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Internal Revenue Bulletin

Cumulative Bulletin XII-2

JULY-DECEMBER, 1933

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Treasury Department : : : : : Bureau of Internal Revenue

Internal Revenue Bulletin

Cumulative Bulletin XII-2

JULY-DECEMBER, 1933

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

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

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

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

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

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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 XII–2, in addition to all decisions of the Treasury Department (called Treasury decisions) pertaining to Internal Revenue matters, contains General Counsel's opinions, and rulings and decisions pertaining to income, estate, sales, and miscellaneous taxes, as indicated on the title-page of this Bulletin, published in the weekly Bulletins (Volume XII, Nos. 27 to 52, inclusive) for the period July 1 to December 31, 1933. 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, 1933.

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

ABBREVIATIONS.

The following abbreviations are used throughout the Bulletin:

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

S. M.—Solicitor's memorandum.
Sol. Op.—Solicitor's opinion.
S. R.—Solicitor's recommendation.
T.—Tobacco Division.
T. B. M.—Advisory Tax Board memorandum.
T. B. R.—Advisory Tax Board recommendation.
T. D.—Treasury decision.
x and *y* are used to represent certain numbers, and when used with the word "dollars" represent sums of money.

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

ANNOUNCEMENT RELATING TO BOARD OF TAX APPEALS DECISIONS.

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

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

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706	XII-41-6447	406
707	XII-41-6448	499
708	XII-43-6468	325
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711	XII-45-6499	326
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3	XII-39-6417	279
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141	XII-33-6349	488
142	XII-37-6400	489
143	XII-41-6449	490
144	XII-46-6513	491
145	XII-49-6550	492
Office decision (T.):		
2	XII-42-6460	378
Office decision (P. T.):		
1	XII-46-6512	432
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4035	XII-29-6297	423
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4071	XII-41-6450	493
4077	XII-43-6471	500
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4081	XII-43-6472	98
4082	XII-43-6474	90
4090	XII-45-6500	339
4092	XII-47-6520	96
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4100	XII-47-6529	496
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BOARD OF TAX APPEALS

CUMULATIVE LIST OF ANNOUNCEMENTS RELATING TO DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS PUBLISHED IN THE INTERNAL REVENUE BULLETIN SERVICE FROM JANUARY 1, 1932, TO DECEMBER 31, 1933, INCLUSIVE.

[Announcements relating to the acquiescence or nonacquiescence of the Commissioner in decisions of the United States Board of Tax Appeals, as published in the weekly Internal Revenue Bulletin, from December 22, 1924, to December 31, 1931, inclusive, are printed in Cumulative Bulletin X–2, pages 1–106. The list below, therefore, contains only such announcements published in the weekly Bulletins from January 1, 1932, to December 31, 1933, inclusive.]

[a] XII–52–6574

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

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
A.			
Abeles, Charles T	40546	24	435
Abeles, Clifford	37695	24	435
Abeles, Francis, estate of	37693	24	435
Abeles, John T	37694	24	435
Abeles, Katherine	37696	24	435
Abeles, Williemene H	41034	24	435
Acme Manifolding Co., Inc	25194 38687	24	429
Adelaide Park Land et al., trustees	39980	25	211
Afremow, David, estate of	39593	25	1246
Afremow, Sarah, executrix	39593	25	1246
Alabama Mineral Land Co	56960 69007	28	586
Albert Lea Packing Co., Inc	20765	24	376
Albrecht et al., Katherine B., executrices [1]	41295	27	1091
Alcoma Corporation	60700	28	1291
Alexander, J. F., estate of	39019	27	1210
Allen, Irene C	25414	25	834
Allied American Corporation	31704	25	1276
American Cigar Co	16229	21	464
American Feature Film Co	27623	24	18
American Security & Trust Co. et al., executors [2]	39167	24	334
Anderson, C. K	33242	27	1305
Anderson, Gustave	36224	26	1208

[a] Ruling No. 6574 includes all acquiescence and nonacquiescence notices published in the Internal Revenue Bulletin service from January 1, 1932 to December 31, 1933.

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

[2] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Ashforth, Albert B., estate of [1]	47190, 48009, 49354	26	1188
Ashforth et al., Mabel A., executors [1]	47190, 48009, 49354	26	1188
Atkins, J. B., estate of	38520	28	500
Atkins, Mrs. J. B	38519	28	500
B.			
Baldwin, Florence G	32387	23	512
Balfour, Sir Robert	40230	25	154
Ball, Philip D. C	36737	27	388
Bankers Dairy Credit Corporation	48329	26	886
Barber, Arthur	26747	25	513
Barber, Philip C	26755	25	513
Barber, St. George	26757	25	513
Barber Trusts, Sarah P	26747–26757	25	513
Barclay, W. L	8743	26	970
Barker, Fred	51102	28	657
B & B Ice & Coal Co	67637	27	1346
Beaumont, Louis D	31931, 46569, 49422	25	474
Bebb, Richard E., estate of [2]	41295	27	1091
Bell, Ivor B.[3]	22335	27	377
Bellows Falls Power Co	18592, 29104	25	195
Bent Co., R. G	57312, 59796	26	1369
Bernstein, Isaac M	36729	28	744
Best, Frank E	36746	26	1070
Bingham, Robert W	51051	27	186
Birdneck Realty Corporation	46079	25	1084
Biscayne Bay Islands Co	27616, 35098, 40147	23	731
Bloodgood, Edith B	26750	25	513
Blum, Julius, trustee	39242, 40939, 45741, 51507	25	119
Boehringer, Rudolph [4]	49891	29	8
Boos Bros. Cafeteria Co	39200	25	651
Borg & Beck Co	24223, 34964	24	995
Bowden, Paul Akers	54923	26	1410
Brinton, Lillian McDonald	53715	28	472
Brown, Berenice	24667, 36637	25	814
Bryan et ux., C. A	24036	19	111
Bryan et ux., L. J	24037	19	111

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Buck, John A., estate of [1]	32584 44153 44684	25	780
Buck et al., Mary M., executors [1]	32584 44153 44684	25	780
Buena Vista Land & Development Co	2025	13	895
Buffalo Union Iron Furnace Co. [2]	16075 16076	23	439
Bullock, George [3]	31209	23	710
Burton, Benjamin T	61055	28	1241
Butler, U. H	46055	24	506
C.			
California Coast Oil Co	25018	25	902
Camp Manufacturing Co	35955	25	537
Carman, F. J	44321 44939 50178	25	162
Carnie-Goudie Manufacturing Co	20074 27095	24	679
Carter Publications, Inc	44838 66891	28	160
Cathey, George	46056	24	506
Cathey, Luke	46057	24	506
Catlin, Daniel K	25421	25	834
Catlin, Theron E	25413	25	834
Central Market Street Co.[4]	24837	25	499
Central National Bank, trustee	28701	25	1123
Central Rendering Corporation	20776	24	376
Champion, David J.[5]	55569 63818	27	1312
Champion, T. Pierre [5]	55568	27	1312
Chapman & Dewey Land Co	37403 51059	25	1166
Chapman & Dewey Lumber Co	33466 37402 47130 50196 51058	25	1166
Chicago & Northwestern Ry. Co.[6]	36343	22	1407
Christopher, Rachel S.[7]	47704	26	292
City Bank Farmers Trust Co. et al., executors [7]	31869	23	663
Clark et al., James, executors	34499	24	1235
Clements, W. L	46058	24	506
Cleveland Trinidad Paving Co.[8]	41962 46297	20	772
Clinchfield Securities Co	40554	25	446

[1] Estate tax decision; acquiescence relates to value of certain real estate in San Francisco and value of stock of Langendorf Baking Co. for estate tax purposes; and reasonableness of Commissioner's allowance for support of the widow.
[2] Acquiescence relates to issue regarding deductions for obsolescence of blast furnaces.
[3] Acquiescence relates to issue 2 of decision.
[4] Acquiescence relates to issue regarding apportionment of taxes among affiliated corporations.
[5] Acquiescence relates to basis upon which gain or loss upon redemption of stock should be computed.
[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.
[8] Nonacquiescence notice published in Cumulative Bulletin X-2, pages 83 and 84, revoked.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Clinton Cotton Mills, Inc	54880	28	1311
Coats, Inc. (R. I.), J. & P.[1]	38904	28	1127
Cochrane, David K	60428	26	1167
Colgate, Mary	61882	27	506
Colorado & Utah Coal Co	53799	26	588
Columbian Carbon Co.[2]	42743	25	456
Columbus Brick & Tile Co.[3]	42707	26	794
Commercial Investment Trust Corporation [4]	43495 50051	28	143
Connecticut River Power Co	18591 29106	25	195
Contractors Construction & Supply Co.[5]	41963	20	772
Cook, Elizabeth E.[6]	38579	25	1351
Cook, M. M., estate of	53044	27	33
Cooke, Beatrice B	26751	25	513
Coombs, Elizabeth M	44768	25	1320
Coombs, J. Howard	44769	25	1320
Cooper, John I	32610 40115	24	216
Corbett, Elliott R	40926	27	388
Corning Trust Co., trustee	29252	26	1359
Cornwell, F. L	30303	24	915
Costello, Joseph [7]	22640	27	377
Cotton, G. E	59655	25	866
Croker, Bula E	41121	27	588
Cromwell et al., William Nelson, executors [8]	42619	24	461
Crouse, George N	43446 51419	26	477
Crowley, Joseph J., estate of [9]	35472	25	340
Crowninshield Shipbuilding Co	18987	24	925
Culver, Wilmer T	37574	24	1013
Cunard Coal Co. [10]	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
Davis, John A	20703	24	36
De Forest, Kate R.[11]	37284	27	373
Delaware & Hudson Co.[12]	50553 50629	26	520

[1] Acquiescence relates to contributions issue and issue respecting deduction of amount paid to treasurer of Rhode Island on account of increasing capital stock.
[2] Nonacquiescence published in Bulletin XI-14, page 1, revoked.
[3] Acquiescence relates to inclusion in consolidated invested capital of capital stock issued for a tile and brick manufacturing plant, etc.
[4] Acquiescence relates to the following issues: Deduction of expenses in connection with issuance of preferred stock; deduction for dividends credited to accounts of employees for purchase of stock.
[5] Nonacquiescence notice published in Cumulative Bulletin X-2, pages 83 and 84, revoked.
[6] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[7] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[8] Estate tax decision; nonacquiescence published in Cumulative Bulletin X-2, page 84, revoked.
[9] Estate tax decision.
[10] Acquiescence relates to deductions for additional royalties and officers' salaries and directors' fees.
[11] Gift tax decision.
[12] Nonacquiescence published in Cumulative Bulletin XI-2, page 12, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Dennis, Frank H., estate of [1]	50263	26	1120
Dennis, Merry M., executrix [1]	50263	26	1120
Detroit Trust Co. et al., executors [1]	35472	25	340
Dickinson, Albert G	35015 43176	23	1211
Dirksen, Anna L., executrix	17717	24	1152
Dirksen, Theodore H., estate of	17717	24	1152
Dome Co	41887	26	967
Dominion National Bank	52165	26	421
Douglas Co., John	38726	23	1307
Drexel Packing Co	20775	24	376
Duff, Robert C.[2]	37552	23	1342
Dunham, Walter E	66308	27	1068
E.			
Eagle Pass & Piedras Negras Bridge Co	42460	23	1337
Easterwood, Jr., W. E	40181 63416	28	1283
Easterwood, Jr., Mrs. W. E	40182 63417	28	1283
Eisendrath, Edwin W	36726	28	744
Eisendrath et al., Edwin W., executors	36724	28	744
Eisendrath, Marion	36727	28	744
Eisendrath et al., Rose L., trustees	36728	28	744
Eisendrath, William B	36725	28	744
Eisendrath, William N., estate of	36724	28	744
Elkins, Hallie D.[3]	39255	24	572
Elliott-Granite Linen Corporation	48212	26	936
Elmore Milling Co	46768 52972	27	84
Emery, Mary M., estate of [3]	40899	25	585
Enameled Metals Co	19011	25	186
Ennis Ice Co	22021 22022 26259 42184	24	40
Evergreen Cemetery Association	30726	25	544
F.			
Falck, Alexander D	20452	26	1359
Falls City Ice & Beverage Co	67636	27	1346
Fame Canning Co	20774	24	376
Farmers Life Insurance Co.[4]	43317	27	423
Farmers' Loan & Trust Co., trustee	29465	26	1359
Federal Street & Pleasant Valley Passenger Ry. Co	29758	24	262
Fidelity Savings & Loan Association	14862 31801 39406 45215	23	1059
First National Bank of Boston, administrator	36438 46583	25	252
First National Bank of Key West	45186	26	370
Florence Manufacturing Co	15383 26079	25	676

[1] Estate tax decision.
[2] Acquiescence relates to issue 1 of decision.
[3] Nonacquiescence published in Cumulative Bulletin XI-1, page 9, revoked.
[4] Acquiescence relates to issue in connection with option payment received for purchase of land.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Folk, H. B	28396 31018	25	599
Forest Products Chemical Co	46621	27	638
Forres, Lord	40229 43973	25	154
Foster, L. B.[1]	43086	26	1328
Foster, N. C., estate of [2]	32984	25	414
Foster et al., Willard, executor [2]	32984	25	414
Frank, Emil	50224	27	1158
G.			
Gambill, A. A	47902	26	995
Gamble & Stockton Co.[3]	42707	26	794
Gardner, Charles E.[4]	38575	25	1351
Garron et al., Isabel K. J., executors [2]	47705	26	292
George, Jerome R	45240	27	765
George Machinery Co., R. B	61218	26	594
Ginsberg, Albert A	27628	24	18
Ginsberg, Nathan A	27629	24	18
Globe Construction Co	43438 51694 53310	25	146
Golden, Edward A	27625	24	18
Goldman, Maxwell	30302	24	915
Gordon, Kizzie [5]	22332	27	377
Gordon, Max L.[5]	22333	27	377
Gottlieb Realty Co	42528	28	418
Graeper, W. A	46619	27	632
Grand River Gravel Co	23085	22	1124
Green, Robert D.[6]	53647	24	719
Green, W. S	43786 46373 63487	26	1017
Grey Bull Corporation	47376	27	853
Griffis, Stanton [4]	38577	25	1351
Griffiths, George W	42498	25	1292
Griffiths, John	43074	25	1292
Guaranty Building & Loan Co	55352	27	754
Gulf Coast Irrigation Co.[7]	33694 40081 41343	24	958
Gurnee, Augustus Coe, estate of [8]	42619	24	461
H.			
Haberland, Paul	29289	25	1370
Hailey-Ola Coal Co	30962	24	895
Halladay, Sarah P	26754	25	513
Hamburg, Jr., Sam	30304	24	915
Hanscom, Edward E., estate of [2]	44992	24	173
Hanscom et al., Melville, executors [2]	44992	24	173

[1] Acquiescence relates to issue regarding filing of separate return for 1925.
[2] Estate tax decision.
[3] Acquiescence relates to inclusion in consolidated invested capital of capital stock issued for a tile and brick manufacturing plant, etc.
[4] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[5] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[6] Acquiescence relates to transactions 1, 2, 3, and 4.
[7] Acquiescence relates to all issues except affiliation issue.
[8] Estate tax decision; nonacquiescence published in Cumulative Bulletin X-2, page 88, revoked.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Harbeson Lumber Co., W. B	33076 51012	24	542
Harbison, Ralph W	54346	26	896
Harbison, William Albert	54347	26	896
Harrah, Marie E	25269	27	1305
Harrah, William F	21643	27	1305
Hartford-Empire Co	29958 41736 53600	26	134
Hastings, Frederick A	38864	27	1305
Havard, Charles	32841	25	1161
Hay, W. H	37499	25	96
Hayman Co., B	16552	25	736
Hemphill, Clifford [1]	38573	25	1351
Hervey, W. R	46806	25	1282
Hess, Nathaniel J	33279	24	475
Hettman, Walter E.[2]	22341	27	377
Hickman, Fannie Snyder	16253	24	438
Himelhoch Bros. & Co	41728 42769 45663	26	541
Hires Co., Charles E	47781	26	1351
Hobbs, Henry	27352	26	241
Hobbs, Teck	27351	26	241
Hoffer, Anita Owens	33374	24	22
Hoffer, T. B	33375	24	22
Hollingsworth, A. E	54282	27	621
Hollister, George Buell	29461	26	1359
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.[1]	12052	22	51
Houston, George T.[3]	13104 22008	22	51
Houston, Horace K.[3]	22009	22	51
Houston, Philip D.[3]	22007	22	51
Hunter, C. W., executor	45417	26	417
Hunter, George H., estate of	45417	26	417
Huntington, Henry E., estate of [4]	45429	28	289
Huyler's, Inc	28369 29154 39841	24	425
I.			
Independent Ice & Coal Co	67639	27	1346
Ingalls, Charles C., estate of [5]	57835	25	773
Interstate Realty Co	46272 50981	25	728
Iten Biscuit Co	16429 20899	25	880

[1] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[2] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[3] Acquiescence relates only to deduction for business expenses in 1920 and to number of feet of timber cut during 1919.
[4] Acquiescence relates to issue regarding loss from operation of a farm in 1925 and 1926 and issue regarding increasing deficiency for 1925 by amount of interest accrued on bonds exchanged for art objects.
[5] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
K.			
Kammerdiner, J.	41643, 46555	25	495
Kansas City Leasehold & Improvement Co.[1]	35718	17	213
Kansas City & Memphis Farms Co.	51060	25	1166
Kasch, Ed.	48293	25	284
Kasch, Theodora.	48293	25	284
Kelley, John P.	38233	26	212
Kent, Everett E.	39576, 42589, 46064	26	482
Kibele, O. B.[2]	24882	27	377
Kinney Co., Inc., G. R.	31397, 32980	26	1091
Kirchner, Julius C.	25428	27	1305
Knight, E. D.	56865	28	188
Kraemer, Samuel.	37822	25	686
Kuhn, Ida L.	32609, 40267	24	216
Kunau et al., Oscar F. C., trustees.	64815	27	509
L.			
Lake Charles Naval Stores.	34630, 36940	25	173
Landers, Douglas J., estate of [3]	35443	21	1347
Lawson, John.	40232	25	154
Leamington Hotel Co.	48413	26	1004
Leidesdorf, Samuel D.	48305	26	881
Leonard Holding Corporation, George B., estate of.	48871	26	46
Ley, George W.[2]	22336	27	377
Ley, Mary C.[2]	22337	27	377
Liberty Farms Co.	26717, 29899	22	1298
Lincoln, Robert Todd, estate of [3]	39167	24	334
Lippincott et al., J. Bertram, executors [3]	49233	27	735
Lippincott, Walter, estate of [3]	49233	27	735
Littauer, Eugene, estate of [4]	51858	25	21
Littauer et al., Lucius N., executors [4]	51858	25	21
Little, C. B.	61821	27	1022
Livingood, Charles J., executor [5]	40899	25	585
Loeb, Jr., et al., William, trustees.	34161	26	635
Logel, Joseph F.	37762, 40071	24	798
Longyear, Jr., John M.	47117, 56027, 62410	28	1085
Longyear, Mary B., estate of.	36438, 46583	25	252

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

[3] Estate tax decision.

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

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Loughborough Development Corporation	51064	29	95
Lourie, David A	27630	24	18
Luhrig Collieries Co	40048	26	194
M.			
Markham Irrigation Co.[1]	41344	24	958
Martin Hotel Co. and affiliated corporations	16275	24	899
Martin et al., J. Earle, trustees	44583	24	862
Martin, T. S., estate of	44583	24	862
Martins, Andy [2]	22334	27	377
Marvin, Walter S.[3]	38578	25	1351
Matagarda Canal Co.[1]	40082 41345	24	958
Matthews, J. P	26250	22	858
Mauldin, I. M	26239	22	858
McCall, Florence [4]	47702	26	292
McCool, Bess	46059	24	506
McDonald, L. G	25427	27	1305
McEwan, Anna B	25996	26	727
McEwan et al., Anna B., executors	25997	26	727
McEwan, A. F	25995	26	727
McEwan, Lillian G	25994	26	727
McEwan, W. H., estate of	25997	26	727
McGrew, Elizabeth W	26753	25	513
McLennan, A. R	26730	25	1052
McMillan, William Northrup, estate of [5]	45966	27	318
Mead Coal Co., C. H	42718 42719 54660	28	599
Memphis Memorial Park	49259 53458	28	1037
Mercantile-Commerce National Bank in St. Louis et al., executors and trustees [4]	35443	21	1347
Messer, Richard B., estate of [4]	42513	27	556
Metropolitan Properties Corporation	45032	24	220
Michigan Trust Co. et al., executors [4]	42513	27	556
Milby & Dow Coal & Mining Co	22021 22022 26259 42184	24	40
Milgrim & Bros., Inc., H.[6]	33177	24	853
Mississippi Packing Co., Inc	20772	24	376
Mitchell, L. C	41610	28	767
Mitchell, Oscar [7]	41680 41874 54673	27	101

[1] Acquiescence relates to all issues except affiliation issue.
[2] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[3] Acquiescence relates to issues regarding allocation of total cost between common and preferred stocks purchased.
[4] Estate tax decision.
[5] Estate tax decision; acquiescence, except in so far as concerns the question of situs.
[6] Acquiescence relates to issue 1 of decision.
[7] 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.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Mobile Light & Railroad Co.[1]	41026, 42062	23	543
Moorehead, William A	25853	22	858
Moorshead, O	57045	28	253
Murchison, Mrs. A. H	62838	28	257
Murphy, Mae A. Kelley	38222	26	212
Murray, Edward J	40176, 58858	28	624
Murray, Rebecca J	40174, 58857	28	624
Murtha & Schmohl Co	17911	17	442
Musgrove, Floyd L	42591	27	554
Mutual Assurance Society of Virginia	43911	24	1102
N.			
Nail et al., R. E., executors	53044	27	33
National Capital Insurance Co. of the District of Columbia	56748	28	1078
National Contracting Co.[2]	24520	25	407
National Mill Supply Co	37001	23	1362
National Packing Corporation	31668, 33971	24	952
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 [3]	28045	26	696
Newbury, Mollie Netcher	38049	26	101
Newbury, Mollie Netcher, trustee	38052	26	101
Newell et al., Sterling, executors [4]	57835	25	773
New England Power Co	18593, 29105	25	195
New Market Investment Co.[5]	35719	17	213
Newton, Elizabeth K.[4]	47703	26	292
Newton, Joseph R., estate of [4]	47705	26	292
New York, Chicago & St. Louis R. R. Co	21047	23	177
North Side Lumber & Timber Co	34924	27	1187
Northern Coal Co.[6]	34945	24	307
Noyes, Jansen [7]	38574	25	1351
O.			
Oakley, Richard H	45778	24	1082
Ontario Realty Co.[5]	35721	17	213
O'Rear, E. C.[8]	32335	28	698

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

[2] 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.

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

[4] Estate tax decision.

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

[6] Acquiescence relates to inventory issue.

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

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
P.			
Paine et al., Francis Ward, executors	34113	25	764
Paine, William A., estate of	34113	25	764
Palm Beach Mather Co	43850	24	536
Parkland Ice & Coal Storage Co	67640	27	1346
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
Pegg, Albert O.[1]	22338	27	377
Pennsylvania Investors Co	20766	24	376
Perkins et al., Jacob	28701	25	1123
Pershouse, Alice E	26749	25	513
Pershouse, Mabel B	26748	25	513
Phillips, C. J	47901	26	995
Pictorial Review Co	43995	26	472
Piggly Wiggly Corporation	25126 43860	28	412
Pizitz Dry Goods Co., Louis	46585	22	161
P-M-K Petroleum Co.[2]	50576 54779	24	360
Polar Ice & Coal Co	67638	27	1346
Pope, Olive R	29274	25	1161
Powell, Benjamin I	50380	26	509
Price, Laura M	40659	24	216
Price, W. E	41072	24	216
Prophylactic Brush Co	32996 47845 47846	25	676
Prosser, Constance B	26752	25	513
Putnam Trust Co	34743	26	655
Q.			
Quinn, Evan V	8544	26	970
Quinn, Martin M	8598	26	970
Quinn, Paul H	8574	26	970
R.			
Rapp, John W., estate of	28618	24	1061
Rauh Realty Co	32822	26	48
Reardon & Sons Co., John	20773	24	376
Rialto Mining Corporation	48692 56877	25	980
Richards & Hirschfeld, Inc	21715	24	1289
Riggs National Bank [3]	30903	17	615
Robson, Clara P., estate of	26645	25	949

[1] Acquiescence relates to that part of decision holding that Walter E. Hettman is not liable as a transferee; and to limitation issue.
[2] Acquiescence relates to third issue of decision.
[3] Nonacquiescence published in Cumulative Bulletin X-2, page 99, withdrawn.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Rodeo-Vallejo Ferry Co.[1]	36411 48528	24	936
Rosenberg, Louis	27626	24	18
Rosenbloom Finance Corporation [2]	35778 40903	24	763
Roth, Gorton	22568	26	631
Roy & Titcomb, Inc	29138	24	969
Russell, C. C	46060	24	506
Russell, Mrs. C. C	46061	24	506
S.			
St. Louis Union Trust Co., executor [3]	45966	27	318
Sanders, W. C	26651	25	949
San Martinez Oil Co	37447 43121	25	218
Sappington, G. Ridgely	51944	25	1385
Schepp Co., L	42908	25	419
Schermerhorn, Harriet Pullman	43145	26	1031
Scovill Manufacturing Co	29854 30238	25	265
Scruggs, Gross R	33610	24	1174
Scruggs Investment Co	46270	24	1174
Scruggs, Marian P	38711	24	1174
Seaconnet Coal Co.[4]	18089	24	307
Searles Real Estate Trust	24489	25	1115
Securities Co	40553	25	446
Security First National Bank of Los Angeles et al., executors [5]	45429	28	289
Sells Sporting Goods Co	20771	24	376
Shand, Gadsden	26238	22	858
Shaw, David, estate of	34499	24	1235
Shea, R. P	37835 40034	24	798
Simcoe Realty Co.[6]	35720	17	213
Sinclaire et al., Helen B., executors	37703	26	1359
Sinclaire, Henry P., estate of	29252	26	1359
Sinclaire, Jr. Henry P., estate of	37520	26	1359
Sinclaire et al., Murray, executors	37520	26	1359
Sinclaire, Reginald	37864	26	1359
Sinclaire, William, estate of	37703	26	1359
Sioux Falls Metal Culvert Co	41070	26	1324
Smathers 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

[1] Acquiescence relates to deduction of contribution to Victory Highway Association.
[2] Acquiescence relates to holding of Board that distributions received from Joseph H. Finch & Co. were not partial liquidating dividends.
[3] Estate tax decision; acquiescence, except in so far as concerns the question of situs.
[4] Acquiescence relates to inventory issue.
[5] 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.
[6] Acquiescence relates to March 1, 1913, value, for purposes of calculating gain or loss upon sale of land at Versailles, Mo.; whether the invested capital of the Simcoe Realty Co. should be increased for 1918; and the March 1, 1913, value for amortization purposes of a leasehold belonging to Kansas City Leasehold & Improvement Co.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Smith, Louis, estate of	18876	24	807
Smoot, Lewis E	32578	25	1038
South Memphis Land Co	44500	27	897
Southard, Jennie	42592	27	554
Southern Railway Co. et al [1]	21481 29951 37887– 37898	27	673
Sprague & Son Co., C. H.[2]	34946	24	307
Sprunt & Son, Inc., Alexander	38408	24	599
Standard Beef Co	20770	24	376
Standard Conveyor Co	33159 36393 40873	25	281
Stauffen, Theodora B	26756	25	513
Stearns, Robert L	37573	24	1013
Stegeman, A. V	26643	25	949
Stegeman, Jr., Albert V	26650	25	949
Stegeman, Fannie L	26644	25	949
Stegeman, H. M	26647	25	949
Stegeman, H. R	26646	25	949
Stegeman, Mabel K	26649	25	949
Stegeman, William L	26648	25	949
Stevens, John H	29685	24	52
Stevenson Consolidated Oil Co.[3]	43416	23	610
Stock Yards Bank of Cincinnati	41085	25	964
Stockham, Elijah	22569	26	631
Stone et al., Irving K., executors and trustees [4]	43830	26	1
Stone, Irving Lee, estate of [4]	43830	26	1
Stoneman, David	27627	24	18
Stromeyer, Irene	55341	28	472
Stromeyer, William A	55342	28	472
Strong, Harold C.[5]	38576	25	1351
Sullivan, Eugene C	29389	26	1359
Sunburst Oil & Refining Co	45979	23	829
T.			
Talbot, J. A.[6]	36191	23	792
Texas Irrigation Co.[7]	40083 41346	24	958
Thompson, Edward W	51103	28	657
Thompson, W. L	51104	28	657
Tifft, Charles	31029 33464 42340 45957	25	986

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

[2] Acquiescence relates to inventory issue.

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

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

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

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

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

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Tifft, Lewis E	31030 33465 42341 45958	25	986
Times-Picayune Publishing Co	48892 49539	27	277
Tobey, Maurice	27624	24	18
Tolerton & Warfield Co.[1]	45320	23	892
Tracy, William R	45513	25	1055
Tricou, Sallie S	28093 40258	25	713
Trout, H. W	39020	27	1210
Turner, Kathleen M.[2]	22340	27	377
Turrish, Henry	44742	24	913
Twin Bell Oil Syndicate	29518	26	165
U.			
Ulster & Delaware R. R. Co	28927	25	109
Union Lard Corporation	20769	24	376
Union Pacific R. R. Co. et al [3]	35639– 35649 35684 35685 40060 40061 40062	26	1126
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
W.			
Walker, George H., estate of [4]	31869	23	663
Ward Bros. Co	30992	24	989
Warner Co.[5]	53039 53040 59190	26	1225
Washington Market Co	43912	25	576
Watson, Jr., John H	53414	27	463
Wayne County & Home Savings Bank [6]	49144	26	761
Wheelock, R. L	37806	28	611
Wheelock, Mrs. R. L	37805	28	611
White Oak Transportation Co.[7]	18088	24	307
Whitney, Williard M	37927	26	212
Whitson, Thomas J	40233	25	154
Wilcox, C. B	46371	27	580

[1] Acquiescence relates to issue regarding deduction of loss sustained by petitioner during nonaffiliated period.
[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 donations issue; amortization of discount on bonds issued prior to 1913; computation of tax for 1920.
[4] Estate tax decision.
[5] Nonacquiescence published in Cumulative Bulletin XII-1, page 24, withdrawn.
[6] Nonacquiescence published in Cumulative Bulletin XI-2, page 18, revoked.
[7] Acquiescence relates to inventory issue.

ACQUIESCENCES—Continued.

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Williams, Ella J	29273	25	1161
Williams, W. W	46062	24	506
Williamson, Alexander B	40231 43972	25	154
Williamson, Archibald (Lord Forres)	40229 43973	25	154
Wilson & Co., Inc., of California	20768	24	376
Wilson Commission Co	20767	24	376
Wilson & Co., Lee	33826	25	840
Wilson Shipbuilding Co.[1]	34337	25	182
Winne, Walter G	60900	27	369
Wood, Fred T	38808	27	162
Wood Lumber Co., E. K	23605 24156	25	1013
Wray, Eliza J	25881	24	94
Wright, George M	25854	22	858
Wright, Leonard Marshall	45508	26	21
Y.			
Young, Ethel P	38868	24	815
Yukon Alaska Trust	34161	26	635
Z.			
Zinsser & Co	5242	21	152

[1] Acquiescence does not relate to issue 5 of decision.

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

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Abelson Realty Co., Inc	53792	24	686
Abelson's, Inc	53793	24	686
Ackerman, Irving C	30311 31634 40948 40949	24	512
Alameda Park Co	8355	25	850
Albrecht et al., Katherine B., executrices [1]	41295	27	1091
Alker, Vera M. Kohler	36116	25	243
Allied Furriers Corporation	50059	24	457
American Brick & Tile Corporation	29994	22	1121
Ames, Jr., Ward	49817	27	624
Apartment Corporation	42024	26	849
Arabol Manufacturing Co	50489	26	1068
Archbald, Edward B	61660 65064	27	837
Archbald, Joseph A	61661 65062	27	837
Archbald, Jr., Joseph A	61673 65063	27	837
Armstrong, William M	40419	25	928
Ashton, Willard H	39148	28	582
B.			
Babson, Fred K	52224	27	859
Babson, Gustavus	52223	27	859
Babson, Henry B	52222	27	859
Ballinger, Bessie M., executrix [2]	32177	23	1311
Ballinger, Walter F., estate of [2]	32177	23	1311
Bankers Trust Co., trustee	32459	24	10
Bartlett, J. Kemp	63632	28	285
Bay, Robert P	66014	28	1168
Bebb, Richard E., estate of [1]	41295	27	1091
Beebe, Junius, trustee	52707	26	190
Beebe, Marcus, estate of	52707	26	190
Belfast Investment Co.[3]	19128	17	213
Bell & Sons, Samuel	38056 41647 45616	22	793
Bindley, Mary M., estate of	58871	28	113
Bliss, Sydney R	55902	26	962
Bliss, Valentine	53422	26	732
Board of Fire Underwriters of the City of Duluth	43150	26	860
Boca Ceiga Development Co	40446	25	941
Boehringer, Rudolph [4]	49891	29	8
Bowman-Biltmore Hotels Corporation	41472 43629	24	1193

[1] Estate tax decision; nonacquiescence relates to State inheritance tax issue.
[2] Estate tax decision.
[3] Nonacquiescence in issue as to whether petitioner is entitled to deduction for amortization of the Lee tract warehouse for 1918.
[4] Nonacquiescence relates to issue involving reorganization.

NONACQUIESCENCES—Continued.

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Bowman Hotel Corporation	10651 24912 28971 38006	24	1193
Brackman, J. W.	45714	24	259
Bradbury, I. C.	45780	23	1351
British-American Tobacco Co., Ltd.	41224	27	226
Brooklyn City R. R. Co.	20353	27	77
Brooklyn & Queens Transit Corporation	20353	27	77
Brown, Frank A., estate of	47677	26	901
Brown, H. C.	33343	25	631
Brown, Harry A.	48136	26	901
Brown, Pearl B., executrix	47677	26	901
Buck, John A., estate of [1]	32584 44153 44684	25	780
Buck et al., Mary M., executors [1]	32584 44153 44684	25	780
Buffalo Union Iron Furnace Co.[2]	16075 16076	23	439
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
Busche, F. C.[4]	9447 10202 10755	10	1345
Business Real Estate Trust of Boston	33469 42684 50305	25	191
Butler-Veitch Co.	45169 45170	23	953
C.			
Cadwalader, Mary Helen	46327	27	1078
Carey Fibre Products Co., Emerson	36381	26	675
Carey Salt Co.	36382	26	675
Carroll, J. J.	51880	27	65
Carroll, Lena Carter	51881	27	65
Carson, John E.	45393	28	236
Carson, Rose L.	45392	28	236
Carter, A. L.	51882	27	65
Carter, A. L., administrator	47669	27	65
Carter, Mrs. A. L.	51883	27	65
Carter, E. A.	51884	27	65
Carter, Lillie N.	51885	27	65
Carter, Maude H., estate of	47669	27	65
Carter, Jr., W. T.	51886	27	65
Cassels, Robert	58793	26	1401

[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] Acquiescence published in Cumulative Bulletin X-1, page 10, withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Central Market Street Co.[1]	24837	25	499
Central Union Trust Co. of New York, executor	31736	25	757
Champion, David J.[2]	55569 63818	27	1312
Champion, T. Pierre [2]	55568	27	1312
Chapman, C. F	52496	28	53
Chenowith, H. C	38349	26	301
Chicago & Northwestern Ry. Co.[3]	36343	22	1407
Clark Thread Co.[4]	38903 47974	28	1127
Coastwise Transportation Corporation	39916	28	725
Cobleigh, Margaret Edwards, estate of [5]	40765	24	176
Columbus Brick & Tile Co.[6]	42707	26	794
Commercial Garage Co	41646	22	793
Commercial Investment Trust Corporation [7]	43495 50051	28	143
Community Bond & Mortgage Corporation	43784	27	480
Cone, Edward K	58777	26	1401
Cook, Elizabeth E.[8]	38579	25	1351
Cook, Sam	35014	25	92
Cooper, A. T.[9]	3144	7	798
Crile, Grace McBride	43136	26	1020
Crispin, Mrs. Egerton	45267	28	236
Crosby, Oscar T	51317	27	1234
Cross, Maurice	32735	24	1079
Cunard Coal Co.[10]	26874 26875 28792	26	234
Cuppia, Jerome C	58545	26	1401
D.			
Davidson, Watson P	46486	27	158
Davis, C. R.[11]	10299	10	1233
	32950	20	931
Davis, Frederick H	37324	24	405
Davis, Thomas L	37395	24	405
Degener, John F., estate of [5]	38500	26	185
Degener, Jr., et al., John F., executors [5]	38500	26	185
De Lisser, Horace, estate of [12]	2459	2	102
Depew, Ganson	50860	27	515
Dohrmann, Andrew B. C	20658	19	507
	23969	19	466
Dolomite, Inc	60661	28	1270
Dort, J. Dallas, estate of [5]	44735	26	1321

[1] Nonacquiescence relates to issue regarding Board's jurisdiction of subsidiaries.
[2] Nonacquiescence relates to issue whether redemption of stock was equivalent to taxable dividend.
[3] Nonacquiescence relates to following issues: Undermaintenance; profit and loss on bonds retired; amortization of bond discount.
[4] Nonacquiescence relates to issue respecting depreciation.
[5] Estate tax decision.
[6] Nonacquiescence relates to inclusion in consolidated invested capital of capital stock issued for promissory notes.
[7] Nonacquiescence relates to deduction in 1926 of excess of market value over sale price of stock sold to employees.
[8] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[9] Acquiescence published in Cumulative Bulletin VII-1, page 1, withdrawn.
[10] Nonacquiescence relates to expenditures for mine equipment.
[11] Acquiescence published in Cumulative Bulletin X-1, page 17, withdrawn.
[12] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 18, recalled.

NONACQUIESCENCES—Continued.

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Drawoh, Inc	45014	28	666
Drumheller, George	41515, 45752	27	209
Duff, Robert C.[1]	37552	23	1342
Dunham et al., Lucy Belle, executors [2]	46603	26	286
Dunham, Mary Virginia, estate of [2]	46603	26	286
E.			
Eifert, Earl C	45781	23	1351
Elkins, William L., estate of	56449	28	367
Ethel D. Co	32032	27	25
Everhart, James William	26675	26	318
F.			
Fairmount Cemetery Association	30925, 42811	25	1272
Farmers Cotton Oil Co	42679	27	105
Farmers Life Insurance Co.[3]	43317	27	423
Feldman, Henry O	45359	28	236
Field, Marshall	36908	26	116
Fifth Street Building	16627, 29264, 45537	24	876
First National Bank in St. Louis [4]	44278, 48078	23	1124
First National Bank of Boston, administrator [2]	44746	25	612
First Peoples Trust	45403	26	551
Fleitmann, William M., estate of [4]	28449	22	1291
Fleitmann, Jr., et al., William M., executors [4]	28449	22	1291
Fletcher, Salathiel R	33041	24	75
Folger & Co., J. A	22212, 30721	27	1
Folger Estate Co	31200, 35147	27	1
Foster, Caroline B., estate of [2]	46672	26	708
Foster, et. al., Charles H. W., executors [2]	46672	26	708
Foster, L. B.[5]	43086	26	1328
Fox River Paper Co	20878	28	1183
G.			
Gale, Emily A	61672	27	837
Gamble & Stockton Co.[6]	42707	26	794
Garcia, Edward H	21657	22	1027
Gardner, Charles E.[7]	38575	25	1351
Garrie, Daniel T., estate of	31736	25	757
Garvan, John Joseph, estate of [2]	44746	25	612
Gassner, Louis [8]	4017	4	1071
Gerard, Erle	45221	28	236

[1] Nonacquiescence relates to issue 2 of decision.
[2] Estate tax decision.
[3] Nonacquiescence does not relate to issue in connection with option payment received for purchase of land.
[4] Acquiescence notice published in Cumulative Bulletin X-2, pages 23 and 24, recalled.
[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 consolidated invested capital of capital stock issued for promissory notes.
[7] 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.
[8] Acquiescence published in Cumulative Bulletin X-1, pages 24, 27, withdrawn.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Gerlach, Theodore R	38042 41641	27	565
Gladding, Mary D., estate of [1]	31435	27	385
G. M. & S. Co	16383	26	223
Goetjen & Metson Co	17875	26	223
Goldberg, Harry S.[2]	5389	4	1073
Goldschmidt et al., Georgette, executors [3]	16138	14	1010
Goldschmidt, Henry P., estate of [3]	16138	14	1010
Graham, M. H	38335	26	301
Green, Robert D.[4]	53647	24	719
Greenleaf Textile Corporation	46746	26	737
Gregory, Evelyn F	55299	27	223
Griffis, Stanton [5]	38577	25	1351
Guitar Trust Estate	35102	25	1213
Gulf Coast Irrigation Co.[6]	33694 40081 41343	24	958
Gulf, Mobile & Northern R. R. Co.[7] [8]	24887 42150	22	233
Gummey, Frank B	61056	26	894
H.			
Hancock, G. Allan	36867	25	607
Hanson, Charles C	15398	23	590
Harris, Allen [2]	10980	10	1374
Harris, Simon	31632	24	512
Harrison, J. E	45361	28	236
Hart, John H	52795 60115	27	528
Hartley, Cavour, executor	42343	27	952
Hartley, G. G., estate of	42343	27	952
Hauser, W. E	43301 43302	26	1178
Hawley Investment Co	45169 45170	23	953
Hedrick, J. T	33533	24	444
Heller, B. G	40634	25	259
Hemphill, Clifford [5]	38573	25	1351
Henn, A. W	37102	20	1133
Hermann, John C	51959	27	409
Hickman, Howard C	37369	27	807
Hieronymus, Carl Richard, estate of	48930	24	269
Highway Trailer Co	44568	28	792
Higley & Co., E. B	51003	25	127
Hill, D. F., estate of [1]	29399	24	1144
Hill et al., Paul F., executors [1]	29399	24	1144
Hodges, Agnes Wiley, executrix	38336	26	301
Hodges, W. L., estate of	38336	26	301

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

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Hodges, W. L., trustee	38337	26	301
Holmes Bakery & Confectionery	44943 52861	27	1229
Holmes, Carl F	51473 53395	27	660
Holmes, E. A., trustee	44943 52861	27	1229
Holmes, Margaret A	48631 51570 53394	27	660
Household Products, Inc	44809	24	594
Housman, Clarence J	58798	26	1401
Housman, Frederick	58774	26	1401
Houston Baseball Association	43985 45430	24	69
Houston Bros.[1]	12052	22	51
Houston, George T.[1]	13104 22008	22	51
Houston, Horace K.[1]	22009	22	51
Houston, Philip D.[1]	22007	22	51
Hulburd, Charles H., estate of	22028	27	1123
Hulburd, De Forest, individually and as executor and trustee	22028	27	1123
Hunter, G. W., estate of [2]	33564	25	1078
Huntington, Henry E., estate of [3]	45429	28	289
Hutchison Coal Co	34939	24	973
I.			
Imperial Elevator Co	35688	25	234
Imperial Investment Co	29291	23	1281
Indianapolis, Crawfordsville & Danville Electric Ry. Co	33859	24	197
Indianapolis & Northwestern Traction Co	33861	24	197
Iten Biscuit Co	43667 45164	25	870
Ives Dairy, Inc	39873	23	579
J.			
Jackson & Eastern Ry. Co	38295 [4] 42149	22	233
Jackson, Wermich Trust	32307	24	150
Jamison Coal & Coke Co	31690 34088	24	554
Janotta, Stella S.[5]	51172	28	39
Jefferson Standard Life Insurance Co	43149	25	1335
Johnston, Hugh McBirney, individually and as executor and trustee	22028	27	1123
Jones, Bessie R	58285	27	171
K.			
Keeys, Edward L	45360	28	236
Kerrigan, Arthur L	58794	26	1401

[1] Nonacquiescence relates to March 1, 1913, value, and to the basis for the deduction for depletion and for the computation of gain or loss upon subsequent sale of the timber.
[2] Estate tax decision.
[3] Nonacquiescence relates to issue whether taxpayer sustained a net loss in any business regularly carried on in 1924 which could be carried forward and deducted from taxable income in 1925.
[4] Nonacquiescence relates to issue involving deduction for depreciation on ways and structures.
[5] Gift tax decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
King, John M	41549	26	1158
Knapp, Kittie A.[1]	2775	7	790
Koch, Harry A	55318	26	1025
Kountze, Charles T	37323	24	405
Kountze et al., Charles T., executors	37535	24	405
Kountze, Luther L., estate of	37535	24	405
Krull, Francis [2]	16985	10	1096
L.			
Lafayette Life Insurance Co	41721 42663	23	946
Laun, Alfred A	45347	26	764
Laun, J. B	45348	26	764
Leeper, Frank E., estate of	45266	28	236
Leeper, Pearl E	45265	28	236
Leetonia Furnace Co	32272	23	979
Levine, Hyman [2]	7435	8	298
Liebes & Co., H	28544 35038	23	787
Linderman, William S., executor	58871	28	113
Littauer, Eugene, estate of [3]	51858	25	21
Littauer et al., Lucius N., executors [3]	51858	25	21
M.			
Mallory, L. W., estate of	33231	27	750
Manchester Coal Co	33392	24	577
Manhattan Life Insurance Co	60827	28	129
Margay Oil Corporation	44891	26	199
Markham Irrigation Co.[4]	41344	24	958
Marvin, Walter S.[5]	38578	25	1351
Matagarda Canal Co.[4]	40082 41345	24	958
McCormick et al., Cyrus H., trustees	44139	26	1172
McCrory, Luke W., trustee	32444	25	994
McLister, Frank	48562	27	155
McMillan, William Northrup, estate of [6]	45966	27	318
Meyer, Robert R	44032	27	44
Miglietta, Olga K	36379	25	243
Miller, Albert	45368	28	236
Mills, J. H. Coadby	58797	26	1401
Mitchell, Oscar [7]	41680 41874 54673	27	101
Mitchell, William	58799	26	1401
Modjeski, Ralph	49517	28	1051
Moore Bread Co	41645	22	793
Moore, G. H	38351	26	301

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

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Morganite Brush Co., Inc	26369	24	776
Moro Realty Holding Corporation	37406, 44759, 50490	25	1135
Morriss et al., Julia L	41023, 41024, 45863, 45864	23	1076
Morriss Realty Co. Trust No. 1	41023, 45863	23	1076
Morriss Realty Co. Trust No. 2	41024, 45864	23	1076
Morse, Emma R., estate of [1]	44652	27	1070
Mosser, Charles F	55399	27	513
Mueller, Earl W	45362	28	236
Murphy et al., Fred T., trustees	43795	25	724
Murphy Personal Property Trust	43795	25	724
Mutual Life Insurance Co. of New York	9764	23	749
N.			
Nashville, Chattanooga & St. Louis Ry	33799	24	856
National Contracting Co.[2]	24520	25	407
National Land & Construction Co	40126	25	562
National Pipe & Foundry Co.[3]	32997	19	242
Neal et al., J. Henry, trustees	45403	26	551
Neill, James [4]	9290	8	299
Nelms, Frank Haywood	51887	27	65
Nelms, Mrs. Frank Haywood	51888	27	65
Newport Co	35431	24	1246
New York Life Insurance Co	38880	24	1217
Nibley-Mimnaugh Lumber Co	17527	26	978
Nichols & Cox Lumber Co	23601	24	54
Nicodemus, Jr., F. C	52326, 62569	26	125
Nielsen Co., E. H	8899	26	223
North American Investment Co	30183	24	419
Northern Coal Co.[5]	34945	24	307
Noyes, Jansen [6]	38574	25	1351
O.			
Oakman et al., Mamie R	42917	24	84
Ogden, Hugh W	23943	24	1239
Old Mission Portland Cement Co	38853	25	305
Olinger Mortuary Association	36502	23	1281
Omaha Coca-Cola Bottling Co	52641	26	1123
O'Rear, E. C.[7]	32335	28	698

[1] Estate tax decision.
[2] Nonacquiescence relates to issue 1 of decision and issue regarding deductibility of overhead costs in 1925.
[3] Acquiescence published in Cumulative Bulletin IX-2, page 43, revoked. Revocation of prior acquiescence and present nonacquiescence are due to the failure of the Board's decision to limit the word "distributed" to the cash distributions made to the stockholders.
[4] Acquiescence published in Cumulative Bulletin X-1, page 46, withdrawn.
[5] Nonacquiescence relates to statute of limitations issue.
[6] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[7] Nonacquiescence relates to issue regarding amount of loss sustained by petitioner by reason of destruction by fire of his residence and furniture.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Oswego Falls Corporation	28301, 32673, 34352	26	60
Owens, J. T	63149	27	469
Owens, Mrs. J. T	63150	27	469
Owens, O. O	31986	26	1147
P.			
Pacific Nash Motor Co	45169, 45170	23	953
Pacific Rock & Gravel Co	28776	26	296
Peabody, Cornelia Haven, estate of [1]	39647	24	787
Peabody et al., Stephen, executors [1]	39647	24	787
Petaluma & Santa Rosa R. R. Co.[2]	13830	11	541
Peters, Andrew J	54050	28	976
Phelps et al., Luis James, executors [3]	50336	27	1224
Phillips, William S	24446, 31769	24	98
Pierce, Edward A	58796	26	1401
Pittsburgh Athletic Co	60569, 66964, 67422	27	1074
Plettner, Maude Brown	33345	25	631
P-M-K Petroleum Co.[4]	50576, 54779	24	360
Post & Sheldon Corporation	56695	28	26
Powel, T. I. Hare	64464	27	55
Pryor & Lockhart Development Co	38872, 45668, 51326	26	1054
Purse, James N	54124	27	725
R.			
Randolph, Frankie Carter	51890	27	65
Randolph, R. D	51889	27	65
Raymond, Howard W	58544	26	1401
Realty Associates, as syndicate manager [5]	27921	17	1173
Reed, Latham R	58800	26	1401
Rehtam, Inc	45016	28	666
Richardson et al., Forrest, executors [1]	44652	27	1070
Richfield Oil Co	42921	25	101
Riffel, Henry [6]	3576	3	436
Riley, Stoker Corporation	36584	26	749
Roberts, Walter B	37534	24	405
Robertson, J. G	49552, 52370	28	53
Rodeo-Vallejo Ferry Co.[4]	36411, 48528	24	936
Rorimer, Louis	58850	27	871

[1] Estate tax decision.
[2] Nonacquiescence relates to that part of decision concerning purchase of taxpayer's own bonds at less than par which were held as an investment. Acquiescence notice as to this issue published in Cumulative Bulletin VII-2, page 31, revoked.
[3] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.
[4] Nonacquiescence relates to first issue of decision.
[5] Acquiescence published in Cumulative Bulletin X-2, page 59, withdrawn.
[6] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 60, recalled.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Rosenbloom Finance Corporation [1]	35778, 40903	24	763
Ross, Blanche S.[2]	51171	28	39
Rosser, E. M., executor [3]	40765	24	176
Roth, W. A.[4]	45065	22	587
S.			
St. Louis Southwestern Ry. Co	13319, 27768, 33938	24	917
St. Louis Union Trust Co., executor [5]	45966	27	318
Salomon, Leon [4]	3725	4	1109
	12231	8	979
San Carlos Milling Co., Ltd.[6]	39525	24	1132
Sand Springs Ry. Co	32438, 32439	21	1291
Sather Lease—Thomas Sather & Co	31979	26	86
Schwartz-Kasser Improvement Co	36876	26	322
Scott, Thomas B., estate of [7]	50336	27	1224
Seaconnet Coal Co.[8]	18089	24	307
Seatree, William Ernest	22094, 33640	25	396
Security First National Bank of Los Angeles et al., executors [9]	45429	28	289
Selwyn Eddy Co	21612	25	1341
Sheaffer Pen Co., W. A	36604	27	1056
Shepherd Syndicate	48332, 51327	26	1062
Shlenker, Simon J	58801	26	1401
Silberblatt, Solomon	46335	28	73
Skiff, Frank V.[2]	51173	28	39
Small's, Inc	53791	24	686
Smith, Mrs. Grant	43300, 43305, 43306	26	1178
Smith, Milton, estate of	52132	28	422
Smith, Jr., Milton, executor	52132	28	422
Snyder, Inc., H. S. & M. W	36686	26	692
Southern California Rock & Gravel Co	30898	26	296
Southern Railway Co. et al.[10]	21481, 29951, 37887–37898	27	673
Sprague & Son Co., C. H.[8]	34946	24	307
Spring City Foundry Co	21169	25	822
Sredies, Inc	45015	28	666

[1] Nonacquiescence does not relate to the Board's holding that distributions received from Joseph H. Finch & Co. were not partial liquidating dividends.
[2] Gift tax decision.
[3] Estate tax decision.
[4] Acquiescence published in Cumulative Bulletin X–1, pages 56, 57, withdrawn.
[5] Estate tax decision; nonacquiescence as to question of situs.
[6] Acquiescence as to issue 2 published in Cumulative Bulletin XI–1, page 6, and nonacquiescence as to issue 1 published in Cumulative Bulletin XI–1, page 11, withdrawn.
[7] Estate tax decision; nonacquiescence with respect to the trusts for the son and daughter.
[8] Nonacquiescence relates to statute of limitations issue.
[9] 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.
[10] Nonacquiescence relates to issues involving additional compensation, rental interest on additions and betterments, and back mail pay for use of properties during Federal control.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Stanley Co. of America	31516, 33142, 40023	26	705
Stearns, Marshall, administrator	48930	24	269
Stern et al., Samuel E. A., executors [1]	2459	2	102
Stetson, Iola Wise	41743	26	390
		27	173
Stevenson Consolidated Oil Co.[2]	43416	23	610
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 [3]	43830	26	1
Stone, Irving Lee, estate of [3]	43830	26	1
Straus, Aaron	65091	27	1116
Strayer, Walter A	48564	27	155
Streefkerk, Mrs. S	45363	28	236
Strong, Harold C.[4]	38576	25	1351
Sturgeon-Hubbard Trust	37095	25	368
Sturgeon et al., Rollin S., trustees	37095	25	368
Suncrest Lumber Co	33244	25	375
Swartz, Inc., Edward G	36650	25	1065
Swift, Mary Dodson, estate of	44909	26	615
Swisky, Toby W	42032	25	259
T.			
Talbot, Frederick C., estate of	20411	27	829
Talbot, J. A.[5]	36191	23	792
Talbot et al., Susan D., executors	20409	27	829
Talbot, William H, estate of	20409	27	829
Taylor, H. Seldon, estate of [6]	64444	27	220
Taylor, Jr., et al., H. Seldon, executors [6]	64444	27	220
Taylor, Jessie Carter	51891	27	65
Taylor, Judson L	51892	27	65
Tennessee Consolidated Coal Co	33383	24	369
Terre Haute, Indianapolis & Eastern Traction Co	33858	24	197
Terre Haute Traction & Light Co	33860	24	197
Terry, Anna Davis	45446	26	1418
Texas Irrigation Co.[7]	40083, 41346	24	958
The Hub, Inc	46298	26	1201
353 Lexington Avenue Corporation	65089	27	762
Tillotson Manufacturing Co	44167	27	913
Titus, C. Dickson	20705	24	36
Todd, Willis	37536	24	405
Tolerton & Warfield Co.[8]	45320	23	892
Towers & Sullivan Manufacturing Co	40508	25	922

[1] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 67, recalled.
[2] 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.
[3] Estate tax decision; nonacquiescence relates to issue involving property transferred by trust agreement.
[4] Nonacquiescence relates to value of common stock of American Chain Co., Inc., and the basis of allocation of cost between said common stock and preferred stock of said company acquired at the same time and under the same agreement.
[5] Nonacquiescence relates to depreciation allowance in computing loss in sale of a boat.
[6] Estate tax decision.
[7] Nonacquiescence relates to affiliation issue.
[8] 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.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Trojan Oil Co	33757	26	659
Twin Bell Oil Syndicate	45052	26	172
Tyler et al., Sidney F., trustees	56449	28	367
U.			
Union Guardian Trust Co., executor [1]	44735	26	1321
Union Pacific R. R. Co. et al.[2]	35639 35649 35684 35685 40060 40061 40062	26	1401
Union Trust Co., trustee	42917	24	84
United Oil Co	38082 42922 51622	25	101
V.			
Van Camp Packing Co., Inc	46131	26	256
Voelbel, Jacob, estate of [3]	6009	7	276
Voelbel, Walter W., executor [3]	6009	7	276
Volunteer State Life Insurance Co	54176	27	1149
Von Gunten, Christain W	61278	28	702
Vonnegut Hardware Co	44940	28	784
W.			
Waggoner, Ella	33517	24	657
Waggoner, W. T	33516	24	657
Walker, Talbot C	20407	27	829
Wall, Frank E.[4]	7359	4	915
Wardman, Harry	22348	24	102
Warner Collieries Co. of Delaware	34679	26	1047
Watab Paper Co	24773 28082 38685 41733 46076 51387	27	488
Wells Fargo Bank & Union Trust Co., administrator	20411	27	829
West Virginia-Pittsburgh Coal Co	20337 25030	24	234
Wheeling Mold & Foundry Co. (Del.)	23410	27	929
White, Juliet C	58775	26	1401
White Oak Transportation Co.[5]	18088	24	307
White, Rita M. Kohler	36112	25	243
White, Sidney J	58776	26	1401
Wilcox & Sons, J. F	40619	28	878
Williams et al., Frank G., executors	33564	25	1078
Wilson, Luke F., estate of	32444	25	994
Wilson Shipbuilding Co.[6]	34337	25	182

[1] Estate tax decision.
[2] Nonacquiescence relates to issue regarding rental interest and issue concerning net loss of Los Angeles & Salt Lake R. R. Co. for period January 1 to April 30, 1921.
[3] Estate tax decision; acquiescence published in Cumulative Bulletin X-2, page 73, recalled.
[4] Acquiescence published in Cumulative Bulletin X-1, page 68, withdrawn.
[5] Nonacquiescence relates to statute of limitations issue.
[6] Nonacquiescence relates to issue 5 of decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Wobber Bros	36875	26	322
Wobbers, Inc	36874	26	322
Wolpert, Urban F	48563	27	155
Wood Furniture Co., J. A	40565	21	564
Woodward, George [1]	42279	23	1258
Y.			
Youngstown Sheet & Tube Co	28149 35511	24	1246
Z.			
Ziegler, Albert W	46291	23	1091
Ziegler, Clifford E	46292	23	1091
Zobelein, George	45352	28	236
Zobelein, Mrs. Edward	45353	28	236

[1] Acquiescence published in Cumulative Bulletin X-2, page 78, withdrawn.

INCOME TAX RULINGS.—PART I.

REVENUE ACT OF 1932.

SUBTITLE B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 51: What included in gross income. XII–43–6465
I. T. 2725

REVENUE ACT OF 1932.

Discount on bank acceptances secured by warehouse certificates on Government cotton, and signed by the Secretary of Agriculture, in transactions entered into under authority of section 4, part 1, Title I of the Agricultural Adjustment Act, or gain or profit derived from the purchase and sale of such acceptances, may not be excluded from gross income.

Advice is requested whether the discount on bank acceptances, which are signed by the Secretary of Agriculture and secured by warehouse certificates on Government cotton, or gain or profit derived from the purchase and sale of such acceptances, is subject to Federal income tax.

The transactions in which the Secretary of Agriculture signs the bank acceptances are entered into under the authority granted by section 4, part 1, Title I of the Agricultural Adjustment Act, approved May 12, 1933, which provides as follows:

SEC. 4. The Secretary of Agriculture shall have authority to borrow money upon all cotton in his possession or control and deposit as collateral for such loans the warehouse receipts for such cotton.

There is no provision in the Act cited, or in the Revenue Act of 1932, under which the discount, or gain or profit derived from the purchase and sale of the bank acceptances in question, may be excluded from gross income. It follows that such income must be reported in the taxpayer's Federal income tax return and is subject to tax.

ARTICLE 53: Compensation paid other than in cash.

XII-52-6575
G. C. M. 12300

REVENUE ACT OF 1932.

"Post allowances" paid by the United States to certain officers and employees of the Foreign Service are in the nature of additional compensation, and are subject to Federal income tax. The allowances to such officers and employees for living quarters, including heat, fuel, and light, are not compensatory in character, and such allowances do not constitute income subject to Federal income tax.

An opinion is requested relative to the taxability under the Revenue Act of 1932, of post allowances and the value of living quarters, including heat, fuel, and light, granted to officers and employees of the State Department in the Foreign Service of the United States.

It is contended that in providing residence quarters and allowances for quarters to such officers and employees of the Foreign Service of the United States, the primary consideration of the Government has been the interest of the United States and not the interest of the officers and employees of the Foreign Service. In this connection detailed information was submitted as to the purpose of the several Acts of Congress providing for such allowances.

The Act of February 23, 1931 (46 Stat., 1207), relating to the classification of clerks in the Foreign Service of the United States, provides in part as follows:

SEC. 3. That the Secretary of State is hereby authorized, at posts where in his judgment it is required by the public interests for the purpose of meeting the unusual or excessive costs of living ascertained by him to exist, to grant compensation to clerks assigned there in addition to the basic rates herein specified, within such appropriations as Congress may make for such purpose: *Provided, however,* That all such additional compensation with the reasons therefor shall be reported to Congress with the annual Budget.

The Executive order, dated June 8, 1931, relating to representation and post allowances, states that post allowances are granted for the following purpose:

7. Assistance in adjusting official incomes at certain posts to the ascertained cost of living at such posts.

In view of the above, this office is of the opinion that such post allowances are in the nature of additional compensation and constitute taxable income to the recipients.

By the Act of April 29, 1926 (44 Stat., 330, 333), the Secretary of State was authorized to provide quarters for officers of the Foreign Service "at places where, in his judgment, it would be in the public interest to do so." Under the Act of June 26, 1930 (46 Stat., 818), authorizing appropriations to provide allowances for quarters for the Foreign Service, the prime purpose in mind appears to have been not the question of giving additional comforts to those officers but of insuring more complete service to the United States and its citizens trading and traveling abroad.

Upon careful consideration of all the evidence, this office is of the opinion that such allowances for living quarters, including heat, fuel, and light, are not compensatory in character and do not constitute income which is subject to Federal income tax.

The conclusion reached herein is not in conflict with General Counsel's Memorandum 11453 (C. B. XII-1, 26), which holds that

the value of living quarters, or allowances therefor, where such quarters are furnished not for the convenience of the employer but as a part of the compensation for services rendered, should be included in gross income.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

ARTICLE 58: Sale of stock and rights. XII–27–6264
G. C. M. 11743

REVENUE ACTS OF 1928 AND 1932.

In construing the "first in, first out" rule, stock acquired through the exercise of rights should be considered as having been acquired when the stock rights were exercised, rather than when the original stock was purchased. If stock rights issued in respect of several different lots of stock are exercised at the same time, any sale of stock acquired through such exercise will be presumed to have been made from stock acquired through rights issued in respect of the earliest acquired lot, and if the latter lot was also acquired through rights exercised at the same time as rights in other lots were exercised, then the same principle may be carried back as many "generations" as are necessary in order to discover which lot should be presumed to have been sold first.

An opinion is requested relative to the proper method of computing the basis of stock acquired by the exercise of stock rights. The following problems are submitted:

A, a taxpayer, acquired 250 shares of the M Company common stock on June 8, 1920. Rights were issued as of the record date May 20, 1921, calling for 1 share at $100 for every 5 held. A exercised his rights and received 50 shares. A likewise exercised the rights received September 8, 1922, calling for 1 share at $100 for every 5 shares held. Again the rights received June 10, 1924, calling for 1 share at $100 for every 5 held were exercised. Thus immediately after the exercise of the rights received on June 10, 1924, A had 432 shares, acquired as follows:

	Shares.
June 8, 1920	250
May 20, 1921	50
September 8, 1922	60
June 10, 1924	72
	432

The basis of these 432 shares was found by taking the cost price of the original 250 shares and adding the subscription price of the 182 shares received through the exercise of the rights.

These 432 shares were carried on the books of A as lot No. 1.

A exercised the rights received on June 8, 1926, and thereby received 72 shares, which he set up on his books as lot No. 2.

A exercised the rights received June 1, 1928, and thereby received 72 shares issued on the 432 shares originally held, that is, lot No. 1. The 72 shares received, he set up as lot No. 3. He received 12 shares issued on lot No. 2. These 12 shares he set up as lot No. 4.

On May 23, 1930, A received rights which he exercised, thereby acquiring 72 shares on lot No. 1. These 72 shares he set up as lot No. 5. Twelve shares were received on lot No. 2. These 12 shares he set up as lot No. 6. The 12 shares received on lot No. 3 were set up as lot No. 7 and the 2 shares received on lot No. 4 were set up as lot No. 8.

Thus through the exercise of the rights issued to stockholders of record May 23, 1930, A received 72 shares issued on lot No. 1, 12 shares issued on lot No. 2, 12 shares issued on lot No. 3, and 2 shares issued on lot No. 4.

These 98 shares are represented by one certificate, No. P——. A sells 85 shares out of the shares represented by certificate No. P——.

Question No. 1: Which 85 shares were sold?

Question No. 2: If A sold 60 shares, which 60 shares were sold?

Question No. 3: If A sold 100 shares and turned in certificate No. P—— and a certificate representing the other shares owned, which shares were sold?

Question No. 4: What is the proper method of setting up the lots—

(a) If A purchased 100 shares of the M Company common stock in 1920 and exercised the rights in 1921, 1922, and 1924, should the original stock and the stock acquired through each of these issues of rights be set up as one lot?

(b) If A acquired 100 shares in 1925 and exercised the rights received in 1926, 1928, and 1930, how many lots of stock with different cost bases would A have? Should the lots be set up as indicated above or should the lots be set up in blocks; that is, taking the total number of shares, would lot No. 1 consist of 432 shares; lot No. 2 of 72 shares; lot No. 3 of 84 shares arrived at by grouping lots Nos. 3 and 4; and would lot No. 4 consist of 98 shares arrived at by grouping lots Nos. 5, 6, 7, and 8?

Question No. 5: If A purchased 100 shares in 1923 at a price substantially different from the 250 shares originally purchased and exercised all rights received upon the 100 shares, and assuming that A sold 600 shares in 1931 and that the time of acquisition of the shares can not be ascertained nor can the shares be otherwise identified as being attributable to any particular subscription or purchase, what 600 shares were sold?

In respect of the first question it is stated in the inquiry that A received one certificate, No. P——, representing 98 shares acquired through exercise of rights issued on May 23, 1930, and that 85 of these shares are sold. The question correctly assumes that all of the 98 shares represented by the certificate do not have the same basis for gain or loss, and that it becomes material, therefore, to decide which shares were sold. Before attempting to answer this question, however, it is convenient to consider whether a proper method has been followed in setting up the various "lots" of stock, and indeed, in question (4), the letter specifically makes this inquiry.

In the opinion of this office it is proper to include in lot 1 all of the original stock and all of the stock acquired through exercise of rights issued prior to January 1, 1925, because even though those shares are sold to-day, the method of determining basis prescribed by article 39 of Regulations 65 is the method still used (T. D. 4145, C. B. VII–1, 59), and that method results in assigning the same basis to an original share as is given to a share acquired through exercise of rights. Since A has not bought other M Company stock having a different basis between the time of the original purchase and the time the rights in question were issued, there is no reason why all these shares having the same basis should not be included in one lot. If other M Company shares had been purchased in the meantime having a different basis, this result would not follow, due to the requirements of the "first in, first out rule," but this question will be discussed under question 5. For purposes of question 1, the letter of inquiry correctly states that lot 1 contains 432 shares, each of which has the same basis for gain or loss.

In respect of stock acquired through exercise of rights issued subsequent to December 31, 1924, the method of determining the basis is determined by article 39 of Regulations 69 and the corresponding articles of later regulations. That method results in giving a basis to shares acquired through exercise of rights which is different from the basis assigned to the shares in respect of which the rights are

issued. Therefore, when A exercised the rights issued on June 8, 1926, and acquired 72 additional shares thereby, such shares will form lot 2, since their basis for determining gain or loss is different from that of the shares in lot 1.

On June 1, 1928, rights were issued calling for 1 new share for each 6 shares already held, with the result that A on exercising such rights acquired 72 new shares in respect of the 432 shares in lot 1, and 12 shares in respect of lot 2. Since the shares in lot 1 have a different basis from the shares in lot 2, it follows that the 72 shares received in respect of lot 1 will have a different basis from the 12 shares received in respect of lot 2. Moreover, the 72 shares received in respect of lot 1 will have a different basis from the shares in lot 1, and the 12 shares received in respect of lot 2 will have a different basis from the shares in lot 2. Therefore, there are now four lots of shares, each lot having a different basis, and the taxpayer is correct in setting up four different lots on his books. (See I. T. 2417, C. B. VII–1, 59.)

The rights issued on May 23, 1930, also called for 1 new share for each 6 shares held, so that A, on exercising the rights, acquired new shares as follows: 72 shares in respect of lot 1, which are correctly set up as lot 5; 12 shares in respect of lot 2, which are correctly set up as lot 6; 12 shares in respect of lot 3, which are correctly set up as lot 7; and 2 shares in respect of lot 4, which are correctly set up as lot 8. These 98 shares last received are represented by one certificate, No. P——, and the question is, If A sells 85 of the shares represented thereby, which 85 shares were sold?

Since these 85 shares are identified as being from the 98 shares last received, the presumption of "first in, first out" is applicable only in deciding between lots 5 to 8, inclusive, for the presumption is not used except to the extent that the shares can not be identified, and the shares sold are identified as having belonged in lots 5 to 8. (See *Cleveland Trust Co., executor*, v. *Commissioner*, 24 B. T. A., 132, C. B. X–2, 14.) In the opinion of this office, 72 of the 85 shares should be presumed to have been sold from lot 5, 12 shares from lot 6, and 1 share from lot 7. Article 58 of Regulations 77 provides that "* * * if the stock in respect of which the rights are issued was purchased at different times or at different prices and the stock rights issued in respect of such stock can not be identified as having been issued in respect of any particular lot of such stock, the basis for determining the gain or loss from the sale of the * * * new shares in cases where the rights are exercised, shall be ascertained in accordance with the principles laid down in article 600." The principles laid down in subdivisions (3) and (4) of article 600 indicate that any sale of stock acquired through exercise of rights will, under such circumstances, be presumed to have been made from the stock acquired through rights issued in respect of the earliest acquired stock. The earliest acquired stock in the instant case is lot 1, and the 72 shares in lot 5, acquired through exercise of rights issued in respect of lot 1, should therefore be presumed to have been sold before any of the shares in lots 6 to 8. The next earliest acquired stock is lot 2, and the 12 shares in lot 6, acquired through exercise of rights issued in respect of lot 2, should therefore be presumed to have been

sold before any of the shares in lots 7 or 8. This accounts for 84 of the 85 shares.

In respect of the remaining share, it may be contended that no distinction can be made between lots 7 and 8, on the ground that those two lots were not only both acquired through exercise of rights issued at the same time in respect of lots 3 and 4, but that lots 3 and 4, themselves, were also acquired through the exercise of rights issued at the same time on June 1, 1928, and presumably exercised at the same time. In other words, the distinction between lots 5 and 6 on the one hand, and lots 7 and 8 on the other, is that while lots 5 and 6 were acquired through exercise of rights issued, and presumably exercised, at the same time, those rights were nevertheless issued in respect of lots 1 and 2, and lots 1 and 2 were acquired at different times, whereas in the case of lots 7 and 8, even the "parent" lots 3 and 4 were acquired at the same time. However, the "grandparent" of lot 7 is lot 1, while the "grandparent" of lot 8 is lot 2, and therefore, by carrying back the principles of article 600 to an earlier "generation," we arrive at the conclusion that lot 7 should be presumed to have been sold before lot 8. While this may appear at first glance to be carrying the presumption of "first in, first out" to rather ridiculous extremes, it must be recognized that, at best, the presumption is simply an arbitrary "rule of thumb" which the courts have upheld. (See *Snyder* v. *Commissioner*, 54 Fed. (2d), 57.) The presumption is one of law, not of fact; and neither from the factual nor from the legal standpoint is it any more arbitrary to assume that lot 7 is sold before lot 8 than it would be to assume that lot 1 is sold before lot 8. Not to presume that lot 7 is sold before lot 8 would require the averaging of the bases of the shares in both lots, and it was to avoid such averaging that the "first in, first out" rule has been adopted and upheld. (See *Skinner* v. *Eaton*, 45 Fed. (2d), 568, cert. denied, 283 U. S., 837; *Burdett Stryker* v. *Commissioner*, 21 B. T. A., 561; *William P. Jenks* v. *Commissioner*, 22 B. T. A., 910.)

The question should be considered, however, whether the position of the Bureau in similar situations on the 2-year holding period for capital gain or loss purposes requires a different result from that which has been reached above, particularly in view of the fact that article 58 of Regulations 77 contains a sentence not in the prior regulations stating that "In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101(c)8 (relating to the period for which property has been held) [for capital gain or loss purposes] shall be applied. * * *" While subparagraphs (A), (B), (C), and (D) of section 101(c)8 do not deal with stock acquired through exercise of rights, the question arises whether the Bureau is impliedly bound to apply to such stock the same acquisition date for purposes of the "first in, first out" rule, as it applies for capital gain or loss purposes.

In the opinion of this office the Bureau is not so bound, and should not attempt to apply the same rule. It is impossible to do so consistently, because the Bureau's capital gain or loss rule now is that the portion of *each share* acquired through exercise of rights, which represents the rights, has been held as long as the original stock,

and that the other portion of the new share, representing the new investment, has been held only from the time the stock right was exercised. (G. C. M. 11645, C. B. XII–1, 117.) Consequently, where the original stock has been held more than two years, but the stock acquired through exercise of rights has not, the total gain or loss on sale of the new stock is divided into two portions, one of which is ordinary gain or loss, while the other is capital gain or loss. The "first in, first out" rule, on the other hand is simply a presumption as to what shares out of several different lots are sold, and since *whole* shares and not parts of shares are sold, an acquisition date which splits the shares into parts can not be consistently applied.

This office is therefore of the opinion that in construing the "first in, first out" rule, stock acquired through exercise of rights should be considered as having been acquired when the stock rights were exercised, rather than when the original stock was purchased. If stock rights issued in respect of several different lots of stock are exercised at the same time, then, as already pointed out, any sale of stock acquired through such exercise will be presumed to have been made from stock acquired through rights issued in respect of the earliest acquired lot, and if the latter lot was also acquired through rights exercised at the same time as rights in other lots were exercised, then the same principle may be carried back as many "generations" as are necessary in order to discover which lot should be presumed to have been sold first.

Question No. 2 relates to the case where A sold 60 shares and the question is, which 60 shares were sold. If 60 shares were sold from certificate No. P ——, then, according to principles already stated, these are all presumed to have been sold from lot 5. If the 60 shares were sold without having been identified in any way whatever, then they are presumed to have been sold from lot No. 1.

Question No. 3 relates to the case where A sold 100 shares, turning in certificate No. P—— and a certificate representing all the other shares owned, and inquires which shares were sold. It is known that the 98 shares represented by certificate No. P—— represent lots 5 to 8, inclusive, and the other certificate must therefore represent the 583 shares contained in lots 1 to 4, inclusive. It is arguable that, since A has turned in all his certificates, none of the shares sold can be identified as coming from any particular lot, and that consequently all the 100 shares should be presumed to have been sold from lot 1. This argument would be much stronger if certificate No. P——, as well as the other certificate, had represented 100 or more shares, or if each certificate had represented less than 100 shares. But certificate No. P—— in fact contained less than 100 shares, while the other certificate contained more than 100 shares, and if A had desired to sell all the shares from the latter certificate he would not have needed to turn in certificate No. P——. Therefore, the most reasonable presumption is that A was selling all the shares represented by certificate No. P——, and making up the balance of 2 shares from the other certificate. Accordingly, this office is of the opinion that all of lots 5 to 8, inclusive, had been sold, together with 2 shares from lot 1. (Compare *Cleveland Trust Co.* v. *Commissioner*, supra; *Howbert* v. *Penrose*, 38 Fed. (2d), 577; *M. J. Scanlon* v.

Commissioner, 21 B. T. A., 1120.) However, if good evidence were introduced that A did not intend to sell any particular shares, and that his only purpose in turning in both certificates was to have all his remaining shares represented by one certificate, then probably all the shares should be presumed to have been taken from lot 1. On the other hand, if certificate No. P—— were in fact assigned directly to the buyer by the taxpayer, such an assignment would tend very strongly to indicate that the particular shares represented by such certificate were in fact sold. (See *M. J. Scanlon*, supra.)

Question 4 has already in effect been answered, but for the sake of clarity it is again answered specifically as follows:

(a) The original stock and the stock acquired through exercise of rights issued in 1921, 1922, and 1924, should be set up as one lot, assuming that no other original purchases were made between the dates of these issuances of rights.

(b) If A acquired 100 shares in 1925 and exercised the rights received in 1926, 1928, and 1930, A would have 8 different lots of stock with different cost bases, provided that A did not also have the 250 original shares referred to in questions 1 to 3, or the 100 original shares referred to in question 4(a).

Returning to the set-up in questions 1 to 3, question 4(b) suggests that instead of 8 lots, perhaps there should be only 4, arrived at by grouping lots 3 and 4 into one and lots 5 to 8 into another lot. The reason behind this suggestion is evidently the thought that lots 3 and 4 were acquired through rights presumably exercised at the same time, and that lots 5 to 8 were also acquired through rights presumably exercised at the same time. This question has already been discussed above, and the conclusion has been reached that paragraphs designated as (3) and (4) of article 600 of Regulations 77 furnish a method for distinguishing between these lots for purposes of the "first in, first out" rule, even though they are acquired through rights exercised at the same time, and that consequently there should be 8 lots rather than 4. The 8 lots clearly have different bases for gain or loss, and A is clearly entitled to rely on this and distinguish the identical shares sold if he can. This being so, it would appear to follow that even where the shares sold can not be identified, the 8 lots should nevertheless be distinguished for the purpose of applying the presumption of "first in, first out."

Question No. 5 relates to the case where A purchased 100 shares in 1923 at a different price from that paid for the 250 shares purchased in 1920, that he exercised all the rights on the 100 shares (and presumably also on the 250 shares), and that he sold 600 shares in 1931, none of which can be identified as being attributable to any particular subscription or purchase. The inquiry is then made, What 600 shares were sold? In such a case the lots would be arranged as follows: In lot 1, the 250 shares purchased in 1920, together with the 110 shares acquired in 1921 and 1922 through exercise of rights, or a total of 360 shares; in lot 2, the 100 shares purchased in the open market in 1923; in lot 3, the 72 shares acquired through exercise of rights issued on June 10, 1924, in respect of lot 1; in lot 4, the 20 shares acquired through exercise of rights issued on June 10, 1924, in respect of lot 2; in lot 5, the 60 shares acquired through exercise of rights issued on June 8, 1926, in respect of lot 1,

and so on. It is unnecessary to proceed further, because the 600 shares sold would be assumed to come from these 5 lots in the order named, under principles already stated in this memorandum.

It may be argued that lot 3 should be included in lot 1 under question 5, since the shares in these 2 lots have the same basis for gain or loss, and that lot 4 should be included in lot 2 for the same reason. This could be done in the instant example without changing the result, but if 400 unidentified shares had been sold, instead of 600, the result would be different. For example, suppose the adjusted basis of each share in the different lots, after issuance of rights, is as follows:

Lot 1, 360 shares at $100.
Lot 2, 100 shares at $150.
Lot 3, 72 shares at $100.
Lot 4, 20 shares at $150.

Under this situation, if 400 unidentified shares are sold, 360 shares will have a basis of $100, or $36,000, and 40 shares will have a basis of $150, or $6,000, making a total basis of $42,000 for the 400 shares sold. But if lot 3 is put with lot 1, and lot 4 is put with lot 2, and the 400 shares are all presumed to be sold from lot 1, then the basis of such shares will be $40,000 instead of $42,000. In the opinion of this office, the 100 shares at $150 are acquired before the 72 shares at $100 are acquired, and therefore, under the "first in, first out" rule, the 100 shares at $150 should be presumed to be sold before the 72 shares at $100. Hence, 4 lots should be set up instead of 2. However, where the taxpayer has only one original lot of stock, as assumed under the preceding questions, then the taxpayer may include in that lot all shares acquired through exercise of rights issued in respect thereof prior to January 1, 1925.

ARTICLE 64: Forgiveness of indebtedness. XII-51-6567
I. T. 2745

REVENUE ACT OF 1932.

The amount of deposits relinquished to the M Bank to provide it with a surplus, with the understanding that the depositors should be repaid from dividends declared on the bank's capital stock, is not taxable income.

Advice is requested whether the amount of deposits relinquished to the M Bank to provide it with surplus represents taxable income to the bank for Federal income tax purposes.

It appears that the M Bank is a corporation organized under the laws of the State of R. The deposits involved were relinquished to provide the bank with surplus against which to charge losses disclosed in its securities account, and with the understanding that the depositors should be repaid from dividends declared on the bank's capital stock. The stock has been deposited in escrow with another bank until repayment to the depositors has been made from dividends on the stock.

The amount of the deposits so relinquished is held not to be taxable income, as defined in section 22(a), Revenue Act of 1932.

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

ARTICLE 122: Traveling expenses. XII–41–6441
I. T. 2721

REVENUE ACT OF 1932.

The ordinary and necessary expenses paid or incurred by the taxpayer in connection with his duties as a member of a district board of the N. R. A. Recovery Board constitute an allowable deduction for Federal income tax purposes as a business expense for the taxable year in which paid, provided he submits evidence showing that all such expenditures were made in furtherance of the work he was doing for the Government, and that the expenditures would not have been made had he not been in the service of the Government.

Advice is requested whether the ordinary and necessary expenses incurred by A in the performance of his duties as set forth below constitute an allowable deduction from gross income for Federal income tax purposes.

The taxpayer was appointed a member of a district board of the N. R. A. Recovery Board embracing the States of R and S, and works under orders issued direct from Washington, D. C. The taxpayer was drafted by the President to serve without compensation or expense allowance.

Section 23(a) of the Revenue Act of 1932 provides that in computing net income there shall be allowed as deductions all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including traveling expenses while away from home in the pursuit of a trade or business.

Article 122 of Regulations 77, under the Revenue Act of 1932, reads as follows:

> Traveling expenses as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, become business instead of personal expenses.

The United States Board of Tax Appeals held in the *Appeal of D. C. Jackling* (9 B. T. A., 312, C. B. X–2, 35), that since the taxpayer was employed by the United States during the year 1918 and expended from his own funds for subsistence and transportation for himself and secretary, in connection with his employment, an amount greater than that allowed him by the United States for that purpose, the amount so expended is a proper deduction from gross income.

Accordingly, all the ordinary and necessary expenses paid or incurred by the taxpayer in the performance of his duties as a member of a district board, N. R. A. Recovery Board, constitute an allowable deduction for Federal income tax purposes as a business expense for the taxable year in which paid, provided he submits evidence showing that all such expenditures were made in furtherance of the work he was doing for the Government, and that they would not have been made had he not been in the service of the Government; in other words, that the expenditures were made entirely for the benefit of the Government and in furtherance of the work which it had requested him to perform.

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

ARTICLE 151: Taxes. XII-30-6304
I. T. 2703

REVENUE ACTS OF 1928 AND 1932.

The license tax imposed by the State of Montana on the sale or distribution of gasoline is deductible as a tax in the Federal income tax return of the consumer who pays it and to whom it is not refunded. If, however, the license tax is added to or made a part of the business expense of such consumer, it can not be deducted by him separately as a tax.

A ruling is requested relative to who is entitled to deduct the license tax imposed by the State of Montana on the sale of gasoline.

The definition of terms used in the gasoline license tax are given in section 2396.1 of the Supplement to the Revised Codes of Montana, 1923–1927.

The gasoline distributors' and dealers' license tax imposed under chapter 185 of the Revised Codes of Montana, 1921, has been variously amended by changes in the specific sections or the enactment of whole new chapters, in some instances without specific repeal of prior legislation, up to and including the amendments imposed by chapter 6 of the Laws of Montana, 1931.

Sections 2382 and 2383 of the Revised Codes of Montana, 1921, as thereafter amended and set forth in chapter 6 of the Laws of Montana, 1931, effective April 1, 1931, impose a license tax of 5 cents for each gallon of gasoline sold or distributed during the period April 1, 1931, to March 31, 1932, and for each year thereafter until March 31, 1941. A tax of 3 cents per gallon is likewise imposed on each gallon of gasoline sold or distributed after March 31, 1941.

Sections 2 and 3 of chapter 19 of the laws of 1927, which are shown as sections 2396.2 and 2396.3 in the Supplement of the Revised Codes of Montana, 1923–1927, have thereafter been amended and are set forth in chapter 6 of the laws of 1931.

Chapter 175 of the Laws of Montana, 1931, amends prior legislation, first enacted as section 1 of chapter 17 of the laws of 1927, which provides for refund of gasoline license taxes in certain instances, as follows:

SECTION 1. That any person who shall purchase and use any gasoline, with reference to which there has been paid into the treasury of the State of Montana, under the laws of this State licensing dealers in gasoline, a tax at the rate of five cents (5 cents) per gallon, for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes other than on the public highways or streets of this State, motor boats, aeroplanes or aircraft, or for cleaning or dyeing, or for any commercial use other than propelling vehicles upon any of the public highways or streets of this State, and who has paid said tax either directly to the State of Montana or indirectly as a part of the purchase price of said gasoline, shall be allowed and paid as a refund or drawback an amount of money equal to five cents (5 cents) multiplied by the number of gallons of gasoline so purchased and used, upon presenting to the board of equalization of the State of Montana, within the time allowed by law, a sworn statement, accompanied by the original paid invoices showing such purchase and use, which statement shall set forth that the tax has been paid, the total amount of such gasoline so purchased upon which he has paid the tax and which has been used by such consumer other than for propelling vehicles operated upon any of the public highways or

streets of this State, and which statement shall contain such additional information as may be required by the board of equalization of the State of Montana on forms to be furnished by said board; provided that such refund or drawback shall not exceed the tax imposed by law. All such applications for refunds or drawbacks shall be filed with the board of equalization of the State of Montana within six (6) months after the date on which such gasoline was purchased as shown by such paid invoices. The board of equalization of the State of Montana shall have sixty (60) days thereafter within which to make such investigation as it may desire, to ascertain the truths of the statements made. If the statement is found to be correct by said board of equalization of the State of Montana, said refund or drawback shall be paid out of the gasoline license tax drawback fund in the same manner as other claims against the State are paid. * * *

SEC. 2. All acts and parts of acts in conflict herewith are hereby repealed.

Section 23(c) of the Revenue Acts of 1928 and 1932 provides that in computing net income there shall be allowed as deductions taxes paid or accrued within the taxable year, with certain exceptions not here material. Article 151 of Regulations 74 and 77, relating to the Revenue Act of 1928 and the Revenue Act of 1932, respectively, provides that in general taxes are deductible only by the person upon whom they are imposed.

While some of the language of the statute under which the gasoline license tax is imposed would indicate that it is to recompense the State for a license granted the dealer or distributor, the amount of tax is such that the law should be regarded as a revenue measure, not providing so much for a "license" as for a "tax." That portion of the law cited in which provision is made for refund of the tax to the consumer who uses the gasoline for purposes other than propelling vehicles on the public highways or streets is designed to lift the burden of the tax placed on such consumer. It follows, therefore, that it is the purpose of the Montana law to impose the gasoline license tax upon the individual consumer and not upon the dealer or distributor.

In accordance with section 23(c) of the Revenue Acts of 1928 and 1932 and article 151 of Regulations 74 and 77, it is held that the license tax imposed by the State of Montana on the sale or distribution of gasoline is deductible as a tax in the Federal income tax return of the consumer who pays it and to whom it is not refunded. If, however, the license tax is added to or made a part of the business expense of such consumer, it can not be deducted by him separately as a tax.

ARTICLE 151: Taxes.

XII-34-6351
I. T. 2708

REVENUE ACT OF 1932.

The tax provided by the retail sales act enacted by the State of Illinois, effective April 1, 1933, which is imposed upon the vendor of tangible personal property, is deductible under section 23 (c) of the Revenue Act of 1932 in determining his net income subject to Federal income tax.

Advice is requested in regard to the deductibility for Federal income tax purposes of the tax imposed under the retail sales act enacted by the State of Illinois, effective April 1, 1933. The tax

provided by the act is imposed upon persons engaged in the business of selling tangible personal property at retail in the State.

The provisions of the Illinois retail sales act, in so far as pertinent to the discussion of the question presented, read as follows:

SEC. 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of 3 per cent of the gross cash receipts from such sales in this State of tangible personal property made in the course of such business on and after the 1st day of the next calendar month after the taking effect of this act and prior to July 1, 1935. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State.

SEC. 3. On or before the 15th day of the second calendar month after the taking effect of this act, and on or before the 15th day of each calendar month thereafter until but not including August, 1935, every person engaged in the business of selling tangible personal property at retail in this State during the preceding calendar month shall make a return to the department stating:

1. The name of the seller;

2. His address or the address of his place of business;

3. The total sales at retail of all tangible personal property sold by him in the course of such business during the preceding calendar month;

4. The total cash amount refunded by the seller during the preceding calendar month to purchasers on account of tangible personal property returned to him, upon the sale at retail of which, the tax herein imposed had been paid;

5. The total cash receipts during the preceding calendar month from the sale at retail of tangible personal property made in the course of such business on and after the 1st day of the next calendar month after the taking effect of this act;

6. The total amount of sales at retail of tangible personal property during the preceding calendar month, made in the course of such business payment for which was not made to the seller during the preceding calendar month; and shall at the same time pay to the department the amount of the tax herein imposed. However, the item of cash refunds shown as provided herein above in subdivision 4 of this section shall be allowed as a credit against the total cash receipts as provided in subdivision 5. Such return shall be made on forms prescribed and furnished by the department, shall be made under oath or affirmation and shall contain such other information as the department may reasonably require.

* * * * * * *

SEC. 7. If it shall appear that an amount of tax has been paid, which was not due under the provisions of this act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due or to become due under this act from the person who made the erroneous payment or such amount shall be refunded to such person by the department.

Since the tax provided by the act is imposed upon the vendor of tangible personal property, it is the opinion of this office that he may deduct the amount thereof as a tax under section 23(c) of the Revenue Act of 1932, in determining his net income subject to Federal income tax.

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

ARTICLE 151: Taxes. XII-43-6464
I. T. 2726

REVENUE ACT OF 1932.

The capital stock tax imposed by section 215 of the National Industrial Recovery Act is an excise tax levied with respect to (and is contingent upon) carrying on or doing business. Where a domestic corporation is engaged in business during the entire calendar year 1933 the capital stock tax for the fiscal year ended June 30, 1933, accrued on June 16, 1933, the date of enactment of the Act, and the capital stock tax for the fiscal year ending June 30, 1934, accrued on July 1, 1933, the beginning of that fiscal year.

A ruling is requested relative to the accrual date of the capital stock tax imposed by section 215 of the National Industrial Recovery Act where the taxpayer is a domestic corporation and is engaged in business during the entire calendar year 1933.

The corporation will file an income tax return for that year and use the accrual method of accounting. The question involved is whether the capital stock tax imposed by section 215 of the National Industrial Recovery Act for the year ended June 30, 1933, and for the year ending June 30, 1934, will both accrue in the calendar year 1933 and be deductible in computing net income for that year.

Section 215 of the National Industrial Recovery Act provides in part as follows:

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

* * * * * * *

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

(3) to any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive. * * *

The National Industrial Recovery Act, which imposes an excise tax upon every corporation with respect to carrying on or doing business, measured by the adjusted declared value of its capital stock, was approved on June 16, 1933. As that tax is not a continuation of an existing tax (the capital stock tax imposed by section 700(a), Title VII, of the Revenue Act of 1924 having been repealed, effective on June 30, 1926, by section 1200(a) of the Revenue Act of 1926), the tax for the fiscal year ended June 30, 1933, must be held to have accrued on June 16, 1933, the date of enactment of the National Industrial Recovery Act, provided the corporation was engaged in business on that date. (Cf. I. T. 2675, C. B. XII-1, 105.) Not until then had the event (the enactment of the National Industrial Recovery Act) occurred which would permit the accrual of such tax within the rule laid down in *United States* v. *Anderson* (269 U. S., 422).

As the capital stock tax is an excise tax levied with respect to (and is contingent upon) carrying on or doing business, the tax for the fiscal year ending June 30, 1934, accrued on July 1, 1933, the beginning of that fiscal year, in the case of a corporation doing business on that date. (See *The Pictorial Review Co.* v. *Commis-*

sioner, 26 B. T. A., 472, C. B. XI–2, 8; *Columbian Carbon Co.* v. *Commissioner*, 25 B. T. A., 456, C. B. XI–1, 2: G. C. M. 10613, C. B. XI–1, 173.) It follows that where a domestic corporation is engaged in business during the entire calendar year 1933 the corporation should accrue as of June 16, 1933, the capital stock tax for the fiscal year ended June 30, 1933, and should accrue as of July 1, 1933, the capital stock tax for the fiscal year ending June 30, 1934. (See G. C. M. 8553, C. B. IX–2, 109.) The corporation in the instant case will, therefore, be permitted to deduct in its return for the calendar year 1933 the capital stock tax for the year ended June 30, 1933, as well as such tax for the year ending June 30, 1934, the taxes for both fiscal years having accrued in the calendar year 1933.

ARTICLE 151: Taxes. XII–46–6505
I. T. 2731

REVENUE ACT OF 1932.

The vendor may deduct the "tax of 1 per centum" imposed by the Oklahoma sales tax law, effective July 10, 1933, in determining net income for Federal income tax purposes. In so far as the vendee is concerned the tax is merely an additional cost of the articles purchased, and is not an allowable deduction in his Federal income tax return.

A ruling is requested whether the "tax of 1 per centum" imposed by the Oklahoma sales tax law is deductible by the vendor or the vendee in computing net income.

The pertinent provisions of the law (ch. 196, Oklahoma Session Laws, 1933), which became effective July 10, 1933, are as follows:

SEC. 4. There is hereby levied a tax of 1 per centum (1%) upon the gross proceeds of all sales of tangible personal property consisting of goods, wares or merchandise, sold at retail in the State of Oklahoma, to consumers or users; and a like tax upon the gross proceeds of all sales, within this State, derived from the following:

Upon all sales of tickets, or admissions to places of amusement and athletic events;

Upon all sales of electricity, electric light current, electric power, gas (natural or artificial) to domestic or industrial consumers thereof;

Upon all sales of service to telephone subscribers and others, for the transmission of messages and/or conversations, whether local or long distance;

Upon all sales of service for the transmission of messages, by telegraph companies;

Upon all sales of service in radiocasting, whether in the transmission of messages or otherwise, or in the leasing, hiring or renting of radiocasting equipment or facilities;

Upon all sales of food, confections or drinks, prepared or compounded by hotels, restaurants or other dispensers and sold at retail and served for immediate consumption upon the premises, or delivered or carried away from the premises for consumption elsewhere.

Upon the sale of goods, wares or merchandise, as defined by section 4 of this act, by conditional sales contracts or by partial payment or installment payment plan, the tax shall be paid upon the whole or the sales price at the time such contract is entered into.

No vendor shall advertise or hold out to the public in any manner, directly or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. A violation of this provision shall constitute a misdemeanor.

The tax herein levied shall be computed and collected as hereinafter provided.

SEC. 5. The tax herein levied shall not apply to the sale of raw products from farms, orchards or gardens, by the producers or owners thereof, for resale; nor to the sale of live stock, poultry or other farm products, by the producers or owners thereof, for resale; nor to the sale of oil, gas, or other minerals for resale and/or for manufacture and resale; nor to the sale of other raw materials, by the producers or owners thereof, for resale; nor to sales at wholesale for resale; nor to the sale of gasoline subject to the gasoline excise tax levied by law; nor to the sale of cigarettes subject to any stamp tax levied by law of the State of Oklahoma; nor to the sale of any other commodity upon the sale of which any tax is imposed under or by virtue of article 10 (ten), section 12 (twelve) of the constitution of the State of Oklahoma; nor to tickets or admissions to State or county fairs; nor to any sale by the State or any municipal subdivision thereof.

* * * * * * *

SEC. 6. (a) * * * Every vendor, at the time of making the return required hereunder, shall compute and pay to the commission the tax due for the preceding calendar month. * * *

* * * * * * *

(c) It shall be the duty of every vendor required to make a report and pay any tax under this act, to keep and preserve suitable records of the gross proceeds of sales taxable under this act, and such other books of account as may be necessary to determine the amount of tax due hereunder; * * *.

With reference to the vendor, the rules and regulations promulgated by the Oklahoma Tax Commission, which have the force and effect of law, state, in paragraph (b) on page 7 and paragraph (11) on page 10, respectively, as follows:

(b) The "vendor," as used in this section and throughout the act, being the seller of "tangible goods, wares or merchandise," to "consumers or users," is the taxpayer; and is the person whose duty it is to pay the taxes levied by the act, to the Oklahoma Tax Commission.

* * * * * * *

(11) Under every provision of the law the "vendor" is the taxpayer. He pays to the State the tax imposed by the law upon his total taxable sales. It is not material as to who is the purchaser.

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

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

ARTICLE 151: Taxes. XII-46-6506
I. T. 2732

REVENUE ACT OF 1932.

The Michigan sales tax of 3 per cent imposed upon sales by retailers under section 2, act 167, Michigan Public Acts of 1933, effective July 1, 1933, is an excise tax imposed by the State on the vendor for the privilege of engaging in the business of making sales at retail. For Federal income tax purposes, the tax is an allowable deduction only in the return of the vendor upon whom it is imposed and who is liable for its payment. In so far as the vendee is concerned the tax is merely an additional cost of the articles purchased.

A ruling is requested whether the Michigan sales tax of 3 per cent imposed upon all sales by retailers is deductible by the vendor or the vendee for Federal income tax purposes.

The law in question, act 167, Michigan Public Acts of 1933, became effective July 1, 1933. Section 2 provides in part as follows:

SEC. 2. *Imposition of the tax.*—There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as hereinbefore defined, an annual tax for the privilege of engaging in such business equal to 3 per cent of the gross proceeds thereof, less deductions allowed in section 4.

* * * * * * *

The tax hereby imposed shall be payable from and after June 30, 1933.

Other provisions of the law, so far as pertinent to the discussion of the questions presented, read as follows:

SECTION 1. *Definitions.*—That when used in this act:

* * * * * * *

(b 1) The term "sale at retail" means any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use or for any other purpose than for resale in the form of tangible personal property. The term "sale at retail" includes conditional sales, installment lease sales and any other transfer of such property when the title is retained as security for the purchase price but is intended to be transferred later. The term "sale at retail" shall not include an isolated transaction in which any tangible personal property is sold, transferred, offered for sale, or delivered by the owner thereof, or by his representative for the owner's account, such sale, transfer, offer for sale or delivery not being made in the ordinary course of repeated and successive transactions of a like character by such owner or on his account by such representative.

(b 2) The term "sale at retail" includes sales of electricity for light, heat and power and sale of natural and artificial gas when made to the consumer or user for consumption or use rather than for resale.

(c) The term "gross proceeds" means the amount received in money, credits, property or other money's worth in consideration of sales at retail within this State, without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Credits or refunds for returned goods may be deducted.

* * * * * * *

SEC. 5. *Additional tax.*—The tax imposed by this act shall be in addition to all other license fees and taxes levied by law as a condition precedent to engaging or continuing in any business taxable hereunder, except as in this act otherwise specifically provided.

* * * * * * *

SEC. 13. *Tax lien; sale of business.*—The tax and any interest or penalties imposed by this act shall be a lien upon the property of the taxpayer used in connection with the business for the privilege of doing which the tax is imposed. * * *

* * * * * * *

SEC. 23. *Advertising; reimbursement.*—No person engaged in the business of selling tangible personal property at retail shall advertise or hold out to the public in any manner, directly or indirectly, that the tax herein imposed is not considered as an element in the price to the consumer. Nothing contained in this act shall be deemed to prohibit any taxpayer from reimbursing himself by adding to his sale price any tax levied hereunder.

In view of the provisions of law quoted above it is evident that the tax is an excise tax imposed by the State on the vendor for the privilege of engaging in the business of making sales at retail. For Federal income tax purposes, such tax is an allowable deduction under section 23(c) of the Revenue Act of 1932 only in the return of the vendor upon whom it is imposed and who is liable for its payment. In so far as the vendee is concerned the tax is merely an additional cost of the articles purchased.

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

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

ARTICLE 151: Taxes. XII–47–6518
I. T. 2733

REVENUE ACT OF 1932.

The tax imposed under the provisions of the California retail sales tax act of 1933 is an excise tax imposed by the State on the vendor for the privilege of engaging in the business of making sales at retail. For Federal income tax purposes the tax is an allowable deduction as a tax under section 23(c) of the Revenue Act of 1932 to the vendor only, upon whom it is imposed and who is liable for its payment. Where the vendor collects the amount of the tax from the vendee he must include the amount so collected in his gross income. The amount equivalent to the tax paid by the purchaser constitutes additional cost to him of the article purchased.

Advice is requested whether the California sales tax, imposed upon the vendor for the privilege of engaging in the business of making sales at retail, is an allowable deduction by the vendor or the vendee for Federal income tax purposes.

The law under which the tax is imposed is the "Retail sales tax act of 1933." Section 3 provides:

SEC. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of 2½ per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of 2 per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes.

Other provisions of the law, so far as pertinent to the discussion of the question presented, read as follows:

SEC. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

* * * * * * *

(f) "Gross receipts" means the total amount of the sale price of the retail sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and "gross receipts" shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit, nor shall "gross receipts" include the price received for labor or services used in installing, applying, remodeling or repairing the property sold.

For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer.

(g) "Board" means the State Board of Equalization.

* * * * * * *

SEC. 8. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

SEC. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. * * *

SEC. 9. The tax levied hereunder shall be a direct obligation of the retailer and shall be due and payable in quarterly installments on or before the 15th day of the month next succeeding each quarterly period * * *.

* * * * * * *

SEC. 12. Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. * * *

The tax imposed under the provisions of the California retail sales tax act of 1933 is an excise tax imposed by the State on the vendor for the privilege of engaging in the business of making sales at retail. For Federal income tax purposes the tax is an allowable deduction as a tax under section 23(c) of the Revenue Act of 1932 to the vendor only, upon whom it is imposed and who is liable for its payment. Where the vendor collects the amount of the tax from

the vendee he must include the amount so collected in his gross income. The amount equivalent to the tax paid by the purchaser constitutes additional cost to him of the article purchased.

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

ARTICLE 151: Taxes. XII–49–6551
I. T. 2741

REVENUE ACTS OF 1928 AND 1932.

The amount of the deduction allowable under the Federal income tax law on account of taxes paid under the Wisconsin income tax law for taxable years ended prior to November 30, 1931 (the date on which *Hoeper* v. *Tax Commission of Wisconsin et al.*, 284 U. S., 206, was decided), is the amount of tax for which the taxpayer was liable under the State income tax law on account of his or her individual income computed separately. Where in the administration of the State income tax law the State taxing authorities permitted the income of one spouse to be reduced by the losses of the other resulting in a smaller State tax than would have been paid if the income of each had been computed on the basis of separate returns, no deduction is allowable in excess of the tax actually paid.

