy contained in the Social Security Act is adopted for purposes of this Act, since the taxes herein are in place of the taxes under Title VIII of the Social Security Act.

Section 7 sets up the procedure for the collection and payment of taxes, giving the Commissioner of Internal Revenue all powers necessary to enforce collections and making applicable other provisions of law contained in other statutes which may be useful in connection with the administration of this tax measure. By reason of the expansion in the coverage of this bill as compared with the present Act, some taxpayers have begun to pay taxes under Title VIII of the Social Security Act who will now find those taxes not to have been due.

Section 7(e) provides for the adjustment of such payments made under Title VIII of the Social Security Act and the taxes due under this measure, and will cover both the existing situation and any which may arise in the future.

Section 8 provides that the several district courts of the United States and the District Court of the United States for the District of Columbia shall have jurisdiction in connection with the enforcement of obligations under this measure.

Section 9(a) prescribes that the term "employment" as defined in section 811(b) of the Social Security Act is not to include service performed by an individual as an employee or as an employee representative. It is possible to interpret the present Act in such a way that employee representatives be included, both under that Act and Title VIII of the Social Security Act. While this interpretation has not been given the language, it is now made clear that employee representatives can be covered only by the Carriers Taxing Act.

Section 9(b) prescribes that the Secretary of the Treasury shall, at intervals not longer than three years, estimate the reduction in the amount of taxes collected under Title VIII of the Social Security Act by reason of the fact that persons and employees paying taxes under this Act do not pay taxes under the said Title VIII.

Section 10 contains the usual separability provision.

Section 11 provides for the repeal of the Act of August 29, 1935, as amended, entitled "An Act to levy an excise tax upon carriers and an income tax upon their employees, and for other purposes." It is made clear, however, that while this Act is repealed, the present bill, when it becomes an Act, will be a substitution therefor and that there will, therefore, be no invalid retroactive application of any taxing provision.

Since the effective date of the new Act will be January 1, 1937, rather than March 1, 1936, and since the tax rates for the period since January 1 are lower than under the existing statute, there will be certain refunds due of amounts heretofore collected as taxes. It is further provided that proceedings pending for the recovery of moneys paid as taxes shall be terminated. Moreover, specific provision is made also for the payment into the Treasury and to employees in the proper proportion, of all moneys held by employers as taxes but never paid into the Treasury.

Section 12 directs the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make and publish such rules and regulations as may be required to enforce the Act.

Section 13 provides that the Act may be cited as the "Carriers Taxing Act of 1937."

Changes in Existing Law.[1]

In compliance with paragraph 2a of Rule XIII of the Rules of the House of Representatives, the Act of August 29, 1935, as amended, which is repealed by the bill, is set forth below enclosed in black brackets:

[AN ACT To levy an excise tax upon carriers and an income tax upon their employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITIONS.

SECTION 1. That as used in this Act—

(a) The term "carrier" means any express company, sleeping-car company, or carrier by railroad, subject to the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of and operating the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Commissioner of Internal Revenue or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

(b) The term "employee" means (1) each person who at or after the enactment hereof is in the service of a carrier, and (2) each officer or other official

[1] Included in House report but not incorporated in Senate report.

representative of an "employee organization," herein called "representative," who before or after the effective date has performed service for a carrier, who is duly designated and authorized to represent employees under and in accordance with the Railway Labor Act, and who, during, or immediately following employment by a carrier, was or is engaged in such representative service in behalf of such employees.

(c) A person shall be deemed to be in the service of a carrier whenever he may be subject to its continuing authority to supervise and direct the manner of rendition of his service, for which service he receives compensation.

(d) The term "compensation" means any form of money remuneration for active service, received by an employee from a carrier, including salaries and commissions, but shall not include free transportation nor any payment received on account of sickness, disability, or other form of personal relief.

(e) The term "effective date" means March 1, 1936.

(f) The term "enactment" means the date on which this Act may be approved by the President or be finally passed.

INCOME TAX ON EMPLOYEES.

SEC. 2. In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee, 3½ per centum of the compensation of such employee (except a representative) not in excess of $300 per month, received by him after the effective date.

DEDUCTION OF TAX FROM WAGES.