For taxable years ending on or after November 30, 1931, where separate State and separate Federal income tax returns are filed by husband and wife, each spouse is entitled to deduct on the Federal income tax return the amount of State income tax paid on the separate State return. Where separate State returns, but a joint Federal return, are filed, the sum of the State income taxes may be deducted on the joint Federal return. Where a joint State return and separate Federal returns are filed, each spouse should be permitted to deduct that proportion of the State income tax paid which the average income of each bears to the combined average income.

Inquiry is made as to the amount of Wisconsin income tax which may be deducted for Federal income tax purposes in view of the decision of the United States Supreme Court in the case of *Hoeper* v. *Tax Commission of Wisconsin et al.* (284 U. S., 206), wherein it was held in effect that the Wisconsin statute was unconstitutional in so far as it required that the tax be computed " on the combined average taxable income " regardless of whether separate or joint returns were filed by husband and wife.

Objection has been raised by taxpayers to the allowance as a deduction in the separate Federal income tax returns of husband and wife of only that amount of Wisconsin income taxes which would have been due from each if the tax had been computed on their separate incomes by the State of Wisconsin. It is pointed out that under the Wisconsin statutes a husband and wife are permitted to make separate returns or to " join in a single joint return." Furthermore, a refund from the State of the excess of the tax computed on the

combined income over the amount due if computed on the separate incomes of husband and wife is denied unless the taxpayer paid the tax under protest and, prior to the issuance of the United States Supreme Court decision on November 30, 1931, appeared before the county income tax board of review and objected to the computation of the tax on the basis of the combined income.

It is contended that where the husband and wife elect to file a joint State return the principles laid down in the United States Supreme Court decision in the case of *Hoeper* v. *Tax Commission of Wisconsin et al.*, supra, are not applicable, and that in the separate Federal returns allowance should be made for the State income tax actually assessed and paid. The question is, therefore, whether in the case of spouses who filed separate Federal income tax returns and a joint State income tax return the amount of State income tax actually paid should be allowed as a deduction in the proportion that the income of each bears to the combined income; and whether where separate State returns are filed the United States Supreme Court decision should be followed and only that amount of State income tax allowed as a deduction which would have been due from husband and wife if such tax had been computed on their separate returns.

After careful consideration it is believed that a distinction must be drawn between joint returns filed by husband and wife under the Wisconsin income tax law for taxable years ended prior to November 30, 1931, the date of the Hoeper decision, and taxable years ending on or after that date. Before the Hoeper decision the Wisconsin income tax was imposed in the same manner whether husband and wife reported their income in a joint return or in two separate returns. There was no true election as in the case of the Federal income tax law. The evil condemned by the United States Supreme Court was the imposition of a tax on one person measured by the income of another. This evil was present whether husband and wife reported their income to the State of Wisconsin on one piece of paper or on two pieces of paper. Therefore, in computing the amount of State income tax deductible for Federal income tax purposes for taxable years ended prior to the date of the Hoeper decision the principle stated in that decision should be followed in cases where husband and wife filed joint State income tax returns as well as in cases where they filed separate State income tax returns.

The situation was changed by the decision of the Supreme Court in the case of *Hoeper* v. *Tax Commission of Wisconsin et al.*, supra. Section 71.09, 4(c) of the Wisconsin statute reads in part as follows:

> Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. * * *

The second sentence quoted above was nullified by the decision of the United States Supreme Court in the Hoeper case but the court did not hold that where a true election exists a joint return is not permissible. The court was not asked to pass upon the legality of a joint return, voluntarily filed, with full knowledge that two courses leading to different tax results are open to the parties. It is believed

that the effect of the Hoeper decision is to permit a true election, as is the case under the Federal law.

It follows that the amount of the deduction allowable under the Federal income tax law on account of taxes paid under the Wisconsin income tax law for taxable years ended prior to November 30, 1931, is the amount of tax for which the taxpayer was liable under the State income tax law on account of his or her individual income computed separately. Where in the administration of the State income tax law the State taxing authorities permitted the income of one spouse to be reduced by the losses of the other, resulting in a smaller State tax than would have been paid if the income of each had been computed on the basis of separate returns, no deduction in excess of the tax actually paid is allowable for Federal income tax purposes.

For taxable years ending on or after November 30, 1931, where separate State and separate Federal income tax returns are filed by husband and wife, each spouse is entitled to deduct on the Federal income tax return the amount of State income tax paid on the separate State return. Where separate State returns, but a joint Federal return, are filed the sum of the State income taxes paid on the separate returns may be deducted on the joint Federal return. Where a joint State return and separate Federal returns are filed, each spouse should be permitted to deduct for Federal income tax purposes that proportion of the State income tax paid which the average income of each bears to the combined average income.

It may be pointed out that in accordance with Mimeograph 3958 (C. B. XI–2, 33) no deduction is allowable with respect to taxes illegally or improperly collected. The excess amount paid under an erroneous interpretation of the Wisconsin income tax law, therefore, is not deductible as a tax in Federal income tax returns.

ARTICLE 152: Federal duties and excise taxes. XII–49–6543
Mim. 4108

Deductibility for Federal income tax purposes of the processing tax, compensating tax, and tax on floor stocks imposed by the Agricultural Adjustment Act, approved May 12, 1933 (Public, No. 10, Seventy-third Congress).

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., November 22, 1933.

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

Taxes imposed under the provisions of the Agricultural Adjustment Act (Public, No. 10, Seventy-third Congress) are deductible, for Federal income tax purposes, from gross income as taxes for the taxable year in which paid or accrued, depending upon the manner in which the books of the taxpayer are kept. They are deductible for Federal income tax purposes only by the person liable for the tax

under the provisions of article 8, Regulations 81 (processing tax), or article 19, Regulations 81 (compensating tax), or article 6, Regulations 82 (tax on floor stocks), or liable as vendee under the provisions of section 18 of the Act, articles 27 and 28, Regulations 81, or article 7, Regulations 82.

These taxes are deductible as taxes for the year in which paid or accrued, provided (*a*) that they are not refunded or credited to the taxpayer, or (*b*) that the equivalent of a deduction from gross income in respect of the taxes is not obtained by their being added to and made a part of the expenses of the business or the cost of the articles of merchandise with respect to which they are paid or accrued, or (*c*) that such equivalent has not been otherwise obtained. (See articles 151 and 152, Regulations 77.)

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

GUY T. HELVERING,
Commissioner.

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

ARTICLE 171: Losses. XII-35-6372
(Also Section 111, Article 561.) I. T. 2711

REVENUE ACT OF 1932.

The taxpayer's real property in New Jersey was subjected to a tax sale in 1932 by the municipality of R and was thereafter held by the municipality.

Held, the acquisition by the municipality was not a sale on which a loss may be claimed for income tax purposes.

The taxpayer owned real property in New Jersey which was subjected to a tax sale in 1932 by the municipality of R and was thereafter held by the municipality. The question involved is whether the tax sale constitutes a closed transaction on which a loss may be deducted in the taxpayer's 1932 return.

An examination of the Compiled Statutes of the State of New Jersey (1911–1924), volume 2, indicates that when a municipality acquires real property at a tax sale there is no actual sale so long as the right of redemption exists. Paragraph 208–444a (35) of such compiled statutes provides in part:

Land held by municipality assessed in name of owner—no sale while held by municipality. 32. Where a parcel of land is held by the municipality under a sale not redeemed, then until the right of redemption is barred, all subsequent taxes, assessments for benefits and other municipal charges shall be assessed in the name of the owner, as if no sale had been made, * * *.

It is accordingly held in the instant case that the acquisition of the property by the municipality in 1932 for taxes was not a sale on which a loss may be claimed for income tax purposes.

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

ARTICLE 204: Capital sum recoverable through depreciation allowances. XII-28-6281 G. C. M. 11933

REVENUE ACT OF 1932 AND PRIOR REVENUE ACTS.

In the case of buildings or other property paid for by the lessor and turned over to the lessee under a lease which provides that such property is to be maintained by the lessee and the same property or its equivalent in value returned to the lessor at the expiration of the lease in as good condition and value as when leased—

1. The lessee should not be allowed depreciation deductions on property in which he has made no capital investment. When the lessee makes expenditures in performance of his obligation, he may deduct the amount paid for ordinary repairs in the year in which paid, and expenditures for capital items should be amortized over the life of the property replaced or the remaining term of the lease, whichever is shorter. No distinction is to be recognized on the ground that the lessee's books of account are kept on the accrual basis.

2. The lessor should not be allowed to take depreciation deductions in respect of the leased property during the continuance of the lease. The cost or other basis of the property, adjusted for depreciation to the beginning of the lease, should remain undisturbed until the end of the lease, when it may be amortized over the estimated useful life of the property as then determined.

The foregoing rules should be applied to cases wherein the lessor and lessee are affiliated corporations which file consolidated returns.

An opinion is requested relative to the position which should be taken concerning (1) the allowance of depreciation deductions for leased property where, under the terms of the lease, the lessee is obligated to maintain the same and to return it or equivalent property at the termination of the lease, and (2), if under such circumstances depreciation deductions are to be denied both the lessor and lessee, whether the rule is so far applicable as to deny such deductions to lessor and lessee corporations which are affiliated and file consolidated returns.

I.

In *Weiss* v. *Wiener* (279 U. S., 333, Ct. D. 60, C. B. VIII-1, 257) it was held that a lessee who has made no investment in buildings on the leased premises is not entitled to depreciation deductions in respect of such buildings, even though the lessee is obligated to keep the same in "like condition as the same now are in," speaking of the date of the execution of the lease, and in case of their destruction or removal from any cause to replace them with buildings of a fair cost or value of a sum equal to or greater than the value of the existing buildings. The circuit court of appeals, in that case (27 Fed. (2d), 200), would have permitted the lessee to anticipate actual performance of such an obligation by permitting him to set up, by deductions out of the annual income from the leased premises, a reserve to restore or replace the original buildings. The Supreme Court, refusing to permit the lessee to do this, said:

The circuit court of appeals, interpreting *United States* v. *Ludey* (274 U. S., 295), said that the purpose of the Revenue Act is to tax only gain, and that

the amount thus allowed to be set aside is not gain, but is capital that has gone into gross income. But it is very clear that as yet the capital of the lessee has not gone into it, and upon the considerations just mentioned it is not enough that he has made a contract, that very possibly may not be carried out to replace that capital at some future time. If, as we think, *such a contract is not enough to cause the lessee a present loss* by wear and tear, the fact, which may be assumed, that the property was used by him in his business, does not matter. Of course he must show an interest in the property and a present loss to him to make the statute apply. [Italics supplied.]

(See also *Brevoort Hotel Co.*, 1 B. T. A., 132, C. B. X–1, 8: *Brevoort Hotel Co.* v. *Reinecke*, 36 Fed. (2d), 51, Ct. D. 139, C. B. VIII–2, 305; *Belt Railway Co. of Chicago* v. *Commissioner*, 9 B. T. A., 304, C. B. X–2, 6, affirmed 36 Fed. (2d), 541, certiorari denied 281 U. S., 742; *Ohio Cloverleaf Dairy Co.* v. *Commissioner*, 13 B. T. A., 1320, affirmed without opinion, 34 Fed. (2d), 1022; *Terminal Railroad Association of St. Louis* v. *Commissioner*, 17 B. T. A., 1135, affirmed 61 Fed. (2d), 166 (certiorari denied 288 U. S., 604); and *Terre Haute, Indianapolis & Eastern Traction Co.* v. *Commissioner*, 24 B. T. A., 197 (now on appeal to the Circuit Court of Appeals for the Seventh Circuit).)

In the case of *Ohio Cloverleaf Dairy Co.* v. *Commissioner*, supra, the Board of Tax Appeals, referring to its prior decisions in the *Appeal of William J. Ostheimer* (1 B. T. A., 18) and *Belt Railway Co. of Chicago* v. *Commissioner*, supra, said:

* * * In those cases, as in this, the taxpayers kept their books on an accrual basis. In *William J. Ostheimer*, supra, the Board said:

"In order that an item may be accrued, however, a liability must actually be incurred in the taxable year. (*Schuster & Co.* v. *Williams*, 283 Fed., 115.) The statute recognized the accrual basis of making returns by providing for the deduction of expenses *incurred* but not paid. It is apparent that no liability *in praesenti* was incurred under the terms of the lease in question in the years 1918 and 1919 however well known it might have been that a liability in some amount would be incurred at some time in the future. The liability to restore chattels as good as new or as good as when received when a lease is ultimately canceled or surrendered at some indefinite or indeterminate time in the future is not a present actual liability, and is not the actual incurring of an expense or liability."

The content of the foregoing quotation appears to coincide entirely with the view of the Supreme Court as set forth in the excerpt, above set forth, from the opinion in *Weiss* v. *Wiener*, supra.

In *Terre Haute, Indianapolis & Eastern Traction Co.* v. *Commissioner*, supra, the Board of Tax Appeals said:

It is also settled that where the lessee covenants to maintain the property in as good condition as when taken over from the lessor, the lessee is entitled to a deduction for all capital items so made [by it], spread over the life of the particular property or remaining term of the lease, whichever is shorter. (*Duffy* v. *Central R. Co. of New Jersey*, 268 U. S., 55.) * * *

* * * And the lessee, when it makes good the loss, is entitled to deduct the entire amount so expended either in the year in which made (if an ordinary repair), or (if a capital item), over the life of the property replaced or remaining term of the lease, whichever is shorter. In that manner the lessee will have returned to it its entire cost of maintaining the property which it is entitled to deduct, and the lessor, at the end of the term, will receive back its property or its equivalent in value in as good a condition and value as when leased. * * *

As to the lessor, the question whether he is entitled to depreciation deductions on property turned over to the lessee under the terms and conditions indicated has been thoroughly reviewed by the Board of Tax Appeals in *Terre Haute, Indianapolis & Eastern Traction*

Co. v. *Commissioner*, supra. After reviewing its prior decision in the *Appeal of A. Wilhelm Co.* (6 B. T. A., 1), the Board said:

It is argued on behalf of the petitioners in the instant proceedings that the Wilhelm case is distinguishable from their cases by reason of the term of the lease, the option granted, and the large improvements placed on the Wilhelm property by the lessee. While these may be distinguishing facts, we think it is true that the underlying legal principle is the same in both cases. The statute only permits the owner of property used in the business to take a "reasonable" deduction for exhaustion, wear and tear. When property is leased with a provision in the lease that it is to be maintained by the lessee and the same property or its equivalent in value returned to the lessor at the expiration of the lease in as good a condition and value as when leased, we believe that it would be contrary to the meaning of section 234(a)7 of the Revenue Act of 1921 to find that the lessor had actually suffered any loss deductible under that section, for, as said in *Weiss* v. *Wiener*, supra, he must show "a present loss to him to make the statute apply."

Petitioners further argue that to deny the lessor the right to take the deduction is to deny the deduction to anyone, since it is settled that the lessee is not entitled thereto. But such a situation is more apparent than real. The lessor is denied the deduction because it has not and will not suffer any loss for the reason that the lessee has promised to make good any loss that might occur on account of exhaustion, wear and tear. * * * It might be added that in making such a contract the lessor would naturally receive a less rental than if it had agreed to maintain the upkeep of the property itself.

Petitioners' position is that in leases of such long duration as the ones here in question, the proper application of section 234(a)7 should be to permit the lessor to deduct an amount commensurate with the actual exhaustion, wear and tear of the property until its entire capital sum has been so deducted and to include in the lessor's income at the end of the term the value of the property turned over to the lessor at that time. We do not think, however, that this position gives full effect to the actual agreement existing between the lessor and lessee. The respective leases provided that the lessee would "during said term renew, repair and replace the same, so as to maintain and keep the demised premises in as good order, repair and condition as the same are now and in their present state of efficiency * * *." The presumption is that the parties will perform in accordance with their agreement. This being true, we do not think it would be reasonable to allow the lessor a deduction for exhaustion, etc., when such exhaustion was constantly being arrested by the lessee. We, therefore, hold to our decision in *A. Wilhelm Co.*, supra. The respondent's determination on this issue is sustained.

After careful consideration, it is the opinion of this office that the position of the Bureau should conform with the rulings indicated in the decisions reviewed above. That is to say, in the case of buildings or other property paid for by the lessor and turned over to the lessee under a lease which provides that such property is to be maintained by the lessee and the same property or its equivalent in value returned to the lessor at the expiration of the lease in as good condition and value as when leased.

1. The lessee should not be allowed depreciation deductions on property in which he has made no capital investment. When the lessee makes expenditures in performance of his obligation, he may deduct the amount paid for ordinary repairs in the year in which paid, and expenditures for capital items should be amortized over the life of the property replaced or the remaining term of the lease, whichever is shorter. No distinction is to be recognized on the ground that the lessee's books of account are kept on the accrual basis.

2. The lessor should not be allowed to take depreciation deductions in respect of the leased property during the continuance of the lease. The cost or other basis of the property, adjusted for

depreciation to the beginning of the lease, should remain undisturbed until the end of the lease when it may be amortized over the estimated useful life of the property as then determined.

II.

The foregoing rules should be applied to cases wherein the lessor and lessee are affiliated corporations which file consolidated returns. It was held in *Swift & Co.* v. *United States* (Ct. of Cls.) (38 Fed. (2d), 365) that in providing for consolidated returns Congress " was simply laying down the principle that where a group of companies constituted a single business unit, the net income, determined in accordance with the general principles of law, should be *combined*, losses being offset against gains, and the rate of tax should be determined by the relation between such combined net income and the invested capital of the group as a whole, each corporation being at all times separately recognized and individually liable for its proportion of the tax according to the net income properly assignable to it." (See also G. C. M. 8618, C. B. IX–2, 180, and compare article 31 of Regulations 75 and 78.) Where neither the lessee nor the lessor is entitled to a deduction according to the general principles of law, it should follow that the deduction does not become allowable because it happens that the lessor and lessee are affiliated corporations which file consolidated returns.

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

ARTICLE 261: Contributions or gifts by individuals.

REVENUE ACT OF 1932.

Contributions to Salvation Army and branches. (See I. T. 2747, page 70.)

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 291: Credits of individual against net income. XII–43–6465 I. T. 2727

(Also Section 147, Article 811; Section 148, Article 831.)

REVENUE ACT OF 1932.

The entire amount of interest or dividends received during 1932 from a domestic building and loan association is subject to Federal income tax. If a building and loan association has been held to be exempt from filing income tax returns and paying income tax, it is not required to make a return of information with respect to dividends paid by it to its members or shareholders. Such association must, however, file information returns with respect to interest payments amounting to $1,000 or more during any taxable year, beginning with the calendar year 1932.

A ruling is requested concerning the status for Federal income tax purposes of distributions made by domestic building and loan

associations to holders of installment stock which matured prior to the passage of the Revenue Act of 1932 (but after its effective date), and the liability of such associations to file returns of information with respect to such distributions made in 1932.

In the case submitted, installment shares are paid for at the rate of $1 a month on each share of stock subscribed. Dividends, declared semiannually, are not paid in cash but are credited to the accounts of the shareholders on the books and records of the association. Upon maturity of the stock the face value thereof is paid in cash, or by means of a paid-up stock certificate, or certificate of deposit. In April, 1932, the ninth series of installment shares matured and shareholders received $202x$ dollars per share in cash or its equivalent. Of such distribution, $147x$ dollars constituted a return of amounts paid in and $55x$ dollars constituted accumulated dividends.

Since the Revenue Act of 1932 contains no provision with respect to the exemption of any portion of the interest or dividends received from a domestic building and loan association, the entire amount of interest or dividends received from such an association during the year 1932 is subject to Federal income tax. The term "interest" refers to interest on money loaned to the association, whether such loans are ordinary straight loans or are represented by certificates of deposit, and the amount of interest in the hands of the recipient is subject to both the normal tax and surtax.

The term "dividends" applies to the earnings on all classes of stock of a building and loan association, whether installment, matured, unmatured, full-paid, or prepaid, to the extent that they are paid out of earnings accumulated after February 28, 1913. Section 25(a)1 of the Revenue Act of 1932 provides for the allowance as a credit against the net income of an individual, for the purpose of the normal tax, of the amount of dividends received from a domestic corporation subject to Federal income tax. Therefore, beginning with the year 1932 dividends paid to its shareholders by an exempt domestic building and loan association are subject to both the normal tax and the surtax. Dividends credited on installment stock, however, constitute income taxable to the shareholders only in the year in which they are actually paid or become unqualifiedly subject to demand. Consequently, where the earnings of the association are not paid to the holders of installment stock until maturity of the stock, credits of such earnings to their accounts do not represent income until the stock has matured. Income in each case is to be determined as the excess of the amount received on the maturity of the shares over the amount paid in on the shares or, if acquired prior to March 1, 1913, the value of the shares as of that date plus the aggregate amount paid in subsequent thereto. Hence, the amount of $55x$ dollars, which represents the total amount of earnings (accumulated since February 28, 1913) credited on each share of installment stock as of the date of maturity in 1932, must be reported as taxable income for the year 1932, regardless of the year or years in which such earnings were credited to the account of the stockholder on the books of the association.

Unless a corporation is subject to the Federal income tax imposed by the Revenue Act of 1932 it is not required to make returns of

information with respect to the dividends distributed by it. (See section 148(a) of the Revenue Act of 1932.) Accordingly, if a building and loan association has been held to be exempt from the requirement of filing income-tax returns and paying income tax, it is not required to make a return of information with respect to dividends paid by it to its members or shareholders. Such association must, however, file information returns with respect to interest payments amounting to $1,000 or more during any taxable year, beginning with the calendar year 1932. (See section 147(a) of the Revenue Act of 1932 and article 811 of Regulations 77.)

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 44.—INSTALLMENT BASIS.

ARTICLE 352: Sale of real property involving deferred payments. XII-36-6387 G. C. M. 12148

REVENUE ACTS OF 1926, 1928, AND 1932.

If a casual sale of real property contemplates but two payments, one during the first year and one in a later year, the income may be returned on the installment basis if the payment received in the first year does not exceed the percentage of the selling price specified in the statute.

The term "*initial* payments" contemplates at least one other payment in addition to the initial payments. Where the entire purchase price is to be paid in a lump sum in a later year, there being no payment during the first year, the income may not be returned on the installment basis.

Income may not be returned on the installment basis where no payment in cash or property other than evidences of indebtedness of the purchaser is received during the first year, the purchaser having promised to make two or more payments in later years.

Inquiry has been made as to the Bureau's position on several questions arising under section 212(d) of the Revenue Act of 1926 and section 44 of the Revenue Acts of 1928 and 1932.

These sections provide that income may be returned on the installment basis under certain circumstances, namely, (1) in the case of a person who regularly sells or otherwise disposes of personal property on the installment plan; (2) in the case of casual sales or dispositions of personal property or real property, "if in either case the initial payments do not exceed 40 per centum [25 per centum under the Revenue Act of 1926] of the selling price." (Certain additional prerequisites must also be satisfied if personal property is involved.) The statute then provides that "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." (The "taxable period in which the sale or other disposition is made" will hereafter usually be referred to as the "first year.")

Four questions have been asked in connection with casual sales of real property, which will be stated and answered in the order presented:

(1) May income be returned on the installment basis when the payments in cash or property other than evidences of indebtedness of the purchaser received during the first year do not exceed 40 per cent of the selling price (25 per cent under the Revenue Act of 1926), but the entire balance of the purchase price is to be paid in a lump sum in a later year?

This question has already been answered in the affirmative in I. T. 2691 (C. B. XII–1, 52), and the position there taken is affirmed. The regulations of the Bureau imply that the only test of whether a sale is "on the installment plan" is whether the "initial payments" exceed the percentage of the selling price specified in the statute. (Article 44, Regulations 69; article 352, Regulations 74, 77.) Moreover, even if this implication were not in the regulations, there is no express requirement in section 212(d) of the Revenue Act of 1926 or in section 44 of the Revenue Acts of 1928 and 1932 that casual sales of real property must constitute what are commonly known as "installment sales" in order to permit the return of income on the installment basis, the only requirement in the statutes being that the "initial payments" must not exceed 40 per cent of the selling price (25 per cent under the Revenue Act of 1926). Therefore, even if a casual sale of real property contemplates but two payments, one during the first year and one in a later year, the income may be returned on the installment basis if the payment received in the first year does not exceed the percentage of the selling price specified in the statute.

(2) May income be returned on the installment basis where the only payment received in cash or property other than evidences of indebtedness of the purchaser during the first year is a nominal payment such as $1, the contract providing for the payment of the entire balance in a lump sum in a later year?

This question is identical with the one answered above except that it is specified that the initial payment is nominal. In the opinion of this office the answer is the same. The situation falls literally within the requirements of the statutes and regulations, and is as much within their spirit and purpose as where the initial payment is substantial.

(3) May income be returned on the installment basis where no payment in cash or property other than evidences of indebtedness of the purchaser is received during the first year, the purchaser having promised to pay the entire purchase price in a lump sum in a later year?

In the opinion of this office the answer to this question must be in the negative. The statutes provide that income may be returned on the installment basis "if * * * the initial payments do not exceed" a certain percentage of the selling price, and this use of the term "initial payments" fairly implies that there must be more than one payment in order to satisfy the statute. It is true that there is no substantial economic difference between the position of a seller who is to receive the entire purchase price in a later year and the position of one who is to receive $1 in the first year and the entire balance in a lump sum in a later year. But it is equally true that there is no

substantial economic difference between a seller who receives exactly 40 per cent of the selling price during the first year and a seller who during the first year receives $1 over 40 per cent of the selling price, yet the Revenue Acts of 1928 and 1932 draw the line at 40 per cent. In other words, Congress, in enacting the subsections of the statutes referring to casual sales of real property, did not state in general terms a broad purpose that sellers are to be permitted to defer the payment of income tax whenever the payment of the purchase price is deferred, but on the contrary framed an exact definition, in part using mathematical terms, permitting the installment basis of returning income to be used only in *certain cases* where payment is deferred. This mathematical exactness of definition is again evidenced in the same subsection in referring to casual sales of *personal* property, the income from which may not be returned on the installment basis unless the selling price exceeds $1,000. In such cases a sale for $1,000 would not be within the statute, but a sale for $1 over $1,000 would satisfy the statute.

Accordingly, this office is of the opinion that the term "*initial* payments" contemplates at least one other payment in addition to the initial payments; and that where the entire purchase price is to be paid in a lump sum in a later year, there being no payment during the first year, the income may not be returned on the installment basis. The Board of Tax Appeals has so held in the case of *Thomas F. Prendergast, Ex.*, v. *Commissioner* (22 B. T. A., 1259). See also *Walnut Realty Trust* v. *Commissioner* (23 B. T. A., 850).

(4) May income be returned on the installment basis where no payment in cash or property other than evidences of indebtedness of the purchaser is received during the first year, the purchaser having promised to make two or more payments in later years?

The statute is satisfied "if * * * the initial payments do not exceed" the specified percentage of the selling price, but the statute provides that "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 * * * is made.*" [Italics supplied.] Therefore, if land is sold for $20,000 under a contract providing that the purchaser is to pay nothing during the first year, and $5,000 during each of the four succeeding years, it is clear that no "initial payments" are provided for. The $5,000 which is to be paid during the second year is not an "initial payment" within the meaning of the statute because it will not be received "during the taxable period in which the sale * * * is made."

In the opinion of this office the statute fairly implies that there must be an "initial payment" in order for income to be returned on the installment basis, and it follows that where the first payment is to be received during the second year, the income may not be returned on the installment basis.

It may be argued that where no payment is received during the first year "the initial payments do not exceed 40 per centum of the selling price," and that the requirements of the statute are literally satisfied. But this is not so. Where no payment is received during the first year, the situation is not correctly and literally expressed by saying that the "initial payments do not exceed 40 per centum

of the selling price," for this very statement implies two things, (1) that there has been an "initial payment," and (2) that it was not in excess of 40 per cent of the selling price, whereas the truth is that no "initial payment" has been made.

The only theory under which such a statement would correctly and literally express the situation would be to hold that there may be an initial payment of *zero*, but this is itself a contradiction in terms, for the term "payment" implies that "something" is paid, and zero is not "something"; it is literally "nothing."

Moreover, to hold that the provision of the statute that "the initial payments do not exceed 40 per centum of the selling price" is satisfied where no payment is received during the first year, but two or more payments are received in later years, would logically lead to the conclusion that the statute is satisfied where no payment is received during the first year, the entire purchase price being received during a later year, yet it has already been stated under question (3) that this does not satisfy the statute, and that the Board has so held.

Furthermore, so to hold would also logically lead to the conclusion that the statute is satisfied if no payment is received during the first year, 50 per cent of the selling price is received during the second year, and 50 per cent in the third year. The payment received during the second year could not be treated as an initial payment (and so be held not to satisfy the statute unless it constitutes 40 per cent or less of the selling price) because the term "initial payments" is confined by the statute to payments made during the first year.

Accordingly, it is concluded that income may not be returned on the installment basis where no payment in cash or property other than evidences of indebtedness of the purchaser is received during the first year, the purchaser having promised to make two or more payments in later years.

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

Article 353: Sale of real property on installment plan. XII–35–6373
G. C. M. 12012

REVENUE ACT OF 1932.

A taxpayer sold certain real estate at a loss in 1930 and claimed the loss as a deduction for that year. Title did not pass to the vendee. After receiving partial payments the vendor repossessed the property in 1932.

The taxpayer should report as income for the year of repossession the difference between (1) the entire amount of the payments actually received on the contract and retained by him, and (2) the sum of the profits previously returned as income (zero) and an amount representing what would have been a proper adjustment for exhaustion, wear and tear, etc., of the property during the period it was in the hands of the purchaser had the sale not been made. The basis of the property becomes its former selling price.

An opinion is requested relative to the method of reporting income for 1932 where property, which was sold on the installment plan, was repossessed in that year.

The taxpayer sold certain real estate (which cost him $11,000) for $9,000 in the year 1930. Title to the property did not pass to the vendee. A loss of $2,000 was taken in the return of the taxpayer for 1930. The down payment plus all partial payments amounted to $4,000. As the vendee failed to pay the balance due of $5,000 the vendor repossessed the property in 1932.

The Income Tax Unit expresses the view that the taxpayer (vendor) should be required to report as taxable income for 1932, the year of repossession, the difference between $6,000 (the $4,000 received as payment on the contract and retained by the taxpayer plus the $2,000 loss taken as a deduction in 1930), and an amount representing what would have been a proper adjustment for wear and tear of the property during the period it was in the hands of the purchaser had the sale not been made. The Income Tax Unit also suggests that the basis of the property in the hands of the taxpayer for the purpose of determining depreciation and/or gain or loss on subsequent disposition is the original basis at the time of sale, namely, $11,000. The conclusions reached herein are not in accord with the views of the Unit.

It is well established that if property is sold at a loss, the amount of the loss must be taken in its entirety in the year of sale, notwithstanding that the transaction may in every respect qualify as an installment sale. (I. T. 2063, C. B. III-2, 108; *George P. Sacks* v. *Commissioner*, 23 B. T. A., 307; *Darwin D. Martin* v. *Commissioner*, 24 B. T. A., 528, affirmed C. C. A. 2, 61 Fed. (2d), 942, and cases cited.) Assuming that the sale in 1930 was a bona fide transaction, this office sees no reason why the loss actually sustained should not be allowed as a deduction for that year regardless of the fact that under the terms of the contract title to the property did not pass to the vendee.

Article 353 of Regulations 77, applicable to the year 1932, reads in part as follows:

> If the vendor has retained title to the property and the purchaser defaults in any of his payments, and the vendor repossesses the property by agreement or process of law, the difference between (1) the entire amount of the payments actually received on the contract and retained by the vendor and (2) the sum of the profits previously returned as income in connection therewith and an amount representing what would have been a proper adjustment for exhaustion, wear and tear, obsolescence, amortization, and depletion of the property during the period the property was in the hands of the purchaser had the sale not been made, will constitute gain or loss, as the case may be, to the vendor for the year in which the property is repossessed, and the basis of the property in the hands of the vendor will be the original basis at the time of the sale. * * *

Under the foregoing language the taxpayer should report as income for the year of repossession the difference between (1) the entire amount of the payments actually received on the contract and retained by him, i. e., $4,000, and (2) the sum of the profits previously returned as income (zero) and an amount representing what would have been a proper adjustment for exhaustion, wear and tear, etc., of the property during the period it was in the hands of the purchaser had the sale not been made. The vendor should not, in the opinion of this office, be required to return as income for the year 1932 the loss taken as a deduction for 1930.

The provision in the foregoing article of Regulations 77 relative to the basis of the property in the hands of the vendor can not be applied under the circumstances of this case. The basis of the property to the repossessing vendor should not be increased by the amount of the loss previously claimed. In other words, the basis of the property to him becomes its former selling price—the amount by which the loss was fixed.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 51.—INDIVIDUAL RETURNS.

ARTICLE 381: Individual returns.

REVENUE ACT OF 1932.

Income tax returns for fiscal years ended in 1933. (See T. D. 4408, page 426.)

SECTION 52.—CORPORATION RETURNS.

ARTICLE 391: Corporation returns.

REVENUE ACT OF 1932.

Income tax returns for fiscal years ended in 1933. (See T. D. 4408, page 426.)

ARTICLE 392: Returns by receivers. XII-32-6330
G. C. M. 12000

REVENUE ACT OF 1932.

Where "trustees" handle a portion of the assets of a bank for the purpose of liquidating them, the "trust" is not a separate taxable entity from the liquidating bank. The income of the "trust" is the income of the liquidating bank and should be returned as such.

In 1932 a "trustees' agreement" was executed "by and between C, acting commissioner of banking of the State of Wisconsin and statutory receiver of the M Bank * * *, party of the first part, and A, duly elected by the directors of the reorganized M Bank, and B, duly elected by the creditors of said bank, parties of the second part." The agreement states that the M Bank, a delinquent banking corporation, by resolution of its directors turned over its assets on October —, 1932, to the commissioner of banking for "liquidation and reorganization"; that such assets are now in the hands of C; that 60 per cent of the liability to depositors has been assumed by the "reorganized M Bank" in consideration of the assignment to it by C of certain "class A" assets of the M Bank; that the balance of the assets of said bank, known as "class B" assets, have been set aside in

a "special trust" under the direction and control of the parties of the second part; that agreements of unsecured creditors of the bank, representing more than 90 per cent of the aggregate claims against the bank, have been secured, wherein said creditors have agreed to accept payment of the balance of their claims not taken over by the reorganized bank out of the proceeds of the liquidation of the "special trust"; that the parties of the second part will issue participating trust certificates to all depositors and unsecured creditors of the bank for the 40 per cent of their claims not taken over by the reorganized bank; that the parties of the second part will liquidate the "special trust," aided by the advice of the creditors' committee of the M Bank, which consents to this agreement; *that the parties of the second part will act at all times under the supervision of C and his deputy, the director of liquidation, and will make monthly report to said director in the manner required of receivers for delinquent State banking corporations;* that the compensation of the parties of the second part shall be fixed by the above-mentioned creditors' committee, *subject to the approval of C;* that whenever a sufficient amount of cash is in the possession of the parties of the second part, *upon and with the approval of the party of the first part*, a liquidating dividend shall be paid to all holders of participating trust certificates; that the creditors' agreement is made a part of this agreement; that this contract shall be binding upon all creditors of the bank; that the parties of the second part release C from any liability arising by reason of his having been in statutory possession and control of the assets of the M Bank.

The creditors' agreement provides that the creditors will accept repayment of their claims in the following manner: First, that there shall be set aside in a "special trust" such securities of the bank as are of doubtful value or collectibility, together with a certain amount of other securities, all to be selected by the creditors' committee and the reorganization committee, subject to approval of the State banking department, from which "trust fund" the claims not assumed by the reorganized bank shall be paid; second, that the "trust" shall be administered by two trustees, one to be selected by the creditors' committee and the other by the directors of the reorganized bank, both of whom are to act under the direction and control of the commissioner of banking; that the compensation of the trustees shall be fixed by the creditors' committee, subject to the approval of the commissioner of banking; that the committee shall act in an advisory capacity to the trustees during the liquidation of the "trust"; that the reorganized bank shall have the privilege of purchasing at any time at the value thereof, any of the assets so segregated, with the exception of cash, and to substitute therefor any of the assets which shall have been taken over by the reorganized bank; third, if and when all claims of creditors of the bank have been repaid in full, the remainder of the assets of the "trust" shall revert to, and become the property of the stockholders of the M Bank, as of the date of suspension; that all assets not so placed in trust, or used to retire bills payable and preferred claims, shall be and remain the property of the bank upon its agreement to assume and repay to the creditors their proportion of the full value thereof at certain named times from the reopening of the bank, and in

certain proportions; and that the agreement of the bank is to be evidenced by certificates of deposit in the reorganized bank.

It is stated in the "trustees' agreement" that the M Bank is a "delinquent banking corporation." Section 220.08 of the Wisconsin Statutes, 1929, as amended, provides in part as follows:

220.08. *Delinquent banks; commissioner may take possession.* (1) Whenever it shall appear to the commissioner of banking that any bank or banking corporation to which this chapter is applicable [national banks are excluded] has violated its charter or any law of the State, or is conducting its business in an unsafe * * * manner, or if the capital * * * is impaired, * * * or if any such bank or banking corporation shall suspend payment * * * or is in an unsound or unsafe condition * * *, the Commissioner may forthwith take possession of the property and business of such bank * * * and retain such possession until such bank * * * shall resume business, or its affairs be finally liquidated as herein provided. * * *

* * * * * * *

(16) Whenever any bank * * * has been completely liquidated, the commissioner * * * shall * * * cancel the charter of such bank * * *.

* * * * * * *

(18) Whenever a plan for the reorganization of any bank has been agreed upon within 10 days after the commissioner * * * has been charge * * * and such plan has been entered into by the depositors and unsecured creditors * * *, which represent not less than 90 per cent of the amount of deposits and unsecured claims * * *, the commissioner * * * may forthwith approve such reorganization plan * * * and all other depositors and unsecured creditors shall be * * * subject to such agreement * * *.

In *United States* v. *Parker* (9 Fed. (2d), 473), the Federal District Court for the Western District of Wisconsin, in ruling on the status of the commissioner of banking under section 220.08, supra, of the Wisconsin statutes, said that the commissioner holds the property of the banks as a "receiver." It will be noted that in the "trustees' agreement" C, the party of the first part, is referred to as "acting commissioner of banking of the State of Wisconsin and *statutory receiver of the M Bank*." (Italics supplied.) See also *In re Citizens' Savings & Trust Co.* (171 Wis., 601, 177 N. W., 905).

Article 71 of Regulations 77 provides in part as follows:

ART. 71. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. * * * Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. * * *

In *Taylor Oil & Gas Co. et al.* v. *Commissioner* (47 Fed. (2d), 108, certiorari denied, 283 U. S., 862), and in *Burnet* v. *Lexington Ice & Coal Co.* (62 Fed. (2d), 906 [Ct. D. 707, page 234, this Bulletin]), the courts held that the provision in prior regulations, corresponding to the provision just quoted, is a reasonable regulation and should be given effect. Therefore, in so far as the acting commissioner of banking is liquidating the bank's assets in the instant case, it seems clear that any income realized from such assets is taxable to the banking corporation. The commissioner is acting as a statutory receiver of the corporation, and the statute clearly contemplates that the banking corporation shall remain in existence until liquidation is completed. (See paragraph 16, quoted above, implying that the corporate charter is not to be canceled in such a case until the bank "has been completely liquidated.")

The question directly in issue in the instant case, however, is whether the so-called "special trust" is a separate taxable entity or simply a part of the liquidating process of the corporation. In the opinion of this office the latter alternative is the proper treatment of the situation. The "trustees' agreement" provides that the parties of the second part, who are in immediate possession and management of the assets of the "special trust," will act at all times under the supervision of C and his deputy, the director of liquidation, and will make monthly report to said director in the manner required of receivers for delinquent State banking corporations. The agreement further provides that the amount of compensation of the parties of the second part is subject to C's approval, and that no liquidating dividends can be paid without his consent. Irrespective of the fact, therefore, that the parties of the second part purport to release C from all liability arising from his position as statutory receiver, the so-called "special trust" is in effect simply an agency of the statutory receiver, approved by the creditors, to help liquidate a portion of the corporation's assets.

Moreover, the creditors' agreement provides that if and when all claims of creditors of the bank have been repaid in full, the remainder of the assets of the "trust" shall revert to, and become the property of the stockholders of the M Bank, as of the date of suspension. This provision shows that while the creditors have agreed to look only to the "special trust" for the payment of a certain proportion of their claims, the creditors have not *purchased* the assets of the "special trust." The "trust" assets are still the assets of the liquidating corporation, subject to the payment of creditors, and any surplus will go to the corporation's stockholders as in the case of any other assets. Accordingly, the "special trust" is not a separate taxable entity. Its income is the income of the liquidating bank and should be returned as such.

It is not clear either from the statute, or from the agreements, whether the reorganized bank is a new and different corporation from the original bank or is merely a continuation thereof. The reorganization of a corporation may or may not result in a new corporation, depending on all the surrounding circumstances (14a C. J., 1041, 1045). If the reorganized bank is a new corporation, the original corporation is nevertheless still in existence until its assets have been liquidated, and any income from the "trust" assets is the income of the original corporation. If the reorganized bank is simply a continuation of the original corporation, then the situation is that a corporation has agreed with its creditors that a certain portion of their claims shall be satisfied only from certain assets which the corporation sets aside for that purpose (but which the creditors have not purchased), the corporation remaining fully liable for the balance of the creditors' claims. In such a case the corporation is a fortiori taxable on any income realized from the assets so set aside.

The conclusion that the "special trust" is not a separate taxable entity is supported by the authorities. In *Taylor Oil & Gas Co.* v. *Commissioner*, supra, the stockholders of a corporation adopted a resolution that it be dissolved, and authorized the president and directors to act as trustees for the creditors and stockholders. All the necessary documents to accomplish the dissolution according to

law were filed with the secretary of state. Later the trustees conveyed all the property to another corporation for $150,000 in cash. The Circuit Court of Appeals, Fifth Circuit, held that the profit was taxable to the corporation, quoting with approval a provision in article 547, Regulations 45 (which is identical with the provision in article 71 of Regulations 77, quoted above), and stating in part:

> This is a reasonable regulation and should be given effect. (*Universal Battery Co.* v. *United States*, 281 U. S., 580.)
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> * * * * * * *
>
> * * * Conceding for the purpose of argument that the legal title to the property vested in the trustees by the dissolution, no part of the title passed to the stockholders thereby. The real owner was still the company until such time as its affairs were liquidated, the debts paid, and the residue distributed to the stockholders. The profit on the transaction was earned by the corporation, and the assessment of the taxes based thereon was valid. * * *

Similar conclusions were reached in *Burnet* v. *Lexington Ice & Coal Co.*, supra; *Fulton's Executors* v. *Commissioner* (47 Fed. (2d), 436); *Fred A. Hellebush et al., Trustees*, v. *Commissioner* (24 B. T. A., 660); *S. A. MacQueen Co.* v. *Commissioner* (26 B. T. A., 1337); and *Paraffine Oil Co.* v. *Commissioner* (28 B. T. A., May 31, 1933).

In the cases just cited those responsible for the creation of the "trust" were the liquidating corporation and the *stockholders*, while in the instant case they were the liquidating corporation (acting through its statutory receiver, C) and the *creditors*. But this does not distinguish the cases. Regardless of who is primarily responsible for the creation of the "trust," the creditors of the liquidating corporation have the first claim on the assets of the "trust," and the corporation is entitled to the residue. The fact that the corporation permits the residue to be paid directly to its stockholders instead of to the liquidating corporation, does not, as the above cases show, relieve the corporation from tax on any income realized by the "trust." The situation is similar in this respect to that involved where a corporation leases its property, and directs the lessee to pay the rent directly to the stockholders of the lessor. The rent is income to the lessor corporation although it does not pass through the hands of the lessor. (*Rensselaer & S. R. Co.* v. *Irwin*, 239 Fed., 739, 249 Fed., 726, certiorari denied, 246 U. S., 671; *West End St. Ry. Co.* v. *Malley*, 246 Fed., 625; *Northern R. Co. of New Jersey* v. *Lowe*, 250 Fed., 856; *American Telegraph & Cable Co.* v. *The United States*, 61 Ct. Cls., 326, certiorari denied, 271 U. S., 660, T. D. 3799, C. B. V–1, 295; *The Western Union Telegraph Co.* v. *Commissioner*, 27 B. T. A., 265; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S., 716, Ct. D. 80, C. B. VIII–2, 222; *United States* v. *Boston & Maine Railroad*, 279 U. S., 732, Ct. D. 73, C. B. VIII–2, 315; *Marquette Oil Distribution Co.* v. *Commissioner*, 27 B. T. A., 960, March 20, 1933.)

The case of *Allen* v. *Commissioner* (49 Fed. (2d), 716, certiorari denied, 284 U. S., 655, Ct. D. 417, C. B. X–2, 315) is not contrary to the conclusion reached in the instant case, for in *Allen* v. *Commissioner* the question here in issue was not presented to the court. It is well settled that "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute prece-

dents." (*Webster* v. *Fall*, 266 U. S., 507; *Ex Parte Bakelite Corporation*, 279 U. S., 438; *United States* v. *Mitchell*, 271 U. S., 9, T. D. 3865, C. B. V–1, 233.) Moreover, the transaction involved in *Allen* v. *Commissioner* took place in 1922, 10 years after the original corporation had merged with another, and the two had become a third. By that time, the original corporation may have passed completely out of existence.

In view of the foregoing, it is held that the "trust" is not a separate taxable entity from the liquidating bank and that the income of the "trust" is the income of the liquidating bank and should be returned as such.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

SECTION 55.—PUBLICITY OF RETURNS.

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1932.

Special Committee to Investigate Foreign and Domestic, Ocean and Air Mail Contracts. (See T. D. 4378, page 219.)

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1932.

Special Committee to Investigate Receivership and Bankruptcy Proceedings and Appointment of Receivers and Trustees. (See T. D. 4397, page 220.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT A.—RATES OF TAX.

SECTION 103.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 521: Proof of exemption. XII–31–6318
I. T. 2705

REVENUE ACT OF 1932.

During the year 1932 an employees' beneficiary association received contributions from members amounting to 37,403.83x dollars, or 95.92 per cent of its net income, and interest (less loss on investments) amounting to 1,590.83x dollars, or 4.08 per cent. Interest actually received was 8,314 36x dollars and loss on the sale of bonds was 6,723.53x dollars.

Held, that the 85 per cent limitation of section 103(16) of the Revenue Act of 1932 refers to gross income; and that the interest income received may not be reduced by the loss on the sale of bonds in determining whether that income is in excess of 15 per cent. As less than 85 per cent of its gross income consisted of amounts collected from members for the sole purpose of paying benefits and meeting expenses, this association is not entitled to exemption under section 103(16) of the Revenue Act of 1932.

During the year 1932 an employees' beneficiary association received contributions from members amounting to 37,403.83x dollars, or 95.92 per cent of its net income, and interest (less loss on investments) amounting to 1,590.83x dollars, or 4.08 per cent. The financial statement shows that 8,314.36x dollars was received from interest and a loss of 6,723.53x dollars was incurred on the sale of bonds. It therefore becomes necessary to determine whether the 85 per cent limitation of section 103(16) applies to gross or net income.

Section 103(16) of the Revenue Act of 1932 and the corresponding provisions of the Revenue Act of 1928 provide exemption for:

> Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (A) no part of their net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (B) 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.

By reason of the reference to collections from members for the purpose of paying life, sick, accident, or other benefits to members and meeting expenses, it is evident that the 85 per cent limitation in the Act refers to gross income. Since losses incurred on the sale of securities are ordinarily deductible for the purpose of computing net income, and the limitation in the above-quoted section refers to gross income, it follows that the interest income received may not be reduced by the loss on the sale of bonds in determining whether the interest income is in excess of 15 per cent.

Inasmuch as less than 85 per cent of the gross income of the association during the year 1932 was received from members, it is not entitled to exemption for that year under the provisions of section 103(16) of the Revenue Act of 1932. The association is, therefore, required to file a return for the year 1932 and returns for prior years during which less than 85 per cent of its gross income consisted of amounts collected from members for the sole purpose of paying benefits and meeting expenses. Returns will also be required for future years in which less than 85 per cent of its gross income is received from members.

ARTICLE 525: Building and loan associations and cooperative banks. XII-51-6568 G. C. M. 12333

REVENUE ACTS OF 1928 AND 1932.

> Advances or loans made on investment certificates issued by the M Building and Loan Association should be disregarded in determining the status of such association under section 103(4) of the Revenue Acts of 1928 and 1932. Loans made in 1931 to persons who later within the year subscribed to stock should be treated as loans to members.

An opinion is requested relative to the exemption of the M Building and Loan Association for the years 1931 and 1932 under section 103(4) of the Revenue Acts of 1928 and 1932.

The facts in the case material to the discussion of the questions presented are as follows:

The evidence submitted shows that during 1931 the association loaned 400x dollars, of which the sum of 137x dollars, or more than

34 per cent, was loaned to persons who were not stockholders. The association advises that of the latter amount the sum of $120x$ dollars represents advances made to holders of investment certificates. It is stated that the interest on these investment certificates is payable periodically, quarterly, or semiannually; that the investor needing funds goes to the association and asks to withdraw the amount represented by his investment certificate; that the investor finds that if he withdraws the amount needed prior to an interest payment date he will sacrifice a certain amount of interest, the amount depending upon the date of withdrawal; and that he is advised by the association that if, instead of withdrawing, he will borrow from the association the sum needed, when the interest payment date on his certificate arrives he then can cash his investment certificate and cancel the promissory note which he has given to the association. Interest is charged by the association on the promissory note given by the holder of the investment certificate. The association contends that in this way the investor saves interest which he would otherwise lose, and that the so-called loan is but a return to the investor of the amount he had previously loaned to the association. It is stated that after eliminating the amount of $120x$ dollars, representing advances to the holders of the investment certificates, the loans to persons who were not holders of stock of the organization aggregated but $17x$ dollars.

In connection with the loans made during the year 1931 to holders of membership shares, it is stated, with respect to loans made after March 10, 1931, that shares were subscribed for at the time the loans were made; that in the case of 16 loans made prior to that date aggregating $50x$ dollars, membership shares were subscribed for between March 10, 1931, and April 13, 1931; and that, with respect to 9 loans aggregating $29x$ dollars, membership shares were subscribed for between April 13, 1931, and October 19, 1931.

It appears that loans made during the year 1932 amounted to $147x$ dollars, and that of this amount the sum of $46x$ dollars represented amounts advanced to holders of investment certificates in the same manner as such advances were made to holders of these certificates during the year 1931, as explained above. It is shown that all other loans made by the association during 1932 were made to members.

On the foregoing facts advice is requested whether the organization named is entitled to exemption and, more particularly, whether the so-called loans made to holders of investment certificates are to be eliminated in determining whether substantially all the business of the association for the years in question was confined to making loans to members.

In consideration of the question of exemption the Bureau has recognized that the acceptance of deposits is one of the methods used by building and loan associations in raising funds. The amounts so received are treated as borrowed money. The practice on the part of building and loan associations of borrowing money tends to advance the primary purpose for which such associations are presumed to operate. Any limitation on this method of securing funds would necessarily restrict the concept of the functions of a building and loan association. An incident to the acceptance of deposits is the obligation to repay all of the deposits upon demand of the depositors.

This is equally true with respect to partial withdrawals, whether or not the partial withdrawals take the form of bona fide loans.

It is the opinion of this office that advances or loans made on investment certificates issued by the M Building and Loan Association should be disregarded in determining the status of such association under section 103(4) of the Revenue Acts of 1928 and 1932. It is further the opinion of this office that loans made during the year 1931 to persons who later within the year subscribed for stock should be treated as loans to members and that the methods of operation of the M Building and Loan Association are such as to entitle it to exemption for the years 1931 and 1932 under section 103(4) of the Revenue Acts of 1928 and 1932.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

ARTICLE 527: Religious, charitable, scientific, literary, and educational organizations and community chests.
(Also Section 23(n), Article 261.)

XII–52–6576
I. T. 2747

REVENUE ACT OF 1932 AND PRIOR REVENUE ACTS.

The Salvation Army is exempt from Federal income tax under section 103(6) of the Revenue Act of 1932 and the corresponding provisions of prior Revenue Acts. Contributions made to it by individuals are deductible by them in computing net income, subject to the limitation prescribed by section 23(n) of the Revenue Act of 1932 and the corresponding provisions of prior Revenue Acts.

This ruling is applicable to all branches of the organization which are component parts of its national organization and have similar purposes and activities.

Advice is requested whether the Salvation Army is exempt from Federal income tax, and whether contributions made to the Salvation Army and its various branches are allowable deductions in the income tax returns of individual donors.

The organization was incorporated without capital stock in 1899 under an act entitled "An act to provide for the incorporation of the Salvation Army." (See ch. 468, Laws of New York State, 1899.) The certificate of incorporation provides in part as follows:

Fifth. Said The Salvation Army is designed to operate as a religious and charitable corporation in all the States and Territories of the United States.

Sixth. The general objects and purposes of the Salvation Army are as follows:

To have the custody and control of all the temporalities and property, real and personal, belonging to the Salvation Army in the United States, and revenues therefrom, and the administration of the same in accordance with the discipline, rules and usages of the Salvation Army. To see that the entire receipts, revenues and emoluments derived therefrom and from all the various branches of its work, are devoted exclusively to the benevolent, religious and philanthropic purposes of the Salvation Army in the United States, with the exception of a moderate and reasonable compensation to those conducting and having the management of its objects and purposes.

For the spiritual, moral and physical reformation of the working classes; for the reclamation of the vicious, criminal, dissolute and degraded; for visitation among the poor and lowly and the sick; for the preaching of the Gospel and the dissemination of Christian truth by means of open-air and indoor meetings.

The evidence submitted shows that the organization has established throughout various parts of the United States places for religious meetings, lodging shelters for the poor, homes for the rescue of fallen women, hospitals, etc., which are conducted as a part of its religious and charitable work. It appears that all branches of the organization are component parts of its national organization and have similar purposes and activities.

The corporation's income is derived from contributions, legacies, endowments, and from the sale of donated waste material, books, periodicals, and other articles. The corporation receives aid in the form of city and State grants toward the cost of operating women's and children's homes, hospitals, and nurseries. The income is used to pay for the maintenance of men's and women's social institutions, women's and children's homes, hospitals, nurseries, and fresh air camps, to carry on family welfare work and religious activities, and to defray general administrative expenses. No officer, member, or employee receives any pecuniary profit from the corporation's operations except reasonable compensation for services rendered.

Based on the foregoing, it is held that the Salvation Army is entitled to exemption under the provisions of section 103(6) of the Revenue Act of 1932 and the corresponding provisions of prior Revenue Acts. The corporation is not, therefore, required to file returns for 1932 and prior years and future returns will not be required so long as there is no change in the organization, its purposes, or methods of doing business.

Since it is held that the corporation is entitled to exemption under paragraph (6) of section 103 of the Revenue Act of 1932, and the corresponding provisions of prior Revenue Acts, it follows that contributions made to it by individuals are deductible by them in computing net income, subject to the limitation prescribed by section 23(n) of the Revenue Act of 1932 and the corresponding provisions of prior Revenue Acts.

This ruling is applicable to all branches of the organization which are component parts of its national organization and have similar purposes and activities.

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

XII–40–6428
I. T. 2720

REVENUE ACT OF 1932.

The M Marketing Association was formed without capital stock for the purpose of establishing and operating a farmers' market place for members for which rent is charged. The association is organized and operated on a cooperative basis. In instances where it markets products for producers a commission is charged. Its income is from booth rent, commissions, and fees, and is used to meet operating expenses.

Held, the organization is entitled to exemption under section 103(12) of the Revenue Act of 1932.

Advice is requested whether the M Marketing Association is entitled to exemption under section 103(12) of the Revenue Act of 1932.

The M Marketing Association was formed during 1932 without capital stock for the purpose of establishing and operating a roadside, curb, or farmers' market. It is organized and operated on a cooperative basis. Facilities were provided so that its members might assemble, grade, display, sell, advertise, and market fruits, vegetables, and other farm products. An agency was established to act in its own name, or as agent for members of the association, in the handling and marketing of farm products. Any bona fide producer of agricultural products may become a member of the association. The primary activities of the association consist of providing a market place for members for which rent is charged. In instances where the organization markets products turned over to it by producers, a flat selling commission of — per centum is charged. Its financial statement as of May 1, 1933, discloses that its income consists of booth rent, commissions, and fees, and is used to meet operating expenses.

Based on the foregoing, it is held that the organization is entitled to exemption under the provisions of section 103(12) of the Revenue Act of 1932.

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

XII–52–6577
I. T. 2748

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

The term "supplies and equipment" as used in section 103(12) of the Revenue Act of 1932 and corresponding sections of prior Revenue Acts, with the exception of the Revenue Act of 1918, includes groceries and all other goods and merchandise used by a farmer in the operation and maintenance of a farm or the farmer's household. A farmer's cooperative association which purchases such supplies or equipment will not by reason of that fact be denied exemption, provided the value of such purchases for nonmembers does not exceed the value of such purchases for members, and provided the value of the purchases made for persons who are neither members nor producers does not exceed 15 per cent of the value of all its purchases.

Advice is requested whether a farmer's cooperative marketing or purchasing association which buys groceries for its farmer patrons is entitled to exemption from Federal income tax under the Revenue Act of 1932 and prior Revenue Acts.

It is held that the term "supplies and equipment" as used in section 103(12) of the Revenue Act of 1932 and corresponding provisions of prior Revenue Acts, with the exception of the Revenue Act of 1918, includes groceries and all other goods and merchandise used by a farmer in the operation and maintenance of a farm or the farmer's household. A farmer's cooperative association which purchases such supplies or equipment will not by reason of that fact be denied exemption, provided the value of such purchases for nonmembers does not exceed the value of such purchases for members, and provided the value of the purchases made for persons who are neither members of the organization nor producers does not exceed 15 per cent of the value of all its purchases.

SECTION 111.—DETERMINATION OF AMOUNT OF GAIN OR LOSS.

ARTICLE 561: Determination of the amount of gain or loss.

REVENUE ACT OF 1932.

Tax sale in New Jersey where the property is acquired by a municipality. (See I. T. 2711, page 51.)

SECTION 112.—RECOGNITION OF GAIN OR LOSS.

ARTICLE 571: Recognition of gain or loss. XII–48–6532
I. T. 2734

REVENUE ACT OF 1932.

The exchange of Fourth Liberty Loan 4¼ per cent called or uncalled bonds for new Treasury bonds maturing October 15, 1945, constitutes a transaction in which gain or loss will be recognized for Federal income tax purposes. The gain or loss will be the difference between the cost or other basis of the old bonds and the fair market value of the new bonds on the date of the exchange.

ARTICLE 579: Involuntary conversion of property. XII–27–6265
I. T. 2700

REVENUE ACT OF 1932.

Where funds are received by the taxpayer as the result of condemnation proceedings by the United States Government, the application of the funds to the reduction of mortgage indebtedness on another piece of business property does not constitute an expenditure in the "acquisition of other property similar or related in service or use" within the meaning of section 112(f) of the Revenue Act of 1932.

Advice is requested relative to the application of section 112(f) of the Revenue Act of 1932 to transaction involving the sale of a piece of property to the United States Government under condemnation proceedings.

The taxpayer states that she is the owner of a piece of property located in the city of R, State of Y, consisting of two stores and an apartment overhead erected on a lot 50 feet by 100 feet; that the property to be acquired by the Government covers approximately 200 feet by 200 feet; and that within two blocks of the location of the property in question she owns another piece of property which is leased at the present time for stores and which is encumbered by a mortgage held by a bank. The taxpayer inquires whether the application of the funds received from the United States Government to the reduction of the first mortgage on the second parcel of property constitutes an expenditure in the "acquisition of other property

similar or related in service or use" within the meaning of section 112(f) of the Revenue Act of 1932.

Section 112(f) of the Revenue Act of 1932 provides:

Involuntary conversions.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

The discharge of a debt by a debtor is not the acquisition of property except in the sense that it can be said that by discharging the debt the debtor acquires from the creditor the debt and thus extinguishes it. Likewise, when a debt is created the debtor does not dispose of any property except in the sense that the creation of the debt creates a species of property in the hands of the creditor. When the debt is secured by a mortgage the discharge of the debt by the debtor results in no acquisition by the debtor of any property. While it is true that the property which was mortgaged to secure the debt is, by the payment of the debt discharged from the encumbrance, the property notwithstanding the mortgage has at all times belonged to the debtor or mortgagor beneficially.

It is accordingly held that where funds are received by the taxpayer as the result of condemnation proceedings by the United States Government, the application of the funds in the reduction of mortgage indebtedness on another piece of business property acquired by the taxpayer prior to the date of the condemnation of the property in question does not constitute an expenditure in the "acquisition of other property similar or related in service or use" within the meaning of section 112(f) of the Revenue Act of 1932, and, therefore, does not meet the requirements of that section of the law.

SECTION 113.—ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

ARTICLE 594: Property acquired by transfer in trust after December 31, 1920. XII-44-6476 G. C. M. 12309

REVENUE ACT OF 1932.

Where property was transferred by the grantor to a trust *inter vivos* in 1923, and was distributed to the beneficiary in 1932, section 113(a)3 of the Revenue Act of 1932 is applicable in computing gain or loss upon disposition of the property by the beneficiary. The basis in the hands of the beneficiary is the same as the basis to the grantor of the trust.

An opinion is requested with respect to the basis for computing gain or loss from the sale or other disposition of stock delivered to the beneficiary upon termination of a trust *inter vivos*.

A is the beneficiary of a trust created by his father under an indenture dated in 1920. The stock in question was transferred by the grantor to the trust in December, 1923. Under the trust instrument the grantor and one of the three trustees retained the power to direct the disposition, investment, and reinvestment of the trust property, but retained no power to terminate the trust. The income of the trust was to be paid to the grantor, at his discretion, for the use of his son until the latter reached the age of 21 years. From that date the income was to be paid directly to the son. In the discretion of the trustees the principal of the trust could be transferred to A at any time after he reached his twenty-fifth birthday.

The grantor died in 1924. The beneficiary reached his twenty-fifth birthday in 1932, and the trustees distributed to him in that year *x* shares of stock which had been acquired by them from the grantor in December, 1923. The specific question is, What is the basis for computing gain or loss from the sale by the beneficiary of stock transferred by the grantor to a trust *inter vivos* in 1923, and distributed to the beneficiary in 1932?

Section 113(a) (3) and (5) of the Revenue Act of 1932 reads as follows:

(3) *Transfer in trust after December 31, 1920.*—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made.

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

The Committee on Finance, reporting on the revenue bill of 1924, stated in relation to section 204(a)3 of the Revenue Act of 1924, which is substantially the same as section 113(a)3 of the Revenue Act of 1932, as follows:

There is no provision in the existing law which corresponds to paragraph (3) of subdivision (a). According to this paragraph, the basis for determining gain or loss from the sale or other disposition of property acquired after December 31, 1920, by a voluntary transfer in trust, is the same as it would be in the hands of the grantor, following the principle laid down in paragraph (2) as to gifts. * * *

Section 113(a)3 of the Revenue Act of 1932 fixes the basis for gain or loss purposes of property acquired by a transfer in trust after December 31, 1920 (other than by a transfer in trust by a bequest or devise), and the basis so fixed applies both to the trustee and to the beneficiary. Accordingly, where property of a trust *inter vivos* which has the same basis in the hands of the trustee as it had in

the hands of the grantor is transferred by the trustee to the beneficiary, the basis in the hands of the beneficiary is the same as the basis to the trustee and to the grantor of the trust.

Section 113(a)5 of the Revenue Act of 1932 applies only to property transmitted at death. In General Counsel's Memorandum 11309 (C. B. XII–1, 126), in connection with which the present inquiry arose, a testamentary trust was involved which was clearly governed by that section of the Act. In the instant case, the property was transferred by the grantor to a trust *inter vivos* after December 31, 1920. In the opinion of this office section 113(a)3 of the Revenue Act of 1932 is applicable. The basis in the hands of the beneficiary is, therefore, the same as the basis to the grantor of the trust.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

ARTICLE 605: Adjusted basis for determining gain or loss. XII–27–6266
I. T. 2701

REVENUE ACT OF 1932.

A taxpayer has an option for each taxable year of deducting or charging to capital account carrying charges on unimproved and unproductive real property, such as taxes and interest, paid during the taxable year. This option applies only to real property which is both unimproved and unproductive. No part of the expenditures designated as "cost of maintenance and upkeep" may be charged to capital account.

Advice is requested relative to the proper treatment for Federal income tax purposes of carrying charges on nonproductive real property under the provisions of section 113(b)1(A) of the Revenue Act of 1932. Some of the property is unimproved and some is improved. Inquiry is also made as to whether a pro rata portion of "cost of maintenance and upkeep" of such property, such as (a) salaries of manager and assistant who have direct supervision of all properties, (b) wages of laborers whose work consists of mowing weeds and making minor repairs on buildings which are not producing income, (c) rent of office space necessary to do business, and (d) salaries of bookkeepers and clerks necessary to maintain all records pertaining to real estate holdings, may be capitalized as carrying charges.

Section 113(b)1(A) of the Revenue Act of 1932 provides:

(b) ADJUSTED BASIS.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) GENERAL RULE.—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, including taxes and other carrying charges on unimproved and unproductive real property, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

The pertinent part of article 605 of Regulations 77, promulgated under the Revenue Act of 1932, provides: "* * * In the case of unimproved and unproductive real property, carrying charges, such as taxes and interest, which have not been taken as deductions by

the taxpayer in determining net income for the taxable year, or a prior taxable year, are properly chargeable to capital account."

Under the above-quoted provisions of the law and regulations a taxpayer has an option for each taxable year whether carrying charges on unimproved and unproductive real property, such as taxes and interest, paid during the taxable year shall be charged to capital account or deducted in determining the taxpayer's net income for such taxable year. This option applies only to carrying charges on real property which is both unimproved and unproductive.

The Bureau has held that expenditures for advertising with respect to unproductive property can not be capitalized as carrying charges. (I. T. 2284, C. B. V–1, 10.) It is believed that this rule is applicable to the expenditures designated in the taxpayer's letter as "cost of maintenance and upkeep." It is held, therefore, that no part of such expenditures may be properly charged to capital account for Federal income tax purposes regardless of whether such expenditures are attributable to improved unproductive real property or real property which is both unimproved and unproductive.

ARTICLE 605: Adjusted basis for determining gain or loss. XII–50–6554
I. T. 2742

REVENUE ACTS OF 1928 AND 1932.

Basis for computing gain or loss upon the sale of community property in New Mexico by the surviving spouse where the marital relationship is dissolved by reason of death of one of the spouses.

A ruling is requested as to the basis for determining gain or loss, for Federal income tax purposes, from the sale of property acquired by the surviving spouse under the community property laws of the State of New Mexico.

The New Mexico Statutes, Annotated (Compilation of 1929), relating to the interests of the husband and wife in separate property and community property, provide in part as follows:

68–302. Separate property of the wife. All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is her separate property. The wife may without the consent of her husband convey her separate property. [L. '07, ch. 37, section 8; Code '15, section 2757.]

68–303. Separate property of the husband. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is his separate property. [L. '07, ch. 37, section 9; Code '15, section 2758.]

* * * * * * *

68–401. Community property—Conveyances by married women—Limitations. All other property acquired after marriage by either husband or wife, or both, is community property; * * *.

Under section 68–403 of the New Mexico statutes the husband has the management and control of the personal property of the community, and during coverture the husband has the sole power of disposition of the personal property of the community, other than testamentary, as he has of his separate estate; but the husband and wife must join in all deeds and mortgages affecting real estate.

The law of descent and distribution contained in the New Mexico statutes provides in part as follows:

38–104. Distribution of common property on death of wife. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by a judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband. [L. '07, ch. 37, section 26; Code '15, section 1840.]

38–105. Distribution of common property on death of husband. Upon the death of the husband one half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and further as provided by law. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance and the charge and expenses of administration. [L. '07, ch. 37, section 27; Code '15, section 1841.]

It is the settled law of New Mexico that the wife has a vested interest in the community property. (*Beals* v. *Ares*, 25 N. M., 459, 185 Pac., 780; *Baca* v. *Village of Belen et al.*, 30 N. M., 541, 240 Pac., 803; *Hernandez* v. *Becker*, 54 Fed. (2d), 542.) On the death of the wife the entire community estate belongs to her husband. On the other hand, upon the death of the husband one half of the community estate goes to the wife and the other half is subject to the testamentary disposition of the husband; and in the absence of such disposition the community estate goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent, and further as provided by the statute of descent of New Mexico. Furthermore, upon the death of the wife no property is transferred to the husband and there is no inheritance which is subject to tax under the inheritance tax law of New Mexico. (*State* v. *Chavez*, 34 N. M., 258, 280 Pac., 241.) Nor is there any estate transferred to the husband which is subject to Federal estate tax. (*Hernandez* v. *Becker*, supra.) In the latter court decision it was pointed out that although the wife has a vested interest in the community property her interest ceases at her death. She does not have a right of testamentary disposition of the property, and no part thereof goes to her descendants if she predeceases her husband. The entire estate survives to the husband and he retains the management and control of the property after the wife's death the same as before her death. (Section 38–104, New Mexico Statutes, Annotated, 1929.)

In *State* v. *Chavez*, supra, the Supreme Court of New Mexico stated that the conclusions reached by it in that case did not conflict with the principles announced in *Beals* v. *Ares*, supra, and *Baca* v. *Village of Belen et al.*, supra, and commented as follows:

* * * In the former case we had before us the question of dividing the community property between the living spouses whose community was destroyed by divorce. In that case we held that the wife's interest in the community property was equal to that of the husband, and regardless of the fact that the statute makes him manager of the community, his rights were not superior to hers. There was no question in that case as to what their respective rights may have been in case either had died during the existence of the community. We know of no reason why the legislature is not able to provide survivorship in favor of one spouse and deny it to another while recognizing that so long as they live and remain members of the marital community the rights of one are not of an inferior nature to those of the other. * * *

In view of the principles established by the above decisions, it is the opinion of this office that, for Federal income tax purposes, (1) in a case where New Mexico community property is involved and the wife predeceases her husband, the basis for determining gain or loss from the subsequent sale of community property by the husband is the cost (adjusted) of such property to the community, or if the property was acquired prior to March 1, 1913, its cost (adjusted) to the community or its March 1, 1913, value, whichever is greater; and (2) in a case where New Mexico community property is involved and the husband predeceases his wife, and the property is a part of her one-half interest vesting during coverture, the basis for determining gain or loss from a subsequent sale by the wife is the cost (adjusted) to the community, or if the property was acquired prior to March 1, 1913, its cost (adjusted) to the community or its March 1, 1913, value, whichever is greater; and (3) as to any portion of the other one-half of the community property acquired by the wife from her husband upon his death, the basis for determining the gain or loss is governed by section 113(a)5 of the Revenue Acts of 1928 and 1932, or, if the sale was made prior to the enactment of such Acts, the basic value is that obtaining at the date of the husband's death.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 643: Compensation of State officers and employees. XII-34-6353 I. T. 2710

REVENUE ACT OF 1932.

The compensation of all bona fide officers and employees of the State banking department of Iowa engaged in the liquidation of State banks is exempt from Federal income tax. An attorney (other than an assistant attorney general) appointed by the court under section 9240 of the Code of Iowa, 1931, is neither an officer nor an employee of the State and his compensation is subject to Federal income tax.

A ruling is requested in regard to the taxable status of the compensation received by individuals from the banking department of the State of Iowa in connection with the liquidation of closed banks under the supervision of the State banking department.

Section 9131 of the Code of Iowa, 1931 edition, provides for the appointment by the governor and confirmation by the senate of a superintendent of banking, whose term of office is four years. That officer is given general control and supervision of all State banks and trust companies. By section 9136 of the code he is authorized to appoint bank examiners, who are required by section 9138 to give corporate surety bonds for the faithful discharge of their duties. Sections 9238 to 9243, inclusive, of the code read:

9238. *Liquidation—right of levy suspended.* If any such bank shall fail or refuse to comply with the demands made by the said superintendent, or if the said superintendent shall become satisfied that any such bank is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may appoint an additional bank examiner to assist him in the duty of liquidation and distribution, whereupon the right of levy, or execution, or attachment against said bank or its assets shall be suspended.

9239. *Receivership—distribution.* The superintendent of banking may apply to the district court for that district in which said bank is located, or a judge thereof, for the appointment of said superintendent as receiver for such bank, and its affairs shall thereafter be under the direction of the court, and the assets thereof after the payment of the expenses of liquidation and distribution shall be ratably distributed among the creditors thereof, giving preference in payment to depositors.

9240. *Attorney for receiver.* The attorney general of the State, or such assistants as may be appointed by the court, shall represent the superintendent of banks in all proceedings provided for hereunder.

9241. *General assignments.* No general assignment for the benefit of creditors shall be of any validity.

9242. *Superintendent as receiver.* The superintendent of banking henceforth shall be the sole and only receiver or liquidating officer for State incorporated banks and trust companies and he shall serve without compensation other than his stated compensation as superintendent of banking, but he shall be allowed clerical and other expenses necessary in the conduct of the receivership.

9243. *Expense of liquidation.* All expenses of supervision and liquidation shall be fixed by the superintendent, subject to approval by the court or a judge thereof, and shall upon his certificate be paid out of the funds of such bank in his hands.

The supervision of State banks and the administration of the State laws applicable thereto are essentially governmental functions. (I. T. 1316, C. B. I–1, 105; I. T. 2214, C. B. IV–2, 46.)

The "additional bank examiner" appointed by the superintendent of banking under section 9238 is "to assist him in the duty of liquidation and distribution," the superintendent being "the sole and only receiver or liquidating officer" (section 9242) of insolvent State banks and trust companies. The superintendent may apply to the court having jurisdiction "for the appointment of said superintendent as receiver for such bank, and its affairs shall thereafter be under the direction of the court" (section 9239). The superintendent when appointed is the receiver and the "additional bank examiner" is his assistant and under his control. Such an examiner is not charged with any statutory duty except to the extent he represents his principal. His compensation is not fixed by law but by the superintendent, subject to the approval of the court. He holds for no specified tenure. He is employed by the State in the exercise of a governmental function and pursuant to statute. Such an examiner is, therefore, an employee of the State and his compensation as such is exempt from Federal income tax.

The clerical help in such receiverships is also employed by the superintendent pursuant to statutory authority (section 9242), and in connection with the exercise of a governmental function. Such persons are therefore employees of the State of Iowa and their compensation as such is exempt from Federal income tax. (I. T. 1316, supra.)

The fact that the compensation of the "additional bank examiner" and of the clerical assistants is paid out of the funds of the insolvent bank is immaterial. (*Bettman* v. *Warwick*, 108 Fed., 46; *David K. Cochrane* v. *Commissioner*, 26 B. T. A., 1167.)

The only legal representative of the superintendent of banking under section 9240 of the code is the attorney general of the State, "or such assistants as may be appointed by the court." Section 151 of the code provides as follows:

Assistant attorneys general. The attorney general may appoint a first assistant attorney general and such other assistant attorneys general as may be

authorized by law, who shall devote their entire time to the duties of their positions. The assistant attorneys general shall, subject to the direction of the attorney general, have the same power and authority as the attorney general.

An assistant attorney general appointed under the above section is a State officer, since he holds a statutory office for a specified term and possesses the same power and authority as the attorney general. If the court appoints one of such assistant attorneys general to represent the superintendent, his compensation as such is exempt from Federal income tax.

Another question arises where the court appoints an attorney, other than an assistant attorney general, to represent the superintendent. Such an attorney is not appointed by the attorney general. He possesses none of the power or authority of the attorney general, except the right to represent the superintendent, a right any attorney employed or appointed could possess in the absence of statutory restriction. He occupies the same status and has the same authority as that possessed by any attorney appointed for a receiver by a court in the exercise of its general equity jurisdiction. His duties and tenure of office are not prescribed by statute, and his emoluments are fixed by the superintendent, subject to the approval of the court. Such an attorney, therefore, lacks the essentials necessary to constitute him a public officer. (*Metcalf & Eddy* v. *Mitchell*, 269 U. S., 514, T. D. 3824, C. B. V–1, 218; *Fleming* v. *Bowers*, 11 Fed. (2d), 789, T. D. 3833, C. B. V–1, 201.) Such an attorney appointed by the court is also not an employee of the State, since the performance of his duties involves the use of judgment and discretion on his part, he is required to use his best professional skill, and he is subject to no control except that of the court. (*Metcalf & Eddy* v. *Mitchell*, supra; S. M. 5694, C. B. V–2, 159.) His compensation is not, therefore, exempt from Federal income tax.

In view of the foregoing, it is concluded that the compensation of all bona fide officers and employees of the State banking department of Iowa engaged in the liquidation of State banks is exempt from Federal income tax. An attorney (other than an assistant attorney general) appointed by the court under section 9240 of the Code of Iowa, 1931, is neither an officer nor an employee of the State and his compensation is subject to Federal income tax.

ARTICLE 643: Compensation of State officers and employees. XII–40–6429 G. C. M. 12137

REVENUE ACT OF 1932 AND PRIOR REVENUE ACTS.

The compensation of the vocational teachers' training staff of the M University, which is paid in part out of funds contributed by the Federal Government under the Smith-Hughes Act of February 23, 1917 (39 Stat., 929), is subject to Federal income tax. The teachers are not State employees but are employees of a private corporation.

An opinion has been requested as to the taxable status for Federal income tax purposes of compensation received by members of the vocational teachers training staff of the M University which is paid in part out of funds contributed by the Federal Government under

an Act approved February 23, 1917 (39 Stat., 929), known as the Smith-Hughes Act.

The Act in question provides for annual appropriations to the respective States for the purpose of paying salaries of teachers engaged in vocational education. Section 5 of the Act provides that any State desiring to secure the benefits of the appropriations shall, through legislative authority, accept the provisions of the Act and designate or create a State board to consist of not less than three members for the purpose of cooperating with the Federal Board of Vocational Education. In pursuance of that section of the Act the State of R through its legislature accepted the provisions of the Smith-Hughes Act. The department of public instruction of the State of R designated the M University as one of its agencies to carry out the vocational training.

The M University was founded as the ——— ——— in ——, by charter from the State of R, to provide higher education in that State. In —— a second charter was granted under the name of the ———, which later was changed to M University. Throughout its history the university has been partly supported by the State of R in connection with public spirited citizens. It is not a part of the school system of that State.

The specific question is whether the compensation of the teachers who constitute the staff of the M University engaged in vocational training, and who are paid out of funds to which contributions are made by the Federal Government and the State of R, is exempt from Federal income tax.

Article 643 of Regulations 77 provides that compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function. In the instant case the taxpayers are employed by the M University, although selection of such employees is approved by the department of public instruction of the State of R. Such approval is apparently required for the reason that the State desires to exercise to some extent supervision with respect to the employment of persons engaged in vocational instruction. All out of State travel by the teachers of the vocational training staff must be approved by the governor. This is evidently done in the interest of economy and for the further reason that the State is charged with the administration of the Federal funds in connection with the funds which it contributes. The situation is one in which the State of R has simply designated the M University as a medium through which to carry out the vocational training provisions of the Smith-Hughes Act, and uses the teachers employed by the university for that purpose. But the designation of a private educational institution as an agency of the State to conduct vocational training is not sufficient to warrant the classification of its teachers as employees of the State.

In general, where a person is a bona fide State employee, engaged in the exercise of an essential governmental function, the mere fact that the employee receives his compensation out of funds contributed in part by the Federal Government does not take from him his right of exemption from Federal taxation. For example, it was

held in I. T. 2677 (C. B. XII–1, 141) that the compensation of an agricultural teacher in the public school system of Virginia was exempt from Federal income tax even though he was paid in part out of funds contributed by the Federal Government under the Act of February 23, 1917 (39 Stat., 929), which is the Smith-Hughes Act.

It was held, however, in I. T. 2698 (C. B. XII–1, 70) that where an individual was an employee of the public health department of a State and was also appointed by the Secretary of the Treasury as a field agent of the United States Public Health Service, his compensation from the State was exempt from Federal income tax, but the compensation paid to him directly by the Federal Government was taxable. The employee in the latter case held two positions, one as a State employee and the other as a Federal employee.

Conceding, on the basis of *Burnet* v. *Coronado Oil & Gas Co.* (285 U. S., 393, Ct. D. 485, C. B. XI–1, 265), that education, whether vocational or otherwise, is an essential governmental function, the fact remains in the instant case that teachers employed by the M University are not State employees but are employees of a private corporation. Since the taxpayers in the instant case are not State employees it must be held that their compensation as teachers in the M University is subject to Federal income tax, even though their services are rendered in connection with the exercise of an essential governmental function.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 141.—CONSOLIDATED RETURNS OF CORPORATIONS.

ARTICLE 711: Consolidated returns of affiliated corporations for 1932 and subsequent taxable years. XII–41–6442 G. C. M. 12207

REVENUE ACT OF 1932.

Where a group of corporations is affiliated within the meaning of section 141(d) of the Revenue Act of 1932 and the common parent company is in the hands of a trustee in bankruptcy, who is operating the property or business of the company and is, therefore, required to make returns for the corporation under section 52(a) of that Act, a consolidated return may be made by such trustee on behalf of the parent company and its subsidiaries, provided the requirements of Regulations 78 governing the making of consolidated returns are met.

The opinion of this office is requested whether, in the case of a group of corporations affiliated within the meaning of section 141(d) of the Revenue Act of 1932, where the common parent corporation is in the hands of a trustee in bankruptcy, a consolidated return may be made by such trustee on behalf of the parent corporation and its subsidiaries, provided the requirements of Regulations 78 governing the making of consolidated returns are complied with.

The privilege of filing a consolidated return is conditioned upon whether the corporations to be joined in such a return are affiliated

within the meaning of the term "affiliated group," defined in section 141(d) of the Revenue Act of 1932, which reads in part as follows:

* * * As used in this section an "affiliated group" means one or more chains of corporations connected through stock ownership with a common parent corporation if—

(1) At least 95 per centum of the stock of each of the corporations (except the common parent corporation) is owned directly by one or more of the other corporations; and

(2) The common parent corporation owns directly at least 95 per centum of the stock of at least one of the other corporations.

Under section 70a of the Bankruptcy Act, the trustee in bankruptcy, upon his appointment and qualification, is vested with the title to all of the property of the bankrupt at the date of the adjudication, except as to property which is exempt (United States Code Annotated, title 11, section 110). He is entitled to have certificates of corporate stock transferred to his name in the place of the certificates standing in the name of the bankrupt. (*Wilson* v. *The Atlantic & St. Lawrence Railroad Co.*, 2 Fed., 459.) He has the right under the authority and control of the court to administer the same (*Robertson* v. *Howard*, 229 U. S., 254), and to vote the stock at stockholders' meetings, although if he allows the bankrupt to do this, the other stockholders have no right to object. (*State* v. *Ferris* (1875), 42 Conn., 560.) The trustee of a bankrupt corporation takes not only the rights and title of the bankrupt, but also such rights and title as execution creditors may have. (*In re Hood Bay Packing Co.*, 280 Fed., 866.) *In the enforcement of the rights of creditors and stockholders, he can do by law substantially all that they themselves could have done before bankruptcy.* (*Throckmorton* v. *Hickman et al.*, 279 Fed., 196, 202.) Thus, he has two rights as to property in his custody, i. e., that of the bankrupt and that of "a creditor holding a lien by legal or equitable proceedings thereon." (*In re Seward Dredging Co.*, 242 Fed., 225.)

An examination of the decisions applicable to the earlier taxing statutes discloses that the courts held that a tax imposed on corporations alone does not extend to a trustee in bankruptcy. (*United States* v. *Whitridge et al.*, 231 U. S., 144; *Scott* v. *Western Pac. R. Co. et al.*, 246 Fed., 545.) "As under the Bankruptcy Act the entire property of the bankrupt vested in the trustee, the income in question [income received by the trustee arising from the bankrupt's property in his hands] was not the income of the bankrupt corporation, but of the trustee and was subject to income and excess-profits tax only if the statutes authorized the assessment of the tax against him." (*Reinecke* v. *Gardner*, 277 U. S., 239, 241.) Congress, therefore, provided for the filing of returns by trustees in bankruptcy of corporations and made subject to tax the income thus disclosed. (Section 13(c) of the Revenue Act of 1916 and corresponding provisions of later Acts.) Section 52(a) of the Revenue Act of 1932 provides in part as follows:

* * * In cases where * * * trustees in bankruptcy, * * * are operating the property or business of corporations, such * * *, trustees, * * * shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by * * *, trustees, * * * shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Article 392 of Regulations 77 construes this language of the statute to mean that "Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the * * *, trustee, * * *, subject to the order of the court, such * * *, trustee, * * *, stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control."

From the foregoing, it is plain that the effect of both the statute and the regulations is to treat the trustee in bankruptcy as standing in the shoes of the corporation and its officers and directors "where * * * trustees in bankruptcy, * * * are operating the property or business." This is in accordance with approved legal principles. (*Throckmorton* v. *Hickman*, supra; Remington on Bankruptcy, Volume II, section 1143, page 959.) It is well established that the trustee may continue the business (*In re Delmonico's*, 256 Fed., 414; *In re Isaacson*, 174 Fed., 406; *In re Michigan Motor Specialties Co.*, 288 Fed., 377), as the courts are vested with ample authority to keep the business alive. (Section 2(5), Bankruptcy Act, United States Code Annotated, title 11, section 11.)

No provision is made in the taxing statute for treatment of the bankrupt for income tax purposes as though a break occurs in the continuity of the corporation by reason of the adjudication in bankruptcy. The continuity of the accounting period for which the return is required must be maintained by the trustee in bankruptcy, as no provision is made for separate returns with respect to the same year covering the period before bankruptcy and the period subsequent thereto, or for allocating the income or the tax between such periods. Although the trustee takes legal title to the bankrupt's property and may operate the business, Congress apparently intended to avoid the legal implication that a new entity is thereby created for income tax purposes. Under the Revenue Act the same entity is regarded as continuing, although in *custodia legis*, with the same rights and privileges and the same taxable status which it had before bankruptcy. (Section 52(a) of the Revenue Act of 1932.)

Technically, of course, the corporation no longer directly owns 95 per centum of the stock of its subsidiary, as absolute title is vested in the trustee; but since the statute regards the corporate entity as continuing during the period of operation of the business by the trustee in bankruptcy and requires it to be treated for income tax purposes in the same manner as before bankruptcy, with the trustee placed in the shoes of the corporate officers and directors (sections 52(a) and 274 of the Revenue Act of 1932), it is the opinion of this office that the mere change of legal ownership, which takes place by operation of the bankruptcy law, does not constitute such a break in the direct ownership of the stock of the subsidiary as to deprive the trustee of the right to make a consolidated return for the bankrupt corporation.

In Appeals and Review Recommendation 818 (C. B. I–1, 296), it was held, under the Revenue Acts of 1918 and 1921, that consolidated returns must be accepted during the period companies were in the hands of receivers. Accordingly, it has since been the practice of the Bureau to accept consolidated returns from receivers of corporations and also from trustees in bankruptcy, such action apparently being

based upon the fact that both receivers and trustees are dealt with similarly, no distinction being made in the sections of the statutes referring to them, and that general receivers and trustees in bankruptcy are often similarly situated with respect to the title which they hold to property. (16 Fletcher Cyc. Corp., pages 304–305.)

As an indication of the attitude of the courts with reference to the question of the effect of the vesting of title in the trustee in bankruptcy, the court in the case of *Lavenstein Corporation* v. *Commissioner* (25 Fed. (2d), 375), held that corporations were "affiliated" within the meaning of the Revenue Act of 1918, although the stock of one was transferred to a creditors' committee. In reversing the decision of the Board of Tax Appeals in *Lavenstein Corporation* v. *Commissioner* (6 B. T. A., 1134), which denied affiliation because "the alleged actual owners * * * had no record title" to the stock and could acquire such title only by paying the debts in full, the court said:

> * * * True, the stock stood in their names [the creditors' committee] on the books of the corporation, but they held it merely for the purpose of controlling the corporation, * * *.
>
> * * * * * * *
>
> We see no merit in the argument that affiliation should be denied where the stock of one corporation has been pledged as security for the debts of its owners on the theory that they have thereby parted with control over the corporation. * * *

While this office does not regard that court decision as controlling in the instant case, it is believed the reasoning of the court is applicable (as affecting the statutory requirement of direct ownership where legal title is vested by operation of law in the trustee who represents the creditors under the Bankruptcy Act) with greater force than where title is vested in a creditors' committee by virtue of a voluntary agreement between the parties. Although the language of the statute under which the Lavenstein case arose is broader than the language of the existing statute, there appears to be no material differences in the instant case which justify a different conclusion.

In General Counsel's Memorandum 7331 (C. B. VIII–2, 135) it was held that where a parent corporation, for a legal intra vires purpose, has placed the record ownership of a share of stock of a subsidiary in a nominee, such nominee being at all times legally obligated to hold and deal with such share according to such orders and direction as the parent corporation may, from time to time, give him, the ownership of the parent corporation is "direct" within the meaning of section 141(d) of the Revenue Act of 1928. Likewise, this office is of the opinion, as heretofore indicated, that where the title or record ownership of stock of a subsidiary is vested by operation of law in a trustee in bankruptcy, such trustee being at all times legally obligated to hold and deal with the stock according to such orders and direction as the court, in whose custody the bankrupt parent corporation is placed, may give him, the ownership of the parent corporation is "direct" within the meaning of section 141(d) of the Revenue Act of 1932, for the purpose of enabling the trustee to make a consolidated return for the corporation in complying with section 52(a), which requires him to make returns "in the same manner and form as corporations are required to make returns."

Accordingly, it is the opinion of this office that where a group of corporations is affiliated within the meaning of section 141(d) of the Revenue Act of 1932 and the common parent company is in the hands of a trustee in bankruptcy who is operating the property or business of the company and is, therefore, required to make returns for the corporation under section 52(a) of the Revenue Act of 1932, a consolidated return may be made by such trustee on behalf of the parent company and its subsidiaries, provided the requirements of Regulations 78 governing the making of consolidated returns are met.

This conclusion is not inconsistent with section 70a(3) of the Bankruptcy Act, which specifically provides that the trustee shall be vested by operation of law with the title of the bankrupt to "powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person." The privilege of making a consolidated return instead of a single corporate return, if the bankrupt corporation may be benefited thereby, would seem to be in the nature of a "power" granted by statute to which the trustee in bankruptcy succeeds since, under the taxing statute and article 392 of Regulations 77, he "stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control."

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

ARTICLE 711: Consolidated returns of affiliated corporations for 1932 and subsequent taxable years. XII–45–6492 G. C. M. 12208

REVENUE ACT OF 1932.

Where a group of corporations is affiliated within the meaning of section 141(d) of the Revenue Act of 1932, and a subsidiary company is in the hands of a trustee in bankruptcy or a receiver, who is operating the property or business of the company and is, therefore, required to make returns for the corporation under section 52(a) of that Act, the income of such a subsidiary company may be included in a consolidated return for the affiliated group, provided the trustee in bankruptcy or the receiver, as the case may be, executes Form 1122 and consents to the provisions of Regulations 78 governing the making of consolidated returns. (See G. C. M. 12207, page 83, this Bulletin.)

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

SECTION 147.—INFORMATION AT SOURCE.

ARTICLE 811: Return of information as to payments of $1,000.

REVENUE ACT OF 1932.

Interest payments of $1,000 or more during the taxable year by exempt building and loan association. (See I. T. 2727, page 55.)

ARTICLE 811: Return of information as to payments of $1,000. XII-49-6544 Mim. 4107

Returns of information required to be filed by insurance companies.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., November 22, 1933.

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

Section 147(a) of the Revenue Act of 1932 provides:

Payments of $1,000 or more.—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments described in section 148(a) or 149), of $1,000 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

Article 813 of Regulations 77 provides in part:

Cases where no return of information required.—Payments of the following character, although over $1,000, need not be reported in returns of information on Form 1099:

* * * * * * *

(i) Payments of salaries, rents, royalties, interest (except bond interest required to be reported on ownership certificates), and other fixed or determinable income aggregating less than $2,500 made to a married individual.

If the marital status of the payee is unknown to the payor, or if the marital status of the payee changed during the taxable year (see article 295), the payee will be considered a single person for the purpose of filing a return of information on Form 1099.

Section 22(b) of the Revenue Act of 1932 reads in part:

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

(1) *Life insurance.*—Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or in installments (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income);

(2) *Annuities, etc.*—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts) under a life insurance, endowment, or annuity contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph * * *.

The excess of the amounts received over the aggregate premiums or consideration paid as provided in section 22(b)2 comes within the meaning of the term "fixed or determinable income" which is

required to be reported in returns of information under section 147(a). Every life insurance company is required to file an information return on Form 1099 in each case where such excess amount paid during the calendar year was $1,000 or more to a single person, a partnership, or a fiduciary, or $2,500 or more to a married person. Payments in respect of policies surrendered before maturity and lapsed policies need not be reported in returns of information on Form 1099.

Where for 1933 or a prior calendar year a showing is made that due to lack of detailed accounting records it is impracticable to determine what portion, if any, of the amounts described in section 22(b)2 and paid by the insurance company is in excess of the aggregate premiums or consideration paid to the company, the reporting of the gross amount paid during the year by the company under the contract will be considered a sufficient compliance with the provisions of this mimeograph. The information returns should be so prepared as to indicate clearly that the report is of the gross amount paid. In such cases, where it appears that the excess amount would not equal or exceed $1,000 in the case of a payment to a single person, a partnership, or a fiduciary, or $2,500 or more to a married person, a report of the gross amount need not be made. For 1934 and subsequent calendar years, the information returns shall show the excess of the amounts described in section 22(b)2 and paid by the insurance company over the aggregate premiums or consideration paid to the company, as provided by the preceding paragraph of this mimeograph.

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

GUY T. HELVERING,
Commissioner.

ARTICLE 813: Cases where no return of information required. XII-29-6300 T. D. 4370

INCOME TAX.

Article 813, Regulations 77, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 813 of Regulations 77 is hereby amended by inserting after paragraph (*i*) a new paragraph reading as follows:

(*j*) Payments of commissions made by fire insurance companies, or other companies insuring property, to general agents, except when specifically directed by the Commissioner to be filed.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved July 8, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

SECTION 148.—INFORMATION BY CORPORATIONS.

ARTICLE 831: Return of information as to payments of dividends.

REVENUE ACT OF 1932.

Dividend payments to members or shareholders by exempt building and loan association. (See I. T. 2727, page 55.)

SECTION 149.—RETURNS OF BROKERS.

ARTICLE 841: Return of information by brokers. XII–43–6474
Mim. 4082

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

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 14, 1933.

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

Section 150 of the Revenue Act of 1928 and section 149 of the Revenue Act of 1932 provide that every person doing business as a broker shall, when required by the Commissioner, render a correct return duly verified under oath, under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, showing the names of customers for whom such person has transacted any business, with such details as to the profits, losses, or other information which the Commissioner may require, as to each of such customers, as will enable the Commissioner to determine whether all income tax due on profits or gains of such customers has been paid.

Article 841 of Regulations 74 and 77 provides that when directed by the Commissioner, either specially or by general regulation, every person doing business as a broker shall render a return on Form 1100, showing the names and addresses of customers to whom payments were made or for whom business was transacted during the calendar year or other specified period next preceding, and giving the other information called for by the form.

In accordance with the foregoing, all persons or organizations acting at any time during the calendar years hereinafter specified as broker or other agent in stock, bond, or commodity transactions (including banks which handle clearing orders for depositors or custodian accounts) are hereby directed to file returns of information on Form 1100 with respect to all customers, depositors, or accounts for whom or which business was transacted during each of the calendar years 1929, 1930, 1931, and 1932 and each calendar year thereafter. A separate Form 1100 must be prepared for each calendar year for each customer, depositor, or account for whom or which business was transacted during the year, upon which should be shown the name and address and the other information provided for in the form. Form 1100 is printed on white paper and a dupli-

cate thereof is printed on pink paper. In each case where the account is guaranteed or others have power to issue buy or sell orders and to make withdrawals of cash or securities from the account, a duplicate of the form as prepared on white paper will be made on the pink form for each name and address, other than the customer, required to be entered on the reverse side of Form 1100. Form 1100A is provided for use as a letter of transmittal to accompany Forms 1100.

Forms 1100 for the calendar years 1929, 1930, 1931, and 1932, accompanied by Form 1100A properly filled out and executed, should be forwarded to the internal revenue agent in charge of the division in which the broker, agent, or bank is located not later than November 15, 1933. The forms for the calendar year 1933 and subsequent calendar years should be forwarded to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., not later than February 15 of the year following that for which the returns are made.

Forms 1100 for the calendar years 1929, 1930, 1931, and 1932, which show that the customers listed therein are located in an internal revenue agent's division other than that in which the forms are filed, will be forwarded by the internal revenue agent in charge to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C.

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

GUY T. HELVERING,
Commissioner.

ARTICLE 841: Return of information by brokers. XII–46–6507
G. C. M. 12433

REVENUE ACTS OF 1928 AND 1932.

Auctioneers engaged in selling shares of stock for customers are not exempt from furnishing the information required by section 149 of the Revenue Act of 1932 with respect to such sales on the ground that they are not brokers within the contemplation of the statute. It is not necessary for the Bureau to look only to section 149 of the Revenue Act of 1932 for authority to require the information called for, since section 1104 of the Revenue Act of 1926, as amended by section 618 of the Revenue Act of 1928, gives the Commissioner such right.

An opinion is requested whether the firm of A & B is required to furnish returns of information under section 149 of the Revenue Act of 1932 upon request of the Commissioner.

Section 149 of the Revenue Act of 1932 reads as follows:

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

In accordance with that provision of law letters requesting a list of customers and details as to profits and losses have been sent to a

number of brokers, including several firms which hold themselves out to be auctioneers, one of which is the firm of A & B.

It is argued that the firm of A & B, as auctioneers, can not be required to furnish such information, and in the brief filed on their behalf emphasis is laid upon the common law distinction between an auctioneer and a broker.

If it be conceded that the common law concept of an auctioneer differs from that of a broker in that a broker is one employed to negotiate purchases and sales for other parties of property of which he has neither possession nor control, it must equally be conceded that such a concept does not include a stock broker. A stock broker does have possession and control of the property and transfers the owner's title thereto by delivery in the same manner as an auctioneer. (*Banta* v. *City of Chicago*, 172 Ill., 204, 50 N. E., 233; *Northrup* v. *Shook*, 18 Fed. Cases, 10329; *Cothran & Connally* v. *United States*, 276 Fed., 48.) Therefore, a strict adherence to the common law concept of a broker would exclude a stock broker. However, the section of law involved does not require a strict construction. It is a remedial provision, enacted to prevent frauds upon the revenue, and should be so construed as to accomplish effectually the object of the Legislature in enacting it. (*Cliquot's Champagne*, 3 Wall., 114, 145.)

The term "broker" in its broader sense, the sense in which it is used in section 149 of the Revenue Act of 1932, comprehends one who acts as the medium of negotiating and contracting any kind of a bargain. (*Hamburger* v. *Corr*, 157 Pa. St., 133, 27 Atl., 681.) This office does not concede that an auctioneer engaged in selling stock is not a broker within the contemplation of that section of law.

It is not necessary, however, that the Bureau look only to section 149 of the Revenue Act of 1932 for authority to require from the firm of A & B information as to profits and losses of customers. Section 1104 of the Revenue Act of 1926, as amended by section 618 of the Revenue Act of 1928, reads as follows:

SEC. 1104. 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 hereby 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.

This section was construed by the United States District Court, District of New Jersey, in the case of *R. T. Miles, Revenue Agent in Charge*, v. *United Founders Corporation*. This decision is dated March 10, 1933. The statement of facts, in so far as material, and the memorandum opinion of the court in that case, read as follows:

The Department claims that this exchange resulted in a taxable income having been received by the stockholders who made the exchange of stock, and the names of stockholders, together with amount of stock and method of exchange, should be divulged, so that proper assessments may be made against the persons whose income was increased, if not reported by them in their annual report.

In some instances stockholders reported the exchange, and whether such exchange created an additional income, as the court understands the situation, is still debatable and a subject of existing litigation.

* * * * * * *

The defendant contends that this statute does not give the Government power or authority to engage in a "fishing expedition" and applies only when the name of the individual stock owner or taxpayer is known and disclosed.

No question is raised as to the right of the Government to proceed in this class of cases.

We must interpret the statute as it reads, and I am convinced that under its terms it is the duty of a corporation, where any question arises as to the taxability of transfers or exchanges of stock, to disclose the names of the exchanging stockholders, so that the question of each stockholder's income may be adjusted and assessed if lawful to do so.

I am unable to construe the statute in the manner suggested by the defendant, and the result is that the motion to vacate the order of Judge Forman, requiring the defendant to produce its books, etc., for examination by Government agents, is denied, and the order confirmed.

In view of the foregoing, this office is of the opinion that auctioneers engaged in selling shares of stock for customers are not exempt from furnishing the information required by section 149 of the Revenue Act of 1932 with respect to such sales on the ground that they are not brokers within the contemplation of the statute.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

ARTICLE 841: Return of information by brokers. XII-47-6519
Mim. 4099

Extension of time for filing information returns on Form 1100 for 1929 to 1932 by banks, trust companies, and their affiliates.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., November 7, 1933.

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

Reference is made to Mimeograph 4082, dated October 14, 1933 (see on page 90), which directs all persons or organizations acting at any time during the calendar years 1929, 1930, 1931, and 1932 as broker or other agent in stock, bond, or commodity transactions (including banks which handle clearing orders for depositors or custodian accounts), to file returns of information on Form 1100 not later than November 15, 1933, with respect to all customers, depositors, or accounts for whom or which business was transacted during those years.

An extension of time to December 31, 1933, is hereby granted to banks and trust companies and corporations or other organizations affiliated with them, for filing information returns on Form 1100 for the years 1929, 1930, 1931, and 1932 as required by Mimeograph 4082.

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

GUY T. HELVERING,
Commissioner.

SUPPLEMENT G.—INSURANCE COMPANIES.

SECTION 203.—NET INCOME OF LIFE INSURANCE COMPANIES.

ARTICLE 971: Tax-exempt interest and reserve funds. XII–38–6407 I. T. 2717

REVENUE ACT OF 1932 AND PRIOR REVENUE ACTS.

Where coupons attached to certain life insurance policies known as "guaranteed premium reduction policies" are left with the company to accumulate at interest, the amount of such interest actually paid out in cash, or amounts applied to shorten the premium-paying period, or to purchase additional insurance, or to pay renewal premiums, which amounts are considered as the equivalent of cash payments, are allowable as deductions in computing the net income of the life insurance company.

Information is requested with respect to the deductibility by life insurance companies of interest on coupons paid under the following circumstances:

Life insurance companies issue certain life insurance policies known as "guaranteed premium reduction policies" to which are attached coupons. Upon each annual premium-paying date a coupon matures, which may be turned in to the company in payment of the premium to the amount of the face value of the coupon, or if the premium is paid in full in cash the policyholder may use the coupon to purchase paid-up additions to the face of the policy, or the coupon may be collected at any time with interest or may be applied to shorten the premium-paying period of the policy.

It is held that where coupons are left with the company to accumulate at interest, the amount of such interest actually paid out in cash, or amounts applied to shorten the premium-paying period, or to purchase additional insurance, or to pay renewal premiums, which amounts are considered as the equivalent of cash payments, are allowable as deductions in computing the net income of the life insurance company.

SUPPLEMENT J.—POSSESSIONS OF THE UNITED STATES.

SECTION 251.—INCOME FROM SOURCES WITHIN POSSESSIONS OF UNITED STATES.

ARTICLE 1131: Citizens of the United States and domestic corporations deriving income from sources within a possession of the United States. XII–29–6292 G. C. M. 11903

REVENUE ACT OF 1932.

If a Federal employee, who is a citizen of the United States resident in Puerto Rico, can qualify under section 251 of the Revenue Act of 1932, he comes within a special class of taxpayers and his salary received for services performed in Puerto Rico as an employee of the United States Government is not to be included in his gross income from sources within the United States. If he can not qualify as coming within a special class of tax-

payers, i. e., does not satisfy the conditions of section 251, then he reports as a nonresident citizen and his salary paid by the United States must be included as an item of gross income, but in this circumstance the taxpayer may avail himself of the credit provisions of section 131(a)1 of the Revenue Act of 1932.

An opinion is requested whether employees of the United States Government in Puerto Rico are required to render income tax returns to the Federal Government on their salaries.

Section 4 of the Revenue Act of 1932, entitled "Special classes of taxpayers," provides that the application of the general provisions and of Supplements A to D, inclusive, to each of the special classes of taxpayers designated in section 4, shall be subject to the exceptions and additional provisions found in the supplement applicable to such class. Subsection (g) reads as follows:

(g) Individual citizens of the United States or domestic corporations, satisfying the conditions of section 251 by reason of deriving a large portion of their gross income from sources within a possession of the United States,—Supplement J.

Section 251, entitled "Income from sources within possessions of United States," provides that in the case of a citizen of the United States satisfying certain conditions gross income means only gross income from sources within the United States. The conditions are (1) if 80 per centum or more of the gross income of such citizen (computed without the benefit of section 251), 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 (2) if, in the 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.

If a Federal employee who is a citizen of the United States resident within Puerto Rico, can qualify under section 251 of the Act of 1932 he comes within a special class of taxpayers and the provisions of section 116(a) which exclude from gross income in the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, "amounts received from sources without the United States (except amounts paid by the United States or any agency thereof)" does not apply.

If a Federal employee, who is a citizen of the United States resident in Puerto Rico, can not satisfy the conditions prescribed in section 251 and makes his return as a nonresident citizen of the United States, then his salary received as an employee of the United States Government can not, under the provisions of section 116(a), be excluded from his gross income. Section 131(a)1, which permits a credit of the tax paid to any possession of the United States, would apply to such nonresident citizen, but would not apply to a citizen qualifying under section 251, for subsection (g) of section 251 reads:

Credits against tax.—Persons entitled to the benefits of this section shall not be allowed the credits against the tax for taxes of foreign countries and possessions of the United States allowed by section 131.

With respect to whether earned income is from sources within or without Puerto Rico, attention is invited to I. T. 2286 (C. B. V–1, 52), wherein it is held that the place where the services are performed is the controlling factor in determining the source of income. (Cf. section 119(a)3 and section 119(b)3 of the Revenue Act of 1932.)

Summarizing, if the taxpayer can qualify under section 251 of the Revenue Act of 1932, his salary received for services performed in Puerto Rico as an employee of the United States Government is not to be included in his gross income from sources within the United States, but if the taxpayer can not qualify as coming within a special class of taxpayers, i. e., does not satisfy the conditions of section 251, then he reports as a nonresident citizen and his salary paid by the United States must be included as an item of gross income, but in this circumstance the taxpayer may avail himself of the credit provisions of section 131(a)1 of the Revenue Act of 1932.

SUPPLEMENT O.—OVERPAYMENTS.

SECTION 322.—REFUNDS AND CREDITS.

ARTICLE 1254: Claims for refund by taxpayers. XII–47–6520
Mim. 4092

Refund claims and amendments thereto.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 30, 1933.

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

Reference is made to the decisions of the Supreme Court in the cases of *United States* v. *Memphis Cotton Oil Co.* (288 U. S., 62, Ct. D. 626, C. B. XII–1, 307); *United States* v. *Henry Prentiss & Co., Inc.* (288 U. S., 73, Ct. D. 627, C. B. XII–1, 311); *United States* v. *Factors & Finance Co.* (288 U. S., 89, Ct. D. 628, C. B. XII–1, 315); *Bemis Bros. Bag Co.* v. *United States* (289 U. S., 28, Ct. D. 649, C. B. XII–1, 338); and *George Moore Ice Cream Co., Inc.*, v. *Rose, Collector of Internal Revenue* (53 S. Ct., 620, Ct. D. 676, C. B. XII–1, 341).

As the result of the decisions in the above-mentioned cases, the following principles are established with respect to the sufficiency of claims for refund filed prior to May 1, 1929:

(*a*) Where a timely claim contains no specific grounds, but charges overpayment generally, the claim may be corrected by amendment before rejection (even though the period of limitation applicable to the filing of claims has expired) to include any specific ground (except as provided in (*c*) below), including special assessment where the Commissioner is unable satisfactorily to determine invested capital and such an assessment is required by section 210 of the Revenue

Act of 1917 or section 327(a) of the Revenue Act of 1918 or the Revenue Act of 1921.

(*b*) A timely claim for refund based upon one or more specific grounds may not be amended after the bar of the statute to include other and different grounds. If, however, the claim gives notice, although in general terms, that aside from the specific grounds alleged an overpayment has been made in reference to other items, the claim may, prior to rejection thereof, be amplified by amendment as to such other items.

(*c*) The act of the Commissioner of Internal Revenue in granting or refusing special assessment under section 327(d) of the Revenue Act of 1918 or the Revenue Act of 1921 is discretionary and administrative. Such an assessment is not ordered except upon application by the taxpayer and the grievance that will support an application therefore " assumes adherence to the statute, and counts upon extraordinary conditions as justifying a claim that the statute is oppressive." (*United States* v. *Henry Prentiss & Co.*, supra.) Therefore, a timely claim for refund, whether general or specific, based upon error of law or fact can not be turned by amendment, after the bar of the statute, into a claim requesting the Commissioner to exercise the discretionary jurisdiction given him under section 327(d). Conversely, a timely claim for refund based solely upon the ground that the Commissioner should exercise the discretionary jurisdiction vested in him under section 327(d) can not be turned by amendment, after the bar of the statute, into a claim based upon error of law or fact. In either such case the amendment would constitute an entirely new claim. See paragraph (*b*) above.

The decisions of the Supreme Court above referred to relate to claims for refund filed pursuant to the regulations in force prior to May 1, 1929. (See the first footnote to the decision rendered in *United States* v. *Memphis Cotton Oil Co.*, supra.) Therefore, those decisions are not controlling with respect to claims for refund filed on or after that date. As to such claims, Treasury Decision 4265 (C. B. VIII–1, 110) provides as follows:

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

(2) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds so set forth in a claim, or an amendment thereof, filed prior to the expiration of such period.

(3) These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date, and all other regulations are modified in so far as they are inconsistent with these regulations.

Similar provisions are contained in article 1254 of Regulations 77.

Accordingly, claims for refund filed prior to May 1, 1929, will be considered and acted upon in accordance with the rules herein. A claim for refund which fails to set forth any grounds why a

refund is due will be *promptly* rejected, provided such action has not theretofore been taken, and provided the claim has not been amended in accordance with the rules stated in (*a*) above.

Attention is also invited to Treasury Decision 4235 (C. B. VII–2, 76), which provides in part that any claim which has been disallowed will be reconsidered and allowed at any time prior to the expiration of the statutory period of limitation for bringing suit, if it clearly appears that the claim should be allowed on the merits, but that no reopening or application for reopening will extend the period within which suit can be brought, nor will a reconsideration of a claim be considered as a reopening of the claim. (See further the decision of the United States District Court, Southern District of New York, in the case of *Heebner* v. *United States*, 50 Fed. (2d), 904, Ct. D. 357, C. B. X–2, 291.)

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

GUY T. HELVERING,
Commissioner.

TITLE VII.—TAX ON TRANSFERS TO AVOID INCOME TAX.

SECTION 901.—IMPOSITION OF TAX.

ARTICLE 1281: Transfers to avoid income tax. XII–43–6472
Mim. 4081

Transfer agents through whom stock or securities are transferred to foreign transferees as described in section 901 of the Revenue Act of 1932 to file statements.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 13, 1933.

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

Under section 901 of the Revenue Act of 1932 there is imposed upon the transfer of stock or securities by a citizen or resident of the United States, or by a domestic corporation or partnership, or by a trust which is not a foreign trust, to a foreign corporation as paid-in surplus or a contribution to capital, or to a foreign trust, or to a foreign partnership, an excise tax equal to 25 per centum of the excess of (1) the value of the stock or securities so transferred over (2) its adjusted basis in the hands of the transferor as determined under section 113 of the Revenue Act of 1932. Under section 902 this tax does not apply if the transferee is an organization exempt from income tax under section 103 of the Revenue Act of 1932, or if prior to the transfer it has been established to the satisfaction of the Commissioner that such transfer is not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes.

All transfer agents through whom any transfers described in section 901 of the Revenue Act of 1932 are made should immediately report such transfers to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., a statement being furnished with respect to each transfer showing the name and address of the transferor and of the transferee, a description of the stock or securities and quantity or number transferred, and the date of transfer. These statements should be submitted in the form of a letter since no printed form will be prepared for the purpose.

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

GUY T. HELVERING,
Commissioner.

INCOME TAX RULINGS.—PART II.

REVENUE ACT OF 1928.

SUBTITLE B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 51: What included in gross income. XII–45–6493
G. C. M. 12355

REVENUE ACT OF 1928.

The so-called agreements of "purchase and resale" entered into between the M Bank and its customers constitute in substance and effect loans by the bank of the amounts involved in the various contracts. The bank should report as gross income the entire amount of interest charged its customers in such transactions. The bank is not entitled to treat as income from tax-exempt securities the interest payable by the obligors on such securities during the period they are held by the bank, but such interest should be treated as the income of the customer submitting the securities as collateral.

An opinion is requested relative to the proper treatment, for income tax purposes, of certain interest by the M Bank.

During the years 1929 to 1931, inclusive, certain transactions were entered into by the M Bank and its customers which, it is stated, resulted in the "purchase and resale" of tax-exempt securities. It was the practice for a customer owning such securities and desiring to secure temporary funds to enter into a written agreement with the bank providing as follows:

Agreement made the _____ day of _____, 19__, between [the customer] hereinafter referred to as the party of the first part, and [the bank], hereinafter referred to as the party of the second part,

WITNESSETH:

1. That the party of the first part, in consideration of the agreements hereinafter contained, to be performed by the party of the second part, agrees to sell and deliver to the said party of the second part on the day and year first above written the following securities: _____

_____

for which in consideration thereof the party of the second part agrees to pay to the party of the first part _____.

2. In consideration of the premises, the party of the first part agrees to repurchase and the party of the second part agrees to sell said securities on or before _____.

3. Upon the failure of said party of the first part to accept delivery of said securities as provided for in clause 2 hereof, and to make payment therefor, then the party of the second part may immediately, without further notice to the party of the first part, sell the above-mentioned securities at public or private sale, at any broker's board or otherwise, and apply the proceeds of said sale as far as needed toward the above contract price, and of any or all other obligations or liabilities of the party of the first part to the party of the second part, accounting to the party of the first part for any surplus arising;

the party of the first part remaining liable to the party of the second part for any deficiency remaining unpaid after such application.

4. In the event of failure of said party of the second part to deliver said securities and accept payment therefor under this repurchase agreement, then the said party of the first part may, without further notice of the party of the second part, "buy in" the party of the second part under terms and conditions corresponding to those described in the preceding paragraph.

5. Delivery and payment to be made at the office of the party of the _____ part. * * *

Other forms of agreements are used but they are similar to the above form in all substantial respects.

The bank charges interest at various rates depending upon the amount involved, the type of securities, the period over which the transaction extends, and the customer. Interest may exceed, equal, or be less than the interest payable by the obligor on the securities involved. Where tax-exempt securities are "purchased and resold" it is the practice of the bank to charge the customer interest during the period the bank holds the securities, but instead of including such interest in its income tax return, the bank treats the transaction as an investment in tax-exempt securities and excludes interest (at the rate named in the securities) from its taxable income. Where the interest charged is less than the rate of interest payable on the securities (where the bank, for example, "purchases" from a customer 4 per cent Treasury bonds and requires the customer to pay only 3 per cent upon the amount "invested" by the bank in such securities) the bank treats as nontaxable interest 4 per cent of the amount "invested" and excludes such 4 per cent interest from its total income derived from loans. The result is that the bank not only fails to pay income tax upon the 3 per cent interest charged the customer but an additional 1 per cent of the amount "invested" is treated as tax-exempt interest and eliminated from the bank's income. Using the above example, and assuming that securities in the amount of $100,000 were "purchased" for four months, the bank would include in gross income 3 per cent of $100,000 for four months, or $1,000, but would exclude from gross income 4 per cent of $100,000 for four months, or $1,333.33. In effect, the bank is deducting from its admittedly taxable income the excess of the rate payable on the tax-free securities over the interest charged the customer, as well as eliminating entirely the interest charged the customer on the "purchase and resale" contract.

From an examination of the document quoted above and the others submitted, it appears (1) that the identical securities which are "sold" to the bank are required to be held by it for repurchase by the customer, and that the customer is entitled to demand and receive such identical securities when he performs his agreement to repurchase; (2) that upon the failure of the customer to repurchase the securities and to make payment therefor as stipulated, the bank may sell the securities, apply the proceeds of the sale upon the repurchase price, and either credit the customer with any excess or hold him liable for any deficiency; (3) that the customer is legally bound both to repurchase the securities and to pay any deficiency remaining unpaid after the application of the proceeds of sale (the customer not having a mere option to repurchase); (4) that the customer agrees to pay interest at a stipulated rate

upon the amount advanced by the bank; and (5) that the value of the securities may or may not equal the amount advanced by the bank. Advice is requested whether this type of transaction should be treated as a bona fide purchase and resale of securities, or whether it should be treated as an interest-bearing loan secured by collateral.

In the opinion of this office the alleged purchase and resale agreements simply effect a loan of money by the bank upon collateral security, and such agreements should not be treated as purchases by the bank of securities for investment. It is unnecessary for the purpose of this memorandum to determine whether such a purchase and resale transaction really approximates a chattel mortgage or a pledge. It is sufficient to say that in either case the treatment accorded the transaction by the bank should not be accepted for Federal income tax purposes.

In 11 Corpus Juris, Chattel Mortgages, paragraph 15, page 413, it is stated that a bill of sale with an agreement permitting repurchase may constitute a chattel mortgage under circumstances similar to those here presented. The paragraph is as follows:

> *Conditions permitting repurchase.*—A bill of sale with an agreement permitting repurchase may constitute either a chattel mortgage or a conditional sale, its character depending on the surrounding circumstances and the intention of the parties. The fact that a bill of sale contains an agreement to resell the property to the seller at a fixed price or confers on him an option to repurchase it does not, in itself, establish that the transaction is a mortgage, especially when there is no debt to be secured and no obligation to repay. But the transfer may be shown to be a mortgage by evidence that the vendor's obligation continued, that he bound himself to pay interest, that the bill of sale was given to secure a loan, or that the amount of consideration was inadequate as a purchase price.

To the same effect is *Whittemore* v. *Fisher* (132 Ill., 243, 24 N. E., 636) and *Fountain* v. *Bryce* (33 S. C. Eq., 234). In the same way a bill of sale with an obligation (or permission) to repurchase may constitute a pledge, depending upon the circumstances of the transaction, and a deed of real estate under like circumstances may be held to be a mortgage. In any event, the substance of the transaction is that property is made to constitute security for the payment of a debt. In this case, the *obligation* to repurchase in itself justifies the treatment of such a transaction as a loan. Indeed, in this case all the characteristics of the transactions indicate that in substance the bank is making loans to its customers rather than purchasing securities for its own account. The charging of interest, the agreement to redeliver to the customer the identical securities "purchased" from him, the absolute obligation upon the customer to repurchase, the right given the bank to sell the securities if the customer does not repurchase, the right of the bank to apply the proceeds of a sale upon the customer's obligation with a resulting liability on the part of the customer for any deficiency, and the possible disparity between the so-called purchase price as compared to the value of the securities, strongly indicate that the transactions are in substance loans of money by the bank to its customers. These circumstances are clearly sufficient to require treatment of the transactions as loans.

In *First National Bank in Wichita* v. *Commissioner* (19 B. T. A., 744, affirmed by the Circuit Court of Appeals, Tenth Circuit, 57 Fed. (2d), 7, Ct. D. 663, C. B. XII–1, 210, certiorari denied October 17,

1932, 287 U. S., 636, motion for rehearing denied November 14, 1932), there was presented a case where the First National Bank in Wichita entered into an agreement with the Brown-Crummer Co., dealers in municipal bonds, whereby the company sold to the bank certain tax-exempt bonds but the Brown-Crummer Co. had the privilege of purchasing the bonds from the bank upon the payment of the sum advanced by it, plus interest from the date of purchase by the bank until the date of repurchase by the company. The Commissioner held that the interest charged the company constituted income to the bank, while the bank contended that it derived income from tax-exempt securities during the period the bonds were in its hands. The Board of Tax Appeals sustained the Commissioner in holding that the bank derived taxable income in the amount of interest charged the company, and the Circuit Court of Appeals affirmed the decision of the Board. While there may be some difference between the contract of the parties in the First National Bank in Wichita case and the contract involved in the instant case, such difference is not considered sufficient to require a treatment contrary to that accorded the transaction in the case cited above. In fact, the circumstances in the instant case present a stronger basis for reaching a like conclusion because the customer is *bound* to repurchase the securities. As stated in *First National Bank of Wichita* v. *Commissioner*, supra, the Comptroller of the Currency has indicated that this feature alone is sufficient to constitute the transaction a loan subject to the limit prescribed by section 5200, Revised Statutes.

In view of the foregoing, it is the opinion of this office that the so-called agreements of purchase and resale entered into between the M Bank and its customers constitute in substance and effect loans by the bank of the amounts involved in the various contracts; that the bank should report as gross income the entire amount of the interest charged its customers in such transactions; and that the bank is not entitled to treat as income from tax-exempt securities the interest payable by the obligors on such securities during the period they are held by the bank. On the contrary, such interest should be treated as the income of the customer who submitted the securities to the bank as collateral, notwithstanding an agreement between the customer and the bank that the bank may accrue as its own income the nontaxable interest payable on the tax-exempt securities.

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

Article 52: Compensation for personal services. XII–50–6555
I. T. 2743

REVENUE ACT OF 1928.

Where an employee returns 30 per cent of his salary to his employer during the taxable year in pursuance of an agreement on his part to accept a 30 per cent reduction in salary, the amount so returned should not be included in his gross income.

A ruling is requested whether an amount returned by A to his employer during the calendar year 1931 equal to 30 per cent of his

salary, in lieu of a flat salary reduction, should be included in his gross income for that year, under the circumstances set forth below:

In the year 1931 the financial status of the M Association was such that it was not possible to maintain the salary schedule then in effect. As the organization did not wish to reduce its personnel, it was decided to make drastic cuts in salaries and thus keep each man employed. In view of the uncertainty as to the permanence of the salary reductions, and for the reason that it was to the interest of those employed to retain the salary level, each employee was given his salary check in the original amount. Prior to the receipt of the check, however, each employee was required to give to the M Association his personal check or cash for the amount of the decrease in his salary.

An employee who accepts employment, or who continues in employment under the circumstances set forth, is held to have received only the amount of the reduced salary. In other words, where an employee returns 30 per cent of his salary to his employer during the taxable year in pursuance of an agreement on his part to accept a 30 per cent reduction in salary, the amount so returned should not be included in his gross income for that year.

ARTICLE 58: Sale of stock and rights.

REVENUE ACT OF 1928.

Method of computing the basis of stock acquired by the exercise of stock rights. (See G. C. M. 11743, page 31.)

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

ARTICLE 84: Interest upon State obligations. XII-39-6415
Ct. D. 736

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

1. EXEMPTION—INTEREST—AWARD IN CONDEMNATION PROCEEDINGS—CONSTITUTIONALITY.

The obligation of a municipality to pay an award in condemnation proceedings is not an obligation of a political subdivision of a State within the meaning of section 213(b)4 of the Revenue Act of 1926 and section 22(b) of the Revenue Act of 1928, and interest paid upon the award is not exempt from tax. The exempting clause is to be construed in the light of its general purpose, which was to safeguard the borrowing power of the States. Taxation of the interest was not unconstitutional, the tax being upon the property of the taxpayer and not imposing any burden upon an instrumentality of the State.

2. DECISION AFFIRMED.

The decision of the district court (60 Fed. (2d), 291, Ct. D. 580, C. B. XI-2, 67) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

United States Trust Co. of New York as Executor of the Will of William Burhans Isham, plaintiff-appellant, v. Charles W. Anderson, Collector of Internal Revenue for the Third Collection District of New York, defendant-appellee.

[June 13, 1933.]

OPINION.

AUGUSTUS N. HAND, Circuit Judge: The interests in real estate belonging to the decedent Isham were condemned by the city of New York under section 976 of the Greater New York charter. By virtue of that section, title to the interest in the first plot passed to the city on April 1, 1925, and to the second plot on June 2, 1926. Upon the making of the award in the condemnation proceedings interest at 6 per centum was allowed to the property owner from the dates when the city took title. In the case of the first plot condemned, the decedent received his award, with interest, in 1927, and in the case of the second plot in 1928.

Section 213(b) of the Revenue Act of 1926 providing certain exemptions from income taxes reads as follows:

"SEC. 213. (b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title:

* * * * * * *

"(4) Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations or securities enumerated in clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom, in such form and with such information as the Commissioner may require. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income taxes."

The plaintiff-appellant contends that the foregoing section applied to the interest received by the decedent upon his award in the year 1927 and rendered it exempt from taxation.

Section 22(b) of the Revenue Act of 1928 is identical with section 213(b) of the Act of 1926. The plaintiff-appellant contends that it applied to the interest received by the decedent upon his award in 1926 and rendered it similarly exempt.

The questions before us are (1) whether the statutory exemptions from taxation of "the obligations of a State * * * or any political subdivision thereof * * *" covered the interest received by the decedent in 1927 and 1928 upon the condemnation awards, and (2) whether, if they did not, taxation of these interest items under the general provisions of the Acts of 1926 and 1928 was beyond the constitutional power of Congress because it involved taxing a State instrumentality.

There is no doubt that the clause exempting from taxation "obligations of a State * * * or any political subdivision thereof" may be so interpreted as to embrace almost anything which a State or municipality is bound to pay and may thus exempt income which is within the taxing power of the United States. The question is, how broadly the word "obligations" is to be construed and just what income is covered by the exemption.

In determining the scope of the word we must bear in mind the settled rule of construction that "tax exemptions are never lightly to be inferred" (*Heiner* v. *Colonial Trust Co.*, 275 U. S., at page 235 [T. D. 4112, C. B. VII–1, 207]), and will not be applied to a particular case unless granted in the statute in plain terms. (*Denman* v. *Slayton*, 282 U. S., at page 519; *Phoenix Insurance Co.* v. *Tennessee*, 161 U. S., at page 177; *Chicago &c. Railroad* v. *Guffey*, 120 U. S., at page 575;

Vicksburg &c. Railroad Co. v. *Dennis*, 116 U. S., at page 668; *Philadelphia &c. Railroad* v. *Maryland*, 10 How., at page 393.)

The phrase exempting "interest upon * * * the obligations of a State * * * or any political subdivision thereof" has been used in every Revenue Act since the adoption of the sixteenth amendment to the Constitution of the United States. At the time that amendment was proposed, it was argued that it would place the borrowing capacity of the States at the mercy of the Federal taxing power. On February 8, 1910, Senator Borah submitted to the Senate a resolution, No. 175, directing the Judiciary Committee to report whether "the proposed amendment * * * would if adopted authorize Congress to lay a tax upon income derived from State bonds and other municipal securities or would authorize Congress to tax the instrumentalities or means and property of the State or the salary of State officers." (Congressional Record, volume 45, page 1585.)

It is clear from the wording of the foregoing resolution that the author had particularly in mind the question whether the amendment would adversely affect the power of the States and their political subdivisions to borrow money.

In *Evans* v. *Gore* (253 U. S., at page 262 [T. D. 3037, C. B. 3, 93]), Justice Van Devanter, while discussing the income tax legislation under the Revenue Act of 1918 which attempted to tax judicial salaries, said that "Congress refused to treat interest received from bonds issued by a State or any of its counties or municipalities as within the taxing power." This statement (at page 262) in the footnote of the opinion in *Evans* v. *Gore*, as well as the language of the congressional conference report of February 8, 1919, relating to the Revenue Act of 1918 (volume 57, Congressional Record, 2988), treated the exemption as designed to safeguard the borrowing power of the States and to prevent taxation which might impair its efficacy or burden the property or instrumentalities of the States. In *Denman* v. *Slayton* (282 U. S., 514), where the deductibility from the gross income of a taxpayer of interest on indebtedness incurred to purchase tax-exempt "obligations or securities" was discussed and held not allowable, the Supreme Court plainly had in mind securities issued to borrow money.

The language of section 213(b) of the Revenue Act of 1926 makes it reasonably clear that the exemptions of interest upon "obligations of a State" and upon "obligations of the United States" relate to "obligations" of the same kinds. Subdivision B exempts "securities issued under the provisions of the Federal Farm Loan Act," and subdivision C provides that "in case of obligations of the United States issued after September 1, 1917, * * * the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof * * *." It seems manifest, not only because of the objects sought to be attained by the exemptions, but also from the use of the term "issued" both in subdivisions B and C, that the obligations referred to in subdivision A were only such as might be "*issued*" in the exercise of the borrowing power of the States.

An award in condemnation, bearing interest, can not be regarded as "*issued*" by a municipality, nor can taxation of the interest received upon such an award in any way affect the borrowing power of the State. There is no bargaining by the municipality in connection with the matter. The owner of the property condemned is obliged to sell it because of the exercise of the right of eminent domain. There was no competition between the city and other prospective purchasers, for the city had a prior right to the property and one that was subject only to the requirement that it pay a fair price. On the other hand, State and municipal bonds and securities issued to borrow money, if tax exempt, will command a better price in the market than if they are subject to taxation, because the purchaser is not compelled to buy them and, being a free agent, may be induced by the tax-exemption feature to prefer them to private bonds for investment. It disregards the whole purpose of the exemption to apply it to interest upon obligations of a State which it can compel a citizen to take in exchange for the fair value of his property. The rate of interest is fixed by law and neither it, nor the amount of the award adjudged as of the time of taking, is a matter over which he has any control.

Not only is the meaning which we attribute to "obligations of a State" in accord with the evident purposes of granting the exemption, but this meaning has been given to similar words in various decisions rendered by the Circuit Courts of Appeal and the Board of Tax Appeals.

In *American Viscose Corporation* v. *Commissioner* (56 Fed. (2d), 1033) (C. C. A. 3), the United States had refunded, in 1926, income taxes illegally collected for the years 1917 to 1919, and had added, pursuant to statute, interest on

the amount so collected. The taxpayer claimed that the interest was exempt from Federal income taxes because it was "upon obligations of the United States," but the Circuit Court of Appeals of the Third Circuit held that it was not exempt, saying:

"The exemptions of Congress were evidently meant to aid in the flotation of Government bonds and securities by making them tax-free and, therefore, more attractive to investors. We see no reason why the construction of the statute should be so broadened as to cover a transaction which had no relation to the flotation of securities, but was one where the Government had wrongfully collected money, and, in righting the wrong had pro tanto, compensated therefor by paying interest."

It is argued that the American Viscose decision should properly have been put on the ground that the right to a refund arose after September 1, 1917, and that the interest accruing thereupon was expressly subjected to income taxes under the last clause of section 213(b)4(C). But the court of appeals expressly put its decision on the ground that the word "obligations" meant Government "bonds and securities." It evidently made no difference that the words "obligations of the United States," and not the words "obligations of a State," were being interpreted, for the exemptions under section 213(b)4 were reciprocal, and the meanings of the two phrases must be regarded as identical.

In *Kansas City Southern Railway Co.* v. *Commissioner* (16 B. T. A., 665) the Board of Tax Appeals held that interest paid by the United States to the Kansas City Southern Railway Co. upon deferred payments, due as compensation for the use of its railroad properties, while operated by the Railroad Administration, was not exempt from taxation as "interest upon obligations of the United States and its possessions." The decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit. (*Kansas City Southern Railroad Co.* v. *Commissioner*, 52 Fed. (2d), 372.) The decision of the Board in *Missouri Pacific Railway* v. *Commissioner* (22 B. T. A., at page 295) likewise involved the question of whether interest paid by the Railroad Administration could be taxes and was to the same effect as *Kansas City Southern Railway Co.* v. *Commissioner* (16 B. T. A., 665).

In *Kline* v. *Commissioner* (26 B. T. A., 745) the Board of Tax Appeals followed the decision of Judge Bondy in the case at bar.

The decision in *Hibernia Savings & Loan Society* v. *San Francisco* (200 U. S., 310) is significant. There the validity of a tax imposed by the State of California as applied to checks or orders signed by the Treasurer of the United States was in question. Section 3701 of the Revised Statutes exempted "stocks, bonds, Treasury notes and other obligations of the United States from taxation by or under State * * * authority." While the Supreme Court held that such checks were "obligations of the United States," it determined that they did not come within the exemption. Though the decision does not govern the present case, it shows that the word "obligations" in an exemption clause is to be construed in the light of the general purposes of the exemption and is not necessarily all-embracing.

In view of the foregoing, we think that the district court was right in holding that interest upon the condemnation awards was not exempt under section 213(b)4 of the Act of 1926, or section 22(b) of the Act of 1928.

It is argued that the office decision of the Commissioner of Internal Revenue in 1920 (O. D. 591, C. B. 3, 113), holding that interest upon a condemnation award is interest upon an obligation of a political subdivision of a State and is accordingly exempt, ought to be followed.

We are not, however, referred to any continuous governmental practice in conformity with this ruling. The contrary view was taken by the Board of Tax Appeals in *Kansas City Southern Railway Co.* v. *Commissioner* (16 B. T. A., 665), and likewise by the Circuit Courts of Appeal of the Third and Eighth Circuits, and the original ruling of the Commissioner has been expressly revoked. Under such circumstances, there can be no obligation to give the first departmental ruling any conclusive weight. (*Merritt* v. *Cameron*, 137 U. S., at pages 551–552.)

The appellant finally contends that to tax the interest on the awards is to impose an unlawful burden upon an instrumentality of a State. The answer to this is that the tax was upon the decedent's property; namely, the interest on his awards, and he was in no sense an instrumentality of the State. The functions of the State were neither impaired nor affected by the tax, nor could any burden possibly be laid by it upon State instrumentalities.

As Hughes, C. J., said in *Willcuts* v. *Bunn* (282 U. S., 216 [Ct. D. 280, C. B. X–1, 309]), where the Supreme Court held that profits on sales of municipal bonds were subject to Federal income taxes:

"The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government. * * *" (At page 225.) "* * * Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposes a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible. * * *" (At page 234.)

The decision in *Burnet* v. *Coronado Oil & Gas Co.* (285 U. S., 393 [Ct. D. 485, C. B. XI–1, 265]) does not affect our conclusion here. There, lands granted by the United States to the State of Oklahoma for the support of public schools and dedicated to State purpose under the State constitution, were leased by the State to a private company for extraction of oil and gas. The State reserved a part of the gross proceeds, which was paid into the public school fund, while the lessee was allowed to retain the remainder. In such circumstances, the lease was treated as an instrumentality of the State and Federal taxation upon the income derived by the lessee under it was held to be unconstitutional, because a burden upon an instrumentality of a State. Such a tax might have interfered with the right of the latter to secure the best terms in bargaining for the leasing of its lands. In the present case there was no bargaining, nor any possibility of bargaining, between the taxpayer and the city of New York. Title passed to the latter by the exercise of the right of eminent domain. The real estate of the taxpayer was not leased but transferred in invitum to the city. Taxation of the interest upon his award affected no governmental function. (*Group No. 1 Oil Corporation* v. *Bass*, 283 U. S., 279 [Ct. D. 330, C. B. X–1, 153].)

Decree affirmed.

ARTICLE 84: Interest upon State obligations.

REVENUE ACT OF 1928.

"Purchase and resale agreements" of tax-exempt securities. (See G. C. M. 12355, page 100.)

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

ARTICLE 121: Business expenses. XII–35–6374
Ct. D. 724

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

1. DEDUCTION—PERSONAL EXPENSE—LEGAL EXPENSE—TRADE OR BUSINESS.

Expenses incurred by taxpayer for legal service in prosecuting litigation, with other heirs at law of a large estate, whereby a substantial amount was recovered by the estate, the taxpayer receiving her proportionate share thereof, are a personal expense within the meaning of section 24(a) of the Revenue Act of 1928 and are not an allowable deduction, under section 23(a) of that Act, as an expense "in carrying on any trade or business."

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (26 B. T. A., 741) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Clara Hill Lindley, petitioner, v. Commissioner of Internal Revenue, respondent.

Petition to review a decision of the Board of Tax Appeals.

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

[March 6, 1933.]

OPINION.

CHASE, Circuit Judge: The petitioner is one of several heirs at law of Mary T. Hill, who died intestate in 1921. The administrator of the estate of Mary T. Hill filed an estate tax return and paid the tax computed thereon. Subsequently, the Commissioner determined a deficiency in the tax amounting to $1.130,616.08. The administrator paid the deficiency under protest and brought suit in the District Court for the District of Minnesota to recover that as well as the original tax paid. The suit was unsuccessful and, upon advice of counsel, the administrator declined to take an appeal. Thereupon, this petitioner joined with some of the other heirs in taking an appeal in the name of the administrator and obtained a reversal of the judgment. As a result, the estate recovered the sum of $1.221,963.35 of which this petitioner received her proportionate share. She paid her share of the expenses of the litigation undertaken by the heirs who acted with her to have the rights of the estate determined on appeal when the administrator declined to do that. This was paid in accordance with an agreement among the heirs providing for each to bear one-seventh of the expenses. In 1928 the petitioner paid as her part of the fees of attorneys in compliance with her agreement the sum of $13,507.65. She deducted this amount from her own gross income for that year in computing her net income in her return.

The Commissioner disallowed the deduction and determined a deficiency based upon the inclusion of that amount in her net taxable income. The Board of Tax Appeals sustained the Commissioner and the petitioner now seeks to review its decision.

The deduction is claimed under section 23(a) of the Revenue Act of 1928 which is quoted so far as applicable:

"In computing net income there shall be allowed as deductions:

"(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *."

No one will deny that the deduction claimed can be allowed only if it fairly falls within the provisions of the statute. That the payment was a necessary expense incurred by the petitioner is plain enough. It is safe to assume that no appeal would otherwise have been taken. Nor can it be said that the fees of attorneys are not ordinary expenses in the conduct of litigation. (Compare *Kornhauser v. United States*, 276 U. S., 145 [T. D. 4222, C. B. VII–2, 267].) The difficulty with the position of the petitioner is found in the attempt to show that what she paid was an expense in carrying on any trade or business.

In *Kenan v. Bowers* (50 Fed. (2d), 112 [Ct. D. 367, C. B. X–2, 346]), we held that a voluntary payment by the beneficiary of a trust by way of additional compensation to the trustees was a personal expense and not deductible. It is true that in the Kenan case the expense was apparently unnecessary while here it had to be incurred. Moreover, in *Commissioner v. Wurts-Dundas* (54 Fed. (2d), 515), we held that the fees of attorneys necessarily paid by a guardian to obtain additional income to which the guardianship was entitled were deductible expenses in computing the net income in the guardian's return. But it must be noticed that the expenses were in no sense personal; and were incurred in the performance of a duty to obtain all income belonging to the guardianship.

In this case, however, the petitioner was acting only to secure her own personal rights as an heir at law even though she and the others did so in the name of the administrator. It must be remembered that the statute (section 24(a) of the 1928 Act) expressly provides that there shall be no deduction for personal expenses. We can find no just basis for holding that the payments sought to be deducted stand any differently than would fees the petitioner may have paid attorneys to secure advice upon which to base her decision to join with the other heirs in defraying the expense of the appeal. Her personal rights were involved; she paid attorneys to protect them; and

Congress did not see fit to allow any deduction from the gross income of a taxpayer for purely personal expenses. In this respect this case stands exactly as did *Commissioner* v. *Field* (42 Fed. (2d), 820), where we held such expenses as these could not be deducted.

Affirmed.

ARTICLE 121: Business expenses. XII–42–6455
Ct. D. 742

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

DEDUCTION—ORDINARY AND NECESSARY EXPENSE.

Expenditures made by the guardian of a ward for clerical services in connection with the disbursement of the ward's income, for which disbursement the guardian received commissions, are not deductible as ordinary and necessary expenses paid in carrying on business, within the meaning of section 23 of the Revenue Act of 1928, where the duties confided to the guardian were delegated to employees as a matter of personal convenience. The Government is not bound by the decree of the surrogate court allowing the guardian's account in which such expenditures were charged against the ward's income.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

Cordelia Biddle Robertson, as General Guardian of the Person and Estate of her Infant Son Anthony Newton Duke, plaintiff, v. *Walter E. Corwin, Collector of United States Internal Revenue for the First District of the State of New York, defendant.*

[June 16, 1933.]

OPINION.

BYERS, D. J.: This is an action at law to recover from the collector of internal revenue of this district, $53.69, representing a tax of $47.56 with $6.13 interest said to have been improperly assessed in connection with the plaintiff's income tax return for 1928, as guardian of her minor son, Anthony N. Duke.

The return asserted as a deduction "authorized by law" (line 16) the sum of $1,942.68, which embraced an item of $777 described as "clerical help, etc."

That item was disallowed, and the tax assessed in connection therewith presents the pending question.

The pleadings raise no issue of fact, but a motion by plaintiff for judgment on the pleadings was denied when made in advance of trial so that the plaintiff might have opportunity "to identify, in the legal sense, the expenditures here involved with those examined" in *Commissioner of Internal Revenue* v. *Wurts-Dundas* (54 Fed. (2d), 515).

It now becomes necessary to conclude whether, as the result of the trial, the plaintiff has succeeded in so doing.

The ward's income for the year in question was $22,831.97 according to the return, derived as to $22,279.33 from trust companies as trustees, and as to $552.64 from interest on bank balances and mortgage certificates.

There was actually received a further sum not included in the return, but it was shown at the trial that this was tax-paid at the source.

Under a decree of the surrogate's court of New York County, the guardian is permitted to expend the infant's income for his support and education to the extent of $28,800 per year, in order that he may maintain the scale of living which is appropriate to one of his affluence. This is the provision of the decree of May 14, 1930, judicially settling the guardian's intermediate account covering the period from December 1, 1923, to December 31, 1928, inclusive. The authorization above referred to is prospective in operation, to commence on January 1, 1930.

The judicial settlement so obtained, sanctioned the expenditures which had been made by the guardian during the period embraced in the account, including those here involved, and examination of the annual inventory and account filed in the surrogate's court at the close of each calendar year reveals that for the years 1926, 1927, and 1928, the guardian applied a portion of her

son's income to the household expenses of the family of which he was a member, his stepfather, Thomas Markoe Robertson, being the head.

The testimony is that the ward during the year 1928 was chargeable with one-quarter of such expenses, which involve the maintenance of homes in Westbury and Southampton as well as the attendant charges for motoring, yachting and the like. Establishing his share of those disbursements gave rise to the disputed item, which represents clerical services, namely:

Share of Miss Cummins' wages		$559.00
Share of Miss Williams' wages		143.00
		702.00
H. A. Hall, accountant's services	$22.50	
	52.50	
		75.00
		777.00

The latter item involves $52.50 for services in connection with the said intermediate accounting which was filed in the New York County surrogate's court in November, 1929, and might well have been embraced in the costs awarded in the final decree therein.

The testimony of Miss Williams alone was offered on this trial, and it is to the effect that she is employed by the ward's stepfather, and is the private secretary of the plaintiff. She has entire charge of the latter's bank accounts as guardian. The ward lives with his mother and stepfather, and pays one-quarter of all costs of the various establishments and appurtenances, and consequently the bills have to be checked in order to be sure of their accuracy.

These maintenance charges run about $60,000 annually, of which the ward's share is around $15,000.

Also she checks the bills that are personal to him, for tuition at school, doctor's charges and the like. She segregates the items, and operates three bank accounts in order to accomplish these purposes. She draws all checks, examines vouchers and receipts, and spends from two to four hours per day in these various duties. As stated, $143 was paid in 1928 to this witness.

Nothing was said about Miss Cummins' services, as to whom there is charged nearly four times as much.

The income tax return reveals that the guardian included, in her deduction of $1,942.68, the sum of $949.85 as commissions, presumably computed according to the New York law, and not questioned by the collector.

That sum was more than sufficient to pay the disputed item.

The questions of law are: First, was the collector required to regard the acquiescence of the surrogate's court of New York County in these particular charges of the guardian against her son's income as binding upon him? Second, if not, were they ordinary and necessary expenses paid during the taxable year in carrying on the business of the guardianship?

The answer to the first question is in the negative. *Holifield* v. *Commissioner, etc.* (7 B. T. A., 1302), which involved payments made from income of minors to defray the expenses of removing a former guardian and an administratrix for incompetence, is not to the contrary.

Here there was no issue made between the special guardian representing the infant, in the accounting proceeding, and the petitioner therein, touching the propriety of these deductions from the ward's income; thus there was no real adjudication by the surrogate which, under the principles of comity, might be urged as controlling.

More important is the fact that the surrogate did not purport to construe section 23 of the United States Revenue Act of 1928, which is the duty of this court, with respect to these matters. It is quite conceivable that the decision herein will not be deemed apposite upon the next settlement of the guardian's accounts in the surrogate's court.

The answer to the second question does not involve considering whether there is such a thing as carrying on the business of administering a ward's estate, for such has been recognized for the purposes of the Revenue Act (*Commissioner, etc.*, v. *Wurts-Dundas*, supra).

Under circumstances that involve preserving the estate, or increasing it, lawyers' bills have been allowed as proper deductions.

Here the guardian was not required to put forth efforts to garner the income, as will be seen from the constituency above stated. Nor was she called upon

to preserve or increase the ward's estate during the taxable year. The duties of collection consisted in depositing checks in a bank, a process lying within the capacity of the average person.

The disbursement of the income is one of the things compensated for by the commissions allowed by law. So far as the bills for tuition and other expenditures personal to the ward are concerned, supervision thereof was confided to the guardian—the ward's mother—by the surrogate's court. If she chose to delegate that duty to others, that was a matter of personal convenience to her, rather than such a business expense as the cases have sanctioned for the purposes of income tax deductions.

With reference to the household bills, it will be seen that, however considerable they may be in number and in detail, they represent in effect what the plaintiff's husband and herself present to the guardian as the infant's share of maintaining the family abodes and menage; they come therefore to the guardian with the presumption of regularity and authenticity inherent in their sponsorship. It would be a strange reasoning that would lead to the conclusion that the ward's income should be exempt in part from the tax in question in order that he may be made secure against mistaken charges presented by his mother and his stepfather.

If checking these various bills is to be regarded as part of the cost of maintaining the establishments, on the theory that elaborate domestic administration involves clerical services, the answer would be that they may be presumed to have been absorbed in the general charge of 25 per centum of rent and household expense, charged to the ward for the year 1928 as stated.

These reflections induce the belief that the collector was right and that the items in question represent expenditures made by the guardian for her own personal convenience, rather than necessary deductions in connection with the business of her guardianship, and that judgment must be awarded to the defendant, with costs.

ARTICLE 121: Business expenses. XII–48–6533
Ct. D. 755

INCOME TAX—REVENUE ACTS OF 1924, 1926, AND 1928—DECISION OF SUPREME COURT.

1. DEDUCTION—ORDINARY AND NECESSARY EXPENSE.

Where the taxpayer, a commission agent, and formerly the secretary of a corporation which had been adjudged an involuntary bankrupt and had a discharge from its debts, during the years 1924–1928 paid substantial portions of the debts of the corporation in order to reestablish his relations with customers he had known when acting for the corporation and to solidify his credit and standing, such payments are in the nature of capital expenditures and are not deductible from income for those years as ordinary and necessary business expenses, within the meaning of section 214 of the Revenue Acts of 1924 and 1926 and section 23 of the Revenue Act of 1928.

2. DECISION AFFIRMED.

The decision of the Circuit Court of Appeals, Eighth Circuit (63 Fed. (2d), 976), affirming 25 B. T. A., 117, affirmed.

SUPREME COURT OF THE UNITED STATES.

Thomas H. Welch, petitioner, v. *Guy T. Helvering, Commissioner of Internal Revenue, respondent.*

On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

[November 6, 1933.]

OPINION.

Mr. Justice CARDOZO delivered the opinion of the court.

The question to be determined is whether payments by a taxpayer, who is in business as a commission agent, are allowable deductions in the computation

of his income if made to the creditors of a bankrupt corporation in an endeavor to strengthen his own standing and credit.

In 1922 petitioner was the secretary of the E. L. Welch Co., a Minnesota corporation, engaged in the grain business. The company was adjudged an involuntary bankrupt, and had a discharge from its debts. Thereafter the petitioner made a contract with the Kellogg company to purchase grain for it on a commission. In order to reestablish his relations with customers whom he had known when acting for the Welch company and to solidify his credit and standing, he decided to pay the debts of the Welch business so far as he was able. In fulfillment of that resolve, he made payments of substantial amounts during five successive years. In 1924, the commissions were $18,028.20; the payments $3,975.97; in 1923, the commissions $31,377.07; the payments $11,968.20; in 1926, the commissions $20,925.25, the payments $12,815.72; in 1927, the commissions $22,119.61, the payments $7,379.72; and in 1928, the commissions $26,177.56, the payments $11,068.25. The Commissioner ruled that these payments were not deductible from income as ordinary and necessary expenses, but were rather in the nature of capital expenditures, an outlay for the development of reputation and good will. The Board of Tax Appeals sustained the action of the Commissioner (25 B. T. A., 117), and the Court of Appeals for the Eighth Circuit affirmed. (63 F. (2d), 976.) The case is here on certiorari.

"In computing net income there shall be allowed as deductions * * * all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." (Revenue Act of 1924, ch. 234; 43 Stat., 253, 269, section 214; 26 U. S. C., section 955; Revenue Act of 1926, ch. 27; 44 Stat., 9, 26, section 214; 26 U. S. C. App., section 955; Revenue Act of 1928, ch. 852; 45 Stat., 791, 799, section 23; cf. Treasury Regulations 65, articles 101, 292, under the Revenue Act of 1924, and similar regulations under the Acts of 1926 and 1928.)

We may assume that the payments to creditors of the Welch company were necessary for the development of the petitioner's business, at least in the sense that they were appropriate and helpful. (*McCulloch* v. *Maryland*, 4 Wheat., 316.) He certainly thought they were, and we should be slow to override his judgment. But the problem is not solved when the payments are characterized as necessary. Many necessary payments are charges upon capital. There is need to determine whether they are both necessary and ordinary. Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack. (Cf. *Kornhauser* v. *United States*, 276 U. S., 145.) The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. At such times there are norms of conduct that help to stabilize our judgment, and make it certain and objective. The instance is not erratic, but is brought within a known type.

The line of demarcation is now visible between the case that is here and the one supposed for illustration. We try to classify this act as ordinary or the opposite, and the norms of conduct fail us. No longer can we have recourse to any fund of business experience, to any known business practice. Men do at times pay the debts of others without legal obligation or the lighter obligation imposed by the usages of trade or by neighborly amenities, but they do not do so ordinarily, not even though the result might be to heighten their reputation for generosity and opulence. Indeed, if language is to be read in its natural and common meaning (*Old Colony R. R. Co.* v. *Commissioner*, 284 U. S., 552, 560; *Woolford Realty Co.* v. *Rose*, 286 U. S., 319, 327), we should have to say that payment in such circumstances, instead of being ordinary is in a high degree extraordinary. There is nothing ordinary in the stimulus evoking it, and none in the response. Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it

is rather a way of life. Life in all its fullness must supply the answer to the riddle.

The Commissioner of Internal Revenue resorted to that standard in assessing the petitioner's income, and found that the payments in controversy came closer to capital outlays than to ordinary and necessary expenses in the operation of a business. His ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong. (*Wickwire* v. *Reinecke*, 275 U. S., 101; *Jones* v. *Commissioner*, 38 F. (2d), 550, 552.) Unless we can say from facts within our knowledge that these are ordinary and necessary expenses according to the ways of conduct and the forms of speech prevailing in the business world, the tax must be confirmed. But nothing told us by this record or within the sphere of our judicial notice permits us to give that extension to what is ordinary and necessary. Indeed, to do so would open the door to many bizarre analogies. One man has a family name that is clouded by thefts committed by an ancestor. To add to his own standing he repays the stolen money, wiping off, it may be, his income for the year. The payments figure in his tax return as ordinary expenses. Another man conceives the notion that he will be able to practice his vocation with greater ease and profit if he has an opportunity to enrich his culture. Forthwith the price of his education becomes an expense of the business, reducing the income subject to taxation. There is little difference between these expenses and those in controversy here. Reputation and learning are akin to capital assets, like the good will of an old partnership. (Cf. *Colony Coal & Coke Corporation* v. *Commissioner*, 52 F. (2d), 923.) For many, they are the only tools with which to hew a pathway to success. The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business.

Many cases in the Federal courts deal with phases of the problem presented in the case at bar. To attempt to harmonize them would be a futile task. They involve the appreciation of particular situations, at times with borderline conclusions. Typical illustrations are cited in the margin.[1]

The decree should be affirmed.

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

ARTICLE 151: Taxes.

REVENUE ACT OF 1928.

Montana gasoline tax. (See I. T. 2703, page 39.)

[1] Ordinary expenses: *Commissioner* v. *People's-Pittsburgh Trust Co.* (60 F. (2d), 187), expenses incurred in the defense of a criminal charge growing out of the business of the taxpayer; *American Rolling Mill Co.* v. *Commissioner* (41 F. (2d), 314), contributions to a civic improvement fund by a corporation employing half of the wage earning population of the city, the payments being made, not for charity but to add to the skill and productivity of the workmen (cf. the decisions collated in 30 Columbia Law Review, 1211, 1212, and the distinctions there drawn); *Corning Glass Works* v. *Lucas* (37 F. (2d), 798), donations to a hospital by a corporation whose employees with their dependents made up two-thirds of the population of the city; *Harris* v. *Lucas* (48 F. (2d), 187), payments of debts discharged in bankruptcy, but subject to be revived by force of a new promise. Cf. *Lucas* v. *Ox Fibre Brush Co.* (281 U. S., 115), where additional compensation, reasonable in amount, was allowed to the officers of a corporation for services previously rendered.

Not ordinary expenses: *Hubinger* v. *Commissioner* (36 F. (2d), 724), payments by the taxpayer for the repair of fire damage, such payments being distinguished from those for wear and tear; *Lloyd* v. *Commissioner* (55 F. (2d), 842), counsel fees incurred by the taxpayer, the president of a corporation, in prosecuting a slander suit to protect his reputation and that of his business; *105 West 55th Street* v. *Commissioner* (42 F. (2d), 849) and *Blackwell Oil & Gas Co.* v. *United States* (60 F. (2d), 257), gratuitous payments to stockholders in settlement of disputes between them, or assume the expense of a lawsuit in which they had been made defendants; *White* v. *Commissioner* (61 F. (2d), 726), payments in settlement of a lawsuit against a member of a partnership, the effect being to enable him to devote his undivided efforts to the partnership business and also to protect its credit.

ARTICLE 151: Taxes.

REVENUE ACT OF 1928.

Wisconsin State income taxes, husband and wife filing either joint or separate State and either joint or separate Federal returns. (See I. T. 2741, page 48.)

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

ARTICLE 171: Losses. XII–40–6430
G. C. M. 12151

REVENUE ACT OF 1928.

No part of the increased price, which the taxpayer paid for surface land and improvements in order to avoid litigation arising out of damage thereto caused by the taxpayer's coal mining operations, is deductible as an expense for the year 1930. Until there has been a sale or other disposition of the property it can not be determined whether a loss has actually been sustained.

An opinion is requested whether the taxpayer should be permitted to deduct as an expense for the year 1930 any part of the cost of surface land and improvements thereon which were purchased by the taxpayer in that year primarily to avoid litigation over the damage caused by its coal mining operations. The inquiry arises as a result of the decision of the Board of Tax Appeals in *Manchester Coal Co.* v. *Commissioner* (24 B. T. A., 577, nonacquiescence, C. B. XI–1, 10).

The taxpayer corporation is the owner of coal lands which it has leased to coal companies on a royalty basis. In some cases it does not own the surface over the coal. During and after the extraction of the coal the surface has been injured by subsidence, causing breaks and injury to wells and buildings. In prior years suits were entered against the taxpayer by the owners of the damaged surface land which resulted in verdicts often in excess of the actual fee value of such land and improvements. After numerous costly suits the taxpayer decided to purchase the surface land and improvements at agreed prices. This procedure was followed in 1930. When the purchases were made the taxpayer, after consultation with its engineers and the lessee company, determined what it considered to be the value of the surface land and improvements. This value was charged to a so-called "land account." The difference between this value and the cost was charged as "land damages" and deducted as an expense on the taxpayer's income tax return.

In the case of the Manchester Coal Co., supra, the taxpayer company was engaged in the mining of coal by the open-pit or stripping method, which operation destroyed the market value of the surface of the lands so mined. In its decision in that case the Board held that as the mining operations resulted in the destruction of the entire value of the surface and not merely an impairment or shrinkage of such value, the cost of the land should be added to the cost of the coal in determining the depletion allowable. The Board distinguished its decision in that case from its decision in the case of *Mrs. J. C. Pugh, Sr., Executrix, et al.*, v. *Commissioner* (17 B. T. A., 429, C. B. X–2, 58,

affirmed 49 Fed. (2d), 76, certiorari denied, 284 U. S., 642), in which it held that a shrinkage in the value of surface rights in land owned by the petitioners, due to seepage from wells drilled thereon, was not an allowable deduction to the petitioners for the year in which the loss in value took place, and that until there had been a sale or other disposition of the property it would be impossible to state whether a gain or a loss would be sustained.

In the present case the issue is whether any part of the increased price, which the taxpayer corporation paid for the surface land and improvements in order to avoid litigation arising out of damage to such land and improvements caused by the taxpayer's coal mining operations, is deductible as an expense. The instant question is distinguishable from the questions involved in the appeals of the Manchester Coal Co. and Mrs. J. C. Pugh, Sr., et al., supra. In so far as the principle involved in the cases decided by the Board is applicable to the issue here under consideration, it is the opinion of this office that the decision in the Pugh case, disallowing a deduction for impairment of value of surface land, has a more direct bearing thereon, since both the Pugh case and the instant case involve merely an impairment in the value of the surface land.

It is also the opinion of this office that the question here involved is governed by the principle laid down in I. T. 2657 (C. B. XI-2, 55), that "The purchase of property at a price greater than its market value does not result in a deductible loss for income tax purposes." (See also *M. J. Hellmers* v. *Commissioner*, 5 B. T. A., 198; *Schuman Piano Co.* v. *Commissioner*, 10 B. T. A., 118; O. D. 851, C. B. 4, 179; A. R. R. 906, C. B. I-1, 143.) The ruling last cited (A. R. R. 906) held that the purchase of a factory and equipment for more than their real value, in order to settle litigation, resulted in no deductible loss under the Act of August 5, 1909. The same principle is applicable under the later Revenue Acts. Until there has been a sale or other disposition of the property it can not be determined, in cases of this character, whether a loss deductible for income tax purposes has in fact been sustained.

Accordingly, it is the opinion of this office that the taxpayer may not deduct as an expense for the year 1930 any part of the increased price which it paid for the surface land and improvements in question.

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

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

Article 204: Capital sum recoverable through depreciation allowances.

REVENUE ACT OF 1928.

Allowance of depreciation deductions for leased property where lessee is obligated to maintain same and to return it or equivalent property at termination of lease. (See G. C. M. 11933, page 52.)

SECTION 23(m).—DEDUCTIONS FROM GROSS INCOME: BASIS FOR DEPRECIATION AND DEPLETION.

ARTICLE 242: Allowable capital additions in case of mines. (Also Section 111, Article 561.)

XII-32-6331
T. D. 4376

INCOME TAX.

Articles 222 and 1561 of Regulations 69, article 242 of Regulations 74, and article 561 of Regulations 74, as amended by Treasury Decision 4321 [C. B. X-2, 169], amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 222 of Regulations 69 and article 242 of Regulations 74 are hereby amended by the elimination of the first sentence of paragraph (b), and the substitution therefor of two sentences reading as follows:

Expenditures for plant and equipment and for replacements, not including expenditures for maintenance and for ordinary and necessary repairs, shall ordinarily be charged to capital account recoverable through depreciation. Expenditures for equipment (including its installation and housing) and for replacements thereof, which are necessary to maintain the normal output solely because of the recession of the working faces of the mine, and which (1) do not increase the value of the mine, or (2) do not decrease the cost of production of mineral units, or (3) do not represent an amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made, shall be deducted as ordinary and necessary business expenses.

Article 1561 of Regulations 69 is hereby amended by inserting after the second sentence in the second paragraph thereof the following:

In the case of mines and oil or gas wells the cost or other basis of the property shall not be increased by (1) expenditures made in the taxable year 1925 or subsequent taxable years and allowed under article 222 or article 223 as deductions in computing net income, or (2) expenditures made in taxable years prior to 1925 and allowed as deductions in computing the net income of the taxpayer for such taxable years.

Article 561 of Regulations 74, as amended by Treasury Decision 4321 (C. B. X-2, 169), is hereby amended by inserting after the third sentence of the second paragraph thereof the following:

In the case of mines and oil or gas wells the following shall not be considered as items properly chargeable to capital account: (1) Expenditures made in the taxable year 1928 or subsequent taxable years and allowed under article 242 or article 243 as deductions in computing net income; (2) expenditures made in taxable years prior to 1928 and allowed as deductions in computing the net income of the taxpayer for such taxable years.

GUY T. HELVERING,
Commissioner.

Approved July 26, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

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

ARTICLE 261: Contributions or gifts by individuals.

REVENUE ACT OF 1928.

Contributions to Salvation Army and branches. (See I. T. 2747, page 70.)

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 44.—INSTALLMENT BASIS.

ARTICLE 352: Sale of real property involving deferred payments.

REVENUE ACT OF 1928.

Casual sales of real property on installment plan. (See G. C. M. 12148, page 57.)

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 52.—CORPORATION RETURNS.

ARTICLE 391: Corporation returns. XII-33-6341
G. C. M. 11954

REVENUE ACT OF 1928.

Since the taxpayer, a foreign corporation, had both "an agent in the United States" and an "office or place of business in the United States," it is not within the provisions of section 235 of the Revenue Act of 1928. Section 52(a) of the Revenue Act of 1928 is controlling, and a return form filed in the name of the taxpayer which was not "sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer," is not a return within the meaning of the statute.

An opinion has been requested whether a foreign corporation, having an office or place of business in the United States and also an agent therein, may be held to have filed a return which starts the running of the period of limitation prescribed by section 275 of the Revenue Act of 1928, where the return form submitted was not sworn to as required by law.

Section 52(a) of the Revenue Act of 1928 provides as follows:

Requirement.—Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *

Section 235 of the Revenue Act of 1928 provides as follows:

* * * If any foreign corporation has no office or place of business in the United States but has an agent in the United States, the return shall be made by the agent.

The instant taxpayer had both "an agent in the United States" and an "office or place of business in the United States." Accordingly, it is not within the provisions of section 235 of the Revenue Act of 1928, but section 52(a) of that Act is controlling. Form 1120 filed in the name of the taxpayer was not "sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer," and was not, therefore, a return within the meaning of sections 52(a) and 275 of the Revenue Act of 1928. (*Lucas* v. *The Pilliod Lumber Co.*, 281 U. S., 245, Ct. D. 266, C. B. IX-2, 396.) General Counsel's Memorandum 11000 (C. B. XI-2, 298) is not in point, since in that case the taxpayer had "no office or place of business in the United States."

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

SECTION 55.—PUBLICITY OF RETURNS.

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1928.

Special Committee to Investigate Foreign and Domestic, Ocean and Air Mail Contracts. (See T. D. 4378, page 219.)

ARTICLE 421: Inspection of returns.

REVENUE ACT OF 1928.

Special Committee to Investigate Receivership and Bankruptcy Proceedings and Appointment of Receivers and Trustees. (See T. D. 4397, page 220.)

SUBTITLE C.—SUPPLEMENTAL PROVISIONS.

SUPPLEMENT A.—RATES OF TAX.

SECTION 101.—CAPITAL NET GAINS AND LOSSES.

ARTICLE 501: Definition and illustration of capital net gain. XII-37-6395 G. C. M. 12118

REVENUE ACT OF 1928.

An unlimited conveyance for a cash consideration of the lessor's reserved royalty under an oil and gas lease, or a fractional interest therein, may be treated as a sale of a capital asset within the purview of the capital gains provision (section 101) of the Revenue Act of 1928, provided the interest in the property sold otherwise falls within the definition of the term "capital assets" as defined in section 101.

An opinion is requested whether, in view of the decision of the Supreme Court of the United States in the case of *Burnet* v. *Harmel* (287 U. S., 103, Ct. D. 611, C. B. XI-2, 210), an unlimited conveyance

for a cash consideration of the lessor's reserved royalty under an oil and gas lease, or a fractional interest therein, may be treated as a sale of a capital asset under section 101 of the Revenue Act of 1928.

In *Burnet* v. *Harmel*, supra, the Supreme Court of the United States held that where an owner in fee executes *an oil and gas lease* for a specified term and as long thereafter as oil and gas shall be produced by the lessee, in consideration of a cash bonus and stipulated royalties measured by the production of oil and gas, the bonus and royalties are not "gain from the sale or exchange of capital assets" within the meaning of section 208(a)1 of the Revenue Act of 1924, but are taxable as ordinary income. The court said that irrespective of any particular characterization of the payments in the local law, for the purpose of applying the capital gains provision the Revenue Acts of Congress have their own criteria, and when judged accordingly an oil and gas lease is not to be described as a "sale" of the mineral content of the soil, using the term either in its technical sense or as it is commonly understood. Referring to its prior decisions under the corporation excise tax law of 1909, the Supreme Court said that "they established, for purposes of defining 'income' in a tax measured by it, that payments by lessees to lessors under mining leases were not a conversion of capital, as upon a sale of capital assets, but were income to the lessor, like payments of rent," citing *Stratton's Independence, Ltd.*, v. *Howbert* (231 U. S., 399); *Goldfield Consolidated Mines Co.* v. *Scott* (247 U. S., 126); *Stanton* v. *Baltic Mining Co.* (240 U. S., 103); *Von Baumbach* v. *Sargent Land Co.* (242 U. S., 503); and *United States* v. *Biwabik Mining Co.* (247 U. S., 116). The decision in *Burnet* v. *Harmel*, supra, confirmed a line of opinions of the Board of Tax Appeals, including *Henry L. Berg et al.* v. *Commissioner* (6 B. T. A., 1287); *John T. Burkett* v. *Commissioner* (7 B. T. A., 560); James R. Parkey *et al.* v. *Commissioner* (16 B. T. A., 441); *Henry Harmel* v *Commissioner* (19 B. T. A., 376); and *W. P. Ferguson* v. *Commissioner* (20 B. T. A., 130).

The Board of Tax Appeals has held that a conveyance by deed, for a cash consideration, of an interest in the lessor's mineral rights, subject to an existing oil and gas lease under which the lessee has the right to operate for a term of years or so long as oil or gas is produced from the land by the lessee, constitutes a sale of a capital asset within the capital gains provision (section 206) of the Revenue Act of 1921. (*J. E. Murphy* v. *Commissioner*, 9 B. T. A., 610, C. B. VIII–2, 37, and *J. D. Reynolds* v. *Commissioner*, 10 B. T. A., 651, C. B. VIII–2, 44.) A fractional interest in the royalty reserved under the lease was considered to have passed to the grantee as an incident of the conveyance in each of the cases cited.

The Board has also decided that the conveyance for a cash consideration of a fractional interest in a reserved royalty as such is a sale of property within the meaning of section 202 of the Revenue Act of 1921, and that the grantor of such an interest is not entitled, in determining taxable income, to apply against the consideration received a depletion deduction based upon the discovery value depletion base provided for in section 214(a)10 of the Revenue Act of 1921. (*Appeal of Anna Taylor*, 3 B. T. A., 1201;

J. M. Hudson v. *Commissioner*, 14 B. T. A., 983.) These decisions of the Board sustained the position of the Commissioner. If such a conveyance of a reserved royalty, or a fractional interest therein, constitutes a sale of property for the purposes of section 202 of the Revenue Act of 1921 it also qualifies as a sale of a capital asset under section 206 of that Act, assuming that the reserved royalty is an interest which the lessor has owned for more than two years prior to the conveyance.

The Bureau has held following the Board's decision in the case of *J. E. Murphy* v. *Commissioner*, supra, that a conveyance by royalty deed of a fractional interest in the oil, gas, and other minerals under certain lands, and in the royalty rights in respect thereto, without limitation as to duration of time is "a sale of capital assets," and that the provisions of section 208 of the Revenue Act of 1926 are applicable to such a sale. (I. T. 2524, C. B. IX–1, 199.) In such a case the fractional interest in the reserved royalty passes to the grantee as an incident of the grant of a fractional interest of the lessor's reserved oil and gas rights subject to the lease.

As heretofore indicated, the case of *Burnet* v. *Harmel*, supra, establishes the principle that all payments from lessee to lessor under an oil and gas lease are income from the use of the land and are not gain from the sale or conversion of capital assets. This rule should be applied in all cases where the instrument of grant may be classified properly as a lease. This office is of the opinion, however, that in the case of an unlimited conveyance for a cash consideration of the lessor's reserve royalty under an oil and gas lease, or of a fractional interest therein, as in the cases of *J. E. Murphy* v. *Commissioner*, supra, and the *Appeal of Anna Taylor*, supra, the conveyance may be treated as a sale of a capital asset within the purview of the capital gains provision (section 101) of the Revenue Act of 1928, provided the interest in the property sold otherwise falls within the definition of the term "capital assets" as defined in section 101.

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

SECTION 103.—EXEMPTIONS FROM TAX ON CORPORATIONS.

Article 521: Proof of exemption. XII–31–6319
Ct. D. 709

INCOME TAX—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

Exemption—Mutual Fire Insurance Association.

A fire insurance association originally organized as a purely mutual association which subsequently authorized issuance of nonparticipating term insurance for a fixed premium, about 10 per cent of its business being written upon the term plan, is not a mutual fire insurance association that is exempt from tax under section 231(11) of the Revenue Act of 1926 and section 103(11) of the Revenue Act of 1928. Building and loan association cases distinguished.

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COURT OF CLAIMS OF THE UNITED STATES.

Baltimore Equitable Society v. *The United States.*

[May 8, 1933.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

This action is begun to recover taxes alleged to have been wrongfully collected from plaintiff for the years 1925, 1926, 1927, and 1928.

The plaintiff is a voluntary association doing an insurance business. The Commissioner assessed upon its net income for the years mentioned above the corporation income tax. The plaintiff claims to be exempt therefrom under the provisions of the statute that read as follows:

"SEC. 103.[1] EXEMPTIONS FROM TAX ON CORPORATIONS.

"The following organizations shall be exempt from taxation under this title:

* * * * * * *

"(11) Farmers' or other mutual hail, cyclone, casualty, or fire insurance companies or associations (including interinsurers and reciprocal underwriters) the income of which is used or held for the purpose of paying losses or expenses."

There is no dispute as to the facts, although there is a dispute as to the ultimate conclusions which may be drawn therefrom. As stated above, the plaintiff is a voluntary association doing a fire insurance business, without having any capital stock. Its original charter provided for insuring houses from loss by fire and that each member should contribute annually to the losses and share the gains and advantages arising by reason of the covenants of insurance and the payments required from the subscribers or members. Every person insuring was required to deposit a certain sum which was to be returned at the expiration of the policy taken out with a proportionable dividend of the profits that had accrued, deducting losses and incident charges. Under the terms of the charter the members of the society secured insurance policies for a term of seven years, and at the conclusion of the 7-year period each member was required to pay his respective proportion of all losses and charges for that period. Later, in 1865, a plan of perpetual insurance was adopted under which a member on the payment of a fixed deposit was protected against partial or total loss by fire of the property insured to the extent insured, perpetually or to such a time as he ceased to be a member by withdrawing his deposit. Prior to the time when the plan of perpetual insurance was adopted, and in 1858, a resolution was adopted authorizing the society to write term insurance at a fixed premium for a period of less than seven years. The plaintiff contends that under these facts it was at all times a mutual company in which the members were the parties insured and that the provision for writing term insurance was merely incidental.

The defendant on the other hand contends that it is not a mutual company within the meaning of the statute, and that its income is not "used or held for the purpose of paying losses or expenses." The latter objection will first be considered.

Finding 9 shows that the company had a surplus of $1,336,482.57 in 1924 which increased each year thereafter until in 1928 it reached the sum of $1,719,610.44. The defendant contends that this surplus was larger than was necessary to pay the ordinary losses and expenses of the company. The plaintiff practically admits this, but argues in effect that under the circumstances of the case no more is carried than would be dictated by ordinary prudence. The evidence shows that the company limits its risk to buildings in the city of Baltimore, which undoubtedly enhances the amount to which it might in event of an extensive fire be called upon to pay. The company was in existence at the time of the great Baltimore fire which so largely depleted its surplus that it needed to be increased and built up. It is now contended that the company carries no more than is proper in view of the fact that such a fire might recur. As we view the situation, while it is not likely that there will be another such

[1] Revenue Act of 1928 (45 Stat., 791, 812). The same provision was contained in section 231 of the Revenue Act of 1926 (44 Stat., 9, 39).

great conflagration it is quite possible. Defendant calls attention to the fact that the surplus is increasing somewhat each year, but we do not think that this shows that it is not held for the purpose of paying losses or expenses. The only other disposition that could be made of it is to distribute a certain portion thereof to the stockholders, for which provision has been made by a resolution adopted providing that if at any time the "reserved surplus" should amount to a sum equal to 10 per cent of the total amount of the risks assumed by the plaintiff, plus $60,000, such excess should be distributed among the members as a dividend; but no dividend has ever been paid. We doubt whether the word "dividend" is proper as applied to such a distribution. Certainly it would not be a distribution of any profits but merely a return to the members of amounts collected which were in excess of the amount necessary to meet losses and expenses. The distribution is made when it is determined that it is no longer necessary to hold these amounts to pay losses and expenses; and if a larger amount was accumulated than necessary or held longer than necessary the purpose of the accumulation was to pay losses and expenses therewith, and the action of the association in accumulating more than was necessary or holding the accumulations longer than was necessary was merely an error in judgment and does not affect the purpose and object in view.

The other objection, as we think, is more serious and fatal to the plaintiff's case. As before stated, the plaintiff was originally a purely mutual company in which the premiums paid by each member constituted a common fund devoted to the payment of any losses that might occur and in which all of the persons insured were members of the association and equally assessed in proportion to each member's insurance either to meet losses which might occur in the future or which the company might not have on hand funds to discharge. But subsequently and during a period which involved the years for which the taxes in question were levied the company or association by virtue of another resolution authorized the issue of term insurance for a fixed premium for a period of less than seven years. The plaintiff contends that as only about 10 per cent of its insurance was written upon the term plan for a fixed premium, this amount is too small to affect the general nature of the company. We do not think this position is well taken. As to those who received this term insurance at a fixed premium, there was no mutuality. They paid in advance for their insurance, and that was the end of all payments and liabilities so far as they were concerned. That the number so insured is small compared with the total number insured under the mutual plan appears to us to make no difference. There is nothing in the evidence to show that there was any restriction on the number that might be so insured or the proportion of the risks that might be so undertaken. If it had been one-third instead of one-tenth, we think no one would contend that the company could receive the benefit of the exemption. We do not think the provisions for exemption applied to a company that was partly mutual and partly not. Such a holding would, we think, extend the exemption to cases that were not within the intention of Congress, for there would be no way of drawing the line except to say that when a large proportion of the insurance written was not upon the mutual plan the company was not a mutual company, and that when only a small proportion was so written the association still remained mutual.

There are a number of decisions which hold that the fact that a building and loan association loans money to nonmembers or receives deposits will not deprive it of the exemption from income tax granted to building and loan associations by the Federal statute. But we think that the cases are not parallel with the one at bar. In the case of the building and loan associations, the business which they did with nonmembers was not building and loan business, if we consider the words "building and loan" should be construed together. Building and loan associations are organized for the purpose of making loans to members for the purpose of constructing buildings (usually homes) and receiving installment payments to cancel the loans. In the cases cited, the deposits received or the loans made had nothing to do with building purposes. So far as the building and loan business was concerned the companies were still purely mutual and the members shared equally in the profits or losses as the case might be. But in the instant case the "term insurance," while written for nonmembers, was insurance business nevertheless, and as we construe the statute, in order to be entitled to the exemption the plaintiff must show that the insurance business was conducted on a mutual basis. This was clearly not the case as to the policyholders who took out term insurance.

They were not members, were not entitled to any refund of premiums paid upon the surrender or cancellation of their policies, or to share in the distribution of the earnings and profits of the company. In short, so far as those who held policies for term insurance were concerned, there was no mutuality.

We think that when Congress provided the exemption set out in the statute it intended that it should apply only to companies that are purely mutual and that consequently the plaintiff was subject to the corporation tax.

It follows that the plaintiff's petition must be dismissed, and it is so ordered.

ARTICLE 525: Building and loan associations and cooperative banks.

XII-28-6282
G. C. M. 11893

REVENUE ACT OF 1928.

The M Association was incorporated as a building and loan association under the laws of Wyoming. All borrowers subscribed for loan certificates, which did not entitle them to participate in the management of the association. The Wyoming statutes provide that those holding stock in a building and loan association shall be considered members thereof.

This organization is not within the exemption of section 103(4) of the Revenue Act of 1928 which is extended to those associations substantially all the business of which is making loans to members.

An opinion is requested relative to the taxable status of the M Association.

The association was incorporated under the laws of Wyoming as a building and loan association. All borrowers subscribed for loan certificates, which do not entitle them to participate in the management of the association.

Chapter 331 of the Wyoming statutes, 1920, section 5222, provides that all persons, companies, and corporations holding stock in a building and loan association shall be considered members thereof until such stock is duly transferred upon the books of the association or is canceled, forfeited, or withdrawn. Chapter 103, section 6, Session Laws of Wyoming, 1927, relating to building and loan associations, provides that the membership in any association coming under the provisions of that act shall consist of persons holding shares therein.

On the foregoing facts it is concluded that borrowers who were merely required to subscribe for loan certificates could not be considered as members of the association in determining its status for Federal income tax purposes under section 103(4) of the Revenue Act of 1928, which exempts building and loan associations "substantially all the business of which is confined to making loans to members."

While those persons who merely hold the loan certificates issued by the association are required to pay certain fees, yet they hold no stock therein and are not subscribers to stock. They have no vote and no voice whatever in the control or management of the association. The association being incorporated, the fundamental rule cited hereinbefore that membership in an incorporated building and loan association can only be acquired through stock ownership or at least through a subscription to stock is applicable. The mere holders of loan certificates do not meet this test. Being neither stockholders

therein nor subscribers to stock they lack the prime requisites of membership. While building and loan associations may ordinarily fix the requirements of membership therein, yet such of them as are incorporated may not in so doing violate the rule of general application that true membership in a corporation can only be secured through stock ownership or subscription to stock. In the opinion of this office those persons who merely hold loan certificates issued by the association and are neither owners of stock therein or subscribers thereto are not bona fide members of the association within the meaning of the exempt provisions of the law.

This office is, therefore, of the opinion that the M Association is not entitled to exemption under section 103(4) of the Revenue Act of 1928.

ARTICLE 525: Building and loan associations and cooperative banks.

REVENUE ACT OF 1928.

Loans to nonmembers to defer withdrawals of deposits and to nonmembers who later in the year became members. (See G. C. M. 12333, page 68.)

ARTICLE 527: Religious, charitable, scientific, literary, and educational organizations and community chests.

REVENUE ACT OF 1928.

Exemption of Salvation Army and branches. (See I. T. 2747, page 70.)

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

REVENUE ACT OF 1928.

"Supplies and equipment," defined. (See I. T. 2748, page 72.)

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 111.—DETERMINATION OF AMOUNT OF GAIN OR LOSS.

ARTICLE 561: Determination of the amount of gain or loss.

REVENUE ACT OF 1928.

Amendment of article 561 of Regulations 74, as amended by Treasury Decision 4321 (C. B. X–2, 169). (See T. D. 4376, page 117.)

SECTION 113.—BASIS FOR DETERMINING GAIN OR LOSS.

ARTICLE 591: Basis for determining gain or loss from sale.

REVENUE ACT OF 1928.

Community property in New Mexico, the marital relationship being dissolved by death of one of the spouses. (See I. T. 2742, page 77.)

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

SECTION 116. XII–38–6408
G. C. M. 12167

REVENUE ACT OF 1928.

During the year 1930 the taxpayer was employed as master of a steamship engaged in trade between certain United States ports. He was absent from the United States and its territorial waters for 234 days during that year in the performance of his duties as master of the vessel, due to the fact that the irregularities of the United States coast line and safe navigation required that the vessel be operated beyond the territorial waters of the United States.

Held, that the taxpayer has met the conditions prescribed by section 116(a) of the Revenue Act of 1928 under which exemption is allowed. He was a bona fide nonresident citizen of the United States for more than six months during the taxable year, and his compensation constituted earned income from sources without the United States.

The instant case involves the question whether the taxpayer may be classified as a bona fide nonresident citizen of the United States for more than six months during the taxable year 1930, and receive the benefit of the exemption provided by section 116(a) of the Revenue Act of 1928.

During the year 1930 the taxpayer was employed as master of the steamship *M*, operated by the O Company. The ship in question was of United States registry and engaged in trade between the city of R, State of S, and certain other United States ports. The taxpayer was absent from the United States and its territorial waters for 234 days during the year 1930 in the performance of his duties as master of the vessel, due to the fact that the irregularities of the United States coast line and safe navigation required that the vessel be operated beyond the territorial waters of the United States. During that year the taxpayer received compensation as master of the ship amounting to x dollars. He included this compensation in his income tax return and paid a tax of z dollars. He now seeks to recover the tax on the ground that his compensation constituted earned income from sources without the United States, received by a citizen of the United States who was a bona fide nonresident thereof for more than six months during the taxable year, and was therefore exempt from taxation.

Section 116 of the Revenue Act of 1928 provides for certain exclusions from gross income, including—

(a) *Earned income from sources without United States.*—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States if such amounts constitute earned income as defined in section 31; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

In construing the phrase "a bona fide nonresident of the United States for more than six months during the taxable year," the Bureau has held that it applies to any American citizen who is actually outside the United States for more than six months during the taxable year. The absence need not be continuous, but may be made up of several trips where the periods of absence from the United States amount in the aggregate to more than six months during the taxable year. It has also been held that the citizen is not required to be a resident of any foreign country, but is only required to be a nonresident of the United States for more than six months. (G. C. M. 9848, C. B. X–2, 178, and rulings cited therein.)

Article 1023 of Regulations 74 recognizes that a person's status as a resident or nonresident of the United States may be affected by his employment aboard ship. That article reads in part as follows:

* * * Residence may be established on a vessel regularly engaged in coastwise trade, but the mere fact that a sailor makes his home on a vessel flying the United States flag and engaged in foreign trade is not sufficient to establish residence in the United States, even though the vessel, while carrying on foreign trade, touches at American ports. * * *

Under the above-quoted provision of the regulations a person employed aboard a ship which plys within the territorial waters of the United States may under some circumstances be classified as a resident of this country. If residence may be established by a person while employed aboard a vessel within the territorial waters of the United States, it follows that if the ship on which he is engaged operates beyond the territorial waters, or on the high seas, for more than six months during the taxable year, he should be treated as a nonresident within the meaning of section 116(a) of the Revenue Act of 1928.

With respect to men employed aboard ships, this office has previously held in the case of officers and enlisted men of the Navy on duty afloat, that if they are without the United States "and its territorial waters" for more than six months during the taxable year their compensation for services without the United States and its territorial waters is exempt. (I. T. 2293, C. B. V–2, 33; S. M. 5446, C. B. V–1, 49.)

In the instant case the situation is not materially different from that of a naval officer in charge of a United States battleship which leaves one American port for a cruise on the high seas and returns to another American port after an absence of more than six months. (I. T. 2293, supra.) Both derive income for services performed without the United States and its territorial waters, and both are "out of the United States" for the period of time prescribed by the statute. (S. M. 5446, supra.) Accordingly, the taxpayer has met the conditions prescribed by section 116(a) of the Revenue Act of 1928

under which exemption is allowed. He was a bona fide nonresident citizen of the United States for more than six months during the taxable year, and his compensation constituted earned income from sources without the United States. (Sections 31(a), 119(c)3, and 116(a) of the Revenue Act of 1928.)

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

ARTICLE 642: Income of States. XII-46-6508
G. C. M. 12227

REVENUE ACT OF 1928.

The income received by the taxpayer under the interests held by him in leases of California State tidelands is not exempt from Federal income tax.

Inquiry has been made as to the taxability of income received by the taxpayer in 1930 from certain interests held by him in leases of California State tidelands.

Under the provisions of chapter 303, Statutes of California of 1921, the State of California offered to give to citizens of the State permits to prospect for oil and gas or other minerals upon any lands belonging to the State, including tidelands, under certain conditions set forth in the act. The State was to receive a share of the income derived from such lands, which income was to be used for general governmental purposes. For its services in connection with the filing of applications and securing of permits, the taxpayer's law firm agreed to accept — per cent of whatever proceeds might thereafter accrue to certain operators. The agreement was entered into in each case with the operator prior to the filing of the application, so that the law firm had a —— interest in the proceeds from each venture. Formal assignments evidencing these interests were made in 1929.

It also appears that the taxpayer was one of a group of persons who secured on their own behalf lease or permit No. ——, which was recorded in the name of a client. Neither the taxpayer nor any of the parties who obtained this lease operated under it. They entered into subleases, retaining only an interest in the production from the property. The other lease interests which the taxpayer had and from which he derived income were received as compensation for services rendered to clients of the taxpayer's law firm in filing applications and securing permits. In other words, all of the taxpayer's income here in question was derived from his share of the proceeds arising from the production of oil and gas by others.

The taxpayer contends that his income from these lease interests is exempt from Federal income tax in view of the decision of the United States Supreme Court in the case of *Burnet* v. *Coronado Oil & Gas Co.* (285 U. S., 393, Ct. D. 485, C. B. XI-1, 265), in which it was held that the income of a lessee of State school lands in Oklahoma, derived from the production by it of oil and gas from such lands, is not subject to Federal income tax for the reason that a lease of such lands is an instrumentality of the State used in carrying out an essential governmental function; and that to tax the

income arising from the lease would result in an imposition upon the lease itself.

In arriving at its conclusion in the Coronado case the United States Supreme Court took into consideration the fact that under the decisions of the Supreme Court of Oklahoma a lease for the exploration, development, and production of oil and gas does not result in a sale of oil and gas in place. In a similar case involving school lands in Texas, *Group No. 1 Oil Corporation* v. *Bass* (283 U. S., 279, Ct. D. 330, C. B. X–1, 153), an opposite conclusion was reached by the United States Supreme Court in view of the decisions of the Supreme Court of the State of Texas holding that such a lease does result in the sale of oil and gas in place.

In *Western Oil & Refining Co.* v. *Venago Oil Corporation et al.* (16 Pac. (2d), 190) the Supreme Court of California laid down the general rule as to the effect of such an oil and gas lease in that State. After reviewing a number of cases involving oil and gas leases, the court stated as follows:

> Other cases might be cited, but the rule appears to be that, under the ordinary oil and gas lease, the right of entry upon land for the purpose of exploring for oil vests in the lessee upon the execution of the lease, but the title to the oil and gas is inchoate, and does not vest until the oil and gas are reduced to possession. In other words, the oil and gas lease is to be distinguished from the ordinary lease in that the lessee, under such oil lease, does not acquire a vested interest in the oil and gas in place prior to its development, but only a right to enter and develop the well and remove the oil when so developed.

(See also *Graciosa Oil Co.* v. *Santa Barbara County*, 99 Pac., 483, and *Bandini Petroleum Co. et al.* v. *Superior Court in and for Los Angeles County et al.*, 293 Pac., 899.)

It is apparent, therefore, that the general rule in California as to the effect of an oil and gas lease, that is, whether it effects a sale of oil and gas in place, does not differ materially from the Oklahoma rule.

In its opinion in the case of *Burnet* v. *Coronado Oil & Gas Co.*, supra, which followed the principle laid down by that court in the case of *Gillespie* v. *Oklahoma* (257 U. S., 501), holding that neither leases of tribal Indian lands nor the income therefrom may be taxed by the State, the Supreme Court stated:

> We are disposed to apply the doctrine of *Gillespie* v. *Oklahoma* strictly and only in circumstances *closely analogous* to those which it disclosed. * * * [Italics supplied.]

A similar statement is contained in the later decision of that court in the case of *Burnet* v. *A. T. Jergins Trust* (288 U. S., 508, Ct. D. 653, C. B. XII–1, 214), involving the question of exemption of income derived by a trust created for the purpose of entering into an oil and gas lease on lands acquired by the city of Long Beach, Calif., for water supply purposes. In the latter case the facts were distinguished from those involved in the Coronado case, and the exemption claimed was denied. It must be determined, therefore, whether the circumstances in the instant case are "closely analogous" to those involved in the case of *Burnet* v. *Coronado Oil & Gas Co.*, supra.

In the opinion of this office the facts and circumstances in the instant case are clearly distinguishable from those in the Coronado case. In the first place, the lands involved are State tidelands, and

did not come to the State of California from the Federal Government impressed with an express trust requiring them to be used exclusively for public school purposes, as did the Oklahoma lands involved in the Coronado case. (*Burnet* v. *A. T. Jergins Trust*, supra.) The income of the State from the lands in the instant case was paid into the State treasury to be used for general purposes. The taxpayer is not a lessee of State school lands nor is he an operating assignee of any such lands. Even if he be considered as a lessee under the lease recorded in the name of a client for the benefit of several individuals, including the taxpayer, he is not an operating lessee. He performs no services whatever as a producer of oil and gas, or any other product, from State school lands. He is not an instrumentality of the State by which its property is converted into money to be used in carrying out an essential governmental function of the State. His income does not flow from contracts entered into by and between the taxpayer and the State, but arises from contracts made between the taxpayer and third persons, to which contracts the State is not a party. Taxation of such income could in no way result in a burden on the State or an instrumentality thereof.

In view of the foregoing, this office is of the opinion that the income received by the taxpayer under the interests held by him in leases of California State tidelands is not exempt from Federal income tax.

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

Article 642: Income of States. XII-51-6570
Ct. D. 763

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

1. Exemption—State Instrumentality—Sale of Oil and Gas Lease of School Lands of Montana.

Where the State of Montana executed a lease of oil and gas lands dedicated to the support of the public schools of the State, and the assignee in 1926 sold its interest in the land to another corporation, one-third of the purchase price payable in cash and the balance to be paid out of production of oil from the lands, the income derived by the assignee during the years 1929, 1930, and 1931 from the proceeds of the sale is not exempt from Federal tax as income derived from an instrumentality of the State, but is in the nature of a profit upon the sale of a capital investment at a price above cost.

2. Decision Followed.

The decision of the Court of Claims in the case of *Ernest Whitworth Marland* v. *United States* (53 Fed. (2d), 907, Ct. D. 738, page 184, this Bulletin) followed.

District Court of the United States in and for the District of Montana.

Rice Oil Co., a Corporation, plaintiff, v. *United States of America, defendant.*

[September 8, 1933.]

OPINION.

Pray, J.: The question here is on the demurrer to the complaint, that it does not state facts sufficient to constitute a cause of action.

This is an action for the recovery of income taxes alleged in the complaint to have been erroneously included in the income tax returns made by plaintiff

to the Commissioner of Internal Revenue. Claims for refund of such taxes were made and denied by the Commissioner. The State of Montana executed a certain oil and gas lease to one George F. Stannard; thereafter the plaintiff became the owner thereof through assignment dated July 13, 1926.

The income in question was derived from proceeds of sale of oil taken from the lands described in the lease. Plaintiff claims that such income "was in fact exempt and immune from imposition of Federal income tax, because the said oil and gas lease under which plaintiff operated said premises was an instrumentality of the State of Montana for the utilization of said lands dedicated to the support of public schools; and to tax the fruits of the lease would burden the State of Montana in the performance of the governmental function of maintaining such schools; and to tax the income of the operator of said oil and gas leasehold arising from its operation thereof, amounted to imposition upon the lease itself."

It appears from the complaint that plaintiff sold its interest in the lands on September 10, 1926, to the Marine Corporation for $3,000,000. One million dollars was paid in cash and $2,000,000 were to be paid out of production of oil from the lands included in the lease. By the terms of the contract governing this transaction title was to pass to the purchaser as of August 11, 1926. Therefore, can it be said that the income in question was derived by plaintiff as a lessee of the lands or was it in the nature of a profit upon the sale of a capital investment at a price above cost; in view of the facts here, the latter would seem to afford the correct answer under *Marland* v. *United States* (53 F. (2d), 907) and *Willcuts* v. *Bunn* (282 U. S., 216 [Ct. D. 280, C. B. X–1, 309]).

The demurrer of defendant will therefore have to be sustained, and it is so ordered.

ARTICLE 643: Compensation of State officers and employees.

REVENUE ACT OF 1928.

Vocational training teachers employed in private institutions and paid in part from Federal funds. (See G. C. M. 12137, page 81.)

SECTION 119.—INCOME FROM SOURCES WITHIN UNITED STATES.

ARTICLE 675: Rentals and royalties. XII–48–6534
I. T. 2735

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

The taxpayer, a nonresident alien author, entered into a number of contracts conveying to parties in this country volume and/or first or second serial rights, and motion picture rights or dramatization rights in his literary works.

Held, such grants were licenses, and payments made under the contracts are rentals or royalties from or for the privilege of using copyrights and other like property. All the income in question is from sources within the United States except (1) the payments derived from the contract with C for certain Canadian rights; (2) such of the payments, if any, under the contract with B, as have their source in the exercise of dramatic rights in Great Britain and Canada, and elsewhere abroad; (3) such of the payments for the motion picture rights as can be definitely assigned to the privilege of using foreign copyrights outside the United States.

Office Decision 988 (C. B. 5, 117) is revoked and I. T. 1231 (C. B. I–1, 206) is modified.

Advice is requested whether certain payments received during the years 1921 to 1928 by the taxpayer, a nonresident alien author, are taxable as income from sources within the United States.

The income in question was received pursuant to contracts made by the taxpayer with a number of publishers and producers. Under the contract with the M Company the taxpayer granted the volume and second serial rights in certain books already written, reserving a stipulated royalty per copy sold. The contract also provided that the M Company should have the right to publish in the United States all new books of the taxpayer and some of his older books at royalty rates mutually agreeable to the contracting parties. A contract with the N Company gave that company the motion picture rights throughout the world in certain writings of the taxpayer in consideration of stipulated sums payable in installments. A contract with B granted him the dramatization rights in the United States and Canada (with an option on the English and foreign rights) in certain writings of the taxpayer. Stipulated sums were to be paid to him as royalties. The R Company was granted first American and Canadian serial rights in the taxpayer's exclusive output of both long and short stories for which the R Company was to pay a stipulated sum. A contract with C granted him a license for one year, renewable at his option, to publish and sell certain books in Canada. A stipulated royalty per copy was to be paid.

From the information furnished by officers of the M and N Companies it appears that the preliminary negotiations to all of these contracts occurred in the United States between the taxpayer's agents and the publishing and motion picture corporations. The contracts were drawn and submitted to the taxpayer in a foreign city where he signed them. It is not stated where the publishing and motion picture corporations executed the contracts, whether the taxpayer after signing the contracts transmitted them directly to the publishing and motion picture corporations, or whether the taxpayer after signing the contracts transmitted them to his agents in this country for delivery to the publishing and motion picture corporations.

The years involved are the calendar years 1921 to 1928, inclusive. Reference will be made only to the Revenue Act of 1928, since the differences existing in earlier Acts are immaterial. The applicable provisions of the Revenue Act of 1928 are as follows:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

(a) *Gross income from sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

* * * * * * *

(3) *Personal services.*—Compensation for labor or personal services performed in the United States;

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

* * * * * * *

(c) *Gross income from sources without United States.*—The following items of gross income shall be treated as income from sources without the United States:

* * * * * * *

(3) Compensation for labor or personal services performed without the United States;

(4) Rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of

or for the privilege of using without the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like properties; and

(5) Gains, profits, and income from the sale of real property located without the United States.

* * * * * * *

(e) * * * Gains, profits, and income from—

* * * * * * *

(2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States,

shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from sources within the country in which sold, * * *.

Article 678 of Regulations 74 reads as follows:

Sale of personal property.—Income derived from the purchase and sale of personal property shall be treated as derived entirely from the country in which sold, * * *. The word "sold" includes "exchanged." The "country in which sold" ordinarily means the place where the property is marketed. This article does not apply to income from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States or produced (in whole or in part) by the taxpayer without and sold within the United States. (See article 682.)

(See also articles 674 and 675 of Regulations 74.)

Patents, copyrights, and other franchises have, from the earliest times, been regarded as having a fixed and immovable situs in the place where they are exercisable, the same as real property has in the place where it is situated, although patents, copyrights, and franchises are personal property. It is plain from the provisions of section 119(a) 3, 4, and 5, section 119(c) 3, 4, and 5, and section 119(e)2 that Congress intended to treat lands, patents, copyrights, and franchises as a single class for the purpose of "rentals or royalties from * * * [or] for the use of or for the privilege of using," but for the purpose of sales it intended to treat real property as a class by itself and to treat patents, copyrights, and franchises in the class with all other personal property. The question here presented is, therefore, whether the income derived by the taxpayer was compensation for labor or personal services, rentals or royalties from, or for the use of, or for the privilege of using copyrights in the United States, or was gains, profits, and income from the sale of personal property.

Based upon the language of General Counsel's Memorandum 236 (C. B. VI-2, 27), it is contended that all sums received by the taxpayer under the contracts entered into with the M Company and the R Company on account of literary productions written by the taxpayer after the date of such contracts are for personal services actually rendered to the M Company and the R Company. The contracts provide "that all new books * * * shall be published in the United States by said M Company, the royalty terms to be arranged hereafter" [M Company contract]; and "we contract for the taxpayer's exclusive output, both long stories and short stories, * * *. * * * first American and Canadian serial rights * * *" [R Company contract]. These contracts prescribe in no manner what the taxpayer shall write. They merely

provide that if the taxpayer writes any new books or stories, the publishers shall have certain rights in their publication and sale in the United States. They are neither contracts of employment nor contracts for the rendition of personal services. Contracts of employment, or for rendition of services are, however, frequently entered into with writers and artists. The case of *Ingram* v. *Bowers* (57 Fed. (2d), 65) involves such a contract, and General Counsel's Memorandum 236, supra, refers to another. In *Ingram* v. *Bowers*, supra, the taxpayer agreed to sing into a recording apparatus for the purpose of making phonograph records. The taxpayer in the instant case did not agree to write any books or stories whatever. He merely agreed that if he did write books or stories the contracting publisher should have certain limited rights to publish them in the United States. This office concludes that no part of the income here in question is compensation for labor or personal services.

The question remains whether the income was "Rentals or royalties from * * * [or] for the use of or for the privilege of using * * * copyrights," or whether it was from sales of personal property.

Copyright is the exclusive right of the owner to multiply and dispose of copies of an intellectual product. (Drone on Copyrights.) A copyright is the "exclusive privilege, secured according to certain legal forms, of printing, or otherwise multiplying, publishing and vending copies of certain literary or artistic productions." (*American Tobacco Co.* v. *Werckmeister*, 207 U. S., 284, quoting definition from Bouvier's Law Dictionary.) It includes also "the exclusive right to translate, dramatize, or to perform, represent or to deliver in public, or to make records by which the composition may be mechanically reproduced or performed." (13 Corpus Juris, 945.)

In "An Outline of Copyright Law" by Richard C. De Wolf (pages 77–78) it is stated:

> Through a series of licenses the various rights included in a single copyright may be parceled out among a number of different licensees, and this is a means of realizing the fullest value of a copyrighted work. In the case of a book, for example, the following series of rights may be the subject of separate disposition by license: Rights of first, and of second, serial publication; book publication; translation; dramatization, and the making of moving pictures. The copyright owner keeps the legal title to the parent copyright all the time, but he sells the right to use it in the various ways mentioned. There may also be a division of territory by license. A may be given the right to perform a play in New York and B on the road. This of course is a different thing from the assignment of foreign copyrights, e. g., for Canada, for Great Britain, etc.

In 13 Corpus Juris (1094–1095) it is stated that a copyright is an indivisible thing and can not be split up and partially assigned, either as to time, place, or particular rights or privileges, less than the sum of all the rights comprehended in the copyright; that exclusive rights may, however, be granted, limited as to time, place, or extent of privileges which the grantee may enjoy; and that the better view is that such limited grants operate merely as licenses and not as technical assignments, although often spoken of as assignments. (*New Fiction Publishing Co.* v. *Star Co.*, 220 Fed., 994; *Goldwyn Pictures Corporation* v. *Howell Sales Co.*, 282 Fed., 9.)

It is apparent from the facts in this case that in no instance did the taxpayer assign his literary property in its entirety or his copyright therein, or his indivisible rights therein in granting the serial, the volume, the book, the second serial, the dramatic or motion picture rights to the various contracting parties. The taxpayer in these contracts granted the publishers and producers licenses to use in particular ways his literary property and his copyright therein, and exacted from them certain payments for that use. These were not, and could not be, contracts of sales; they were in fact contracts of license, and the payments for such licenses constituted rentals or royalties subject to tax as such. (*Charles E. Kaltenbach* v. *The United States*, 66 Ct. Cls., 581; *Estate of Ernest Gustav Hoffman* v. *Commissioner*, 8 B. T. A., 1272, acquiescence C. B. VII–2, 18.)

The fact that a payment in the nature of a rent or royalty is in a lump sum rather than so much per annum, per unit of property, per performance, per book sold, or a certain percentage of the receipts or profits, does not alter the character of the payment as rent or royalty. (O. D. 1028, C. B. 5, 83; *Appeal of J. M. & M. S. Browning Co.*, 6 B. T. A., 914, acquiescence C. B. VII–1, 5.) Nor is it material whether the royalty is paid in advance. (*Appeal of Bloedel's Jewelry, Inc.*, 2 B. T. A., 611.) It is accordingly the opinion of this office that the payments in question are "rentals or royalties from * * * [or] for the use of or for the privilege of using * * * copyrights * * * and other like property." Since the grant by the taxpayer in each instance is so clearly the grant of a particular right in all the rights constituting the taxpayer's literary property and copyright, the conclusion is obvious that the grant is a license and not a sale.

The applicable Revenue Acts regard royalties from American copyrights (or for the use of or for the privilege of using in the United States copyrights and other like property) as income from sources within the United States, and royalties from foreign copyrights (or for the use of or for the privilege of using without the United States copyrights and other like property) as income from sources without the United States. Substantially all the income here in question constitutes royalties from, or for the use of, or for the privilege of using American copyrights. A detailed classification here is deemed unnecessary. It seems sufficient to say that all the income in the instant case is income from sources within the United States, except (1) the payments derived from the contract with C for certain Canadian rights; (2) such of the payments, if any, under the contract with B, as have their source in the exercise of dramatic rights in Great Britain and Canada, and elsewhere abroad; (3) such of the payments for the motion picture rights as can be definitely assigned to the privilege of using foreign copyrights outside the United States.

In Office Decision 988, supra, a grant of all rights of serial publication in the United States in certain literary works was through error said to be a sale. Such a grant could only be a license. Office Decision 988 is accordingly revoked.

In I. T. 1231, supra, it was stated that there was a sale of serial rights of publication. Since it is held that such a grant could only be a license, I. T. 1231 is modified to accord with the views herein expressed.

SECTION 141.—CONSOLIDATED RETURNS OF CORPORATIONS—1929 AND SUBSEQUENT TAXABLE YEARS.

ARTICLE 713: Corporations to be included in consolidated returns for 1929 and subsequent taxable years. XII–31–6320 G. C. M. 11800

REVENUE ACT OF 1928.

A foreign corporation, because of its exclusion from the privileges of affiliation by section 238 of the Revenue Act of 1928, can not be recognized as a common parent corporation under section 141(d) of that Act. Its 100 per cent owned domestic subsidiaries may not be permitted to file a consolidated return as an affiliated group for the taxable year 1929, on the basis of that connection.

An opinion is requested whether a consolidated income tax return for the year 1929 may be filed for a group of domestic corporations where the common parent corporation is a foreign company.

The M Company, a foreign corporation, owns 100 per cent of the outstanding capital stock of a number of corporations organized under the laws of various States of the United States. Some of such domestic corporations in turn own 100 per cent of the capital stock of other corporations organized in the United States. The question is whether, under such circumstances, the domestic companies may file one consolidated return for the year 1929, excluding therefrom only the foreign common parent corporation.

Section 141 of the Revenue Act of 1928 reads in part as follows:

(d) As used in this section an "affiliated group" means one or more chains of corporations connected through stock ownership with a common parent corporation if—

(1) At least 95 per centum of the stock of each of the corporations (except the common parent corporation) is owned directly by one or more of the other corporations; and

(2) The common parent corporation owns directly at least 95 per centum of the stock of at least one of the other corporations.

* * * * * * *

(e) A consolidated return shall be made only for the domestic corporations within the affiliated group. * * *

Section 238 of the 1928 Act provides that:

A foreign corporation shall not be deemed to be affiliated with any other corporation within the meaning of section 141 or 142.

The definition of an "affiliated group," as set forth in section 141(d), considered alone, makes no exception of a foreign corporation and sets up the test only of connection through stock ownership with a common parent corporation. Therefore, in the determination of the composition of an "affiliated group" it might be said, if nothing more was required to be taken into consideration, that the group should be recognized as one "affiliated group" irrespective of the fact that the common parent corporation is a foreign corporation. The provision of section 141(e) could then be taken to mean that of such an "affiliated group" only the domestic corporations therein may be allowed to file a consolidated return.

Section 238 of the Act provides that a foreign corporation *shall not be deemed to be affiliated with any other corporation* within the meaning of section 141. The question is whether this means that

a foreign corporation shall be excluded from any consideration whatever under section 141. If this is the proper interpretation of section 238, it follows that a foreign corporation can not be recognized as a "common parent corporation," within the purview of section 141(d), and if there is no domestic corporation to take its place as common parent corporation, by the proper connection through stock ownership, the corporations involved must be considered not to constitute an affiliated group. The situation in such a case becomes one in which the stock of a number of corporations is owned by the "same interests," i. e., a class B connection. The Revenue Act of 1928 does not permit the filing of consolidated returns upon the basis of the ownership of stock by the same interests.

In article 2 of Regulations 75 and 78, it is stated that the term "affiliated group" does not include any corporation which, under section 141, can not be included in a consolidated return.

On principle it would seem that if a foreign corporation shall not be deemed to be affiliated with any other corporation within the meaning of section 141, no effect can be given to its stock holdings in any other corporation for any purpose affecting the determination of affiliations under that section. Affiliation, for Federal tax purposes, means connection through stock ownership in the manner specified in section 141(d), and if a foreign corporation is not to be deemed to be affiliated with any corporation the result is that the stock holdings of such a corporation are not to be considered for the purpose of determining the composition of an affiliated group.

Accordingly, it is the opinion of this office that the M Company, a foreign corporation, because of its exclusion from the privileges of affiliation, can not be recognized as a common parent corporation under section 141(d) of the Revenue Act of 1928. Its 100 per cent owned domestic subsidiaries may not, therefore, be permitted to file a consolidated return as an affiliated group for the taxable year 1929, inasmuch as their connections through stock ownership with that company can not be recognized. Some of these domestic subsidiaries are in turn parent companies owning 100 per cent of the stock of other domestic companies, and consolidated returns should, of course, be accepted from such affiliated groups.