SEC. 3. (a) The tax imposed by section 2 of this Act shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the compensation of the employee as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(b) If more or less than the correct amount of tax imposed by section 2 is paid with respect to any compensation payment, then, under regulations made under this Act by the Commissioner of Internal Revenue, proper adjustments, with respect both to the tax and the amount to be deducted, shall be made, without interest, in connection with subsequent wage payments to the same employee by the same employer.

EXCISE TAX ON CARRIERS.

SEC. 4. In addition to other taxes, every carrier shall pay an excise tax of 3½ per centum of the compensation not in excess of $300 per month paid by it to its employees after the effective date.

ADJUSTMENT OF TAX.

SEC. 5. If more or less than the correct amount of the tax imposed by section 4 is paid, with respect to any compensation payment, then, under regulations made by the Commissioner of Internal Revenue, proper adjustments with respect to the tax shall be made, without interest, in connection with subsequent excise-tax payments made by the same employer.

REFUNDS AND DEFICIENCIES.

SEC. 6. If more or less than the correct amount of the tax imposed by sections 2 or 4 of this Act is paid or deducted with respect to any compensation payment and the overpayment or underpayment of the tax can not be adjusted under sections 3 or 5, the amount of the overpayment shall be refunded, or the amount of the underpayment shall be collected in such manner and at such times (subject to the statute of limitations properly applicable thereto) as may be prescribed by regulations under this Act as made by the Commissioner of Internal Revenue.

INCOME TAX ON EMPLOYEES' REPRESENTATIVE.

SEC. 7. In addition to other taxes, there shall be levied, collected, and paid upon the compensation of each employees' representative received by such representative an income tax of 7 per centum annually upon that portion of the

compensation of such employees' representative not in excess of $300 per month. The compensation of a representative for the purpose of ascertaining the tax thereon shall be determined according to such rules and regulations as the Commissioner of Internal Revenue shall deem just and reasonable and as near as may be shall be the same compensation as if the representative were still in the employ of the last former carrier.

COLLECTION AND PAYMENT OF TAXES.

SEC. 8. (a) The taxes imposed by this Act shall be collected by the Commissioner of Internal Revenue and shall be paid into the Treasury of the United States as internal-revenue receipts. If the taxes are not paid when due, there shall be added as part of the tax (except in the case of adjustments made in accord with the provisions of this Act) interest at the rate of 6 per centum per annum, or for any part of a month, from the date the tax became due until paid.

(b) Such taxes shall be collected and paid quarterly in such manner and under such conditions not inconsistent with this Act as may be prescribed by the Commissioner of Internal Revenue.

(c) All provisions of law, including penalties, applicable with respect to any tax imposed by section 600 or section 800 of the Revenue Act of 1926, and the provisions of section 607 of the Revenue Act of 1934, insofar as applicable and not inconsistent with the provisions of this Act, shall be applicable with respect to the taxes imposed by this Act.

(d) In the payment of any tax under this Act a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

COURT JURISDICTION.

SEC. 9. The several district courts of the United States and the District Court of the United States for the District of Columbia, respectively, shall have jurisdiction to entertain an application and to grant appropriate relief in the following cases which may arise under the provisions of this Act:

(a) An application by the Commissioner of Internal Revenue to compel an employee or other person residing within the jurisdiction of said court or a carrier subject to service of process within said jurisdiction, to comply with any obligations imposed on said employee, other person, or carrier under the provisions of this Act.

(b) The jurisdiction herein specifically conferred upon the said Federal courts shall not be held exclusive of any jurisdiction otherwise possessed by said courts to entertain actions at law or suits in equity in aid of the enforcement of rights or obligations arising under the provisions of this Act.

PENALTIES.

SEC. 10. Any person or any carrier which shall willfully fail or refuse to make any report in accordance with this Act required by the Commissioner of Internal Revenue in the administration of this Act, or which shall knowingly make any false or fraudulent statement, or report in response to any report or statement required by this Act shall be punished on conviction by a fine of not less than $100 nor more than $10,000.

SOCIAL SECURITY ACT.

SEC. 11. The term "employment," as defined in subsection (b) of section 811 of Title VIII of the Social Security Act, shall not include service performed in the employ of a carrier as defined in subdivision (a) of section 1 of this Act.

TERMINATION OF TAXES.

SEC. 12. The taxes imposed by this Act shall not apply to any compensation received or paid after June 30, 1938.

SEPARABILITY.

SEC. 13. 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.]

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