SECTION 150.—RETURNS OF BROKERS.

ARTICLE 841: Return of information by brokers.

REVENUE ACT OF 1928.

Requirement and instructions with respect to filing Forms 1100 and 1100A. (See Mim. 4082, page 90.)

ARTICLE 841: Return of information by brokers.

REVENUE ACT OF 1928.

Extension of time for filing information returns on Form 1100 for 1929 to 1932 by banks, trust companies, and their affiliates. (See Mim. 4099, page 93.)

SECTION 162.—NET INCOME.

ARTICLE 863: Decedent's estate during administration. XII-35-6375 I. T. 2712

REVENUE ACTS OF 1926 AND 1928.

In Pennsylvania the "widow's exemption" is of the same character as the "widow's allowance," the "year's support," or similar allowance provided in the statutes of other States, and takes priority in payment over Federal income tax.

Information is requested whether the "widow's exemption" or allowance, provided by section 8446 of the Pennsylvania statutes, takes priority over income taxes due the United States from the estate of her deceased husband.

Under section 8446, Pennsylvania statutes, the widow (or children forming a part of the family, if there be no widow entitled) may retain or claim either real or personal property, or the proceeds of either real or personal property, belonging to the estate to the value of $500. It is made the duty of the executor or administrator to have the property so retained or claimed appraised and set apart for the use of the widow or children; or, if a claim is made for $500 in money, the executor or administrator is required to set apart that amount from the funds of the estate to the widow or children.

In Pennsylvania the "widow's exemption" is regarded as a substantial right which may be vigorously and completely enforced against the estate. Thus, in *Hill* v. *Hill* (32 Pa. St., 511), where the widow commenced an action against the administrator who had refused to set apart her exemption, the court held that the widow's right to the exemption was paramount to the rights of creditors. Nor is this right of exemption defeated because the property of the husband was levied upon prior to his death under a judgment waiving exemption. (*Beetem & Co.* v. *Getz*, 5 Pa. Super. Ct., 71.) Even as to a lien for city taxes filed against property belonging to the husband and sold to satisfy the indebtedness, the "widow's exemption" was held to be superior to the lien of the city. (*Appeal of City of Allentown*, 109 Pa. St., 75.)

The "widow's exemption" provided by the Pennsylvania law is of the same character as the "widow's allowance," the "year's support," or similar allowance provided in the statutes of other States. The priority of this class of allowances over internal revenue taxes is discussed in I. T. 2430 (C. B. VII-2, 72), I. T. 2518 (C. B. IX-1, 158), and G. C. M. 4217 (C. B. VII-2, 162). While the decisions cited relate to cases of widows domiciled in the States of Missouri, Georgia, and Colorado, respectively, the generally accepted doctrine as to the priority of such statutory allowances is considered and the position of the Bureau in respect to them is outlined.

In view of the foregoing, it is held that the "widow's exemption" in Pennsylvania takes priority in payment over Federal income tax.

SUPPLEMENT G.—INSURANCE COMPANIES.

SECTION 203.—NET INCOME OF LIFE INSURANCE COMPANIES.

ARTICLE 971: Tax-exempt interest and reserve funds.

REVENUE ACT OF 1928.

Interest on coupons of "guaranteed premium reduction policies." (See I. T. 2717, page 94.)

SUPPLEMENT L.—ASSESSMENT AND COLLECTION OF DEFICIENCIES.

SECTION 275.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

ARTICLE 1201: Period of limitation upon assessment of tax. XII–42–6456 Ct. D. 743

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

1. ASSESSMENT—STATUTE OF LIMITATION.

Where a decedent died on May 31, 1928, and a return covering his income from January 1 to May 31, 1928, was filed by his executors on March 15, 1929, accompanied by a request for prompt audit and assessment addressed to the collector, an assessment of additional tax for the above taxable period, made on April 28, 1930, was barred because made after the expiration of the 1-year period provided in section 275(b) of the Revenue Act of 1928.

2. SAME—REQUEST FOR PROMPT ASSESSMENT—TIME AND PLACE OF FILING.

A request for prompt audit and assessment, filed with the return and addressed to the collector, is properly and duly filed, both as to time and place, within the meaning of section 275(b).

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Thomas S. Maffitt, as Coexecutor, and Winifred E. Walsh, as Coexecutrix, of the Estate of Edward J. Walsh, Deceased, appellants, v. *Louis J. Becker, Collector of Internal Revenue, appellee.*

Appeal from the District Court of the United States for the Eastern District of Missouri.

[June 24, 1933.]

OPINION.

BOOTH, Circuit Judge, delivered the opinion of the court.

This is an appeal from a judgment for defendant, appellee, in an action brought by appellants to recover income taxes and interest which were paid by them and which it is alleged were illegally assessed.

A jury was waived and the case tried to the court.

The findings by the court are set out in the margin.[1]

By requests for declarations of law timely made, defendant raised the questions now presented on this appeal. They may be stated thus:

(1) Whether the written request for a prompt audit of the return and a prompt assessment of the tax liability of the decedent, Edward J. Walsh, was properly and duly filed by the executors of his estate, the appellants herein, as provided for in section 275(b) of the Revenue Act of 1928 (45 Stat., 856).

(2) Whether it was the duty and obligation of executors to make and file a return of income received by their testator during the fractional part of a

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[1] FINDINGS OF FACT.

The plaintiffs in this case are the duly qualified executor and executrix under the will of Edward J. Walsh, deceased. The said Edward J. Walsh died May 31, 1928.

For the years preceding the calendar year 1928, Edward J. Walsh had made returns of his income on the basis of the calendar year.

The plaintiffs herein, as executors, made a return of income received by the said Edward J. Walsh for the period from January 1 to May 31, 1928, and included in that return certain profits which the decedent had realized on the sale of securities, but did not, at the time of filing such return, pay the tax on such profit. The profit which was derived from the sale of such securities was included in the assets of the estate of the decedent for the purpose of determining the estate tax, and the estate tax was determined by the value of the estate including such profits.

The income tax return for the period from January 1 to May 31, 1928, as filed by the executors, was filed on March 15, 1929. Attached to said income tax return was a request for a prompt assessment which was signed by said executor and executrix, which request was in the following language:

COLLECTOR OF INTERNAL REVENUE,
St. Louis, Mo.

DEAR SIR: There are filed herewith tax returns by the undersigned as executors under the will of Edward J. Walsh. In accordance with section 275 of the Revenue Act of 1928, we respectfully request a prompt audit of said returns and a prompt assessment of any tax liability that may be asserted thereunder.

(Signed) THOMAS S. MAFFITT,
(Signed) WINIFRED E. WALSH,
Executors under the will of Edward J. Walsh.

Said request for a prompt assessment being attached to the return was filed with the collector of internal revenue at St. Louis simultaneously with and attached to the return on March 15, 1929.

On April 28, 1930, and more than one year after the above request was so filed, the Commissioner of Internal Revenue assessed an additional tax of $7,156.55, plus interest thereon in the sum of $487.53 and notified the plaintiffs herein of such assessment. Thereafter, and on May 3, 1930, the total sum of $7,644.08 was paid to the defendant as collector by the plaintiffs herein. Thereafter a claim for a refund of said amount was made, which claim was subsequently denied by the Commissioner of Internal Revenue. Thereafter this suit was filed for the recovery of such claim.

No persons other than the plaintiffs herein, as the executor and executrix under the will of Edward J. Walsh, are the owners of the claim herein asserted or interested therein; no assignments or transfer of the claim herein asserted, or any part thereof, or interest therein, has been made.

CONCLUSIONS OF LAW.

First: The request for prompt assessment was not binding in law as a compliance with section 275(b) and did not limit the time within which an assessment of additional tax might be made to one year from the date that said return was filed.

a. Because it was not filed after the return was made, but contemporaneously, and

b. Because it was not filed with the Commissioner of Internal Revenue, but filed with the collector.

Second: Under the Revenue Act in force in 1928 and 1929, the plaintiffs in this case were required to make two returns of income for taxes for the year 1928, to wit, one for income received by the decedent for the last five months of his life, that is, from January 1 to May 31, 1928, inclusive, and a separate return for his estate in their hands during the seven months from June 1 to December 31, 1928, inclusive.

Third: The levy and assessment of taxes against income received by the decedent from January 1 to May 31, 1928, being the portion of the year that the decedent lived, is the assessment of an income tax for a taxable year.

Fourth: The regulations promulgated by the Commissioner of Internal Revenue requiring executors to make a separate return for a decedent for that portion of a taxable year that the decedent had lived, are valid and proper, and the levy and assessment of an income tax by the Commissioner of Internal Revenue for such period of time, as constituting a taxable year, are within the limits of congressional enactment and are valid and effective.

Fifth: An executor under the will of a decedent is a fiduciary for the decedent within the meaning of that term as used in the Revenue Act of 1928.

Sixth: Although the property was included in the assets of the estate of Edward J. Walsh at the time of his death and was subjected to the estate tax, if such property had been received as profit by the said Edward J. Walsh in the year during which he died, such profit is income to him and is to be taxed as such, and the imposition of income taxes and estate taxes on the same property, at different times and in the hands of different persons, although they be imposed within the same year, is not objectionable on the ground that such imposition of income taxes and estate taxes against the same property is double taxation.

year that their testator had lived; and whether there was liability for a tax on income for such fractional part of a year.

(3) Whether profits derived by the decedent, which profits were included in and formed a part of the assets of the decedent for the purpose of the estate tax, and were subject to taxes as corpus, were also taxable as income during the same year.

The first of these questions calls for a construction of the statute referred to. It reads so far as here directly involved as follows:

"(b) *Request for prompt assessment.*—In the case of income received during the lifetime of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of two years after the return was filed."

Paragraph (a) of the same section reads as follows:

"(a) *General rule.*—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

By comparison of paragraphs (a) and (b), the purposes of the latter are apparent. One purpose was to shorten the time from two years to one year for assessing the tax where income had been received during the lifetime of the decedent, but subsequent to his last return. To secure such shortening of the time, there were two prerequisites: (1) the filing of a return; (2) a request by the executor or administrator for prompt audit and assessment. A return was necessary in order that the auditing and the assessing officers might have information upon which to work; a request was necessary in order that the officers might know that the statute shortening the time for assessment was invoked.

If filing the request sets the 1-year limitation running, common fairness would suggest that the request should not be filed before the return is filed. But the moment the return is filed, the material upon which to work is furnished and no good reason is suggested why the request should not be filed at once. The words of the statute "filed after the return is made" are satisfied, so far as purpose is concerned, if the filing of the request takes place *not before* the return is made. Such construction of the words "filed after the return is made" is apparently in accord with the views of the officers charged with the execution of the statute. In Regulations 74 of the Treasury Department relating to income tax under the 1928 Revenue Act, we find in article 1201 the following statement (page 307):

"The request, in order to be effective, must be made after the return is filed."

And in article 1202 the following statement, referring to the request (page 309):

"* * * nor is it of any effect if made before the return is filed."

A similar statement is found in Regulations 65 under the Revenue Act of 1924.

In the case of *Nichols* v. *Lee* (16 Colo., 147) the court had before it section 3577 of the Colorado General Statutes of 1883 which provided as follows:

"Whenever, after inventory and appraisement therein, as herein provided, it shall appear that the personal estate of any decedent is insufficient to discharge the just debts * * * resort may be had to the real estate."

In discussing the statute, the court said:

"The words 'after inventory and appraisement' can properly be taken only as a *designation of the time at which, or before which*, the administrator may not make his application." [Italics ours.]

Even if the words "filed after the return is made" are held to require a definite sequence of acts, yet the case at bar does not show failure in respect to such sequence. Where acts are required to be done in a certain order and they are done on the same day, it will be presumed that they are done in the order required. (62 C. J., page 979; *Deal* v. *Anderson*, 165 Ga., 416; *Revill's*

Heirs v. *Claxon's Heirs*, 12 Bush (Ky.), 558; *Ferris* v. *Chic-Mint Gum Co.*, 7 Del. Ch., 270; *Knowlton* v. *Culver*, 2 Pinney (Wis.), 243.)

But it is contended that the request for prompt audit and assessment was not filed with the proper officer; that it should have been filed with the Commissioner of Internal Revenue and not with the collector.

It is to be noted that the statute does not specify with what officer the request shall be filed; nor do the regulations. This is an important fact to be considered.

It is next to be noted that the collector is the revenue officer with whom the average taxpayer most commonly comes in contact; the return is filed with him; he is required to audit the return and if mathematical errors are discovered, to notify the taxpayer; notice and demand for payment, in case deficiency is established, come to the taxpayer from the collector. To the average taxpayer, the collector is the representative of the taxing and collecting authority.

It is further to be noted that a request for prompt audit and assessment filed with the collector reaches the persons required to be prompt more quickly than if filed at Washington with the Commissioner. An examination of article 451 of Regulations 74 of the Treasury Department relating to income tax will show that an audit of the return is made by the collector, and a survey and classification is made by revenue agents detailed from the offices of internal revenue agents in charge, before the return is forwarded to Washington. Promptness on the part of these officials is just as essential to the carrying out of the provisions of the statute as is promptness on the part of officials at Washington or elsewhere through whose hands the return passes. Time is accordingly saved by filing the request for promptness with the collector instead of with the Commissioner.

It is still further to be noted that at the time the request for prompt audit and assessment in the case at bar was left with the collector, his attention was called to it, and he received and retained it without disclaimer of authority to receive and file it.

Finally, the well-known rule of construction of tax statutes should be applied: that where the language of the statute is uncertain, it should be construed favorably to the taxpayer. (*Gould* v. *Gould*, 245 U. S., 151.)

In that case the court in its opinion said (page 153):

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

The case of *Mutual Lumber Co.* v. *Poe* (44 F. (2d), 922, and 50 F. (2d), 1079), relied upon by appellee, is not in point because in that case the statute involved expressly required that the notice under consideration should be filed with the Commissioner.

Our conclusion is that the request for prompt audit and assessment was properly filed, both as to time and place, and that the assessment was made after the statutory limitation had expired and was, therefore, invalid.

We find it unnecessary to discuss the other questions presented on this appeal.

The judgment is reversed with instructions for further proceedings not inconsistent with the views herein expressed.

SUPPLEMENT O.—OVERPAYMENTS.

SECTION 322.—REFUNDS AND CREDITS.

ARTICLE 1254: Claims for refund by taxpayers.

REVENUE ACT OF 1928.

Refund claims and amendments thereto. (See Mim. 4092, page 96.)

TITLE IV.—ADMINISTRATIVE PROVISIONS.

SECTION 606.—CLOSING AGREEMENTS.

ARTICLE 1301: Closing agreements relating to tax liability in respect of internal-revenue taxes. XII–30–6305 Ct. D. 705

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

1. SUIT—CLOSING AGREEMENT—VALIDITY—ABSENCE OF CONSIDERATION.

A "closing agreement" under section 606 of the Revenue Act of 1928 constitutes a statutory bar to an action at law to recover any part of the taxes covered by the agreement (where there is no showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment made), even though there was no consideration for the agreement.

2. CLOSING AGREEMENT—VALIDITY—APPROVAL BY ACTING SECRETARY.

Approval of a "closing agreement" by the Acting Secretary of the Treasury constitutes an approval by the Secretary of the Treasury within the meaning of section 606 of the Revenue Act of 1928.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

William F. Perry et al., Trustees, v. *Frank A. Page, Collector of Internal Revenue.*

[April 21, 1933.]

OPINION.

LETTS, J.: This is an action at law, with jury trial waived, brought by the surviving trustees under the will of one Frank B. Hazard, deceased, to recover the sum of $11,123.04, representing taxes paid by the estate for the year 1927.

It is alleged that this tax was erroneously assessed and collected upon income of the estate which, under the terms of the will of the decedent, was to be used exclusively for charitable purposes and should have been deducted from gross income as not taxable under the provisions of sections 214 and 219 of the Revenue Act of 1926.

To this claim the defendant has set up as a bar to the action a closing agreement executed in April, 1929, by the plaintiff trustees and by the Commissioner of Internal Revenue. This agreement, which is set out on a form customarily used for that purpose, carries upon its face the following:

"The above agreement has been approved by the Secretary of the Treasury in accordance with the provisions of section 606 of the Revenue Act of 1928, the approval being specifically enumerated on Schedule No. 1980, dated April 23, 1929."

This certificate appears to have been indorsed "Mr. Bond, Act'g Sec't'y."

Turning to Schedule No. 1980 introduced as an exhibit, we find another form instrument customarily used in the office of the Commissioner of Internal Revenue bearing date of April 23, 1929, addressed to the Secretary of the Treasury and purporting to submit for his consideration, and requesting his approval of, the action of the Commissioner of Internal Revenue in entering into the settlement agreement here involved. At the foot of this instrument appears the following notation:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"*April 27, 1929.*

"Approved:
"HENRY HERRICK BOND,
"*Acting Secretary of the Treasury.*"

The plaintiffs have set up in reply, and by way of avoidance of the legal effect of this settlement agreement, the following contentions:

First. That the entire amount of the tax collected being imposed upon income which had been set apart for charitable purposes under the terms of decedent's will, there was no color of lawful right or claim on the part of the Government to assess or collect the tax and that, therefore, there was no consideration for the settlement agreement entered into.

Second. The plaintiffs contend that section 606 of the Revenue Act of 1928 requires that any settlement agreement must be approved by the Secretary or Undersecretary of the Treasury, in person, before the agreement becomes binding and that the exhibit, Schedule 1980, bearing the aforementioned indorsement by Henry Herrick Bond, Acting Secretary, does not establish the necessary approval of the agreement by the Secretary or Undersecretary.

The plaintiffs' third and fourth replications to the defendant's plea allege that the settlement agreement was entered into through the malfeasance of the Commissioner of Internal Revenue and by reason of misrepresentation of a material fact by him, or his agents and servants, and was, therefore, not binding upon the plaintiffs. At the trial of the case no serious effort was made to sustain either of these allegations and it is affirmatively found that there was no malfeasance or misrepresentations either by the Commissioner or his agents and servants, within the meaning and intendment of section 606 of the Revenue Act of 1928.

The only two real issues involved are, therefore, in regard to the need and adequacy of consideration for the agreement and, secondly, whether the record, as above summarized, discloses an approval by the Secretary of the Treasury within the meaning of said section 606.

At the very outset of the consideration of a suit of this character, one is concerned with the query of whether or not the tax in question was, in whole or in part, improperly assessed and collected. The conclusion arrived at in that connection does not, however, necessarily control the result to be reached after giving legal effect and consideration to the subsequent voluntary, although perhaps mistaken, acts of the parties. I am satisfied from a study of the provisions of the decedent's will and the testimony and other exhibits presented that, were it not for the intervention of the settlement agreement, the plaintiffs here would be entitled to a recovery of the full amount of the tax in question. (*Slocum et al.* v. *Bowers*, 15 Fed. (2d), 400; *Bowers* v. *Slocum*, 20 Fed. (2d), 350, Treasury Decision 4122, C. B. VII–1, 247.)

If this conclusion be correct, it is clear that the Government on its part in entering into the settlement agreement neither gave up nor surrendered anything. There is nothing in the record to suggest either a desire or intention to pursue further investigation or make any additional assessments upon the income of the estate for the year 1927. There was no surrender of any right or claim on the part of the United States by agreeing to retain the full amount of $11,123.04. The only apparent colorable controversy which existed between the parties was the claim of the plaintiffs that a refund of the full amount should be made and the contention by the Government that no additional refund should be made, there having been refunded in March, 1929, a small amount of the original collection.

Counsel for the defendant dwell in their brief and argument upon the fact that in 1927 a portion of the estate income, upon which the tax was imposed, had not, during 1927, been specifically allocated or designated under the will to a specific beneficiary. This fact is emphasized to support the contention that as of the time the settlement agreement was signed the Government did have a colorable claim to a part, at least, of the tax assessed. The quieting of this difference is presented as a legal consideration for the agreement. It is difficult to discern, however, even if there were a colorable basis for the Government's contention, how the settlement of an argument over a portion could constitute a consideration running to the plaintiffs for acquiescence in the retention by the Government of the whole. The Government, by entering into the settlement agreement, made no compromise, no surrender, of any disclosed colorable legal right. There was given no consideration for the commitment of the taxpayer in the sense "consideration" is employed in the law of contracts.

What then is the effect of this lack of consideration upon the validity of the settlement agreement? In my opinion, there is none. There is a stated period within which the taxpayer or the Government may sue, or be sued, in respect to income taxes. In one situation, the taxpayer may, by voluntary consent, cause this period to be extended. This act on the taxpayer's part is, for conven-

lence, called a waiver. In another situation, if both parties voluntarily consent to a final statement of the tax account and if this consent be evidenced by a written instrument and approved by the Secretary or Undersecretary of the Treasury in manner specified in said section, the effect of such voluntary and concurring acts is to shorten the period. The legal significance of such action on the part of the taxpayer and the designated officials of the Government is neither dependent upon, nor altered by, either the accuracy or fairness of the resulting tax burden. This procedure, requiring as it does the concurring action of both parties, results in what is called a "settlement agreement." The effect of such an agreement is stated by the statute. The acts take on legal significance and radiate consequences, not because of the principles of contract law, but because of statutory specification within a legislative field which permits a sovereign to control and designate how, when and where it may be sued.

In the case of *Aetna Life Ins. Co.* v. *Eaton* (43 Fed. (2d), 711, 714 [Ct. D. 225, C. B. IX–2, 263]), Hand, J., in referring to the character and effect of a closing agreement, said:

"We are clear that by the closing agreement the parties in fact intended to settle all questions relating to the validity of the assessments for 1923 and 1924, and that, irrespective of this, the Revenue Act made the agreement a *statutory bar.*"

In the case of *Bankers' Reserve Life Co.* v. *United States* (42 Fed. (2d), 313, 316), the Court of Claims in an opinion written by Littleton, J., sustaining a demurrer to the declaration, held that that court was without jurisdiction to entertain a suit to recover income tax after a settlement agreement had been entered into. The court said:

"Congress thus expressly *authorized the parties by agreement to shorten the period of limitation* for the determination, assessment, and collection of a tax and for the filing of claims for refund, abatement, credit, and the institution of suit for the recovery of the amount paid."

Some of the authorities examined seem to toy with the notion that in dealing with these settlement agreements a guide may be found by turning to the law of contracts. I am convinced, however, that that is not the case. We are dealing with acts, the legal significance of which may be arbitrarily stated by Congress so long as there is no constitutional conflict. These consequences as stated are:

"(1) the case shall not be reopened as to the matters agreed upon * * *

"(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

I find that there was no consideration running from the Government to the taxpayer incident to the stipulation here presented as a settlement agreement, but that such absence of consideration does not alter its conclusive and binding effect.

The question yet remains as to whether the settlement agreement was executed in all respects in compliance with the statute so as to constitute an insuperable bar to recovery in this action. No issue is raised in regard to the sufficiency of the form of the instrument. There is no contention that it was not properly and timely signed by the plaintiffs in this case. The testimony of former Commissioner Blair in identifying his signature clearly establishes a prima facie case that the settlement agreement was timely and properly executed by him.

Paragraph (b) of section 606 of the Revenue Act of 1928 provides, in addition to the execution of the agreement by the taxpayer and the Commissioner or his subordinate, as follows:

"If such agreement is *approved* by the Secretary, or the Undersecretary, within such time as may be stated in such agreement," etc.

The agreement carries upon its face a certificate certifying that it has been approved by the Secretary of the Treasury, dated April 23, 1929, and carries the notation of "Mr. Bond, Act'g Sec't'y, April 27, 1929." The last clause of this certificate is as follows: "the approval being specifically enumerated on Schedule 1980." Turning to this schedule, we find a communication addressed to the Secretary of the Treasury, bearing date April 23, 1929, requesting his approval of the settlement agreement. This schedule or communication purports to be signed by Mr. Blair, then Commissioner. Upon this schedule appears a notation dated April 27, 1929, "Approved: Henry Herrick Bond, Acting Secretary of the Treasury."

The plaintiffs contend that, under the statute, the approval must be given by the person who is in fact Secretary of the Treasury, or the person who is in fact Undersecretary of the Treasury; that these documents signed by Mr. Bond, as Acting Secretary, are insufficient and that, therefore, the agreement never became binding upon the plaintiffs or a bar to this action.

Counsel for the plaintiffs, in tracing the legislative history of the section of the statute involved, disclose support for their contention, at least to the extent that it was the intention of Congress that these agreements should not be passed upon by minor subordinates, but should have the approval of one of the two major officials of the Department. It will be noted, however, that the statute does not require the signature or approval in writing by these officials. It conditions the binding effect of the agreement only upon their approval. I am of the opinion that the interpretation of the intendment of this requirement should not be so technical or strictly construed as to be at times unworkable and impractical. After all, Government must go on and it can scarcely be assumed that Congress intended, in event of absence or disability of the Secretary and Undersecretary, with an acting and designated head of the Department in charge, that the machinery of government in any respect should be brought to a standstill. No question is raised that Mr. Bond was at the time Acting Secretary of the Treasury; no doubt is raised in respect to the fact that the agreement here involved was approved by Mr. Bond and as Acting Secretary of the Treasury. It may reasonably be assumed, in the absence of any evidence to the contrary, that the Secretary of the Treasury approved the official acts of him who was the acting head of his Department. Not that he approved in the sense that the matter was specifically brought to his attention and that he, by word or deed, gave express and specific approval thereto, for there is no evidence that such was the case, but the Secretary may be deemed to have generally approved all official acts of the Acting Secretary. Assuming, however, that there was in this case no personal approval, general or specific, by either the Secretary of the Treasury, in person, or the Undersecretary, in person, I am satisfied that the requirements of the statute were met by the approval of the agreement by him who was the acting head of the Department.

The necessity of thus giving a practical interpretation to the specific requirements of a congressional act, in regard to how and by whom an official duty must be discharged, is reviewed in the early case of *Williams* v. *United States* (1 How., 290). (See also *Roxford Knitting Co.* v. *Moore & Tierney, Inc.*, 265 Fed., 177; *United States* v. *Blendauer*, 122 Fed., 703, 707; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S., 351.)

The authorities cited by counsel for the plaintiffs, such as that of the *Botany Worsted Mills* v. *United States* (278 U. S., 282 [Ct. D. 39, C. B. VIII–1, 279]), in support of the contention that "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode," deal with a totally different problem and the general language employed must be considered in the light of the specific issue involved. I have been able to find no authority, and none have been cited, which would justify the contention that the acting head of an executive department may not discharge the duties of government delegated to or imposed by law upon the titular head of that department.

I find, therefore, that the settlement agreement pleaded in bar to this action was properly executed and properly approved, and constitutes a bar to any recovery in this suit.

Judgment may be entered for defendant.

SECTION 610.—RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

SECTION 610. XII–28–6283
Ct. D. 699

INCOME TAX—REVENUE ACTS OF 1921 AND 1928—DECISION OF COURT.

1. SUIT—MONEY PAID BY MISTAKE.

Where it was the understanding of both the taxpayer corporation and the Government that an overassessment against the corporation for the year 1918 should be credited with a tax owing by its subsidiary for the year 1917, but through error the entire amount

was refunded in 1923, suit brought by the Government in 1927 was not barred by the statute of limitations, since the action was not for collection of the unpaid tax, but for the recovery of money paid by mistake.

2. DUTY IMPOSED BY STATUTE.

Section 252 of the Revenue Act of 1921 imposes upon the Government the duty, when refund is allowed for a given year, of deducting therefrom a tax due for any other year, and is a public law of which taxpayer was charged with notice. With the known duty of making the deduction goes the reciprocal duty on the part of the taxpayer of not retaining a refund from which deduction of any other tax due and unpaid has not been made.

3. DECISION AFFIRMED.

The decision of the District Court, Southern District of Illinois (52 Fed. (2d), 666), affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Woolner Distilling Co., appellant, v. *The United States of America, appellee.*

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

Before ALSCHULER and SPARKS, Circuit Judges, and WILKERSON, District Judge.

[December 29, 1932.]

OPINION.

ALSCHULER, Circuit Judge: The appeal is from a judgment against appellant for money alleged to have been paid it by appellee through mistake.

The facts appear by stipulation. April 1, 1918, appellant's subsidiary filed with the United States collector of internal revenue at Pittsburgh, Pa., its income and profits tax return showing $2.457.96 due for 1917, which tax was assessed accordingly. October 9, 1918, the taxpayer filed through the collector's office a claim for abatement of that assessment, which claim the Commissioner of Internal Revenue rejected December 26, 1922; but the tax remained unpaid. April 29, 1919, the taxpayer filed its return for the year 1918, reporting a tax of $5,994.86, which amount was assessed against it and was paid to the same collector. Subsequently, on audit and review of the last-named return, the Commissioner determined that the taxpayer owed no tax for the year 1918, and issued the usual certificate of overassessment and refund in favor of the taxpayer for the 1918 tax of $5,994.86, and listed it with the collector at Pittsburgh in December, 1922, notifying the taxpayer accordingly. Shortly after allowance of refund for the 1918 tax, under date of January 2, 1923, the taxpayer, by his attorneys, sent the Commissioner, who duly received it, this letter:

"I have the honor to respond, on behalf of the Duquesne Distributing Co., Pittsburgh, Pa., to your letter addressed to it under date of December 26, 1922, wherein you rejected claim for abatement in the amount of $2,457.96 heretofore filed by that company. It appears from your letter dated November 25, 1922, that the Duquesne Distributing Co. was overassessed for 1918 in the amount of $5.994.86. It further appears in your letter of December 26, 1922, that in your opinion you can not under the pertinent letter and regulations permit the offsetting of the latter overassessment against the claim for abatement first referred to.

"The company has no objection to disallowance of the claim for abatement in view of the circumstances that have transpired since it was filed, provided that the amount of the overassessment for 1918 is credited to it or to the Woolner Distilling Co., in some manner which may be conceived proper by you.

"Very truly yours,

"CROCKER, JOHNSON & SHORES,
"LYLE T. ALVERSON."

The requisite and customary notification of the overassessment and overpayment of the 1918 tax and of the disallowance of taxpayer's contention respecting the 1917 tax was duly placed on file in the collector's office, but, through some unexplained blunder, the Government's check for the *entire* amount of the refund for the 1918 tax was issued, and on February 10, 1923, was sent to the taxpayer, and was paid February 19, 1923. Later the alleged error in failing to deduct the unpaid 1917 tax was called to the taxpayer's attention, but the amount was not paid or refunded to the Government. The suit was brought in 1927, and the declaration charged that the failure to deduct from the payment to the taxpayer the amount of the 1917 tax was through mistake, and demanded judgment accordingly. Jury was waived, and upon the stipulated facts the court gave judgment for appellee.

The defense to the action is that the suit, in essence, was for the collection of the unpaid 1917 tax, and that the action therefore was barred by the statute of limitations, since it was not commenced until more than five years after the taxpayer's return for the 1917 tax. (Section 250(d), Revenue Act of 1921; 42 Stat., 265.)

It is conceded that this is the only way in which any statute of limitations is here involved, and that, if this is in fact a suit to recover money paid out by mistake, and not a suit to collect the 1917 tax, there is no defense to it.

Section 252 of the Revenue Act of 1921 (42 Stat., 268) specifies that where a refund is allowed for the tax of any year there *shall* be deducted therefrom whatever, if any, tax is due the United States for any other year, and the balance only be refunded. This is a public law of which every person is supposed to be aware and must take notice, and appellant must be held to have known at the time it received the refund of the 1918 tax that it was then the duty of every person connected with the refunding of the tax to deduct therefrom the unpaid 1917 tax.

With the known duty of making the deduction goes the reciprocal duty on the part of the taxpayer that he do not take or receive from the Government the refund from which there is not deducted the amount of any other tax then due and unpaid. That those acting for the Government did not deduct it most clearly indicates a mistake. That appellant *mistakenly* received and retained it is the only conclusion which can be drawn without impeachment of appellant's good faith.

But the stipulation itself dispels any doubt respecting mistake in the payment. It recites the applicable statutes and the Treasury regulations which make clear the duty respecting the deduction, and specifies in several places that the payment without the deduction was made through inadvertence, error, or mistake.

But, regardless of the statutes, the conduct on both sides makes it evident that the intention and understanding of both was that the 1917 tax would be deducted, and payment made only of the difference. The letter of January 2, 1923, to the Commissioner from the attorneys for taxpayer makes it plain that the taxpayer expected the deduction of the 1917 tax to be made. The limitation upon collection of that tax had not then expired, and this conduct of the parties evidences their willingness and their understanding that the deduction would be made, and the difference only paid, and of itself sufficiently manifests the mistake in making the payment without the deduction. Section 610(b) of the Revenue Act of 1928 (45 Stat., 875) specifically authorizes the bringing of actions by the Government for money paid out by it through mistake.

Conclusive reply to the taxpayer's assertion that this is in fact a suit for the 1917 tax is the fact that it is nothing of the kind. It is a suit for just what it purports to be—the recovery of money paid by mistake. If the evidence to support this action consisted only of the showing of the unpaid 1917 tax, then, wholly apart from the statute of limitations, the action would fall for want of proof to sustain it. An action specifically brought for money paid by mistake would not be supported by mere proof of an unpaid tax. Appellant can not be permitted to dictate the sort of action to be brought against it. Appellee chose to bring suit to recover payment which it made by mistake to appellant, and we are satisfied that the evidence fully sustains the judgment rendered.

Affirmed.

SECTION 611.—COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

SECTION 611. XII–33–6342
Ct. D. 716

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

CLAIM IN ABATEMENT—SUFFICIENCY.

A document entitled "Claim for abatement," filed by plaintiff on August 31, 1920, requesting that assessment of additional tax for 1918 be abated on the ground that it was without warrant of law and illegal, is a claim in abatement within the meaning of section 611 of the Revenue Act of 1928. That section does not require that the claim shall fully comply with the statute and the regulations, but contemplates any claim filed for the purpose of abating the tax and which operates to stay collection.

COURT OF CLAIMS OF THE UNITED STATES. No. L–290.

H. S. Eckels & Co. v. *The United States.*

[June 5, 1933.]

OPINION.

LITTLETON, Judge, delivered the opinion of the court.

The only question in this case is whether a document filed by plaintiff August 31, 1920, entitled "Claim for abatement," asking that the entire additional assessment of $6,136.88 be abated on the ground that the assessment was without warrant of law and illegal, was a claim in abatement within the meaning of section 611 of the Revenue Act of 1928, which provides that if any tax was assessed prior to June 2, 1924, and within the period of limitation properly applicable thereto and "if a claim in abatement was filed, * * * and if the collection of any part thereof was stayed," the payment of any part of such tax shall not be considered as an overpayment. We think the claim for abatement filed comes within the provisions of section 611. This section does not require that the claim in abatement contemplated therein shall be a claim fully complying with the statute and the regulations of the Treasury Department, but contemplates any claim which may be filed having for its purpose the abatement of the tax which operates to stay collection of the tax assessed. The fact that collection of tax had been stayed by some act of the taxpayer was the reason for the provision that a late collection should not be regarded as an overpayment.

It is stipulated and we have found as a fact that collection of the tax was stayed by the filing of the claim for abatement. The case, therefore, comes within the plain provisions of section 611 and the petition must be dismissed. It is so ordered.

SECTION 611.

REVENUE ACT OF 1928.

Abatement claim filed, collection stayed, but collection made after expiration of period. (See Ct. D. 751, page 209.)

SECTION 614.—INTEREST ON OVERPAYMENTS.

SECTION 614. XII-32-6332
Ct. D. 713

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

INTEREST ON OVERPAYMENTS—SETTLEMENT OF WAR CLAIMS ACT.

Section 24(e), Trading with the Enemy Act, as amended (as amended by section 18, Settlement of War Claims Act of 1928), limiting the payment of interest on the refund of internal revenue taxes imposed in respect of property in the hands of the Alien Property Custodian, was not repealed by section 614 of the Revenue Act of 1928, the latter Act being general legislation relating to taxes.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

United States Ex Relatione I. G. Farbenindustrie Aktiengesellschaft, appellant, v. *David Burnet, Commissioner of Internal Revenue; Ogden L. Mills, Secretary of the Treasury; W. O. Woods, Treasurer of the United States; and Howard Sutherland, Alien Property Custodian.*

Appeal from the Supreme Court of the District of Columbia.

[April 10, 1933.]

OPINION.

VAN ORSDEL, Associate Justice: This appeal is from a judgment of the Supreme Court of the District of Columbia, dismissing appellant's petition for a writ of mandamus to compel the Commissioner of Internal Revenue to compute and allow, and to compel the Treasurer of the United States to pay to the Alien Property Custodian, interest on a tax refund which was made to the Alien Property Custodian for appellant's account in May, 1929.

It appears that in 1918 the Alien Property Custodian seized the capital stock of an American corporation, held by three individuals as trustees for a German corporation. The petitioner is the successor in interest of the German corporation. After the seizure by the Alien Property Custodian he sold the stock for $5,296,332, which amount was deposited in the Treasury of the United States in an identified trust account.

On March 15, 1924, internal revenue taxes assessed against the three individual trustees, from whom the stock was seized, in the amount of $3,262,268.91, were paid by the Alien Property Custodian out of moneys deposited in the trust account. The Custodian filed a claim for refund of the taxes so paid, which claim was allowed, and the full sum was repaid to the Custodian on March 15, 1929, but no interest was paid thereon.

This suit is to compel the Commissioner of Internal Revenue to compute the interest on said taxes from 1924 to 1929, and to require the Treasurer of the United States to pay the same to the Alien Property Custodian. To the petition, setting forth in substance the above facts, the respondents answered, admitting the facts but challenging the jurisdiction of the court on the ground that mandamus is not a proper remedy, and challenging the right of the petitioner to the payment of interest on its claim. Petitioner demurred to the answer. The demurrer was overruled, and petitioner, electing to stand upon its demurrer, a judgment was entered dismissing the petition, from which this appeal was taken.

We think this case can be disposed of on the single question of the right of the petitioner to recover interest for the period during which the money paid, as a tax, was in the possession of the Government. Petitioner contends that its case comes within the provisions of section 614 of the general Revenue Act of May 29, 1928 (45 Stats., 791, 876), which provides as follows: "(a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum, as follows: * * * (2)

In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner."

Respondents rely upon the provisions of section 18 of the Settlement of War Claims Act of March 10, 1928 (45 Stat., 254, 276), which reads as follows:

"(e) In case of any internal-revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax."

It is contended by the petitioner that the later general Revenue Act of May 29, 1928, operates to repeal by implication the provisions of section 18, supra. This contention, we think, is untenable on several grounds. The Settlement of War Claims Act was in the nature of special legislation, relating to alien property seized and in the hands of the Alien Property Custodian, and providing for the disposition thereof; while the general Revenue Act of 1928 was general legislation, relating to the collection of income taxes by the National Government. It is elementary that a special statute relating to a particular subject, in the absence of manifest inconsistency, will not be repealed by the mere enactment of a later general statute, relating to the same subject, unless the later Act specifically provides for the repeal of the earlier Act, or for a general repeal of all Acts relating to the subject.

The Acts here in question were passed at the same session of Congress, and but a short time intervened between the passage of the Settlement of War Claims Act and the general Revenue Act. In Lewis' Sutherland on Statutory Construction, second edition, volume 1, section 268, the author under the head of acts passed at the same session says:

"The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. In the first case it would manifestly be an inadvertence, for it is not supposable that the legislature would deliberately pass an act with conflicting intentions; in the other case the presumption rests on the improbability of a change of intention, or, if such change had occurred, that the legislature would express it in a different act without an express repeal of the first."

And, in reference to the construction to be placed upon such statutes, passed at the same session of the legislature, the same author continues:

"Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in *pari materia*. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session."

Applying the above rule to the Acts here in question, we find no difficulty in disposing of petitioner's contention. The Settlement of War Claims Act was dealing with property over which Congress had absolute and complete control. The alien petitioner had no legal or constitutional claim to recover any part of the seized property, except through the generosity of Congress. Congress, therefore, in dealing with the subject of interest on taxes to be refunded on such property, was legislating alone in respect of that class of property and of that class of ownership.

On the other hand, under the general Revenue Act, Congress was dealing with a matter of taxation upon the property of the citizen, whose constitutional and property rights were involved, and upon which the taxing power could only be exercised under strict rules of general equality. The subject matter of the two Acts was radically different; the class of property involved in the two Acts was radically different; hence there is no legal basis upon which the provisions of the Revenue Act can be held to repeal by implication the interest provisions of the earlier Settlement of War Claims Act.

Though it be conceded that the two Acts treat generally of the same subject, it by no means follows that the later Act may be regarded as repealing by implication the earlier Act. Such an implication arises only where there is

an inconsistency between the two Acts which can not be reconciled. No such inconsistency here exists. In *Rodgers* v. *United States* (185 U. S., 83, 87) the court said:

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

It is unnecessary, however, to apply this strict rule of construction to the present case. Section 24(e) placed a limitation upon the payment of interest on taxes refunded under the Settlement of War Claims Act, which related to the special subject of the settlement of "claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian." The Settlement of War Claims Act embraced all of these subjects, and was in the nature of a final disposition thereof. Congress was here treating with a separate and individual matter unrelated to the Revenue Act of 1928, which contained no reference to the prior Act or sought to repeal any of the provisions contained therein.

With this disposition of the case, it is unnecessary to consider the question of jurisdiction.

The judgment is affirmed.

SECTION 618.—EXAMINATION OF BOOKS AND WITNESSES.

SECTION 618.

REVENUE ACT OF 1928.

Auctioneers engaged in selling stock. (See G. C. M. 12433, page 91.)

INCOME TAX RULINGS.—PART III.

REVENUE ACT OF 1926 AND PRIOR ACTS.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 201.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 1541: Dividends. XII-44-6478
Ct. D. 749

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. DEDUCTION—DIVIDEND FROM DOMESTIC CORPORATION—BUILDING AND LOAN ASSOCIATION.

A sum received in 1924 upon withdrawal from a building and loan association, in excess of the amounts paid in on account of membership fee and stock subscriptions and consisting of accumulated profits, constitutes a dividend within the meaning of section 201(a) of the Revenue Act of 1924, and is deductible from gross income under the provisions of section 234(a)6 of that Act. I. T. 1665 (C. B. II-1, 5) followed.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 1279) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Aaron Ward & Sons, by Liquidating Trustees, respondent.*

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

Before BUFFINGTON, DAVIS, and THOMPSON, Circuit Judges.

[June 8, 1933.]

OPINION.

THOMPSON, Circuit Judge: This is an appeal from an order of redetermination of the Board of Tax Appeals. In March, 1916, the respondent, a New Jersey corporation, subscribed to 1,000 shares of the capital stock of the Fourteenth Ward Building and Loan Association, a domestic corporation. The respondent paid a membership fee of $1 at the time of the subscription and $97,000 in monthly installments of $1,000 each, or an aggregate sum of $97,001. Thereafter it applied to the association for withdrawal of its investment and on March 18, 1924, it received $129,840 from the association in full payment of its stock.

Under the constitution of the association, a member was permitted to withdraw his investment after written notice. Each member was subject to certain fines or penalties for failure to comply with the rules of the association. His investment, including any profits credited to his stock, was subject to a proportionate share of any losses sustained by the association. The profits of the association were computed quarterly and a proportionate amount thereof credited to the shares of each member. A member who withdrew before the termination of the first year of his subscription was entitled to receive the

amounts paid by him, less unpaid fines and his proportion of any loss sustained by the association. A member who withdrew before the termination of any subsequent year of his subscription was entitled to receive the amounts paid by him, plus a percentage of the profits credited to his shares, less unpaid fines and his proportion of any loss. The constitution further provided that the owner of the stock ceased to be a member of the association when his stock matured and was paid. No stockholder could withdraw any amount either of profits or investment except by surrendering his stock for cancellation and terminating his membership.

The respondent withdrew from the association and received $32,839 in excess of the amount paid by it for the stock. The petitioner claimed that this sum was taxable as a gain or a liquidating dividend. The respondent contended, and the Board of Tax Appeals held, that the sum in excess of the amount paid by the respondent for the stock was a dividend from a domestic corporation and, therefore, was exempt from taxation under the provisions of sections 201(a) and 234(a)6 of the Revenue Act of 1924. These sections read:

"SEC. 201. (a) The term 'dividend' when used in this title * * * means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913." (26 U. S. C. A., section 2115 a.)

"SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * * *

"(6) The amount received as dividends (a) from a domestic corporation * * *." (26 U. S. C. A., section 986.)

Cases cited by the petitioner containing a discussion of the meaning of the term "dividend" are not authoritative because Congress has specifically defined the word in the Act and thus made that definition exclusive. The instant case contains all the essentials of a dividend, as defined in paragraph (a) of section 201. Distribution in money was made by the association to one of its shareholders out of profits of the association. The profits in question were necessarily accumulated after February 28, 1913, since the respondent did not become a shareholder until 1916.

The Treasury Department, when ruling in respect to building and loan associations, committed itself to the view that the profits of the association, periodically credited to its members, are to be treated as dividends within the meaning of section 201(a). The ruling of the Internal Revenue Bureau, I. T. 1665, reported in Cumulative Bulletin II–1, pages 5 and 6, reads:

"While not actually distributed, these profits are credited periodically in proportion to the amount of stock actually paid for in the same manner that dividends are credited and paid in the ordinary commercial corporation. The shareholder is entitled to no credits if there are no earnings and such credits vary with the vicissitudes of the business. They are in a very true sense similar to the dividends in other corporations. If such periodical credits were interest on money advanced, they would be fixed in amount and payable whether the corporation had net earnings or not.

"It is held, therefore, that the periodical distributions of earnings on running installment shares of stock paid or credited by a building and loan association to the holders of this class of stock are dividends within the definition of a dividend as set forth in section 201 of the Revenue Act of 1921, in so far as they are out of earnings accumulated subsequent to February 28, 1913."

The association accumulated and invested the dues paid periodically by the members. The profits were derived from investment of the dues and not from the sale of any of the property owned by the association. Profits, when made by the association, were credited regularly to the shares of the members in the same proportion as the number of shares owned by the member bore to the total number of outstanding shares. We think the profits made and apportioned among the stockholders constituted a dividend of profits. This is so although the profits were accumulated until the shares matured, instead of being declared and paid at regular intervals. See *Cary* v. *The Savings Union* (22 Wall., 38).

The order of the Board of Tax Appeals is affirmed.

ARTICLE 1545: Distributions in liquidation.

REVENUE ACT OF 1926.

Transfer of purchase money notes to stockholder upon dissolution of corporation. (See Ct. D. 758, page 174.)

SECTION 202.—DETERMINATION OF AMOUNT OF GAIN OR LOSS.

ARTICLE 1561: Determination of the amount of gain or loss.

REVENUE ACT OF 1921.

An agreement made in 1904 for a contingent compensation realized in 1923. (See Ct. D. 714, page 187.)

ARTICLE 1561: Determination of the amount of gain or loss.

REVENUE ACT OF 1926.

Amendment of article 1561, Regulations 69. (See T. D. 4376, page 117.)

SECTION 204.—BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

ARTICLE 1591: Basis for determining gain or loss from sale. XII–36–6388 Ct. D. 727
(Also Section 208, Article 1651.)

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. BASIS FOR DETERMINING GAIN OR LOSS—SALE OF STOCK.

Where a taxpayer in 1920 and 1921 acquired stock in a corporation organized by him, for which he paid cash, the gain derived from the sale of the stock in 1922 was properly based upon the difference between the cash paid for the stock and the price received upon its sale, in accordance with section 202(a) of the Revenue Act of 1921. Additional assets turned over to the corporation by the taxpayer were properly excluded in determining the cost of the stock, since there was no proof that the corporation ever rendered any consideration therefor. The alleged actual value of the stock, as shown by offers therefor after the corporation was organized, may not be considered as evidence of its value when acquired.

2. CAPITAL NET GAIN—"CAPITAL ASSETS."

Where stock was bargained for in 1920 and issued at different dates, the last block being issued in 1921, in ascertaining whether profit on the sale of all the stock in 1922 was taxable as capital net gain or as ordinary net income the effective date of the taxpayer's stock rights was that of its issuance and not that of the subscription agreement. The stock, not having been held for profit or investment for more than two years, was not a "capital asset" within the meaning of section 206(a)6 of the Revenue Act of 1921.

3. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (22 B. T. A., 1241) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

Mayme C. Sommers, Administratrix, C. T. A., Estate of E. E. Sommers, Deceased, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Before LEWIS, COTTERAL, and PHILLIPS, Circuit Judges.

[February 20, 1933.]

OPINION.

COTTERAL, Circuit Judge, delivered the opinion of the court.

The income tax involved is of the deceased husband of petitioner, for the calendar year 1922. A deficiency was found by the Commissioner, of $16,615.23, as to which there were some adjustments, leaving a net deficiency of $14,531.26. A redetermination was sought before the Board of Tax Appeals and the Commissioner's holding was affirmed. The administratrix now appeals to this court asserting there was error in arriving at the deficiency.

From 1908 to 1920, Sommers was general manager of the Great Western Oil Co., doing business in Colorado, Utah, and Wyoming. Under his management the company acquired a valuable patronage and its affairs prospered. In 1920, he and his associates offered to buy the business for $70,000, but it was sold to Gates Oil Co. for $150,000 and $20,000 was donated to him by the vendor, provided he would cancel his contract with the Gates Oil Co. and not interfere with the sale.

His next enterprise was to organize the Sommers Oil Co., in the same field. He secured the cooperation of the Continental Oil Co., and agreed with it he would subscribe for 60 per cent of the stock of the new company, and the Continental would subscribe for the remainder. The plan was carried out, except for the issuance of a few qualifying shares to directors. The Sommers Oil Co. was organized in 1920. Its books show the capital stock was issued for $100 a share, paid in cash. He paid for his stock, in cash, as follows: July 17, 1920, $12,000; August 24, 1920, $12,000; October 18, 1920, $18,000; February 1, 1921, $12,000; total $54,000. The Continental also paid likewise for its shares.

At the time the Sommers Oil Co. was organized Sommers owned a lease on the property of Neef Bros. Brewing Co., at Denver, Colo., near the tracks of the Denver & Rio Grande Railroad Co., and certain trackage rights secured from that company, suitable for the wholesale business of the oil company. He assigned the lease and trackage rights to the company, but it does not appear that he was paid anything therefor. He also transferred to the new company the account of the Quaker State Oil Co., but it was held by him as president of the new company and belonged to it. That company prospered and did a large business. In November, 1922, he sold his stock in that company for $142,000. In computing his profit on the sale, the Commissioner used as a basis the cost of his stock—$54,000—and computed the gain by deducting that sum from the sale price of the stock. This was in accordance with section 202(a) of the Revenue Act of 1921 (42 Stat., 229), which provides that gain or loss in a sale transaction shall be ascertained on a basis of cost.

But the petitioner contends the proper basis was $129,000, measured by the cash paid and the additional assets turned over to the company for his 60 per cent interest, or the actual value of the stock as shown by bona fide offers therefor after the Sommers Oil Co. was organized.

There are obvious reasons for refusing petitioner's contentions. One of them is that there was no record or proof that the Sommers Oil Co. ever rendered any consideration for the lease and trackage rights transferred by him to the company. The evidence of their value was properly excluded. The only proof is contained in the books of the company, which show the issuance of stock for the cash par value thereof, and this occurred at the dates of the issues, subsequent to the transfer.

An item of good will is relied upon as being exchanged for the stock. But it had been earned by him as a representative of the Great Western Oil Co., belonged to it, passed to the Gates Oil Co., and was not assignable by him, as his property or personal asset, to the Sommers Oil Co. Good will is not susceptible of separate ownership or transfer. It arises only out of a particular business and has no existence apart from it. (*Pfleghar Hardware Specialty Co.* v. *Blair*, 30 F. (2d), 614; *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S., 436; *In re Leslie-Judge Co.*, 272 F., 886.) Another difficulty with the contention is that there was no showing of any transfer of good will to the Sommers Oil Co. It did have the benefit of Sommers's influence and the patrons he had attracted in his connection with the Great Western Oil Co. But, as stated, that good will passed to the Gates Oil Co. There was not and could not be any transfer of it to the Sommers Oil Co.

The petitioner also relies on the value of the stock he acquired from the Sommers Oil Co., and complains of the exclusion of evidence offered to show the stock was worth not less than $250 a share, and his 60 per cent interest in the company was worth not less than $129,000. The evidence was not admissible, in view of section 202(c) of the Revenue Act of 1921, which provides that "no gain or loss shall be recognized unless the property received in exchange has a definite and readily realizable market value." There was no evidence of any market value of the property exchanged for the stock, except the cash paid for it. That was the statutory method of reaching the value of the stock, because the stock could have no market value until it was issued. None of it was for sale. Later offers for the stock were not evidence of such value. (*Sharp* v. *United States*, 191 U. S., 341.) The test would be the value on the organization of the company, and not afterward at the dates shown in the offers of the proof.

Another question remains. The stock was bargained for in 1920, issued at different dates, the last block of 120 shares February 1, 1921, and the sale of all was made in November, 1922. Was that block taxable as a capital net gain as contended by petitioner, or as ordinary net income, as ruled by the Board? It is urged that Sommers's interest was a unit—60 per cent of the stock—and should be construed to have been issued as of the date of the agreement. That agreement was binding on the subscribers, but not the corporation. (*Crosby* v. *Stratton*, 17 Colo. App., 220, 68 Pac., 130.) His investment increased with each issue of stock, and the value of it was not affected by the previous investments. The effective date of his stock rights was that of issuance of the stock. Until that date, there was not a final subscription, and the last stock issued represented no interest theretofore invested in the capital of the company. Section 206(a)6, Revenue Act of 1921, which applies, provides that "capital assets" mean property acquired and held by the taxpayer for profit or investment for more than two years. The stock could not therefore be a "capital asset" within the meaning of that section.

We are of the opinion that the Board of Tax Appeals correctly decided the controversy and its decision is accordingly affirmed.

SECTION 205.—INVENTORIES.

ARTICLE 1611: Need of inventories.

REVENUE ACT OF 1918.

Business of propagation and culture of oysters. (See G. C. M. 12004, page 168, and I. T. 2704, page 169.)

SECTION 206.—NET LOSSES.

ARTICLE 1621: Net losses, definition and computation. XII-33-6343, Ct. D. 717

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

NET LOSSES — TAX-EXEMPT INTEREST — CONSTITUTIONALITY OF STATUTE.

Section 206(a)5 of the Revenue Act of 1926, which requires the inclusion in gross income of tax-exempt interest in ascertaining the amount of net loss, is constitutional, and plaintiff's net loss for 1926, allowed as a deduction from its income for 1927, was properly computed by the inclusion of such interest in gross income, in accordance with the provisions of that section. The deduction of the whole or any part of a loss of one taxable year from the net income of another taxable year is wholly within the discretion of Congress, which has the power to classify according to the fact and to limit the deduction provided in the above section to those taxpayers who actually sustain operating losses, notwithstanding that in determining that fact income exempt from taxation is to be considered.

COURT OF CLAIMS OF THE UNITED STATES. No. M-390.

Philadelphia Fire & Marine Insurance Co. v. *The United States.*

[May 29, 1933.]

OPINION.

LITTLETON, Judge, delivered the opinion of the court.

The computation of the amount of the net loss for 1926 which was allowed by the defendant as a deduction from plaintiff's income for 1927 was in accordance with the provisions of section 206 of the Revenue Act of 1926 and this is not questioned, but plaintiff contends that the entire loss for 1926 of $92,447.31, representing the excess of allowable deductions over its taxable gross income, was deductible from net income for 1927 and that the provisions of section 206(a)5 of the 1926 Act, which requires that such loss be reduced by the amount of interest received free from tax, is unconstitutional and void under the rule laid down in *National Life Insurance Co.* v. *United States* (277 U. S., 508 [T. D. 4206, C. B. VII-2, 296]) and in *Denman* v. *Slayton* (282 U. S., 514 [Ct. D. 318, C. B. X-1, 380]). It is insisted that the tax of $2,391.03 collected for 1927 results alone from the fact that plaintiff received $33,250 from tax-free securities and that it was subjected to greater burdens on its taxable income for 1927 solely because it owned certain income that was exempt from tax. We think section 206(a)5 is constitutional. We fail to see the parallel between the question presented in this case and that decided in *National Life Insurance Co.* v. *United States*, supra, and in *Denman* v. *Slayton*, supra. The tax-exempt interest received in 1926 by plaintiff in this case has never been subjected to tax. Had Congress been so minded, it could have required plaintiff to pay a tax upon its entire net income of $80,491.91 for 1927 and, had it done so, the plaintiff could not complain.

Under our system of taxation each taxable year stands alone and the deduction of the whole or any part of a loss of one taxable year from the net income of another taxable year is wholly within the discretion of Congress and it may constitutionally place any limitation it desires upon such deduction. In providing for the deduction allowable under section 206(a) it was within the constitutional power of Congress to classify according to the fact and to limit the deduction therein provided to those taxpayers who actually sustained operating losses, notwithstanding that in the determination of the fact income exempt from taxation is to be considered. This rule has been followed by the Board in a number of cases upholding the constitutionality of section 206(a)5. In *Warren Steam Pump Co.* (23 B. T. A., 585) the Board said: "Taxable income as defined in the several Revenue Acts is determined on a basis of a

12-month period, except in particular circumstances not necessary to discuss here. A departure from this rule was inaugurated by the so-called net-loss provision of the Revenue Act of 1918, and continued in subsequent Revenue Acts. This provision of the several Acts is not open to all taxpayers, but only those who come within its terms, and the loss to be carried forward must be measured by the terms of the statute, and not otherwise. A glance at the provisions of section 206(a) of the Revenue Act of 1926, with which we are concerned here, discloses a very detailed plan of determining a loss that may be carried forward into another year. We see no reason why Congress in granting this particular boon may not limit it so that the loss to be carried forward is an actual and true loss, and not an artificial one which arises from the exclusion of certain nontaxable income."

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

ARTICLE 1622: Claim for allowance of net loss.

XII–30–6306
Ct. D. 706

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. NET LOSS—AFFILIATED CORPORATIONS—CONSOLIDATED AND SEPARATE RETURNS.

Where an affiliated group of corporations of which the taxpayer corporation was a member filed a consolidated return for the year 1921, disclosing a net loss, the taxpayer may not carry forward into its separate returns for the years 1922 and 1923 the full amount of its separate loss for 1921. Only such proportion of the consolidated net loss as the net loss of each member bears to the aggregate net loss of the group may be applied against the net income of each for the succeeding taxable year.

2. SAME—TAX-EXEMPT DIVIDENDS.

Tax-exempt dividends received by the affiliated group are to be included in gross income for the purpose of determining the amount of statutory net loss to be carried forward into the separate return by the taxpayer.

3. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (21 B. T. A., 997) affirmed.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Kaiwiki Sugar Co., Ltd., appellant, v. *David Burnet, Commissioner of Internal Revenue.*

Appeal from the Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[February 6, 1933.]

OPINION.

MARTIN, Chief Justice: This appeal arises upon a ruling of the Commissioner of Internal Revenue, sustained by the Board of Tax Appeals, ascertaining the net loss shown by a consolidated return made by a group of affiliated corporations, and determining the proportion thereof which one of the affiliated group might carry forward into its separate return for the next succeeding year. The issues call for particular reference to sections 204, 214(a) and 240, Revenue Act of 1921. The Board's opinion is reported in 21 B. T. A., 997.

It appears that for the taxable year 1921 the appellant, Kaiwiki Sugar Co., was a member of an affiliated group of five corporations which submitted a consolidated return of income. The net incomes and net losses of the individual

members of the affiliated group for the year 1921, as finally determined and approved by the Commissioner of Internal Revenue, are as follows:

Names of members of affiliated group.	Amounts of net income or loss from the operation of individual members.	Income from dividends received by each member.	Net income plus dividends or net loss of each member.
Theo. H. Davies & Co., Ltd	[1] $287,207.78	$110,169.40	[3] $397,377.18
Kaiwiki Sugar Co., Ltd	[2] 220,564.20	None.	[4] 220,564.20
Kukaiau Ranch Co., Ltd	[2] 4,131.35	2,107.00	[4] 2,024.35
Davies Bldg. Co., Ltd	[2] 55,484.59	None.	[4] 55,484.59
Pearl City Fruit Co., Ltd	[2] 132,871.71	None.	[4] 132,871.71
Loss exclusive of income from dividends	125,844.07		
Total income received from dividends		112,276.40	
Statutory net loss of affiliated group			13,567.67

[1] Net income. [2] Loss. [3] Income. [4] Net loss.

According to the foregoing table it appears that the appellant taxpayer, if separately considered suffered a net loss in the year 1921 in the sum of $220,564.20; that it received no returns from nontaxable dividends in that year; that the total loss of the affiliated corporations, exclusive of income from nontaxable dividends, was $125,844.07; that the total income received in that year by the group from nontaxable dividends was $112,276.40; and that the statutory net loss of the affiliated group as computed by the Commissioner was $13,567.67. Accordingly no income tax was assessed against the affiliated corporations for the taxable year 1921.

For the taxable years 1922 and 1923 the appellant filed a separate income return, and carried forward as a deduction in this return the full amount of its separate net loss for 1921, to wit, the sum of $220,564.20. This claim was made under section 204(b) of the Revenue Act of 1921. The Commissioner refused to allow this deduction, but permitted a deduction of $6,641.60 for the year 1922, which he apportioned as appellant's net loss as a member of the affiliated group for 1921. This apportionment was accomplished by allotting to each member of the group, which if considered separately would have sustained a net loss, such a proportion of the consolidated net loss as the net loss of the member sustained to the aggregate net loss of the group. No such deduction was allowed to appellant for the year 1923, inasmuch as the net loss thus carried over was absorbed by the return for 1922. This action of the Commissioner was sustained upon appeal by the Board of Tax Appeals, whereupon the present appeal was taken.

Appellant's complaint as set out in its petition filed with the Board, is that the Commissioner in computing its net taxable income for the years 1922 and 1923 refused to allow it to carry forward as a deduction the full net loss separately sustained by it for the calendar year 1921, such net loss amounting as aforesaid to $220,564.20. Appellant therefore prayed that the Board should find it entitled to a deduction in that sum in computing its taxable income for the years 1922 and 1923.

In this court, however, the petitioner's contention is that in computing the portion of the net loss which it could carry forward to the years 1922 and 1923, the nontaxable dividends received by its affiliates should be disregarded, and that the combined loss of the affiliated group should not be reduced by the nontaxable income of any of its members before the apportionment thereof to the several members of the group.

It may be doubted whether the latter question is properly before us upon this appeal, inasmuch as it was not specifically presented to the Board of Tax Appeals. Nevertheless, appellant's several contentions are so closely interrelated that we feel justified in considering them together in this opinion.

Upon a review of the record we are convinced that both contentions of the appellant are erroneous.

It is plain beyond dispute that it was not the legislative intent to permit a member of an affiliated group joining in a consolidated return, to make use of its separate net loss for 1921 as an offset against the net gains of its associate members in that year, thereby reducing the net income of the combined group and at the same time permit it to make use of such net loss as a deduction in its separate return for the years 1922 and 1923. Such a procedure obviously

would result in allowing a double deduction for the net loss of such member of the group, first, as an offset in the consolidated return for 1921, and, second, as a deduction in the subsequent separate return of the member for 1922 and 1923. Therefore appellant's claim for a deduction of its entire net loss for 1921, in computing its income taxes for the years 1922 and 1923, is overruled. (*Swift & Co.* v. *United States*, 38 F. (2d), 365.)

The second contention of appellant is likewise untenable. The computation made by the Commissioner whereby the "net loss" of the affiliated group, to wit, $125,844.07, is offset in part by the addition to gross income of tax-exempt dividends received by the group in the sum of $112,276.40, leaving a statutory net loss of $13,567.67, reaches a correct result according to the terms of the statute. The Commissioner did not err in holding that the tax-exempt dividends should be included in gross income for the purpose of determining the amount of the statutory net loss to be carried forward by appellant. Sections 204 and 240, Revenue Act of 1921. (Cf. *General Securities Corporation*, 23 B. T. A., 130; *Crocker First Nat. Bank* v. *Commissioner*, 26 B. T. A., 1078; *Adams case*, 19 B. T. A., 781; *Schlesinger case*, 5 B. T. A., 943; *Warren Steam Pump Co.*, 23 B. T. A., 585; *Orr* v. *Sembower*, 20 B. T. A., 605.) (See *Woolford Realty Co., Inc.*, v. *Rose, Collector*, 286 U. S., 319 [Ct. D. 493, C. B. XI-1, 154].)

The decision of the Board of Tax Appeals is affirmed.

SECTION 207 (REVENUE ACT OF 1924).—FISCAL YEARS.

ARTICLE 1631 (REGULATIONS 65): Fiscal years ending in 1924. XII-42-6457 Ct. D. 744

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. INCOME—COMPUTATION—CAPITAL NET LOSS—FISCAL YEAR OF PARTNERSHIP ENDING IN CALENDAR YEAR 1924.

Where the taxpayer in his return for the calendar year 1924 showed a capital net loss, but a large ordinary net income partially due to his share in partnership profits for the fiscal year ending in June, 1924, the "other income" for 1924 to which the portion of partnership income subject to 1924 rates shall be added, in accordance with section 207(b) of the Revenue Act of 1924, means the net income on which the tax at regular rates is calculated without the inclusion of capital items, unless such items are brought therein by the operation of section 208 relating to them. Where, as here, separate computation of the capital net losses is to the advantage of the Government and is therefore prescribed, in accordance with section 208(c), the item of capital net loss thus put under the 12½ per centum flat rate can not figure in the computation of the taxes under the regular rates, and the "other income" to which partnership gains are to be added is unaffected by the capital items.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (19 B. T. A., 1928) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

George G. Westfeldt, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals (District of Louisiana).

Before BRYAN, FOSTER, and SIBLEY, Circuit Judges.

[March 13, 1933.]

OPINION.

SIBLEY, Circuit Judge: The taxpayer in his returns for the calendar year 1924 showed a capital net loss, but a large ordinary net income. Part of the

latter was due to his share in the profits of a partnership which had a fiscal year ending in June, 1924. A part of the partnership profits was therefore attributable to business done in 1923, and by section 207(b) of the Revenue Act of 1924 should have tax rates of 1923 applied to it in computing the taxpayer's 1924 taxes. The specific provision here important is, with parentheses added, "In such cases the part of such income (that derived from the partnership) subject to the rates in effect for the most recent calendar year (1924) shall be added to *the other income* of the taxpayer subject to such rates (those of 1924) and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year (1923) shall be placed in the next higher brackets of the rate schedule applicable to such year." The sole dispute is whether the item of capital net loss is to figure in the "other income" above italicized so as to reduce the net income for 1924 to which the partnership income attributable to 1923 is to be added, or whether the capital net loss is to be set apart entirely except to take 12½ per centum of it finally as a credit on the tax. By the critical words "other income" we think Congress meant simply the net income on which income tax at regular rates is being calculated. It would or would not include capital items according to the operation of section 208 relating to them. Originally all gains and losses although arising from what are now called capital transactions were treated like other gains and losses. To avoid the hardship of realizing in one year gains really accumulated over a period of years, the device of treating them at the taxpayer's option as capital gains and making a flat rate tax of 12½ per centum on such net gains was introduced in the Revenue Act of 1921. In the Revenue Act of 1924 net losses in such transactions were similarly treated, in substance at the Government's option for the separate computation is to be rejected if it results in less taxes than the usual method. When, as here, it is found that separate computation of the capital net losses is to the advantage of the Government and is therefore prescribed, the capital items thus put under the 12½ per centum flat rate go out of the computation of the taxes under the regular rates, and the "other income" to which partnership gains are to be added is unaffected by the capital items. The computation of the Commissioner upheld by the Board of Tax Appeals was correct, and the petition for review is denied.

SECTION 208.—CAPITAL GAINS AND LOSSES.

ARTICLE 1651: Definition and illustration of capital net gain.

REVENUE ACT OF 1921.

Effective date of stock rights. (See Ct. D. 727, page 155.)

ARTICLE 1651: Definition and illustration of capital net gain. XII-48-6535 Ct. D. 756

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. INCOME—CAPITAL GAIN—CAPITAL ASSETS—SALE OF BUILDINGS ERECTED ON LAND ACQUIRED FOR INVESTMENT.

Where a real estate dealer acquires unimproved land for investment in 1919, erects buildings thereon and sells them in 1922 and 1923, within two years after their erection, the land being acquired more than two years prior to the sales is a "capital asset" within the meaning of section 206 of the Revenue Act of 1921, and so much of the profit derived from the sales as is apportionable to the enhancement in its value is taxable as "capital gain," but the buildings which were erected on the unimproved land within two years prior to the sales do not come within the terms of that section, and so much of the profit as is attributable thereto is taxable as ordinary income.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 418) affirmed.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Helen M. Dunigan, Administratrix of Estate of David J. Dunigan, Deceased, appellant, v. *David Burnet, Commissioner of Internal Revenue, appellee.*

Appeal from the Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[June 5, 1933.]

OPINION.

GRONER, Associate Justice: This is an appeal by Helen M. Dunigan, as administratrix of the estate of David J. Dunigan, deceased, from a decision of the Board of Tax Appeals determining income tax deficiencies for the years 1922 and 1923.

The case is said to be one of first impression.

A condensed statement of facts taken from the findings of the Board is as follows: Deceased (Dunigan) was during the years 1922 and 1923, and for several years prior thereto, engaged in the real estate business in the District of Columbia. It was his practice to purchase unimproved parcels of land and to erect houses thereon, mostly of a small residential type, which he would sell in single units. During 1919 he purchased two such tracts of land in the northwest section of the District of Columbia, upon which he subsequently built houses. Some of these houses he sold in 1922 and 1923. The profits derived from these sales are the items in dispute in this proceeding. The *land* was acquired by Dunigan more than two years prior to the dates of the sales but the *buildings* were erected within the two years. Deceased filed for 1922 and 1923 income tax returns in which he reported the profits from the sales as *capital net gains* within the meaning of section 206 of the Revenue Act of 1921 (42 Stat., 227). The Commissioner treated the profits as ordinary income and asserted the deficiencies. The division of the Board of Tax Appeals to which appeal was taken reversed the Commissioner and held that no further tax was due. The entire Board reviewed the decision of the division, and held that so much of the profit as was apportionable to the enhancement in value of unimproved land was taxable as capital gain, but so much as was attributable to the houses erected thereon (within the 2-year period) was not capital gain and was returnable and taxable as ordinary income. If all the profits arising from the sale of the property are taxable as capital gain, there is no deficiency.

The question for decision, therefore, is whether the Board of Tax Appeals was right in segregating the amount of profits realized as between the land itself and the improvements placed thereon and in holding that the portion of the profits allocable to the improvements—the buildings—was not capital gain within the statute. The formula used to ascertain what portion of profits is attributable to land and what portion to buildings has the approval of both taxpayer and Commissioner.

Section 206(b) of the Revenue Act of 1921 (42 Stat., 227) provides that "Any taxpayer * * * who for any taxable year derives a capital net gain" may pay in lieu of the tax imposed by sections 210 and 211 a tax of 12½ per cent on such capital net gain.

The term "capital assets" means property acquired for investment and held for more than two years. The purpose of the Act, by a reduction of the regular tax rate, was to stimulate consummation of profitable transactions in property bought for investment; in other words, to expedite sales of property which would be otherwise postponed by reason of the high rate of taxation. It was anticipated the Government would be the gainer by increased revenues. (See *Burnet* v. *Harmel*, 287 U. S., 103 [Ct. D. 611, C. B. XI-2, 210].)

In the sale of stocks, bonds, or land bought for investment as an entirety, the applicability of the provisions of the statute depends solely on the question of the time of acquisition, but here we have a case in which property sold as a

whole was acquired, part more than two years prior to sale and part less than two years. The difficulty that first suggests itself in such circumstances is how to allocate the profits. However perplexing that may be ordinarily, it is agreed in this case the method adopted is fair. Taxpayer, however, invokes the common-law rule that when buildings are erected on land, the former become part and parcel of the latter and the two are merged into and become one, and he insists that if Congress had intended to depart from this rule of identity of buildings with the land on which they stand, it would have said so in plain and appropriate language. The question, for many reasons, is not wholly free from doubt, but the doubt disappears, we think, when the language of the provision of the Act is considered in connection with the established practice in the administration of other provisions of the tax laws in relation to the same subject matter, i. e., lands and buildings, etc. In none of these is the common-law rule of identity followed.

For instance, universally buildings and land are taxed separately for State taxation purposes. When the buildings are torn down, or destroyed, the custom is to abate the tax assessment accordingly. For purposes of depreciation under the Federal tax laws, the land and buildings are considered separately. In the case of the removal of timber, allowance is made for depletion, and so also in the case of minerals, or oil or gas removed from the land. If the owner of the land and buildings destroys the latter to make room for another, the tax laws permit a deduction equal to the value of the destroyed buildings as a loss sustained in the year of demolition. These illustrations which occur to us seem to recognize that in taxing statutes the common-law rule is no longer always applicable, that the fiction which it established has yielded to practical considerations, fair alike to the sovereign and the citizen. Nor is the rule inflexible even in cases between private parties, for "the ownership of a house erected upon land may sometimes be severed from that of the land by express stipulation or implied understanding, in which case the house is to be regarded as personalty." (Minor on Real Property, 2d ed., volume 1, section 23.)

As we have seen, the statute makes the lower tax rate applicable in the case of profits derived from the sale of "property acquired and held by the taxpayer for more than two years." Here admittedly the houses were held "for investment" less than two years before sale, and so, as a matter of actual fact, the investment was made less than two years before the profits were realized, and here, as we have seen, the profits were determined and undisputed. This history and sequence put the case squarely outside the language of the section (206). In such circumstances to apply the common-law rule that whatever is annexed to the freehold becomes part of it, and thus to disregard the period of time as applied to acquisition of the houses, would be to substitute a legal fiction for a long-recognized policy of severance of land and buildings where actuality is and ought to be the controlling consideration. "When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way." (*Blackstone* v. *Miller*, 188 U. S., 189, 206.)

Affirmed.

ARTICLE 1654: Capital net losses. XII–31–6321
Ct. D. 710

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

CAPITAL GAINS AND LOSSES—"CAPITAL NET LOSS."

Where a taxpayer in 1927 sells at a loss stock purchased in 1924, the loss sustained is a "capital net loss" within the meaning of section 208(a)6 of the Revenue Act of 1926, and the tax is properly computed under section 208(c), notwithstanding the fact that no other sales or exchanges of capital assets had been made during the taxable year from which capital gain had been derived. The statute does not require that there must be both capital gain and capital loss during the same year in order to produce capital *net* loss or gain.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

George F. Piper, Jr., appellant, v. *Levi M. Willcuts, as Collector of Internal Revenue for the District of Minnesota, appellee.*

Appeal from the District Court of the United States for the District of Minnesota.

[April 11, 1933.]

OPINION.

VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

The facts and issue in this appeal, as in the trial court, are thus succinctly stated by the trial judge:

"From the stipulation of facts it appears that Mr. Piper, the plaintiff, purchased 300 shares of the capital stock of the Minneapolis Artificial Ice Rink, Inc., in the year 1924, for which he paid $30,000. He held this stock until 1927, when he sold it for $4. He therefore sustained a loss of $29,996, for which he was not compensated by insurance or otherwise. He did not acquire nor enter into a contract or option to acquire shares of the capital stock of the Minneapolis Artificial Ice Rink, Inc., within 30 days before or after the sale of the shares purchased. In 1927 he did not sell or exchange any property held by him for more than two years, other than these shares. In his individual income tax return for the calendar year 1927, Mr. Piper deducted from gross income $29,996 as a loss sustained within the calendar year 1927, within the meaning of section 214(a) (4) and (5) of the Revenue Act of 1926 (Title 26, U. S. C. A., paragraph 955).

"The Commissioner of Internal Revenue determined a deficiency in the plaintiff's tax liability for the calendar year 1927 of $1.528.82, holding that the loss from the sale of the stock in question constituted a 'capital net loss' within the meaning of section 208(a)6 of the Revenue Act of 1926 (Title 26, U. S. C. A., paragraph 939), and that it was therefore not a proper deduction from the plaintiff's gross income. The computation of the plaintiff's tax liability under section 208(c) of the Revenue Act of 1926 resulted in a deficiency as determined by the Commissioner. Mr. Piper paid the deficiency, and brought this suit to recover the amount paid.

"The only question involved is whether the plaintiff's conceded loss is a 'capital net loss' within the meaning of section 208(a)6 of the Revenue Act of 1926."

There is no dispute as to the facts, and the question presented is purely one of law. The contention of appellant is thus stated:

"The capital net loss with which the statute deals can only exist when there have been sales or exchanges of capital assets at both gain and loss resulting in an amount of loss greater than the amount of gain. If there have been sales or exchanges of capital assets at a loss and no sales or exchanges of capital assets at a gain the statute is inapplicable. In such a situation a taxpayer is entitled to the benefit of section 214(a) (4) and (5)."

At the outset it may be well to state some established rules of law which must govern our consideration and disposition of this issue.

It may be conceded that, where in the language of a statute the legislative body's intent clearly appears it is to be presumed that it said what it meant to say; but courts should construe a statute in such manner as to avoid absurdity or injustice. (*Echols* v. *Commissioner* (C. C. A. 8), 61 F. (2d), 191.) A statute should be reasonably construed to carry out its purposes and objects where the meaning is not perfectly clear. (*Fidelity National Bank & Trust Co.* v. *Commissioner* (C. C. A. 8), 39 F. (2d), 58.)

"A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." (*Smythe* v. *Fiske*, 23 Wall., 374, 380.)

"The rule of strict construction will not be pressed so far as to reduce a taxing statute to a practical nullity by permitting easy evasion." (*Carbon Steel Co.* v. *Lewellyn*, 251 U. S., 501.)

"The rule that tax laws shall be construed favorably for the taxpayers is not a reason for creating or exaggerating doubts of their meaning." (*Irwin, Collector,* v. *Gavit*, 268 U. S., 161 [T. D. 3710, C. B. IV–1, 123].)

The intention of the lawmaker is the law, and must govern where it may be deduced reasonably from the language employed. With this in mind let us examine into the legislative and judicial history of this statute. (*Burnet* v. *Harmel*, 287 U. S., 103, 108.) The pertinent provisions follow:

Section 208, 1926 Revenue Act (Title 26, U. S. C. A., paragraph 939—Capital gains and losses) (44 Stat. L., 19):

"SEC. 208. (a) For the purposes of this title—

"(1) The term 'capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921;

"(2) The term 'capital loss' means deductible loss resulting from the sale or exchange of capital assets;

"(3) The term 'capital deductions' means such deductions as are allowed by section 214 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year;

"(4) The term 'ordinary deductions' means the deductions allowed by section 214 other than capital losses and capital deductions;

"(5) The term 'capital net gain' means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gain;

"(6) The term 'capital net loss' means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

* * * * * * *

"(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

"A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain.

"(c) In the case of any taxpayer (other than a corporation) who for any taxable year sustains a capital net loss, there shall be levied, collected, and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

"A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax under this subdivision be less than the taxes imposed by sections 210 and 211 computed without regard to the provisions of this section."

The first legislation upon this specific subject is to be found in section 206 of the Revenue Act of 1921, by the Sixty-seventh Congress (Stat. L., volume 42, pages 232, 233). Without quoting fully, it is sufficient to point out that this Act permitted this same reduction of tax upon capital net gains as in the Act of 1926 above set out. The provision of the latter Act with respect to capital losses was not included in this Act of 1921. The purpose of section 206 of the Act of 1921 is thus stated in *Burnet* v. *Harmel* (287 U. S., l. c. 106):

"Before the Act of 1921, gains realized from the sale of property were taxed at the same rates as other income, with the result that capital gains, often accruing over long periods of time, were taxed in the year of realization at the high rates resulting from their inclusion in the higher surtax brackets. The provisions of the 1921 Revenue Act for taxing capital gains at a lower rate, reenacted in 1924 without material change, were adopted to relieve the taxpayer from these excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions. (House Report No. 350, Ways and Means Committee, Sixty-seventh Congress, first session, on the revenue bill of 1921, page 10; see *Alexander* v. *King*, 46 F. (2d), 235" [Ct. D. 294, C. B. X-1, 223].)

In like manner we seek the intent and purpose of the Revenue Act of 1924, in section 208(a) of which provision was made for the deduction of 12½ per centum of the capital net loss, in computing income, instead of the full amount of said loss as theretofore. In the ascertainment of the intent of Congress and the purpose of the Act we are again permitted to resort to legislative history. (*United States* v. *Great Northern Ry. Co.* (C. C. A. 8), 57 F. (2d), 385; *Burnet* v. *Harmel*, supra.) When the Revenue Act of 1924 was called up in the House

of Representatives of the Sixty-eighth Congress, Mr. Green of Iowa, chairman of the Ways and Means Committee in charge of the bill, in explaining its provisions and purposes, said:

"A very important provision in the bill relates to the allowance for capital losses. It is provided that the amount by which the tax is reduced on account of capital losses shall not exceed 12½ per cent of the losses, and the provision of the existing law, that the tax on the sale or disposition of capital assets shall be limited to 12½ per cent of the gain, is retained."

He then referred to the law of 1921 providing that capital gains should only be taxed at the rate of 12½ per cent, and continued:

"Unfortunately, we were not able to include in the law, by reason of opposition in the other House, a similar provision with reference to capital losses. It was included in the House bill, but was taken out in the Senate. As a result we have found that, in the language of the Secretary of the Treasury, the Government is continually being 'whipsawed,' because the large investors take their profits only when they really need them, but always take their losses and get full credit. They do that because, as the matter stands now, there is only a 12½ per cent tax on the gains, and they get full credit for the losses. We have therefore inserted in this bill provisions similar to those contained in the amendment to the Revenue Act which passed the House last summer, providing that capital gains and capital losses shall both be placed on the same basis; that capital gains shall be taxed at 12½ per cent, at the election of the taxpayer, and that capital losses shall only receive an allowance for deduction at the rate of 12½ per cent. I really could imagine nothing that is fairer, and if this provision is retained in the bill, and I intend it shall be if I am able to keep it there, it will result in the addition of a large amount of revenue to the Government out of which it is now being defeated, and sometimes in a very improper manner. I want to say in this connection that even as matters stand the Government is getting far more revenue than it would if sales of capital assets were taxed at the full rate." (Volume 65, Congressional Record, Part 3, Sixty-eighth Congress, first session, page 2428.)

The legislative intent and purpose is thus made clear, and should be preserved in construction if the language of the Act permits. The pertinent provisions of the law of 1924 have been reenacted in the Acts of 1926, 1928, and 1932. Section 208(c) of the Revenue Act of 1926 governs here.

The Commissioner of Internal Revenue and the Board of Tax Appeals have consistently construed these Revenue Acts in conformity with the contention of the Government and the decision of the trial court in the instant case. (*Dahlinger* v. *Commissioner*, 20 B. T. A., 176; *Gilbert and Chase, petitioners*, v. *Commissioner*, 21 B. T. A., 1245; *Elkins* v. *Commissioner*, 24 B. T. A., 572.) The case of *Nicoll* v. *Commissioner* (16 B. T. A., 868), upon which appellant places some reliance is, rather, an indirect ruling in appellee's favor. The first syllabus holds that:

"The term 'capital net gain', as used in subdivision (b) of section 206 of the Revenue Act of 1921, comprehends the net result of all transactions during any taxable year, involving the sale or exchange of capital assets, provided such result represents a net gain to the taxpayer."

Long-established departmental practice is entitled to much consideration. (*Commissioner* v. *Liberty National Bank* (C. C. A. 10), 58 F. (2d), 57; *Fidelity National Bank & Trust Co.* v. *Commissioner* (C. C. A. 8), 39 F. (2d), 1. c. 61.)

Much of the argument of counsel for appellant is based upon the use of the word "net" in describing capital gains, and losses. It is contended that without exchanges of capital assets at a gain, there can be no net capital loss over gain within the meaning of section 208(c). The infirmity of this contention appears upon examination of the terms of the 1921 Revenue Act, in which no provision is made for capital loss deductions. Nevertheless, the capital gains dealt with are described as capital "net" gains, which mean "the excess of the total amount of capital gain over the sum of the capital deductions and capital losses"; and the reduced percentage of taxation was allowed whether or not there had been any capital loss due to the exchange of capital assets. So, under the Act of 1926, "the term 'capital net loss' means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain"—if any. If there is no such capital gain, the greater the capital loss. (*Rasp* v. *City of Omaha et al.*, 113 Neb., 463.) Of course the Act, in providing for these reduced taxes and deductions must, in terms, contemplate the striking of a balance if contemporaneous

gains and losses exist. It is to be observed that there are other factors in the computation, to wit capital and ordinary deductions in arriving at the net gain or loss. The term "net" has no significance of the nature urged by appellant. This case has been argued as depending entirely upon section 208 of the Act of 1926. It is pertinent also to consider section 206(a)2 of the same title. (44 Stat. L., 17.) Under the heading "net losses" we find:

"SEC. 206. (a) As used in this section the term 'net loss' means the excess of the deductions allowed by section 214 or 234 over the gross income with the following exceptions and limitations:

* * * * * * *

"(2) In the case of a taxpayer other than a corporation, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of the capital gains."

There were no capital gains in this year.

The Commissioner of Internal Revenue determined a deficiency in the plaintiff's tax liability for the year 1927 of $1,528.82, the computation being made under section 208(c) of the Revenue Act of 1926. His action was sustained by the trial court. The judgment was correct in any aspect of the case and, accordingly, is affirmed.

PART II.—INDIVIDUALS.

SECTION 212.—NET INCOME OF INDIVIDUALS DEFINED.

ARTICLE 23: Bases of computation. XII-30-6307
(Also Section 205, Article 1611.) G. C. M. 12004

REVENUE ACT OF 1918.

The net income of a person engaged in the business of propagation and culture of oysters can not be properly computed upon the basis of inventories. The net income of such a taxpayer is the amount of the gross sales of oysters plus all other items of gross income less allowable deductions, to be reported on the cash receipts and disbursements basis or the accrual basis in accordance with the method of accounting used by the taxpayer in keeping its books and in filing its returns.

Recommended that Office Decision 684 (C. B. 3, 80) be modified.

It has been suggested that Office Decision 684 should be modified in order to clarify its meaning relative to the bases on which taxpayers engaged in the business of propagation and culture of oysters may report their income. The decision in question reads as follows:

The net income of a person engaged in the business of propagation and culture of oysters can not be properly computed upon the basis of inventories. Amended returns will be required for those years for which returns have been based upon inventories. The net income is the gross receipts for the year less the necessary business expense and other allowable deductions.

It is pointed out that this office decision seems to be misleading in that the wording "gross receipts" leads to the conclusion that receipts mean money in hand or payments for goods sold, and that a taxpayer engaged in the business in question has no right to file returns on the accrual basis.

It is further pointed out that in the administrative application of this decision it has been held that it is directed to the composition of the gross income of a taxpayer engaged in the propagation of oysters and that it does not mean that all items, both as to income

and deductions, must be reported on the cash basis. In other words, if a taxpayer's books are kept and its returns are filed on the accrual basis, an amended return reflecting all items on the cash basis is not only not required but is not allowable.

Certain taxpayers have contended that under the last sentence of this office decision a redetermination of the net income is permitted on a cash basis in cases where the books have been kept and the returns have been filed on the accrual basis, except with respect to inventories.

In order to avoid the misleading inference that the term "gross receipts" means in all cases money in hand or payments for goods sold, and to preclude the erroneous conclusion which follows that a taxpayer engaged in the business in question has no legal right to file returns on the accrual basis, it is recommended that Office Decision 684 be amended to read as follows:

The net income of a person engaged in the business of propagation and culture of oysters can not be properly computed upon the basis of inventories. The net income of such a taxpayer is the amount of the gross sales of oysters plus all other items of gross income less allowable deductions, to be reported on the cash receipts and disbursements basis or the accrual basis in accordance with the method of accounting used by the taxpayer in keeping its books and in filing its returns.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

ARTICLE 23: Bases of computation. (Also Section 205, Article 1611.) XII-30-6308 I. T. 2704

REVENUE ACT OF 1918.

In view of General Counsel's Memorandum 12004 (page 168, this Bulletin), Office Decision 684 (C. B. 3, 80) is amended to read as follows:

The net income of a person engaged in the business of propagation and culture of oysters can not be properly computed upon the basis of inventories. The net income of such a taxpayer is the amount of the gross sales of oysters plus all other items of gross income less allowable deductions, to be reported on the cash receipts and disbursements basis or the accrual basis in accordance with the method of accounting used by the taxpayer in keeping its books and in filing its returns.

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 32: Compensation for personal services. XII-27-6267 Ct. D. 693

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

INCOME—BONUS.

A "bonus" paid to an employee of a railroad company by authorization of the stockholders of a holding company, which owned all the stock of the employer company, constituted additional compensation rather than a gift, and was therefore taxable to the employee as income.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

James W. Bass, Collector of Internal Revenue, appellant, v. *A. L. Hawley, appellee.*

Appeal from the District Court of the United States for the Western District of Texas.

[January 12, 1933.]

OPINION.

SIBLEY, Circuit Judge: James W. Bass, collector of internal revenue, appeals from the judgment on a verdict directed against him in favor of A. L. Hawley for recovery of an income tax for the year 1925. The question is whether $16,250 received by Hawley that year was a gift or additional compensation for services. Hawley had for 22 years been the general auditor of the El Paso & Southwestern Railroad Co., all the stock of which was owned by El Paso & Southwestern Co. The latter had no active business, and was a mere holding company. We will call the former the Railroad company, the latter the Holding company. Negotiations beginning in the spring of 1924 culminated in the sale by the Holding company of all the stock of the Railroad company to the Southern Pacific Co. The railroad and its business were turned over to the purchaser on October 31, 1924, but the sale was as of May 1, 1924, and an accounting was to be had of operations meanwhile in which it was expected that the Holding company would be found due the Southern Pacific Co. a substantial sum. The consideration of the sale was $28,000,000 of stock and $29,500,000 of bonds of the purchasing company, to be issued directly to the stockholders of the Holding company. The Holding company had no other assets, and since its liabilities remained to be settled, the bonds were deposited in a bank for the stockholders. The stockholders thus became stockholders in the Southern Pacific Co., and thereby retained an interest in the Railroad company. On November 10, 1924, the directors of the Holding company sent to each of its stockholders what was called a "Statement of plan of reorganization." It reviewed in detail the transactions above outlined, and referring to the possible debt to the Southern Pacific Co. continued: "In addition to this sum the directors request that the stockholders of the company authorize them *in recognition of the long and faithful service* of the officers and employees of the railroad to pay to officers and employees to be designated by the directors *additional compensation* to be decided by the directors, and that they be authorized to set aside for *such compensation* a sum not to exceed $1,000,000," retaining to meet this and all liabilities of the Holding company and expenses of the reorganization so much of the deposited bonds as might seem necessary. The appointment of a committee to finally dispose of the bonds was suggested. Each stockholder signed a reply, stating that he understood about the unsettled liabilities, expenses and "bonuses to employees," and appointed a committee of five "to pay the expenses, *compensate employees,* to adjust and settle the accounts, etc.," charging it all against the deposited bonds. The committee set aside $1,500,000 of the bonds, borrowed money on them which was later repaid by a sale of the bonds, and on December 22 paid out according to their account "bonus $619,940," and on January 2 "bonus $273,750." There is testimony that some of the larger payments were divided so as to prevent the recipient getting it all in the same taxable year. The committee reported to the stockholders on February 24, 1923, their progress in meeting the "unsettled expenses, obligations to Southern Pacific Co., *bonuses to employees,* etc." The committee's report and statement of January 6, 1927, showed as paid out "*compensation,* 1924, $619,940; 1925, $280,450; total, $900,390." The payments were made only to employees who were not members of any union, but there was no set formula, the representatives of the committee giving attention also to the financial and family condition of the employee. Each check was accompanied by a card "With *appreciation* and best wishes of El Paso & Southwestern Co. from committee appointed November 18, 1924." Hawley received $32,500, half of which went into his own and half into his wife's income-tax return. He protested the tax on this item, and on payment asked for a refund, referring to it in his claim always as a *bonus.*

The Board of Tax Appeals and the Court of Claims have reached opposite conclusions as to the taxability of this distribution. (*Barnes* v. *Commissioner,*

17 B. T. A., 1002; *Schumacher* v. *United States* (55 Fed. (2d), 1007 [Ct. D. 480, C. B. XI–1, 216].) Hawley relies strongly on *Jones* v. *Commissioner* (31 Fed. (2d), 755) and *Blair, Commissioner*, v. *Rossetter* (33 Fed. (2d), 286). Each of these cases in holding payments to employees to be nontaxable gifts relies on the fact that there was no obligation to pay and the payments were over and above the wages and salaries due. The controlling importance of that fact has since been denied by the Supreme Court in *Old Colony Co.* v. *Commissioner* (279 U. S., at page 730 [Ct. D. 80, C. B. VIII–2, 222]), where the question was whether the litigant owed a tax, saying: "The payment for services even though entirely voluntary was nevertheless compensation within the statute." Again in *Lucas, Commissioner*, v. *Ox Fibre Brush Co.* (281 U. S., 115 [Ct. D. 265, C. B. IX–2, 384]), where the question was whether the litigant could deduct the payment as an expense of business, a like result was reached. *Noel* v. *Parrott* (15 Fed. (2d), 669 [T. D. 3908, C. B. V–2, 149]), was approved. In *Fisher* v. *Commissioner* (59 Fed. (2d), 192) it was ruled that absence of legal duty to pay is not conclusive of a gift. Whether a payment in a given case shall be deemed taxable compensation or a gift exempt from tax depends on the intention of the parties and particularly that of the payer, to be determined from the attending facts and circumstances.

Income that may be taxed includes gain derived from labor. (*Eisner* v. *McComber* [*Macomber*], 252 U. S., 189 [T. D. 3010, C. B. 3, 25].) One who in the peace and under the protection of the United States gainfully exercises his faculties of mind or body may be called on to share the gain with the Public Treasury. Section 213 of the Revenue Act of 1926 here applicable includes in gross income to be taxed "gains, profits and income derived from salaries, wages or *compensation for personal service* * * * of whatever kind and in whatever form paid." It excludes property acquired by "gift, bequest, devise or inheritance." The intent is that all receipts in whatever form that come because of labor and service, whether payment could be compelled or not, shall be taxed as arising from labor. That only is a gift which is purely such, not intended as a return of value or made because of any intent to repay another what is his due, but bestowed only because of personal affection or regard or pity, or from general motives of philanthropy or charity. Those payments made because of past services but over and above what was contracted and compellable to be paid have been called additional compensation and bonuses, and are taxable income to the recipient. From the standpoint of the payer also they are recognized as disbursements for wages or salaries, and when paid in the conduct of a regular business may be deducted as an expense thereof. See Regulations 69, article 108. The meaning in this connection of additional compensation as a payment for services above what is demandable is clear. Bonus has a parallel meaning: "Something given in addition to what is ordinarily received by or strictly due to the recipient; money given in addition to an agreed compensation." Webster's International Dictionary. Bearing in mind the proper meaning of these terms in looking at the documents that attended these payments we are at once impressed that in no case were they called gifts, but in every instance compensation, additional compensation or bonuses to employees was the term used. Even the card which accompanied each says: "In appreciation," which connotes that something has been appraised and its value acknowledged. The payments were made to none but old employees. They were confined to nonunion men, which suggests some recognition of loyalty in labor disputes. There is no evidence of personal relationships leading to personal gifts. Where financial and family conditions were considered there may have been added a minor element of charity, but this does not appear to have influenced the payment of $32,500 to Hawley. We think it plain that this sum was a bonus paid him in recognition of long and faithful service.

Against this conclusion is put forward the fact that neither the Holding company nor the committee claimed a deduction for the payment in their tax returns. It is true that a payment which is a gift as respects the payer, and so not deductible, will likely be a gift in the hands of the recipient and not taxable, but it is not true that because a payment may not have been taken as a deduction by the payer that it can not be taxed as income to the recipient. The former may have overlooked or waived his right to deduct, which would not relieve the latter from his duty to pay taxes. Or it may happen that the payer was not, when the obligation was assumed and the payment made, engaged in business and so not within the statute allowing the deduction. This seems probable in this case.

Again it is objected that the employer was not the Holding company or its stockholders, but was the Railroad company, and that the Railroad company alone could make additional compensation; that a voluntary payment by anyone else is necessarily a gift. The objection would have force where the third person had no interest in the employment and no cause to feel obligated to compensate the service. But in this case although the stockholders authorized the payment it was made out of funds really belonging to the Holding company as the proceeds of the sale of its assets, and the Holding company was the sole owner of the Railroad company. If the additional compensation was fairly due, and should have been paid out of the Railroad company's assets, it would have come to the same thing in settling with the Southern Pacific Co. The situation produced by the sale made it inevitable that whatever was paid should eventually be the loss of the stockholders. In determining the incidence of taxation, corporate organization of taxpayers is not ordinarily to be disregarded. (*Burnet, Commissioner*, v. *Commonwealth Improvement Co.* [Ct. D. 622, C. B. XII–1, 277]; *Burnet, Commissioner*, v. *Clarke*, Supreme Court, December 12, 1932 [Ct. D. 620, C. B. XII–1, 175]; *Planters' Cotton Oil Co.* v. *Hopkins, Collector*, 53 Fed. (2d), 825 [Ct. D. 446, C. B. XI–1, 149].) But in a case like this where neither corporation nor stockholder is the taxpayer, and motive and intent is the question, the substance of the matter should be looked to. The evidence does not require a finding that the payment to Hawley was a gift, and the court erred in so instructing the jury.

The claim for refund set up that the payment was made by the Holding company. The amended pleadings and the evidence showed an involvement of its stockholders. The point is made that there was a departure from the case made by the claim for refund. (*J. P. Stevens Engraving Co.* v. *United States*, 53 Fed. (2d), 1; *Snead, Collector*, v. *Elmore*, 59 Fed. (2d), 312.) The difference is but a detail, not going to the substance of the controversy and not calculated to occasion a surprise. There was no forbidden departure.

The cause is reversed, and remanded for further proceedings not inconsistent with this opinion.

ARTICLE 42: Sale of personal property on installment plan.

XII–49–6545
Ct. D. 759

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. NET INCOME—INSTALLMENT SALES.

Where an automobile dealer who sells cars on the installment plan takes customers' notes secured by conditional sale contracts, indorses the notes to finance companies and sells and assigns to them his interest in the contracts, and where the finance companies pay to the dealer the face of the unpaid purchase price less insurance and interest charges and collect the notes themselves, the transactions with the finance companies are properly treated as sales rather than as loans, and income from the installment sales under section 212(d) of the Revenue Act of 1926 may not be allocated beyond the year in which the customers' contracts were assigned to the finance companies.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (22 B. T. A., 224) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Lucius H. Elmer, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Appeal by the taxpayer from an order of the Board of Tax Appeals fixing a deficiency in his income tax for the years 1922 and 1923.

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

[June 5, 1933.]

OPINION.

L. HAND, Circuit Judge: The question raised by this appeal is of the taxpayer's right under section 212(d) of the Act of 1926—which was made retro-

active—to allocate part of his income from installment sales among the years when his customers actually paid for the goods. This in turn depends upon whether the transactions between him and two "finance companies" were sales or loans. If sales, he agrees that the Commissioner and the Board were right, who refused to allow the payments to be spread beyond the year in which he assigned his customers' contracts to the finance companies; if loans, the Commissioner agrees that he should have been allowed to allocate the payments to the years when the buyers actually paid.

The taxpayer was a selling agent in Hartford for Ford motor cars, which he sold upon the installment plan. His terms of sale were $50 cash down, and a series of weekly or monthly payments over a period of 18 months. As evidence of the customer's indebtedness he took one or more notes, bearing interest, secured by a contract of conditional sale, which reserved title to him, and gave him the right to retake and sell the car upon default in the payment of any installment. Being in need of ready funds, he raised money upon these notes by indorsing them to companies organized for that purpose, and assigning his interest in the contracts. For the earlier part of the period in question he dealt with a Maryland company, in which he had no interest; but later he organized a company of his own in Hartford. Although he was the prime mover in this company, and owned or controlled substantially all its shares, for the purposes of this case it is to be treated as a stranger.

The nature of the transactions with the Maryland company is left very vague in the findings and in the evidence; the taxpayer can not ask more than that we assume them to have been of the same kind as those with the Hartford company, about which we can learn more. To this company he "sold" and assigned his customers' contracts outright, including his interest as conditional seller, and indorsed their notes. For this he received the face of the unpaid purchase price, less insurance charges which the company agreed to pay. Apparently it also deducted some "interest" charges for itself, though the notes themselves bore interest. The company agreed to tell him of any default, upon which he was at once to retake the car under the contract and sell it, probably as its agent, though that is not clear; but in any event he was to repay the amount realized. The company got all the payments from the customer direct, and was repaid in full, if he did not default. If he did, it kept all he had paid, got the proceeds from the sale of the car, and the dealer merely made up the difference between these amounts and the original advance.

Such transactions are somewhat ambiguous and admit of definition as loans or sales on slight differences. If a merchant discounts his customer's note at a bank, indorsing it, but getting immediate credit for its discount value, it would be a most unnatural thing to consider it a loan from the bank. He remains liable if the customer defaults, but the collection is in the bank's hands, and the transaction is closed in the absence of a default. If, on the other hand, a merchant pledges his accounts to a "finance" company and collects them himself, paying the loan out of his collections, it is clearly a loan, and has always been so considered. (*Home Bond Co.* v. *McChesney*, 239 U. S., 568; *In Re Gotham Can Co.*, 48 Fed. (2d), 540 (C. C. A. 2); *In Re Grand Union Co.*, 219 F. R., 353 (C. C. A. 2); *Nat. T. & C. Co.* v. *Orcutt*, 259 F. R., 830 (C. C. A. 7); *Commercial Security Co* v. *Holcomb*, 262 F. R., 657 (C. C. A. 5).) The law in Connecticut is the same. (*Barker Piano Co.* v. *Commercial Security Co.*, 93 Conn., 129.) These transactions were different; the finance companies collected the notes themselves, and, as we have said, if the customer did not default, the dealer had no more to do than if he had discounted his note with a bank. Nor was there any equity in the assigned accounts for which the companies were responsible to the dealer; the full amount was paid, less a somewhat nebulous "interest" charge, which gave the companies a profit of more than the interest on the customer's note. If the dealer was the companies' agent to retake and sell the cars, their interest never reverted to him; it remained in them as it had been originally transferred. It is at least open to doubt whether this was not the relation, and doubts are resolved against the taxpayer. In some cases indeed the companies appear to have retaken the cars themselves. In any event, the dealer's liability was only to pay what remained of the customer's debt, he never became liable for the original advance he had received.

It is true that in the contract between the taxpayer and the Hartford company, the advances were spoken of as "loans," but this is not conclusive, especially as the dealer "sold" his rights to the company. Possibly the parties thought of them as loans; a merchant might similarly regard a dis-

counted note, or any other transfer of property whose value he warranted. It is possible, as we have suggested, to construe these transactions in either way. We incline to consider them as more nearly analogous to discounts, because they were closed transactions unless the customer defaulted, the dealer having nothing to do with collection; because there was no equity to be remitted; because, though the dealer was to enforce the collateral, he may have done so as agent for the company, which remained entitled to the proceeds; and because he was never liable for the advances as such. In any case the evidence is not clear enough to upset the findings.

Order affirmed.

ARTICLE 44: Sale of real property involving deferred payments.

REVENUE ACT OF 1926.

Casual sales of real property on installment plan. (See G. C. M. 12148, page 57.)

ARTICLE 45: Sale of real property on installment plan. (Also Section 201, Article 1545.)

XII-49-6546
Ct. D. 758

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INSTALLMENT SALE—"PAYMENTS RECEIVED"—"INITIAL PAYMENTS"—DISPOSITION OF EVIDENCES OF INDEBTEDNESS.

Where a corporation sold real estate, receiving less than one-fourth of the purchase price in cash and the balance in purchaser's notes secured by mortgage and later in the same year dissolved and distributed the notes and mortgages to its sole stockholder, part of the value of the property discharging a debt owed to the stockholder, the amount of the debt so paid does not constitute "payments received in cash or property" within the meanmeaning of section 212(d) of the Revenue Act of 1926, and is not a part of the "initial payments" within the meaning of that subdivision.

2. INSTALLMENT SALE—DISSOLUTION OF VENDOR CORPORATION.

A vendor corporation may report income received from sale of real estate upon the installment basis, regardless of the fact that later in the same taxable period it is dissolved.

3. INSTALLMENT SALE—NET INCOME—PROFIT FROM DISTRIBUTION OF PURCHASE MONEY NOTES—SATISFACTION OF DEBT.

Where a corporation's sole stockholder releases first mortgages upon real estate owned by the corporation, for the purpose of allowing it to give clear title to purchasers buying on the installment basis, and the transaction is treated as creating a debt owing by the corporation to its stockholder, the transfer to the stockholder, upon dissolution of the corporation, of purchase money notes and mortgages, to the extent that they discharged the debt, constitutes payment of such debt and can not be regarded as wholly a liquidating dividend. Upon such disposition of the notes at face value in the amount of the debt, a taxable profit is realized by the corporation.

4. DECISION REVERSED.

The decision of the Board of Tax Appeals (23 B. T. A., 796) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Duram Building Corporation, petitioner-appellant, v. *Commissioner of Internal Revenue, respondent.*

Appeal from the United States Board of Tax Appeals.

Before MANTON, SWAN, and CHASE, Circuit Judges.

[July 5, 1933.]

OPINION.

Duram Building Corporation petitions for review of a decision of the Board of Tax Appeals redetermining a deficiency in income taxes for the year 1926 in the amount of $15,822.32. Reversed and remanded.

SWAN, Circuit Judge: In February, 1926, the petitioner, Duram Building Corporation, sold two parcels of real estate at a profit over their cost. The issue presented by this appeal is whether it was entitled to return this profit for taxation upon the installment basis, pursuant to section 212(d) of the Revenue Act of 1926 (26 U. S. C. A., section 953d). The sales were made for part cash and the balance in the purchaser's notes secured by mortgage. The cash received from the purchaser was less than one-fourth of the purchase price; but subsequently, upon dissolution of the petitioner in August, 1926, the aforesaid purchase money notes and mortgages (as well as a small amount of other property) were distributed to its sole stockholder; $41,758.71 of the value of the property so distributed discharged a debt owed to the stockholder, the remainder being treated as a liquidating dividend. The Commissioner contends that the amount of the debt so paid must be added to the cash payments made by the purchaser earlier in the year, thereby causing the "initial payments" to exceed 25 per cent of the purchase price and precluding the use of the installment basis in reporting the profit on the real estate sales. This contention was sustained by the Board of Tax Appeals.

Section 212(d) of the Revenue Act of 1926 gives a taxpayer the privilege of reporting income on the installment basis if "the initial payments do not exceed one-fourth of the purchase price." (See *Burnet* v. *S. & L. Bldg. Corporation*, 288 U. S., 406 [Ct. D. 651, C. B. XII–1, 195].) It then defines the term "initial payments" as follows:

"As used in this subdivision the term 'initial payments' means the payments received in cash or property other than evidence of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made."

But this statutory definition itself requires defining. Although evidences of indebtedness of the purchaser are not to be deemed initial payments, is this likewise true of what may be realized during the taxable period from disposing to a third person the purchaser's evidences of indebtedness? The Board has held that what is so realized must be considered "payments received in cash or other property." With this construction of the statute we can not agree. When the purchaser's notes are sold or otherwise disposed of to a third party, they are not paid, nor does the vendor then receive "payment" for the land in the ordinary sense of the word. In speaking of "payments received," we think the statute refers to payments received from the purchaser of the land. The section comprises in a single phrase payments received in cash or property other than evidences of indebtedness of the purchaser. Clearly evidences of indebtedness of the purchaser can only be received from the purchaser; it is implicit that payments of cash or other property are to be received from the same source. Moreover, when the vendor disposes of the purchaser's notes he enters into a separate transaction with a third party which may itself result in profit or loss. This is expressly recognized by section 44(d) of the Revenue Act of 1928. That statute of course, is not controlling as to the petitioner's transactions in 1926; but we view it as merely an express recognition of what was equally true under the 1926 Act by reason of the general provisions (sections 202–204) with respect to the sale of property by a taxpayer. (Compare *Meagher* v. *Com'r*, 20 B. T. A., 68, 72; *Virginia Beach Corporation* v. *Commissioner*, 23 B. T. A., 1170, 1175.) *Therefore, as we interpret section 212(d), the privilege of reporting upon the installment basis depends upon the transactions*

between the vendor and purchaser of the land during the taxable period; it is not made conditional upon what disposition the vendor may make of the purchaser's evidence of indebtedness by transactions with third parties during the taxable period in which the land was sold. Such transactions are separate and independent and will themselves be the basis for a return of profit or loss.

No court decision has been called to our attention which contradicts this view. Most of the Board's decisions to the contrary rest upon *Packard Cleveland Motor Co.* (14 B. T. A., 118). That was a case where automobiles were sold under installment contracts and all the installment notes were forthwith discounted with a credit company pursuant to an arrangement existing when the automobiles were sold on installments. Clearly the whole profit on the sale was realized in the taxable year in question whether or not the installment basis of reporting was permitted. Other decisions relied upon, of a similar character, are *Mytinger* v. *Commissioner* (4 B. T. A., 896); *Gillies* v. *Commissioner* (20 B. T. A., 570); *Elmer* v. *Commissioner* (22 B. T. A., 224). It is true that *Chapman* v. *Commissioner* (19 B. T. A., 878) can not be so explained but it follows the earlier authorities on the theory that any conversion of an installment note into cash within the taxable period in which the land was sold is an "initial payment." For reasons already stated we can not accept the Board's construction of section 212(d).

The Commissioner suggests that the method of reporting on the installment basis presupposes that the taxpayer will continue in business and should not be deemed applicable when the taxpayer is dissolved during the taxable period in which the sale is made. This is a consideration which might well have weight with Congress in formulating its legislative policy, but we find no such limitation in the statute.

The taxpayer's debt to its sole stockholder arose from the fact that the stockholder released first mortgages upon the petitioner's real estate for the purpose of allowing it to give a clear title to the purchasers. The petitioner urges that the release of the first mortgages should be treated as a voluntary contribution to capital and the distribution of the purchase money notes and mortgages as being wholly a liquidating dividend. (See *Virginia Beach Corporation* v. *Commissioner*, 23 B. T. A., 1170.) But the parties treated the transaction on the books of the corporation as creating a debt which was paid, and the Board has so found the facts. There is support for the finding and we must accept it. To the extent that the purchase money notes and mortgages paid this debt the corporation is in the same position as if it had sold a portion of them for cash and used the cash to pay its debt. (See *Batcheller* v. *Commissioner*, 19 B. T. A., 1050.) On this disposal of the mortgage notes at face value in the amount of the debt, it realized a profit which it must return for taxation. On this basis, we understand the petitioner to admit a deficiency of $2,957.09, which the Commissioner does not question.

Accordingly the order of the Board is reversed and the cause remanded for entry of an order of deficiency in the amount stated.

ARTICLE 50: When included in gross income. XII-30-6309
Ct. D. 708

INCOME TAX—REVENUE ACTS OF 1916 AND 1917—DECISION OF COURT.

GROSS INCOME—EXECUTOR'S FEE—CONSTRUCTIVE RECEIPT.

Where, under Pennsylvania law, executors' compensation may be fixed and paid when earned, or when partial or final accounts are prepared and filed, and where an executor of three estates, who kept his personal accounts on the basis of actual receipts and disbursements, performed services as executor in the years 1916 and 1917, and might have been paid in 1916 for services rendered in that year, but chose to wait until 1917, when first and partial accounts were filed, the amount earned in 1916 may not be considered as constructively received during that year, within the meaning of article 24 of Regulations 33, and taxed at 1916 rates, but was properly taxed at 1917 rates as income received during that year.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

John M. Freeman v. *United States of America.*

[March 31, 1933.]

OPINION.

MCVICAR, J.: In 1916 plaintiff was appointed executor of three estates. He performed services during that year for said estates of the fair value of $60,344.80. There were sufficient funds in each of said estates during that year to pay for services of plaintiff chargeable to that year. Plaintiff did not present a bill to said estates during 1916 for his services of that year. The estates did not set aside, credit or pay during 1916 anything to plaintiff on account of services earned by him in 1916. In 1917 first and partial accounts were filed in court in two of said estates by plaintiff. Before doing so plaintiff fixed and caused to be paid to him for services rendered in the years 1916 and 1917, in said two estates and also in the third estate, $72,316.45. Plaintiff kept his accounts on the basis of actual receipts and disbursements. He returned the aforesaid sum of $72,316.45 as income for 1917. He subsequently filed a claim of refund with the Commissioner of Internal Revenue for $15,227.94 on the ground that the value of the services rendered by him in 1916 to said estates was income for that year, and that by reason of the difference between the 1916 and 1917 rates he was entitled to a return of said sum. Plaintiff's claim was refused by the Commissioner. This action is brought to recover said claim against the United States, the collector of internal revenue to whom the tax was paid being out of office.

The question for decision is whether the sum of $60,344.80 for services rendered by plaintiff during 1916 was taxable to plaintiff as income for that year.

The applicable Revenue Acts of 1916 and 1917 required plaintiff (as he did) to make his income tax returns on the basis of actual receipts and disbursements as this was his method of keeping accounts. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, by Regulations 33 defined and illustrated what were actual receipts under said Act (which regulation is recognized as valid by both parties), the relevant part being as follows:

"Actual receipt is a reduction to possession. Constructive receipt is where income is credited to or made available to recipients and is to be reported as income; as credit to account of recipients of savings-bank interests," etc.

"In the case of compensation for service rendered, where no determination of compensation is had until the completion of the service, the amount received in consideration of the service is income to be accounted for as for the calendar year of its receipt."

"Where the service and payment period is divided by the end of the taxable year, the compensation for the period so divided at the end of the year will be accounted for as income for the year in which payment is actually received."

The regulation as to constructive receipts was no doubt made to prevent fraud by taxpayers who might fail to reduce to possession interest credited to accounts in bank, to collect interest coupons on bonds, or to collect other moneys credited to, or set apart for them so as to lessen the amount of their taxes.

Under Pennsylvania law executors may be compensated for services as rendered. It is customary in most estates, if a partial account is filed, for the executor to fix and pay for his service (as was done in two of the estates under consideration) at or about the time of the preparation and filing of such partial accounts, and where final accounts only are filed (unless unduly protracted) to fix and pay for such services all or about the time of the preparation and filing of such final accounts. Plaintiff, therefore, had it in his power to pay for the 1916 services in 1916, or wait, as he did, in two of the estates until preparation of the partial accounts in 1917, or he might have waited until the preparation of final accounts.

If the 1916 rate had been more favorable to the Government than the 1917 rate it could not, in my opinion, have charged plaintiff the 1916 rate for the

1916 services. Plaintiff had the right and followed the custom in having his 1916 services paid in 1917. The income for the services rendered by plaintiff in 1916 was not "credited to or made available to" plaintiff in 1916. He did not present bills for his 1916 services in 1916, or was there any money credited to him in said estates for such services rendered in 1916.

Constructive payments are not to be inferred in all cases where money is credited to another which he is at liberty to draw upon at any time. In *Massachusetts Life Insurance Co.* v. *United States* (53 Supreme Court Reports, 337 [Ct. D. 638, C. B. XII–1, 286]) it was held that an insurance company was not entitled to deduct from gross income interest unconditionally credited to policyholders in 1926 which had not been actually withdrawn during that year. The Supreme Court, in an opinion handed down February 6, 1933, by Mr. Justice Roberts, said, page 5:

"We are referred to a regulation which provides: 'Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession.' It is argued that the regulation requires the policyholder to report interest credited to him as received in the year of credit. The conclusion drawn is that if the credit is income to the insured it must constitute a 'constructive payment' by the company. In this view the transaction is said to come within the term 'paid' and we may disregard the word 'accrued.' This regulation has, however, not been applied in any case where income has been credited to another by a taxpayer employing the cash receipts and disbursements method of accounting; and specifically it has not been invoked to require policyholders to report as income the dividends or interest credited to them in cases such as this. No tax is demanded of them until actual receipt of the money. The constructive payment theory is, we think, untenable."

Regulations 33 aforesaid, which provides that such income shall be accounted for in the year received "where no determination of compensation is had until the completion of the service" would, in principle, require, where no compensation is fixed until after a part of the services is performed, that such compensation should be accounted for in the year received.

I have examined the cases cited by plaintiff and defendant in their briefs, not any of which are determinative of the issue here involved. I am of the opinion that plaintiff did not constructively receive in 1916 compensation for services rendered by him that year which were paid in 1917. I am also of opinion that the income for such service was not taxable in 1916.

Let an order for judgment be prepared in accordance with the foregoing findings of fact, conclusion of law and this opinion.

ARTICLE 50: When included in gross income.

XII–47–6521
Ct. D. 753

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. GAIN OR LOSS—SALE OF REAL ESTATE—CONTINGENT LIABILITY.

Where taxpayer sold her interest in certain real estate to a corporation in 1925 for cash and other considerations, remaining contingently liable on an outstanding mortgage which the corporation did not assume, the excess of cash received by her over that originally paid constituted taxable income for 1925. Profits are taxable in the year in which they occur, and the tax may not be withheld because of the possibility of loss occurring in later years.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 1148) affirmed.

3. CERTIORARI DENIED.

Petition for certiorari denied on October 9, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Florence B. Fawsett, petitioner, v. Commissioner of Internal Revenue, respondent.

Petition for review of decision of the United States Board of Tax Appeals.

Before ALSCHULER and EVANS, Circuit Judges, and LINDLEY, District Judge.

[February 17, 1933.]

OPINION.

This appeal is from a decision of the Board of Tax Appeals which included, improperly as petitioner contends, the sum of $18,142.05 in her 1925 taxable income.

EVANS, Circuit Judge: Petitioner asserts that the amount in controversy, being the profits obtained on a Florida real estate deal, should not have been included in her 1925 taxable income, but were profits of the year 1930. The Commissioner and the Board of Tax Appeals held otherwise.

The facts out of which the controversy arises may be briefly stated as follows:

Petitioner, a Milwaukee resident, and Flower Bros., Florida real estate dealers, purchased, in 1925, 10,474 acres of Florida real estate for $104,748. The purchase price was paid by (*a*) the assumption of an outstanding mortgage of $35,000; (*b*) the execution of a second mortgage securing four notes of $10,000 each for the payment of which petitioner became liable; and (*c*) cash advanced by the two purchasers. Each paid $12,774.10. A corporation was organized to purchase and dispose of the land which was conveyed to the corporation for a price aggregating $160,000 and 400 shares of its capital stock. Eighty-five thousand dollars was paid in cash, and the balance was represented by the two outstanding mortgages, aggregating $75,000, only the former of which the corporation assumed.

The capital stock of the corporation was 1,400 shares, 1,000 shares of which were sold to the public and 400 shares divided equally between petitioner and Flower Bros. From the proceeds of the sale of the stock to the public, $85,000 was applied on the purchase price of the land, the balance used in part to apply on one of the mortgages. After the costs and commissions incident to the sale were paid, petitioner received, July, 1925, as her part of the deal, $30,916.15. Her profits, which were realized in 1925, were therefore $18,142.05. However, she was contingently liable on the four $10,000 notes which Flower Bros. executed. The venture turned out badly for the corporation which finally permitted the land to be sold on foreclosure in 1930. A sufficient sum was realized to satisfy the outstanding mortgages, but nothing was realized on the stock.

Upon this statement of facts we agree with the Commissioner and the Board of Tax Appeals that petitioner's profits on the transaction occurred in 1925, and the possible loss on the $40,000 mortgage was not deductible therefrom. It is true there was a possibility of petitioner's being called upon to make good a judgment predicated upon the four notes of $10,000 each. However, that was a loss which she was required to meet when and if it occurred. If it ever occurred she could deduct the loss from the gains and profits for the year wherein it occurred. As stated in *Burnet* v. *Huff* (288 U. S., 156), decided February 6, 1933:

"* * * the mere existence of liability is not enough to establish a deductible loss. There is liability in the case of a breach of contract, but as the court said in *Lucas* v. *American Code Co.* (280 U. S., 445, 450 [Ct. D. 168, C. B. IX–1, 314]), 'even an unquestionable breach does not result in loss if the injured party forgives or refrains from prosecuting his claim.' And whether a taxpayer will actually sustain a loss through embezzlement of trust funds of which he is trustee will depend upon a variety of circumstances. If there is liability on his part for the misappropriation, it does not create a certainty of loss, as the defalcation may be made good by the one who caused it, or the liability of the taxpayer may be enforced only to a limited extent or not at all. The requirement that losses be deducted in the year in which they are sustained calls for a practical test. The loss 'must be actual and present.'"

The Government tax is due the year the profits occur. The tax may not be withheld because perchance there may be a loss due to a rise or fall of values or due to mismanagement, etc.

The order of the Board of Tax Appeals is affirmed.

ARTICLE 50: When included in gross income.

REVENUE ACT OF 1926.

Advance payment on sale closed in later year. (See Ct. D. 754, page 200.)

ARTICLE 52: Examples of constructive receipt. XII-34-6354
Ct. D. 721

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GROSS INCOME—PROCEEDS OF ASSIGNED CONTRACT.

Where petitioner, an attorney at law, and other attorneys entered into a contract with a client, agreeing to conduct legal proceedings to establish her rights in a certain trust estate and to receive as compensation for their services 40 per cent of any amount which might be recovered, and where, before any amount was recovered or there was any assurance that there would be, petitioner made a written assignment to his wife of an undivided one-half of his interest in the contract, the entire amount received as the petitioner's share in the proceeds of the contract was taxable income to him. Inasmuch as the contract of employment created a relationship of attorney and client, there could be no transfer of the corpus or res and the gift effected merely an equitable assignment of possible future income.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (24 B. T. A., 531) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Harry A. Daugherty, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Upon petition to review an order of the United States Board of Tax Appeals.

Before WILBUR and SAWTELLE, Circuit Judges, and CAVANAH, District Judge.

[January 30, 1933.]

OPINION.

SAWTELLE, Circuit Judge: The respondent determined that the entire proceeds of a certain contract, hereinafter set forth, were taxable as the income of petitioner, despite an assignment of one half of the proceeds of the contract by petitioner to his wife. The Board of Tax Appeals held that the determination of the respondent was correct; and this appeal is from the decision of the Board.

The tax in question is for the calendar year 1926, and was assessed under section 213(a) of the Revenue Act of 1926 (44 Stat., 23; 26 U. S. C. A., section 953).

In 1912, petitioner, an attorney at law, and one Robert J. Folonie were engaged in litigation in the State of Illinois to establish the rights of one Mrs. Estelle Howland in a trust estate created by her father-in-law, John D. Jennings, who died in 1889. This litigation terminated unsuccessfully to Mrs.

Howland. Certain adverse interests were represented by the law firm of Campbell & Fischer, of Chicago. In 1923, Edwin Jennings, the last surviving son of John D. Jennings, and brother-in-law of Mrs. Howland, died. Mr. Campbell, of the firm of Campbell & Fischer, upon learning that petitioner still represented Mrs. Howland, stated to petitioner that, in connection with the prior litigation, he had studied and briefed the question of Mrs. Howland's rights in the trust estate and that he had reached the conclusion that, in view of the death of Edwin Jennings, Mrs. Howland was entitled to a substantial interest therein. Campbell offered to give his brief to petitioner. Petitioner said that he would ascertain the wishes of his client with regard to the matter, but that in no event could he handle litigation for her, because a position he then held with the Standard Oil Co. of Indiana occupied all of his time and attention. It was orally agreed between Campbell and petitioner that petitioner would not engage in any of the litigation, but that petitioner was simply to furnish the client. At a conference between Mrs. Howland and her husband and petitioner and Campbell, it was agreed that a bill to construe the will should be filed, and that all of the work in connection with the proceeding should be performed by the firm of Campbell & Fischer, and neither petitioner nor Folonie would be required to do any work in connection with the case. The contract executed by Mrs. Howland and the attorneys, in Chicago, on November 5, 1923, is as follows:

"I hereby appoint Harry A. Daugherty (petitioner), Robert J. Folonie, John G. Campbell and Herman A. Fischer, Jr., to act as my solicitors and attorneys in all matters pertaining to my interest in the trust estate founded by the last will of John D. Jennings, deceased. They are authorized to commence or participate in any proceedings they deem necessary in order to establish my interest therein. As their full compensation for services they are to receive an amount equal to 40 per cent of any money or property I am awarded or receive in connection with the subject matter of said trust estate; it being agreed and understood that this compensation is to be in addition to any fees which may be awarded, either to me on account of my solicitors' fees, or directly to my solicitors, by any court, from the trust estate as a whole, on account of legal services rendered by them in any suit or suits which they instituted or participated in involving the subject matter above mentioned, but does not include anything which I may receive directly from the estate of Edwin Jennings, deceased, as distinguished from the said trust estate found by the will of John D. Jennings, deceased."

January 30, 1924, petitioner wrote a letter to his wife, inclosing his copy of the contract of employment with Mrs. Howland, and on the margin of the contract petitioner indorsed an assignment to his wife of an undivided one-half of his interest in the contract. Some time in 1925 petitioner orally advised Campbell of this assignment. At the time of this assignment or gift the litigation to which the contract related was pending and undetermined. There was no assurance that there would be a successful termination or settlement in favor of Mrs. Howland, and petitioner's interest in the contract and the value of the interest transferred to his wife was therefore wholly contingent and undeterminable.

In June, 1926, the litigation was settled, and Mrs. Howland received $943,605 in satisfaction of her claim. Pursuant to the contract, 40 per cent of this amount was paid to the attorneys. Petitioner received $47,180, or one half of the amount due him under the contract of employment, and the other half was, pursuant to the assignment, paid to petitioner's wife, who deposited the money in her own name and used it for her own benefit and purposes.

The respondent added to petitioner's gross income for the year in question the sum paid to petitioner's wife under the assignment. The Board of Tax Appeals affirmed this determination on the ground that the sum in question represented compensation paid to petitioner for his legal services and was therefore income taxable to him, under the decision of the Supreme Court in *Lucas* v. *Earl* (281 U. S., 111).

It is contended that in *Lucas* v. *Earl*, supra, there was no contract to which an assignment could attach and no res or property which was susceptible of assignment, while in the case at bar there was a valuable contract which was income producing and which constituted an assignable property right of the petitioner.

In *Lucas* v. *Earl*, supra, it was agreed between a husband and his wife "that any property either of us now has or may hereafter acquire * * * either by

earnings (including salaries, fees, etc.), or any rights by contract or otherwise * * * shall be treated and considered and hereby is declared to be received, held, taken, and owned by us as joint tenants, and not otherwise, with the right of survivorship." In sustaining a tax on the husband for the whole of the salary and attorney's fees earned by him, and taxable under a statute similar to the one here involved, the court said:

"A very forcible argument is presented to the effect that the statute seeks to tax only income beneficially received, and that taking the question more technically the salary and fees became the joint property of Earl and his wife on the very first instant on which they were received. We well might hesitate upon the latter proposition, because however the matter might stand between husband and wife, he was the only party to the contracts by which the salary and fees were earned, and it is somewhat hard to say that the last step in the performance of those contracts could be taken by anyone but himself alone. But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing Act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts, however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

Inasmuch as the contract of employment in this case created a relationship of attorney and client, there could be no transfer of the corpus or res, and the gift effected merely an equitable assignment of petitioner's possible future income. In *Poe* v. *Seaborn* (282 U. S., 101, 117 [Ct. D. 259, C. B. IX–2, 202]), the court said: "The very assignment in that case (*Lucas* v. *Earl*, 281 U. S., 111) was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate." So, here, the assignment could operate on nothing but the earnings of petitioner. The fact that petitioner did no work in connection with the litigation out of which the income arose does not alter the situation. His prior services in connection with that litigation undoubtedly prompted the parties in making the contract of employment which gave rise to the income, and his interest in the contract at the time of the assignment was, of course, wholly uncertain and contingent.

We are, therefore, unable to distinguish this case from the broad rule of *Lucas* v. *Earl*, supra, that the fruits should not be "attributed to a different tree from that on which they grew," and from cases in which the courts have held that anticipatory arrangements transferring income to accrue from personal services to be rendered by the assignor are unavailing for tax purposes. (See *Bishop* v. *Commissioner* (C. C. A. 7), 54 F. (2d), 298 [Ct. D. 477, C. B. XI–1, 164]; *Luce* v. *Burnet* (App. D. C.), 55 F. (2d), 751; *Parker* v. *Routzahn* (C. C. A. 6), 56 F. (2d), 730 [Ct. D. 489, C. B. XI–1, 256]; *Blumenthal* v. *Commissioner* (C. C. A. 2), 60 F. (2d), 715.)

Affirmed.

ARTICLE 52: Examples of constructive receipt. XII–43–6466 Ct. D. 745

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

GROSS INCOME—UNCOLLECTED INTEREST COUPONS—CONSTRUCTIVE RECEIPT.

The fact that the mental and physical condition of the taxpayer in 1923 rendered him unable to clip and cash interest coupons which had matured between January 1, 1923, and the date of his death, September 18, 1923, did not relieve his estate from the liability to pay income tax upon the interest which was constructively received by the decedent, though uncollected. The law contemplates that one who is incapable of managing his own affairs may have another to do that for him, and that even though such a condition exist, the income that is subject to his unfettered command may be taxed to him whether he sees fit to enjoy it or not.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

Ella C. Loose, as Executrix of the Last Will and Testament of Jacob L. Loose, Deceased, and Individually, plaintiff, v. *United States of America, defendant.*

[July 11, 1933.]

OPINION.

REEVES, J. This is a suit to recover a tax paid under protest. The amount, including interest was $12,974.86. It was paid on January 3, 1930. Plaintiff seeks to recover the amount thereof with interest at 6 per centum from the time it was paid.

The agreed statement of facts shows that Jacob L. Loose deceased on September 18, 1923, and that prior to his death, and after December 31, 1922, interest coupons in the sum of $34,687.50 on sundry securities owned and held by him had matured for payment. Because of his physical and mental condition he was unable to clip and cash said coupons although the debtors were entirely solvent and responsible.

After the death of Mr. Loose, the coupons were treated as assets of the estate, and an estate tax was paid as required by law. Subsequently it was determined that such coupons should have been treated as income during the year 1923 and that same were taxable as such.

All the principal facts are agreed to by the parties, including the physical disability of Mr. Loose. The agreed statement of facts was supplemented, however, by the introduction of affidavits, showing a mental infirmity of the decedent so as to render it impossible in view of the circumstances for him to have converted said coupons into cash.

Other facts as they become pertinent will be stated in the course of this memorandum opinion.

1. Applicable revenue laws provide that the "gross income" shall include "income derived * * * from interest." Treasury regulations duly promulgated provide for "constructive receipt" in certain cases, and particularly in the case of interest as follows:

"Where interest coupons have matured but have not been cashed, such interest payment though not collected when due and payable, is nevertheless available to the taxpayer, and should therefore be included in his gross income for the year during which the coupons matured."

Without more, this would seem to settle the matter.

2. However plaintiff contends that the physical and mental incapacity of the decedent at the time would relieve him of the liability to pay the income tax on said coupons under the circumstances.

Neither mental nor physical incapacity will relieve one of his duty to pay taxes. (*DeHatre* v. *Edmonds*, 200 Mo., 246, l. c. 276; *Commissioner* v. *Bingham*, 35 Fed. (2d), 503, l. c. 504 [Ct. D. 207, C. B. IX–2, 289].)

3. Again, in dealing with the question of dividends on corporate stocks, a special enactment of the Congress provided that "a taxable distribution made by a corporation to its shareholders or members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

Plaintiff insists that such an enactment shows the purpose of the Congress to exclude matured interest coupons before the amount thereof has actually been received in cash. This is suggested under the well known maxim, "Expression unium est exclusio alterius."

Clearly the maxim is inapplicable. By the enactment with respect to dividends, Congress put such on the same basis as matured interest. When the dividend was declared and set apart, it had an identical status with interest matured. In the case of the dividend, it only became available by affirmative act of the board of directors. The fund for its payment had to be appropriated. In the case of the interest coupons, the contract obligation of the debtor was to provide funds for its payment. In the absence of congressional act, it may be questioned whether the Commissioner could have promulgated a regulation in respect of unpaid dividends. By such an enactment it was within his right to make such regulation.

4. It should be borne in mind that the executrix treated the coupons as a part of the assets of the estate. They were duly inventoried and an estate tax paid thereon. This was required to be done before the same were cashed. Before they could become assets of the estate they must have been treated as income.

As said in *Corliss* v. *Bowers* (281 U. S., 376, l. c. 378 [Ct. D. 188, C. B. IX–1, 254]):

"The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income whether he sees fit to enjoy it or not."

This is true, even if suffering from a mental or physical infirmity. The law contemplates that one who is incapable of managing his affairs may have another to do that for him.

Other questions were discussed by counsel, but the foregoing appear to be sufficient to decide the case.

Accordingly, the recovery is denied and the issues are found for the Government.

It is so ordered.

SECTION 213(b).—GROSS INCOME DEFINED: EXCLUSIONS.

ARTICLE 74: Interest upon State obligations.

REVENUE ACT OF 1926.

Interest paid by a municipality upon award in condemnation proceedings. (See Ct. D. 736, page 104.)

ARTICLE 87: Income of States. XII–40–6431
Ct. D. 738

INCOME AND EXCESS PROFITS TAX—REVENUE ACTS OF 1916, 1917, AND 1918—DECISION OF COURT.

EXEMPTION—STATE INSTRUMENTALITY—SALE OF OIL AND GAS LEASES OF SCHOOL LANDS OF OKLAHOMA.

The profit derived by a lessee from the sale of oil and gas leases of school lands acquired from the State of Oklahoma is not exempt from Federal taxation. The principle that one Government may not levy a tax upon the functions or instrumentalities of another applies only where the tax would be a real and direct burden upon the State's exercise of its governmental functions, and can not be applied to this case, where no substantial burden is cast upon the State's leasing power by taxing the profit from a sale by the individual lessee.

COURT OF CLAIMS OF THE UNITED STATES. No. K–322.

Ernest Whitworth Marland v. *The United States.*

[June 5, 1933.]

OPINION.

LITTLETON, Judge, delivered the opinion of the court.

Plaintiff's motion, for a new trial on the question whether the profits derived by him from the sale of leases theretofore acquired from the State of Oklahoma were subject to Federal income tax was allowed with leave to take additional testimony with respect to this question. Additional evidence was

taken and we have made additional special findings of facts as requested by the parties.

Plaintiff relies in general upon the principle announced in *Gillespie* v. *State of Oklahoma* (257 U. S., 501), and applied in *Burnet* v. *Coronado Oil & Gas Co.*, supra [285 U. S., 393, Ct. D. 485, C. B. XI–1, 265], and contends that the rule laid down by the court in these cases entitles him to judgment under finding 7 herein that "if the profits derived from the resale of such leases by the lessees of the State are held subject to income and excess profits taxes by the Federal Government, that holding would have the effect to restrict and to limit substantially the market for such leases, and to substantially lessen the price obtainable by the State therefor." He claims that the case of *Willcuts* v. *Bunn* (282 U. S., 216 [Ct. D. 280, C. B. X–1, 309]), is also an authority in his favor upon the principle upon which he relies for the reason that in that case the court said "before we can restrict their (the taxing Acts') application upon the ground of a burden cast upon the State's borrowing power, where the tax is not laid upon the contract made by the State in the exercise of that power, or upon the amounts payable thereunder, but is laid upon the result of distinct transactions by private owners, it must clearly appear that a substantial burden upon the borrowing power of the State would actually be imposed. * * * Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposes a burden upon the State's borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible."

He, therefore, contends that the tax here in question must be held invalid on the ground that under the facts it has been made to appear that it casts a substantial burden upon the State's leasing power and that its effect is to hamper the State's efforts to make the best terms possible for its public schools, a function strictly governmental in character. The defendant also relies upon the case of *Willcuts* v. *Bunn*, supra, as authority for its position that the profits on the sale of the leases are subject to Federal taxation.

We have again carefully considered this question in the light of the additional facts established on the new trial, and in the light of the reargument and the authorities cited by the parties in support of their respective positions, and have again come to the conclusion announced in the opinion of December 7, 1931, that plaintiff is not entitled to recover and that the petition must be dismissed.

In *Group No. 1 Oil Corporation* v. *Bass* (283 U. S., 279 [Ct. D. 330, C. B. X–1, 153]), the court had before it the question of the taxability of profits derived from oil leases on public lands of Texas. In that State, unlike Oklahoma, the granting of a lease on oil and gas lands constitutes a sale of oil and gas located beneath the surface. The case therefore was one of a claimed immunity from taxation because of the source of the title. The court, while recognizing that the State's property before sale could not be taxed by the Federal Government, nor could the sale thereof be taxed, said:

"But it does not follow that the same property in the hands of the buyer, or his use or enjoyment of it, or the income he derives from it, is also tax immune. (*New Brunswick* v. *United States*, 276 U. S., 547; *Forbes* v. *Gracey*, 94 U. S., 762; *Tucker* v. *Ferguson*, 22 Wall., 527; see *Weston* v. *Charleston*, 2 Pet., 449, 468; *Veazie Bank* v. *Fenno*, 8 Wall., 533, 547.) Theoretically, any tax imposed on the buyer with respect to the purchased property may have some effect on the price, and thus remotely and indirectly affect the selling government. We may assume that if the property is subject to tax after sale, the governmental seller will generally receive a less favorable price than if it were known in advance that the property in the hands of later owners, or even of the buyer alone, could not be taxed.

"But the remote and indirect effects upon the one government of such a nondiscriminatory tax by the other have never been considered adequate grounds for thus aiding the one at the expense of the taxing power of the other. (See *Willcuts* v. *Bunn*, 282 U. S., 216, 231; *Educational Films Corporation* v. *Ward*, 282 U. S., 379; *Metcalf & Eddy* v. *Mitchell*, 269 U. S., 514, 523–524 [T. D. 3824, C. B. V–1, 218].) This court has consistently held that where property or any interest in it has completely passed from the Government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once Government owned, or because the sale of it effected some Government purpose. (*New Brunswick* v. *United States*, supra; *Forbes* v. *Gracey*, supra; *Tucker* v. *Ferguson*, supra; see *Gromer* v. *Standard*

Dredging Co., 224 U. S., 362, 371; *Choctaw, O. & G. R. Co.* v. *Mackey*, 256 U. S., 531, 537; *Central Pacific R. Co.* v. *California*, 162 U. S., 91, 125; *Railroad Co.* v. *Peniston*, 18 Wall., 5, 35–37; *Weston* v. *Charleston*, supra, 468.)"

The court recognized the principle of the Gillespie case, but, upon the basis that the property had passed to the buyer, held that the limits of the immunity had been exceeded. The income from the oil and gas produced was held in that case subject to tax by the Federal Government.

In *Susquehanna Power Co.* v. *State Tax Commission of Maryland* (No. 1) (283 U. S., 291), immunity was claimed from State taxation because of the use of property otherwise taxable, pursuant to and in connection with a license from the Federal Government. The court in denying the claim for immunity said:

"Assuming, for present purposes, that the license of the Power Commission is a Federal instrumentality, immune from taxation or other direct interference by the State, it does not follow that the property appellant uses in its power project is clothed with that immunity. The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other. * * *"

In the case of the *Indian Motorcycle Co.* v. *United States* (283 U. S., 570 [Ct. D. 354, C. B. X–1, 439]), the court reaffirmed the principle of immunity and applied it in that case which involved a tax levied on the sale of motorcycles to a municipal corporation for use in its police service, and distinguished the case of *Willcuts* v. *Bunn*, supra, as follows: " * * * for the taxes there in question were not laid on transactions involving an exertion of governmental functions and their bearing on governmental operations was so indirect or remote as to place them outside the principle which is applicable here."

In *Burnet* v. *Coronado Oil & Gas Co.*, supra, the court applied the principle announced in the Gillespie case and held that income derived from the sale of oil and gas produced from lands leased from the State of Oklahoma was exempt from tax, but indicated that the principle should not be extended. It was there said that: "We are disposed to apply the doctrine of *Gillespie* v. *Oklahoma* strictly and only in circumstances closely analogous to those which it disclosed. * * *"

In *Fox Film Corporation* v. *Doyal* (286 U. S., 123) the court declined to apply the principle of immunity where the burden upon the State was indirect and remote. In this case the court said:

"The principle of the immunity from State taxation of instrumentalities of the Federal Government, and of the corresponding immunity of State instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland*, 4 Wheat., 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' (*Indian Motocycle Co.* v. *United States*, 283 U. S., 570, 576, 579.) Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson* v. *Maryland*, 254 U. S., 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.' (*Willcuts* v. *Bunn*, 282 U. S., 216, 225.)"

The immunity from taxation applies only where the tax would be a real and direct burden upon the State's exercise of its governmental functions and it is our opinion that under the cases cited the burden upon the State of Oklahoma in leasing its public lands on the best possible terms, because of the tax that may be exacted from the lessee upon the sale by him of his leases from the State, is so indirect and remote as to place it outside the principle that one Government may not levy a tax upon the functions or instrumentalities of another. Although it is shown in this case that a lessee of oil lands from the State of Oklahoma would pay more to the State for a lease in the first instance, if he were assured that profits from the sale of a lease would be exempt from Federal income tax, this was doubtless true in *Group No. 1 Oil Corporation* v. *Bass*, supra.

The tax offends the implied constitutional prohibition only if it is imposed directly upon a governmental instrumentality, or if, though it is not so imposed, its effect is to place a direct and substantial burden upon the exercise

of a governmental function. (*Willcuts* v. *Bunn*, 282 U. S., 216; *Metcalf & Eddy* v. *Mitchell*, 269 U. S., 514.) A gain derived by a taxpayer through a sale of property or interest therein acquired from a State, whether acquired in the form of a lease or by purchase, does not, in our opinion, fall within the implied constitutional prohibition against taxation. "The immunity does not extend to anything lying outside or beyond governmental functions and their exercise * * *." (*Indian Motocycle Co.* v. *United States*, supra.) The immunity from taxation extends only to those agencies through which the State immediately and directly exercises its sovereign powers, and it is apparent that not everyone who uses his property or derives a profit, as a result of his dealings with the Government, may clothe himself with immunity from taxation. (*Metcalf & Eddy* v. *Mitchell*, supra.)

Plaintiff is not entitled to recover and his petition is dismissed. It is so ordered.

ARTICLE 88: Compensation of State officers and employees.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Vocational training teachers employed in private institutions and paid in part from Federal funds. (See G. C. M. 12137, page 81.)

ARTICLE 90: Income accrued prior to March 1, 1913. (Also Section 202, Article 1561.)

XII-32-6333
Ct. D. 714

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. GROSS INCOME—BASIS FOR DETERMINING GAIN OR LOSS.

Where petitioner made an agreement in 1904 with a foreign company whereby it was agreed that he should receive a one-fourth interest in any enhancement in value above par of shares of stock of the company placed in his hands, if certain contingencies occurred, and where the stock so held was turned over during the war to the Alien Property Custodian, who sold it and in 1923 paid petitioner his share in the enhancement in value, the entire amount received from the Alien Property Custodian, less attorneys' fees paid by him, was taxable income to petitioner, rather than the difference between the March 1, 1913, value of the stock and its selling price. The agreement was not a capital asset of ascertainable value on March 1, 1913, being only a promise of future payments under specified conditions.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (22 B. T. A., 36) affirmed.

3. CERTIORARI DENIED.

Petition for writ of certiorari was denied by the Supreme Court on March 27, 1933 (53 S. Ct., 526).

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Fritz Worm, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals.

Before ALSCHULER and SPARKS, Circuit Judges, and WILKERSON, District Judge.

[October 19, 1932.]

OPINION.

Petitioner seeks a reversal of an order of the Board of Tax Appeals approving a deficiency assessment of income tax for the year 1923.

In 1904, the petitioner was manager for the German-American Portland Cement Works, hereinafter referred to as the "American company." Twenty-five hundred shares of the stock of the American company, a controlling interest, were owned by the Portland Cementfabrik Hemmoor, hereinafter referred to as the "German company." In that year, petitioner made a new agreement with the German company. He was elected president and general manager of the American company and his powers were enlarged. The stock certificate for 2,500 shares of the American company was placed in his hands, unindorsed. It was agreed that if he made a success of the American company he would be given one-fourth interest in the enhancement of the value of this stock above par, that he should receive one-fourth of such enhanced value in case of a sale thereof, that in case he resigned there was to be an accounting and that if he died his estate would receive the benefit thereof.

Petitioner was successful with the American company and paid off its mortgage indebtedness. The value of the stock, as was found by the Board, became stable and the stock on March 1, 1913, was worth at least $200 per share.

During the war the stock certificate for 2,500 shares was turned over to the Alien Property Custodian. New directors were appointed by the Custodian, but petitioner remained in his position as president and manager. The stock was sold in 1919 by the Custodian for $286 per share, and in 1923 the Custodian paid the petitioner $100,000, less certain adjustments which are not here material, as his share in the enhancement of the value of the stock above par.

Petitioner in his income tax return for 1923 reported as income only that portion of the amount received from the Custodian which represented the difference between the selling price of the stock and the value of $225 per share which petitioner claimed it was worth on March 1, 1913.

The Commissioner, in auditing the return ruled that the entire amount received by the petitioner from the Custodian, after deducting attorneys' fees paid by the Custodian, was income of the petitioner for 1923 and made a deficiency assessment accordingly. The Board of Tax Appeals sustained the Commissioner, and to review that order this petition is brought.

WILKERSON, District Judge: Section 213 of the Revenue Act of 1921 (ch. 136, 42 Stat., 227, 238) requires that for income tax purposes there shall be included "gains, profits, and income derived from * * * compensation for personal service * * * or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever."

That section also requires that the amount of such items, except as otherwise provided, shall be included in the gross income for the taxable year in which received by the taxpayer.

The sixteenth amendment, granting to the Congress power to tax incomes without apportionment, became effective February 25, 1913. If a part of the total gain received by the taxpayer accrued during the period before the effective date of the amendment, it must be deemed for income tax purposes, as accretion to capital not taxable by the income tax Acts enacted under the sixteenth amendment. (*Lucas* v. *Alexander*, 279 U. S., 573 [Ct. D. 76, C. B. VIII–2, 273].)

Section 202(b) of the Revenue Act of 1921 (ch. 136, 42 Stat., 227, 229) provides:

"The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be * * *

"(1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value."

Treasury Regulations 62, article 90, provides:

"Any claim existing unconditionally on March 1, 1913, whether presently payable or not and held by a taxpayer prior to March 1, 1913, whether evidenced by writing or not, and all interest which had accrued thereon before that date, do not constitute taxable income, although actually recovered or received subsequent to such date. * * *"

Petitioner claims that the agreement by which he was to receive one-fourth of the enhanced value of the stock in certain contingencies was a part of his capital on March 1, 1913; and that the value of this agreement on March 1,

1913, should be found and deducted in determining the amount received by him from the proceeds of the sale of the stock which is to be included as a part of his income for 1923.

In order to determine the gain derived by petitioner from the agreement which is to be treated as income, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed on March 1, 1913. The burden of proof to establish the amount of that capital value, clearly, is upon the petitioner. (*Burnet* v. *Houston*, 283 U. S., 223, 227 [Ct. D. 328, C. B. X–1, 343]; *Reinecke* v. *Spalding*, 280 U. S., 227, 233 [Ct. D. 154, C. B. IX–1, 305]; *Botany Mills* v. *United States*, 278 U. S., 282, 289 [Ct. D. 39, C. B. VIII–1, 279]; *United States* v. *Anderson*, 269 U. S., 422, 443 [Ct. D. 34, C. B. II–2, 87].) To be sure, the taxing statutes must be construed with an eye to possible constitutional limitations so as to avoid doubts as to validity (*Lucas* v. *Alexander*, supra); but a construction which relieves the taxpayer of the burden of showing facts from which, under the rules of proof, the capital value existing on March 1, 1913, may be ascertained is not permissible. (*Burnet* v. *Houston*, supra, 228.)

It is clear that by the agreement of 1904, petitioner did not become the owner of any portion of the shares of stock. His interest was limited to participation in the enhanced value of the stock. Petitioner had no interest in any dividends paid on the stock. If the stock was sold below par he received nothing.

That which it is claimed should have been valued as a capital asset consisted of the promise of the German company to pay one-fourth of the value of the stock of the American company above par in certain contingencies, as follows:

(1) If the German company should sell the stock, petitioner would receive one-fourth of the amount received for the stock in excess of $100 per share;

(2) If petitioner should resign as president and manager of the American company, there would be an accounting and the German company would pay to petitioner one-fourth of the value of the stock above par;

(3) If petitioner should die, there would be an accounting and the German company would pay to petitioner's estate one-fourth of the value of the stock above par.

The payment promised if the German company should elect to sell the stock was wholly dependent upon an act beyond the control of petitioner and which it was impossible to foresee.

The payment promised to be made if petitioner should resign his position with the American company was, of course, within the power of petitioner to control. To receive the payment, however, petitioner was obliged to give up his position with the American company, and there is no basis in the record for valuing the promise, when the uncertain and speculative element of the resignation required as a condition of the obligation to pay is taken into consideration.

The promise to pay to petitioner's estate in the event of his death approaches more nearly the field of reasonable certainty. But here petitioner made no attempt to make a showing of the value of the promise on March 1, 1913, on the assumption that the value of the stock would remain constant until petitioner should die. If the value of the promise could have been ascertained by resort to the mortality tables and to methods employed in life insurance and annuity computations, petitioner did not elect to follow that course. He bases his claim upon the contention that the value on March 1, 1913, of the promise of the future payments is one-fourth of the value of the stock on that date above par. That contention, as we have pointed out already, can not be sustained.

This case, in our opinion, lacks those elements of certainty upon which to base a valuation as of March 1, 1913, which are to be found in the cases upon which petitioner relies. (Compare *Lucas* v. *Alexander*, 279 U. S., 573; *Lynch* v. *Turrish*, 247 U. S., 221; *Eldredge* v. *United States*, 31 Fed. (2d), 924; *Kentucky Tobacco Products Co.* v. *Lucas*, 5 Fed. (2d), 723; *Platt* v. *Bowers*, 13 Fed. (2d), 951; *Kosmerl* v. *Commissioner*, 25 Fed. (2d), 87; *Ruth Iron Co.* v. *Commissioner*, 26 Fed. (2d), 30; *Saunders* v. *Commissioner*, 29 Fed. (2d), 834; *Portage Silica Co.* v. *Commissioner*, 49 Fed. (2d), 985; *Commissioner* v. *Stephens*, 51 Fed. (2d), 681.)

The case is more nearly analogous as to contingency in the promised payments to *Workman* v. *Commissioner* (41 Fed. (2d), 139) and *Woods* v. *Lewellyn*

(252 Fed., 106). The observation in *Burnet* v. *Houston* (283 U. S., 223, 228) is pertinent:

"The impossibility of proving a material fact upon which the right to relief depends, simply leaves the claimant upon whom the burden rests with an unenforceable claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof."

(See also *Burnet* v. *Logan*, 283 U. S., 404, 413 [Ct. D. 351, C. B. X–1, 345].)

The order of the Board of Tax Appeals is affirmed.

SECTION 213(c).—GROSS INCOME DEFINED: NONRESIDENT ALIEN INDIVIDUAL.

ARTICLE 92: Gross income of nonresident alien individuals. XII–48–6536 I. T. 2736

REVENUE ACT OF 1918.

Office Decision 988 (C. B. 5, 117), in which it was stated that a nonresident alien author sold to a domestic corporation all rights of serial publication in the United States in certain literary works, and held that profit on the transaction was not income from sources within the United States and not subject to withholding, is revoked, in view of I. T. 2735 (see page 131, this Bulletin).

SECTION 214(a)1.—DEDUCTIONS ALLOWED INDIVIDUALS: BUSINESS EXPENSES.

ARTICLE 101: Business expenses. XII–27–6268 Ct. D. 694

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. COUNSEL FEES—ORDINARY AND NECESSARY BUSINESS EXPENSE.

An amount paid by petitioner to his attorneys for services rendered and expenses incurred in connection with demands made on behalf of his divorced wife for an accounting of his administration of her financial affairs during their marriage was a personal expense, and therefore not deductible as an ordinary and necessary business expense under the provisions of section 214(a)1 of the Revenue Act of 1926.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 304) affirmed.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Henry Sanderson, appellant, v. *David Burnet, Commissioner of Internal Revenue, appellee.*

Appeal from the Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[January 16, 1933.]

OPINION.

GRONER, Associate Justice: This is a tax case, and involves petitioner's income taxes for the year 1925. The facts are not disputed, and show petitioner resided in New York, and from 1911 to 1918 was a general partner in the firm of

Charles D. Barney & Co., members of the New York Stock Exchange. In 1919 he became a special partner, and in 1921 retired entirely from the firm. He was married in 1914 to Elizabeth Fairchild Howard. His wife at the time of the marriage was worth a little over a million dollars. Prior to the marriage she had maintained an account with the Barney firm, which in 1923 she transferred to the Central Union Trust Co. She bought, sold, and carried securities on margin, had money advanced to her and bills paid through the Barney firm. In 1915 she purchased land on Long Island on which she erected a residence, which when completed, cost $1,220,000. Petitioner advanced $600,000 of his own money to assist in paying for the home. In 1921 petitioner and his wife went abroad, where in 1923 difficulties between them arose, resulting in a separation and in 1926 in a divorce in Paris, where both then resided and continued to reside for some time thereafter. In the middle of 1924, petitioner received a letter from a New York attorney asking an accounting of petitioner's administration of his wife's financial affairs. Petitioner then retained counsel and engaged accountants to examine the details of his wife's transactions as shown by the books of the Barney company and the Central Union Trust Co. One of the demands made by petitioner's wife was that by reason of a deposit by her in 1914 of $100,000 with Barney & Co. she was entitled to have a half of petitioner's interest in the firm's profits, but this claim was withdrawn, and in February, 1925, counsel for petitioner's wife presented to him a bill in equity, which it was represented he intended to file, "alleging that with full confidence in her husband Mrs. Sanderson had permitted him to assume control of her capital, that he had arbitrarily commingled her funds with his own, using her securities as collateral for his loans, diverting income from her, transferring valuable securities of hers to his account, using her money for living expenses, retaining control over her account before and after its transfer to the Union Central Trust Co., and doing divers other improper acts," wherefore she prayed that he be directed to render a just and full accounting and deliver to her in cash and securities whatever should appear due. The bill in equity was never filed, and petitioner's wife later disclaimed all knowledge of its contents, but petitioner, to avoid litigation and its disagreeable features, compromised the dispute by check contrary to the wishes of his attorney, and paid in the year 1925 on account of counsel fees and other expenses in connection therewith, $37,562.63. The Board held that this expense arose directly out of petitioner's marital situation and was a personal expense within the meaning of section 215 of the Revenue Act of 1926 (44 Stat., 9). Petitioner, on the other hand, contends the amount was deductible "as an ordinary and necessary business expense" under the provisions of section 214(a)1, and relies upon *Kornhauser* v. *United States* (276 U. S., 145 [T. D. 4222; C. B. VII-2, 267]), and various decisions of the Tax Board since the Kornhauser case.

In the Kornhauser case the Supreme Court held that attorney's fees paid by the taxpayer in defense of an accounting suit brought by his former law partner respecting shares of stock which the taxpayer had received for professional services claimed by the partner to have been performed during the existence of the partnership were deductible as ordinary and necessary expenses in carrying on a trade or business. The Board of Tax Appeals have applied the ruling in the Kornhauser case in a number of subsequent cases. In *Munson* v. *Commissioner* (18 B. T. A., 232), where a taxpayer engaged detectives to guard his business property imperiled through circumstances arising in the operation of the business, it was held the expense was deductible. In *Continental Co.* v. *Commissioner* (19 B. T. A., 1095) the Board approved a deduction of attorney's fees paid for services performed in representing taxpayer before the Federal Trade Commission in defending taxpayer against charges of improper practices. And in *Citron-Byer Co.* v. *Commissioner* (21 B. T. A., 308) the Board approved attorney's fees paid in defending the taxpayer against a conspiracy indictment in connection with an alleged conspiracy to defraud the United States in the purchase of wire in connection with the business of the taxpayer. In the last-named case the Board said: "If the fees were paid in defense of an action or proceeding directly connected with and proximately resulting from the ordinary and proper conduct of the taxpayer's business, they are ordinary and necessary expenses of the business and deductible as such." And they applied the same rule in the case of *Howard* v. *Commissioner* (22 B. T. A., 375) and in *Potter* v. *Commissioner* (20 B. T. A., 252).

We think the quoted language above correctly states the applicable rule, but we do not find in the facts in the case under consideration a justification for its application here. In the Board's finding of facts there is a statement to the effect that when the controversy between petitioner and his wife began the latter claimed, by virtue of the deposit by her of $100,000, a half interest in his profits in the firm of which he had formerly been a member. If the deduction claimed had resulted from expenses incurred in defending this claim, there would be good ground for contending that it was expended in protecting his business interests, and in that aspect was a business expense, the deduction of which is allowable, but the statement of facts also shows that this claim was withdrawn and that the real grounds of the controversy were matters alleged in the bill of complaint, and these, as we have seen, related entirely to questions arising out of the purchase and erection of the Long Island residence, the alleged commingling by the husband of his and his wife's funds, the use by him of her securities as collateral for his loans, and the use of her money for living expenses, rather than anything which had any relation to any business in which he was then or had formerly been engaged. In the state in which we find the record, it is, of course, impossible to segregate or allocate any part of the expenditure made by petitioner to the withdrawn claim with relation to a share of his business income, or, as a matter of fact, to know that even a small part of it was attributable to that claim. If petitioner's wife had a claim against the partnership of which petitioner was formerly a member, the claim doubtless would have been made against the partnership rather than against one of its members. The fact that it was not tends very strongly to show that the conclusion stated above is the correct one and that the threatened proceeding was in fact for an accounting between husband and wife growing wholly out of their domestic affairs, and this becomes even more apparent when it is considered that the dispute was apparently part and parcel of the separation and divorce. It was therefore a personal rather than a business controversy.

In this aspect, the doctrine announced by the Supreme Court in the Kornhauser case, supra, is without influence, and we think the decision of the Board should be affirmed.

Affirmed.

ARTICLE 101: Business expenses. XII-37-6396
Ct. D. 731

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. DEDUCTION—ORDINARY AND NECESSARY EXPENSES—CAPITAL EXPENDITURES.

Installment payments made by petitioner coal company in extinguishment of an obligation to pay the cost price of a spur track to its coal lands are capital expenditures and are not deductible from income as ordinary and necessary expenses.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (24 B. T. A., 1096) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Cripple Creek Coal Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals.

Before ALSCHULER and EVANS, Circuit Judges, and FITZ-HENRY, District Judge.

[March 23, 1933.]

OPINION.

EVANS, Circuit Judge: The controversy between petitioner and respondent grows out of certain payments made by petitioner which it deducted from its income as "ordinary and necessary expenses." Respondent contends that these

payments were made in reduction of a liability and as such were not deductible from petitioner's income. The taxes involved are upon incomes for the years 1922 and 1923.

Petitioner was an Illinois corporation with its principal office in Galesburg. It acquired leases on coal lands near Bryant, Fulton County, Ill. (which lands were about 3 miles from the tracks of the C., B. & Q. R. R.), for the purpose of supplying the street railways of Minneapolis and St. Paul with "screenings" coal. The Transit Supply Co., a purchasing agent for said street railways, had experienced difficulty in 1917 in securing the necessary coal requirements (which amounted to approximately 300 tons a day) of said street railways and had caused petitioner to be organized to acquire coal leases and mine the coal. Hield, who represented the Transit Supply Co., held the stock of petitioner and was apparently influential with the street car companies. Before coal could be successfully mined and sold, it was necessary to construct a spur track from the C., B. & Q. R. R. to the leased coal lands. It was out of the cost of this spur track and the payments made as a result thereof that this controversy arose.

Petitioner and the railroad company contracted for the construction of the spur track, the estimated cost of which was $90,372. Of this cost the railroad company was to pay $10,000 and petitioner, $24,000 upon the execution of the agreement. The balance ($56,372) was to be paid by petitioner in four equal installments upon demand. Complications and difficulties arose because the actual cost exceeded the estimated cost by $52,955.16. Petitioner originally agreed that should cost exceed estimate it would promptly be paid. Petitioner was unable, however, to pay the balance of $56,372 in four equal installments, and it was also unable to pay the sum of $52,955.16, the difference between actual and estimated cost.

Numerous agreements were made between the interested parties in an effort to pay the cost of the spur track. It was first agreed (1917) between the railroad company and petitioner that while the latter was to pay the cost of the spur track, the railroad company would allow a rebate of $3 for every car hauled over the track on which the railroad received $15 or more revenue. Immediately upon the execution of this agreement, the Transit Supply Co. entered into an agreement to purchase, at cost price f. o. b., all of its coal requirements (about 300 tons a day) from petitioner for 15 years. Petitioner, in 1919, assigned its right to the $3 per car rebate to the Transit Supply Co. for moneys by it advanced to pay the estimated cost of the spur track. It became necessary, however, to change this agreement when the railroad company began applying this $3 rebate to the satisfaction of its claim of $52,955.16, the amount over and above the estimate which the railroad company paid for the construction of the spur track. Petitioner and the Transit Supply Co. thereupon entered into another agreement (1921) under which petitioner agreed to pay the Transit Supply Co. $3 per car and the Transit Supply Co. was to receive the $3 per car rebate after the railroad's claim was extinguished until the money by it advanced was fully paid. By this 1921 agreement, the assignment to the Transit Supply Co. of the obligation of the railroad company to reimburse, included in the contract of 1921, was permitted to stand but was to be reassigned to petitioner when $62,724.02 was paid either by the railroad or by petitioner, the latter's liability being expressly limited to the above amount and its payment, in the manner above described. Under this latter contract, petitioner paid the Transit Supply Co. $17,232 in 1922 and $26,817 in 1923.

Looking through the form of the various agreements to the substance and keeping in mind the relationship of the parties who operated, controlled, and managed the street railway companies, the Transit Supply Co., and petitioner, as well as the purpose and object of the agreements, we reach the conclusion that the $3 payments were all made to satisfy the debt created by the construction of the spur track. The 1919 agreement between petitioner and the Transit Supply Co. was for the expressed purpose of repaying the latter company for the moneys advanced by it for petitioner. It is true, this agreement provided that "in no event shall * * * (petitioner) * * * be liable to pay to * * * (Transit company) * * * any portion of said sum * * * except in the manner and to the extent herein set forth." The $3 per car payments therein provided were, however, merely installment payments in satisfaction of a debt created by the construction of the spur track and which debt the Transit Supply Co. satisfied upon petitioner's agreement to repay.

The parties, though no doubt actuated by good faith, entered into the first agreement upon a mutually mistaken assumption respecting the cost of the spur track. When the actual cost became known, new agreements had to be and were made. The additional cost was a direct obligation of the petitioner. Again the latter, unable to advance the cash, was required to pay the amount advanced by another, out of its future business. This sum was fixed, as in the previous agreement, at $3 per car. The amount of the installment and the basis upon which it was computed were, however, unimportant. The significant fact was that it was a payment in extinguishment of an obligation to pay the cost price of the spur track. Inasmuch as the cost price of this track was a capital investment (*Colony Coal & Coke Corporation* v. *Commissioner*, 52 F. (2d), 923 [Ct. D. 439, C. B. XI–1, 278]; *Gauley Mt. Coal Co.* v. *Commissioner*, 23 F. (2d), 574), all sums paid by petitioner in extinguishment thereof fell under that head rather than "ordinary and necessary expenses."

Petitioner calls attention to and stresses the fact that after its indebtedness for construction of the spur track was extinguished, the payment of the $3 per car did not cease. If this were the only fact to be considered, it would strongly support petitioner's position. However, it must yield to the more persuasive facts disclosed in the foregoing statement.

The agreement between petitioner and the Transit Supply Co., entered into in 1921, stated that its purpose was to carry out more fully the intent of the previous agreement which provided for the assignment of the $3 per car rebates. That agreement was made by the parties when they labored under a mistake as to the cost of the spur track. Inasmuch as the second agreement was merely to carry out the intent of the parties set forth in their first agreement, and was made necessary through this mutual mistake of fact, it is, we think, necessary to read the two agreements together and to find that the assignment of the $3 rebates and the $3 per car additional payments were made for the sole purpose of satisfying a capital obligation for which petitioner alone was liable.

The order of the Board of Tax Appeals is affirmed.

Article 101: Business expenses.

REVENUE ACTS OF 1924 AND 1926.

Voluntary payment by former secretary of bankrupt corporation of substantial portion of its debts. (See Ct. D. 755, page 112.)

Article 112: When charges deductible.

XII–52–6578
Ct. D. 766

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. Deductions—Losses—Sale on Installment Basis.

Where taxpayer's wife in 1923 sold certain shares of stock which she had received from him by gift after March 1, 1913, and prior to December 31, 1920, at a price less than their value at the date of the gift, the payments being spread over the years 1924, 1925, 1926, and 1927, the loss sustained may not be spread over the period covered by the installment payments, since the transaction was completed and the loss definitely fixed in 1923. Section 212(d) of the Revenue Act of 1926, dealing with sales made on the installment plan, permits a taxpayer to spread the income therefrom over the period covered by the installment payments, but makes no provision for apportioning losses sustained.

2. Decision Affirmed.

The decision of the Board of Tax Appeals (23 B. T. A., 307) affirmed.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

George P. Sacks, appellant, v. *David Burnet, Commissioner of Internal Revenue.*

Appeal from the Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, HITZ, and GRONER, Associate Justices.

[June 26, 1933.]

OPINION.

HITZ, Associate Justice: This is a petition to review a decision of the Board of Tax Appeals.

The decision of the Board sustained the Commissioner. The stipulated facts are as follows:

In 1923 petitioner's wife sold certain shares of stock which had been given her by petitioner after March 1, 1913, and prior to December 31, 1920. The value of the shares at the date of the gift was $157,466.67. The selling price was $126,604.23. The payments were $51,604.23 in 1924 and $25,000 in each of the years 1925, 1926, 1927. Husband and wife filed a joint return in 1927 and deducted $6,094.27 as the proportion of loss which the amount received in that year bore to the total sale price. The Commissioner decided that the sale was a closed transaction in 1923 and that there was no provision in the statute for spreading a loss on the sale of property over the period covered by the payments. Petitioner contends otherwise and insists that under section 212(d) of the Revenue Act of 1926—made applicable to prior years by section 1208 of that Act—he is entitled to spread the loss over the period covered by the installment payments.

The precise point—attempted to be sustained by the same arguments submitted to us—was considered and decided by the Court of Appeals in the Second Circuit in December, 1932, in the case of *Martin* v. *Commissioner* (61 F. (2d), 942 [Ct. D. 686, C. B. XII–1, 226]). In that case Judge Manton, referring to section 212(d), says that section grants authority for reporting only *income* on the installment basis—that it specifically provided by Act of Congress a privilege which prior thereto was dependent on regulations promulgated by the Commissioner, but that it makes no reference to losses, and as to this omission and its effect in circumstances like those we are considering, he says:

"The statute limiting the thing to be done in a particular mode includes the negative of any other mode. (*Botany Worsted Mills* v. *United States*, 278 U. S., 282, 49 S. Ct., 129 [Ct. D. 39, C. B. VIII–1, 279].) Ordinary losses are deductible only in the year in which they are sustained. (*Lucas* v. *American Code Co.*, 280 U. S., 445 [Ct. D. 168, C. B. IX–1, 314].) The general principle underlying income tax statutes since the sixteenth amendment was adopted has been a computation of gains and losses on the basis of annual accounting for the transactions of the year. (*Burnet* v. *Sanford & Brooks Co.*, 282 U. S., 359 [Ct. D. 277, C. B. X–1, 363].) In order to support a right to deduct over a period of years a loss sustained in a particular year, there must be some authority therefor in the statute permitting the deduction, or otherwise the general principle of an annual accounting for tax purposes must be applied. (*Woolford Realty Co.* v. *Rose*, 286 U. S., 319 [Ct. D. 493, C. B. XI–1, 154].) The income tax law is concerned only with realized losses as well as realized gains. (*Weiss* v. *Wiener*, 279 U. S., 333 [Ct. D. 60, C. B. VIII–1, 257].) The transaction here was completed and the loss definitely fixed in 1925. (*Lewellyn* v. *Elec. Reduction Co.*, 275 U. S., 243; *Dresser* v. *United States* (Ct. Cl.), 55 F. (2d), 499, 512 [Ct. D. 503, C. B. XI–1, 267].)"

But petitioner urges that "income" is a flexible term and as used in section 212(d) includes equally results from a transaction whether gain or loss follow, but this contention is not supported by either reason or authority. In the Martin case, supra, it was rejected, and in *Woolford R. Co.* v. *Rose* (286 U. S., 319–327), the Supreme Court said, referring to a nearly similar contention that to interpret the words "net income" as used in the taxing statute to include also "net loss" would be a metamorphosis too great to be viewed without a shock.

In the view we take of the applicable statutes, the Commissioner was clearly right, and we consequently affirm the decision of the Board.

Affirmed.

SECTION 214(a)4, 5, AND 6.—DEDUCTIONS ALLOWED INDIVIDUALS: LOSSES.

ARTICLE 141: Losses. XII-35-6376
(Also Section 214(a)7, Article 151.) Ct. D. 723

INCOME TAX—REVENUE ACTS OF 1913, 1916, 1917, 1918, AND 1921—DECISION OF COURT.

1. DEDUCTIONS—LOSSES.

Losses sustained in the years 1913 to 1923 by a corporation which was organized and financed by a partnership as a mail order branch of its mercantile business but operated as a distinct and separate entity and filed income, capital stock, and State franchise tax returns for those years, are not deductible by the partnership or by the individual partners, as the corporation is a separate entity for tax purposes and can not be regarded as an agent for the partnership.

2. SAME—BAD DEBTS.

Yearly advances, followed in subsequent years by further advances, are not deductible as bad debts where they are not ascertained to be worthless and charged off within the taxable year.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Margaret A. Jamison and Martha A. Jamison, Individually and as Surviving Executrices of the Estate of Christina Arbuckle, Deceased, plaintiffs, v. *William H. Edwards, Formerly Collector of Internal Revenue for the Second District of New York, defendant.*

Same v. *Frank Collis Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, Deceased, Collector of Internal Revenue, etc., defendant.*

Same v. *John Z. Lowe, Jr., Formerly Collector of Internal Revenue, etc., defendant.*

Margaret A. Jamison and Martha A. Jamison, Individually and as Administratrices of the Estate of Catherine A. Jamison, Deceased, plaintiffs, v. *William H. Edwards, formerly Collector of Internal Revenue for the Second District of New York, defendant.*

Same v. *Frank Collis Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, Deceased, Collector of Internal Revenue, etc., defendant.*

Same v. *John Z. Lowe, Jr., Formerly Collector of Internal Revenue for the Second District of New York, defendant.*

[April 27, 1933.]

OPINION.

COXE, D. J.: These are motions by the defendants to dismiss for insufficiency amended complaints in six suits brought by the personal representatives of Christina Arbuckle and Catherine A. Jamison, deceased, to recover tax refunds for the years 1914 to 1923, inclusive. The complaints are all substantially identical, except for variations in parties, amounts, and formal allegations; and the motions present for determination a single question, whether the yearly losses sustained by Charles Williams Stores, Inc., a New York corporation, from 1914 to 1923, inclusive, should be allowed as deductions in the personal income tax returns of Christina Arbuckle and Catherine A. Jamison for the years in which the losses were concurrently sustained by the corporation.

In 1912, Christina Arbuckle, William A. Jamison and Catherine A. Jamison became partners in the firm of Arbuckle Bros., which had for many years been engaged in the coffee, sugar and wholesale grocery business in New York, Chicago, Pittsburgh and foreign countries. The business was composed of a number of different departments, each maintained and operated as a distinct

branch or unit; and there were also various separate auxiliary services, independently controlled, and using distinctive trade names different from that of the partnership. The stated capital of the firm appearing in the partnership agreement was $7,000,000, but the partners had on deposit an additional $37,613,515.49, thereby giving the firm an initial capital of $44,613,515.49.

After the formation of the partnership, it was decided to establish a mail order business, in order to have "a new means for ultimate distribution of the partnership products," and in February, 1913, Charles Williams Stores, Inc., was incorporated in New York, with an authorized capital of $1,000,000, consisting of 10,000 shares of the par value of $100 each. The name given to the corporation was purely fictitious, and chosen so as to withhold from the trade knowledge that Arbuckle Bros. was engaging in the mail order business. It was determined also that at the outset the business would be restricted to lines which did not compete with regular Arbuckle products.

The 10,000 shares of the stock of the company were originally issued, 4,545 shares to William A. Jamison, 2,475 shares each to Christina Arbuckle and Catherine A. Jamison, 5 shares to W. G. Gilmore, and 500 shares to Charles A. Jamison; and all of this stock was fully paid for by the partnership and charged on its books to "loans on collateral—call," and later in the same year transferred to "loans receivable." The stock of the company continued in the names of the original stockholders during the entire period involved in the present suits.

During the succeeding years, the partnership from time to time made substantial cash advances to the mail order company, which were all charged on the partnership books to "loans receivable"; and for the period ending June 23, 1923, when Catherine A. Jamison died, the total of such advances amounted to $29,670,000, against which there were credits of $3,321,438.65, leaving a net loss of $26,348,561.35. By a settlement agreement, dated April 25, 1925, this net loss was distributed among the three partnership interests, the interest of Catherine A. Jamison being charged with $13,065,061.42, and that of Christina Arbuckle with $12,003,009.17.

The mail order company had a large organization of its own, and was operated as a distinct and separate entity from the partnership, with separate books, offices, and bank accounts, and with separate elected officials. It filed Federal corporation income tax returns for the years 1913 to 1923, inclusive, but paid no taxes because losses were shown in each year. It also filed Federal stock tax returns and State franchise tax returns for the years in question.

In the Federal income tax returns of the partnership, and the individual partners, for the years 1913 to 1923, inclusive, the operations of the mail order business were omitted, and no deductions were claimed or allowed for losses sustained by the corporation; and it is insisted in the present suits that these returns were erroneous, and should be corrected so as to reflect the concurrent yearly losses of the company.

It is first contended by the plaintiffs that the corporation was a mere department of the Arbuckle partnership, and that the corporate entity should be disregarded for tax purposes; but I think this contention is sufficiently answered by *Nixon* v. *Lucas* (42 Fed. (2d), 833 (C. C. A. 2)); *Planters* v. *Hopkins* (286 U. S., 332 [Ct. D. 492, C. B. XI-2, 153]); and *Dalton* v. *Bowers* (287 U. S., 404). In the Nixon case, supra, it was held squarely that a partnership could not treat a wholly owned corporation as a mere department of its business for tax purposes. Indeed, the facts in that case are much stronger in support of the plaintiffs' position than are the facts of the cases at bar, for in the Nixon case the corporation maintained only a shadow of a separate existence, and practically all of its products were sold to the partnership at prices dictated by the partners, whereas in the cases at bar the corporate organization was kept separate and apart from the partnership, and sales were made directly to the public without interference by the partners, and in such a way as not to compete with the products handled by the partnership. Furthermore, in the cases at bar, there was no complete identity of interest between the corporation and the partnership, as only three of the five stockholders of the corporation were members of the partnership; and even the proportionate interests of these three in the stock of the corporation were entirely different from their interests in the partnership.

It is further argued that even if the corporate entity should not be disregarded, still the net yearly advances made by the partnership should be charged off as bad debts at the end of the year, and allowed as deductions in the individual tax returns of the partners. The applicable tax statutes all provide,

however, that only such debts are allowable deductions as are "actually ascertained to be worthless and charged off within the taxable year." (Revenue Acts of 1918 and 1921, section 214(a)7; Revenue Acts of 1916 and 1917, section 5(a)Sixth; Revenue Act of 1913, section II B.) The advances made to the corporation were neither charged off by the partnership during any of the years for which refunds are sought, nor were the amounts "ascertained to be worthless" in those years, for they were followed in subsequent years by further advances in very substantial amounts, indicating clearly that in so far as the partnership was concerned the amounts unpaid were open as valid receivables.

The final contention of the plaintiffs is that the corporation was merely an agent for the partnership; but this contention is not borne out by the allegations of the complaints; for plainly the corporation was acting only for itself as proprietor of its own business, and was in no sense an agent for the partnership, which merely provided the funds to finance the business. The relation of the partnership was merely that of a creditor, and the fact that the individual partners were largely instrumental in shaping the policy of the corporation did not change the relation to one of agency and make the partnership liable for all of the corporation's acts.

The motions of the defendants to dismiss the amended complaints in all six suits are granted.

SECTION 214(a)7.—DEDUCTIONS ALLOWED INDIVIDUALS: BAD DEBTS.

ARTICLE 151: Bad debts.

REVENUE ACTS OF 1913, 1916, 1917, 1918, AND 1921.

Yearly advances to corporation. (See Ct. D. 723, page 196.)

SECTION 214(a)8.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPRECIATION.

ARTICLE 164: Capital sum recoverable through depreciation allowances.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Allowance of depreciation deductions for leased property where lessee is obligated to maintain same and return it or equivalent property at termination of lease. (See G. C. M. 11933, page 52.)

SECTION 214(a)9.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPLETION.

ARTICLE 201: Depletion of mines, oil and gas wells; depreciation of improvements. XII-41-6443 I. T. 2722

REVENUE ACTS OF 1918 AND 1921.

I. T. 1920 (C. B. III-1, 188), holding in part that—

In a case where an original lessee completely relinquishes his lease and a third person enters into a new agreement with the fee owner to which the original lessee is not in any sense of the word a party, it is not believed that

such original lessee would be entitled to depletion if by a collateral agreement with the new lessee he received as consideration for relinquishing his lease an amount based on the oil thereafter recovered—

is modified in so far as it is inconsistent with the decision of the United States Supreme Court in *Palmer* v. *Bender* (287 U. S., 551, Ct. D. 641, C. B. XII–1, 235).

ARTICLE 222: Allowable capital additions in case of mines.

REVENUE ACT OF 1926.

Amendment of article 222, Regulations 69. (See T. D. 4376, page 117.)

SECTION 214(a)10.—DEDUCTIONS ALLOWED INDIVIDUALS: CONTRIBUTIONS OR GIFTS.

ARTICLE 251: Contributions or gifts.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Contributions to Salvation Army and branches. (See I. T. 2747, page 70.)

SECTION 215.—ITEMS NOT DEDUCTIBLE.

ARTICLE 291: Personal and family expenses.

REVENUE ACT OF 1926.

Medical and hospital expenses. (See Ct. D. 754, page 200.)

SECTION 217.—NET INCOME OF NONRESIDENT ALIEN INDIVIDUALS.

ARTICLE 321: Rentals and royalties.

REVENUE ACTS OF 1921, 1924, AND 1926.

Payments received by author with respect to his literary writings. (See I. T. 2735, page 131.)

ARTICLE 324: Sale of personal property. XII–48–6537
I. T. 2737

REVENUE ACT OF 1918.

I. T. 1231 (C. B. I–1, 206) is modified in so far as it stated that there was a sale of rights of serial publication, in view of I. T. 2735 (page 131, this Bulletin). Under such a contract there could not be a sale but only a grant of a license.

SECTION 218.—PARTNERSHIPS.

ARTICLE 336: Distributive shares of partners. (Also Section 213(a), Article 50; Section 215, Article 291.)

XII-47-6522
Ct. D. 754

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTION—PERSONAL EXPENSES—MEDICAL AND HOSPITAL EXPENSES.

Medical and hospital expenses incurred by an individual, member of a law partnership, are personal expenses within the meaning of section 215(a)1 of the Revenue Act of 1926.

2. INCOME—PARTNERSHIP—DISTRIBUTIVE SHARE.

The taxpayer's distributive share of the profits of a partnership is taxable to him, under the provisions of section 218(a) of the Revenue Act of 1926, although he allows his partners to retain a part of his share.

3. INCOME—SALE—ADVANCE PAYMENT.

An advance payment received by the taxpayer in 1925 in connection with the sale of realty is properly included in income for 1926, where title was not passed nor the deed delivered until the later year.

4. BOARD OF TAX APPEALS—FINDING OF FACT—REVIEW OF BOARD'S FINDING—VALUATION—OPINIONS OF EXPERTS.

A finding of fact by the Board of Tax Appeals as to fair market value of property is binding upon the court unless unsupported by evidence. In determining such value the Board is not bound by the opinions of experts.

5. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 1288) affirmed.

6. CERTIORARI DENIED.

Petition for certiorari denied on October 9, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Louis M. Bourne, petitioner, v. *Commissioner of Internal Revenue, respondent.*

On petition to review the decision of the United States Board of Tax Appeals.

Before NORTHCOTT and SOPER, Circuit Judges, and CHESNUT, District Judge.

[January 10, 1933.]

OPINION.

NORTHCOTT, Circuit Judge: This is a petition to review a decision of the United States Board of Tax Appeals. The decision of the Board is reported in 23 B. T. A., 1288, and involves Federal income tax for the year 1926 in the amount of $980.58.

The petitioner is a lawyer practicing in the State of North Carolina and kept his personal books on the cash receipts and disbursements basis. In the year in question he was ill in a Baltimore hospital for an extended period and claimed as a deduction from his income medical and hospital expenses incurred during his illness.

During the year 1926, petitioner was the head of a law firm that had a net income for that year of $24,023.34. Of this amount the petitioner actually collected and kept $5,234.85. The partnership agreement provided for an equal division of profits but petitioner allowed his partners to retain a part of his share. There is no contention that the partners were not responsible to peti-

tioner for the remainder of his share of the profits, nor is it contended that the partners were not solvent.

During the month of November, 1925, petitioner received the sum of $5,000 as an advance payment or "earnest money" in connection with the sale of a tract of land. The title to the land was not passed upon or the deed delivered until January 19, 1926, when an additional $20,000 was paid on the purchase price of the land. Petitioner contends that this payment of $5,000 should not be included in his income for the year 1926, when the sale was closed, but should be charged in the year 1925 when received.

It is also contended that the Board erred in fixing the value, as of March 1, 1913, of the tract of land sold and that the profits from the sale were thereby placed too high.

With respect to petitioner's claim for deduction for medical and hospital expenses due to his illness we think that the decision of the Board that such expenses were not a proper deduction is correct.

Section 215(a) of the Revenue Act of 1926 provides that:

"(a) In computing net income no deduction shall in any case be allowed in respect of—

"(1) Personal, living, or family expenses; * * *."

The expenses in question were personal and not a proper deduction.

The law partnership of which petitioner was the head collected for the year in question the net sum of $24,023.34 of which the petitioner was entitled to $8,007.78. Section 218(a) of the Revenue Act of 1926 provides as follows:

"(a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed."

This statute has been construed by the courts and it has uniformly been held that a partner must report his distributive share whether received or not. (*Burnet* v. *Leininger*, 285 U. S., 136; *Harris* v. *Commissioner*, 39 F. (2d), 546; *Ruprecht* v. *Commissioner*, 39 F. (2d), 458 [Ct. D. 212, C. B. IX–2, 362]; *Earle* v. *Commissioner*, 38 F. (2d), 965 [Ct. D. 246, C. B. IX–2, 363]; *Larsen* v. *Burnet*, 50 F. (2d), 308.)

The partnership agreement gave the petitioner one-third of the net income and he is properly chargeable with that amount.

As to the advance payment of $5,000 made the latter part of the year 1925, we are again of the opinion that the conclusion of the Board is correct. As was pointed out by Judge Glenn, in *American Land & Investment Co.* v. *Commissioner* (40 F. (2d), 336), the question of whether the payment was to be income or not could not be determined until the sale was completed. This was also the holding by the Supreme Court in the case of *Lucas, Commissioner*, v. *North Texas Lumber Co.* (281 U. S., 11 [Ct. D. 169, C. B. IX–1, 294]), where Mr. Justice Butler said:

"An executory contract of sale was created by the option and notice, December 30, 1916. In the notice the purchaser declared itself ready to close the transaction and pay the purchase price 'as soon as the papers were prepared.' Respondent did not prepare the papers necessary to effect the transfer or make tender of title or possession or demand the purchase price in 1916. The title and right of possession remained in it until the transaction was closed. Consequently unconditional liability of vendee for the purchase price was not created in that year. (*Gober* v. *Hart*, 36 Texas, 139. Cf. *United States* v. *Anderson*, 269 U. S., 422, 441 [T. D. 3839, C. B. V–1, 179]; *American National Co.* v. *United States*, 274 U. S., 99 [T. D. 4099, C. B. VI–2, 193].) The entry of the purchase price in respondent's accounts as income in that year was not warranted. Respondent was not entitled to make return or have the tax computed on that basis, as clearly it did not reflect 1916 income."

The Board fixed the fair market value of the land in question (an 88-acre tract) at $100 per acre, or $8,800 as of March 1, 1913. This is a finding of fact by the Board that is binding upon us unless unsupported by evidence.

(*Phillips et al.* v. *Commissioner*, 283 U. S., 589 [Ct. D. 350, C. B. X–1, 264]; *Burnet, Commissioner*, v. *Leininger*, 285 U. S., 136; *Atlantic Bank & Trust Co.* v. *Commissioner*, 59 F. (2d), 363 [Ct. D. 606, C. B. XI–2, 254].)

We are of the opinion that the finding was right. The petitioner purchased the land on February 14, 1913, for $5,000, and while there was evidence that in addition to the cash paid the petitioner's account for legal services was a part of the purchase price, yet those services were fixed by the petitioner himself at between one and five thousand dollars.

The Board in determining value of property for income tax purposes is not bound by opinion of experts, and this court has no power to review such a finding unless unsupported by evidence. (*Anchor Co.* v. *Commissioner*, 42 Fed. (2d), 99.)

The value placed on the land was in our opinion a fair one.

Affirmed.

SECTION 219.—ESTATES AND TRUSTS.

ARTICLE 343: Decedent's estate during administration.

REVENUE ACT OF 1926.

Priority in payment of "widow's exemption" in State of Pennsylvania over Federal income tax. (See I. T. 2712, page 138.)

ARTICLE 347: Income of trusts taxable to grantor. XII–37–6397 Ct. D. 730

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

INCOME—REVOCABLE TRUST—TAXABLE TO GRANTOR—INCOMPLETE GIFT.

Where the taxpayer gave certain securities to his wife, who thereupon assigned them to the taxpayer and herself as trustees for the benefit of their children, under a trust deed revocable at any time by the husband upon written notice to the wife, and the securities were then deposited in a safe deposit box open to either trustee, there was no valid gift of the securities and the income from the trust is taxable to the husband, under the provisions of section 219(g) of the Revenue Act of 1926, as the real creator of the trust.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Richard N. Jackson, petitioner, v. *Commissioner of Internal Revenue, respondent.*

On petition to review the decision of the United States Board of Tax Appeals.

Before PARKER, NORTHCOTT, and SOPER, Circuit Judges.

[April 4, 1933.]

OPINION.

SOPER, Circuit Judge: The question involved in this proceeding is whether the taxpayer, in computing his income tax for the year 1927, should have been required to include in his gross income the income from certain securities covered by a deed of trust executed on April 1, 1927, by his wife. Thereby she gave and assigned them to the taxpayer and herself, upon certain trusts for the benefit of their children, providing for the payment of the income to them or for their benefit in equal shares during certain periods and for the ultimate delivery of shares of the corpus of the estate to them or their descendants, and the final termination of the trusts. A cross remainder for the benefit of each child was created in the event of the death of the other, leaving no issue. It

was also provided that in case of the death of both children and their descendants before the time fixed for the distribution of the respective shares of the corpus, then upon the death of the last survivor, the entire corpus should be paid over free from the trust to the taxpayer. It was also provided that in the event of the death of the wife before the death of the taxpayer, regardless of whether there should then be living children or descendants, the entire trust estate should be paid over to the taxpayer free from the trust. Finally, it was provided that the deed might be revoked at any time by the taxpayer by written notice of his intention to revoke given to his wife.

The taxpayer testified in substance that he had previously owned the securities in question, and that at or shortly before the time when the deed was executed, he had given them to his wife with the understanding that she would simultaneously create the trust; and that he made no reservation of ownership or interest in the securities. In order to carry the understanding into effect, the securities were delivered to the wife, and by her delivered to the taxpayer and herself as trustees, and were then deposited for safe-keeping in a safe deposit box rented for the purpose, to which access was open to either trustee under the terms of the rental agreement. This arrangement obviously left the property at least partially subject to the personal control and dominion of the taxpayer in case he should exercise the power to revoke the deed. He did exercise this power and revoked the deed on September 28, 1928.

The Commissioner determined that the income from the trust estate was chargeable to the taxpayer on the ground that he had not made a valid gift of the securities to his wife in the eye of the law, and was himself the real creator of the trust and was therefore subject to the provisions of section 219(g) of the Revenue Act of 1926 (44 Stat., 9), which provides that where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor. This determination was properly upheld in our opinion by the Board of Tax Appeals. The indispensable conditions of a valid gift include not only the intention of the donor to divest himself irrevocably of title, dominion and control, but also the irrevocable transfer of title, dominion and control over the subject of the gift by delivery, so that the donor can exercise no further act of dominion or control over it. (*Allen-West Commission Co.* v. *Grumbles*, 129 Fed., 287.) The circumstances which we have related show quite clearly that the taxpayer in this case had not delivered the securities so fully and completely to his wife as to relinquish all dominion and control over them, and the decree of the Board of Tax Appeals must therefore be affirmed.

PART III.—CORPORATIONS.

SECTION 231.—CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

ARTICLE 517: Religious, charitable, scientific, literary, and educational organizations and community chests.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Exemption of Salvation Army and branches. (See I. T. 2747, page 70.)

ARTICLE 522: Farmers' or other mutual hail, cyclone, casualty, or fire insurance companies or associations.

REVENUE ACT OF 1926.

Purely mutual fire insurance association losing exemption by issuing term insurance. (See Ct. D. 709, page 121.)

ARTICLE 523: Farmers' cooperative marketing and purchasing associations.

XII-33-6344
Ct. D. 719

INCOME AND EXCESS PROFITS TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. EXEMPTION—FARMERS' ASSOCIATION.

A corporation engaged in the business of buying, pasteurizing, and distributing milk, whose stock was owned by a cooperative association, and which made approximately 17 per cent of its purchases of produce from nonmembers of the association and reserved its profits to purchase real estate, buildings, and equipment instead of paying them to members of the association, and did not act as sales agent, is not a farmers' association that is exempt from tax under section 231(11) of the Revenue Act of 1921.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 1007) affirmed.

3. CERTIORARI DENIED.

Petition for writ of certiorari was denied by the Supreme Court on March 27, 1933 (53 S. Ct., 527).

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Burr Creamery Corporation, a Corporation, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Upon petition to review the decision of the United States Board of Tax Appeals.

Before WILBUR, SAWTELLE, and MACK, Circuit Judges.

[December 23, 1932.]

OPINION.

MACK, Circuit Judge: The petitioner herein seeks a review of the Board of Tax Appeals order which affirmed respondent's determination denying exemption to petitioner from income and excess profit taxes for the years 1922 and 1923, under section 231(11) of the Revenue Act of 1921. The relevant statutory and regulatory provisions are quoted in the margin.[1]

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[1] SEC. 231. That the following organizations shall be exempt from taxation under this title—

* * * * * * *

(11) Farmers', fruit growers', or like associations, organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them; or organized and operated as purchasing agents for the purpose of purchasing supplies and equipment for the use of members and turning over such supplies and equipment to such members at actual cost, plus necessary expenses;

Treasury Regulations 62, as amended by Treasury Decision 3511 (C. B. II-2, page 201):

"ART. 522. *Cooperative associations.*—(a) Cooperative associations, acting as sales agents for farmers, fruit growers, live-stock growers, dairymen, etc., or engaged in the marketing of farm products, and turning back to the producers the proceeds of the sales of their products, less the necessary operating expenses, on the basis of the produce furnished by them, are exempt from income tax and shall not be required to file returns. Thus cooperative dairy companies, which are engaged in collecting milk and disposing of it or the products thereof and distributing the proceeds, less necessary operating expenses, among the producers upon the basis of the quantity of milk or of butter fat in the milk furnished by such producers, are exempt from the tax. If the proceeds of the business are distributed in any other way than on such a proportionate basis, the association does not meet the requirements of the statute and is not exempt. The accumulation and maintenance of a reasonable reserve for depreciation or possible losses or a reserve required by State statute or a reasonable sinking fund or surplus to provide for the erection of buildings and facilities required in business, or for the purchase and installation of machinery and equipment, or to retire indebtedness incurred for such purposes will not destroy the exemption. A corporation organized to act as a sales agent for farmers, or to market cooperatively the products of the farm, and having a capital stock on which it

The facts are fully stated in the Board's opinion (23 B. T. A., 1007). Those essential to our decision may be summarized as follows:

Burr Creamery Co., of which Burr was sole stockholder, was engaged in the business of buying, pasteurizing, and distributing milk. In 1919, Burr became a member of the California Milk Producers' Association, hereinafter called "association." Taxpayer was organized under the laws of California to take over a part of the assets of the Burr Creamery Co. The capital stock of taxpayer consisted of 1,000 shares of $100 par value per share.

The purposes for which taxpayer was formed, as stated in the articles of incorporation, were practically unlimited. The directors were empowered, under the by-laws, to declare dividends out of surplus profits arising from the conduct of the business. Shortly after taxpayer was organized, Burr Creamery Co. agreed with the association to sell 600 shares of the capital stock of the taxpayer to the association for $60,000, reserving an option to the Burr Creamery Co. to sell the remaining 400 shares for $40,000. Taxpayer duly transferred the full amount of its authorized capital stock of $100,000 par value to the Burr Creamery Co. for that part of the assets of that company used in the distribution of milk. Burr Creamery Co. was legally dissolved in 1921. From 1920 until 1925, Burr was manager of taxpayer. He received as compensation a separate salary and also a percentage of the profits of the business based upon the amount of stock of the taxpayer which he owned. In his income tax return Burr treated the income which he received from the taxpayer as dividends received. At December 31, 1921, taxpayer had a surplus of $89,483.56; at December 31, 1922, the surplus was $116,609.21; at December 31, 1923, the surplus was $169,082.83. These amounts were retained in the business of the taxpayer for the purchase of additional equipment. The remainder of the profits of taxpayer, other than those paid to Burr as compensation, were turned over to the association at the end of each month. Money was also paid over upon demand of the association whenever it was available.

The business of taxpayer during 1922 and 1923 was distributing milk, cream, and dairy products to its customers. Taxpayer obtained raw milk from association and pasteurized it. Association charged taxpayer the same amount for milk that it charged any other creamery. Association did not produce certified milk, and accordingly taxpayer purchased such milk, amounting to about one-third of the total of milk purchased, from persons not connected with association. In order to meet competition, taxpayer had to deal in certified milk, and it also bought a comparatively small amount of cottage cheese and butter from persons not connected with association. Nothing was bought from outsiders that could be bought from members of the association. No refunds were made to those persons not connected with association.

Taxpayer handled approximately one-third of the milk and cream of the association in 1922 and 1923. Association required the taxpayer to take all the milk which could not be sold to other creameries. At times this surplus milk was churned and the buttermilk sold to jobbers. Due to the fact that taxpayer was

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pays a dividend not exceeding the legal rate of interest in the State in which it is incorporated and in which substantially all of the outstanding capital stock is owned by actual producers, will not for such reasons be denied exemption, but any ownership of stock by others than actual producers who market their products through the association must be satisfactorily explained in the application for exemption. In every such case the association will be required to show that the ownership of its capital stock has been restricted as far as possible to actual producers, and that the association has not voluntarily sold or issued any stock to nonproducers. Thus, if by statutory requirement all officers of an association must be stockholders, the ownership of a share of stock by a nonproducer to qualify him as an officer will not destroy the association's exemption. Likewise, if a stockholder for any reason ceases to be a producer and the association is unable, because of a constitutional inhibition or other reason beyond the control of the association, to purchase or retire the stock of such nonproducer, the fact that, under such circumstances, a small amount of the outstanding capital stock is owned by stockholders who are no longer producers will not destroy the exemption.

"(b) Cooperative associations organized and operated as purchasing agents for farmers, fruit growers, live-stock growers, dairymen, etc., for the purpose of buying supplies and equipment for their use and turning over such supplies and equipment to them at actual cost, plus necessary operating expenses, are also exempt. The provisions of paragraph (a) relating to a reserve, sinking fund, or surplus and to capital stock shall apply to associations coming under this paragraph.

"In order to be exempt under either (a) or (b) an association must establish that it has no net income for its own account, other than that reflected in a reserve, sinking fund, or surplus specifically authorized in paragraph (a). An association acting both as a sales and a purchasing agent is exempt if as to each of its functions it meets the requirements of the statute."

required to take this surplus milk its profits were sometimes reduced, and during the last six months of 1922, taxpayer operated at a loss. In 1922 and 1923, taxpayer bought approximately 83 per cent of its milk from association. In 1921, the board of directors of taxpayer passed a resolution that the profits of taxpayer, if needed, were to be used for the purchase of real estate, building, and creamery equipment necessary for conducting the business, and that after the real estate and buildings and creamery equipment were paid for, Burr was authorized to draw out his percentage of the profits earned by the taxpayer.

While on the record before us we should have difficulty in finding that taxpayer was a wholly owned subsidiary of association, nevertheless, for the purposes of this case, we shall proceed, as did the Board of Tax Appeals, on the assumption that association had acquired, prior to 1922, the entire capital stock. We also accept the stipulation of the parties that association is tax exempt within the provisions herein involved. Taxpayer contends that on these assumptions alone, it, too, is entitled to like exemption.

Clearly the language of the statute affords no basis for thus disregarding taxpayer's separate corporate existence and activities. True it is that courts will at times pierce through the shell of separate corporate identity, and, to prevent or to defeat fraud, will treat the two bodies as a single entity. To a limited extent too, and for definite purposes, the Revenue Acts treat affiliated corporations as a tax unit even though one be not a fully owned subsidiary of the other, expressly permitting or requiring consolidated returns. But the fact here urged that ultimately the members of the tax-exempt association, because of its ownership of taxpayer's stock, must be the beneficiaries of taxpayer's net income, does not, in the light of elementary principles of statutory construction (*Riverdale Co-op. Creamery Ass'n* v. *Commissioner*, 48 F. (2d), 711), justify an extension to taxpayer of the tax-exemption rights expressly conferred only upon association. (See *Burnet* v. *Commonwealth Improvement Co.*, United States Supreme Court, December 12, 1932 (United States Daily Supplement Index, page 74) [Ct. D. 622, C. B. XII–1, 277].) While membership in association enabled each member indirectly to share in whatever profits taxpayer might earn, it in no sense made them members of taxpayer; taxpayer was not a membership association but an ordinary corporation for profit, with capital represented by shares of stock.

Under the statute, an association, to be entitled to exemption, must not only be organized but actually operated in the manner and for the purposes specified. It may be conceded that the broad charter powers present no obstacle. (*Fruit Growers' Supply Co.* v. *Commissioner*, 56 F. (2d), 90.) If we should assume that association's members could indirectly be deemed members of taxpayer, nevertheless, on this record, we can not find that the Board of Tax Appeals erred in holding that under the Fruit Growers' Supply Co. case, taxpayer did not so operate as to become tax exempt.

While the Board found that in addition to buying some cheese and butter from outsiders, taxpayer, to meet competition for the trade of certain customers, had to deal in certified milk, and that nothing was bought from outsiders which could be bought from members, we can not interpret this finding as meaning that these activities with outsiders, however advantageous in order to enable it to meet competition in the sale of members' products, were absolutely necessary rather than commercially desirable. Taxpayer could well have confined itself to the marketing of members' products, even though with smaller profit. No showing, however, was made that would have enabled the Board to determine the profits derived from each of these activities.

Did the taxpayer, even as to the members' produce, operate as a sales agent in the manner and for the purpose specified in the regulations? The proceeds of sales less necessary selling expenses, were not turned back to members on the basis of quantity of produce furnished by them. On the contrary, by resolution adopted in 1921, profits were to be reserved until further notice, for purchase of real estate, buildings and equipment. A large surplus was yearly accumulated. There was no showing as to what should be deemed by the Board to be a "reasonable" reserve for these and other permissible purposes within the regulative requirements. (*Riverdale Co-op. Creamery Ass'n* v. *Commissioner*, supra. See, too, *South Carolina Produce Ass'n* v. *Commissioner*, 50 F. (2d), 742; *Producers' Creamery Co.* v. *United States*, 55 F. (2d), 104 [Ct. D. 506, C. B. XI–1, 223].) Nor was there any evidence either as to the proceeds of sales or as to necessary selling expenses.

Order affirmed.

ARTICLE 523: Farmers' cooperative marketing and purchasing associations.

REVENUE ACTS OF 1921, 1924, AND 1926.

"Supplies and equipment," defined. (See I. T. 2748, page 72.)

SECTION 233.—GROSS INCOME OF CORPORATIONS DEFINED.

ARTICLE 548: Gross income of corporation in liquidation.

REVENUE ACT OF 1926.

Profit on sale by liquidating agent. (See Ct. D. 707, page 234.)

SECTION 234.—DEDUCTIONS ALLOWED CORPORATIONS.

ARTICLE 561: Allowable deductions. XII-38-6409
Ct. D. 733

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTION—TAXES—"BONUS."

Bonus payments made by petitioner in 1926 and 1927 to the secretary of the Commonwealth of Pennsylvania, pursuant to the law of that State, on account of increases in its capital stock in those years, were in consideration for the grant of the privilege or franchise of carrying on business within the State, and were not deductible from gross income as "taxes paid or accrued within the taxable year" within the meaning of section 234(a)3 of the Revenue Act of 1926.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (25 B. T. A., 1382) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 5022. *The United Gas Improvement Co., petitioner,* v. *Commissioner of Internal Revenue, respondent.*

No. 5023. *The United Gas Improvement Co., petitioner,* v. *Commissioner of Internal Revenue, respondent.*

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

Before DAVIS and THOMPSON, Circuit Judges.

[April 13, 1933.]

OPINION.

THOMPSON, Circuit Judge: These are petitions for review of two decisions of the Board of Tax Appeals determining deficiencies in the income taxes of the petitioner for the years 1926 and 1927. The petitioner is a corporation organized under the laws of Pennsylvania. During the year 1926 it increased its capital stock and, on account of this increase, made a payment to the secretary

of the commonwealth of the State of Pennsylvania, as required by the Pennsylvania act of May 3, 1899 (P. L. 189, section 1). In 1927 the petitioner increased its capital stock on nine different occasions and, upon each such increase, made a bonus payment to the secretary of the Commonwealth. The payments prior to April 20, 1927, were made as required by the above cited act, and those thereafter as required by the act of April 20, 1927 (P. L. 322). In computing its net income for the years 1926 and 1927, the petitioner deducted the amounts thus paid from its gross income upon the ground that the payment designated a "bonus" in the act, is in fact and law a tax. The Commissioner of Internal Revenue disallowed the deduction. The Board of Tax Appeals approved the action of the Commissioner. The cases were consolidated for hearing before the Board of Tax Appeals and by stipulation of counsel were consolidated for argument before this court.

Payments so made by corporations to the secretary of the Commonwealth are transmitted by him to the treasury department, placed in the general fund, and accounted for by the State treasurer under the subtitle "Corporation taxes." The salary of the Governor, those of his cabinet officers, the members of the legislature, the judges, the State police, as well as other current expenses of the State government, are appropriated from this general fund.

The petitioner contends that a bonus, paid into the treasury and used for the maintenance of agencies of the State government, is a tax and, as such, is deductible within the meaning of section 234(a)3 of the Revenue Act of 1926 which provides:

"In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * * *

"Taxes paid or accrued within the taxable year * * *."

We do not think this contention tenable. The character of the payments is not determined by the uses to which the paid-in funds are appropriated. A bonus is a consideration paid to the State for the grant of the privilege or franchise of carrying on corporate business within the State. A tax, on the contrary, is not a consideration for the grant of a privilege or franchise. It has been defined as "a charge or burden laid upon persons or property for public purposes; a forced contribution authoritatively imposed." (*Tevander* v. *Ruysdael*, 299 Fed., 746, 753.) The view that a bonus is not a tax is sustained by the Pennsylvania decisions. In *Commonwealth* v. *Erie & Western Transportation Co.* (107 Pa., 118), the supreme court affirmed the lower court upon that court's opinion. In discussing the distinction between a bonus and a tax, it was there said:

"* * * the idea of a consideration is always present when we speak of a bonus. Bouvier defines it thus: 'A premium paid to a grantor or vendor, as—the bank paid a bonus to the State for its charter. A consideration given for what is received.' So in *Railroad Company* v. *Maryland* (21 Wall., 456), the distinction between a tax and a bonus is clearly drawn, and the stipulation contained in the charter of the Baltimore & Ohio Railroad Co., requiring it to pay to the State of Maryland one-fifth of the whole amount received by it for the transportation of passengers, is declared on page 473, to be nothing more or less than a bonus, such as a State has a right to exact for the grant of a franchise, and on the facts of that case the law imposing it was held valid, because it was a bonus and not a tax." (*Commonwealth* v. *Erie & Western Transportation Co.*, 107 Pa., 112, 115.)

See also *Commonwealth* v. *Danville Bessemer Co.* (207 Pa., 302), decided upon authority of *Commonwealth* v. *Erie & Western Transportation Co.*, supra.

This court has had occasion to differentiate between a bonus and a tax. In *In re York Silk Mfg. Co.* (192 Fed., 81), an insolvent corporation increased its capital stock before adjudication in bankruptcy. The Commonwealth of Pennsylvania filed a claim as a preferred creditor of the bankrupt for the unpaid bonus. It contended that the bonus thus due was a tax and therefore constituted a preferred claim. The referee refused to consider the unpaid bonus as a preferred claim, upon the ground that it was not a tax but was a consideration payable to the Commonwealth for a benefit conferred. The district court sustained the ruling of the referee and its decision was affirmed by this court.

We are of the opinion that the Board of Tax Appeals rightly held that the bonus payments were not deductible as taxes. The decisions are affirmed.

ARTICLE 561: Allowable deductions. (Also Section 1113, Article 1351.)

XII-45-6494
Ct. D. 751

INCOME AND PROFITS TAX—REVENUE ACTS OF 1918, 1921, 1926, AND 1928—DECISION OF COURT.

1. ASSESSMENT AND COLLECTION—CLAIM FOR ABATEMENT—STATUTE OF LIMITATIONS.

Where a claim was filed in 1919 for the abatement of 1918 tax, assessed in 1919, and collection was stayed, section 611 of the Revenue Act of 1928 prevents the recovery, as an overpayment, of the tax collected in 1925 after the statutory period for collection had expired.

2. SUIT—CLAIM FOR REFUND—SUFFICIENCY.

Claims for refund requesting allowance for amortization upon a power plant constructed during and subsequent to the war, and in which the percentage of value in use as previously fixed by the Commissioner was not protested, are insufficient as a basis for a suit to secure an increased amortization allowance based upon a lesser post-war value in use, in view of the provisions of section 1113 of the Revenue Act of 1926, which requires that the precise ground upon which recovery is sought shall be first presented to the Commissioner in a claim for refund.

3. DEDUCTION—AMORTIZATION—VALUE IN USE—REASONABLE ALLOWANCE.

Where plaintiff constructed a new power plant during and subsequent to the war, and the evidence showed that all the new boilers were used at different times, although the plant might have been operated with less, the Commissioner's determination of a 72½ per cent value in use was reasonable.

4. SAME—COMPUTATION—FACILITIES CONTINUED IN USE IN POST-WAR PERIOD.

Where property subject to amortization has not been sold or abandoned, but is continued in use in the post-war period, a proper and reasonable allowance for amortization is the difference between the original cost of the property and its post-war residual value, where such value in use is less than the replacement cost, in accordance with section 234(a)8 of the Revenue Acts of 1918 and 1921 and article 184 of Regulations 45 and 62. The allowance can not be based upon both post-war value in use and post-war replacement cost.

5. SAME—APPORTIONMENT.

Where a contract for a power plant was made in 1918, but the costs of construction were expended during 1918, 1919, and 1920, the amortization allowance was properly apportioned over those years, in accordance with prior practice and article 185 of Regulations 62.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

McKeesport Tin Plate Co., a Corporation Organized Under and Existing by Virtue of the Laws of the State of Pennsylvania, and a Resident of the Western District of Pennsylvania, plaintiff, v. *D. B. Heiner, Collector of Internal Revenue for the Twenty-third District of the United States in the Commonwealth of Pennsylvania, defendant.*

McKeesport Tin Plate Co., a Corporation Organized Under and Existing by Virtue of the Laws of the State of Pennsylvania, and a Resident of the Western District of Pennsylvania, plaintiff, v. *The United States of America, defendant.*

[July 3, 1933.]

OPINION.

Above suits present practically the same questions, and relate to plaintiff's taxes for the year 1918. The only issue not common to each suit is the claim

against the collector for $30,899.01, collected after the expiration of the statute of limitations.

As to the claim based upon the statute of limitations, it is plain to us that section 611 of the Revenue Act of 1928 prevents recovery by the plaintiff. The tax was assessed in 1919, a claim for abatement was filed late in the same year, and collection of the tax was stayed by the collector. The tax was not collected until 1925, after the period of collection had expired, but the claim for abatement brought the matter within the scope of section 611 of the Act of 1928, and prevents the return of the amount collected to plaintiff as an overpayment. (See *Graham and Foster* v. *Goodcell*, 282 U. S., 410 [Ct. D. 287, C. B. X–1, 191].)

The main issues relate to the amortization of war facilities. In 1918 the plaintiff's plant consisted of 44 hot mills, and was then the largest tin-plate plant in the world. Twenty-two of its mills had been built in 1915 and 1916 to meet the growing demands for plaintiff's products. Plaintiff's steam power plant, built in 1902, was obsolescent in 1917 and interfered with a proper production, and late in that year it was resolved to construct a new steam power plant upon another site. The new boilers were designed to have sufficient capacity to operate 26 additional hot mills. Land was purchased beside the river at a cost of over $200,000, retaining walls constructed and a boiler house with 12 boilers was built. The original plan was to have 16 boilers, but before the completion of the construction the war had ended, and the 26 hot mills, and the 4 additional boilers intended for their operation, were not built.

The allowance claimed by plaintiff as a deduction for amortization is founded upon the construction of its boiler house. An examination of the records of the Commissioner of Internal Revenue relating to the matter discloses the fact that plaintiff, from time to time, has varied its amortization claim. In its two returns filed in 1919, it claimed an allowance of $714,119.18. In a return filed March 15, 1920, it claimed an allowance for that year of $97,001.94, making the total deduction claimed for the two years $811,121.12. These claims were based upon a cost of $2,561,121.12. The proper cost, it is now agreed (if the cost of the land and wall be included), is $2,470,222.58. On October 13, 1923, plaintiff filed a claim for a total amortization allowance of $1,134,865.33, of which $683,282.46 was claimed for 1918. In this claim the percentage of value in use, theretofore fixed by the Commissioner at 72½ per cent, was not mentioned, the 72½ per cent finding being accepted. On March 14, 1925, plaintiff filed a claim for refund, in which no change was made in the amount of amortization claimed in the immediately preceding claim, but in which the entire amount was claimed as a credit to the 1918 taxes.

Plaintiff's original pleadings in the instant suits are based upon the claim of an amortization allowance of $1,134,865.33, which, as stated, accepted the Commissioner's finding of 72½ per cent as the value in use. Upon trial, however, it offered proof which (it contended) showed the value in use to be $735,014.33. This amount was reached by a rejection of the Commissioner's 72½ per cent value in use, and the adoption of a 7/12 value, and the use of an average of the estimates of engineers as to the cost of a steam-boiler plant which would have met the needs of the plaintiff in the post-war period. Permission was given plaintiff to amend its claim to bring it into agreement with its proof, but no formal order allowing a specific amendment has been submitted.

After the Commissioner stated his determination that plaintiff's boiler house had a value in use of 72½ per cent, no protest in respect to that finding was made by the plaintiff, but his determination was accepted in subsequent claims. Under such circumstances there is considerable force in the contention of the defendant's counsel that the plaintiff is estopped by statute and regulations from now attempting to set up a different value in use. The statute (section 1113 of the Revenue Act of 1926), and the regulations established by its authority, require a claim for refund upon the Commissioner wherein "all facts relied upon in support of the claim should be clearly set forth under oath." While the plaintiff did protest against the original finding of the Commissioner of the value in use of the boiler house, its protest had, in part, been sustained. At no time was any claim made to the Commissioner that the value in use was as small as indicated in testimony offered by plaintiff, and he had no opportunity to rule upon a claim to that effect. No such opportunity having been given him, the suit must fail in so far as it is based upon that claim. (*United States* v.

Felt & Tarrant Mfg. Co., 283 U. S., 269 [Ct. D. 336, C. B. X–1, 431].) The necessity of filing a claim is not dispensed with because the claim will in all probability be rejected. (*Rock Island R. R. Co.* v. *United States*, 254 U. S., 141 [Ct. D. 2, C. B. 4, 342].)

The immediately foregoing comment, in respect to the claim of the defendant that plaintiff was prevented from now asserting a less value in use than that determined by the Commissioner, is perhaps unnecessary in view of the fact that the evidence has failed to satisfy us that the Commissioner was in error in fixing the value in use at 72½ per cent. The testimony showed that all the new boilers of the plaintiff were in use at different times, but that the plant might have been operated with six in active operation. It is quite plain that at least two spares were desirable, if not entirely necessary. Part of the time, in the post-war period, eight boilers were used, and eight were used at the time of trial, when plaintiff was operating the same number of mills as in the post-war period. In any event, in the replacement of a manufacturing plant, good engineering would dictate proper provision for a reasonable increase in the output in the future. Under all the testimony it would seem that the Commissioner's determination of the value in use was based upon sound reasoning. It will be remembered that some of the 12 boilers were installed subsequent to the close of the war.

The next matter for comment is seemingly complicated by the fact that the plaintiff's testimony as to replacement cost was based upon the theory that the value in use of plaintiff's boiler house was 58⅓ per cent, not 72½ per cent, and we therefore have no definite testimony of the replacement cost in the post-war period of a plant which had a 72½ per cent value in use. The dearth of such testimony is immaterial, however, in view of our conclusion that plaintiff is not entitled to an amortization allowance based upon value in use and to an additional allowance based upon replacement cost in the post-war period.

Congress, by article 234(a)8, of the Revenue Acts of 1918 and 1921, conferred wide powers upon the Commissioner of Internal Revenue in respect to the amortization of war facilities. Pursuant to those powers, among others, the Commissioner has, with proper approval, established article 184. Regulations 62 (article 184 of Regulations 45 being substantially the same). That article, as it relates to the present claims, provides that the amortization allowance is the difference between the original cost of the property and the value of the property on the basis indicated by its subsection (2), which is as follows:

"(2) In the case of property not included in (1) above, the value shall be the estimated value to the taxpayer in terms of its actual use or employment in his going business, such value to be not less than the sale or salvage value of the property and not greater than the estimated cost of replacement under normal post-war conditions less depreciation and depletion. * * *"

The subsection (1), referred to in the subsection (2) quoted, relates to property which has been sold by the taxpayer or entirely discarded by him. The taxpayer, in the instant case, is endeavoring to apply both subsections to its advantage. Although still using the facility, and intending to continue the use, it seeks to have the court treat the matter as though the boiler house had been discarded in part. As stated, Congress has given the Commissioner great power in the matter of amortization, and since originally conferring that power, has taken no action to curb or confine it. For 10 years the regulations of the Commissioner have been established, and for that period his interpretations of them have been known. During that period he has applied the regulations in the same manner as in the amortization allowance to the plaintiff. This application of the law has been accepted and followed by the Board of Tax Appeals and by various courts, during the existence of the regulations, as being a correct observance of the statute providing for amortization. Under such circumstances, it is not for this court to undertake to establish a new regulation, or to interpret the existing regulation in another way than that in which it has been construed by its author, and as universally accepted.

By section 184 of both Regulations 45 and 62, the Commissioner of Internal Revenue reasonably exercised the power conferred upon him by statute: and by such sections it is provided that the allowance for amortization, where the property has not been sold or abandoned, shall be the amount of the difference between the actual cost of the property and the post-war residual value, where (as here) such value is less than the replacement cost.

Plaintiff has also contended that the amortization allowance, whatever it may be, should have been credited to income for 1918, instead of being spread over the years 1918, 1919, and 1920. The claim is based upon the fact that the contract for the boiler plant had been made in 1918. The costs therefor, however, were not expended in 1918, but in the years over which the allowance was spread. The spread was in accordance with prior practice and followed article 185, Regulations 62, which provides:

"The amortization allowance shall be apportioned * * * and (b) in cases where the property was not completed in time for use in the production of articles contributing to the prosecution of the war, on the basis of the expenditures made on account of which amortization is allowed."

As was article 184, so article 185 has been established by the Commissioner pursuant to general powers conferred upon him, and what has been said in respect to article 184 is equally applicable to article 185. We see no error in the apportionment of the amortization allowance to the incomes for the three years in which the cost of the property was expended.

Judgment will be entered for the defendant in each case.

ARTICLE 566: Tax on bank or other stock. XII–29–6293
I. T. 2702

REVENUE ACT OF 1921.

I. T. 1407 (C. B. I–2, 193), which holds in part that amounts advanced by a corporation to its shareholders to pay taxes assessed against the shareholders, because of the ownership of the shares, are not deductible in computing the net income of the corporation, is, in view of the Commissioner's acquiescence in the decision of the Board of Tax Appeals in *Wayne County & Home Savings Bank* v. *Commissioner* (26 B. T. A., 761 [page 14, this Bulletin], revoked in so far as it is inconsistent with that decision.

SECTION 236.—CREDITS ALLOWED CORPORATIONS.

ARTICLE 591: Credits allowed. XII–46–6509
Ct. D. 750

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. NET INCOME—DEDUCTION ALLOWED BY MERCHANT MARINE ACT.

The taxable net income for the year 1920 of a steamship company entitled to the benefits of section 23 of the Merchant Marine Act is correctly determined in accordance with sections 230, 236, and 301(b) of the Revenue Act of 1918 and section 23 of the Merchant Marine Act by allowing as a credit the amount of war-profits and excess-profits taxes computed by deducting, with other items, from its total net income an amount equivalent to the net earnings of vessels engaged in foreign trade, as allowed by the Merchant Marine Act, rather than the amount of such taxes which would have been payable had there been no such deduction. The Revenue Act of 1918 and the Merchant Marine Act, enacted in 1920, must be read together, the former imposing a tax only upon net income, which could not be properly computed without taking the deduction which the Merchant Marine Act provided in the case of companies complying with its provisions.

2. DECISION AFFIRMED.

The decision of the district court. (58 Fed. (2d), 792, Ct. D. 539, C. B. XI–2, 402) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Paul J. Bertelsen, Receiver, plaintiff, appellant, v. *Thomas W. White, Collector of Internal Revenue, defendant, appellee.*

Appeal from the District Court of the United States for the District of Massachusetts.

Before BINGHAM, WILSON, and MORTON, JJ.

[June 15, 1933.]

OPINION.

BINGHAM, J.: This is an action brought by Bertelsen, receiver of the Crowell & Thurlow Steamship Co., against Thomas W. White, as collector of internal revenue, to recover an alleged overpayment of $50,000 in taxes for the year 1920. In his answer the collector pleaded a general denial; that he was not the proper party defendant; and a former judgment of dismissal in the Court of Claims as a bar to the action. The district court did not pass upon the issue raised by the general denial or whether the tax collector was the proper party defendant, but held that the suit was barred by the judgment of the Court of Claims and by estoppel in pais.

The action in the Court of Claims was brought July 7, 1926, by the receiver against the United States, and involved, among other issues, the legality of the tax for 1920 against the Steamship company, the parties here being in effect the same as there.

In the Court of Claims the receiver sought to recover from the United States $155,906.71, a portion of an overpayment admitted by the Government for the year 1918, but which the Commissioner of Internal Revenue had applied in payment of taxes for other years, to wit, $37,875.07 for 1917, $68,279 for 1919, and $49,752.39 for 1920, all of which applications the receiver alleged were wrongfully and illegally made, as the income and profits taxes for those years were erroneously claimed by the Commissioner to be due.

During the pendency of the proceedings in the Court of Claims the receiver offered a settlement with reference to all these items, except the application made for the payment of the tax for 1917, and later a dismissal order was entered in the Court of Claims on a motion in which the receiver asked the court to "dismiss the petition filed July 7, 1926, in said cause, without prejudice, however, to the assertion by the claimant, by suit or otherwise, of its claim to receive the sum withheld and applied to the alleged underpayment by the claimant of the tax for the year 1917, for the reasons, as he shows, that, since the filing of said petition all other matters have been satisfactorily adjusted between the claimant and the United States."

The district court also found that the Commissioner of Internal Revenue had acted upon the above offer of settlement by assessing the taxes for 1919 and 1920 in accordance therewith and the plaintiff was for that reason also estopped from maintaining this suit.

From this judgment of the district court the appeal is prosecuted.

If we assume in the plaintiff's favor that he was not precluded from maintaining this suit either on the ground of *res judicata* or estoppel in pais, and that he could maintain the same against the collector as the proper party defendant, we regard the judgment of the district court as correct when the case is considered on its merits.

The merits of the controversy between the parties turn upon the method employed by the Commissioner in assessing the normal income tax of the Steamship company for the year 1920. In assessing that tax the war-profits and excess-profits tax had first to be computed. The general method of arriving at

the war-profits and excess-profits tax is set out in Title III, section 301(b) of the Revenue Act of 1918 (40 Stat., 1088), which provides:

"SEC. 301. (b) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected, and paid upon the net income of every corporation (except corporations taxable under subdivision (c) of this section) a tax equal to the sum of the following:

"FIRST BRACKET.

"20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital;

"SECOND BRACKET.

"40 per centum of the amount of the net income in excess of 20 per centum of the invested capital."

Section 312 reads:

"SEC. 312. That the excess-profits credit shall consist of a specific exemption of $3,000 plus an amount equal to 8 per centum of the invested capital for the taxable year."

June 5, 1920, Congress passed the Merchant Marine Act (41 Stat., 988), section 23 (page 997) of which reads as follows:

"SEC. 23. That the owner of a vessel documented under the laws of the United States and operated in foreign trade shall, for each of the 10 taxable years while so operated, beginning with the first taxable year ending after the enactment of this Act be allowed as a deduction for the purpose of ascertaining his net income subject to the war-profits and excess-profits taxes imposed by Title III of the Revenue Act of 1918 an amount equivalent to the net earnings of such vessel during such taxable year, determined in accordance with rules and regulations to be made by the (shipping) board: *Provided*, That such owner shall not be entitled to such deduction unless during such taxable year he invested, or set aside under rules and regulations to be made by the board in a trust fund for investment, in the building in shipyards in the United States of new vessels of a type and kind approved by the board, an amount, to be determined by the Secretary of the Treasury and certified by him to the board, equivalent to the war-profits and excess-profits taxes that would have been payable by such owner on account of the net earnings of such vessels but for the deduction allowed under the provisions of this section; * * *."

The Crowell & Thurlow Steamship Co., having shown itself entitled to the benefits of this section by having built two new vessels, the Commissioner of Internal Revenue, on October 21, 1926, assessed the excess-profits tax under section 301(b) of the Revenue Act of 1918, but, instead of taking the total net income of the company as the basis of computation, he ascertained the net income subject to the war-profits and excess-profits tax by deducting from the total net income an amount equivalent to the net earnings of the company's vessels engaged in foreign trade, as authorized by section 23 of the Merchant Marine Act.

The net earnings from foreign trade were $1,392,165.51, which, deducted from the total net income of $1,713,755.57, left $321,590.06 as the net income subject to the war-profits and excess-profits tax. On this basis the war-profits and excess-profits tax imposed by Title III, section 301(b) was found to be $9,698.45. This amount is accepted by the plaintiff as correct.

The section relating to an assessment of the company's normal income tax is section 230 of the Revenue Act of 1918. It provides that upon the net income of every corporation there shall be levied, collected and paid for each calendar year after 1918 10 per centum of the net income in excess of the credits provided in section 236, and among the credits there provided is "the amount of any taxes imposed by Title III (war-profits and excess-profits tax) for the same taxable year."

In assessing the income tax of the company for 1920 the Commissioner, in accordance with his construction of sections 230, 236 and 301(b) of the Revenue Act of 1918 and section 23 of the Merchant Marine Act, deducted with other items from the total net income of the company, as a credit, the $9,698.45 which had been imposed as a war-profits and excess-profits tax for the year

1920. The following tabulation shows how the Commissioner arrived at the total tax which was finally assessed for 1920:

Total excess-profits and war-profits tax			$9,698.45
Net income		$1,713,755.57	
Less:			
Interest on United States obligations not exempt	$20,085.05		
Profits tax	9,698.45		
Exemption	2,000.00		
		31,783.50	
Balance taxable at 10 per cent		1,681,972.07	
Amount of tax at 10 per cent			168,197.21
Total tax assessable			177,895.66

The war-profits and excess-profits tax that would have been assessed against the plaintiff but for section 23 amounts to $495,833.77 and the plaintiff claims the assessment of the company's normal income tax should have been as follows, or $48,613.54 less than as assessed by the Commissioner:

Total war-profits and excess-profits tax			$9,698.45
Net income		$1,713,755.57	
Less:			
Interest on United States obligations not exempt	$20,085.05		
Profits tax	495,833.77		
Exemption	2,000.00	519,918.82	
Balance taxable at 10 per cent		1,195,836.75	
Amount of tax at 10 per cent			119,583.67
Total tax assessable			129,272.13

This difference of $48,613.54, with interest, the plaintiff here seeks to recover.

As we understand it the plaintiff claims that section 23 in no way modifies or affects Title III of the Revenue Act of 1918 relating to war-profits and excess-profits taxes; that as to a shipowner taking advantage of its provisions, as well as to others, war-profits and excess-profits taxes are imposed by Title III on the total net income, but if he complies with section 23 and the rules and regulations of the Shipping Board, he is relieved from paying to the Government such part of those taxes as are due to the net earnings of a vessel or vessels engaged in foreign trade; and that, in this case, as the amount of war-profits and excess-profits tax thus imposed would be $495,833.77, that is the amount that, by sections 230 and 236 of the Revenue Act, should be deducted as a credit from the net income of the company in ascertaining its normal income tax.

The plain wording of section 23, however, warrants no such theory. Title III, section 301(b) provides that "there shall be levied, collected and paid upon the *net income* of every corporation * * * a tax equal to the sum of the following," etc. This applied at the time of the passage of the Revenue Act of 1918 and still applies to every corporation, be it a manufacturer or shipowner. After the enactment of the Merchant Marine Act in 1929 the *net income* of the *ordinary corporation* subject to the war-profits and excess-profits taxes imposed by Title III, section 301(b) was a sum obtained by taking the gross income and applying the deductions allowed by section 234. Title II, while the net income of a shipowner taking advantage of section 23 and subject to such taxes was that sum further diminished by the net earnings of vessels engaged in foreign trade.

In section 23 Congress recognized that the "war-profits and excess-profits taxes" there spoken of were to be "imposed by Title III of the Revenue Act of 1918," and simply changed the amount of the net income upon which these taxes were to be thus imposed. The $9,698.45 was the only tax imposed, that is "levied, collected and paid" by virtue of Title III and the only tax that could have been deducted as a credit from the net income within the meaning of the express terms of sections 230 and 236 in determining the normal income tax.

To the extent that section 23 altered the method of ascertaining the net income "subject to war-profits and excess-profits taxes *imposed by Title III* of the Act

of 1918," it modified Title III of the Revenue Act; and we find nothing in the legislative history of the Merchant Marine Act which would lead to a different construction. It is true that the Senate and House conferees submitted a report recommending an amendment to the Revenue Act in order better to carry out the purpose of section 23 and that this report was rejected. But this rejection was solely on the ground, as stated by the Speaker of the House, that "it seems to the Chair clearly that it is not within *their* (the conferees') jurisdiction, because there is nothing in the Senate amendment that, in the opinion of the Chair, *places these matters in conference*." In other words it was simply ruled that it was not within the jurisdiction of the conferees to amend the Revenue Act when only the question of an amendment to the merchant marine bill proposed by the Senate was submitted to them. Furthermore no objection was taken to the statement of Mr. Edmonds, for the House conferees and committee, that "an amendment inserted (in the Marine Act) by the Senate affecting the Revenue Act * * * must naturally have something to do with the Revenue Act, and we could not make an amendment of that kind unless we did amend or change the Revenue Act," and, as we see it, no exception could have been taken to such a self-evident proposition. In any event, as we have shown, section 23, construed in the only way its plain language warrants, modified the Revenue Act of 1918 to the extent required to give effect to that section.

It is also suggested that this interpretation of the sections involved here should not be given as injustice to the taxpaying shipowner would result; and that his total payments of taxes thus assessed would be more than his payment of war-profits and excess-profits taxes and normal income tax computed in the ordinary way. But the money saved from the war-profits and excess-profits tax was not money paid to the Government for its benefit but money of the taxpayer invested in new ships for its own benefit; and while the plaintiff's normal income tax is increased by a little less than $50,000, the revenue of the Government is, in fact, diminished by the sum of $437,521.78, the taxpayer profiting to that extent over what he would otherwise have had to pay. There can be no injustice in that. Furthermore it is voluntary with the taxpaying shipowner whether section 23 shall be invoked or not.

In his assignments of error and brief the appellant suggests that section 23 of the Merchant Marine Act, if construed as above is a revenue Act; that it originated in the Senate and hence is unconstitutional by virtue of Article I, section 7, clause 1 of the Constitution. While section 23 amends Title III so far as it relates to certain shipowners that is only an incident to its general purpose, its primary object being "to establish the American merchant marine upon a sound and permanent basis." It is not a bill to raise revenue. (*United States* v. *Norton*, 91 U. S., 566, 568, 569; *Twin City Bank* v. *Nebeker*, 167 U. S., 196.) On the contrary it diminishes the revenue of the Government. Section 23 of itself does not increase the taxpayer's normal income tax. His normal income tax is increased because section 236, Title II, allows as a credit only the amount of tax imposed upon the taxpayer for that year by section 301 of Title III.

The conclusion here reached conforms to the decision of the Board of Tax Appeals of June 14, 1928, in *Atlantic & Caribbean Steam Navigation Co.* v. *Commissioner of Internal Revenue* (12 B. T. A., 606), where the exact question here under consideration was passed upon. In that opinion the Board said:

"The two Acts (the Revenue Act of 1918 and the Merchant Marine Act) must be read together. Having complied with the conditions of the Merchant Marine Act, which was effective before any tax for 1920 became due under the Revenue Act, petitioner became entitled to a certain additional deduction in computing its net income subject to tax under Title III. The Revenue Act imposed a tax only upon net income, and the net income of petitioner could not have been properly computed without taking the deduction which the Merchant Marine Act provided should be allowed under the Revenue Act. The tax imposed was to be computed upon this net income, not upon what the income would have been had the Revenue Act stood alone, or had the petitioner not taken the necessary steps to entitle it to this additional deduction. The result in this case is that there was not sufficient net income subject to profits tax to result in the imposition of any tax and consequently in computing net income subject to income tax there was no credit to be claimed on the ground that a profits tax was imposed on petitioner by the Revenue Act."

The judgment of the district court is affirmed with costs in this court to the appellee.

SECTION 240.—CONSOLIDATED RETURNS OF CORPORATIONS.

ARTICLE 632: Consolidated returns. XII-34-6355
Ct. D. 722

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. CONSOLIDATED RETURNS—INSURANCE AND NONINSURANCE COMPANIES.

The Revenue Act of 1926 does not permit a company engaged only in soliciting insurance on a commission basis to file a consolidated return, under section 240(a), with a company engaged in issuing insurance policies and assuming risks common to insurance companies, which latter company owned all the stock of the former. It was the purpose of the Legislature, in enacting the provisions exclusively applicable to insurance companies, to segregate such companies from other corporations for tax purposes, and pursuant to such purpose a different tax rate was made applicable to insurance companies, no provision being made for a tax rate applicable to consolidated income of these differently taxed units. In the absence of a statute so providing, the Commissioner has no authority to apply the tax rates of either class to consolidated income of insurance and noninsurance companies.

2. CERTIORARI DENIED.

Petition for writ of certiorari was denied by the Supreme Court on May 22, 1933 (53 S. Ct., 786).

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

The Cincinnati Underwriters Agency Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review an order of the United States Board of Tax Appeals.

Before MOORMAN, HICKENLOOPER, and SIMONS, Circuit Judges.

[January 17, 1933.]

OPINION.

MOORMAN, Circuit Judge: The question in this case is whether the petitioner, an Ohio corporation engaged in soliciting insurance on a commission basis but not engaged in assuming insurance risks or issuing insurance policies, should have been permitted to file consolidated tax returns for the years 1926 and 1927 with another Ohio corporation, the Eureka Security Fire & Marine Insurance Co., which was engaged in issuing insurance policies and assuming insurance risks common to insurance companies.

The Act of 1926, section 240(a), gave to affiliated corporations the right to make consolidated returns for 1926 and subsequent years. In defining such corporations it provided in part that two or more domestic corporations should be deemed to be affiliated if one corporation owned at least 95 per centum of the voting stock of the other or others. The Eureka company owned all of the capital stock of the petitioner, and as the general language of the Act is broad enough to include all domestic corporations, insurance companies and others, it is contended by the petitioner that the decision of the Board of Tax Appeals in disallowing its affiliation with the Eureka company is contrary to the provisions of the Act.

There would be much force in the petitioner's contention were it possible to give it effect without defeating the legislative intent of other provisions of the Act. One of such purposes, as appears from provisions made exclusively applicable to insurance companies, was to segregate such companies from other corporations for tax purposes. Pursuant to this purpose it was provided that in lieu of the tax rates of 13 and 13½ per cent levied upon the income of

other corporations, the rate applicable to insurance companies should be 12½ per cent. Nowhere was provision made for a tax rate applicable to the consolidated income of these differently taxed units. It is contended by the petitioner that this deficiency in the Act may be supplied by an application by the Commissioner of the higher class rate to the consolidated result, but this contention finds denial in the circumstance that there is no authority in the Commissioner so to do, and that tax rates are fixed by statute and not by administrative procedure. There being, therefore, no statutory rate for such consolidated result nor any authority for applying either of the class rates, the only solution of the situation that is practicable is to construe the general provisions relied upon as permitting only such affiliation as could be effected without affecting the other purposes of the Act. This was what was done in circumstances almost identical with those here involved in *Fire Companies Building Corporation* v. *Commissioner* (54 Fed. (2d), 488 [Ct. D. 458, C. B. XI–1, 177]). It was fully warranted under the rule forbidding constructions which lead to absurd consequences. (*In re Chapman*, 166 U. S., 661, 667; *United States* v. *Katz*, 271 U. S., 354, 357.)

It is true that under earlier Acts and to some extent under the Act of 1926 the Internal Revenue Department permitted affiliations between insurance companies and other corporations. There were provisions even in the earlier Acts which made it impracticable to permit the affiliation, and we can find no justification for the Department's practice under those Acts. While the Acts of 1921 and 1924 made special provision for the taxing of insurance companies, neither of them fixed the rate of taxation differently from that provided for other corporations. The Act of 1926, having erected this additional barrier to affiliation, can not be said to have approved a practice indulged in though not justified under the earlier Acts. Nor was there recognition or approval of the practice under the Act of 1926 in the passage of the Act of 1928. The argument for the petitioner is that as the later Act expressly excluded insurance companies from affiliations, it must be assumed that Congress regarded the earlier one as permitting it. A sufficient answer to this is that the provision was inserted in the Act, as shown by the conference report of the committees from the two Houses, as a "clarifying amendment." If reason for the clarification must be found, it is enough to say that the Act of 1926 erected such barriers to affiliation between insurance companies and other corporations in prescribing different tax rates that it was not deemed necessary to exclude insurance companies in terms, but as the Act of 1928 removed these barriers from its effective date, January 1, 1929, by providing for the same tax rate, it was then necessary, in order to exclude insurance companies, that specific provision be made to that effect.

The order of the Board is affirmed.

ARTICLE 633: When corporations are affiliated.

XII–35–6377
Ct. D. 725

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. CONSOLIDATED RETURN—AFFILIATION—OWNERSHIP OF STOCK.

Two corporations are not affiliated within the meaning of section 240(c) of the Revenue Act of 1926 where one stockholder owned 98 per cent of petitioner corporation and 25 per cent of the alleged affiliate and three other stockholders in the affiliate each owned 25 per cent of its stock, the latter three being members of the same family as the stockholder who owned 98 per cent of petitioner corporation, but having neither beneficial nor legal ownership of any of its shares. The statute does not contemplate indirect interest, but requires that at least 95 per cent of the voting stock of the corporations shall be *owned* by the same interests. *Handy & Harman* v. *Burnet* (284 U. S., 136) followed.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (26 B. T. A., 404) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Palgrove Co., petitioner, v. Commissioner of Internal Revenue, respondent.

Appeal from an order of the Board of Tax Appeals fixing a deficiency against the petitioner from income taxes for the year 1925.

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

[March 6, 1933.]

OPINION.

Per curiam: The only question in this case is whether the petitioner was affiliated with A. Klipstein & Co. We may ignore the other two parties to the affiliation. We regard the case as ruled by *Handy & Harman* v. *Burnet* (284 U. S., 136 [Ct. D. 425, C. B. X-2, 370]). The change in the Act of 1918 limits, rather than extends, affiliation. The original Act read "owned or controlled"; the Act of 1926, under which this case arises (section 240(c)), uses only the word "owned." It is plain that the "same interests" did not own 95 per cent of both companies. August Klipstein, Jr., owned 98 per cent of the petitioner and 25 per cent of A. Klipstein & Co. The other three owners (we omit August Klipstein, Sr.'s, insignificant holding), also each owned 25 per cent. It is true that these three were members of the same family as August Klipstein, Jr., and we may assume that in practice they acted in concert with him, but they had neither beneficial nor legal ownership of any shares in the Palgrove Co., and it is this alone which counts.

The same result follows if we treat those shares transferred by Ernest G. Klipstein to August Klipstein, Jr., as in fact held for the benefit of A. Klipstein & Co. If so, the three other shareholders in Klipstein & Co. did indeed have indirect interest in these Palgrove shares; but the statute does not contemplate such interests. Even though we might assume that the Klipstein company could itself be regarded as a shareholder in the petitioner, the shareholders of the Klipstein company were not for that reason to be treated as such shareholders. The statute sets a grosser, more legalistic, test, and the conditions were not fulfilled.

Order affirmed.

SECTION 245.—TAXES ON INSURANCE COMPANIES.

ARTICLE 681: Reserve funds.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Interest on coupons of "guaranteed premium reduction policies." (See I. T. 2717, page 94.)

PART IV.—ADMINISTRATIVE PROVISIONS.

SECTION 257.—RETURNS TO BE PUBLIC RECORDS.

ARTICLE 1090: Inspection of returns. XII-34-6356
T.D. 4378

Amendment to Treasury Decision 4359 [C. B. XI-2, 305] to permit inspection of returns by Special Committee to Investigate Foreign and Domestic, Ocean and Air Mail Contracts.

TREASURY DEPARTMENT.
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 4359 (being regulations prescribed by the Secretary and approved by the President, applicable to the inspection of returns under the Revenue Act of 1932 and prior Revenue Acts,

and incorporated as part of article 421 of Income Tax Regulations 77) is amended by inserting between paragraphs 13 and 14 thereof a new paragraph numbered 13(a) reading as follows:

13(a). Notwithstanding any other provisions of these regulations, returns may be inspected by the Special Committee to Investigate Foreign and Domestic, Ocean and Air Mail Contracts, appointed under Senate Resolution 349, Seventy-second Congress, to the same extent and in the same manner as by a select committee of the Senate specially authorized to investigate returns by a resolution of the Senate.

THOMAS HEWES,
Acting Secretary of the Treasury.

Approved August 3, 1933.
FRANKLIN D. ROOSEVELT,
The White House.

EXECUTIVE ORDER—INSPECTION OF TAX RETURNS BY SPECIAL COMMITTEE TO INVESTIGATE FOREIGN AND DOMESTIC, OCEAN AND AIR MAIL CONTRACTS, UNITED STATES SENATE.

Pursuant to the provisions of section 55 of the Revenue Act of 1932 (47 Stat., 189), section 55 of the Revenue Act of 1928 (45 Stat., 809), and section 257 of the Revenue Act of 1926 (44 Stat., 51), *It is hereby ordered* that returns shall be open to inspection by the Special Committee to Investigate Foreign and Domestic, Ocean and Air Mail Contracts, appointed under Senate Resolution 349, Seventy-second Congress, such inspection to be in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury and approved by the President under date of December 13, 1932, as amended this date.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
August 3, 1933.

ARTICLE 1090: Inspection of returns. XII-44-6484
T. D. 4397

Amendment to Treasury Decision 4359 [C. B. XI-2, 305], as amended by Treasury Decision 4378 [page 219, this Bulletin], to permit inspection of returns by Special Committee to Investigate Receivership and Bankruptcy Proceedings and Appointment of Receivers and Trustees.

TREASURY DEPARTMENT,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 4359 (being regulations prescribed by the Secretary and approved by the President, applicable to the inspection of returns under the Revenue Act of 1932 and prior Revenue Acts, and incorporated as part of article 421 of Income Tax Regulations 77), as amended by Treasury Decision 4378 (page 219, this Bulletin), is further amended by changing paragraph numbered 13(a) thereof to read as follows:

13(a). Notwithstanding any other provisions of these regulations, returns may be inspected by the Special Committee to Investigate Foreign and Domestic, Ocean and Air Mail Contracts, appointed under Senate Resolution 349, Seventy-second Congress, or by the Special Committee to Investigate Receivership and

Bankruptcy Proceedings and Appointment of Receivers and Trustees, appointed under Senate Resolution 78, Seventy-third Congress, to the same extent and in the same manner as by a select committee of the Senate specially authorized to investigate returns by a resolution of the Senate.

W. H. WOODIN.
Secretary of the Treasury.

Approved October 18, 1933.
FRANKLIN D. ROOSEVELT,
The White House.

EXECUTIVE ORDER—INSPECTION OF TAX RETURNS BY SPECIAL COMMITTEE TO INVESTIGATE RECEIVERSHIP AND BANKRUPTCY PROCEEDINGS AND APPOINTMENT OF RECEIVERS AND TRUSTEES, UNITED STATES SENATE.

Pursuant to the provisions of section 55 of the Revenue Act of 1932, section 55 of the Revenue Act of 1928, and section 257 of the Revenue Act of 1926, *It is hereby ordered* that returns shall be open to inspection by the Special Committee to Investigate Receivership and Bankruptcy Proceedings and Appointment of Receivers and Trustees, appointed under Senate Resolution 78, Seventy-third Congress, such inspection to be in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury and approved by the President under date of December 13, 1932, as amended under date of August 3, 1933, and as further amended this date.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
October 18, 1933.

SECTION 262.—INCOME FROM SOURCES WITHIN THE POSSESSIONS OF THE UNITED STATES.

ARTICLE 1135: Citizens of the United States deriving income from sources within a possession of the United States. XII–29–6294 Ct. D. 702

INCOME TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF COURT.

1. GROSS INCOME—INCOME FROM SOURCES WITHIN POSSESSIONS OF UNITED STATES.

A citizen of the United States, resident in the Philippine Islands, who devoted most of his time to the business of a mining corporation in the Philippines, and who, during the years 1920–1925, derived more than 80 per cent of his income from salary, director's fees, and dividends of the corporation, the major portion of such income being derived from dividends, was not entitled to the benefits of section 262 of the Revenue Acts of 1921, 1924, and 1926. The provisions of that section, construed in the conjunctive, require not only that 80 per cent or more of gross income be derived from sources within a possession of the United States, as specified in subdivision (a)(1), but also, as specified in subdivision (a)(3), that 50 per cent or more of gross income be derived from the active conduct of a trade or business within a possession of the United States either on taxpayer's own account or as an employee or agent of another.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 378) affirmed.

3. CERTIORARI DENIED.

Petition for writ of certiorari denied by the Supreme Court on March 27, 1933 (53 S. Ct., 526).

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA. No. 5547.

John W. Haussermann, appellant, v. *David Burnet, Commissioner of Internal Revenue, appellee.*

Appeal from the Board of Tax Appeals.

Before MARTIN, Chief Justice, and ROBB, VAN ORSDEL, HITZ, and GRONER, Associate Justices.

[January 3, 1933.]

OPINION.

GRONER, Associate Justice: This appeal involves deficiencies in income taxes for the years 1922 and 1923, and, by consolidation under No. 5548, the years 1924 and 1925. Petitioner is a citizen of the United States, who has resided in the Philippine Islands since November, 1898. He was formerly a member of the Philippine bar, but in 1903, as attorney for a group of interested parties, he organized the Benguet Consolidated Mining Co. as a *sociedad anonima* under the provisions of the code of commerce of Spain then in effect in the Philippine Islands. He became a member of the board and owned a small interest in the shares of the organization. Later he increased his holdings. Prior to 1915 the mining company had financial difficulties and suspended operations, and in that year petitioner reorganized the company and devoted thereafter practically his entire time to its affairs. In 1917 he became its largest stockholder, and since that date he and his former law associates have dominated its affairs. During each of the years 1920 to 1925, inclusive, more than 80 per cent of petitioner's gross income was derived from sources within the Philippine Islands and consisted of amounts received as salary and director fees and by distributions by way of dividends out of the earnings of the mining company. In 1920 petitioner's total income amounted to approximately $26,000, of which a little more than $2,700 resulted from salary and director's fees, a little more than $12,000 from dividends from the mining company and a little more than $11,000 from other income. In 1921 his total income was a little in excess of $5,000, of which approximately $3,600 was dividends from the mining company and a little less than $500 salary. In 1922 his total income was above $20,000, his salary $1,000, his dividends $18,000. In 1923 his salary was nearly $13,000 and his dividends $68,000. In 1924 his salary was $2,600 and his dividends $100,000. And in 1925 his salary $600 and his dividends $120,000, of a total income of $124,000.

In filing his income-tax returns for the several years, petitioner claimed the benefits of section 262 of the Revenue Acts of 1921, 1924, and 1926. The Commissioner held, and the Board sustained his holding, that the amounts received out of the earnings of the mining company upon his interest therein did not represent income "derived from the active conduct of a trade or business within a possession of the United States" by the petitioner "either on his own account or as an employee or agent of another." The findings of fact by the Board show that petitioner derived more than 80 per cent of his total gross income from sources within the Philippines, but the Board held that while this fact satisfied the requirements of subdivision (a)(1) of section 262, it was not sufficient because subdivisions (a)(1) and (a)(3) should be construed in the conjunctive rather than in the disjunctive or alternative, and that since petitioner's income was not derived "from the active conduct of a trade or business either on his own account or as agent or employee of another," he was not entitled to the benefits of the section.

Petitioner on this appeal assigns as error, first, the action of the Board in holding subdivisions (a)(1) and (a)(3) of section 262 conjunctive rather than disjunctive, and second, that the Board erred in not holding that 50 per cent of petitioner's gross income was derived from the active conduct of a trade or business by petitioner on his own account, etc.

From what has just been said, it will be seen that the questions presented involve a construction of section 262(a) of the Revenue Act of 1921. The section is as follows:

"SEC. 262. (a) That 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

"(2) If, in the case of such corporation, 50 per centum or more of its 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; or

"(3) If, in the 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."

It is therefore obvious that if subdivision (a)(1) of section 262 should be construed in the disjunctive, petitioner is not chargeable with the tax, but we agree with the Commissioner and the Board that this interpretation can not be sustained.

The language of the section shows that Congress was dealing with two classes of taxpayers, namely, individuals and corporations. Subparagraph (1), applicable to both, provides that if 80 per centum or more of gross income is derived from sources within a possession of the United States, and (2) in the case of a corporation if 50 per centum of such gross income was derived from the active conduct of a trade or business within a possession of the United States, and (3) in the case of an individual (United States citizen) if 50 per centum of gross income was derived from the active conduct of a trade or business, etc., "either on his own account or as an employee or agent of another," benefits of the section shall apply.

In our view it is impossible to interpret the section otherwise than to ascribe to its requirements the condition that a corporation must bring itself within the terms of subdivisions (1) and (2) and the individual within subdivisions (1) and (3). Petitioner apparently concedes the correctness of this interpretation of the statute as applicable to corporations, but insists that by the use of the word "or" at the conclusion of subparagraph (2) Congress did not intend the interpretation we think should be made to apply to an individual. But this would be a strained construction of the section. Congress was dealing, as we have already seen, with two classes of taxpayers, and it is plain that the requirements as to each were the same. Both must have derived 80 per centum of gross income from sources within a possession of the United States and both must have derived 50 per centum or more from the active conduct of a trade or business, likewise within a possession of the United States. To hold with petitioner would be to say that the congressional purpose in the enactment was to apply the rule just above announced to corporations but in the case of an individual to extend the benefits of the section without regard to whether any part of such income was derived from the active conduct of a business. The contrary of this has been consistently the ruling of the Treasury Department since the enactment of the Revenue Act of 1921. (See Treasury Regulations 62, articles 1135 and 1136.)

We therefore pass from this phase of the case to the inquiry whether 50 per cent of petitioner's gross income 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. As we have already pointed out, the greater portion of petitioner's income for the years 1920 to 1925 was received as dividends from the mining company. The Board held as to this income that he received it as a stockholder and not from the active conduct of a trade. This we think was correct. On petitioner's behalf it is argued that the mining company was not a corporation but was in fact a partnership organized under the code of commerce then in force in the Philippine Islands and that he occupied to the company the relationship of managing partner. He also insists that even if the company was a corporation, in view of the relation which we mentioned as existing between the company and himself, he derived his income from it in the active conduct of a trade or business either on his own account or as an employee or agent of the company. We think neither of these positions is sustainable.

As to the first, if it were necessary to determine the precise character of the mining company, that is to say, whether it is in fact a corporation, or, as counsel for petitioner insists, a "joint-stock company," the record shows that it has a managing board of directors, that its capital is divided into voting shares, that it has a president and vice president, and that its earnings are distributed to its shareholders ratably according to the number of their shares, respectively, and thus is within the test established by the Revenue Act of 1921 where the term "corporation" is said to include "associations, joint-stock companies, and insurance companies," and article 1502 of Regulations 62, promulgated under this provision, defining these as including associations doing business in an organized capacity whether created by State laws, agreements, declarations of trust, or otherwise. The Supreme Court in *Burk-Waggoner* v. *Hopkins, Collector* (269 U. S., 110 [T. D. 3790, C. B. V–1, 147]), has sustained the correctness of this interpretation and held that unincorporated joint-stock associations with a fixed capital stock divided in shares represented by certificates transferable on the books of the company and whose affairs are managed by a board of directors and executive officers and who conduct their business in general form like a corporation are subject by the Act to be taxed as corporations. Petitioner's company is in all respects within this description, and without regard to whether under the Spanish laws it was technically a corporation, it is, we think, under the tax laws of the United States as much within that category as though it had been granted a charter fixing the limits of its rights and responsibilities, and if our conclusion in this respect is correct, it would follow that petitioner, in receiving dividends from the company, did not thereby derive income from the active conduct of a trade or business either on his own account or as an employee or agent of another. It is quite true that petitioner since 1915 has devoted his entire time to the business of the company, and it is equally true that the salary paid him for these services was vastly inadequate, considered as against the services rendered, and it is apparent he looked to the distribution of the profits rather than to the salary as a proper reward of his efforts, but the fact remains that he received the income, the taxation of which is the subject of dispute, just to the same extent ratably as the other shareholders of the company received theirs. In this aspect, as we think, these amounts were not derived, within the contemplation of the revenue laws, from the active conduct of a trade or business, notwithstanding the fact that petitioner's efforts largely produced them.

This view is supported by the recent decision of the Supreme Court in *Burnet, Commissioner*, v. *Clark*, decided December 12, 1932 [Ct. D. 620, C. B. XII–1, 175], in which the Supreme Court, speaking of a somewhat similar situation and claim, said: "The respondent was employed as an officer of the corporation; the business which he conducted for it was not his own. There were other stockholders. And in no sense can the corporation be regarded as his *alter ego*, or agent." Nor, in our view, can *he* be regarded as the *alter ego* of the corporation.

Affirmed.

PART V.—PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES.

SECTION 270.—DATE ON WHICH TAX SHALL BE PAID.

ARTICLE 1203: Collection of tax by suit. XII–28–6284
Ct. D. 700

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. SUIT ON BOND—STATUTE OF LIMITATIONS—DURESS.

A bond, having been given in connection with an abatement claim, conditioned upon payment of tax, interest, and penalties finally determined by the Commissioner to be due, was enforceable even though executed subsequent to the expiration of the period of limitation for collection. The bond, having served the purpose of a delay and reconsideration, was supported by adequate consideration, and was not executed under duress.

2. CERTIORARI DENIED.

Petition for writ of certiorari was denied by the Supreme Court on April 10, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

United States of America, appellant, v. C. M. Root and Fidelity & Deposit Co. of Maryland, appellees.

Appeal from the District Court of the United States for the Northern District of Texas.

[January 5, 1933.]

OPINION.

HUTCHESON, Circuit Judge: The United States brought this suit on a bond given by appellee Root in connection with an abatement claim. By the condition of the bond Root and his surety, the other appellee, obligated themselves to pay "All sums of money finally adjudicated by the Commissioner of Internal Revenue to be due the United States by the principal for the period covered by the claim as taxes, penalties and interest."

Appellee Root contended that, because at the time the bond was exacted the tax was uncollectible because barred, the obligation of the bond to pay the amount of the tax was without binding force. The district judge before whom the case was tried upon a jury waiver, agreeing with this view, denied recovery. Appellant comes here insisting that the case is ruled by *United States* v. *John Barth Co.* (279 U. S., 370 [Ct. D. 65, C. B. VIII–1, 189]); *Gulf States Steel Co.* v. *United States* (56 Fed. (2d), 43, affirmed November 7, 1932 [Ct. D. 608, C. B. XI–2, 314]).

The condition of the bond in each of these cases, though differing from that of each of the others in verbiage, is in substance and in legal effect the same. In each of the cases the bond, given in connection with a claim in abatement, was conditioned to await the final action of the Commissioner on the claim. In the Barth case, the agreement was to pay "Any part of the tax which the Commissioner found to be due"; in the Steel case, it was "To pay so much of the claim as is not abated"; that is, to pay all of the claim except that part found by the Commissioner not to be due. In this case it was "To pay all sums of money finally adjudicated by the Commissioner of Internal Revenue to be due for the period covered by the claim as taxes, penalties and interest," that is, pay such part of the deficiency as remained after the claim had been adjudicated.

Appellees urge that though the condition of the bond in suit is substantially the same as that of the others, the circumstances of its giving are so different that those cases can not rule this. They say that those bonds, voluntarily given while the tax was still collectible for the purpose of gaining time to pay, were supported by adequate consideration; that this bond, given, after limitation had barred the collection of the tax, in order to prevent a wrongful levy, was exacted by duress and is without consideration. We think appellant has the right of it.

The facts are undisputed. On March 15, 1923, within the period of limitation applicable, the Commissioner of Internal Revenue assessed against Root an additional tax of $27,000.98. In July, 1924, as the result of a notice from the Revenue Service that it had a tax warrant ready to issue, and unless the additional tax was paid there would be an immediate distraint, Root, complying with the condition fixed that a bond be filed, filed an abatement claim. The claim recited the filing in April, 1918, of his income tax return, the assessment on March 15, 1923, of the additional tax, the issuance of tax warrant, and the demand for payment. It contended that the additional assessment was erroneous, and concluded with a prayer that the taxpayer "be given special consideration and treated as a taxpayer without invested income; that the tax be adjusted upon a reasonable basis, and that the Department find that he has fully paid all taxes due."

The bond, reciting the making of the additional assessment and the filing of the abatement claim, was conditioned in effect to pay such amount of the tax as by his action on the claim in abatement, the Commissioner determined to be due. The collection of the tax stayed, the Commissioner proceeded to reexamine the assessment in the light of the claim, and on January 24, 1928,

he notified the taxpayer that his claim had been allowed for $7,510.97, rejected for $19,490.01. He further advised him that he had 30 days in which to present additional evidence to the Commissioner, and 60 days after final determination to file his petition with the Board of Tax Appeals. The claim having been finally adjudicated in accordance with the former decision, and a certificate of overassessment issued accordingly, the taxpayer filed his petition with the Board of Tax Appeals. The Board, on April 30, 1930, in accordance with a stipulation and request of the parties, entered an order that the statute of limitations had barred the collection of the additional tax.

After the entry of this order, the collection of the tax having then been stayed by the execution of the bond for more than six years, demand was made upon Root that he perform the condition of his bond by paying the $19,409.01 with interest, $8,092.97, which the Commissioner had adjudicated as due. Upon his refusing to pay on the ground that the liability of the bond fell with the liability on the tax, this suit was filed.

In his answer Root for the first time made the contention that the bond was without consideration because exacted by duress. The record shows that Root took no step in the long course of these proceedings except of his own volition, and at no time was there any duress, either in fact or in law, practiced on him. True the collector did insist upon payment, and did advise him that in default of payment there would be distraint. These demands however, were made in the most courteous and considerate way. The taxpayer was given the fullest time to consider and determine his course; he was allowed to file claim in abatement, was given extension after extension of time to file his bond. Special consideration was given the claim, and the result of its filing was that the assessment was abated $7,510.97. So unoppressive were the demands, so conspicuous was the indulgence shown, that the taxpayer's representative wrote "You have been so very kind and obliging about this matter that I hate to ask any further favors, but if this (a further extension of time for making the bond) can be granted we will be under lasting obligations." Such facts do not make out a case of duress.

Until an assessment has been adjudicated to be uncollectible, it is the duty of a collector to press for its collection, and the performance of that duty is not affected by the fact that the assessment which he has in hand to collect, is or may be barred by a statute of limitations.

When the demand is pressed the taxpayer may pay it, or stay its collection in some appropriate way. If he pays it, esteeming it wrongfully collected, he may sue to recover it back. If, preferring to delay its payment until he can have its validity determined, he makes a bond or signs a waiver, such bond or waiver is enforceable according to its terms, though limitation has already run against the collection of the tax. (*Stange* v. *United States*, 282 U. S., 270 [Ct. D. 274, C. B. X–1, 414]; *Brown & Sons* v. *Burnet*, 282 U. S., 283 [Ct. D. 279, C. B. X–1, 274]; *Mascot Oil Co.* v. *United States*, 282 U. S., 434 [Ct. D. 286, C. B. X–1, 190]; *United States* v. *Hogshire*, 37 Fed. (2d), 720.) Having the right to compel immediate payment unless the taxpayer makes the required application to stay the collection, the exaction of a waiver or bond can not be duress. (*United States* v. *Southern Lumber Co.*, 51 Fed. (2d), 956; *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S., 295 [Ct. D. 276, C. B. X–1, 323]; *McDonnell* v. *United States*, 59 Fed. (2d), 293 [Ct. D. 570, C. B. XI–2, 328].) If, after the Commissioner had finally determined the amount due the taxpayer, instead of filing his petition with the Board for a reexamination, had paid the tax, he could not have recovered it as an overpayment. (*Bryant-Link Co.* v. *Hopkins*, 47 Fed. (2d), 1068 [Ct. D. 329, C. B. X–1, 430]; *Graham and Foster* v. *Goodcell*, 282 U. S., 409 [Ct. D. 287, C. B. X–1, 191]; *Magee* v. *United States*, 282 U. S., 432 [Ct. D. 285, C. B. X–1, 189]; *Hartwell Mills* v. *Rose*. 61 Fed. (2d), 441.) Where, as here, the taxpayer, upon the condition that he agree to pay all amounts found finally to be due, has secured consent to file a claim in abatement, asking special treatment, the postponement of the collection of the tax until the claim was finally acted upon, and a substantial reduction of the tax, no reason presents itself why he should not perform his agreement. On the contrary, we think it plain that here, as in the John Barth case, "The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay sought."

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

SECTIONS 273 AND 274.—DEFICIENCY IN TAX.

ARTICLE 1231: Deficiency defined. XII-20-3295
(Also Section 280, Article 1291.) Ct. D. 703

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

TRANSFEREE—ESTOPPEL.

Where waivers were executed and petitions filed with the Board of Tax Appeals by officers of a transferee company, in the name and under the seal of the dissolved transferor company which had sold all its assets to the transferee, the latter assuming all the liabilities of the former, the authority of such officers to execute the waivers or to prosecute the appeals may not be denied by the transferee company in an action in equity by the United States to recover of the transferee the deficiencies in tax determined by the Board of Tax Appeals pursuant to stipulation of counsel. Though the dissolution of the transferor was known to the Commissioner, such waiver and appeals obviously having been for its own benefit the transferee is estopped to assume an inconsistent position and deny their validity or the jurisdiction of the Board.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

The Warner Collieries Co., appellant, v. *The United States of America, appellee.*

Appeal from the District Court for the Northern District of Ohio, Eastern Division.

[January 20, 1933.]

OPINION.

HICKS, Circuit Judge: So far as the matters involved are here material, this was a bill in equity to recover of the Wolf Run Coal Co., herein called the Wolf company, and its transferee and obligee, the Warner Collieries Co., herein called the Warner company, income and profits taxes in the sums of $5,414.50 and $13,069.96, with interest, for the years 1918 and 1919, respectively. The court dismissed the bill as to the Wolf company and entered a decree against appellant, the Warner company, for the amounts sued for.

The court made special findings of fact and conclusions of law in accordance with equity rule No. 70½. These findings of fact are not now controverted. So far as relevant, the findings of fact are, that the Wolf company in due course filed its tax returns for 1918 and 1919; that these various returns were executed by its secretary, Whitworth, and its treasurer, Warner, both of whom were charged with attending to its tax matters; that on April 21, 1923, the Wolf company, by Warner, who was then its vice president, executed powers of attorney to certain persons connected with a firm of public accountants, authorizing them to represent the company before the Treasury Department in business pertaining to its tax returns; that in October, 1919, the Wolf company sold all its assets to the Warner company for seventy-five hundred shares of the stock of the Warner company, which shares were of greater value than the amount of the taxes sued for; that as part consideration the Warner company agreed to pay all the liabilities of the Wolf company and to save it harmless against any and all claims, demands and actions arising out of any of its obligations and liabilities.

On November 1, 1923, at a meeting of its board of directors, of which Warner was chairman and Whitworth, secretary, the Wolf company was dissolved by a formal resolution, which declared that the company had completely closed its business and paid all its debts and liabilities. On November 16, 1923, the company, by Warner, its president, and Whitworth, its secretary, certified the dissolution to the secretary of state of Ohio. Upon the dissolution of the Wolf company its directors by virtue of sections 8742 and 8743 of the General Code of Ohio, became trustees with power to settle the company's affairs.

On April 10, 1926, the Commissioner of Internal Revenue addressed to the Wolf company a 60-day letter proposing an additional assessment of income and profits taxes of $7,103.73 for 1918, and on August 3, 1926, he forwarded a similar letter proposing an additional assessment of $18,286.14 for 1919. These

letters never reached the former directors, trustees of the dissolved Wolf company, as such, but the inference is clear that they were brought to the attention of Warner, a former director of the Wolf company and who was then vice president, and Whitworth, who was then secretary and treasurer of the Warner company, and both of whom were at the time handling its tax affairs. Thereupon Whitworth, signing as secretary in the name of the Wolf company, executed waivers, which if valid, protected the Commissioner against the limitation for the assessment and collection of the proposed deficiencies. These waivers, in order to comply with a requirement of the regulations of the Bureau, were executed under the seal of the long since dissolved Wolf company.

On June 9, 1926, and October 1, 1926, petitions were filed with the Board of Tax Appeals in the name of the Wolf company to redetermine the proposed deficiencies. These petitions were signed by Whitworth as secretary and by an attorney connected with the accounting firm to which the before-mentioned power of attorney had been executed by the Wolf company. Notwithstanding these waivers and petitions, executed in the name of the Wolf company, the Department of Internal Revenue knew that this company had been dissolved in 1923. That information had been brought directly to the attention of the revenue collector at Cleveland, where the offices of the Wolf company's successor, the Warner company, were located, and yet with this information in hand, the Commissioner, instead of moving either to dismiss the petitions or to proceed against the trustees of the dissolved corporation, acquiesced in the procedure instituted before the Board. This no doubt seemed to all parties to be a practical way (*Tyler* v. *United States*, 281 U. S., 497 [Ct. D. 190, C. B. IX–1, 383]) of determining the proposed deficiencies against the Wolf company for the payment of which, it was mutually understood, the Warner company was liable under its contract. The proceedings before the Board were, in due course, closed by stipulation signed by counsel employed by virtue of the before-mentioned power of attorney. However, the fees of counsel were paid, eventually, by the Warner company. In this stipulation it was agreed that the deficiencies for the years in question were for the amounts herein sued for and orders of redetermination were accordingly entered and the taxes assessed against the Wolf company. As a result, appellant, the transferee and obligee of the Wolf company, was benefited in two particulars, i. e.—(1) it avoided a jeopardy assessment to which it would have been forced to respond; and (2) the originally proposed deficiencies were substantially reduced.

The points made in the district court, and repeated here, are, that the deficiency assessments were void because the Wolf company had been dissolved long before the issuance of the 60-day letters; that these letters should have been addressed to the trustees of the company; that Whitworth and Warner were unauthorized to act for the dissolved corporation and that the waivers were therefore invalid and inoperative; that the statute of limitations had barred the assessment and collection of the taxes; that the petitions before the Board of Tax Appeals executed by Whitworth and Warner in the name of the Wolf company were unauthorized and void and that the Board was therefore without jurisdiction over either the proposed deficiencies or the Wolf company.

We are of the opinion that appellant is not in a position to raise these questions. It is obvious that the execution of the waivers by Whitworth and Warner and the proceedings before the Board of Tax Appeals were not intended for the protection of the dissolved Wolf company. It is just as obvious that they were intended to and did benefit the Warner company, which these officials then represented, and that the use of the corporate name and seal of the Wolf company, acquiesced in by the Commissioner, was nominal only and fully understood to be so by the Commissioner. Appellant can not therefore now assume a contrary and inconsistent position at the expense of the Government. (See *Magee* v. *United States*, 282 U. S., 432, 434 [Ct. D. 285, C. B. XI–1, 189]; *Independent I. & C. Storage Co.* v. *Commr.*, 50 Fed. (2d), 31, 33 (C. C. A. 5) [Ct. D. 471, C. B. XI–1, 308]; *Lucas* v. *Hunt*, 45 Fed. (2d), 781, 782 (C. C. A. 5); *Hartwell Mills* v. *Rose*, 61 Fed. (2d), 441, 444 (C. C. A. 5); *Pittsburgh Terminal Coal Corporation* v. *Heiner*, 56 Fed. (2d), 1072, 1076 (D. C.) [Ct. D. 501, C. B. XI–1, 225].) Appellant was the real party in interest before the Board and it should not in a court of equity be permitted to complain of irregularities after it had in the name of the Wolf company received all the benefit that it was entitled to under its contract with the Wolf company. (See *Bailey* v. *R. R. Co.*, 22 Wall., 604, 644; *James* v. *Germania Iron Co.*, 107 Fed., 597, 617 (C. C. A. 8); *Souffront* v. *Compagnie Des Sucreries*, 217 U. S., 475, 487.)

The decree of the district court is affirmed.

ARTICLE 1233: Collection of a deficiency. (Also Section 284, Article 1304.)

XII-39-6416
Ct. D. 737

INCOME TAX—REVISED STATUTES—DECISION OF COURT.

1. ASSESSMENT AND COLLECTION OF TAX—INFORMALITY OF ASSESSMENT—COLLECTION BY CREDIT.

An overpayment of plaintiff's income tax for the year 1919 which was credited upon an additional tax for that year assessed against his deceased wife can not be recovered on the ground that the credit was illegal because the assessment was made against the wife in her name rather than against himself as executor of her estate. After the tax due upon the wife's income had been paid, it could not be recovered merely because it had not been formally assessed.

2. ESTOPPEL.

Where taxpayer specifically requested and authorized the application of an overpayment of his income tax in satisfaction of an additional tax on his deceased wife's income, and did not attack the validity of such settlement until long after the expiration of the period of limitation within which assessment could be made against him as executor, he is estopped by his own conduct to question the settlement made.

3. ASSIGNMENT OF CLAIM.

Section 3477, Revised Statutes, relied upon by plaintiff, is not applicable to the facts in this case. That section was enacted as a protective measure to aid the Government in defending claims against it rather than as an instrument for prosecuting a claim against the Government for an amount to which the claimant is not otherwise entitled.

COURT OF CLAIMS OF THE UNITED STATES. No. L-183.

John Muir, an Individual, v. *The United States.*

[June 5, 1933.]

OPINION.

LITTLETON, Judge, delivered the opinion of the court.

Plaintiff contends that the assessment in 1924 of the tax upon the income of his wife for 1919 was void because there was no such person as "Mary Muir" in existence at the time the assessment was made; that the assessment was the same as if it had been made against a fictitious person; that collection thereof from plaintiff by credit was illegal and that, since a legal assessment of the tax against plaintiff as executor of the estate of Mary Muir is barred by the statute of limitation, the amount of $157,680.46 of plaintiff's overpayment for 1919 retained and applied by the Government in satisfaction of the additional tax due in respect of the income of Mary Muir for 1919 should be refunded.

We can not sustain this claim. In the first place it is not necessary that a tax be assessed before it can be legally collected. If a tax is due and is collected without assessment it can not be recovered on that ground alone. In *Myersdale Fuel Co.* v. *United States* (70 C. Cls., 765, 44 Fed. (2d), 437) it was said "Taxes may be and often are collected without assessment and this is recognized by sections 273 of the Revenue Acts of 1924 and 1926, but, in such case, the tax if legally due can not be recovered merely because it had not been formally assessed." The correctness of the tax of $157,680.46 in respect of the income of plaintiff's wife for 1919 is not questioned.

In the next place, plaintiff was the duly qualified and acting executor of the estate of his wife and was residuary legatee under her will. He received the letters showing the determination of the additional tax due upon his wife's income for 1919 and, also, the notices and demand issued by the collector. He and his attorneys thereupon wrote the collector of internal revenue within the time within which the tax could be legally assessed and collected request-

ing and authorizing him to pay the tax due upon the income of Mary Muir for 1919 by retaining and applying in satisfaction thereof $157,680.46 of the overpayment allowed plaintiff in respect of his income tax for 1919. This was done by the official act of the Commissioner and the plaintiff was duly advised thereof. Although he had numerous dealings with the Commissioner's office between February 13, 1925, and August 12, 1927, with respect to the interest payable to him upon his overpayment for 1919, no attack was made upon the validity of the settlement and no question was raised with respect thereto until January 27, 1930, almost five years after the expiration of the statute of limitation within which assessment could be made against him as executor. In these circumstances plaintiff can not now question the satisfaction of the additional tax due in respect of the income of his wife for 1919 in accordance with his specific request and authorization. (*Daube* v. *United States*, 75 C. Cls., 633, 59 Fed. (2d), 842 [Ct. D. 596, C. B. XI-2, 373].) In addition he is estopped by his own conduct to question the settlement made at his request.

It is also contended that the request and authorization of himself and his attorneys, authorizing the Commissioner to retain and apply a sufficient amount of the overpayment by him in respect of his tax for 1919 in satisfaction of the additional tax due in respect of the income of his wife for 1919, constituted a transfer or assignment of a claim which he had against the United States and such assignment was null and void under section 3477 of the Revised Statutes, and that the amount of $157,680.46 of his 1919 overpayment so applied should therefore be refunded. In our opinion the provision of section 3477, Revised Statutes, has no application here. This section was intended to prevent frauds upon the Treasury of the United States in the payment of claims by the Government and all transfers and assignments of any claim upon the United States or any order for receiving payment thereof by the transferee were declared void so that only the original claimant could prosecute the claim and receive payment, except in cases where the assignment was executed after the allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant to the original claimant for payment thereof. In this case there was no probability that the United States could suffer injury in respect of the overpayment of the tax by plaintiff on his income for 1919. He did not assign his claim against the Government to his overpayment of tax to some other person who might attempt to collect it from the Government, but, on the contrary, he requested and authorized the Government to retain a portion of the amount due him as an original claim, in payment and satisfaction of the amount of the tax due the Government in respect of the income of his wife, Mary Muir, for 1919, for the payment of which under the law he was liable as executor of her estate at the time he made the request and gave the authorization.

Section 3477 of the Revised Statutes was enacted as a protective measure to the Government in defending claims against it and was not intended, as it is here attempted to be applied, as an instrument for prosecuting a claim against the Government for an amount to which the claimant is not otherwise entitled. The petition must be dismissed. It is so ordered.

SECTIONS 277 AND 278.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

ARTICLE 1271: Period of limitation upon assessment of tax. XII-28-6285 Ct. D. 698

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

WAIVER—VALIDITY—SIGNATURE OF COMMISSIONER.

An assessment and collection waiver covering the years 1917 and 1918, executed by the taxpayer in 1923, was not rendered ineffective by the fact that the signature of the Commissioner was not placed upon it until 1930, after the expiration of the period of limitation, where, during the period covered by the waiver, the taxpayer had benefited by the Commissioner's reliance thereon, the returns for the years 1917 to 1921 having been

examined, consideration given to claim for refund and credit, and overassessment for the year 1918 applied as a credit against unpaid tax for the year 1917. The written consent of the Commissioner, required by the statute, was sufficiently evidenced by the indorsement of the word "waiver" upon the assessment list.

COURT OF CLAIMS OF THE UNITED STATES.

R. H. Stearns Co. v. *The United States.*

[March 13, 1933.]

OPINION.

WHALEY, Judge, delivered the opinion of the court.

The plaintiff brings this suit to recover an overpayment of $14,928.07 found by the Commissioner due the plaintiff for the taxable year 1918 and applied to a deficiency for the year 1917. At the time of the application the plaintiff had filed a waiver signed by it, but the signature of the Commissioner was not placed thereon until several years after the tax liability for the years in question had been finally adjusted.

For the fiscal years 1917 and 1918 plaintiff filed its income and income and profits tax returns and paid the taxes therein disclosed. The 5-year period provided for in section 250(d) of the Revenue Act of 1921, in which collection could be made for any additional assessment on the 1917 return, expired April 10, 1923, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax."

In February, 1921, the plaintiff executed an unlimited waiver, and the Commissioner signed this waiver on February 6, 1923. This waiver expired on April 1, 1924, under the provisions of the Commissioner's mimeograph letter 3085 (C. B. II-1, 174).

The 5-year limit on the 1918 return for additional assessment expired June 19, 1924. The plaintiff, therefore, on February 19, 1923, executed another waiver covering both the year 1917 and the year 1918 and, instead of being unlimited in time, expired by its terms on March 1, 1925. On June 26, 1925, the Commissioner of Internal Revenue made an additional assessment against the plaintiff for the fiscal year ended July 31, 1917, in the sum of $22,189.10. Following this assessment the plaintiff filed on August 9, 1923, a claim for refund and credit for the four fiscal years, commencing August 1, 1917, and ending July 31, 1921.

After an audit of the various years covered by the claim for refund and credit, the Commissioner on March 1, 1924, one month before the first waiver had expired, and within the period of the second waiver, approved a schedule of overassessments, including an overassessment in favor of plaintiff for $14,928.07, and transmitted it to the appropriate collector for action in accordance with the directions appearing thereon. On June 12, 1924, the collector returned the said schedule with his certification of the application of the credit in accordance with instructions and also forwarded to the Commissioner at the same time a schedule of refunds and credits on which the said overpayment in favor of plaintiff was shown as having been credited. The Commissioner signed the schedule of refunds and credits June 28, 1924, and transmitted a certificate of overassessment to plaintiff. The said overpayment was thus applied as a credit against the remaining unpaid tax liability for the fiscal year ending July 31, 1917, reducing the outstanding liability for that year to $5,829.07, which was paid September 15, 1924, after a second notice and demand on September 1, 1924. The Commissioner's signature was not placed on the waiver of February 19, 1923, until April 7, 1930.

On May 16, 1930, the plaintiff filed two claims for refund, each in the amount of $14,928.07 for the fiscal years ended July 31, 1917, and July 31, 1918, respectively.

The sole contention of the plaintiff is that the signature of the Commissioner, having been placed on the waiver many years after the period for assessment and collection, was ineffective for the validation of such collection. The purpose of a waiver is to extend the time fixed by statute in which an assessment and collection could be made by the Commissioner and the desire of the taxpayer in executing it is to have his returns carefully and deliberately examined and audited for the years in question so he can receive the benefit of any errors, overassessments, and corrections of alleged underpayment. The statute does

not require or demand that the actual waiver executed by plaintiff be signed by the Commissioner. It only provides *both* Commissioner and taxpayer consent in writing to a later determination, assessment, and collection.

When the additional assessment was made June 26, 1923, the statute had not run even under the first waiver, which did not expire until April 1, 1924, and collection could, and undoubtedly would, have been then made had it not been for the action of plaintiff in filing a claim for refund and credit in August, 1923, at or about the time demand was being made for the payment of the tax. As a result of the filing of the claim, a consideration of which necessitated an examination of plaintiff's returns for four years beginning in 1917 and ending in 1921, and thus might well have required, and did require, more time than remained until the first waiver expired, it is certainly reasonable to say that in such consideration the Commissioner relied upon the second waiver which was then on file.

It is thus evident that plaintiff benefited, at its own request, by the actions of the Commissioner under the second waiver. Collection of $20,757.14 was withheld from August, 1923, until September, 1924, when, as a result of the application of the credit, plaintiff had to pay only $5,829.07. The first waiver included only the year 1917 and the second waiver included both 1917 and 1918; clearly the Commissioner acted under the greater which included the lesser in the number of taxable years and in time extension. The plaintiff derived an advantage by the execution of the waiver. In the case of *Liberty Baking Co.* v. *Heiner* (37 Fed. (2d), 703 [Ct. D. 194, C. B. IX–1, 231]), the court said:

"* * * it would be unconscionable to allow the taxpayer to afterwards repudiate a consent upon which the Commissioner has acted and relied. It appears that, in the circumstances, the execution of the waivers was a necessary incident to the securing of further consideration of the plaintiff's tax liability."

The plaintiff in this case accepted the benefits of the Commissioner's acts under the waiver and for almost seven years did nothing to indicate the lack of the signature of the Commissioner on the waiver before its expiration in any way affected its binding effect. It was not until the signature of the Commissioner was placed on the waiver more than six years after the collection had been made that the plaintiff filed a refund claim for the amount of the overassessment for the fiscal year 1918, and within four days thereafter suit was commenced in this court. The statutory period of six months in which the Commissioner has to pass on a refund claim before suit can be commenced was ignored. The suit is based on an account stated. (*Bonwit-Teller Co.* v. *United States*, 283 U. S., 258 [Ct. D. 334, C. B. X–1, 328].)

If the waiver given on February 19, 1923, is valid and binding all the acts of the Commissioner are timely and proper. In our opinion the contention of the plaintiff is without merit and most technical in nature and effect. There is nothing in the statute which requires the Commissioner to give his consent in any particular time or period to the waiver. It is not disputed that he did sign the waiver. The contention is his signature was not placed thereon until the extension period named in the waiver had expired. But when settlement was made and for many years afterwards while the waiver was without the actual signature of the Commissioner, the plaintiff did not complain; on the contrary, it accepted the benefits under the waiver, and no action was taken until the signature was attached years afterwards.

In *Eclipse Lawn Mower Co.* v. *United States*, No. K–40, decided by this court November 14, 1932 [Ct. D. 629, C. B. XII–1, 292], the proof was that a waiver had been filed in response to a written request by the Commissioner and had been misplaced and could not be produced in evidence. The assessment list, as in the instant case, was indorsed "waiver." The court held that the signing of the assessment list by the Commissioner with the indorsement "waiver" on it was sufficient under the statute. In the present case the assessment list contained the word "waiver." It is contended that only the first waiver was meant by the use of this word. But we can see no reason for such an implication and restriction of its use. Both waivers were on file at the time and the second waiver included both years under controversy, and, in our opinion, the intendment by the use of the word applied to the second and not to the first waiver which only covered the one year.

In *Sabin* v. *United States* (70 C. Cls., 574) this court held valid a waiver which the taxpayer had attempted, by written instrument, to revoke prior to the indorsement thereon of the Commissioner's approval. The court said:

"The statute does not require that a consent, in order to be valid, must be in one instrument or that it shall be in any particular form. All that is required is that the consent be evidenced in writing. * * *

"The statute requires no more than that there shall be written evidence of the fact that both parties understand that the limitation period specified in the statute is not to govern the matter and, therefore, that when a date to which the period has been extended is specified there shall be a complete understanding about it. No date was specified in the waiver in this case but the writings leave no doubt as to the understanding of the parties that the period specified in the statute was not to control."

In the instant case both parties had a clear understanding that the statutory period had been extended and both acted upon that understanding. For years the plaintiff was satisfied and contented with the understanding. But by some mysterious channel, after six years the plaintiff learns the Commissioner has placed his signature to the waiver and then for the first time he complains about what was the understanding. No complaint was made while his signature was lacking.

A taxpayer can execute a voluntary waiver after the statutory limitation has expired. (*Stange* v. *United States*, 68 C. Cls., 395, 282 U. S., 270 [Ct. D. 274, C. B. X–1, 414].)

In the case of *Trustees for Ohio & Big Sandy Coal Co.* (43 Fed. (2d), 782), the court in commenting on a waiver given after the bar had allegedly fallen, said:

"As to the signing of the written waivers by the Commissioner, all that is required by the statute is that the Commissioner and taxpayer consent in writing to the extension. * * * But, apart from this, the taxpayer, by the execution of the waiver, has obtained delay in the assessment of additional taxes and a more deliberate and thorough consideration of the questions involved. Under such circumstances the taxpayer ought not be heard to urge the bar of the statute, which it expressly agreed to waive."

In *Commissioner* v. *Hind* (52 Fed. (2d), 1075 (C. C. A. 9)), the court held that a waiver being a unilateral agreement did not require the signature of the Commissioner to give it effect. It is unnecessary for us to follow this decision to the extent it goes because in the case before us the Commissioner did sign the waiver although many years had elapsed after its expiration. The signature of the Commissioner having been given to the waiver together with the other circumstances of the case, we believe, and so hold, that the acts of the Commissioner were valid and proper under a consent in writing by both parties.

The facts in the case of *Mosier* v. *Goodcell* (49 Fed. (2d), 391) are very similar to the facts in this case and in the Mosier case the court held:

"It would seem by the decisions that the written approval by the Internal Revenue Commissioner is not deemed indispensable to the validity of a waiver. As was said in *Stange* v. *United States*, hereinabove cited: 'A waiver is not a contract, and the provision requiring the Commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by a taxpayer.' Also in *Aiken* v. *Burnet* [Ct. D. 275, C. B. X–1, 471], above cited: 'The requirement in section 250(d) of that Act that the Commissioner sign the consent was inserted to meet exigencies of administration, and not as a grant of authority to contract for waivers.' It should be held, in my opinion, that where a taxpayer deposits with the Internal Revenue Commissioner a written waiver in due form and that waiver is accepted and acted upon, the date when the Commissioner actually indorses thereon his written approval does not change the date when the waiver becomes effective."

In our opinion the petition should be dismissed. It is so ordered.

ARTICLE 1271: Period of limitation upon assessment of tax.

REVENUE ACT OF 1918.

Estoppel, where waiver signed by successor corporation prior to expiration of limitation period. (See Ct. D. 764, page 246.)

SECTION 280.—CLAIMS AGAINST TRANSFERRED ASSETS.

ARTICLE 1291: Claims in cases of transferred assets.

REVENUE ACT OF 1926.

Waivers executed and petitions filed with Board of Tax Appeals by officers of transferee company, in the name and under the seal of dissolved transferor company. (See Ct. D. 703, page 227.)

SECTION 284.—CREDITS AND REFUNDS.

ARTICLE 1302: Abatement, credit, and refund adjustments.

REVENUE ACT OF 1921.

Duty of the Government when refund is allowed to deduct taxes due for other years, and the taxpayer's reciprocal duty not to retain refund from which such deduction has not been made. (See Ct. D. 699, page 146.)

ARTICLE 1304: Claims for refund by taxpayers.

REVENUE ACT OF 1926.

Overpayment of plaintiff's tax credited against additional tax assessed against his deceased wife. (See Ct. D. 737, page 229.)

ARTICLE 1304: Claims for refund by taxpayers.

REVENUE ACT OF 1926 AND PRIOR REVENUE ACTS.

Refund claims and amendments thereto. (See Mim. 4092, page 96.)

TITLE X.—BOARD OF TAX APPEALS.

SECTION 1001.—COURT REVIEW OF BOARD'S DECISION.

SECTION 1001. XII–30–6310
(Also Section 233, Article 548.) Ct. D. 707

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. JURISDICTION OF COURT—PETITION FOR REVIEW—MOTION TO VACATE DECISION.

A petition for review of a decision of the Board of Tax Appeals, filed more than six months after such decision, was timely, being within six months after denial by the Board of a motion to vacate the decision. Such motion, timely filed, suspended the running of the period allowed by section 1001 of the Revenue Act of 1926, within which petition for review might be filed, until disposition of the motion.

2. CORPORATION—SALE OF ASSETS.

Where the board of directors of a liquidating corporation appointed its principal stockholder as agent to receive all assets, make such disposition thereof as he saw fit, and pay liquidating divi-

dends to the stockholders, and where sale of the assets was effected by bill of sale and deed executed by the corporation by its president and secretary, the profit from such sale was taxable to the corporation.

3. DECISION REVERSED.

The decision of the Board of Tax Appeals (23 B. T. A., 463) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

David Burnet, Commissioner of Internal Revenue, petitioner, v. *Lexington Ice & Coal Co., respondent.*

On petition to review the decision of the United States Board of Tax Appeals.

Before NORTHCOTT and SOPER, Circuit Judges, and CHESNUT, District Judge.

[January 10, 1933.]

OPINION.

NORTHCOTT, Circuit Judge: This is a petition to review a decision of the United States Board of Tax Appeals, which decision is reported in 23 B. T. A., 463.

Petition for review was taken from a decision of the Board of Tax Appeals entered on May 29, 1931. A motion to vacate that decision was denied by the Board of Tax Appeals on December 1, 1931. The case is brought to this court by petition for review filed May 27, 1932, pursuant to the provisions of sections 1001–1003 of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 109–110).

On November 6, 1926, respondent corporation had six stockholders, of whom five constituted its board of directors. T. S. Eanes was the principal stockholder and owned 122 shares out of a total of 165 shares. Eanes was secretary and treasurer and was in the active management and control of the corporation's property.

On November 6, 1926, all of the stockholders met and adopted the following resolution:

"Resolved, that the board of directors be instructed to take such action as in their opinion will be to the best interests of the stockholders, looking to the liquidation of this corporation."

Thereafter, on the same day, the board of directors met and adopted a resolution in the following terms:

"Resolved, that the Lexington Ice & Coal Co. cease operations as a corporation on December 14, 1926, and that Mr. T. S. Eanes is hereby appointed as agent for the stockholders to receive all assets in kind from said corporation, and that he is hereby instructed to make such disposition of the said assets as he may see fit. That the officers of the corporation are hereby instructed to make deed to the real estate either to T. S. Eanes Agent, for the stockholders or direct to any party named by the said Mr. Eanes.

"Liquidation dividends shall be paid by Mr. Eanes, as funds become available, to the stockholders of record at date of dissolution according to their various holdings."

After the adoption of the resolutions of November 6, 1926, there was no other meeting of either the stockholders or the board of directors.

On November 16, 1926, Eanes (signing in his individual capacity) entered into a contract with Southeastern Ice Utilities Corporation (hereinafter called the Utilities Corporation) to sell to it certain property, which, with minor exceptions, embraced all of the assets of the respondent.

On December 11, 1926, Eanes, signing "T. S. Eanes, Trustee," delivered to the Utilities Corporation a bill of sale to the property described in the contract of November 16, 1926. On the same day a deed for the real estate of the taxpayer was executed by the taxpayer corporation by A. N. Neese as president and T. S. Eanes as secretary, and a bill of sale of the property mentioned in the contract of November 26, 1926, and in the bill of sale executed by Eanes on that day, was executed in the name of the taxpayer by Neese as president and Eanes as secretary.

Payment for the property so conveyed to the Utilities Corporation, in the amount of $38,500, was made in 1926 by check payable in the name of the tax-

payer corporation and deposited in its name. Such amount was paid out by checks in the corporation's name, first to creditors and then ratably to the stockholders.

The corporation was finally dissolved in May, 1927.

The Commissioner of Internal Revenue determined that the taxpayer had sold its property and realized a profit thereon, and assessed a deficiency in the amount of $2,796.65. The Board of Tax Appeals held that the assets of the respondent were transferred to Eanes before the sale was made to the Utilities Corporation, and entered its order of no deficiency.

Thereafter a motion to vacate that decision was made on the ground that the Board in the meanwhile had declared that it had wrongly decided this case. That motion was denied.

The first question presented is as to the jurisdiction of this court to hear the appeal, it being urged on behalf of the respondent that the petition for review was filed too late and was not filed in accordance with section 1001 of the Revenue Act of 1926. This section reads as follows:

"The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals or the Court of Appeals of the District of Columbia as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision was rendered."

The exceptions referred to in the section above quoted have no bearing upon the questions now being discussed.

Section 601 of the Revenue Act of 1928 provides:

"(d) A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry."

We are of the opinion that the petition was filed in time. A similar question was before the Circuit Court of Appeals for the Seventh Circuit (*Griffiths* v. *Commissioner*, 50 Fed. (2d), 782), and in considering it the court said:

"Respondent has filed a motion to dismiss the appeal on the ground that the petition for review of the Board's order of redetermination was received and lodged with the Board on September 30, 1929, which was one day after the expiration of six months from the date of the order of redetermination, and hence was beyond the time granted by statute in which a petition for review may be filed. (Sections 1001, 1005(a), Revenue Act of 1926, ch. 27, 44 Stat., 9 (26 U. S. C. A., sections 1224, 1228(a).))

"It is petitioner's contention, however, that since his petition for a rehearing filed on July 8, 1929, was not denied until September 20, 1929, his time for filing a petition for review was thereby extended for six months from the last-named date. It is conceded by respondent that in the Federal courts the filing of a motion to reopen or vacate a judgment or decision stops the running of the time for appeal, and that it begins to run anew from the time the motion is disposed of. (*Morse* v. *United States*, 270 U. S., 151, 46 S. Ct., 241, 70 L. Ed., 518.) Respondent insists, however, that this well-established practice is not sufficient to override the plain words of the statutes, which provide that the appeal must be taken within six months after the decision is rendered, and that the decision shall become final upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time.

"With respondent's contention we are unable to agree, and we see no reason why the general and uniform rule should not be applied to these statutes in the same manner as applied to other similar statutes. In *Morse* v. *United States*, supra, the statute under discussion provides that all appeals from the Court of Claims shall be taken within 90 days after judgment is rendered; and if a motion for a new trial or a petition for a rehearing was duly and seasonably filed it suspends the running of the statute, and the time within which the proceeding must be initiated begins from the date of the denial of either the motion or petition."

And in the Morse case above referred to Chief Justice Taft said:

"There is no doubt under the decisions and practice in this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition. (*Brockett* v. *Brockett*, 2 How., 238, 241; *Railroad Company* v. *Bradleys*, 7 Wall., 575, 578; *Memphis* v. *Brown*, 94 U. S., 715, 718; *Texas & Pacific Railway* v. *Murphy*, 111 U. S., 488, 489; *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S., 31, 36; *Kingman* v. *Western Manufacturing Co.*, 170 U. S., 675, 678; *United States* v. *Elliott*, 223 U. S., 524, 539; *Andrews* v. *Virginian Railway*, 248 U. S., 272; *Chicago, Great Western Railway* v. *Basham*, 249 U. S., 164, 167.) The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, depends upon the due and seasonable filing of the motion for a new trial or the petition for rehearing. In this case after the first motion for a new trial had been overruled, on May 4, 1924, no motion for a new trial could be duly and seasonably filed under rule 90 of the Court of Claims, except upon leave of the Court of Claims. This leave, though applied for twice, was not granted. Applications for leave did not suspend the running of the 90 days after the denial of the motion for a new trial within which the application for appeal must have been made. For that reason, the motion of the Government to dismiss the appeal as not in time, and so for lack of jurisdiction, must be granted."

Although the Supreme Court has indicated that the Board of Tax Appeals is not a court (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S., 716 [Ct. D. 80, C. B. VIII–2, 222]) its work is of a judicial character (*Blair* v. *Osterlein Machine Co.*, 275 U. S., 220 [T. D. 4120, C. B. VII–1, 181]), and we are of the opinion that the rule governing appeals from courts should prevail as to appeals from the decision of the Board.

"It is familiar law that a decision is not final, within the meaning of the statute providing for an appeal, until disposition of an application for rehearing or reconsideration seasonably made and entertained. (Citing cases.)" (*United States ex rel. Dascomb* v. *Board of Tax Appeals*, 16 Fed. (2d), 337.)

The delay on the part of the petitioner in presenting the motion to vacate the opinion and decision is accounted for by the fact that on November 5, 1931, the Board of Tax Appeals handed down an opinion expressly repudiating its decision in the present case. (*Hellebush et al., Trustees*, v. *Commissioner*, 24 B. T. A., 660.) In the Hellebush case the Board said:

"We are aware that the decision we have reached in this proceeding appears to be in conflict with our decision in *Lexington Ice & Coal Co.* (23 B. T. A., 463). We think our decision in that case was wrong and should not be followed in the future."

After this the respondent filed its motion to vacate. This was done 23 days after the decision of the Board in the Hellebush case and was reasonably prompt. The motion to vacate was not passed on by the Board as a whole but only by the member who wrote the opinion in the present case. Just why this should have been the case we are at a loss to understand, but such is the situation presented by the record.

The Board of Tax Appeals has apparently not adopted rules specifically dealing with rehearings or motions to vacate (although it is apparent to us that it should do so) but such petitions and motions are often filed with the Board and are received and acted upon just as in this case. In the absence of a rule we are of the opinion that the motion to vacate was filed in time and that its filing prevented the decision of the Board from becoming final until the motion to vacate was passed upon. Were this not the proper rule it is conceivable that a petition for a rehearing or a motion to vacate might be pending before the Board of Tax Appeals when the petition for review would have been already filed in a higher court, a situation not consistent with the usual rule governing procedure of appeals.

The sole question presented upon the merits is whether the sale of the assets of the respondent company was made by the company or whether the resolutions of the stockholders and of the board of directors constituted such a transfer of the assets so that the sale was made by Eanes instead of the company.

Under the law of North Carolina, a corporation continues for three years to be a body corporate for the purpose of disposing of its property and dividing its assets. Section 1193, Code of North Carolina 1931. This statute is applica-

ble to any corporation. (*Worthington* v. *Gilmers*, 190 N. C., 128, 129; *Smathers* v. *Bank*, 135 N. C., 410, 413; *General Electric Co.* v. *West Asheville Imp. Co.*, 73 Fed., 386.)

Article 548 of Treasury Regulations 69 provides:

"When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes * * *. Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind upon dissolution, however they may have appreciated or depreciated in value since their acquisition * * *."

Regulations of this character when reasonable should be given effect. (*Universal Battery Co.* v. *United States*, 281 U. S., 580 [Ct. D. 220, C. B. IX-2, 422].)

As recited above, the Board of Tax Appeals in the case of *Hellebush et al., Trustees*, v. *Commissioner*, supra, has reversed this decision in the instant case and decided that a sale made under similar circumstances was a sale by the company. A similar question was before the Circuit Court of Appeals of the Fifth Circuit in *Taylor Oil & Gas Co.* v. *Commissioner* (47 F. (2d), 108) (certiorari denied, 283 U. S., 862), where the court said:

"Conceding for the purpose of argument that the legal title to the property vested in the trustees by the dissolution, no part of the title passed to the stockholders thereby. The real owner was still the company until such time as its affairs were liquidated, the debts paid, and the residue distributed to the stockholders. The profit on the transaction was earned by the corporation, and the assessment of the taxes based thereon was valid."

We agree with the conclusion reached in the Taylor Oil & Gas Co. case and by the Board of Tax Appeals in its more recent decisions that the sale was a sale by the taxpayer company and the profits were properly taxable.

It is contended on behalf of the taxpayer that the conclusion reached by the Board of Tax Appeals in the present case is a finding of fact not to be disturbed when supported by testimony; but here the facts are all admitted and in no sense disputed, and the conclusion of the Board is a conclusion of law properly reviewable by us.

The petition to review was filed seasonably and the decision of the Board of Tax Appeals is reversed.

SECTION 1002.—VENUE.

SECTION 1002. XII-34-6357
Ct. D. 720

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. VENUE—PETITION FOR REVIEW.

The Circuit Court of Appeals for the Second Circuit has no jurisdiction to review an order of the Board of Tax Appeals involving income tax of an estate of a Massachusetts decedent, where the tax return had been filed by the executors with the collector for the district of Massachusetts. The fact that one of the executors resides in New York does not give the second circuit jurisdiction. Section 225(b) of the Revenue Act of 1926, providing that a return by one of two or more joint fiduciaries may be filed in the office of the collector of the district where such fiduciary resides can not be taken as cutting down the explicit provision of section 1002(b), which states that a decision of the Board may be reviewed, in the case of a person (other than an individual), by the circuit court for the circuit in which is located the office of the collector to whom such person made the return. An estate is regarded as a "person (other than an individual)" within the meaning of the latter section.

2. CERTIORARI DENIED.

Petition for writ of certiorari was denied by the Supreme Court on May 15, 1933 (53 S. Ct., 696).

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

James C. Ayer, Charles F. Ayer, and Frederick Ayer, Executors and Trustees of the Estate of Frederick Ayer, Deceased, petitioners, v. *Commissioner of Internal Revenue, respondent.*

Petition to review an order of the Board of Tax Appeals fixing a deficiency in income taxes against the petitioners for the year 1925.

Before L. HAND, SWAN, and CHASE, Circuit Judges.

[February 14, 1933.]

OPINION.

L. HAND, Circuit Judge: Frederick Ayer, a resident and inhabitant of Massachusetts, died in 1918, by his will appointing the three petitioners his executors. They qualified, but his estate was so delayed in administration, that during the year 1925 they were still holding it as such. They filed an income tax return as executors for that year in the district of Massachusetts, on which the Commissioner later assessed a deficiency, at a time when they had been discharged as executors, and had taken over the estate as trustees. As such trustees they filed a petition with the Board of Tax Appeals to review the deficiency, which the Board reduced, but fixed at $1,492.26. This order was entered on September 24, 1932, and on November 1 of that year the petitioners as executors and trustees filed this petition to review the order of the Board. At that time two of them were residents and inhabitants of Massachusetts, and the third, a resident and inhabitant of New York.

We think that this court has no jurisdiction over the case. Section 1002(a) of the Act of 1926 provides that "in the case of an individual," the decision of the Board shall be reviewed "by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia." Section 1002(b) provides for review "In the case of a person (other than an individual) * * * by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, and in case such person made no return, then by the Court of Appeals of the District of Columbia." The word "person" is defined in section 2 of the Act as meaning "an individual, a trust or estate, a partnership or a corporation." Thus section 1002(b) is to be construed as though it read "in case of a trust or estate, a partnership or a corporation," and as this is the case of an "estate," the only circuit in which the petition should have been filed was that in which the "estate" petitioning had filed its return. That was Massachusetts, and the first circuit alone had jurisdiction.

The petitioners argue that this result is forbidden by section 225(b) of the Act of 1926, which provides for returns by fiduciaries of which an executor is one (section 200(b)). The concluding language of section 225(b) on which they rely is: "Any fiduciary required to make a return under this Act shall be subject to all the provisions of this Act which apply to individuals." It seems to us clear that this can not be taken as cutting down the explicit provision for appeals from the Board of Tax Appeals. Fiduciaries are indeed to file returns as individuals, and be in general subject to the same procedure as they, but the distinction between an "individual" and any "person other than an individual," made by sections 1002(a) and 1002(b) is too particular not to prevail against that general provision. The place where an "estate's" return is to be filed is the residence of the executor (section 227(b)), though if there are more than one, any one of them may select his own residence for that purpose, subject to the Commissioner's regulations (section 225(b)). But it was apparently intended that, having once selected the place where the return should be filed, the option was at an end; fiduciaries must review the tax there; they were not free thereafter to go to another circuit which might seem more favorable or convenient, even though one of them lived there.

We are pressed with our decision in *Matheson* v. *Com'r* (54 Fed. (2d), 537), and that of the seventh circuit in *Rusk* v. *Com'r* (53 Fed. (2d), 428). In the first of these the testator had filed his return where he lived, and had died after filing a petition of review with the Board. After its decision the executors filed their petition in the circuit where the return had been filed and where one of them lived. The argument of the Treasury was that as the executors lived in several circuits, they were not collectively inhabitants of

any circuit, and must go to the District of Columbia; and this we rejected. It is to be observed that it was not possible to bring such a situation within the first clause of section 1002(b), because the executors had not filed any return, as they have in the case at bar. Moreover, it would have been a perversion of the intent of the words to apply to them the last clause of that section. A literal reading would result in holding that although the taxpayer had filed his return with the collector where he resided, even his single executor, also resident in the same district, must go to the District of Columbia to review the Board's decision, because he had "made no return." That would certainly have upset the plan of section 1002, as a whole, which made residence or filing the test of jurisdiction. Thus we had either to hold that subdivision (a) applied when the taxpayer had filed the return and died pending appeal to the Board, or there was no right of appeal at all, except one which misapplied the whole scheme of the Act. In that emergency we used section 1002(a), saying that the executors were pro hac vice "individuals." In effect what we did was to treat both proceedings to review the Commissioner as single, and allow a revivor when the original appellant died during the first appeal. In *Rusk* v. *Com'r*, supra (53 Fed. (2d), 428), the taxpayer died after filing a petition to review the Board's decision. That was strictly a revivor.

Here, however, section 1002(b) applies in full; the petitioners filed the return in Massachusetts; they were "persons (other than individuals)." Unless we are to construe the section as covering such a case, it applies only to corporations, for partnerships as such are not taxed, and can have no deficiencies to review. If all that was meant was to provide for review by corporations, it was extraordinary not to name them, and to describe them by so cumbersome a locution. We conclude therefore that the petition was filed in the wrong circuit, and that we have no jurisdiction.

Petition dismissed for lack of jurisdiction.

SECTIONS 1003 AND 1004.—JURISDICTION.

SECTIONS 1003 AND 1004. XII–49–6547
Ct. D. 760

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. BOARD OF TAX APPEALS—FINDING OF FACT—VALUATION OF MORTGAGE NOTES—REVIEW OF BOARD'S FINDING.

Where the owner of land in Florida, valued at $40,000 as a dairy farm, sold it in 1925 to a purchaser who bought for subdivision purposes, receiving $60,000 in cash and the balance of the purchase price of $237,500 in notes maturing over a period of five years, but the purchaser's project failed owing to the collapse of the land boom and the former owner remained in possession and continued to use the property as a farm, the finding of the Board of Tax Appeals that the notes had a fair market value of $20,000 was sustained by evidence of the value of the property for dairy purposes, and such finding may not be reversed by the court.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 579) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Ives Dairy, Inc., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals (District of Florida).

Before BRYAN, FOSTER, and SIBLEY, Circuit Judges.

[May 24, 1933.]

OPINION.

FOSTER, Circuit Judge: This petition to review a decision of the Board of Tax Appeals presents purely a question of fact. The findings and opinion of

the Board reported in 23 B. T. A., 579, fully cover the case and we may refer thereto for the facts in detail.

Briefly stated, the material facts are these: Petitioner owns some 485 acres of land, located about 17½ miles north of Miami, Fla. It had been acquired prior to 1924 at a cost of $27,600. The land was used as a dairy farm and improvements for that purpose had been placed on it. These improvements had a depreciated value of $13,266.71 in 1925 and the whole property was carried on the books of petitioner at a value of $40,866.71. In 1925 the entire property was sold to Lorrain G. Smith for $237,500, $60,000 cash and the balance represented by five notes, maturing respectively on February 15, 1926, to 1930, inclusive, secured by a mortgage on the land and improvements. In addition thereto, also secured by the mortgage, Smith had executed a note for $12,250, representing one-half of the broker's commission on the sale, which he had agreed to pay. Smith intended to subdivide the property into lots, to be released from the mortgage as sold but this project failed and the entire property remained in petitioner's possession and continued to be used as a dairy farm. In making its income tax return for 1925 petitioner considered these notes as having no fair market value and did not include them in the profit on the sale. The Commissioner valued the notes at their face amount and treated the transaction as an installment sale. On this basis the Commissioner determined a deficiency of $2,998.93. The Board of Tax Appeals gave a fair market value of $20,000 to the notes and redetermined the deficiency at $643.37. To sustain the burden of showing that the notes had no fair market value petitioner introduced the testimony of seven witnesses, some bankers and some real estate men. These witnesses fixed the value of the property for agricultural purposes at from $20 to $50 per acre and the testimony tended to show that in the opinion of the witnesses the notes could not be sold without recourse and standing alone were not considered good collateral for a loan at a bank. Cason, president of petitioner, testified that the value of the property for agricultural purposes was $50 per acre; that he had made no effort to sell the notes; that he had endeavored to use them as collateral for a loan of $15,000 with a bank in Miami and the loan was declined unless he would personally indorse the note.

We are not at liberty to reverse a decision of the Board of Tax Appeals based on facts found by the Board if there is any substantial evidence to sustain it. (*Phillips* v. *Commissioner*, 283 U. S., 589 [Ct. D. 350, C. B. X–1, 264].) The Florida land boom had collapsed and it may be assumed that the property had no value for the purpose for which Smith purchased it. It may also be assumed that Smith was not sufficiently solvent to add any considerable value to the notes. But the fact remains that the land and improvements had a fair value of over $40,000 as a dairy farm before the sale to Smith and that value had not appreciably declined. This was substantial evidence that the Board could consider as opposed to the opinion evidence of the witnesses. We concur in the conclusion reached by the Board. The petition is dismissed and the judgment of the Board is affirmed.

SECTIONS 1003 AND 1004. XII–40–6432
Ct. D. 739

INCOME TAX—REVENUE ACTS OF 1917, 1918, AND 1921—DECISION OF COURT.

1. EVIDENCE—REVIEW OF BOARD'S FINDINGS—PARTNERSHIP.

A finding of the Board of Tax Appeals that the taxpayer, a partnership, was composed of only two members, rather than five, as contended by petitioners, being either an ultimate fact drawn from other facts found, or a conclusion of law from the facts found, is reviewable, and being amply supported by the evidence will not be reversed.

2. SAME—FRAUD.

A finding of the Board of Tax Appeals that a return was false and fraudulent and filed with the intent of evading the tax, if supported by any substantial evidence, will not be reversed.

3. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (22 B. T. A., 1393) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 9582. *B. P. Wickham, petitioner*, v. *Commissioner of Internal Revenue, respondent.*

No. 9583. *B. P. Wickham, Administrator of the Estate of E. A. Wickham, Deceased, petitioner*, v. *Commissioner of Internal Revenue, respondent.*

On petition to review decisions of United States Board of Tax Appeals.

Before STONE, VAN VALKENBURGH, and BOOTH, Circuit Judges.

[May 10, 1933.]

OPINION.

BOOTH, Circuit Judge, delivered the opinion of the court.

There are here two petitions for review of a decision and two orders of the Board of Tax Appeals, one of which orders redetermined the deficiency in the income taxes of B. P. Wickham for the years 1917 to 1923, inclusive, and added a 50 per centum penalty because of fraud with intent to evade the tax; the other order redetermined the deficiency in the income taxes of E. A. Wickham for the same years. The penalty was abated because of the death of E. A. Wickham on March 9, 1925.

The two cases were consolidated for hearing before the Board of Tax Appeals; and the two petitions for review are submitted in this court upon one record.

The findings of the Board of Tax Appeals are set out in the margin.[1]

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[1] FINDINGS OF FACT.

Continuous since about 1888 to 1923, inclusive, B. P. Wickham and his brother E. A. Wickham, now deceased, were sole members of a copartnership firm known as E. A. Wickham & Co., and were engaged in the building construction and paving business at Council Bluffs, Iowa. E. A. Wickham, the business head of the firm, was a man of unusual executive and business ability and a dominant figure in the business affairs of Council Bluffs. He was president of two banks in Council Bluffs, as well as principal owner and executive head of the National Construction Co. and the Wickham Bridge & Pipe Co., all corporations. Under this management the affairs of E. A. Wickham & Co. prospered and at times it carried as much as $100,000 in cash deposits in the banks, and had assets valued at not less than $400,000.

About 1893 or 1900, Eleanor Wickham, a sister, became bookkeeper for E. A. Wickham & Co. and continued as such up to and including the years involved. No contract of employment was entered into with Eleanor Wickham for these duties, nor other understanding had, except that E. A. Wickham told her, at the time, that they needed her in the office and asked her to come in and "be in the business." Later, two brothers, John and Leo Wickham began working for the firm under similar circumstances. When the first of these brothers came to the firm about 1906 or 1907, E. A. Wickham said to him: "You might just as well go into the business, John, and all work together. We will all have an interest in it." Leo, who came in 1916, was told by E. A. Wickham that they wanted him to "learn the business and go in with them" and that they "would give him an interest in the concern." No salaries were paid by the partnership firm to any of these employees; nor does the record show the time they devoted to its affairs. All, however, owned stock in the National Construction Co. and the Wickham Bridge & Pipe Co., family corporations, simultaneously operated by them, from which they derived substantial dividends. From the last-named corporation, during at least two of these years, Eleanor Wickham drew a yearly salary of $7,500 as secretary. All of these Wickham brothers drew certain weekly allowances as expenses when out on the business of the firm.

On September 17, 1919, James Wickham, father of these brothers and sister, died at the family homestead in Council Bluffs, Iowa. For many years the father had been associated with his brother O. P. Wickham, in a partnership firm, as building contractors and manufacturers of brick. At the time of his death, James Wickham owned certain undisclosed business interests and properties, the title to which stood in the names of E. A. Wickham and B. P. Wickham, and which had been under the management and control of these brothers. On the day following the funeral of their father, these children of James Wickham assembled at the family homestead and entered into the following written agreement: Partnership agreement entered into this 21st day of September, 1919, by and between E. A. Wickham, B. P. Wickham, Eleanor A. Wickham, Leo J. Wickham and John J. Wickham, all children of James Wickham, decedent, who died on September 17, 1919, whereby all agree and consent to carry on without division or interruption, the business known as the Wickham business interests of Council Bluffs, Iowa, and other localities, in which James Wickham, decedent, had a working interest at the time of his death, the business having been managed by E. A. Wickham and B. P. Wickham, the two oldest sons of the decedent, in whose name or names the title to the properties was taken in such manner as seems best suited to the convenience of the business, and according to the best judgment of E. A. Wickham and B. P. Wickham. And we the above-named children of James Wickham, decedent, agree to continue and carry on the business in the same manner, as partners, and without division or interruption, under the management of E. A. Wickham and B. P. Wickham agreeing that all profits and earnings of every description and character shall belong 30 per centum to E. A. Wickham, 30 per centum to B. P. Wickham, 20 per centum to Eleanor A. Wickham, 10 per centum to Leo J. Wickham and 10 per centum to John J. Wickham. Investments are to be made

The Board of Tax Appeals made no conclusions of law separate from the findings of fact. Counsel for petitioner complain of this omission as embarrassing them in the presentation of their argument in this court.

While we appreciate the complaint of counsel as not warranted, we do not think the omission is of vital importance.

The two findings of the Board of Tax Appeals which are attacked by the petitioner are the first and the last, reading as follows:

"Continuous since about 1888 to 1923, inclusive, B. P. Wickham and his brother E. A. Wickham, now deceased, were sole members of a copartnership firm known as E. A. Wickham & Co. * * *."

"The returns filed by the petitioner B. P. Wickham for each of the years involved were false and fraudulent and were so made and filed with the intent of evading the tax."

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when deemed advisable by E. A. Wickham or B. P. Wickham, and it is further agreed that this partnership agreement shall operate from January 1, 1919, and terminate December 31, 1928, unless terminated by mutual agreement or by death of some of the partners prior to December 31, 1928.

For the taxable years here in controversy, the net income of E. A. Wickham & Co. was as follows:

1917	$33,759.66	1921	$173,498.21
1918	166,744.18	1922	39,947.28
1919	49,973.96	1923	74,034.42
1920	147,716.01		

Not accounted for in the earnings shown above is the cost of 15 brick houses built during these years from material and labor supplied and paid for by the partnership, to which E. A. Wickham and B. P. Wickham took joint title; each claiming a one-half interest.

Prior to 1923 no income tax return was filed in behalf of E. A. Wickham & Co.; nor did either of the two partners, each of whom filed personal income tax returns for all of the years involved, report any income derived by them from the business of that partnership. Some time during 1923 officials of the Treasury Department began an investigation of the affairs of the partnership of E. A. Wickham & Co., and of the returns filed by its members. Some negotiations were had by these officials and E. A. Wickham which resulted in a postponement of the investigations until the Spring of 1924. One condition for such postponement was the execution of assessment waivers by E. A. and B. P. Wickham who represented to the Government officials that they were the sole members of the partnership firm of E. A. Wickham & Co. and constituted all of the parties of interest.

On March 12, 1924, a return for the calendar year 1923 was filed in behalf of E. A. Wickham & Co. This return represented that firm to be a 2-member partnership consisting of E. A. Wickham and B. P. Wickham, between whom its income amounting to $28,238.06 was apportioned in equal parts. In his individual income tax return for 1923, each of these partners reported $14,119.03, or one-half of the amount shown in the partnership return, as income received by him from the partnership in 1923. In May, 1924, Robert R. Wade, a certified public accountant, was employed to audit the accounts of the partnership and to put them in shape for the Government agents. Wade worked upon accounts about three months and prepared a "set-up" from the bank deposit tickets and canceled checks, which was the only memoranda found in the office. These memoranda failed to show the true income of this firm by more than $208.000; but, from them, an amended partnership return was prepared and filed for the calendar year 1923. On the same date delinquent returns for all prior years to and including 1918 were filed. These returns showed E. A. Wickham & Co. to be a 5-member partnership with interests divided, upon a percentage basis, among the following alleged partners:

Members.	Interest.
E. A. Wickham	per centum 30
B. P. Wickham	per centum 30
Eleanor A. Wickham	per centum 20
Leo J. Wickham	per centum 10
John J. Wickham	per centum 10

Omitted from such returns were amounts received by the partnership for work performed for the city of Council Bluffs, in these years, as follows:

1917	$22,046.93	1921	$86,988.46
1918	24,700.90	1922	9,092.33
1919	3,751.32	1923	27,470.22
1920	34,713.17		

B. P. Wickham and E. A. Wickham each filed income tax returns for the years 1913 to 1922, inclusive, but neither reported any income received in these years from E. A. Wickham & Co. For 1923, each of these partners reported receipt of $14,119.03 as his distributive share of the earnings of that firm; this being one-half of its reported earnings for the period as shown in the partnership return filed May 13, 1924. On May 26, 1924, these partners filed amended income tax returns for 1923 in which they reported less amounts than formerly returned, to wit, $2,874.67 as their respective portion of the partnership earnings for 1923. On May 26, 1924, B. P. Wickham filed amended income tax returns for 1919, 1920 and 1921, in which he reported income received from the firm of E. A. Wickham & Co., for these years, in respective amounts of $15,588.48, $52,193.18, and $22,932.86.

The returns filed by the petitioner B. P. Wickham for each of the years involved were false and fraudulent and were so made and filed with the intent of evading the tax.

As to the first, the petitioner contends that the partnership during the years in question was composed of five persons: E. A. Wickham, B. P. Wickham, Leo J. Wickham, John J. Wickham, brothers, and Eleanor A. Wickham, a sister.

The question whether all of these five persons, or only the first two of them made up the partnership is reviewable. The finding of the Board of Tax Appeals on the matter is either an ultimate fact drawn from the other facts found, or a conclusion of law from the facts found.

As to the other matter, whether B. P. Wickham filed fraudulent returns with intent to evade the taxes for the years 1917 to 1923, inclusive, our inquiry is limited to whether there is substantial evidence to support the finding.

MEMBERS OF THE PARTNERSHIP.

It is conceded that E. A. Wickham and B. P. Wickham organized the partnership, E. A. Wickham & Co., about 1888, and that these persons continued to be members of the partnership during all the years in question.

The inquiry thus resolves itself into the question whether the three other persons mentioned became members of the partnership prior to 1917 and remained such until after 1923.

Commencing with the year 1888, the firm of E. A. Wickham & Co. was engaged in the business of paving, and road and railroad construction and public work in the city of Council Bluffs.

Eleanor Wickham, a sister, began to work in the office of the firm about 1900, according to the testimony of B. P. Wickham; but according to the testimony of Eleanor herself, she began in 1893. Whatever the time, no contract of employment was made, but E. A. Wickham told her that they needed her in the business, and asked her to come in and "be in the business." No salary was paid her by the firm, nor does it appear what amount of time she devoted to the work. During at least two of the years now in controversy, she received a salary of $7,500 a year from the Wickham Bridge & Pipe Co., largely a family corporation, in which she owned stock.

It is contended by petitioner that a more definite agreement was entered into in writing in 1919. This will be taken up later.

John and Leo Wickham began working for the firm later than Eleanor, but under similar circumstances. They also owned stock in the Wickham Bridge & Pipe Co. and drew substantial dividends thereon. They also drew allowances from the firm when out on the business of the firm.

In 1919 James Wickham, father of these brothers and sister, died. He and his brother, O. P. Wickham, had for many years been in partnership carrying on the business of contractors and manufacturers of brick. At the time of his death, James Wickham owned certain business interests and properties which had been managed by E. A. Wickham and B. P. Wickham, and the title to which stood in their names.

Shortly after the death of the father in September, 1919, the sons and daughter already mentioned met at the father's home, where most of them lived, and entered into the agreement which is set out in the findings of the Board of Tax Appeals.

It is the contention of petitioner that this agreement made definite the terms of a 5-member partnership, E. A. Wickham & Co., already existing.

It is the contention of respondent that the agreement did not relate to the partnership, E. A. Wickham & Co., but to certain business theretofore carried on by the father. The Board of Tax Appeals apparently took this latter view.

The instrument itself lends some support to both views.

The testimony of B. P. Wickham, Eleanor Wickham and John P. Wickham is to the effect that the agreement related to the partnership, E. A. Wickham & Co., already existing.

There are, however, other facts which must be considered in determining the question whether Eleanor Wickham, John Wickham and Leo Wickham were members of the partnership of E. A. Wickham & Co. Some of these relate to occurrences which were before and some after the agreement of 1919.

No return on behalf of the partnership was made before May, 1924, for any year prior to 1923. Yet there was net income of the partnership for all those years, 1917 to 1922, inclusive, varying from $33,000 to $173,000.

E. A. Wickham and B. P. Wickham each filed income tax returns for the years 1918 to 1922, inclusive, but neither reported any income from the partnership of E. A. Wickham & Co.

In the individual income tax return for 1923, Leo J. Wickham swore that he received a salary of $2,600 from the partnership, but the return showed no income as a member of the partnership.

The 1921 individual return of Eleanor A. Wickham reported as income from partnerships "none." The same report was made on her 1923 return.

In 1923 the Government agent began an investigation. E. A. Wickham told the agent that he wished a postponement of the investigation. He was told that a postponement could not be had unless waivers were given by the individual members of the partnership. E. A. Wickham replied: "There is only two of us in this partnership; I will sign mine now, and I will take my brother's waiver over to him and have him sign it." The waivers were signed by E. A. Wickham and B. P. Wickham.

March 12, 1924, during the period of postponement, a partnership return for 1923 was filed, sworn to by E. A. Wickham. He stated that there were two members to the partnership, himself and B. P. Wickham. The return shows that the income of the partnership was to be divided between himself and B. P. Wickham, 50 per centum each.

Individual returns filed at the same time for E. A. Wickham and B. P. Wickham showed income from the partnership of 50 per centum to each.

In the Spring of 1924, however, the partnership had employed an expert named Wade to audit the accounts of the partnership and put them in shape for the Government agents. In May, 1924, amended returns for 1923 and several prior years were filed for the partnership which showed a 5-member partnership.

In May, 1924, E. A. Wickham and B. P. Wickham also filed amended individual returns on the same basis for 1919, 1920 and 1921, showing income received from the firm of E. A. Wickham & Co.

This change of position on the part of E. A. Wickham and B. P. Wickham in May, 1924, is significant. It came after the expert Wade had undertaken to put the accounts of the partnership in shape for the Government agents, and after the agreement of September, 1919, had been brought to light by an intensive search. Prior to May, 1924, the fact (if it was a fact) of a 5-member partnership had apparently been completely overlooked by E. A. Wickham and B. P. Wickham, as well as by the alleged other members.

Further, in 1922, the partnership sought relief from the insurance provisions of the Iowa workmen's compensation law. The application stated that the partnership, E. A. Wickham & Co., was composed of E. A. Wickham and B. P. Wickham, and was sworn to by both of them.

We think the idea of a 5-member partnership of E. A. Wickham & Co. was an afterthought brought about by the exigencies of an embarrassing tax situation.

Under the decisions of the courts of Iowa, to make a partnership there must be a mutual agreement or understanding between the parties to share in the profits and losses of the concern. There must also be an intent by the several parties to enter into the relation of partners. (*Haswell* v. *Standring*, 132 N. W., 417; *Miller* v. *Baker*, 140 N. W., 407; *Fleming* v. *Fleming*, 174 N. W., 946; *Florence* v. *Fox*, 188 N. W., 966; *Malvern Nat.* v. *Halliday*, 192 N. W., 843; *Tracey* v. *Judy*, 210 N. W., 793; *Norwood* v. *Parker*, 217 N. W., 622; *Kinney* v. *Bank of Plymouth*, 236 N. W., 31.)

Viewing the facts above stated in the light of the authorities cited, we think a 5-member partnership of E. A. Wickham & Co. was not proven. Actions sometimes speak louder than words.

The finding of the Board of Tax Appeals that the partnership of E. A. Wickham & Co. during the years in question was composed of E. A. Wickham and B. P. Wickham as the sole members is amply supported and, in our judgment, is right.

The assignment of error based on the exclusion of testimony has been examined, but we think it is without merit.

THE MATTER OF PENALTIES.

The Board of Tax Appeals assessed 50 per centum fraud penalties against B. P. Wickham for the years 1917 to 1923, inclusive. Similar penalties against E. A. Wickham are not now claimed, owing to the death of E. A. Wickham.

As a basis for the penalties against B. P. Wickham, the Board of Tax Appeals found:

"The returns filed by the petitioner B. P. Wickham for each of the years involved were false and fraudulent and were so made and filed with the intent of evading the tax."

The question on this appeal is whether this finding is supported by any substantial evidence.

There is evidence tending to show that the individual returns of B. P. Wickham for the years prior to 1923 reported no income from the partnership, although the partnership had net income for each of those years.

For the year 1923 the income of the partnership was $74,034 and the share of B. P. Wickham was $37,017. His original return for that year reported $14 119 from the partnership.

The filing of the amended returns in 1924 after the commencement of the investigation by the Government did not wipe out or cure the falsity of the original statements.

Further, if the partnership was, during the years in question, composed of two members only, as the Board of Tax Appeals has found, and we think correctly, then the amended returns of B. P. Wickham made in 1924 were false and fraudulent in that they reported as belonging to him 30 per centum instead of 50 per centum of the partnership earnings.

Further, the amended returns of 1924 were false and fraudulent in that they omitted taxable income received by the partnership for work performed for the city of Council Bluffs for the years 1917 to 1923, inclusive, amounting to about $208,000.

It is attempted to excuse these false returns by testimony that B. P. Wickham was a simple-minded man and did not understand the returns that he signed and verified. This testimony did not impress the Board of Tax Appeals, nor has it impressed us.

In view of all the evidence bearing upon the matter, we can not say that this finding against B. P. Wickham by the Board of Tax Appeals was not supported by substantial evidence.

The findings and order of the Board of Tax Appeals in each case are approved and confirmed, and the petition for review in each case is dismissed.

SECTIONS 1003 AND 1004. XII–51–6571
(Also Sections 277 and 278, Article 1271.) Ct. D. 764

INCOME AND PROFITS TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. BOARD OF TAX APPEALS—JURISDICTION—DEFICIENCY NOTICE SENT TO PREDECESSOR CORPORATION—EFFECT OF APPEAL BY SUCCESSOR CORPORATION.

Where a deficiency notice is mailed to a corporation which has been dissolved, and such notice is received by its successor, which operates under substantially the same name, with substantially the same assets, the same directors and officers, and the same stockholders who hold the same proportionate share of stock as was held in the old corporation, the Board of Tax Appeals has jurisdiction of a petition filed by the successor corporation for redetermination of the asserted deficiency. The failure of the Commissioner to designate the successor corporation as transferee in the deficiency notice does not deprive the Board of jurisdiction.

2. ESTOPPEL—VALIDITY OF WAIVERS.

Under the circumstances of this case, where the successor corporation signed waivers prior to the expiration of the period of limitation, it is estopped by its conduct to deny their validity.

3. DECISION REVERSED.

The decision of the Board of Tax Appeals (24 B. T. A., 54) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Commissioner of Internal Revenue, petitioner, v. *Nichols & Cox Lumber Co., respondent.*

Petition to review order of United States Board of Tax Appeals.

Before MCORMAN, HICKS, and HICKENLOOPER, Circuit Judges.

[June 29, 1933.]

OPINION.

Per curiam: As of December 28, 1922, the "Nichols & Cox Lumber *Co.*" was reorganized under the laws of the same State but with the name of "Nichols & Cox Lumber *Company.*" For their stock in the old company the stockholders were given the same proportionate share of preferred and common stock in the new company. The new company succeeded to all the business and assets of the old company and the latter was thereupon dissolved. However, the business was continued in substantially the same name, with substantially the same assets, the same stockholders, the same directors and the same officers as under the previous charter. The case involves income and profits taxes for the years 1919 and 1920.

Prior to the expiration of the period of limitations, waivers were signed, and on December 10, 1926, a deficiency notice was mailed to "Nichols & Cox Lumber Company." Thereupon the present respondent appealed to the Board of Tax Appeals for a redetermination of the alleged deficiency. The evidence before the Board was confined almost exclusively to the subject of the validity of the waivers but the Board did not decide this question, for, having concluded that the deficiency notices were addressed to and intended for the old company, then dissolved, and that that company alone was authorized to file a petition with the Board of Tax Appeals for a redetermination of the deficiency, a lack of jurisdiction in the Board was found to exist. The petition of the respondent was thereupon dismissed. The Commissioner files the present petition to review.

The question of the jurisdiction of this court to entertain a petition to review on behalf of the Commissioner of Internal Revenue was settled by the case of *Commissioner* v. *Liberty Bank & Trust Co.* (59 Fed. (2d), 320), to which decision the court adheres.

Upon authority of *Burnet* v. *San Joaquin Fruit & Investment Co.* (52 F. (2d), 123 (C. C. A. 9) [Ct. D. 406, C. B. X–2, 260]); *Commissioner of Internal Revenue* v. *New York Trust Co.* (54 F. (2d), 463 (C. C. A. 2) [Ct. D. 540, C. B. XI–2, 320]); *Pittsburgh Terminal Coal Corporation* v. *Heiner, Collector* (56 F. (2d), 1072 (D. C., Pa.) [Ct. D. 501, C. B. XI–1, 225]); and *North American Coal Corporation* v. *Commissioner of Internal Revenue,* decided on order by this court November 11, 1932, we are of the opinion that respondent was estopped by its conduct to deny the validity of the waivers, and that the failure to designate the respondent as transferee in the notice does not deprive the Board of Tax Appeals of its jurisdiction. The decision of the Board of Tax Appeals is therefore reversed and the cause is remanded with directions to the Board to set aside the order dismissing this proceeding and to hear and determine the matters complained of in the petition.

TITLE XI.—GENERAL ADMINISTRATIVE PROVISIONS.

SECTION 611.—COLLECTIONS STAYED BY CLAIM IN ABATEMENT. (1928)

SECTION 611. XII-52-6579
Ct. D. 765

INCOME AND PROFITS TAX—REVENUE ACTS OF 1921 AND 1928—DECISION OF COURT.

SUIT—COLLECTION—LIMITATION—CLAIM FOR ABATEMENT—PAYMENT OF TAX BY TRANSFEREE.

Where a corporation which had sold its assets and distributed the proceeds pro rata to its stockholders filed a claim in abatement of additional taxes assessed against it and collection of the tax was stayed, the subsequent payment by a stockholder-transferee of his aliquot portion of the tax is not recoverable by him as an overpayment under the provisions of sections 607 and 611 of the Revenue Act of 1928. It is immaterial whether collection of the tax was stayed at the instance of the corporation or at the instance of the stockholder-transferee.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States of America, appellant, v. *Frank X. Pfaffinger, appellee.*

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before WILBUR and SAWTELLE, Circuit Judges.

[September 6, 1933.]

OPINION.

SAWTELLE, Circuit Judge: Appellee brought an action at law against appellant in the district court to recover the sum of $1,697.19, plus interest, representing taxes alleged to have been erroneously collected from him during the year 1924. The case was tried by the court, a jury having been waived by the parties.

The court adopted the special findings of fact requested by the appellee, and gave judgment against appellant. There was no request by appellant for different findings, nor were there any exceptions to the ruling of the court on the admission or rejection of evidence. Appellant did submit requests for conclusions of law, which were denied by the court. To this ruling, as well as to the rulings of the court in adopting the proposed conclusions of law submitted by appellee, appellant duly excepted.

At the conclusion of the case appellant made a motion for judgment, which motion was denied, but no exception was noted to the ruling on such motion, although such ruling is the basis of one of the assignments of error in this court.

On March 28, 1918, the Pacific Coast Sales Book Co., of California, filed its income and profit tax return for the year 1917. Appellee was the owner of 50 shares of the capital stock of said corporation, out of a total of 955 shares issued and outstanding. During the month of May, 1917, said corporation sold all of its assets, and during the same year distributed the proceeds from such sale pro rata to its stockholders, including appellee.

The Commissioner of Internal Revenue assessed additional taxes against the corporation for the year 1917 in the amount of $32,399.36. On March 6, 1922, the corporation filed with the collector of internal revenue at Los Angeles its claim

in abatement. On August 30, 1933, the Commissioner notified the corporation of the rejection of its claim. A copy of said claim and the letter of the Commissioner are referred to in the court's findings of fact as exhibits A and B, respectively, and are made a part thereof.

On June 30, 1924, the collector of internal revenue demanded payment of said additional tax for the year 1917 by those, including appellee, who as stockholders of the corporation had received the assets thereof through distribution in 1917, as aforesaid. In accordance with the demand, and in order to prevent the imposition of threatened penalties and the seizure and sale of his property to satisfy the claim so made for said additional taxes, appellee paid the said sum of $1,697.19 on June 3, 1924.

On June 29, 1928, within four years after such payment by appellee, he filed with said collector of internal revenue a claim for refund to him of the said last-mentioned sum. His claim was disallowed on December 1, 1928.

The above is a summary of the facts as found by the court.

The court concluded as a matter of law that the claim in abatement filed by the corporation was not a claim in abatement of the appellee; that at the time of the collection of said sum of $1,697.19 from the appellee, the collection thereof was barred by law and constituted an overpayment of taxes within the meaning of the provisions of section 607 of the Revenue Act of 1928, and that no claim in abatement, within the meaning of section 611 of said Act, was filed by appellee.

Judgment was rendered in appellee's favor for said sum together with interest at the rate of 6 per cent per annum from June 30, 1924.

The relevant statutes are sections 607 and 611 of the Revenue Act of 1928 and section 250(d) of the Revenue Act of 1921, which read as follows:

"SEC. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"SEC. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

"SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within 10 days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: *Provided*, That in cases where the Commis-

sioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing."

As stated by appellant, the question involved is, "Does section 611 of the Revenue Act of 1928 apply to one who as a stockholder and transferee pays his aliquot portion of the tax assessed against the corporation, the corporation having filed a claim for the abatement of the tax so assessed?"

Elsewhere in the brief appellant states: "The primary question for the court to answer is whether Frank X. Pfaffinger (appellee) is in a position to escape the application that would necessarily be made of section 611 of the Revenue Act of 1928 if his transferor, the Pacific Coast Sales Co., were the plaintiff here seeking to recover the tax paid."

Appellee says the question involved is, "Does section 611 of the Revenue Act of 1928 remove the limitation for collection of tax against appellee merely because the Pacific Coast Sales Book Co. filed its claim to abate tax assessed against it in 1922 for the year 1917?"

By the express provision of section 611, if the claim in abatement of the tax was duly filed, and if the collection of the tax was stayed, then the payment of the tax (made before or within one year after the enactment of the Act, as in this case) "shall not be considered as an overpayment under the provisions of section 607."

It was the collection of the tax that was stayed, and, in our judgment, it is immaterial whether it was stayed at the instance of the corporation or at the instance of the stockholder-transferee. The corporation, in filing the claim in abatement, was acting solely for its stockholders and transferees. Had it succeeded in its efforts, the tax would, of course, have been canceled, and the transferee thus relieved of all liability therefor.

The effect of the filing of the claim in abatement was to stay the collection of the tax altogether, not merely against the corporation. And we think it would be illogical to hold that a stay means one thing as applied to the corporation, and another as applied to its stockholders and transferees.

It is clear that had the corporation paid the tax there would have been no overpayment under the provision of section 607, "relating to payments made after the expiration of the period of limitation on assessment and collection." It is equally clear that had the corporation's claim in abatement been allowed, the transferees would have been relieved of the payment of the tax, because the tax imposed upon the corporation is the basis of liability of the transferees. It follows, therefore, that, if the period of limitation had not run in favor of the corporation it had not run against the transferees.

"One who receives assets upon dissolution is liable to the extent of assets received for the payment of taxes of the corporation." (*Phillips* v. *Commissioner*, 283 U. S., 589 [Ct. D. 350, C. B. X–1, 264].)

We think the claim for the abatement of the tax, which had been properly assessed, extended the limitation for collection thereof against the corporation and the stockholders-transferees during the stay, pending disposition by the Commissioner of the claim for abatement of the tax.

Appellee contends that he filed no claim in abatement, that the only claim filed was the one filed by the corporation, and that therefore he did not attempt to delay the collection of the tax. We think it is immaterial whether he filed such a claim, or not. The claim filed by the corporation had the effect of staying the collection of the tax, and no effort was made to collect the same, or any part thereof, pending consideration of the claim.

In view of this holding, we think it is unnecessary to consider appellant's contention that the appellee knew of and participated in the filing by the corporation of the claim in abatement; or the further contention that appellee is not entitled to recover because he voluntarily paid the tax of the corporation without availing himself of injunctive relief.

We are of the opinion that the tax paid by the appellee can not be considered as an overpayment within the meaning of section 607, supra, and that the court erred in rendering judgment in his favor.

Judgment reversed.

SECTION 1113.—LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. XII-28-6286 Ct. D. 697

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. SUIT TO RECOVER TAXES COLLECTED BY DISTRAINT—BOND—STATUTE OF LIMITATIONS.

A bond given by taxpayer, after the expiration of the period of limitation upon collection, to forestall collection by distraint and secure time to pursue a rejected claim for abatement, was supported by sufficient consideration and was not executed under duress. Whether viewed as a contract substituted for the tax obligation, or as a waiver of the period of limitation, it constituted a valid defense to taxpayer's action for recovery of the tax collected.

2. CERTIORARI DENIED.

Petition for writ of certiorari was denied by the Supreme Court on May 15, 1933.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The Simmons Manufacturing Co., appellant, v. *Carl S. Routzahn, Collector of Internal Revenue, appellee.*

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

[January 16, 1933.]

OPINION.

SIMONS, Circuit Judge: Appellant, a taxpayer, sued at law for the recovery of income and profit taxes, and from judgment in favor of the collector appeals.

The question presented arises from the following facts: Additional income and profit taxes for 1918 were assessed against the taxpayer on March 19, 1924, within the statutory time therefor. A claim for abatement was filed, and on November 19, 1924, rejected. On February 16, 1925, the collector issued a warrant of distraint, but on the taxpayer's promise to furnish a bond refrained from serving it, whereupon the taxpayer, in April, 1925, gave a surety bond running to the collector, reciting the filing of the claim for abatement, and conditioned upon the payment of "such portion of the tax as may be found due and payable," the taxpayer contending, however, that on the merits of the case no tax was due or payable. The completed return having been filed June 15, 1919, the bond was given after the applicable 5-year period of limitation had run. The Revenue Act of 1928 became effective May 29, 1928. Section 607 thereof classified as overpayments taxes assessed or paid after the expiration of the period of limitation properly applicable, while section 611 made an important exception thereto. The two sections are printed in the margin.[1] On October 19, 1929, and more than one year after the enactment of the 1928 Act, another warrant of distraint was issued by the collector, and under its authority the disputed taxes were collected October 21, 1929. Claim for refund seasonably filed, was denied. The suit in the district court against the collector

[1] SEC. 607. *Effect of expiration of period of limitation against United States.*
Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Sup. III, Title 26, section 2607.)
SEC. 611. *Collections stayed by claim in abatement.*
If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C., Sup. III, Title 26, section 2611.)

followed. Is the taxpayer prevented from recovering the collection by the giving of the bond?

The taxpayer contends that the collection is a recoverable overpayment within the provisions of section 607, supra; that even though a claim for abatement was filed, the collection is not within the exception of section 611 because made after one year from the passage of the Act; that the bond was not a waiver; that no contractual obligation resulted from it because there was no tax liability at the time it was given, and therefore no consideration to sustain it; that if the taxpayer had paid the tax instead of giving bond, it could have recovered it back, wherefore the bond can be given no greater effect as a defense than actual payment; that there was no acknowledgment of indebtedness; that there was no subsequent finding of a tax due; and that the bond was given under duress.

The solution of the problem before us is not unattended with difficulty. The precise question has never been answered by the Supreme Court of the United States. It appeared in the cases of *Mascot Oil Co., Inc.*, v. *United States* (282 U. S., 434 [Ct. D. 286, C. B. X–1, 190]) and *Heiner, Collector*, v. *Erie Coal & Coke Co.* (idem). In the Mascot case, the taxpayer made a deposit in escrow with a bank to cover the amount of the tax, but when the collector demanded payment it was made by the taxpayer under protest and not from the deposit. In the Heiner case a bond had been given to secure payment of the tax. The making of the deposit in the former case, and the giving of the bond in the latter, were after the applicable statute of limitations had run, and in each case the taxpayer insisted that the statute had not thereby been waived. The question of waiver was, however, laid aside in both cases because of the circumstance that the collections had been made prior to the passage of the 1928 Act, or within one year thereafter, and in consequence the taxpayers were not protected from the operation of section 611 of that Act. This, in conformity with the decision in *Graham* v. *Goodcell* (282 U. S., 409 [Ct. D. 287, C. B. X–1, 191]), decided the same day. In the recent case of *Gulf States Steel Co.* v. *United States* (287 U. S., 32), decided November 7, 1932, the bond sued upon was given after the period of limitation, but as it continued the protection afforded by two previous bonds, the first having been given within the period, it is also not decisive. We are therefore left to rely upon reason and analogy, rather than upon precedent for the solution of the problem that confronts us.

In *United States* v. *The John Barth Co.* (279 U. S., 370 [Ct. D. 65, C. B. VIII–1, 189]), the suit was by the United States upon a bond to stay collection given prior to the running of the statute. It was there held that the making of the bond gave the United States a cause of action separate and distinct from an action to collect taxes which it already had, and that the statutes pleaded in bar could not be extended by implication to a suit upon a subsequent and substituted contract. It was also held that by securing postponement of the collection of the taxes returned the taxpayer waived the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. This was on the ground that the object of the bond was not only to prevent the immediate collection of the tax, but also to prevent the running of time against the Government, and it was said, "The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought." In considering the John Barth case it must be noted that suit there was on the bond, and not for collection of taxes as such. In the instant case suit is not brought upon the bond, the taxes having been already collected by distraint. The suit is to recover taxes so collected, and the defense relied upon is the taxpayer's obligation under the bond. The difference, therefore, is in our view not material. There is merely a reversal of parties, and instead of the United States suing upon the bond, it here asserts the bond as a defense.

If the ruling of the Barth case is not here to be applied, its denial as authority must be based not only upon distinguishing circumstances, but upon circumstances which require the application of different principles. The one distinguishing circumstance that seems to be important is the fact that the bond in the Barth case was given before the running of the statute, and the bond with which we are here concerned was given after the statute had run, and this distinction is urged upon us as conclusive by reason of the fact that in the Barth case the collector refrained from making a collection which he had authority to make, while here the collector had no authority to make the collection. The tax therefore could have been recovered back, and there was no consideration for the bond.

Evaluation of the above contention necessitates a consideration of the state of the law with respect to the remedies available to the collector at the time the bond was given. The statute applicable to the collection here sought to be recovered is the Revenue Act of 1921. Section 250(d) of that Act provided that no suit or proceeding for the collection of taxes due thereunder should be begun after the expiration of five years after the date when the return was filed. By reason of the decision of the Court of Claims in *Toxaway Mills* v. *United States* (61 Ct. Cl., 363 [T. D. 3805, C. B. V–1, 322]), it was thought that the period of limitation contained in the 1921 Act barred collection by suit only, but did not bar collection by distraint proceedings. It was not until the decision of the Supreme Court in *Bowers, Collector,* v. *New York & Albany Lighterage Co.* (273 U. S., 346 [T. D. 4009, C. B. VI–1, 268], decided February 21, 1927), that it was known that the holding of the Court of Claims in the Toxaway case was erroneous. In the meanwhile, collectors everywhere were enforcing collection of taxes in distraint proceedings after the 5-year period of limitation had expired. It was under such circumstances that the warrant in the instant case issued, and the bond was given. There is nothing in the record to indicate bad faith on the part of the collector, and it is to be assumed that he was acting under authority thought by him to be possessed. Nor is there anything in the record to indicate that the taxpayer did not have the same understanding of the law. It was to delay immediate collection by distraint that the bond was given. The taxpayer was relieved of immediate payment, and had attained the object noted in the Barth case by the use of the bond. We can not think that under these circumstances there was not sufficient or adequate consideration for that instrument.

Other considerations contribute to this view. The taxpayer had filed a claim for abatement. It is true that it had already been rejected, but the bond recited the filing of the claim, and it seems logical to infer from such recital that the taxpayer intended to pursue its claim by petition for rehearing or some other appropriate remedy. The giving of the bond secured for it both opportunity and time to do so. Besides, there is nothing sacrosanct in a period of limitation granted by the United States in a taxing statute. (*United States* v. *Southern Lumber Co.*, 51 Fed. (2d), 956 (C. C. A. 8).) It confers no vested right, and can be repealed without denial of due process (*Graham* v. *Goodcell*, supra), and such repeal may be made operative retroactively (*Mascot Oil Co.* v. *United States*, supra). We think in view of what we have said that the bond was a contract substituted for the tax obligation within the reasoning of the Barth case. It is true that the court noted that the bond therein considered was given well within the period of limitation, but we are unable to see that this circumstance was particularly relied upon as a basis for decision. Nor do we conclude that section 250(d) of the 1921 Act, as construed in the Bowers case, operated to extinguish liability for the assessed tax. Congress undertook to do that by section 1106(a) of the Revenue Act of 1926, printed in the margin,[2] but repealed the section as of the date of its enactment by section 612 of the 1928 Act. The necessary implication from both the enactment and repeal of section 1106(a), in spite of some apparent dicta contra, is that the period of limitation neither in Acts prior to nor subsequent to the Act of 1926 extinguished the tax debt, however it may have barred collection or warranted recovery by the taxpayer as an overpayment.

But aside from the contractual obligation created by the bond we think the bond constituted a waiver of the period of limitation, not, perhaps, the express or technical waiver provided for by the so-called consent clause (section 253) of the 1921 Act, but at least an implied waiver. In the Barth case it was held that a bond given to stay collection prior to the running of the statute is a waiver. In *Stange* v. *United States* (282 U. S., 270 [Ct. D. 274, C. B. X–1, 414]) it was held that a waiver is operative even though given after the period of limitation has expired, and this on analogy to the rule that private debts barred by the statute of limitations may be effectively revived after the bar has fallen by a new promise without new consideration (citing Williston, Contracts, sec-

[2] SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App., Title 26, section 1249.)

tions 160 to 184) and also upon the assumption that an effective and not a futile act was intended. (See also *Aiken* v. *Burnet*, 282 U. S., 277 [Ct. D. 275, C. B. X–1, 417]; *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S., 295 [Ct. D. 276, C. B. X–1, 323], and *Florsheim Bros. Co.* v. *United States*, 280 U. S., 453, 466 [Ct. D. 167, C. B. IX–1, 260].) But whether we consider the bond as a waiver or as a substituted contract, the result so far as the taxpayer is concerned is the same.

Some further consideration should perhaps be given to the argument that a payment which can be recovered back is not payment of a debt, and that the bond therefore can be given no greater effect as a defense than actual payment. The statement, however, that the tax if paid could have been recovered, is only qualifiedly true. In the hypothetical case suggested the payment could have been recovered only if the taxpayer could have expeditiously pursued his administrative remedy, have promptly thereafter sued for recovery, and have obtained judgment before the effective date of the 1928 Act. Failing in this, a claim for abatement having been filed, the collection would have come within the ambit of section 611 of the 1928 Act, and recovery would have been barred. It is, of course, idle to speculate upon what might have been done, but which in fact was not done, yet, it is not without interest to note that in *Graham* v. *Goodcell*, supra, wherein sections 607 and 611, supra, were construed, payments were made in November and December, 1924, and suit to recover them back was still pending when the 1928 Act took effect. The bond in the instant case was not given until April 20, 1925. Aside from this, the argument, while not tenable as demonstrating absence of consideration for the bond, does possess a seeming plausibility as an assertion of equitable right based upon a concept of natural justice. Even this seeming plausibility is, however, destroyed when we come to consider the fact that the taxpayer had filed a claim for abatement, and the effect given to such circumstances by the Congress in the enactment of section 611 of the 1928 Act, and the Supreme Court in sustaining its validity. The abatement claim undoubtedly caused the collector to delay collection until the statute had run. Granted that the stay was not mandatory, and that the collector was still under a duty to collect as noted in the Goodcell case, yet the practical effect of the claim was to delay collection, and the bond assured as it actually brought about an additional period for consideration and payment. But for the bond, the collector could have made collection before the 1918 Act became effective. That such result was neither inequitable nor a denial of due process, under *Graham* v. *Goodcell*, supra, has already been pointed out. The reason is thus expressed by the court: "Delay in collection had followed upon the taxpayers' request for a consideration of their claim that the tax should be abated, and in the mistaken belief on the part of the administrative authorities that the statute of limitations did not bar collection by the appropriate proceedings of distraint, the delay had been continued until after the statute had run. On the discovery of the mistake, as pointed out by the decision of this court (the Bowers case), the Congress sought to prevent a refund of the amount thus collected." And again, referring to the case of *Forbes Boat Line* v. *Board of Commissioners* (258 U. S., 338), it was said: "But while the legislature could not in such a case retroactively create a liability, the court recognized that there is a class of cases in which defect in the administration of the law may be cured by subsequent legislation without encroaching upon constitutional right."

We see no merit in the contention that since the bond was conditioned upon subsequent finding of a tax due, and no such finding was made, the promise to pay was not enforceable. The assessment had already been made, the tax had been found to be due, and the claim for abatement had been rejected. In so far as it may have been the intention of the taxpayer to file a petition for rehearing that would result in a subsequent finding, the record is silent as to what, if anything, was done. The taxpayer can not by his own conduct defeat a subsequent finding and then deny liability on a promise to pay because no such subsequent finding had been made. Nor is there any merit to the claim that the bond was obtained by duress. The collector in good faith thought he could execute a warrant of distraint. He endeavored to do so. In the then state of the law such distraint was thought to be legal and within the authority of the collector. There is no showing contra. Besides, the taxpayer was not constrained to furnish the bond. It could have paid the tax, and then sued to recover it back. There was no duress. (See *Burnet* v. *Chicago Railway Equipment Co.*, supra.)

The judgment below is affirmed.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. XII-29-6296 Ct. D. 704

INCOME AND EXCESS PROFITS TAXES—JUDICIAL CODE—DECISION OF COURT.

SUIT IN EQUITY—JURISDICTION OF DISTRICT COURT.

A suit in equity in the district court may not be availed of to restore to the taxpayer the right to prosecute an action at law commenced in that court for the recovery of income and excess profits taxes, which action had been dismissed for want of prosecution and the court, as a court of law, had lost jurisdiction to vacate the judgment because of the elapsed time. Title 28, subdivision 41(20), of the Judicial Code does not vest the district court with equity jurisdiction to set aside a dismissal of an action against the United States and thus deprive the latter of its vested right.

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION.

New England Furniture & Carpet Co., a Corporation, plaintiff, v. *The United States of America, defendant.*

Order granting motion to dismiss.

[February 17, 1933.]

OPINION.

NORDBYE, Judge: The above-entitled matter having been regularly placed upon the special term calendar, came on for hearing on the 10th day of October, 1932, before the undersigned, one of the judges of the above-named court, on a notice of motion for an order dismissing the bill of complaint filed herein, on the following grounds:

"(1) That this court is without jurisdiction over the respondent, the United States of America.

"(2) That this court is without jurisdiction over the subject matter complained of.

"(3) That this court is without jurisdiction to grant the relief prayed for in the bill.

"(4) That this court sitting as a court of claims is without jurisdiction to grant equitable relief.

"(5) That the United States of America has consented to be sued only in the Court of Claims and in the United States District Court sitting as a court of claims and this court is without jurisdiction to entertain a suit against the United States of America sitting as a court of equity.

"(6) That the bill of complaint shows on its face that the complainant, if it has not been guilty of laches, has a full, complete and adequate remedy at law."

The complaint states a good cause of action if this court has jurisdiction of an equitable action of this character against the United States. The United States can not be sued without its consent. This court did have jurisdiction of the original action at law in which a judgment of dismissal was entered on April 1, 1930. That suit was brought to recover income and excess profit taxes which the plaintiff contends it had erroneously paid under the internal revenue laws. The court had jurisdiction to enter the dismissal, and the judgment of dismissal entered thereafter became a final judgment. This court as a court at law lost jurisdiction to vacate or set aside the judgment because more than seven months had elapsed since the entry thereof before any application was made to vacate the judgment of dismissal. No appeal was taken from that judgment within the statutory period. In another proceeding, this court determined that the ancient common-law remedy of coram nobis was not available to the plaintiff to set aside this judgment, though the court did intimate that plaintiff would have recourse to a court of equity. The statute of limitations has now run, and the prosecution of another action to recover these taxes is barred; and, consequently, unless the judgment of dismissal can be set aside and vacated, the right of plaintiff to recover the alleged overpayment of taxes has been lost. The setting aside of any judgment and the

reinstatement of the action at law would therefore deprive the United States of a right with which it is now vested, viz, to forever bar the plaintiff from recovering this alleged overpayment of taxes. Manifestly, this court has no jurisdiction to disturb or deprive the United States of this vested right unless the United States has expressly conferred such jurisdiction upon this court.

Plaintiff brings this action in equity. Paragraph 2 of the bill of complaint reads in part as follows:

"That this is an action in equity, brought by the plaintiff against the defendant to restore to the plaintiff the right to prosecute and have determined an action at law commenced by the plaintiff in this court on March 30, 1927, for the recovery of income and excess-profit taxes which the plaintiff erroneously paid to the defendant under the internal revenue laws of the United States, and which action was dismissed by this court on April 1, 1930."

Any right of jurisdiction must be looked for in Title 28, subdivision 41(20), of the Judicial Code. This section was recently construed in *United States* v. *Turner* (47 Fed. (2d), 86 (C. C. A. 8)), decided January 28, 1931, in which the court quoted the following from the case of *United States* v. *Jones* (131 U. S., 1):

"We can not yield to the suggestion that any broader jurisdiction as to subject matter is given to the circuit and district courts than that which is given to the Court of Claims. It is clearly the same jurisdiction—'concurrent jurisdiction' only—within certain limits as to amount; and the language in which those limits are expressed furnishes an additional argument in favor of the conclusion which we have reached."

This court has been cited to no case which holds that any equity jurisdiction is vested in the district courts in an action against the United States, except upon a claim against the United States for money. True, the ultimate purpose of this action is to vacate a judgment of dismissal and thus revive an action based upon a money demand; but, in attempting to reach that goal, the plaintiff is endeavoring, by the aid of the equity arm of this court, to divest the United States of a vested right. The following digest of the cases indicates a uniformity of opinion against plaintiff's contention:

In *United States* v. *McLemore* (45 U. S., 286) it appears that the United States recovered judgment against one Searoy, and a bill was filed by his surviving executor seeking to enjoin the enforcement of the judgment for the reason that payments had been made upon the judgment for which credit had not been given; that is, payments were made to different persons who succeeded each other in the office of district attorney. The court in disposing of the matter used the following language:

"There was no jurisdiction of this case in the circuit court, as the Government is not liable to be sued, except with its own consent, given by law."

The bill was dismissed.

In *Hill et al.* v. *United States* (50 U. S., 385), a bill was filed on the equity side of the court by the complainants to enjoin a judgment obtained against the complainants by the United States. The court followed the case of *United States* v. *McLemore* and dismissed the bill.

Kirk v. *United States* (131 Fed., 331) was a suit for injunction to restrain and enjoin the United States and the United States marshal from seizing the property of the complainant pursuant to an execution in favor of the United States, issued out of the United States district court. Apparently, the writ of execution was issued in a scire facias proceeding. The court found that the judgment was illegally obtained, and that there was no adequate remedy at law; but the court summarily dismissed as to the United States because "the United States can not be sued by an individual except as permitted by Acts of Congress." (Citing *United States* v. *McLemore*, supra, and *United States* v. *Hill*, supra.)

Buckley v. *United States* (196 Fed., 429 (D. C.)) was a bill in equity to enjoin an execution of a judgment at law. It appeared from the bill of complaint that in 1900 an action was commenced by the United States against certain defendants, including the complainant herein, to recover the sum of $22,344, for cutting and removing timber from certain public lands of the United States. Process was personally served upon complainant. It also appeared that in the same year the grand jury returned an indictment in the same court against the same defendants for the unlawful cutting of timber on public lands; and these two actions were pending on the 8th day of November, 1900, when

the complainant entered into negotiations with the United State attorney for settlement or compromise of the claims against him. According to the complainant, it was his understanding that upon payment of $600, all future proceeding against him would be discontinued. He paid the sum of $600, and it appears that this sum was credited as a fine imposed in the criminal case, and thereafter, on May 11, 1901, judgment was taken against the complainant by default in civil action for the full amount of the claim, together with costs and disbursements. Of this judgment the complainant had no notice until the 17th day of January, 1911, when he was confronted with a writ of execution in the hands of the United States marshal. In the court's opinion, the bill stated a good and meritorious defense and set forth sufficient grounds for equitable relief if the suit was one within the jurisdiction of the court. A demurrer was interposed on the ground that the court had no jurisdiction. The district judge used this language:

"The United States, by successive Acts of Congress have consented to be sued upon their contracts either in the Court of Claims or in a circuit or district court of the United States. (Citing various statutes.) But I know of no Act of Congress authorizing a suit of this kind against the Government. On the contrary, in *United States* v. *McLemore* (4 How., 286, 11 L. Ed., 977), a judgment of the circuit court enjoining the United States from proceeding upon a judgment was reversed and the bill dismissed for want of jurisdiction. In *Hill* v. *United States et al.* (9 How., 386, 13 L. Ed., 185), a similar ruling was made. In *Kirk* v. *United States* (C. C.) (131 Fed., 331), a suit was brought against the United States and the United States marshal to enjoin the execution of a judgment, but as to the United States the bill was dismissed, with costs, for want of jurisdiction. It therefore follows that as to the Government the bill of complaint in this case must be dismissed with costs, and it is so ordered."

Gherwal v. *United States* (46 Fed. (2d), 998) (C. C. A. 9) was an appeal from an order made on the 23d day of April, 1930, dismissing appellant's bill in equity praying for a decree setting aside a certain other decree entered pro confesso on the 17th day of November, 1924, revoking and canceling an order made on the 19th day of January, 1922, which granted to appellant a certificate of naturalization. The motion to dismiss was granted upon the ground that the United States of America was made a party defendant in said suit, and there was no provision of law allowing or permitting the United States to be sued in this cause. The court stated:

"The rule applied by the court below, to the effect that the United States can not be made a party to any suit, action, or proceeding without express authority of Congress is well settled in this case." (Citing cases.)

The lower court was sustained.

In *United States* v. *Turner*, supra, one Christina P. Turner filed a bill against the United States praying that her title to a tract of land in North Dakota be quieted as against any claims of the United States, and for an injunction against any disturbance of her title and possession, and for general relief. It appeared that she alleged ownership by purchase from one F. C. Turner, and she contended that in a deed made to her by F. C. Turner, an error was made in the description, so that the deed described another tract of land. Other allegations in the bill indicated that the United States had recovered a judgment against F. C. Turner, and had issued an execution under the judgment and levied on the same, and had sold the land. The district court entered a decree quieting the plaintiff's title and granted the injunction prayed for. Subsequently, a motion was made to vacate the decree, which motion was overruled, and from that order the appeal was taken. The opinion was written by Judge Munger, who at some length discussed the jurisdiction of the district court, and pointed out that the jurisdiction of this court was concurrent with the Court of Claims, and that the subsequent amendments had not given to the district court any broader jurisdiction than that which is given to the Court of Claims. The court held in this case that Judicial Code (28 U. S. C. A., 41(20)) did not give jurisdiction to a district court to enter a decree quieting title to lands, or to grant an injunction restraining the United States from trespassing upon lands in a suit brought against the Government. The lower court was reversed.

Wood v. *Phillips* (50 Fed. (2d), 714) (C. C. A. 4) was an action seeking to eject a forest supervisor of the United States from certain lands, and to enjoin him from claiming or exercising dominion over the same, and from inter-

fering with the free and uninterrupted use thereof by the plaintiff. The court intimated that an ejection would lie as against the forest supervisor, but in that the suit sought to quiet title, the matter in issue was the title itself and in that the United States did not consent to be sued, and could not be made a party defendant, plaintiff's suit to quiet title, therefore, would be nugatory.

Plaintiff cites two cases—*O'Connor* v. *O'Connor* (146 Fed., 994) (D. C.) and *Brun* v. *Mann* (151 Fed., 145) (C. C. A. 8)—which discuss the jurisdiction of the United States courts in equity actions which are brought to aid, regulate, restrain, or enforce a judgment entered in an action wherein the court was vested with jurisdiction. In *O'Connor* v. *O'Connor*, supra, there was a judgment of dismissal entered in a suit at law. A bill in equity was filed by the parties to the original suit at law to set aside a judgment of dismissal. The court cited the language used in *Freeman* v. *Howe* (24 How., 460), and quoted Justice Nelson as follows:

"The principle is that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties." (Citing cases.)

That is, the court held that the suit on the equity side was merely ancillary to the action at law over which the court had jurisdiction and that service might be made upon the parties in the equity suit even though they resided beyond the limits of the district, and on page 997, the district court states:

"The present bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the court." (Citing cases.)

In *Brun* v. *Mann*, supra, it appeared that a decree of the Federal court had been allowed as the only claim against the estate of a deceased person in the county court of the State in which the administration was pending. The property of the estate consisted of certain lands and water rights appurtenant thereto. The statutes of the State imposed a duty upon the administratrix to sell unexempt real property to pay debts. The administratrix, however, claimed that the real estate was exempt, and refused to take any steps to sell the property. An action was commenced in the Federal court in equity to render a decree for the sale of the land in the State, notwithstanding the pendency of the administration in the county court. The question arose as to the jurisdiction of the Federal court, and Judge Sanborn used the following language:

"Nor was the right of the complainant to invoke this jurisdiction conditioned by the existence of a Federal question or of diversity of citizenship or of the amount in controversy. A bill in equity dependent upon a former action of which the Federal court had jurisdiction may be maintained in the absence of either of these attributes (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to property in the custody of the court in the original suit. Such a dependent suit is but a continuation in a court of equity of the original suit, to the end that more complete justice may be done." (Citing cases.)

Obviously, the court in these cases did not have reference to the limitation placed on district courts in an action against the United States. The only reference to jurisdiction was to the amount in controversy and diversity of citizenship. The district court has equity as well as law jurisdiction over private persons where other jurisdictional facts are present. In the cases cited by the plaintiff, the jurisdiction of the district court is not extended into a field where equity jurisdiction of the parties did not exist. The court simply recognized the right, as well as the necessity, of reserving jurisdiction over the original parties wherever they might reside so far as it became necessary in the furtherance of justice to continue proceedings in equity with reference to the judgment or suit over which the court had obtained jurisdiction. The inherent right, however, of this court to continue supplementary actions with reference to suits and judgments over which it had jurisdiction, must necessarily be limited, so far as the United States is concerned, by the permissive Acts of Congress in vesting jurisdiction in this court over the United States. Without a special pronouncement of Congress indicating intention to extend jurisdiction of the United States courts in an action of this kind, this court would not feel

justified in accepting *O'Connor* v. *O'Connor*, supra, and *Brun* v. *Mann*, supra, as any authority for such extension.

The court is well aware of the peculiar and unusual circumstances which brought about the dismissal, and the excusable neglect which caused the plaintiff to permit the dismissal to ripen into a final judgment. The court feels, however, that it has no alternative but to sustain the Government's contention, and is therefore constrained to grant the motion to dismiss.

It is so ordered.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. XII-32-6334 Ct. D. 715

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

SUIT—CLAIM FOR REFUND—SUFFICIENCY.

A claim for refund based on the ground that amounts of installment payments did not constitute income until received is not a sufficient claim, under section 3226 of the Revised Statutes as amended, to entitle the taxpayer to sue on the grounds that the contract, not being assignable, had no ascertainable market value in 1918, and that no profit could be ascertained until cost had been returned.

COURT OF CLAIMS OF THE UNITED STATES. No. L-82.

H. G. Ferguson v. *The United States.*

[April 10, 1933.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

In 1918 the plaintiff by a written contract sold to the General Electric Co. his entire business and all the assets used in connection therewith. One Gladney was to receive a part of the purchase price, but this is not material to any question raised herein. Under the contract a certain amount was to be paid the plaintiff in cash and the balance in four equal annual installments with interest. No promissory notes or other negotiable instruments were executed. It is agreed that the profit to plaintiff in this transaction was $129,532.52. The Commissioner assessed all of this profit against plaintiff for the year 1918. The plaintiff paid taxes for that year accordingly, filed a claim for refund, and now brings this suit on the ground that the deferred payments provided for in the contract had no fair market value in that year and that consequently there was no profit to be assessed until his cost had been returned. The defendant contends that the suit is not based upon a ground stated in the claim for refund and also that the deferred payments provided in the contract of sale had a fair market price or value in 1918 equal to the full amount thereof.

The first question to be determined in this case is whether plaintiff's claim for refund presented the same matter as that upon which suit is brought. An examination of the claim shows that it contains some incorrect statements and also that not all of its statements are consistent. This, however, would not prevent recovery thereon if it in some way or in some part thereof informed the Commissioner of the claim upon which recovery is now sought. The findings of fact show that in the application for refund it was stated that the contract involved in the case contained "clauses which, if violated * * * constituted a forfeiture of the payments not yet made by the General Electric Co." This statement was not correct. The contract was not assignable and there were certain covenants made therein by the plaintiff, but none of these matters would have afforded ground for a forfeiture. If an assignment was made, it was a mere nullity and would not affect plaintiff's rights under the contract. If plaintiff broke the covenants made on his part, it might give rise to a damage suit or a valid counterclaim against the payments to be made by the other party, but would not otherwise affect the payments to be made by the General Electric Co. The matter which seems to be relied upon as apprising the Commissioner of the claim now made was a statement in the application for

refund that the "amounts did not constitute income until paid by the General Electric Co."; that it had been so held by the Commissioner with reference to payments made to another party under the contract; and that the claim is "based on such decision." While this statement is not very clear or definite, we think the Commissioner must have understood that the plaintiff, by the word "amounts," referred to the payments to be made under the contract and that he claimed that these installment payments did not constitute income until received, but this is not the basis of the action set forth in the petition nor is it the claim now made, which is that the obligations of the purchaser for deferred payments had no fair market value in 1918. The petition also contains an allegation that any income to plaintiff out of profit from the sale was accountable for by him either on the installment basis or the deferred-payment plan.

It is urged on behalf of defendant that the word "amounts" should be construed as meaning "deferred payments," but this is just another way of stating that payments were to be made on the contract by installments. It will be conceded that the Commissioner was duly informed of this fact, but we do not think it helps plaintiff's case. All that the Commissioner could infer from the confused and indefinite statements of the claim for refund was that plaintiff claimed the computation of the tax was subject to the rules that applied to installment contract cases under section 212(d) of the Revenue Act of 1926, and that therefore the Commissioner erred in assessing a tax for the year 1918 upon the total of plaintiff's profits instead of upon the part of the profits that was realized in that year. This is clearly shown by the fact that plaintiff's claim concluded with the statement that it is contended that the profit to be reported in each of the years 1918 to 1922, inclusive, is as follows:

1918	$46,631.69
1919	20,725.20
1920	20,725.20
1921	20,725.20
1922	20,725.20
	129,532.49

On an installment sales basis the computation set out in the application for refund of profits taxable in the years 1918 to 1922, was correct, and nothing was stated about computing the tax on any other basis. There was no mention of the cost of the property, or that the contract could not be assigned, or of the claim now made and upon which the suit must be maintained, if it can be maintained at all, namely, that no profit was realized until the cost had been returned through the payments, and no allegation that there was no tax whatever due on the sale for the year 1918. Nor was it stated that payments made up to and including that year did not exceed the cost of the property. Instead of alleging that no profit whatever was realized in 1918, it was stated to the contrary that $46,631.69 profit should be reported for that year and the tax computed on the proportion of profit realized for each year thereafter. The Commissioner, as it seems to us, could understand nothing from the refund claim except that plaintiff's application for refund was based on the claim that the rules with reference to installment sales contracts in accordance with section 212(d) of the Revenue Act of 1926 should be applied, and that his claim was in substance merely that $46,631.69 should be taxed in that year instead of $129,532.52. On this claim the Commissioner correctly decided that as the initial payment was more than one-fourth of the purchase price the case did not come within the provisions of the section above referred to and therefore rejected the claim made on this basis.

We are unable to agree that the statements which were made in the claim to the effect that there were covenants in the contract which might make the payments forfeitable in any way affect this conclusion. Even if these statements were correct (and in our judgment they were not), the claim as set forth in the application for refund is not in any way based thereon. In so far as it set out any matter that might entitle the plaintiff to a refund, the other statements, if not in actual conflict with the allegations with reference to forfeiture of the payments, at least had no connection therewith and made no reference thereto. If plaintiff recovers at all in this case, he must recover on the ground that the contract, not being assignable, had no market value, and that no profit was realized until the cost to plaintiff had first been received,

all of which is, in our judgment, an altogether different claim from that set up in the application for refund.

We do not think it necessary to determine whether the Commissioner proceeded correctly, but there are some observations that should be made with reference to the situation when the Commissioner assessed the tax. He held that the tax was all due in the year of the first payment as shown by Finding 3. What the plaintiff proposed was that the tax should be assessed in each year as the payments were received in proportion to the amount thereof, and this plan would have greatly reduced the amount of the plaintiff's tax. If the plaintiff had instead suggested the plan which is now proposed in accordance with which all the tax would have been assessed at the time of the last payment and the Commissioner had acted thereon, it probably would have made but comparatively little difference in the amount to be paid by him. This may have been one of the reasons why there was no suggestion of anything of the kind in the claim for refund. But however this may be, we find that after the statute of limitations had run against the collection of the tax for the year in which the last payment was made, plaintiff filed his petition and amended petition and now claims that the tax should have been assessed under a method which was not proposed by the claim for refund.

We have so often held that no recovery can be had where the suit is grounded upon a different claim from the one which was made the basis for the application for refund that we think no citation of authorities is necessary to sustain this rule. It follows that the petition should be dismissed and it is so ordered.

WHALEY, Judge, and BOOTH, Chief Justice, concur.

ARTICLE 1351: Suits for recovery of taxes erroneously collected.

XII-35-6378
Ct. D. 726

FEDERAL TAXES—REVISED STATUTES—DECISION OF COURT.

1. SUIT—CLAIM FOR REFUND—SUFFICIENCY OF CLAIM.

A timely claim for refund, based on the ground that additional depreciation should be allowed on buildings and machinery, does not constitute such a claim for refund, under section 3226 of the Revised Statutes as amended, as will support a suit to recover a tax based on the different ground, set forth in a claim for refund filed after the expiration of the statutory period of limitation, that the taxpayer is entitled to depreciation of a contract for the purchase of bleached sulphite.

2. CASES DISTINGUISHED.

United States v. *Factors & Finance Co.* (288 U. S., 89 [Ct. D. 628, C. B. XII-1, 315]) and *United States* v. *Memphis Cotton Oil Co.* (288 U. S., 62 [Ct. D. 626, C. B. XII-1, 307]) distinguished.

3. CASE FOLLOWED.

United States v. *Henry Prentiss & Co., Inc.* (288 U. S., 73 [Ct. D. 627, C. B. XII-1, 311]) followed.

4. REHEARING DENIED.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Bryant Paper Co. v. *Holden.*

[February 16, 1933.]

OPINION.

HICKS, Circuit Judge: The petition is denied.

We deal here only with point IV thereof, which is, that the opinion is contrary to the decisions of the Supreme Court in the cases of *United States* v. *Factors & Finance Co.* and *United States* v. *Memphis Cotton Oil Co.*, both de-

cided January 9, 1933. We can not yield to this insistence. In each of these cases a general timely claim for refund was followed by a specific amendment relative thereto and explanatory thereof tendered after the expiration of the statutory period. Such is not this case. Here there was a definite, specific and timely claim for refund for depreciation upon buildings and machinery and for losses upon certain accounts. After the statute of limitation had run plaintiff sought to file a refund claim based upon an allowance by the Commissioner of depreciation on the Nashwaak contract. The claim filed after the expiration of the statutory period was a complete departure from the timely claim and bore no relation thereto. The case should therefore be aligned with the case of *United States* v. *Henry Prentiss & Co., Inc.*, also decided by the Supreme Court on January 9, 1933, rather than with the cases relied on in the petition to rehear.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. XII–41–6444 Ct. D. 740

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

SUIT—STATUTE OF LIMITATIONS—ACCOUNT STATED.

Where plaintiff did not accept the Commissioner's determination of an overpayment of tax for 1916 and an additional tax for 1917, as shown in a certificate of overassessment mailed to him in 1923, but filed a petition with the Board respecting the 1917 tax, and a decision was entered, in 1928, that there was no deficiency for 1917, neither the certificate of overassessment nor the Board's decision constituted an account stated, and suit brought in 1930 to recover the overpayment for 1916 was barred by the provisions of section 284(b)1 of the Revenue Act of 1926.

COURT OF CLAIMS OF THE UNITED STATES.

Ellis P. Earle v. *The United States.*

[June 5, 1933.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

Plaintiff brings this action to recover an overpayment of income tax for 1916 and the case turns on the question of whether the suit has been brought in time. The facts are not in dispute.

The plaintiff duly filed his income tax return for 1916 and paid the amount shown to be due thereby. Thereafter, the Commissioner of Internal Revenue assessed a deficiency for that year of $7,658.85, which was paid July 30, 1920. November 25, 1921, the plaintiff filed a claim for refund in the sum of $5,975.23, and July 18, 1922, the Commissioner wrote plaintiff setting out the result of the audit of his tax for the years 1913 to 1919, inclusive. December 19, 1922, the Commissioner, after further consideration and audit of the returns for 1916 and 1917 together with other years, made a statement to plaintiff which showed an overassessment for 1916 of $5,322.25, and an additional tax for 1917 of $93,713.26. Both of these audits included consideration of the claim for refund filed November 25, 1921. March 28, 1923, the Commissioner assessed the additional tax for 1917 of $93,713.26, and a few days later signed a formal statement for the collector in which appeared an overassessment in favor of plaintiff for 1916 of $5,322.25, and therein instructed the collector to apply the overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. The collector complied with the Commissioner's instructions by applying the 1916 overpayment as a credit against the 1917 additional assessment and forwarded to the Commissioner a schedule of refunds and credits duly signed, on which appeared the credit above referred to and an item of interest on the overpayment of $852.43. July 19, 1923, the Commissioner mailed a certificate of overassessment to the plaintiff showing

an overassessment for 1916 of $5,322.25 which had been credited to the 1917 additional assessment. This certificate contained the following statement:

"The balance (if any) of the overpayment is refunded to you by check of the Treasury Department, forwarded herewith.

"Included in the accompanying check is interest in the amount stated below, allowed on the credit, from the date of payment of the additional tax to the date of allowance of the claim."

A check for the amount of interest was accordingly inclosed and the amount thereof paid to plaintiff.

Plaintiff, however, did not accept this conclusion of the Commissioner, and on April 16, 1926, filed a petition with the Board of Tax Appeals with reference to his taxes for 1917, alleging that the additional tax which had been assessed for that year was barred from collection since collection was not made within five years from May 1, 1918, when the return was filed. May 24, 1928, the plaintiff's contention was sustained by the Board of Tax Appeals and a decision was entered that there was no deficiency for 1917.

June 21, 1928, plaintiff filed a claim for credit of the overpayment for 1916 which had been applied against the tax for 1917, asking that it be credited against an outstanding assessment due for 1927. The claim for credit was based on the fact that the overpayment for 1916 had been applied on a tax which was barred. Subsequently, the Commissioner advised the collector that his claim would not be accepted as a claim for credit but would be considered as a refund claim for 1916, and on November 22, 1928, the Commissioner rejected the claim. July 17, 1930, the plaintiff began this suit.

The plaintiff's petition sets out the facts upon which the suit is predicated, but there is nothing in it to indicate whether the suit is brought upon the claim for refund, or the claim for credit, or upon an account stated, in which event the statutory period of limitations for making refunds would not apply. All three of these matters are discussed in the briefs of the respective counsel. We think it quite clear that the suit can not be maintained upon either the claim for refund or upon the claim for credit. Manifestly, the suit upon the claim for refund is barred, and we think that this is equally true with reference to a suit upon the claim for credit unless, as is contended, the statutory provisions with reference to claims for refund and credit are abrogated by reason of the creation of an account stated. We think there was no account stated. In the case of *David Daube* v. *United States*, decided by the Supreme Court May 8, 1933 [Ct. D. 677, C. B. XII–1, 346], the Supreme Court said, as a reason why there was no account stated between the Government and the taxpayer, that "no balance was arrived at as a result of computation and agreement," that is, no balance arrived at by agreement between the Government and the taxpayer. In the case at bar, it would seem clear that no balance was agreed upon between the plaintiff and defendant as a result of the certificate of overassessment that was sent the plaintiff, for the certificate stated in substance that if any balance was due the plaintiff it would be refunded by check. The defendant did not agree to pay the amount for which suit is now brought, nor can any promise to pay it be implied. A blank was put opposite the words "Amount refunded," and opposite the word "Interest," "$852.43," for which a check was inclosed. In fact the attorney for plaintiff in his brief concedes that no agreement was reached as to the balance due by this certificate of overassessment, but argues that on the other hand the plaintiff repudiated it by commencing a suit before the Board of Tax Appeals to have the additional assessment for 1917 set aside as barred. But he contends that when the Board of Tax Appeals rendered its decision and plaintiff accepted it, thereafter, at some indefinite date an account stated arose. To this we can not agree. There was no account presented at that time, and while the decision of the Board of Tax Appeals showed that the account presented to the plaintiff by the Commissioner was erroneous and this decision was binding upon the defendant in further court proceedings it did not make a new account or bring the parties into agreement. We therefore hold that there was no account stated between the parties.

But even if there had been an account stated, we do not think it would avail the plaintiff. If there was any such account it was presented at the time the plaintiff received the certificate of overassessment, but this suit was not brought until more than six years after that date, and a suit upon an account stated is therefore barred. Nor does the fact that the claim for credit was filed within the period of limitations under the account stated (if

the certificate of overassessment is to be considered an account stated) enable plaintiff to maintain a suit on the claim for credit. This fact would not alter the statutory provisions with reference to the effect of filing a claim for credit, for a suit upon a claim for credit and one upon an account stated would be based upon altogether different and unrelated matters. Under the statutory provisions applicable to the claim for credit filed in the case at bar (section 284(b)1, Revenue Act of 1926), no claim for credit could be allowed after four years from the time the tax was paid. This period had long expired when the claim for credit was filed, consequently even if it should be held that there was an account stated the claim for credit was not presented in time. Our conclusion is that the plaintiff's suit is barred whether it be considered as based on the claim for refund, or an account stated, or upon the claim for credit. It follows that the petition must be dismissed and it is so ordered.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. XII–41–6445 Ct. D. 741

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. SUIT—STATUTE OF LIMITATION—ACCOUNT STATED—INTEREST.

Where the Commissioner signs a schedule of refunds and credits showing an overpayment, of which a certain amount is credited against an additional assessment the collection of which is barred at the time collection was made by credit, and issues a certificate of overassessment in the total amount, stating the amount to be refunded and to be credited, to which the taxpayer does not assent, no account is stated. Suit brought in 1930 for the amount credited in 1924 is barred by the statute of limitations. Any cause of action for interest accrued at the time credit was granted and is also barred.

2. CASE FOLLOWED.

David Daube v. *United States* (289 U. S., 367 [Ct. D. 677, C. B. XII–1, 346]) followed.

COURT OF CLAIMS OF THE UNITED STATES.

Edward B. Leisenring, Daniel B. Wentz, Jr., and Fidelity-Philadelphia Trust Co. (formerly Fidelity Trust Co.), Executors of the Estate of Daniel B. Wentz, Deceased, v. *The United States.*

[June 5, 1933.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

The plaintiffs are executors of the estate of Daniel B. Wentz, deceased, who died February 8, 1926.

This suit is brought upon what the plaintiffs claim to be an account stated for $34,814.04 due the deceased. The evidence shows that the Commissioner, on May 15, 1924, signed a schedule of refunds and credits which showed an overpayment of $77,338.94 on the taxes of the deceased for 1919, of which $34,814.04 was credited in the same schedule against that amount of an additional assessment for 1917. The additional tax for 1917 had been assessed in time, but collection was barred by the statute of limitation of five years provided in section 250 of the Revenue Act of 1921 at the time collection was made by the credit. In accordance with this schedule of refunds and credits, a certificate of overassessment was later prepared by the Commissioner showing that the testator's tax for 1919 had been overassessed in the amount of $77,338.94, and that "the report of the internal-revenue agent in charge, dated October 17, 1923, had been approved by this office as to the adjustment for this year." The certificate further went on to state, "The amount of the overassessment will be abated, credited, or refunded, as indicated below," and also, "If an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by Treasury check transmitted herewith."

Notations on the certificate made "below" showed that of the overassessment, $34,814.04 had been credited on additional taxes for the year 1917 and that $42,524.90 was refunded. This certificate, together with a Treasury check for the amount of the refund of $42,524.90 was delivered to the testator about June 15, 1924. After the death of Daniel B. Wentz and on May 13, 1930, the executors of his estate made application to the Commissioner of Internal Revenue for interest on the overpayment for the year 1919 and for a refund of $34,814.04 of the 1919 overpayment which had been credited against taxes of 1917. In this claim they set out a copy of the certificate of overassessment for 1919 and alleged that the interest was due thereon and that the credit above referred to was void, not having been made within the statutory period applicable thereto. This claim was denied. The petition was filed and the suit begun June 10, 1930.

This case, like many others turns on the question of whether the suit was brought in time and the parties agree that unless the suit can be based on an "account stated," the period of limitations for its commencement has expired. It is contended on behalf of the plaintiffs that the certificate of overassessment referred to above constituted an account stated in favor of the taxpayer for $34,814.04 and that consequently the plaintiffs had six years from the time it was delivered to the taxpayer in which to bring suit and that the suit having been instituted June 10, 1930, it was begun in time. The defendant contends that the acts of the Commissioner, including the delivery of the certificate of overassessment, did not constitute an account stated in showing anything due the taxpayer, and that if there was any account stated through the certificate of overassessment it showed that nothing was due the taxpayer after receipt of the refund allowed therein. It is also insisted on behalf of the defendant that interest on the amount claimed can not in any event be recovered, but as we view the case it will not be necessary to consider the point thus raised.

A number of transactions between the deceased and the Commissioner with reference to the taxes in suit and other taxes are shown by the findings of fact in addition to what we have set out above in the opinion, but we do not think it is necessary to refer to them as, in our opinion, they do not affect the determination of the case.

In our view, the decision herein is controlled by the case of *David Daube* v. *United States* (75 C. Cls., 633, 59 Fed. (2d), 842 [Ct. D. 596, C. B. XI–2, 373]) and the opinion of the Supreme Court affirming the decision of this court in *David Daube* v. *United States*, decided May 8, 1933. In the opinion rendered by this court in the Daube case, supra, it is stated that there are certain well-settled principles from which no court has ever varied which apply to an account stated. Among them is the rule that the parties must agree upon the balance struck, that there must be a promise, express or implied, for the payment of such balance, and that where there are mutual or cross demands the parties must come to an agreement as to the allowance or disallowance of the items composing the account, but especially "there must be an adjustment, a balance struck, and an assent to the correctness of the balance." Further, that "the parties can not state an account by agreeing to part of the items, and leaving the others open for future adjustment or litigation," and that "the test of an account stated is that the minds of the parties met as to the amount due." Nor does it make any difference that a claim made in the account may be groundless, although if any part of the claim is disputed so that the balance stated is not admitted it does not become an "account stated." This last is particularly applicable to the case now before us for the reason that the defendant in the account charged the taxpayer with a credit on the taxes of 1917, although the time had expired within which they could legally be collected. In the same case we also said: "The admission of one item in the account of the transactions between the parties offset by another item will not support an action on an account stated as to the item admitted, although it may constitute evidence of the correctness thereof in an action otherwise commenced." The authorities supporting these rules are too numerous for citation.

Applying these principles to the certificate of overassessment which was delivered to the taxpayer and the schedule of refunds and credits which evidently in some way came to the knowledge of the executors, we are clear that there was no account stated to which both parties gave assent. The sheet entitled "Certificate of overassessment" did indeed show the overassess-

ment, but this was only one item of the account which was also shown by the same paper. The document showed that in defendant's statement of the account the item of $34,814.04 was credited upon the testator's taxes for 1917 and that the balance due the taxpayer was $42,524.90, which was accordingly refunded to him by check. This amount was the balance struck in the account as stated by the Commissioner, but the evidence shows that the taxpayer did not agree to this balance, and that the defendant did not agree that $34,814.04 was due the taxpayer. Consequently there was no "account stated." See *Ellis P. Earle* v. *United States* [Ct. D. 740, page 262, this Bulletin], this day decided by this court.

We find nothing in the decision of the Supreme Court affirming the Daube case, supra, which is in conflict with what we have set out above. On the contrary, we think that the opinion therein shows that the Supreme Court had no intention by the decision in the case of *Bonwit Teller & Co.* v. *United States* (283 U. S., 258 [Ct. D. 334, C. B. X–1, 328]), to overturn principles which have been agreed upon by all the courts of this country and remained settled for nearly a century, as seems to be contended on behalf of plaintiffs. In the Daube case, supra, the Supreme Court cited with approval the case of *Newburger-Morris Co.* v. *Talcott* (219 N. Y., 505, 512), in which the Court of Appeals said:

"But the very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness, *insimul computassent*, so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained."

In the next to the last paragraph of the opinion in the Daube case the Supreme Court stated in substance that the decision in the Bonwit Teller case, supra, was limited in its application to cases where the evidence is such that "it sustains the inference of an agreement that the tax shall be repaid." In this case, instead of sustaining any such inference, the evidence clearly shows the contrary. Previous to the issuance of the certificate of overassessment upon which suit is brought the taxpayer had filed claims for credit of the 1918 overpayment against the 1917 additional tax. Instead of making this credit, the certificate upon which plaintiffs now rely was issued showing an overassessment for the year 1919 in the amount of $77,338.94, and a balance was struck therein between the taxpayer and defendant by crediting $34,814.04 (the amount for which suit is now brought) upon additional taxes for the year 1917 and refunding to the taxpayer by check $42,524.90. The check and the certificate of overassessment were issued June 13, 1924, and delivered to Daniel B. Wentz about June 15 of the same year. The petition herein was filed a few days before the expiration of six years from the time the certificate was delivered. Daniel B. Wentz, so far as the record shows, accepted the check which had been sent him without making any protest or objection thereto, but nearly six years afterwards the executors of the estate filed a claim for interest on the overpayments allowed for 1918 and 1919 and for the refund of the $34,814.04 of the 1919 overpayment credited against the 1917 tax. If any inference at all could be drawn from these facts, it would be that Daniel B. Wentz agreed to the balance struck by the Government, but we are inclined to think that the mere fact that he accepted the check does not show that he agreed that the balance struck by the Government was correct. The certificate of overassessment showed clearly how the Government computed the amount due the taxpayer and the remission of the check to him for that amount was in effect a statement that $42,524.90 was the amount due him and payment was being made thereof. We are at a loss to understand how it can be argued from this state of facts that the Government agreed that $34,814.04 more was due the taxpayer.

It is contended on behalf of the plaintiffs that the facts established in *Bonwit Teller & Co.*, supra, make the same kind of a case as that which is now before this court. There may be much similarity between the actual facts in the two cases but there is a great difference in the facts submitted to the court. When the Bonwit Teller case was submitted to this court there was not a line or even a word said in the brief of counsel for either party with reference to an account stated. There was an allegation in the petition to the effect that the Commissioner of Internal Revenue "rendered a statement" to the plaintiff in which statement the amount for which suit was brought "was actually found and agreed to be due" to the plaintiff, and a statement in argument that the action was for the recovery of this amount "upon an allowed claim." Ap-

parently there was no contention over these allegations, but it was contended on behalf of the Government that a refund could not be made because the provisions of the statute were not complied with. The Supreme Court therefore had no occasion to consider whether the facts in the case supported an account stated and we do not think it intended to determine that question. In view of the facts as found in the case now before this court and the language of the Supreme Court in the Daube case, supra, which we have quoted above, we are clear that the decision in the Bonwit Teller case, supra, is not controlling in the case at bar.

The case of *Parks & Woolson Machine Co.* v. *United States* (75 C. Cls., 204, 58 Fed. (2d), 868 [Ct. D. 562, C. B. XI-2, 146]) is also cited in support of plaintiffs' theory but the closing sentence of the opinion therein which reads, "Recovery of the overpayment was barred when the suit was instituted, even if it had been grounded upon an account stated," we think shows that it was not intended to hold that an account stated had been established.

Nor do we find anything in *Naumkeag Steam Cotton Co.* v. *United States*, decided by this court January 9, 1933, that conflicts with what we have said above. That case involved a very different state of facts from the one now before the court and an altogether different issue was raised by the defendant. Consequently nothing was said in the majority opinion which might even remotely refer to an account stated, or to the question of whether the suit was brought in time, which would have involved the discussion of matters not appearing in the case at bar. Having decided the case on the issues presented, obviously it was not necessary for the court to go further and decide some issue that had not been raised.

Our conclusion is that there is no evidence showing or tending to show an agreement, express or implied, to pay this sum to the taxpayer, and we have entered a finding of fact accordingly. As we find in effect and hold that there was no account stated, it follows that plaintiffs' action to recover the amount of the credit is barred. The credit was definitely granted on May 15, 1924, when the Commissioner approved and signed the schedule of refunds and credits. Any cause of action for interest accrued at that date, and is therefore also barred.

It follows from what has been stated above that plaintiffs' petition should be dismissed, and it is so ordered.

ARTICLE 1351: Suits for recovery of taxes erroneously collected.

REVENUE ACT OF 1926.

Insufficiency of one amortization basis in claim for refund as basis for suit on another amortization basis. (See Ct. D. 751, page 209.)

ESTATE TAX RULINGS.

TITLE III.—ESTATE TAX. (1926)

REGULATIONS 70(1926), ARTICLE 19: Power to change enjoyment. XII-31-6322 Ct. D. 711

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GROSS ESTATE—TRANSFERS—POWER TO ALTER OR AMEND TRUST INSTRUMENT.

The value of certain shares of stock transferred by decedent to herself and another as trustees for the benefit of her two daughters for life was properly included in the gross estate, under the provisions of section 302(d) of the Revenue Act of 1926, where the donor reserved the rights to direct payment of the entire net income in unequal shares to her daughters in such amounts and at such times as she saw fit, and to change, alter, or amend the trust instrument, excepting the right to revoke or vacate the trust. Assuming, as contended by plaintiffs, but not deciding, that the power to direct unequal distribution of income was the only change permitted to the donor by the trust instrument, such power can not be considered slight or trivial, but was important and substantial.

2. SAME—TRANSFER TO TAKE EFFECT AT DEATH—CONTINGENT REMAINDER.

Where the trust instrument provided that in the event the donor's daughters predeceased her she should have the right to receive their respective interests in the corpus of the trust estate, such interest, being a contingent remainder and ceasing at the donor's death, would also seem properly taxable under the provisions of section 302(c) of the Revenue Act of 1926.

3. CONSTITUTIONALITY OF STATUTE.

Section 302(d) of the Revenue Act of 1926, construed as imposing a tax upon property transferred in trust where the donor retains control, as indicated above, does not violate the fifth amendment.

4. DECISION FOLLOWED.

The decision of the Supreme Court in the case of *Porter et al.* v. *Commissioner* (288 U. S., 436 [Ct. D. 647, C. B. XII-1, 354]) followed.

COURT OF CLAIMS OF THE UNITED STATES.

Harrison Hoblitzelle and Trimble Hoblitzelle, as Executors of the Estate of Laura T. H. Hoblitzelle, deceased, v. *The United States.*

[May 8, 1933.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

This action involves the construction of certain provisions of the estate tax as contained in the Revenue Act of 1926, under which the value of the gross estate is first determined and therefrom the net estate is ascertained in accordance with the provisions of the statute.

The particular provision with which we are concerned in this case is section 302 of the Act which provides, among other things, that:

"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—

* * * * * * *

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *."

The plaintiffs are the executors of the estate of Laura T. H. Hoblitzelle, who died on May 29, 1929. In 1927, the decedent executed an indenture of trust for the benefit of her two daughters during their lives and providing for appointees and remaindermen after their deaths, also naming herself and another party as trustees. There were a number of special provisions attached, but except as shown by sections 2, 3, and 11 of the indenture of trust set out in the findings they are not material to the determination of the questions involved. It will be seen from an examination of sections 2 and 3 that the donor of the trust "alone reserves the right to direct the trustees to pay over and distribute the entire net income in unequal shares, and in such amounts and at such times as she may see fit, unto her daughters, upon her written instructions to the trustees"; and that section 11 provides:

"The donor hereby reserves the right to change, alter, or amend the terms of this indenture at any time during her life, * * * *Provided, however,* The donor shall not have the right to revoke and vacate this trust by any such amendment or alteration thereof."

The Commissioner of Internal Revenue treated the trust property as a part of the estate of the decedent at the time of her death and computed the estate tax accordingly. To this the plantiffs objected but paid the tax, and after duly filing a claim for refund now seek to recover the amount of additional tax assessed and collected by virtue of this act of the Commissioner.

We think the decision in the case at bar is controlled by the opinion in *Porter et al.* v. *Commissioner*, decided by the Supreme Court March 13, 1933 (288 U. S., 436; 333 C. C. H., paragraph 9195). In view of the last-named decision much of the argument made by plaintiffs in the opening brief has been abandoned, but it is still claimed that notwithstanding that decision the plaintiffs are entitled to recover. In its opinion rendered in that case, the Supreme Court said with reference to the provisions of section 302 quoted above:

"The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death. Subdivision (d) requires to be included in the calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exertion of a power by himself alone or in conjunction with another. Petitioner argues that, as decedent was without power to revoke the transfers or to alter or modify the trusts in favor of himself or his estate, the property is not covered by subdivision (d). But the disjunctive use of the words 'alter,' 'modify' and 'amend' negatives that contention."

In the Porter case the trust instrument contained a paragraph reserving to the donor power at any time to alter or modify the indenture and any or all of the trusts in any manner excepting any change in favor of himself or his estate. The same power to change, alter, or amend is contained in the trust instrument involved in the case at bar. The limitation is worded slightly different and in the Porter case gave the donor a little more power with reference to the change which might be made with reference to the trusts. In the case at bar the donor did not have the right to revoke and vacate the trust by any amendment or alteration, and it is contended by plaintiffs that the power to direct unequal distribution of the income between her two daughters was the only change permitted to the donor by the instrument now before us. We doubt very much whether this contention can be sustained, but assuming for the sake of the argument that it is correct we do not think it affects the judg-

ment which must be rendered in the case. It is true that the opinion in the Porter case does not pass on the question of "whether every change, however slight or trivial, would be within the meaning of the clause" and that in the instant case the donor did not retain as much power over the trust estate as was reserved in the Porter case. Conceding this, we think that the power reserved can not be considered slight or trivial but was important and substantial. If we are correct in this conclusion the statute is broad enough to cover the property conveyed by the trust instrument.

It would seem also that the donor under section 3 of the trust instrument had a further interest in the trust estate in the form of a contingent remainder. In event of the death of either of her daughters during her lifetime she had the right to receive the respective interests of the beneficiary or beneficiaries and this interest ceased upon the death of the donor. Such an interest would be taxable. (See *Klein* v. *United States*, 70 C. Cls., 151, affirmed 283 U. S., 231 [Ct. D. 333, C. B. X–1, 462].)

It is contended that to so construe the statute makes it a harsh provision. We do not think so. The manifest purpose of the provision contained in the trust instrument which we have been construing was to evade the estate tax and at the same time retain a substantial control of the property. If the contention of the plaintiffs that the property so conveyed was not subject to the estate tax should be sustained, then even under the present law it is extremely doubtful whether the property conveyed by the trust instrument would be subject to the gift tax, and a trust instrument of the character now in question would afford a convenient method of avoiding both the estate and gift taxes.

It is further contended by plaintiffs that the statute construed as stated above is arbitrary and capricious and void under the fifth amendment of the Constitution. Without further quotations, we think that the language used by the Supreme Court in the Porter case with reference to a similar constitutional question disposes of this objection.

Plaintiffs' petition must be dismissed, and it is so ordered.

REGULATIONS 70(1929), ARTICLE 19: Power to change enjoyment. XII–35–6383 G. C. M. 11034

> Where a trustor at her death in 1929 had the power to "revoke, alter, and amend" a trust agreement, even though the power could not have been exercised by her until January —, 1930, the value of the trust property nevertheless constituted a part of her gross estate.

Request is made for an opinion whether the value of certain trust property constituted a part of the decedent's gross estate.

On May —, 1923, A, who died May —, 1929, transferred certain of her securities to the M Bank and her husband as trustees. The trust instrument under which the property was transferred contained the following provisions:

> The trustor reserves the right to revoke, alter, and amend this trust in whole or in part, at any time during her life, and reserves such right after her decease to her husband and upon the decease of the trustor and her husband this right shall accrue to the sons of the trustor jointly, and to the survivor of them.

Later A executed a further instrument amending the original trust indenture and providing in part as follows:

> WHEREAS I have reserved in the said trust indenture * * * the right to revoke, alter or amend the same at any time during my life.
>
> NOW THEREFORE I hereby amend the said trust indenture:
>
> (b) * * * waiving until January —, 1928, the right to revoke, alter and/or amend the said instrument, so that the provisions of the said trust

agreement can not be revoked, altered or amended in any particular by me or by any one acting under my authority between the date of this instrument and January —, 1928, provided, however, that at any time before January —, 1928, the said trust, as above amended, can be further continued, without alteration, for one or more years from date.

Under date of December —, 1927, A executed another instrument providing in part as follows:

WHEREAS, by an amendment to the trust agreement above referred to the said trust was made irrevocable until January —, 1928, with the provision that at any time before that date the said trust fund could be further continued without alteration for one or more years from that date, I now hereby provide that the said trust fund shall be continued without alteration until January —, 1930, with the further provision that at any time before that date the said trust fund may be further continued without alteration for one or more years from that date.

The administrator of A's estate contends that the value of the trust property does not constitute a part of the gross estate for the reason that after the creation of the trust the grantor received no benefit from the property and had no interest therein; and that at the date of her death, the trust was, by virtue of the provisions of the instrument executed on December —, 1927, irrevocable, and could not be altered or amended.

Section 302 of the Revenue Act of 1926 provides in part:

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—

* * * * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

Section 302(d), supra, does not require the trustor to be able actually to revest the trust property in himself at the date of death. All that is necessary is that the power to alter, amend, or revoke be vested in him at that time even though such power may not then be exercisable. It is the existence of such a power which brings the trust within the statute. (*Katherine B. Albrecht et al.* v. *Commissioner*, 27 B. T. A., 1091.)

In the instant case it is clear that the instrument of December —, 1927, wherein it was provided "that the said trust fund shall be continued without alteration until January —, 1930," did not operate as a relinquishment of the power which the trustor had reserved to "revoke, alter, and amend" the trust. While A (the decedent) was not, because of the provisions of the instrument dated December —, 1927, able actually to revest the trust property in herself at the date of her death, nevertheless she, at that time, had the reserved power to revest. As has already been stated the existence of such a power is sufficient to bring the trust within the statute.

Accordingly, this office is of the opinion that the value of the corpus of the trust created by A on May —, 1923, constituted a part of her gross estate.

REGULATIONS 70, ARTICLE 24: General rule. XII-46-6510
Ct. D. 752

ESTATE TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GROSS ESTATE—PROPERTY PASSING UNDER POWER OF APPOINTMENT.

Where decedent, the donee of a general power of appointment under the will of his father, exercised the power in favor of his two daughters, who would have taken the property under the will of the donor if the power had not been exercised, the exercise of the power by the donee was a lawful subject of Federal taxation, and the value of the property so passing was properly included in the decedent's gross estate, in accordance with section 302(f) of the Revenue Act of 1926, notwithstanding the fact that the law of Pennsylvania treats the property as passing, not from the donee of the power, but from the donor.

2. RES JUDICATA.

A decision of the Orphans' Court of Pennsylvania, declaring the State rule and holding that the will of the donor vested the remainder in the daughters subject to the right of the donee of the power to direct otherwise, was not res judicata of the question of the right of the Federal Government to impose an estate tax upon the exercise of the power.

3. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (26 B. T. A., 682) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Joseph Walker Wear, William E. Goodman and William Potter Wear, Executors of the Estate of William Potter, Deceased, petitioners, v. *Commissioner of Internal Revenue, respondent.*

Petition for review from the United States Board of Tax Appeals.

Before BUFFINGTON, WOOLLEY, and THOMPSON, Circuit Judges.

[May 26, 1933.]

OPINION.

WOOLLEY, Circuit Judge: William Potter, the decedent, was donee of a general power of appointment under the will of his father. He exercised the power in his own will by giving the property to his two daughters who, had he omitted to exercise it, would have taken the property under the will of their grandfather, the donor, and the decedent's estate would to that extent have escaped a Federal tax. As the decedent did, as a matter of fact, exercise the power, the Commissioner of Internal Revenue imposed upon his estate a tax measured by the value of the property passing under the power, on authority of section 302 of the Revenue Act of 1926. (44 Stat., 9; U. S. C. A., title 26, section 1094.) This provision, in laying down a basis for a taxable net estate, prescribed that the gross estate should be determined by including the value, at the time of the decedent's death, of real and personal property "* * * (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, * * *." On appeal to the United States Board of Tax Appeals that tribunal held the value of the property was properly included in computing gross estate and the additional estate tax was lawfully determined. The executors of the decedent have filed this petition for review.

The petitioners admit the power in question was a general power of appointment. They deny, however, that the donee ever "exercised" it. They take this stand not against the admitted fact that the donee did actually and expressly exercise the power but on the ground that it was legally an abortive act in that it neither produced a new effect nor changed the legal status of the appointees in respect to the property from what it was before. To this contention we briefly answer that the donee exercised the power. Whether it was without legal effect (*In the Matter of Lansing*, 182 N. Y., 238), and therefore

lifted the estate out of the taxing Act and left it under Pennsylvania law, turns on another question which the petitioners state as follows:

"Did the property over which the decedent had a general power of appointment pass under the general power of appointment?"

That question is predicated on the law of Pennsylvania that, "If the donee of the power exercise it in such a manner that the property passes exactly as it would have passed if the power had not been exercised, the property will be treated as passing under the will of the donor." (26 R. C. L., 189; *Freeman's Estate, No. 1*, 35 Pa. Sup. Ct., 185; *Crolius* v. *Kramer*, 279 Pa., 275; *Potter's Estate*, 13 District Reports (Pa.), 667.) If the question as framed by the petitioners states the whole point of the case there is nothing to discuss, for it is indubitably settled in Pennsylvania law as a matter of title that where there is identity of the donee's appointee and the donor's contingent beneficiary title passes from the donor of the power.

The real question, as we venture to put it, is whether the exercise of a general power of appointment is a lawful subject of Federal taxation, to be measured by the value of property which under State law passes, as in this case, not from the decedent donee of the power but from the donor.

The answer depends very much on how the question is approached. If we were dealing with a State rule of property, this Federal court would, of course, be bound by it. But we are dealing with a right of the Federal Government to levy a tax on a particular subject—the exercise of a power of appointment. Matters of Federal taxation, though controlled exclusively by Federal legislation (*Burnet* v. *Harmel*, 287 U. S., 103, 110 [Ct. D. 611, C. B. XI–2, 210]), are sometimes perplexing because of the difficulty in applying provisions of a Federal taxing Act to a subject which States under their own laws regard differently. To laws of the States the Congress can yield, and in some instances, such as in allowing deductions, has yielded. Except when expressly and voluntarily giving way to State laws, the Congress, not permitting its hand to be stayed, may, within the Constitution, reach out and levy Federal taxes on such subjects as it may select (*Lang* v. *Commissioner*, 289 U. S., 109), however they may be regarded at home.

The subject of the tax in this case is the exercise of a general power of appointment. The tax is not on the property of the power but is on the exercise of the power itself. In many States a general power of appointment, following the English rule, is regarded as an estate equivalent to out-and-out ownership of the property, or an ownership at least to the extent of subjecting it to liability for the donee's debts, and of course subjecting it to taxation. (*Chanler* v. *Kelsey*, 205 U. S., 466; *Lederer* v. *Pearce*, 266 Fed., 497; *Fidelity-Philadelphia Trust Co.* v. *McCaughn*, 34 Fed. (2d), 600, 602 [T. D. 4239, C. B. VII–2, 373]; *Rosenberger* v. *McCaughn*, 25 Fed. (2d), 699, 700; 278 U. S., 604 [T. D. 4171, C. B. VII–2, 253].) In Pennsylvania and in some other American jurisdictions, the rule is just the opposite. Such being the diversity of rules, we are not concerned with a question whether one is right and the other wrong, but with an altogether different question, whether a Federal taxing Act is to be put into effect in one jurisdiction and not in another according to the different ways in which the subject of the tax is looked upon.

We do not believe the Congress intended, by the quoted provision of the Act, that the estate tax in respect to the exercise of a general power of appointment should be imposed and collected at the will of the States or upon the accident of the citizenship of the taxpayer. Rather do we think it intended the tax should be laid, not on property and therefore not to be bound by a State rule of property, but on an event arising upon the death of the donee, that is, the exercise of a power of appointment effective on his death. The estate tax being a death tax, rests "upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." (*Knowlton* v. *Moore*, 178 U. S., 41, 56, 57; *Tyler* v. *United States*, 281 U. S., 497, 502, 503 [Ct. D. 190, C. B. IX–1, 383].)

"The question here, then, is not whether there has been in strict sense of the word a 'transfer' (or a 'passing') of the property by the death of the decedent, or receipt of it by right of succession (or by a contingent right under the donor's will), but whether the death had brought into being or ripened for the survivor property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part,

by the value of such rights." (*Tyler* v. *United States*, 281 U. S., 497, 502, 503; *United States* v. *Provident Trust Co.*, 35 Fed. (2d), 339; *Lang* v. *Commissioner*, 289 U. S., 109.)

Recognizing this as the essence of such tax legislation as that here in question, the Supreme Court on another subparagraph of a like section of another Revenue Act openly disregarded the Maryland and Pennsylvania State rules of property in respect to tenancy by the entirety as not controlling on a question of taxation and sustained the Federal tax as imposed not upon property but upon the transmission occasioned by death of one of the spouses. (*Tyler* v. *United States*, supra; *Lang* v. *Commissioner*, supra.)

And, further, the Congress has, in some situations, power to tax transmission of property effected by death even though by the law of the decedent's domicile such property is not part of his estate. (*Fidelity-Philadelphia Trust Co.* v. *McCaughn*, 34 Fed. (2d), 600, 602.)

Of course we realize the petitioners will hasten to say there was in this case under the Pennsylvania rule no transmission on the donee's death because his daughters had received the property under the donor's will.

We have not been convinced that on the death of the donee nothing happened in respect to the property of the power and in respect to the daughter's right to the property by the exercise of the power. Before its exercise the daughters of the decedent, the twice named recipients, had under Pennsylvania law an estate in the property of the power. But it was a defeasible estate, not unlike the interest of a beneficiary in a policy of life insurance where the insured has reserved, yet has not exercised, the right to change the beneficiary. Their estate was liable to be wholly taken away from them by the exercise of the power in favor of others. So long as the donee lived and retained control over the disposition of the property the daughters ran that risk, which was akin to the risk of a change of beneficiaries in a policy of insurance. Not until the donee died did that risk disappear. Until then he stood in their way. Therefore it was upon his death without exercising the power adverse to them that the estate of the daughters became indefeasible. Death, with an exercise of the power in their favor, was the event that wrought the change. Then their estate, theretofore contingent upon the nonexercise of the power against them, became vested, like the interest of a beneficiary of a policy of life insurance becomes vested upon the death of the insured without exercising a reserved right to change the beneficiary, the value of which must, under the cases, be included in the gross estate of the insured for purposes of taxation. (*Chase National Bank* v. *United States*, 278 U. S., 327 [Ct. D. 40, C. B. VIII–1, 308].) The generating source of the change was the death of the donee without action adverse to them. That, too, was the generating source of the tax. And such a tax, we hold, the Federal Government, under its sovereign power to levy taxes, may lawfully impose upon the exercise of a power effecting such a change to be determined by actual results thereby brought about rather than by consideration of rules which define and limit title of property (*Tyler* v. *United States*, 281 U. S., 497, 503), and to be measured (rather than determined) by the value of the property passing. (*Stratton* v. *United States*, 50 Fed. (2d), 48; 284 U. S., 651; *Lee* v. *Commissioner*, 57 Fed. (2d), 399; 286 U. S., 563; *Pennsylvania Co., etc.*, v. *Lederer*, 292 Fed., 629; *Hancy, Executor*, v. *Commissioner*, 17 B. T. A., 464.)

The decision by the orphans' court in *Potter's Estate* (13 District Reports (Pa.), 667) (concerning the same power) is not res judicata of this case. The parties were different; so also was the question. There the question was whether the daughters of William Potter took under the exercise of the power of appointment or under the will of the donor of the power. The court, merely declaring anew the old Pennsylvania rule, held that the will of the donor vested the remainder in the daughters subject to the right of the donee of the power to direct otherwise. The question of the right of the Federal Government to impose a tax on the exercise of the power was not submitted to the orphans' court. Had it been submitted, we gravely doubt that a court of its particular jurisdiction would have taken cognizance of such a Federal question. The joinder of the collector as a party was a mere gesture toward the tax question in the offing. It gave not even a Federal tinge to the decision and bound the Federal Government not at all.

The order of the Board of Tax Appeals is affirmed.

REGULATIONS 70, ARTICLE 25: Taxable insurance. XII-36-6389
Ct. D. 728

ESTATE TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF COURT.

1. GROSS ESTATE—PROCEEDS OF INSURANCE POLICIES.

The proceeds of insurance policies were, to an amount in excess of $40,000, properly included in the decedent's gross estate, even though the policies were issued before the enactment of any Federal estate tax law, where at the time of death the power to revoke and to change the beneficiary was reserved to the insured alone.

2. STATUTE OF LIMITATIONS—JURISDICTION OF BOARD—REDETERMINATION OF GREATER DEFICIENCY.

The Board of Tax Appeals has jurisdiction to determine a greater amount of deficiency than that determined by the Commissioner, where a claim therefor was asserted by the Commissioner before the hearing, even though, in the absence of an appeal to the Board, the collection of the additional tax would have been barred by the expiration of the period of limitation prescribed by section 1009(a) of the Revenue Act of 1924. By appeal to the Board the petitioner was brought within the provisions of section 308(e) of the Revenue Act of 1926, which gives the Board jurisdiction to redetermine the *correct* amount of the tax, the only condition prescribed therein being that claim therefor be asserted by the Commissioner at or before the hearing.

3. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (20 B. T. A., 731) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Helena Liebes, as Executrix of the Last Will and Testament of Isaac Liebes, Deceased, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Upon petition to review an order of the United States Board of Tax Appeals.

Before WILBUR and SAWTELLE, Circuit Judges, and CAVANAH, District Judge.

[March 6, 1933.]

OPINION.

SAWTELLE, Circuit Judge: This is a petition to review a decision of the United States Board of Tax Appeals, in which it was held that there was a deficiency of $4,373.50 in the Federal estate tax on the estate of Isaac Liebes, deceased.

Liebes died on May 29, 1920. The petitioner, as executrix of his estate, filed an estate tax return therefor on May 29, 1921. The amount of the tax originally assessed was $13,692.81, and this amount was paid. On March 13, 1925, the respondent assessed a deficiency of $9,907.99, and on the following day notified the petitioner to that effect, the notice being contained in a deficiency letter. In that letter the respondent stated that "an immediate jeopardy assessment would be made." On February 15, 1926, the petitioner executed a bond in which appeared the statement that she was about to file with the respondent her claim in abatement for the deficiency tax of $9,907.99.

The record does not disclose the actual date of the filing of the claim in abatement, but such claim was rejected wholly on June 7, 1927, and the petitioner was so notified. In the same letter of June 7, 1927, the petitioner was also informed that there was an additional deficiency of $4,141.34, which later was raised by the Board, at the request of the respondent, to $4,373.50. It is this latter amount that is the subject of the present controversy. On July 26, 1927, the petitioner asked for a redetermination of the deficiency, in a petition filed before the Board of Tax Appeals, and on November 25, 1927, she filed an amended petition. On October 15, 1930, the Board decided that there existed the deficiency referred to above.

At the hearing before the Board of Tax Appeals, by stipulation the following three issues were submitted to the Board for decision:

(a) The taxability of the community interest of the decedent's widow, Helena Liebes, in the estate of the decedent, said interest being one-half of the decedent's gross estate.

(b) The taxability of the insurance policies totaling $196,979.34, being the proceeds of insurance policies in excess of $40,000, mentioned in the 60-day letter from the Commissioner of Internal Revenue, dated June 7, 1927.

(c) Whether or not the assessment of any deficiency in tax in excess of the total tax heretofore assessed of $23,600.80 is barred by the statutes of limitations.

The Board decided the foregoing issues as follows:

(a) The community interest of decedent's widow is subject to a Federal estate tax.

(b) One life insurance policy of $50,000 is not subject to a Federal estate tax, and the balance of $146,979.34 of the proceeds of the policies is subject to such tax.

(c) The assessment of a deficiency in excess of the total tax is not barred by the statute of limitations.

The petitioner concedes that the community property question has been finally determined by the Supreme Court adversely to her contention; hence issue (a) is not urged on the petition for review. (See *United States* v. *Robbins*, 269 U. S., 315 [T. D. 3817, C. B. V–1, 188].)

Of the two remaining issues, we will first consider the one dealing with the statute of limitations.

As pointed out by the petitioner, an assessment made in this proceeding after the effective date of the Revenue Act of 1924—June 2, 1924—would have to be within the period limited by section 1009 of that Act. Section 1009 provides in part as follows:

"(a) Except as provided in sections 277, 278, 310, and 311, and subdivisions (b) and (c) of this section, all internal-revenue taxes shall, notwithstanding the provisions of section 3182 of the Revised Statutes or any other provision of law, be assessed within four years after such taxes became due, and no proceeding in court for the collection of such taxes shall be begun after the expiration of five years after such taxes became due."

Since section 305 of the same Act provides that the tax "shall be due and payable one year after the decedent's death," in the instant case, under ordinary circumstances, no assessment could have been made after May 29, 1925, and "no proceeding in court" for the collection of the tax could have been begun after May 29, 1926. Accordingly, the petitioner contends that "the assessment and collection of this additional deficiency of $4,373.50 is barred by the" statute of limitations.

The respondent, on the other hand, answers that the right of review by the Board of an assertion of liability by the respondent "exists only upon the conditions which the law attaches to its exercise, and when the petitioner appealed to the Board she did so in the light of section 308(e) of the Revenue Act of 1926." Section 308(e) reads as follows:

"The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the executor, and to determine whether any additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing."

Accordingly, the respondent argues that when the petitioner contested the Commissioner's determination of the extent of her liability by the same token the petitioner, under the above section, decided to hazard the finding of an obligation larger than that theretofore asserted, even though, in the absence of such appeal, the Government, by reason of the statute of limitations, might not have been able to enforce payment.

We believe that this contention is sound. As the respondent points out, "the petitioner did not open the door to herself alone." The language of section 308(e) is definite and sweeping. The Board is given "jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the executor."

There is only one condition laid down by the statute, to the exercise of this jurisdiction to redetermine an amount greater than that asked for in

the original deficiency notice. That condition is that the jurisdiction to make such redetermination can be exercised "if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing."

In the instant case this condition was met by the respondent, for he sent the deficiency letter to the petitioner on June 7, 1927, and the appeal to the Board was filed on July 26, 1927.

It is not within the province of the courts to add new provisos to the statute. As was said by Mr. Justice Brewer in the case of *United States* v. *Goldenberg* (168 U. S., 95, 103):

"No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense."

Here, as in the Goldenberg case, supra, the "omission," if any there were, "to make specific provision" for claims by the Commissioner when they are barred by the statute of limitations, "does not offend the moral sense." (See, also, *Crooks* v. *Harrelson*, 282 U. S., 55, 60 [Ct. D. 271, C. B. X–1, 469].)

Furthermore, the rights of the Government are never foreclosed except by statutory language clearly indicative of such purpose. In *United States* v. *Nashville, etc., Ry. Co.* (118 U. S., 120, 125) the court said:

"It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign Government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." (Many cases cited.)

In the instant case we believe that Congress has failed "clearly to manifest" that the statute of limitations shall bar the Government from collecting its revenue, in proceedings before the Board of Tax Appeals, whenever the Commissioner shall have made "claim therefor * * * at or before the hearing or a rehearing."

On the contrary, if there is room for any inference, we believe that the inference lies the other way, namely, that Congress intended that the Board should have the power to redetermine the *correct* amount of the tax, even if claim therefor was made by the Commissioner *after* the statute had run, but *before* the hearing or a rehearing.

We next address ourselves to the question of whether or not the insurance policies, totaling $146,979.34, were properly included by the Board as part of the decedent's taxable estate.

Nine insurance policies originally were involved in this case. In the Commissioner's prior audit these policies, totaling $196,989.31, all payable to beneficiaries other than the estate, were included as part of the taxable estate. (There is no point made of the discrepancy of $9.97 in the figure of the prior audit as compared with that first asserted before the Board.) In the deficiency letter of June 7, 1927, however, the Commissioner announced that an adjustment was made by excluding the policies from the taxable estate.

The first of these policies, dated January 1, 1896, issued by the Mutual Life Insurance Co. of New York, for $50,000, originally payable to the executors, administrators, or assigns, contained no provision respecting revocation or change of beneficiary, but by mutual consent, indorsed on the policy under date of January 31, 1908, the policy was changed to make the decedent's wife, her executors, administrators, or assigns, the beneficiaries. The policy later, on January 15, 1917, was assigned to Leon Liebes, a son. The Board of Tax Appeals held that the proceeds of that policy should not be included in the gross estate. The respondent concedes that "this point is not here in issue, since the Commissioner has not appealed."

The four policies in the second group, each for $25,000, were in the Equitable Life Assurance Society. Each was dated October 10, 1912. Each expressly reserved the right of revocation and the power to change the beneficiary. Such a change was made on January 17, 1917. This power to revoke and change rested solely in the insured, and was in no way dependent upon the consent of the beneficiary.

The four policies in the third group, each for $25,000, were in the Mutual Life Insurance Co. of New York. In the body of each policy was the provision that it was issued "without right to the insured to change the beneficiary."

Each of these policies, however, bears on the face the following stamped indorsement: "The beneficiary is changed to (beneficiary named). The right to revoke this designation of beneficiary is reserved to the insured." Under date of January 15, 1917, by the above form of indorsement the beneficiary was changed from Helena Liebes, the original beneficiary, to a son, Leon Liebes, as to two policies, and to a daughter, Lina Liebes Lederman, as to the other two. The policy as now before this court bears on its face the power of revocation in the insured, and such power continued from January 15, 1917, to the date of decedent's death. Each of the four policies in this group is dated February 8, 1915.

The reason that prompted the Commissioner to deduct the amount of the insurance policies—which was included in the original assessment—in his letter of deficiency of June 7, 1927, presumably is that the Commissioner felt bound by the case of *Lewellyn* v. *Frick* (268 U. S., 238 [T. D. 3715, C. B. IV–1, 322]) upon which the petitioner herein strongly relies. In that case Mr. Justice Holmes held that policies issued prior to the passage of the Revenue Act of 1918 were not subject to a Federal estate tax.

After the Frick case came the decision of *Chase National Bank* v. *United States* (278 U. S., 327 [Ct. D. 40, C. B. VIII–1, 308]). In that decision the only reference to the Frick case is to be found on page 333, where, after stating the questions certified, the court observed: "Similar questions were mooted by counsel, but not decided, in *Lewellyn* v. *Frick*."

It is somewhat significant that the court seemed to pass over the Frick case and to rely upon other cases, especially *Saltonstall* v. *Saltonstall* (276 U. S., 260, 271). See, also, *Coolidge* v. *Long* (282 U. S., 582, 598–599), in which the Saltonstall case is cited with approval as furnishing "a good illustration of incomplete succession"; and *Reinecke* v. *Northern Trust Co.* (278 U. S., 339 [T. D. 4261, C. B. VIII–1, 305]).

In the Chase National Bank case, supra, the court, at pages 336–337, said:

"But we think that the rule applied in *Saltonstall* v. *Saltonstall*, supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation of the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers."

In the case of *Burnet* v. *Guggenheim*, decided by the Supreme Court on February 6, 1933 [Ct. D. 636, C. B. XII–1, 374], the cases of *Chase National Bank*, supra, and *Saltonstall* v. *Saltonstall*, supra, are cited with apparent approval on the proposition that "Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid"; and that "There has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of Part I (of Title III of the Revenue Act of 1924), which deals with the estate tax." In the Guggenheim case, the court decided that deeds of trust made in 1917, with a reservation to the grantor of a power of revocation, became taxable as gifts under the Revenue Act of 1924, when, in 1925 there was a change of the deeds by a cancellation of the power.

In *Heiner* v. *Grandin* (C. C. A. 3) (44 F. (2d), 141 [Ct. D. 241, C. B. IX–2, 430]) there were involved two insurance policies, and the question was whether or not having been issued in 1894 and 1906, before the passage of the Revenue Act, they were taxable, under the principle laid down in *Lewellyn* v. *Frick*, supra. The court solved the problem in the following language:

"In the two policies in question, although issued before the Act was passed, the insured reserved the right to change the beneficiary, and so the transfers did not take place until Mr. Grandin's death. Accordingly they constituted a part of his gross estate and were taxable."

See the same case, on second appeal (56 F. (2d), 1082); certiorari denied (286 U. S., 561).

Both on reason and authority, we believe that the eight insurance policies in which the decedent reserved the power of revocation were part of his taxable estate at the time of his death.

Accordingly, the decision of the Board of Tax Appeals is affirmed.

Decision affirmed.

REGULATIONS 70(1929), ARTICLE 44: Transfers for public, charitable, religious, etc., uses. XII–39–6417 E. T. 3

A bequest made by a decedent to trustees with direction to deliver the bequest to a corporation to be organized for educational, charitable, or benevolent purposes is not deductible under section 303(a)3 of the Revenue Act of 1926.

An opinion has been requested as to the deductibility of a bequest for educational, charitable, or benevolent purposes in determining the value of a decedent's net estate.

A decedent by his will named certain trustees to receive a portion of the residue of his estate and deliver the same to a corporation to be organized by them, the object of the corporation being to establish and maintain an educational, charitable, or benevolent institution. The trustees caused to be incorporated a nonstock corporation for the exclusive purposes of conducting charitable, educational, and benevolent work. The question presented for decision is whether the bequest should be allowed as a deduction under section 303(a)3 of the Revenue Act of 1926, which permits the deduction of all bequests to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to any private stockholder or individual.

Testing this bequest under the laws and court decisions of New York, the decedent having been a resident thereof, the conclusion is justified that the bequest might be used for the purpose of establishing and maintaining a private or benevolent institution as distinguished from a public or charitable use. In *People* v. *Powers* (147 N. Y., 104, 41 N. E., 432) a bequest in trust for charitable and benevolent institutions in the city of Rochester, N. Y., was held valid as relating only to such institutions as are both charitable and benevolent. In the case of *In re Shattuck's Will* (193 N. Y., 444, 86 N. E., 455) a bequest to the testator's executors, in trust, to pay the income to such religious, educational, or eleemosynary institutions as his executor should deem advisable, was held void for ambiguity on the ground that while some religious and educational uses are charitable, others are not, and the unqualified term "educational institutions" does not necessarily import a public or charitable institution, but might include a private institution as well.

The case of *In re Cunningham's Will* (136 N. Y. S., 922) involved the validity of a bequest by a decedent to his executors and trustees to be by them applied in their best judgment to such "charitable and benevolent associations and institutions of learning for the general uses and purposes of such associations and institutions as my said executors may select and in such sums as they may deem proper." In holding this bequest valid the court stated that had the limitation been in the disjunctive to such charitable or benevolent institutions as his trustees selected, it would have been within the mischief noted and condemned in the Shattuck case. The Court of Appeals of New York (206 N. Y., 601, 100 N. E., 437), in approving the reasoning of the lower court held that the decedent's will should be considered as though it read "to such charitable associations and to

such benevolent associations and such institutions of learning as are charitable, as my executors may select."

In the instant case it will be noted that the limitation " educational, charitable, or benevolent " is in the disjunctive. The testator may have had in mind the establishment of a charitable institution or an educational institution, but in drafting his will he made it possible for the trustees to use the bequest for the purpose of establishing an institution from which earnings might be derived by stockholders or individuals. It is true that the certificate of incorporation provides that the funds which may be received by the corporation are to be devoted exclusively to charitable, educational, and benevolent work. It is well settled, however, that the determination of whether a gift is a valid charity depends upon the intention of the testator as expressed in the will, and, if it is not found there, the trustees by their own acts can not supply the deficiency.

It is held, therefore, that where a bequest is made by a decedent to trustees with direction to deliver the bequest to a corporation to be organized for educational, charitable, or benevolent purposes, the bequest is not deductible under section 303(a)3 of the Revenue Act of 1926.

REGULATIONS 70(1929), ARTICLE 55: Transfers for public, charitable, religious, etc., uses. XII-37-6399 E. T. 2

Where insurance is receivable by beneficiaries other than the estate and where some of the beneficiaries are charitable organizations, it is held that for the purpose of the charitable deduction to which the estate is entitled the $40,000 statutory exemption should be prorated among the beneficiaries, and the amount of the insurance receivable by such organizations should be reduced by their proportionate shares in the exemption.

Advice is requested relative to the charitable deduction from the gross estate of a decedent in respect of insurance payable to beneficiaries other than the estate, some of the beneficiaries being charitable organizations.

Section 303(a)3 of the Revenue Act of 1926 provides that the amount of the deduction allowable for a transfer of property to charitable organizations or for charitable purposes shall not exceed the value at which the property is included in the gross estate of the decedent. In the case of insurance receivable by beneficiaries other than the estate that value is the excess over the statutory exemption of $40,000. Where some of the beneficiaries are charitable organizations, it is the practice of the Bureau to reduce the charitable deduction by prorating the exemption among the beneficiaries.

A somewhat similar situation arose in the case of *Louise A. Gardner et al.* v. *Commissioner* (22 B. T. A., 1076). The question there under consideration was the deduction to be allowed for previously taxed property. It was contended by the estate that in determining the deduction with respect to life insurance previously taxed, the computation should be made without reference to the exemption of $40,000. In passing upon this issue the Board said:

This argument is clearly contrary to the statute, which specifically provides that the value of the gross estate shall be determined by including the value of all property to the extent of the amount receivable by the executors as

insurance under policies taken out by decedent on 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 decedent upon his own life. * * * We think that the amount of the proceeds of the insurance policies deductible in determining the decedent's taxable estate is correctly arrived at by the method of proration employed.

Although the Gardner case is not directly in point, the reasoning is applicable to cases arising under section 303(a)3 of the statute. It is accordingly held that for the purpose of the charitable deduction to which the estate is entitled the $40,000 statutory exemption should be prorated among the beneficiaries and the amount of the insurance receivable by such organizations should be reduced by their proportionate share in the exemption.

REGULATIONS 70(1929), ARTICLE 105: Remedies for collection of tax and claims against transferred assets. XII-43-6467 Ct. D. 746

ESTATE TAX—REVENUE ACTS OF 1921 AND 1926—DECISION OF COURT.

INJUNCTION—DISTRAINT—LIEN.

The procedure provided by section 316(a) of the Revenue Act of 1926 is not the sole remedy for the collection of a deficiency in tax, where an estate has been distributed before the determination of the deficiency, and as the collector has the right to proceed by way of distraint to enforce the lien which is impressed upon the estate, for the full amount of the tax, at the date of the decedent's death, a suit in equity to enjoin the collector is improper. Section 409 of the Revenue Act of 1921 may not be interpreted to mean that no lien attaches where a tax was returned and paid in full within one year of decedent's death.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Edgar D. Rosenberg, Helen Rosenberg Kahn, and Claude N. Rosenberg, appellants, v. *John P. McLaughlin, Collector of Internal Revenue for the First District of California, appellee.*

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

[June 19, 1933.]

OPINION.

KERRIGAN, District Judge: Appellants have sought by a bill in equity to enjoin the sale of an undivided interest in certain real property under distraint proceedings to collect a deficiency in Federal estate tax. This interest was part of the estate of Isidore Rosenberg, deceased, the father of appellants, who will be hereafter referred to as the testator. The appeal is from the order granting the collector's motion to dismiss the bill of complaint. The appellee concedes that if the collector has no right to proceed by distraint to collect the deficiency in question, appellants are entitled to injunctive relief. The issues are narrowed and the only questions involved relate to the right of the Bureau of Internal Revenue to proceed by way of distraint under the state of facts alleged in the bill of complaint.

The testator died May 23, 1923, while the Revenue Act of 1921 was in force. Less than a year after his death his widow, who was the executrix of his estate, filed an estate tax return showing a tax due of $7,791.04 and paid the tax on the same day. Afterwards, and prior to the distribution of the estate, the executrix filed a claim for refund. While the claim for refund was pending, the estate was distributed. Shortly thereafter the executrix died. When

it became apparent that a refund would be allowed, one of the appellants was appointed administrator with the will annexed of the testator's estate. A refund in the sum of $4,787.60 was paid to the administrator June 5, 1925, and distributed to the heirs. Subsequent to the effective date of the Revenue Act of 1926, the Commissioner determined a deficiency in tax against the estate in the sum of $7,839.07, being $3,501.47 more than the refund and mailed to the administrator the notice required by section 308(a) of the Revenue Act of 1926. (26 U. S. C. A., section 1101.) The administrator appealed to the Board of Tax Appeals and the Commissioner's determination of the deficiency was upheld on February 27, 1929. (*Appeal of Rosenberg*, 14 Board of Tax Appeals, 1340.) The Commissioner on July 27, 1929, assessed the additional estate tax in the full amount of the deficiency, notwithstanding the payment of the $3,501.47 by the administrator previous to the assessment. Thereafter the appellee mailed notice of distraint to the administrator for the unpaid balance of the deficiency.

Appellants are the children of the testator and his widow and are the sole heirs and distributees of the testator's estate either in their own right or as distributees of their mother's estate.

Appellants contend, first, that the only method by which the deficiency may be collected is by transferee proceedings under section 316(a) of the Revenue Act of 1926 (26 U. S. C. A., section 1119(a)), and second, if the Government is not restricted to that remedy, that there is no existing lien upon the property for the deficiency. The appellee contends that the transferee proceedings are an additional and alternative remedy for the collection of the tax and that there is a valid and subsisting lien on the property enforceable by distraint.

The collector was not restricted to the transferee proceedings provided by section 316(a) of the Revenue Act of 1926 to collect a deficiency in tax against an estate which had been distributed before the determination of the deficiency, and might follow any other valid procedure for collection. The use of the word *shall*, upon which great stress is laid by appellants, is not mandatory and does not confine the collector to a single method of procedure. A similar question of statutory interpretation was before this court in regard to section 280(a) of the same Act (26 U. S. C. A., section 1069(a)), which provides for transferee proceedings to collect income taxes. In the case of *Leighton* v. *United States* (61 Fed. (2d), 530, affirmed by the Supreme Court on May 29, 1933 [Ct. D. 684, C. B. XII–1, 305]), it was contended that the collector was precluded from proceeding to collect the tax by suit in equity to impress the property in the hands of transferees with a trust by the new section, and could only enforce collection by means of transferee proceedings. In that case there was a deficiency in income tax determined against a corporation after its property had been distributed to its stockholders. Section 280(a) is word for word the same as section 316(a) except in so far as one deals with income tax and the other deals with estate tax. The word *shall* is used in exactly the same context in both statutes. It was held in that case that the use of *shall* did not make the procedure mandatory, and that the remedy was not exclusive but cumulative on the authority of *Phillips* v. *Commissioner* (283 U. S., 589 [Ct. D. 350, C. B. X–1, 264], and *United States* v. *Updike* (281 U. S., 489 [Ct. D. 192, C. B. IX–1, 228]). Two quotations from the case of *Phillips* v. *Commissioner*, supra, may well be repeated here. "This remedy is in addition to proceedings to enforce the tax lien or actions at law or in equity." Further in the opinion it is said "The power of Congress to provide an additional remedy for the enforcement of existing liabilities is clear." There is no valid reason for distinguishing between the two statutes and the decision in the Leighton case is conclusive upon this point.

The only remaining question is: Is there a valid and subsisting lien upon the property enforceable by distraint? It is conceded that if such a lien attached to the property it arose under section 409 of the Revenue Act of 1921 which provided:

"That unless the tax is sooner paid in full, it shall be a lien for 10 years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien * * *."

It is argued by the appellants that the clause "unless the tax is sooner paid in full" refers to the due date of the tax as provided in section 407 of the same Act, which is one year from the date of the decedent's death; and that no lien

arises until such due date. Appellants further argue that the tax in the instant case having been returned, and the amount returned having been paid in full prior to such due date, no tax lien ever attached to the property. These contentions are not in accord with the law.

The language used in *Page* v. *Skinner* ((C. C. A. 8), 298 Fed., 731 [T. D. 3600, C. B. III–1, 485]), though assailed as merely dicta, correctly states the law as to when the property is impressed with the tax lien.

"The imposition took effect at the time of death and the tax became at once a lien on the property of the estate, enforceable by sale, if not paid, on proceedings in court (*New York Trust Co.* v. *Eisner*, 256 U. S., 345)."

One test of the *accrual* of a tax so that the tax is saved from the effect of repealing statutes has been whether or not a lien for the tax attached to the property before the repeal and it has been held in a line of inheritance taxes commencing with *Hertz* v. *Woodman* (218 U. S., 205) that the tax accrued or was imposed at the decedent's death and the estate of the decedent was impressed with a lien at the same time. (*United States* v. *Ayer* (C. C. A. 1), 12 Fed. (2d), 194; *Crooks* v. *Loose* (C. C. A. 8), 36 Fed. (2d), 571 [Ct. D. 147, C. B. IX–1, 372]; *O'Brien* v. *Sturgess*, 39 Fed. (2d), 950, affirmed (C. C. A. 3), 45 Fed. (2d), 1017 [Ct. D. 165, C. B. IX–1, 367]; *Ewbank* v. *United States*, 37 Fed. (2d), 383, affirmed (C. C. A. 7), 50 Fed. (2d), 409; *United States* v. *Cruikshank et al.*, 48 Fed. (2d), 352 [Ct. D. 332, C. B. X–1, 464].) The thing that is taxed is the transfer of the decedent's estate upon his death. The full amount of the tax is fixed as a liability at that time as provided by the statutes then in force and the gross estate of the decedent is impressed with a lien for the full amount of the tax. In the light of these principles, it is clear that the clause of said section 409, "unless the tax is sooner paid in full," refers to the termination of the lien by payment in full during the 10-year period—not to the imposition of the lien on the due date of the tax.

Reliance is placed upon the language used in *United States* v. *Woodward* (256 U. S., 632 [T. D. 3195, C. B. 4, 153]), to the effect that an estate tax accrues one year after the death if so provided by statute, and appellants argue therefrom that there is neither liability nor lien for the tax prior to accrual. This case was not one concerned with the incidence of the tax. It considered the term *accrual* from the standpoint of permissible deduction under an income tax provision. The effect of the decision in the Woodward case was limited to a narrow and different proposition in the case of *United States* v. *Mitchell* (271 U. S., 9).

Applying these principles to the instant case it follows that a lien for the full amount of the estate tax was impressed upon the gross estate of Isidore Rosenberg at the date of his death. Since the correct amount of the tax has never been paid in full, there is a present lien upon the property for the unpaid portion of the tax. The fact that the deficiency determined included the amount of the refund does not affect our conclusions. In the case of *Levy* v. *Commissioner* (48 Fed. (2d), 725) in this circuit it was held that the amount of a refund might properly be included in the determination of a deficiency. We are not confronted with the same situation as in the case of *Kelley* v. *United States* (30 Fed. (2d), 193 (C. C. A. 9)), where there was no deficiency determined and the only amount claimed was that of the refund. The payment of the difference between the amount of the deficiency and that of the refund after the determination of the deficiency does not affect the existence of the tax lien.

The collector has the right to enforce the lien by distraint and sale as provided in sections 3187 and 3188 of the Revised Statutes. Although these sections apply to the enforcement of general liens created under Revised Statutes, section 3186, they also apply to the enforcement of special liens created by other statutes. (*Blacklock* v. *United States*, 208 U. S., 75.) A tax lien on property may be enforced by seizure and sale under a warrant of distraint where, at the time the lien attached, the property belonged to the person liable to pay the tax. (*Hartman* v. *Bean*, 99 U. S., 393; *Mansfield* v. *Excelsior Refining Co.*, 133 U. S., 326; *Blacklock* v. *United States*, supra.) For estate tax purposes the executor or administrator is the person liable to pay the tax. Since the estate tax lien attaches immediately upon the death of a decedent, the property at that time may be regarded as belonging to the taxpayer, that is, the administrator or executor. Property which constituted the decedent's estate and passed into the hands of the executor or administrator was impressed with the lien and is subject to seizure and sale.

Judgment affirmed.

REGULATIONS 70, ARTICLE 308(e): Jurisdiction of Board. XII-38-6410 Ct. D. 734

ESTATE TAX—REVENUE ACTS OF 1924 AND 1926—DECISION OF COURT.

1. JURISDICTION OF BOARD—REDETERMINATION OF GREATER DEFICIENCY—ASSESSMENT UNDER PRIOR REVENUE ACTS.

The Board of Tax Appeals has jurisdiction and power, under section 308(e) of the Revenue Act of 1926, to determine a greater amount of deficiency in estate tax than the amount of which the executors had been notified, where before the hearing the Commissioner asserted a claim for additional tax, even though certain life insurance policies, upon which the claim was based, were mentioned for the first time in the amended answer submitted more than three years after the estate tax return was filed. The fact that the tax liability arose under the Revenue Act of 1924 does not render inapplicable the provisions of the above section, since section 1200(b) of the 1926 Act provides that the Revenue Act of 1924 shall remain in force for the assessment and collection of all taxes imposed by that Act, and section 318(a) provides that if after the enactment of that Act the Commissioner shall determine that an assessment of estate tax should be made under any of the prior Acts, the amount shall be computed under the applicable Act but assessed and collected in accordance with the 1926 Act.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (18 B. T. A., 1121) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Louis M. Weiller, Irwin R. Heilbroner, Herbert H. Maass and Helen W. Heilbroner, as Executors and Trustees under the Last Will and Testament of Louis Heilbroner, Deceased, petitioners, v. *Commissioner of Internal Revenue, respondent.*

Appeal from the United States Board of Tax Appeals.

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

[April 17, 1933.]

OPINION.

Petition by Louis M. Weiller and others, as executors and trustees under the will of Louis Heilbroner, deceased, for a review of a decision of the United States Board of Tax Appeals, fixing a deficiency in their Federal estate tax in the sum of $5,381.96, and also of an order denying their motion to reopen the proceedings before the Board for the purpose of introducing further evidence. Decision of the Board of Tax Appeals affirmed.

AUGUSTUS N. HAND, Circuit Judge: Louis Heilbroner died June 26, 1924, leaving a will of which the petitioners became executors. On June 24, 1925, they filed their return for the Federal estate tax. On July 3, 1926, the Commissioner of Internal Revenue sent to these executors a "deficiency notice" fixing a deficiency in their tax at $20,178.84. This deficiency was based upon the failure of the executors to include in their tax return certain life insurance policies of the decedent payable to beneficiaries other than the estate. They appealed from the assessment of deficiency to the United States Board of Tax Appeals by petition filed August 31, 1926. On September 12, 1928, and more than three years after the filing of the Federal estate tax return, the Commissioner filed an amended answer to the petition before the Board in which he alleged that three life insurance policies of the face value of $98,000 should have been included in decedent's gross estate and that the deficiency should be increased accordingly. These policies were in addition to those which had formed the basis for the deficiency determined by the Commissioner and were

not included in the amount stated as the gross estate in his deficiency letter to the taxpayer or in their return.

The Board of Tax Appeals held (1) that the three insurance policies should be included in the gross estate and (2) that the claim for an additional tax had been properly asserted.

The original deficiency assessed by the Commissioner was paid by the taxpayers prior to the entry of the order upon the decision of the Board and is no longer in question. That order, based on the inclusion of the three insurance policies in the gross estate of the decedent, fixed a further deficiency of $5,381.96, and is the basis of the present appeal.

The question presented to us is whether the Board of Tax Appeals could properly increase the deficiency assessed by the Commissioner by a claim for an additional tax, based wholly upon the three insurance policies, when they were mentioned for the first time in the Commissioner's amended answer to the taxpayers' petition to review the assessment before the Board.

The taxpayers contend that the Board was without jurisdiction to include the three insurance policies in the gross estate, and thus to increase the final tax deficiency, for the reason that those items were not included in the property on which the Commissioner's assessment was based or in the deficiency notice of July 3, 1926, mailed to the taxpayers. This contention is negatived by section 308(e) of the Revenue Act of 1926 which regulates the procedure before the Board of Tax Appeals during the pendency of the review of the Commissioner's deficiency assessment by the taxpayer. It reads as follows:

"The Board shall have jurisdiction to redetermine the correct amount of the deficiency, even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the executor, and to determine whether any additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing."

But the taxpayers insist that the foregoing subdivision only authorizes the Board to redetermine and increase deficiencies in tax returns made under the Act of 1926 and does not cover returns like the present made under the Act of 1924 or deficiencies arising out of a tax liability under that Act. They say section 308(a) of the Act of 1926, providing for an appeal to the Board after a determination and notice of deficiency, only relates to notices in respect to taxes imposed by the latter Act because section 307 of the Act of 1926 defines deficiency thus:

"As used in this title in respect of a tax *imposed by this title* the term 'deficiency' means—

"(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the executor upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, refunded, or otherwise repaid in respect of such tax."

We can see no ground for supposing that this definition of deficiencies limits deficiencies to those under the Act of 1926. Section 1200(b) of the Act of 1926 provides that the Revenue Act of 1924 shall remain in force for the "assessment and collection of all taxes imposed by such Act." We think that the introductory words of section 307 of the Act of 1926 were intended to limit the scope of the particular definition in that section to taxes imposed by that Act but not to affect deficiencies under prior Acts. Section 318(a) and 318(e) of the Act of 1926 deals with deficiencies under prior Acts and 318(a) provides that if, after February 26, 1926, the Commissioner should determine that an assessment of an estate tax should be made under any of the prior Acts, the amount should be computed under the Act applicable but assessed and collected under the Act of 1926. How, after these provisions, it can be said that section 308(a) deprives the Board of authority to increase deficiencies arising under the Act of 1924 passes our comprehension. If such a contention were sound, and the Act of 1926 does not apply to the case at bar because it does not relate to deficiencies under the Act of 1924, there was no right to appeal to this court, for the right of such an appeal was first given in the Act of 1926.

Similar provisions empowering the Board of Tax Appeals to review deficiencies in income taxes assessed by the Commissioner appear in the Act of 1926. They also give the Board jurisdiction to redetermine the correct amount of the deficiency "even if the amount so redetermined is greater than the amount

notice of which has been mailed to the taxpayer." See section 274(e). There are provisions in section 283(a) dealing with deficiencies in income taxes under prior Acts which exactly resemble those of section 318(a) relating to estate taxes.

Our decision in *Davison* v. *Commissioner* (60 Fed. (2d), 51) construed section 274(e) of the Act of 1926 and was to the effect that the Board of Tax Appeals could assess a deficiency in income taxes greater than that determined by the Commissioner under circumstances much like the present. We there said:

"The petitioner challenges the jurisdiction of the Board to assess a deficiency greater than the deficiency set out in the 1925 notice because he asserts that the statute of limitations had run before the Commissioner's amended answer was filed. This contention is without merit. Section 274(e) of the Revenue Act of 1926 * * * permits the Board to redetermine the correct amount of the deficiency, even if it be greater than the amount stated in the Commissioner's notice to the taxpayer, 'if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.' (*Cement Gun Co.* v. *Commissioner*, 38 Fed. (2d), 107.) The provisions of section 277(b), Revenue Act 1926, * * * and section 274(a) of the Act * * * cause the running of the statute of limitations to be suspended while proceedings are pending before the Board."

The decision in *Cement Gun Co.* v. *Commissioner* (36 Fed. (2d), 107) is in accord with *Davison* v. *Commissioner*, supra, as to law and facts.

The only difference between the two decisions last mentioned and the case at bar is that here new property upon which an additional deficiency has been found was first introduced in the answer of the Commissioner before the Board of Tax Appeals and had never been considered by the Commissioner or included in his deficiency notice. The taxpayers' theory seems to be that a deficiency can only be increased by the Board when it concludes that the Commissioner adopted a wrong rule of law in dealing with the facts shown by the return, or where the particular credits or debits upon which the Commissioner had based his determination of the deficiency were valued improperly. But we see no reason for supposing that section 308(a) is so limited and we hold that it enables the Board of Tax Appeals to make a full audit and do complete justice between the parties whenever the taxpayer seeks to review the assessment and the Commissioner asserts a claim that an additional amount should be assessed. It seems clear from the foregoing that the Board proceeded properly and rightly determined an additional deficiency. It can make no difference that in arriving at this determination it dealt with matters extraneous to the original assessment.

The running of the statute of limitations was suspended while proceedings were pending before the Board of Tax Appeals by section 310 of the Act of 1926.

We understand that the appeal from the order denying a motion for a rehearing is no longer pressed. But in any event the disposition of the application for a rehearing was a matter resting in the sound discretion of the Board. (*Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S., 308.)

The orders of the Board of Tax Appeals are affirmed.

TITLE III. PART I.—ESTATE TAX. (1924)

REGULATIONS 68, ARTICLE 10: Character of interests included. XII-38-6411 Ct. D. 735

ESTATE TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. GROSS ESTATE—CONSTITUTIONALITY OF STATUTE.

Section 302(a) of the Revenue Act of 1924 is not violative of Article I, section 8, of the Constitution, which provides that all duties, imposts and excises shall be uniform throughout the United States. Differences of State law which may bring a person within or without the category designated by Congress as taxable may not be read into the Federal law to spell out a lack of uniformity.

2. GROSS ESTATE—REAL ESTATE LOCATED IN ILLINOIS.

The value of the interest of a decedent at the time of his death in real estate located in Illinois should be included in determining the value of his gross estate under section 302(a) of the Revenue Act of 1924.

3. SUIT—CLAIM FOR REFUND—AMENDMENT.

Where a claim for refund and a petition allege the wrongful inclusion of two specified parcels of real estate in the decedent's gross estate as not belonging to the decedent, such description may be enlarged, to include a third parcel in the same situation, in an amended petition filed with the court, if such petition is filed within the time within which the claim for refund might have been amended.

4. DECISION AFFIRMED.

The decision of the district court (60 Fed. (2d), 1063, Ct. D. 599, C. B. XI-2, 429) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Nos. 4872–4875.

The Continental Illinois Bank & Trust Co., Executor of the Estate of Victor F. Lawson, Deceased, appellant, v. *United States of America, appellee.*

United States of America, appellant, v. *The Continental Illinois Bank & Trust Co., Executor of the Estate of Victor F. Lawson, Deceased, appellee.*

The Northern Trust Co., a Corporation, and Edward Herbert Bennett, Executors of the Estate of Catherine Bennett, Deceased, appellant, v. *United States of America, appellee.*

William D. Dean, Administrator with the Will Annexed of the Estate of Robert J. Bassett, Deceased, appellant, v. *United States of America, appellee.*

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

[May 26, 1933.]

OPINION.

Causes numbered 4872, 4874, and 4875 were brought under section 1025(c) (ch. 234 of the Act of 1924 (43 Stat., 348), as amended February 24, 1925 (ch. 309, 43 Stat., 972, 28 U. S. C. A., section 41(20)). They were suits to recover certain estate taxes paid by the representatives of the several estates referred to, which taxes were assessed and collected under and by virtue of the Revenue Act of 1924 (ch. 234, section 301(a), and 302 (a) and (b)).[1] Cause No. 4873 is the cross appeal of the Government from the judgment rendered in cause No. 4872, and the Government is hereinafter referred to as cross-appellant as distinguished from the other appellants. The causes were heard at the same time and were submitted to the court without a jury. The estates involved are hereinafter referred to respectively as the Lawson, Bennett, and Bassett estates.

Victor F. Lawson died testate in Cook County, Ill., August 19, 1925. The return for the estate tax was filed on August 19, 1926, and showed real estate

[1] Revenue Act of 1924 (ch. 234, 43 Stat., 253):

"SEC. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States: * * *.

"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—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy."

in Illinois valued at $778,542.68, real estate in Wisconsin valued at $484,500, and other property which with the real estate made a gross estate valued at $21,559,940.78. Deductions for costs, charitable bequests, and other charges amounted to $15,397,133.12, leaving a net estate of $6,162,807.66. On this a tax of $655,546.15 was paid on August 19, 1926, and on January 30, 1928, an alleged deficiency was paid in the sum of $18,612.55, which included the sum of $1,514.50 as interest. The executor of the estate filed suit to recover the taxes so paid, basing his claim for refund on the following grounds:

1. As to the entire amount, the unconstitutionality of the Revenue Act of 1924.

2. As to the real estate located in Illinois and Wisconsin, the fact that in those States real estate of a decedent is not necessarily subject to payment of charges against his estate and the expenses of administration.

3. As to the sum of $7,162.65 and interest from the time of payment of that amount, the fact that it was paid on certain property which was held to belong to Iver Norman Lawson rather than to the decedent in the case of *Lawson* v. *Illinois Merchants' Trust Co.* (337 Ill., 49).

The court found and adjudged against the executor of the Lawson estate on its first and second contentions, and rendered judgment for it on its third contention in the sum of $9,165.19 and from that judgment both parties have appealed.

In the Bennett and Bassett estates each decedent was a resident of Illinois and died testate in the respective years, 1925 and 1926. Each owned real estate in Illinois at the time of death, and each left more than sufficient personal property to pay all debts and costs of administration. Returns were made for the purpose of determining the estate tax, and in each case, the Government included the value of the real estate in the gross estate, and the tax thus calculated was paid by the representatives of the respective estates. The suits to recover were based upon the first two grounds as set forth in the Lawson petition, and the court rendered judgment against the claimants.

SPARKS, Circuit Judge: It is first contended by appellants that section 302(a) of the Revenue Act of 1924, supra, is violative of Article I, section 8, of the Constitution of the United States,[2] which provides that all duties, imposts and excises shall be uniform throughout the United States. It is admitted that such required uniformity is geographical and not intrinsic. It is not contended by appellants that the alleged lack of geographical uniformity appears upon the face of the statute. They argue, however, that it arises by virtue of a decision of the United States Supreme Court in *Crooks* v. *Harrelson* (282 U. S., 55 [Ct. D. 271, C. B. X–1, 469]), which held that a decedent's real estate under the laws of Missouri was not subject to the payment of expenses of administration and for that reason could not be included in the gross estate of a resident of that State for the purpose of computing estate taxes. Hence appellants insist that the taxes laid under the section referred to are not geographically uniform because the enactment does not include a decedent's real estate in Missouri.

With this contention we are not in accord. In *Poe* v. *Seaborn* (282 U. S., 101 [Ct. D. 259, C. B. IX–2, 202]) the court said, at page 117, "* * * differences of State law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity."

In *Knowlton* v. *Moore* (178 U. S., 41) the subject of geographical uniformity was quite exhaustively treated, and Mr. Justice White there speaking for the court used the following language, at page 106:

"Though there is a provision that all duties, imposts and excises shall be uniform—*that is, to be laid to the same amount on the same articles in each State*—yet this will not prevent Congress from having it in their power to cause them to fall very unequally and much heavier on some States than on others, because these duties may be laid on articles but little or not at all used in some other States, and of absolute necessity for the use and consumption in others; in which case, the first would pay little or no part of the revenue arising therefrom, while the whole or nearly the whole of it would be paid by the last, * * *."

[2] "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

In *Patton* v. *Brady, Ex.* (184 U. S., 608) the tax assessed was an excise on tobacco which was held valid. The court quoted with approval the following language from the *Head Money Cases* (112 U. S., 580), "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found."

In *Florida* v. *Mellon* (273 U. S., 12) it was contended that because the State of Florida did not impose an inheritance tax, the Federal estate tax Act was unconstitutional in that it allowed as a credit against the Federal estate tax the inheritance taxes paid to the States, and that resident decedents of Florida were thus treated differently from decedents who were residents of other States which had inheritance tax laws. The court held the Act valid, saying,

"The contention that the Federal tax is not uniform because other States impose inheritance taxes while Florida does not, is without merit. Congress can not accommodate its legislation to the conflicting or dissimilar laws of the several States nor control the diverse conditions to be found in the various States which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (Article I, section 8, clause 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States."

In *Phillips* v. *Commissioner* (283 U. S., 589 [Ct. D. 350, C. B. X–1, 264] the court said:

"The extent and incidence of Federal taxes not infrequently are affected by differences in State laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power of the requirement of geographical uniformity. (Citing *Florida* v. *Mellon*, supra; *Crooks* v. *Harrelson*, supra; *Poe* v. *Seaborn*, supra; and comparing *Head Money Cases*, supra, and *Clark Distilling Co.* v. *Western Maryland Ry. Co.* (242 U. S. 311).)

If, when the Federal estate tax Act was enacted, the laws of every State had provided that all property of each decedent, real or personal, should be subject to the payment of the charges against his estate and the expenses of administration and also be subject to distribution as part of his estate, the question of geographical uniformity would not have arisen. But if the contention of appellants were sound, then the subsequent enactment of any State to the effect that resident decedents' real estate should not be subject to the charges, or expenses of administration, or to distribution, as provided in the Federal Act, would render the Federal Act unconstitutional for lack of geographical uniformity. In other words, an admittedly constitutional Federal enactment would be rendered unconstitutional by a subsequent State enactment. The time of such State enactment is not of importance, and the cases cited do not support appellants' contention.

Appellants recognize the principle that without offense to the Constitution, an excise may be based directly upon and related directly to State laws where those laws are of the essence of the thing taxed. (*See Flint* v. *Stone Tracy Co.*, 220 U. S., 107.) They contend, however, that the classification in the Federal statute is not of the essence of the thing taxed. In this we think they are in error. The thing taxed is the transfer of the certain net estates. The limitation is to the extent of the interest of the decedent in such estates which is subject to the payment of charges against his estate and the expenses of its administration, and which is subject to distribution as part of his estate. The basis of the classification is the relation of the property to the estate, and it is of the essence of the thing taxed.

It is contended by appellants that the trial court erred in holding that real estate in Illinois was properly included in the gross estate. This question was decided by this court adversely to their contention, March 10, 1933, in *Estate of Edward M. Marble et al.* v. *Commissioner of Internal Revenue.*

Cross-appellant contends that the trial court erred in permitting the Lawson estate to amend its petition, and in rendering judgment thereon for that estate in the sum of $9,165.19. It is disclosed by the record that the third ground of recovery was based on the alleged fact that there was included in the gross estate of Victor F. Lawson certain real estate which belonged to Iver Norman Lawson. Appellant had in its claim for refund attacked the validity of the entire assessment, and under one paragraph of the claim had asserted as a basis for such invalidity that the Commissioner had wrongfully included "certain real estate and personal property" which belonged to Iver Norman Lawson. In the specific description of such property in the claim,

however, only two tracts of real estate were described. By the order allowing the filing of the amended petition, within the period within which appellant might have filed an amended claim for refund, appellant was permitted to enlarge the description by including a third parcel. It is cross-appellant's contention now that no recovery can be had as to such third parcel in view of the fact that its specific description was omitted from the claim for refund. We consider the principles laid down in *United States* v. *Memphis Cotton Oil Co.* (288 U. S., 62) as determining this question adversely to such contention.

Judgment affirmed.

REGULATIONS 68, ARTICLE 14: Dower and curtesy. XII-28-6287 Ct. D. 701

ESTATE TAX—REVENUE ACT OF 1924—DECISION OF COURT.

GROSS ESTATE—STATUTORY INTEREST IN LIEU OF DOWER.

A widow's statutory one-half interest in real estate in lieu of dower was properly included in the decedent's gross estate, under the provisions of section 302(b) of the Revenue Act of 1924, where she had elected to take under the will in lieu of dower under Missouri statutes which allow her either that election, one-half the real and personal property if the husband die without children, or a child's part in lieu of dower if there be children living. Decedent having died without children, the election of the child's share was not available to the widow, and her election to take the entire estate under the will could not be availed of to defeat the tax.

UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

Nellie D. Scott, Executrix of the Estate of Edward J. Scott, plaintiff, v. *Louis J. Becker, Collector of Internal Revenue, First District of Missouri, defendant.*

[March 9, 1933.]

OPINION.

DAVIS, D. J.: The facts in this case have been stipulated by the parties. The question to be answered by the court has been agreed upon by counsel and is stated in the briefs. The problem presented arises out of an effort to determine the extent to which the real estate of Edward J. Scott, deceased, is subject to assessment for inheritance tax purposes.

Section 302 of the Revenue Act of 1924 provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

"(a) * * * (b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy."

What was the extent of the interest of Nellie D. Scott in the real estate of her husband existing at the time of his death?

1. She had a dower interest of one-third, under the following section of the Revised Statutes 1929:

"SEC. 318. *Dower in real estate.*—Every widow shall be endowed of the third part of all the lands whereof her husband * * * was seized of an estate of inheritance * * * to hold and enjoy during her natural life."

2. She had one-half of his real estate subject to his debts, if she elected to take it under the following statute:

"SEC. 325. *Husband dying without children, widow, how endowed.*—When the husband shall die without any child, or other descendants in being, capable

of inheriting, his widow shall be entitled: * * *, second, to one-half of the real and personal estate belonging to the husband at the time of his death, absolutely, subject to the payment of the husband's debts."

The widow elects whether to take under this statute or dower under section 318. This election is expressly authorized by section 327. When the election to take under section 325 is made, it is in lieu of dower. *Klocke* v. *Klocke* (276 Mo., 572) construes this statute and holds that section 325 provides an estate that is a "substitute" for dower. Both estates can not be taken; consequently this statute does not create an estate in addition to dower. A substitute for dower and in lieu of dower, mean the same thing.

We know of no reason why the defendant should not rely upon this section. It may be that it has done so. But if it has so relied, confusion has been injected into the case by the constant reference to a "child's part," as though reliance were being placed upon section 328 of the Missouri statute.

3. She had the right to take under the will in lieu of dower, and this is what she did. The statute is:

"SEC. 332. *Land passing by will held in lieu of dower.*—If any testator shall, by will, pass any real estate to his wife, such devise shall be in lieu of dower out of the real estate of her husband whereof he died seized * * * unless the testator by his will, otherwise declared."

We now state the question which the parties agree must be answered by the court, and which constitutes the sole issue in this case:

"Is the widow's child's share interest in the Missouri real estate owned by her husband on the date of his death properly included in the decedent's gross estate for the purpose of determining the net taxable estate, or should only the value of the widow's dower interest in such property have been included in the gross estate?"

Reference must here be again taken of the Missouri statute relating to when a widow may take a child's share of her deceased husband's estate.

Section 324 R. S., 1919, amended Laws 1921, page 119 (now, as again amended 1927, section 328 R. S., 1929), effective at the time of the death of the deceased, provided:

"*Child's part, when taken in lieu of dower.*—When the husband shall die, leaving a child or children or other descendants, the widow may, in lieu of dower of the one-third part of all lands whereof her husband died or shall die seized of an estate of inheritance, to hold and enjoy during her natural life, elect to be endowed absolutely in a share of such lands equal to a share of a child of such deceased husband. The provisions of this section shall be subject to the payment of her husband's debts."

This estate was available to the widow, when and only when, "the husband shall die, leaving a child or children." Edward J. Scott left no child. Consequently, the estate created by this section, that is a child's part, was never available to his widow. The widow had or acquired no such an interest in the estate at the time of the death, and she could not by any sort of an election have acquired such an interest.

This conclusion is not out of accord with *United States* v. *Waite* (C. C. A. 8) (33 F. (2d), 567 [Ct. D. 79, C. B. VIII–2, 395]), because there the deceased left a widow and two children, and the right of the widow to take a child's share existed. In *Crooks* v. *Loose* (C. C. A. 8) (36 F. (2d), 571 [Ct. D. 147, C. B. IX–1, 372]), it was not the "child's share" statute that was under consideration.

Consequently, we hold that under the circumstances here present the widow's child's share interest in the real estate of the deceased as provided by section 328 was not properly included in the decedent's gross estate for the purpose of fixing the net taxable estate. The widow's dower interest in such property as provided by section 318, or the one-half interest in lieu of dower as provided by section 325, could properly be included in value of the taxable interest in the estate. The defendant was justified in availing itself of the latter item. There can be no reason why it should be required to elect to accept the basis least advantageous to itself. Particularly where as here, the widow elected to take the entire estate under the will. Such a decision on her part could not possibly defeat the tax.

Accordingly, counsel may draft the judgment.

REGULATIONS 68, ARTICLE 25: Taxable insurance. XII-36-6390
Ct. D. 729

ESTATE TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. DEDUCTIONS—PREVIOUSLY TAXED PROPERTY.

Where the interval between the deaths of two decedents was more than five years, but distribution to the present decedent of corporate stock received by inheritance from the prior decedent occurred within five years prior to his death, the value of the stock may not be deducted in determining the net estate of the present decedent, under the provisions of section 303(a)2(A) of the Revenue Act of 1924.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (23 B. T. A., 370) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Second National Bank & Trust Co. and George L. Humphrey, Executors and Trustees of the Estate of Arthur D. Eddy, Deceased, petitioners, v. *Commissioner of Internal Revenue, respondent.*

Petition to review an order of the United States Board of Tax Appeals.

Before MOORMAN, HICKENLOOPER, and SIMONS, Circuit Judges.

[March 14, 1933.]

OPINION.

MOORMAN, Circuit Judge: Walter S. Eddy died intestate August 4, 1918, and an estate tax was paid on his estate. An order of distribution was made on June 8, 1920, and Arthur D. Eddy received by inheritance 4,687½ shares of stock from his deceased brother's estate. Arthur Eddy died testate April 22, 1925, and his executors claimed a deduction from his gross estate of the shares of stock received from the brother's estate. The Commissioner denied the claim on the ground that more than five years elapsed between the death of the two brothers, and determined a deficiency. Upon petition the Board of Tax Appeals affirmed. (23 B. T. A., 370.) The case is brought to this court by petition to review.

The sole question is whether section 303(a)2 of the Revenue Act of 1924 (43 Stat. L., 305) authorizes the deduction of the value of property acquired by inheritance from a prior decedent in a case where the interval between the two deaths was more than five years but the distribution to the second decedent occurred within five years prior to his death. This section of the statute provides:

"SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * * * *

"(2) An amount equal to the value of any property (A) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (B) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from such donor by gift or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior Act of Congress was paid by or on behalf of the donor or the estate of such prior decedent as the case may be, * * *"

Except for clause (B) of this Act, it is substantially identical with section 403(a)2 of the Revenue Act of 1921. (43 Stat. L., 279.) In order to alleviate the hardship of successive taxes within a short time upon the same property,

Congress provided in the Act of 1921 for deductions from the gross estate of a decedent of property received from a prior decedent where the death of the second decedent occurred within five years of the death of the first. At that time gifts made in contemplation of death were taxable, and within the limitation stated this provision allowed deductions for gifts of that character as well as those received by bequest, devise or inheritance. Under that Act and prior Acts gifts *inter vivos*, not made in contemplation of death, were not taxable. The Act of 1924, however, laid a tax upon such gifts and provided for an additional deduction as set forth in subdivision (B). The purpose in allowing this deduction was the same as in the earlier Act. The deductions allowed under the Act of 1921 covered only property, including gifts in contemplation of death, passing from the dead to the living, and by the terms of the Act the two deaths had to occur within five years. The Act of 1924 did not change in any way what was already covered by the Act of 1921, but added a new and distinct provision relating to gifts *inter vivos* which had not theretofore been subject to a tax, leaving in effect and reenacting the earlier provision allowing deductions for property passing by gift in contemplation of death, bequest, devise or inheritance where the second decedent's death occurred within five years of the first. The property here in question was received by inheritance not by gift *inter vivos* and falls within section (A) of the statute, which allows the deduction only where the death of the prior decedent occurred within five years of the death of the decedent whose estate is subject to the tax.

The order of the Board of Tax Appeals is affirmed.

REGULATIONS 68, ARTICLE 36: Claims against the estate. XII-33-6345 Ct. D. 718

ESTATE TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. GROSS ESTATE—DEDUCTIONS—CLAIMS AGAINST THE ESTATE.

Where a decedent and his daughter entered into a written contract whereby, in consideration of her agreement to make no claim or demand against him during his life or against his estate after his death for support, maintenance, or distribution to her as an heir at law, and to make no contest of his will, he agreed to create a trust for her benefit, either *inter vivos* or upon his death (which trust was not established), such contract is in fact and in substance an agreement on the part of the decedent to make a bequest for the use of his daughter, and an amount paid to her by the executrix of his will in purported compliance with the terms of the agreement is not allowable as a deduction from the decedent's gross estate. The payment is in the nature of a testamentary disposition, and does not constitute a claim against the estate contracted for a fair consideration "in money or money's worth" within the meaning of section 303(a)1 of the Revenue Act of 1924.

2. PETITION DISMISSED.

Petition to review the decision of the Board of Tax Appeals (23 B. T. A., 1250) dismissed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Lillian T. Latty, Executrix of the estate of S. D. Latty, Deceased, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review order of United States Board of Tax Appeals.

Before MOORMAN, HICKENLOOPER, and SIMONS, Circuit Judges.

[January 16, 1933.]

OPINION.

HICKENLOOPER, Circuit Judge: This cause involves a question of construction of section 303 of the Internal Revenue Act of 1924 (ch. 234, 43 Stat.,

253), pertaining to the estate tax, which section provides in part as stated in the note.[1]

Samuel D. Latty of Lakewood, Ohio, died testate on January 31, 1926, leaving surviving him his widow, Lillian T. Latty, and a daughter by a previous marriage, Helen Marie Latty Jackson. Under date of December 1, 1923, the testator had entered into a written contract with his daughter whereby, in consideration of her agreement to make no claim or demand against him during his life, or against his estate after his death, for support, maintenance or distribution to her as an heir at law, and not to contest any last will and testament which he might leave, he agreed to create a trust in the sum of $50,000, either *inter vivos* or upon his death, and, pending the creation of such trust, to pay to her $2,500 per year as income thereon, or 5 per cent on the agreed principal amount. The terms upon which this trust fund was to be held are not of importance here and it is sufficient to say that the agreement provided for a typical spendthrift trust, Mrs. Jackson to receive the income during her lifetime and being given a power of appointment by last will and testament as to the principal. From the date of this agreement to the date of his death, the father punctually paid the stipulated income to his daughter, but failed to make any provision by his will for the creation of the trust. After his death the executrix of his estate paid to Mrs. Jackson the sum of $53,381.55, in purported compliance with the terms of the agreement of December 1, 1923, and the sole question here involved is whether, in computation of the estate tax, the executrix is entitled to the deduction of this sum from the gross estate as a claim "contracted *bona fide* and for a fair consideration in money or money's worth" under the section above quoted. The deduction was denied by the Board of Tax Appeals and the executrix brings her petition to review the decision of that Board.

Assuming, as the Board of Tax Appeals did, but not deciding, that the contract between the decedent and his daughter was supported by adequate consideration, and was valid, and that it created mutual obligations, we are of the opinion that it was in fact and in substance an agreement upon the father's part to make a bequest for the use of his daughter, and that as such it was a claim to a distributive interest in the estate and not a claim against the estate within the meaning of section 303. In *Briscoe* v. *Craig* (32 F. (2d), 40 [Ct. D. 136, C. B. VIII–2, 417]) this court held that if the widow allows all the property left by the deceased to pass as a part of his estate, then, regardless of the fact that an adverse dower interest might have been asserted, the entire property does pass as a part of the deceased's estate and as such is taxable. In speaking of the rights in personalty acquired by a widow in the event of her election not to take under the will, we also said: "They are not claims against the estate, but only interests in the net estate, and thus not adverse to the estate as a whole. In this, they are unlike dower rights which have priority over the claims of creditors." To substantially the same effect see *Jacobs* v. *Commissioner* (34 F. (2d), 233 (C. C. A. 8) [Ct. D. 128, C. B. VIII–2, 403]) and *Schuette* v. *Bowers* (40 F. (2d), 208 (C. C. A. 2) [Ct. D. 191, C. B. IX–1, 386]). It is true that the father was at liberty to make conveyance of this trust fund at any time prior to his death, but this was not done. Had it been done the question would then have been presented whether the subject of such conveyance should be included in the gross estate as a transfer made in contemplation of death and not the subject of "bona fide sale for a fair consideration in money or money's worth," under section 302(c) of the Revenue Act of 1924. (*Safe Deposit & Trust Co.* v. *Tait*, 295 Fed., 429 (D. C. Md.) [T. D. 3544, C. B. III–1, 470]; *Phillips* v. *Gnichtel*, 27 F. (2d), 662 (C. C. A. 3).) This question does not here arise but the cases cited may throw light upon the meaning of the words "in money or money's worth," considered below.

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[1] SEC. 303. For the purpose of the tax the value of the net estate shall be determined—
(a) In the case of a resident, by deducting from the value of the gross estate—(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages upon, or any indebtedness in respect to, property * * * to the extent that such claims, mortgages, or indebtedness were incurred or contracted bona fide and for a fair consideration in money or money's worth * * * as are allowed by the laws of the jurisdiction * * * under which the estate is being administered.

It is also true that if the contract be supported by adequate consideration and valid, and if it be further regarded as creating an obligation on the part of the father to establish the trust estate either during his lifetime or by his will, Mrs. Jackson might have asserted a cause of action for breach of contract in the event of the death of her father without having made such testamentary provision. Had such a course been pursued it is possible that the claim might have been considered as adverse to the estate as a whole and as deductible. This we need not decide. It is enough that the claim was not so asserted or adjusted, and that Mrs. Jackson received the sum paid to her, not as damages, but as her agreed distributive interest in her father's estate, and as if upon specific performance of his contract. Under these circumstances we think that *Briscoe* v. *Craig*, supra, and *Schuette* v. *Bowers*, supra, both disallowing deduction for dower where the widow took under the will and the dower rights were not asserted as such, preclude allowance of the deduction in the instant case.

The soundness of the above-stated conclusion is emphasized, we think, when we consider the purpose and effect of the addition to the analogous section of the 1921 Act of the clause permitting the deduction of claims against the estate only to the extent that such claims were "incurred or contracted bona fide and for a fair consideration in money or money's worth." Possibly the reason why this clause has not been specifically the subject of judicial construction is that its meaning seems fairly apparent to the ordinary intelligence. In the present case we are not so much concerned with whether there was a "fair" consideration, although it might be somewhat difficult to say just what legal right Mrs. Jackson relinquished by her contract, as we are with whether the consideration moving to the father may rightly be considered as a consideration "in money or money's worth." There are instances in which it is practically impossible to say that a fair consideration is not to be regarded as a consideration in money or money's worth. (Cf. *Ferguson* v. *Dickson*, 300 Fed., 961 (C. C. A. 3), involving a contract in consideration of marriage), but we think that ordinarily these words must be construed to evidence an intent upon the part of Congress to permit the deduction of claims only to the extent that such claims were contracted for a consideration which at the time either augmented the estate of the decedent, granted to him some right or privilege he did not possess before, or operated to discharge a then existing claim, as for breach of contract or personal injury.

When the 1924 Act was reported by the Ways and Means Committee in the House of Representatives (H. R. 179, Sixty-eighth Congress, first session, page 28), the analogy was drawn between the exception of a sale under section 402(c) of the 1921 Act (section 302(c) of the Act of 1924), relating to transfers made in contemplation of death, and the claims permitted to be deducted under section 303 then being considered. It was stated that "on principle the same limitation should be applied here and the proposed amendment is designed to effect this result." It has also been held with reference to section 402(c) of the 1921 Act and section 302(c) of the 1924 Act that those transactions which are supported by a good consideration, but which nevertheless are purely testamentary in their nature and effect, are not sales for money or money's worth within the intent of the Act. (See *Phillips* v. *Gnichtel*, supra, and *Safe Deposit & Trust Co.* v. *Tait*, supra.) A "sale" implies the receipt "of money or money's worth" as the purchase price of that conveyed—the continued maintenance of the estate of the vendor at approximately its preexisting value. A testamentary disposition is in the nature of a bounty and the antithesis of a sale. We think that the same line of demarcation must apply here, and if the purpose of the parties was that the subject of the contract might pass as a part of the estate and be made a matter of testamentary disposition, and it did so pass or was so treated, the claim is not to be regarded as founded upon a consideration "in money or money's worth."

For the reasons above stated the petition to review is dismissed.

REGULATIONS 68, ARTICLE 44: Transfers for public, charitable, religious, etc., uses. XII-50-6556 Ct. D. 761

ESTATE TAX—REVENUE ACT OF 1924—DECISION OF COURT.

GROSS ESTATE—DEDUCTION—CHARITABLE BEQUESTS—VALUATION.

Where a decedent by his will gave his residuary estate in trust to pay annuities to certain beneficiaries, with the provision that should the beneficiaries leave daughters surviving them, such survivor or survivors should receive a designated sum and upon the termination of the trusts the principal should be paid to certain charities, the residuary bequests to charity have no ascertainable value as of the date of the decedent's death, and are not deductible from the value of the gross estate under section 303(a)3 of the Revenue Act of 1924.

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

The Pennsylvania Company for Insurances on Lives and Granting Annuities and Charles Schmoele, Executors of the Estate of Theodore C. Birnbaum, v. *William E. Brown, Late Acting Collector of Internal Revenue for the First District of Pennsylvania.*

[July 18, 1933.]

OPINION.

KIRKPATRICK, J.: In their return for inheritance tax, the executors of Theodore C. Birnbaum claimed the amount of $327,861.24 as a deduction from the gross estate, on the ground that this was the amount of a bequest to certain charities. The Commissioner of Internal Revenue disallowed the deduction and determined a deficiency in the tax which with interest was paid by the executors who brought this suit for its recovery. The case was tried to the court with a jury. At the close of the testimony each side submitted a general point for binding instructions in its favor, thus leaving it for the court to determine both law and facts.

The Commissioner's reason for disallowing the deduction was that the residuary bequests to charities had no ascertainable value at the date of the decedent's death.

By the will the entire residuary estate was given to the executors in trust; (1) to pay certain annuities to eight designated beneficiaries during their respective lives. (2) "If either of my nieces, Emma Hilgesen or Aurora Norberg, or my nephews, Carl Norberg or Alwill Norberg should leave daughters surviving them, I give to such surviving the sum of five thousand dollars ($5,000) each." (3) "Upon the termination of all of the foregoing trusts" to pay over the principal to certain designated charities.

It is apparent that the amount of the residuary estate which will go to charity will vary inversely with the number of daughters surviving the four named nephews and nieces, at the rate of $5,000 for each daughter. At the time of the decedent's death, September 8, 1924, the four nephews and nieces were living and there were also five living daughters. One niece was 57 years old and married, the other 56 years old and unmarried. The nephews were respectively 51 and 45 years old, both married. All four are still living.

The assessment and payment of the tax can not be postponed until the termination of the trusts, and therefore whether or not any deduction is allowable and, if so, how much, must be determined as of the date of the decedent's death. At that time the chances were, of course, slender that any more daughters would come into the world to reduce the bequest to the charities, and by this time they are negligible. One or more of the daughters now living may die and so increase it.

Evidence was submitted consisting of birth statistics from the Bureau of the Census for the birth registration area of the United States, for the year 1924, showing, I believe, that no children were born to women over 55 years of age and that the chance of a man over 45 of having a daughter is about 1 to 32. However, the plaintiff did not contend very seriously that the court could make any findings of fact by which the amount which the charities will ulti-

mately take could be ascertained and it would be ludicrous to attempt to do so. Of course in this particular case anyone could make a pretty good guess at it, but if there were 20 nephews and nieces, all young and all married, the situation would be very different. If that were the case the charitable bequest might easily be cut in half or more when the time for distribution arrived. I therefore find as a fact that it is impossible to ascertain the amount of the residuary bequest to charities as of the date of the decedent's death.

The plaintiff's real contention is that, since the interest of the charities is vested (subject only to be divested or reduced upon certain contingencies), it is incumbent upon the Government to show to what extent it will be reduced and, upon failure to make such showing, the whole deduction should be allowed. Parenthetically, the plaintiff has not been quite consistent in this, because he has already diminished his claim for deduction by $25,000 allowing $5,000 for each of the living daughters. The Government contends that the charities have a contingent interest only, and that under *Humes* v. *United States* (276 U. S., 487 [T. D. 4185. C. B. VII–2, 378]), no deduction can be allowed.

There is no possible doubt that interest of the charities was vested, subject to be divested in part at least on the happening of contingencies. (See *Wheaton Coal Co.* v. *Harris*, 288 Pa., 294; *Marshall's Estate*, 252 Pa., 394; *Neel's Estate*, 252 Pa., 394.)

It does not follow however that the plaintiff can claim the deduction. Questions of vested or contingent [interest] may be of the greatest importance in determining the alienability of the remainder or its liability to be subjected to claims of creditors, but we are here construing a taxing statute and determining whether or not a deduction is allowable. The deduction is of "The *amount* of all bequests," etc. As the court said in *Humes* v. *United States*, supra, "But the fundamental question in the case at bar, is * * * what construction shall be given to a statute. Did Congress in providing for the determination of the net estate taxable, intend that a deduction should be made for a contingency, the actual value of which can not be determined from any known data?" It happened that, in the Humes case, the remainder was a contingent one, but the point that the court emphasized is that the controlling question is the uncertainty and unascertainability of the amount claimed, and there is just as much uncertainty of amount involved in a vested remainder subject to be divested as in one which is contingent.

The burden of proof is always upon the taxpayer claiming an exemption. Statutes allowing exemptions from taxation to charities are of course construed liberally in favor of the exemption, but that does not affect the rule that one claiming a deduction must be able to show, with reasonable certainty at least, the amount which he claims. In *Ithaca Trust Co.* v. *United States* (279 U. S., 151 [Ct. D. 61, C. B. VIII–1, 313]), while the amount by which the deduction might be diminished could not be ascertained with absolute certainty, it was possible to ascertain it with reasonable exactness.

If, as the plaintiffs contend, the vested character of the remainder controls, it can readily be seen where it would lead. For example, it is well settled in Pennsylvania that a remainder, though subject to be wholly divested by the exercise of power of appointment given the life tenant, may, none the less, be a vested remainder. Again, under a will, the birth or survival of a single child may operate to wipe out an entire remainder interest and yet not affect its character as vested. These considerations make plain the necessity of adhering closely to the policy of *Humes* v. *United States*, supra, namely, that no deduction can be allowed the amount of which can not be ascertained at the testator's death with reasonable accuracy. This case happens to be one in which, in view of the large amount of the residuary estate, the small size of the contingent bequests and the age of the parties, the percentage of error in any guess at the amount which will go to charity is likely to be small, but the fact that such cases will arise does not call for encroachment upon the plain policy of the law.

I therefore conclude as matter of law that the deduction was properly disallowed, for the reason that the residuary bequests to charity have no ascertainable value as of the date of the decedent's death.

I affirm the defendant's points for charge that under all the law and evidence the verdict must be in favor of the defendant, and deny the plaintiff's point, allowing exceptions to the plaintiff.

I find generally for the defendant.

Judgment may be entered accordingly.

TITLE IV.—ESTATE TAX. (1921)

REGULATIONS 63(1922), ARTICLE 18: Transfers in contemplation of death. XII-37-6398 Ct. D. 732

ESTATE TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. GROSS ESTATE—TRANSFERS MADE IN CONTEMPLATION OF DEATH.

Gifts to the decedent's children of a material part of his property, made within two years of his death, were made in contemplation of death within the meaning of section 402(c) of the Revenue Act of 1921, the facts and circumstances disclosed, considered in the light of the bodily and mental condition of the decedent at the time the transfers were made, having failed to overcome the presumption, raised by the statute, that they were so made.

2. SAME—PRESUMPTION—BURDEN OF PROOF.

The presumption raised by section 402(c) places the burden of proof on the estate to show either the negative fact that the transfers were not made in contemplation of death or to show affirmatively that they were made because of some impelling motive connected with the purpose and thought of life.

COURT OF CLAIMS OF THE UNITED STATES. M-254.

J. C. Myers, as Administrator of the Estate of F. E. Myers, Deceased, v. *The United States.*

[April 10, 1933.]

OPINION.

WILLIAMS, Judge, delivered the opinion of the court.

The plaintiff, as administrator of F. E. Myers, deceased, seeks to recover $726,284.13, with interest, Federal estate taxes imposed and collected by the Commissioner of Internal Revenue under the provisions of sections 401 and 402(c) of the Revenue Act of 1921. (42 Stat., 227.)

F. E. Myers, a resident of Ashland, Ohio, died intestate, December 2, 1923. The plaintiff, as administrator of his estate, duly filed an estate tax return disclosing a gross estate of $5,995,487.14, and a tax liability of $802,150.70, which amount was paid. The return disclosed four gifts made by the decedent to his natural heirs within two years of his death, but the value of the gifts was not included in the gross estate.

Subsequently the Commissioner of Internal Revenue included the four gifts in the gross estate but upon the consideration of a protest filed by the plaintiff, determined to include only the value of the last two gifts. These gifts were made on May 14, 1923, and August 24, 1923, and had respective values of $350,000 and $3,019,159.30. The inclusion of these two gifts in the decedent's gross estate resulted in a deficiency assessment of $726,284.13, which was paid by plaintiff on June 21, 1927. Timely claim for refund of the tax having been filed by the plaintiff, and rejected by the Commissioner of Internal Revenue, plaintiff has instituted this suit to recover the amount so paid.

The challenged tax was imposed and collected under section 401, and section 402(c) of the Revenue Act of 1921. Section 402(c) reads:

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or

created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

The two gifts in question amounted to $3,369,159.30, slightly less than one-third of the gross estate of $10,627,287.70, as determined by the Commissioner of Internal Revenue. The transfers constituted a material part of the decedent's estate. They were not made as a result of a bona fide sale for a fair consideration in money or money's worth. They were made within two years prior to the decedent's death, and unless the contrary is shown must be deemed to have been made in contemplation of death, and are subject to the Federal estate tax imposed by sections 401 and 402(c) of the Act of 1921. This presumption is a rebuttable one—expressly stated to be such by the statute—and may be overcome by proof that the transfers were motivated from purposes associated with life rather than with death. (*United States* v. *Wells*, 283 U. S., 102 [Ct. D. 340, C. B. X–1, 475], affirming *Wells* v. *United States*, 69 C. Cls., 485.)

The Supreme Court in *United States* v. *Wells*, supra, for the first time interpreted the phrase "in contemplation of death" as used in the Federal taxing statutes. The court in that case was construing the Revenue Act of 1918, which is identical with section 402(c) of the Revenue Act of 1921. The decision in that case is a comprehensive and discriminating discussion of the intent and meaning of the term "in contemplation of death" and establishes the tests which must control in the determination of whether particular transfers are made in contemplation of death. The court said:

"* * * Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. (*Nichols* v. *Coolidge*, 274 U. S., 531, 542 [T. D. 4072, C. B. VI–2, 351]; *Milliken* v. *United States*, ante, page 15 [Ct. D. 320, C. B. X–1, 472].) As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. * * * The question, necessarily, is as to the state of mind of the donor.

"As the test, despite varying circumstances, is always to be found in motive, it can not be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. Old age may give premonition and promptings independent of mortal disease. Yet age in itself can not be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer. The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.'

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed. * * * The purposes which may be served by gifts are of great variety. It is common knowledge that a frequent inducement is, not only the desire to be relieved of responsibilities, but to have children, or others who may be the appropriate objects of the donor's bounty, independently established with competencies of their own, without being compelled to await the death of the donor and without particular consideration of that event. There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death."

Following the language just quoted the court, referring to the views expressed by this court in its decision, said:

"We think that the Government is right in its criticism of the narrowness of the rule laid down by the Court of Claims, in requiring that there be a condition 'creating a reasonable fear that death is *near at hand*,' and that '*such* reasonable fear or apprehension' must be 'the only cause of the transfer.' It is sufficient if contemplation of death be the inducing cause of the transfer whether or not death is believed to be near. But it does not appear that the decision of the court rests upon the limitation thus expressed. The court did not rely merely upon the fact that at the time of the transfers decedent considered that he had recovered from his former illness and believed the assurances given him by his physician that he need have no fear of its recurrence or any 'anxiety whatever about his state of health.' That fact was manifestly important, but, in addition to that, the court held that 'the immediate and moving cause of the transfers was the carrying out of a policy, long followed by decedent in dealing with his children, of making liberal gifts to them during his lifetime.'"

It is the contention of the plaintiff that the facts in the instant case make a far stronger showing than the facts in the Wells case that the gifts in question were not made in contemplation of death. It is urged that the impelling motive for the gifts was to gratify a living purpose and was the final consummation of plans which were made by the decedent at least as early as 1917. Plaintiff says in his brief:

"* * * the impelling and dominant motive for the gifts of May 14 and August 24, 1923, was his gratification over the attainment of a purpose which was so desirable to him during his lifetime and the completion of plans for the welfare of their children which he and Mrs. Meyer had long delighted to consider together. This purpose was the broader development and training and the increased happiness of his children during his lifetime in preparation for the responsibilities of large wealth which they would later have to assume. Such motives were entirely unaffected by any thought of his own death at any time."

The Supreme Court in the Wells case pointed out that in accordance with proper practice this court should have found the ultimate fact as to the impelling motive for the transfers. Appreciating fully the grave responsibility this duty imposes upon the court, we have given a most careful consideration to all the facts and circumstances shown to detect and determine the dominant motive of the decedent in making the transfers. We have reached the conclusion that the facts and circumstances disclosed, considered in the light of the bodily and mental condition of the decedent at the time the transfers were made, fail to overcome the presumption raised by the statute, and have accordingly found that the transfers in question were made in contemplation of death.

The decedent was 74 years 8 months and 16 days old at the time of his death on December 2, 1923. He was in every respect and in the best sense of the term, what is commonly known as a self-made man. Born and reared on a farm, where he lived until he reached the age of 20 years, with only a common-school education, and without the aid of inherited wealth, through his own untiring efforts and ability, he became one of the great industrial leaders of his day and at his death left a fortune of more than $10,000,000. The record discloses that he was a man of determined will, dominating personality, and possessed of almost infinite capacity for hard work. He was exceptionally energetic and active both physically and mentally, and until a short time before his death kept in close touch with every detail of his large and varied business enterprises. He believed in economy and thrift both in the use of time and money. He practiced these virtues in his own life and incessantly urged their importance upon his children. Although a man of great wealth, he lived frugally and simply and indulged in no luxuries. He was not a liberal or generous man in the expenditure of money, either in his dealings with his family or others, when his great wealth is taken into consideration. Liberality is a relative term. A donation or gift that would be considered as most liberal and generous when made by one of limited wealth or means might well be deemed niggardly if made by one of ample means or great wealth.

While witnesses testified generally that he was most liberal in his dealings with the public and made large and generous contributions to churches, educational and other institutions, cross-examination of these witnesses developed that the sum total of such contributions during the 20-year period preceding his

death was very small—$15,000 toward the building of a Y. M. C. A. in Ashland, Ohio, $25,000 for the reconstruction of an old hall at Wittenberg College, Springfield, Ohio, which was later called "Myers Hall," $10,000 for a nurses' home which he and his wife presented to a local hospital, a $5,000 donation to a college at Ashland, and a gift of $5,000 between 1912 and 1915, toward the rebuilding of a church at Ashland. Aside from these outright donations the decedent contributed annually from $800 to $1,000 to the English Lutheran Church at Ashland. If he made other and further gifts than those stated, they are not shown in the record.

An incident in connection with decedent's donation of $5,000 to the college at Ashland, which was made in 1923, only a few months before his death, throws significant light on his mental attitude toward giving. Shortly after signing his subscription for the $5,000 the college found itself in need of immediate funds. Decedent was informed of that fact and requested to pay his subscription, with the statement that if he would do so 5 per cent would be deducted from the amount of the subscription. He accepted the proposition, wrote his check for $4,750, and thus liquidated his voluntary obligation to contribute $5,000 to a college in his home town where he had lived for 50 years and where he had amassed his great fortune.

Until after he had passed the age of 72 years decedent was no more liberal in dealing with members of his family than he was in his public benefactions. His family consisted of his wife and four children, two sons and two daughters. The oldest son, George, died in 1915 at the age of 40 years, unmarried. The only gift made by decedent to this son was 60 shares of stock of a par value of $100 each, $6,000, which was made in 1907. At the same time he made a like gift to his younger son John. He gave each of the three children at the time of their marriage $15,000 in cash for the purpose of buying a home. He later gave John $7,000 additional for the completion of his home. In 1918 he gave to each of his children $25,000 in Liberty bonds. Aside from small sums ranging from $100 to $500 which he gave the children from time to time while living at home before their marriage, and presents such as automobile and pianos, made to them subsequent to their marriage, the sum total of decedent's gifts to his children prior to December, 1921, was $6,000 to his son George, $53,000 to his son John, and $40,000 to each of his two daughters.

These facts are strikingly dissimilar to the facts in the Wells case. Wells for 30 years prior to the time the gifts in question in that case were made had followed a consistent policy of making large gifts to his children. It was a part of his philosophy of life that the wise and proper thing for a rich man to do was to make large and generous advancements to his children while they were young and could have a father's advice in its control and management. It was his desire to see his children established in life and trained in the management of property while he was alive and could assist them. He preached this wholesome doctrine to his business associates year in and year out and consistently followed it in dealing with his children. Not only that, he was severe in his criticism of some of his rich associates who followed a different policy in dealing with their children—a policy characterized by him as "niggardly." His final gifts, the subject of the litigation, were a balancing of the books, an equalization among his children of their gifts, and was stated by him to be such, and was so marked on his books. He had also been told by his physician, an eminent specialist in whom he had great confidence, a short time before the gifts were made, that he was fully restored from a previous illness; that he was in good health for a man of his age, and had no reason to fear a recurrence of his ailment. Upon that record, and the facts as stated were supported by overwhelming proof, both oral and documentary, it was held that—

"The plaintiffs have not only overcome the presumption created by the statute that the transfers were made in contemplation of death, but have definitely established the fact that the immediate and moving cause of the transfers was the carrying out of a policy long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime. He had consistently followed that policy for nearly 30 years and the three transfers in question were a continuation and final consummation of such policy * * *."

Here a different picture is presented. We have a man, many times a millionaire, with a princely income ranging as high as $700,000 a year, whose only gifts to his children until after he had passed the age of 72 years, aside from small wedding gifts and occasional presents such as automobiles, pianos, jewelry, etc., were $25,000 in Liberty bonds given to each of them in 1918; a man who, though amply able to establish his children comfortably and independently in

life, without serious impairment of his great and rapidly mounting fortune, did not see fit to do so, but chose rather to leave them practically to their own resources until they had reached middle life; and who permitted a son to support a wife and three children on the meager salary of $5,000 a year until he was past 39 years of age. The mere recitation of these facts shows how unlike they are to the facts in the Wells case, and utterly refutes the suggestion that the decedent consistently practiced a policy of making large and generous gifts to his children.

The decedent, however, during the last two years of his life adopted a more liberal and generous policy and transferred to his children by four separate gifts property aggregating more than $5,000,000 in value.

It is contended by plaintiff that the impelling motive for these gifts was the carrying out of "living purpose" plans formulated by the decedent not later than 1917—the giving of property to his children in his lifetime—and that the gifts of May 14, 1923, and August 24, 1923, the gifts involved in suit, were the accomplishment and final consummation of these plans.

Decedent in the year 1917 was considering the matter of making a gift of some of his property to the children and discussed the matter with certain of his business associates. Just when he definitely concluded that he would make the gift is not disclosed. He was still considering the matter in 1919 and so informed his son John. However that may be, the proof, in our opinion, leaves no room for doubt that whatever plans he may have formulated in 1917, or had in mind at that time in reference to making a gift of property to his children, were completely and precisely executed and consummated in the trust agreement of December 22, 1921.

In 1917 the decedent informed Mr. H. D. Messick, a close friend and business associate, that he intended to give his children some property of substantial value, and discussed with him the advisability of placing it in trust. He informed Messick that the reason he wanted to give some of his property to his children in his lifetime was that he had more than sufficient and that he wished them to have the use and enjoyment of it. In 1919 he discussed these plans with Mr. J. R. Nutt, of Cleveland, and in 1919 he informed his son, John, that he was considering with Mr. Messick creating a trust in favor of his children. Mr. Nutt suggested that he make his gift to the children outright. This suggestion was rejected, the decedent stating that he wanted the gift to be in the form of a trust where the bank could look after the securities and the children to have the income for awhile.

In 1920 Mr. Messick was requested to prepare the trust agreement, which he did, but the trust for certain business reasons was not then executed. Subsequently in 1921 decedent again had Mr. Messick prepare a trust agreement which was executed on December 22, 1921, depositing in trust for his wife and three children stocks and bonds of the approximate value of $1,200,000. The income from the trust was payable equally to the beneficiaries for three years, at the end of which time three-fourths of the corpus was payable to the children in equal shares, and the remaining one-fourth was similarly payable to them upon the death of their mother. There is no evidence that the decedent, either in 1917 or at any time prior to the execution of the trust agreement of December 22, 1921, ever planned or contemplated gifts of property to his children other than the gifts embodied in this agreement. All plans formulated by him before that date for making gifts to his children were fully consummated by the execution of this trust agreement. There is no evidence that he then had in mind or had formulated plans for other and further gifts. This fact is conclusively shown by the decedent's statement to his children on Christmas, 1921, at the time he presented them the trust agreement, that in making the gift he and his wife had succeeded in doing something they had expected to do and had been planning to do for some time. He had succeeded in doing what he had planned to do, and all that he had planned to do—created a trust in favor of his children.

The decedent was past 74 years of age at the time the gifts of May 14, 1923, and August 24, 1923, were made. They were made within a few months of the date of his death, and at a time he was suffering from an incurable malady. It is true he had not been informed of the nature of his ailment by either the physicians attending him or by his children. It is true, also, that up to a short time preceding his death he retained his mental alertness, visited his office frequently, dictated letters, examined reports, signed documents, held conferences with his associates, and kept in close touch with his business affairs.

He continued to make occasional automobile trips, attended meetings of boards of directors of corporations in which he was interested, and addressed banquets on two or three occasions at about or subsequent to the time the gifts were made. Aside from the fact that he was losing weight there was very little change in his personal appearance prior to August 24, 1923.

It is contended that these facts and circumstances conclusively show that the decedent had no knowledge of his actual condition at the time the gifts were made; that he felt no apprehension that his illness would result fatally, and that his bodily and mental condition in no way influenced him in making the gifts.

While some of the facts and circumstances shown are consistent with the theory that some motive other than contemplation of death impelled the decedent to make the gifts, they are far from conclusive. A consciousness that death is imminent is not required to bring the gifts within the statute. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is sufficient if contemplation of death be the inducing cause of the transfer whether or not death is believed to be near. (*United States* v. *Wells*, supra.) We think the facts and circumstances relied upon, taken as a whole, tend to support rather than to rebut the presumption that the gifts were made in contemplation of death. The decedent could not be unaware of the fact that he was suffering from a most serious ailment that would probably prove fatal. He had visited the Cleveland clinic as early as August, 1921. For six months prior to that time he had suffered from indigestion and sharp pains in the stomach. He had lost 12 pounds in weight. He was then found to have high blood pressure and was admonished to slow up in his work and to go on an ordered diet. He was also warned by the physician that if he did not follow these instructions serious results would follow. He disregarded these warnings and continued to work as hard as before. Between that date and January 1, 1923, he had been attended by his physician, Dr. Patton, on 22 occasions.

While in Florida in January, 1923, he suffered intense pains in the region of his right side and abdomen. His suffering was so acute that Mrs. Myers had him promise that upon their return home he would go to the Cleveland clinic for an examination. Shortly after his arrival home on March 16, he told Dr. Patton that he was troubled with a disturbance in his right side which he believed to be his appendix. Dr. Patton examined him and concluded that the trouble was cancer. He did not inform decedent of what he suspected but advised him to go to the clinic for examination. On March 26 he was examined at the Cleveland clinic and his ailment was definitely ascertained to be a cancerous growth at the junction of the large and small intestines. X-ray pictures confirmed this diagnosis and disclosed the presence of a cancerous growth of the size of a "small grapefruit." It was estimated that this growth had then continued over a period of one or possibly two years, and had become so extended that an operation to remove it was not advisable.

Decedent during the course of the examination referred to the recent death at the clinic of one of his close friends from an appendicitis operation, and expressed the opinion that his trouble might probably be due to the same cause. He was informed by the physicians that this was not true, and was told that his case was not an operable one, but would be treated by X-ray therapy. He received his first X-ray treatment on the following day, March 27, and thereafter was subjected to similar treatments on April 6 and July 1, 1923.

He was not informed by his physicians at that time that he was suffering from cancer. He did not, so far as the record shows, ever inquire of his physicians as to the nature of his illness, or discuss the matter with any one, at any time prior to November 8, 1923. It is most astonishing that the decedent made no inquiries of his physicians at the time of his examination on March 26, or at any time thereafter as to the nature of his illness. He went to the clinic, accompanied by his personal physician and his son, believing that he probably might have to undergo an operation for appendicitis, an operation from which one of his close friends had recently died. That he then realized that his condition was serious is not open to doubt. It is incredible that a man of his courage, good sense, and dominating will, when informed by his physicians that his ailment was not what he had suspected it might be, would not want to know the exact nature of his trouble and would not demand full information of the result of the examination. In view of the fact that he made no such inquiries the conclusion is well nigh irresistible that he understood and fully

realized the seriousness of his condition, and although he may not have definitely known that he had an internal cancer, he suspected the truth, or in any event he knew that he was suffering from a malady that would probably result fatally to him. He knew that he had a lump in his side as big as a small grapefruit; that it was very sensitive and at times caused him excruciating pain; that it could not be treated by an operation, and that the X-ray treatment to which he was subjected was a well-known and universally recognized treatment for cancer. While, as plaintiff contends, X-ray therapy treatments are used for a number of ailments other than cancer, one of its principal uses is for treatment of cancer, and its use in this case was highly suggestive to decedent, a man of superior intelligence, of the likelihood of the presence of cancer. But without regard to whether the decedent knew or did not know, suspected or did not suspect, the exact nature of his ailment prior to November 8, 1923, he undoubtedly appreciated the seriousness of his condition and realized that his hold on life was most precarious. Unlike the donor in the Wells case, the decedent was not told by his physicians before the gifts were made that he had recovered his health and was completely cured of his ailment, nor had he been assured by them that he would recover. He knew when the gifts were made that he had not recovered from his illness and that his health had not been restored. While he had received temporary benefit from the X-ray treatments, he still had what he termed "the lump" in his side from which he suffered acutely when in an uncomfortable position, whether walking, riding, or lying in bed. He was losing weight, slowly perhaps, but surely and progressively. His strength and powers of endurance were waning. These striking facts, together with the obvious solicitude of his children, his nurse, and his friends for his health and comfort, the frequent visits of his physician, Dr. Patton, the character of treatments received at the clinic, could hardly have deceived a man of decedent's judgment and insight.

Aside from this most serious and alarming bodily condition, decedent, at and prior to the time the gifts were made, was greatly distressed in mind because of the recent death of his wife. They had been inseparable companions for a half century, and her death was a great shock to him. The witnesses all testified that he never recovered from the blow, and that he continued to grieve for her until his death.

It was under these circumstances and conditions that the gifts involved were made. It can not be said that the decedent's bodily and mental condition at the time the transfers were made was such as to negative or refute the presumption created by the statute that they were made in contemplation of death. The burden of proof is upon the plaintiff. He must show either the negative fact that the transfers were not made in contemplation of death, or show affirmatively that they were made because of some impelling motive consistent with the purpose and thought of life, and thus by exclusion establish the fact that they were not made in contemplation of death.

The impelling motive for the gifts, as we have seen, was not and could not have been the carrying out of a policy long and consistently followed by the decedent of making large advancements to his children in his lifetime, because he had never adopted or followed such policy at any time prior to December, 1921, when he had passed the age of 72 years, nor was the impelling motive for the gifts the carrying out and final consummation of plans formulated as far back as 1917 for making gifts of property to his children, as the trust agreement of December 22, 1921, completely satisfied and consummated those plans. The impelling motive could not have been that natural and laudable desire of a parent to recognize the special needs of his children, as decedent had, in two prior gifts aggregating more than $2,000,000, established them comfortably in life, and they stood in no special need of his bounty at the time the gifts were made.

The gifts were made to his three children, share and share alike, in the same proportions and interests in which they had natural claims upon his bounty. The distribution among the children was in no way different than it would have been in the event of his death intestate. In the absence of a showing to the contrary, the presumption created by the statute must stand, and the impelling motive for the transfers must be deemed to have been the desire of the decedent, in contemplation of his own death, to transfer to his children a material part of his property in the nature of a final disposition and distribution of the same.

The petition is therefore dismissed. It is so ordered.

REGULATIONS 63, ARTICLE 23: Property held jointly or as tenants by the entirety. XII-48-6538 Ct. D. 757

ESTATE TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. GROSS ESTATE—JOINT TENANCY—ACQUISITION BEFORE PASSAGE OF ANY ESTATE TAX ACT.

Where the decedent at the time of his death in 1923 held as joint tenant with his wife certain real estate in Illinois acquired in 1909, one-half the value of the property is properly included in determining the value of the decedent's gross estate under section 402(d) of the Revenue Act of 1921. That section is not applied retroactively, since the existence of the joint tenancy at the date of death and not its creation at an earlier date furnishes the basis for the tax.

2. CASE FOLLOWED.

Gwinn v. *Commissioner* (287 U. S., 224 [Ct. D. 617, C. B. XII-1, 360]) followed.

3. CASE DISTINGUISHED.

Knox v. *McElligott* (258 U. S., 546) distinguished.

4. DECISION AFFIRMED.

The decision of the Circuit Court of Appeals, Seventh Circuit (62 Fed. (2d), 591), affirming 23 B. T. A., 635, affirmed.

SUPREME COURT OF THE UNITED STATES.

Harold T. Griswold, W. W. S. Carpenter, and Laird Bell, Executors of the Estate of William H. Redington, Deceased, petitioners, v. *Guy T. Helvering, Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 6, 1933.]

OPINION.

Mr. Justice SUTHERLAND delivered the opinion of the court.

Section 402 of the Revenue Act of 1921 (ch. 136, 42 Stat., 227, 277, 278), imposing an inheritance tax, provides,

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, * * *.

* * * * * * *

"(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, * * *."

The decedent died in 1923, while the foregoing provision was in effect. At the time of his death he and his wife held as joint tenants certain real estate in Illinois, title to which vested in them by conveyance on October 5, 1909. The Commissioner valued this real estate at $90,000, and included the whole of it in the value of decedent's gross estate as being within the reach of section 402(d). Upon appeal to the Board of Tax Appeals, that tribunal, disapproving in part the Commissioner's determination, held that the value of only decedent's one-half of the property could be included for the purposes of the tax. (23 B. T. A., 635.) The circuit court of appeals affirmed. (62 F. (2d), 591.)

Whether this application of the statute gives it a retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at the earlier date, which furnishes the basis for the tax. By the judgment under review, only half of the value, that is to say, the value of decedent's interest, has been included, leaving the survivor's interest unaffected. After the creation of the joint tenancy, and until his death, decedent retained his interest in,

and control over, half of the property. Cessation of that interest and control at death presented the proper occasion for the imposition of a tax. See *Gwinn* v. *Commissioner* (287 U. S., 224 [Ct. D. 617, C. B. XII–1, 360]) and cases cited. And since that is all that is sought to be reached by the tax here in question, the complaint that the statute has been given a retroactive application obviously is without substance. The statute as applied does not lay a tax in respect of an event already past, but in respect of one yet to happen.

Petitioners insist that *Knox* v. *McElligott* (258 U. S., 546) is to the contrary, but, clearly, it is not. There the tax return included the value of decedent's one-half of the jointly owned property, but did not include the value of the half which had been owned and enjoyed by the surviving joint tenant. Nevertheless, the Commissioner undertook to impose a tax in respect of the value of this latter half as well. This court held that to do so was to apply the statute retroactively, and that this, under the circumstances of that case, could not be done. It did not hold, or intend to hold, that the statute was retroactive in so far as the value of the decedent's half of the joint estate was concerned. That question was not there involved. It is the only question here.

Judgment affirmed.

SALES TAX RULINGS.

TITLE IV.—MANUFACTURERS' EXCISE TAXES. (1932)

SECTION 601.—EXCISE TAXES ON CERTAIN ARTICLES.

REGULATIONS 44, ARTICLE 11: Scope of tax. XII–44–6490
T. D. 4401

TAX ON LUBRICATING OILS.

Section 601(c)1 of the Revenue Act of 1932, as amended by section 4(b) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress).—Article 11 of Regulations 44, amended.—Scope of tax.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 44, approved June 18, 1932, are amended by inserting in lieu of the excerpt from section 601 of the Revenue Act of 1932 and the caption thereof at the beginning of Chapter II, the following:

SECTION 601(c)1 OF THE REVENUE ACT OF 1932, AS AMENDED BY THE ACT APPROVED JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).

(c) There is hereby imposed upon the following articles sold in the United States by the manufacturer or producer, or imported into the United States, a tax at the rates hereinafter set forth, to be paid by the manufacturer, producer, or importer:

(1) Lubricating oils, 4 cents a gallon; but the tax on articles described in this paragraph shall not apply with respect to the importation of such articles. Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax shall be imposed under this section upon lubricating oils sold to a manufacturer or producer of lubricating oils for resale by him, but for the purposes of this title such vendee shall be considered the manufacturer or producer of such lubricating oils.

Article 11 of Regulations 44, as amended by Treasury Decision 4339, approved July 16, 1932 [C. B. XI–2, 446] and by Treasury Decision 4362, approved March 3, 1933 [C. B. XII–1, 380] is further amended by striking out the fifth paragraph and inserting in lieu thereof the following:

On and after July 1, 1933, no tax shall be imposed upon lubricating oils sold by a manufacturer or producer of such oils to another manufacturer or producer of lubricating oils for resale by him, provided the manufacturer

making the sale, prior to or at the time of sale, obtains from the purchaser a certificate showing that the oils are purchased by him for resale. For the purpose of this tax the vendee shall be considered the manufacturer or producer of such lubricating oils. On and after November 1, 1933, no lubricating oil shall be sold tax-free to another manufacturer or producer for resale unless the purchaser has registered with the proper collector of internal revenue as a manufacturer or producer of lubricating oils, and has obtained a registration certificate on Form 637 bearing his registration number, as provided in article 7, as amended, of these regulations, and unless the exemption certificate required by the foregoing sentence bears the purchaser's registration number.

Tax-free sales of lubricating oil to manufacturers under section 601(c)1 or section 620(1) (see article 7) may be made under an exemption certificate in substantially the following form:

EXEMPTION CERTIFICATE.

The undersigned hereby certifies that he is a manufacturer or producer of lubricating oils, and holds certificate of registry No. ____, issued by the collector of internal revenue at _____, and that the lubricating oils purchased hereunder are for resale by him or use by him as material in the manufacture or production of lubricating oils or as a component part of lubricating oils to be manufactured or produced by him.

It is understood that the undersigned is liable for tax as the manufacturer or producer upon his resale, or upon his use otherwise than as specified above, of the oils purchased hereunder, unless specifically exempted by law. It is also understood that the fraudulent use of this certificate to secure exemption will subject the guilty parties to the penalties provided by law.

_____,
Name.

_____.
Address.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved October 26, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

SECTION 601 OF THE REVENUE ACT OF 1932, AS AMENDED BY THE ACT OF JUNE 16, 1933. (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS.)—LUBRICATING OILS.

REGULATIONS 44, ARTICLE 11: Scope of tax. XII–46–6511
S. T. 712

Basis for computing tax upon the sale or use of nonfluid lubricating oils.

Section 601(c)1 of the Revenue Act of 1932, as amended by the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), imposes a tax at the rate of 4 cents per gallon upon lubricating oils "sold in the United States by the manufacturer or producer * * *."

A manufacturer or producer of nonfluid lubricating oils taxable under article 11 of Regulations 44, as amended by Treasury Decision 4339 (C. B. XI–2, 446) and Treasury Decision 4362 (C. B. XII–1, 380), may use 8 pounds to the gallon as a basis for computing and reporting the tax upon the sale or use of such oils.

SECTION 601(c)2.—BREWER'S WORT.

REGULATIONS 44, ARTICLE 13: Scope of tax. XII-27-6269
Ct. D. 695

EXCISE TAXES—REVENUE ACT OF 1932—DECISION OF COURT.

SUIT IN EQUITY—INJUNCTION TO RESTRAIN COLLECTION OF TAX.

The tax imposed by the Revenue Act of 1932 upon the manufacture and sale of brewer's wort being neither illegal nor in the nature of a penalty, collection thereof may not be enjoined by a suit in equity in the absence of special and extraordinary circumstances rendering inapplicable section 3224 of the Revised Statutes, which prohibits such a suit.

DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF NEW YORK.

No. 1526. *Broadway Blending Corporation, plaintiff,* v. *G. T. Sugden, Collector of Internal Revenue for the Twenty-eighth District of New York, defendant.*

No. 1527. *Cataract Blending Corporation, plaintiff,* v. *G. T. Sugden, Collector of Internal Revenue for the Twenty-eighth District of New York, defendant.*

ADLER, District Judge: Both of the above entitled suits involve identical issues, and the facts in each are substantially the same.

The complainants are domestic corporations, one doing business in the city of Buffalo, N. Y., and the other in the city of Rochester, N. Y. The defendant is the collector of internal revenue for the twenty-eighth district of New York, which includes the cities of Buffalo and Rochester.

These actions are brought in equity. Upon the filing of the bills of complaint, applications were made in each suit, upon verified affidavits of officers of the complainant corporations, for temporary injunctions restraining the defendant from proceeding to collect or assess any and all taxes against the complainant corporations upon the manufacture and sale of "brewer's wort." Temporary injunctions were issued. Motions by the complainant corporations to make these injunctions permanent pending the determination of the suits were denied upon the failure of the complainant corporation to furnish security.

Decision on motions to dismiss the bill of complaint in each suit was reserved until the end of the trial. The grounds of the motions which were set up in the amended answers as separate and distinct defenses were:

a. That the complainant corporations had a complete and adequate remedy at law, of which they had not availed themselves.

b. The alleged causes of action were barred under the provisions of section 3224 of the Revised Statutes prohibiting the maintenance of any suit for the purpose of obtaining injunctive relief to restrain the collection of any tax.

c. Failure of the bills of complaint to allege facts sufficient to constitute a valid cause of action in equity.

d. Lack of jurisdiction.

The complainant corporations rest their prayer for equitable relief upon the grounds:

a. That the so-called "blend" manufactured and sold by them is not in fact "brewer's wort," and therefore can not be taxable as such.

b. That the tax in question is, in fact, a penalty.

c. That the tax is confiscatory.

d. That the method of assessment and collection pursued by the defendant was illegal.

It seems necessary to quote the applicable provisions of the Revenue Act of 1932, with brief comment on the Act and the regulations. Section 601, subdivision "c" "2" of Title IV, reads as follows:

"Brewer's wort, 15 cents a gallon. Liquid malt, malt sirup, malt extract, fluid, solid, or condensed, made from malted cereal grains in whole or in part, unless sold to a baker for use in baking, or to a manufacturer or producer of

malted milk, medical products, foods, cereal beverages or textiles, for use in the manufacture and production of such products, 3 cents a pound. For the purposes of this paragraph liquid malt containing less than 15 per centum of solids by weight shall be taxable as brewer's wort."

The tax imposed under Title IV, section 601, subdivision "c" "2" became effective June 21, 1932. (See article 2 of Regulations 44.) It attaches when title to the article sold passes from the manufacturer (article 5 of Regulations 44), and shall be paid by the manufacturer on all sales made directly or through an agent (article 4 of Regulations 44). Returns must be filed with the tax on or before the last day of the month following that for which it is made, except when otherwise prescribed under article 51, covering jeopardy assessments (article 48 of Regulations 44). All taxes are due and payable to the collector without assessment by the Commissioner or notice from the collector at the time fixed for filing the returns (article 49 of Regulations 44).

Another provision of the Revenue Act of 1932, which has application to these cases is section 1105, which reads as follows:

"(a) If the Commissioner finds that a person liable for tax (other than income tax) under any provision of the internal-revenue laws designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partially ineffectual proceedings to collect such tax unless such proceedings be brought without delay, the Commissioner shall cause notice of such finding to be given to such person, together with a demand for an immediate return and the immediate payment of such tax, and such tax shall thereupon become immediately due and payable.

"(b) If such person (1) is not in default in making any return or paying any tax under the internal-revenue laws, and (2) furnishes to the United States, under regulations to be prescribed by the Commissioner with the approval of the Secretary, security approved by the Commissioner with the approval of the Secretary, that he will duly return and pay the tax to which the Commissioner's finding relates, then such tax shall not be payable prior to the time otherwise fixed for payment."

Something of the business, history, the organization and the financial set-up and status of the complainant corporations, as developed by the testimony on the trial, must be stated. The Broadway Blending Corporation was incorporated and commenced business on August 5, 1932, by borrowing the sum of $5,500. It apparently acquired no other assets. On December 1, 1932, its bank book shows a balance on hand of $18.81. However the entries in the bank book disclose that from August 10, 1932, to October 12, 1932, inclusive, this corporation deposited approximately $100,000. The Cataract Blending Corporation was incorporated and began business on July 8, 1932, with an authorized capital stock of $25,000, $1,500 of which was cash and $23,500 of stock was issued for a quantity of machinery and tin cans.

1. On the question whether the product taxed was not "brewer's wort," the testimony offered by the complainants was not convincing. In the Broadway case complainant's witness who was its expert gave practically no testimony on that point. In the Cataract case after testifying at length as to the analysis of a sample, which testimony was admitted over objection on the ground of the uncertain identification of the sample, the same witness who was in the employ of both complainants stated that the product is a diluted malt sirup solution and not liquid malt or wort. He called it a blend. The defendant offered the testimony of two Government chemists. They testified that they made analyses of the product of complainants and testified positively that they found it to be "brewer's wort." Further that in their opinion it was made wholly or in part from malted cereal grains. This was the entire testimony in these cases on the nature of complainant's product. I shall not comment further on this question at this time in view of my conclusions shortly to be stated on the other questions involved.

2. Complainants contend that the tax in question is in fact a penalty, and that therefore section 3224 of the Revised Statutes, which will hereafter be discussed, is without application. The complainants offered in evidence the Revenue Act of 1932 imposing the tax and the committee hearings in Congress held prior to its passage. I must find that the entire Act was designed and passed for the purpose of raising revenue for the support of government. As stated by the Supreme Court in *Lipke* v. *Lederer* (259 U. S., 557), the distinction between a tax and a penalty is, that the one has for its purpose the raising of

revenue and the other is punishment for an infraction of the law. *Lipke* v. *Ledcrer*, supra, had under consideration a penalty, so termed, in the National Prohibition Act, a penal statute. It does not apply, because there is nothing here to indicate that the tax in question was included in the Revenue Act of 1932 for any other purpose than to raise revenue. Even assuming that "brewer's wort" can not be used except in the manufacture of beer in violation of the National Prohibition Act, the Congress may tax that which it prohibits, and this fact does not operate to constitute the tax a penalty. This was held by the Supreme Court in *United States* v. *One Ford Coupe* (272 U. S., 321). I conclude that the tax imposed on "brewer's wort" is not a penalty.

3. Complainants contend that the tax in question is confiscatory because it is so high as to result in the destruction of their business. Of this there is no proof, but assuming it to be true, the courts are without power to interfere in view of the rule laid down in *McCray* v. *United States* (195 U. S., 27), and reiterated in *Miller* v. *Nut Margarine Co.* (284 U. S., at page 506 [Ct. D. 457, C. B. XI–1, 370]), where the Supreme Court said:

"The complainant asserts that the exaction of 10 cents per pound while in the guise of a tax, is really a penalty imposed to eliminate competition with butter, and is therefore in excess of the power granted to the Congress by the Constitution. But, having regard to *McCray* v. *United States* (195 U. S., 27), we treat the imposition laid by the Act upon oleomargarine as a valid excise tax."

4. The contention of plaintiffs that the method of assessment and collection was illegal will be passed over for the reason that the original assessments have been vacated and discharged, as was set up in the amended answers and proven upon the trial.

5. The main question here is whether the complainants had an adequate remedy at law of which they have not availed themselves and whether they are barred from maintaining these suits in equity in view of the provisions of section 3224 of the Revised Statutes which prohibit the maintenance of any suit to restrain the collection or assessment of any tax unless, (1) there exists some special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, or unless, (2) it is determined that the tax in question is in fact a penalty and therefore without the provisions of section 3224. Unless the complainants are brought by their pleadings and proof within the exceptions above stated, these actions in equity will not lie.

It is necessary to discuss briefly the case of *Miller* v. *Nut Margarine Co.*, supra, which is authority for the first exception just stated to section 3224. In the Miller case, which had to do with the tax on oleomargarine, the Internal Revenue Bureau had failed to appeal from adverse decisions rendered in actions at law determining the product in question not to be taxable as oleomargarine and the Commissioner of Internal Revenue had advised the trade generally that the particular product was not taxable. Upon this ruling the complainant in that case manufactured and sold over a considerable period of time thousands of dollars worth of its product not contemplating any liability for taxes. The Supreme Court in its decision reciting these facts and other unusual facts as they appeared in this case stated that "by reason of the special and extraordinary facts and circumstances, section 3224 does not apply." In the cases at bar there are no extraordinary facts and circumstances of the character and comparable with those that appear in the Miller case. Here the complainants did not proceed with their obvious legal remedy which is to pay the tax and sue for recovery, while in the oleomargarine cases there had been decisions in cases at law against the Internal Revenue Bureau. These cases can not be brought within the exception defined by the Miller case.

The other exception that would take these cases without the provisions of section 3224 is that the tax is in fact a penalty. I have previously discussed that question and held that in these cases the tax is not a penalty and distinguished the case of *Lipke* v. *Ledcrer*, supra, relied upon by the complainants.

On the question of the constitutionality of the tax raised by the complainants, the interesting case of *Bailey* v. *George* (259 U. S., 16 [T. D. 3347, C. B. I–2, 342]) is cited. In this case the taxpayer sought relief in equity from the provisions of the child labor tax law and the court held that the unconstitutionality of the tax was not sufficient to invoke equity jurisdiction in view of section 3224 of the Revised Statutes. On the same day that that decision was handed down by the Supreme Court, it handed down the decision in *Child*

Labor Tax Case (259 U. S., 20), in which it held the child labor tax law unconstitutional, but in the last-mentioned case the taxpayer pursued the remedy provided by law, which is by paying the tax and suing for its recovery. (*State Railroad Tax Cases*, 92 U. S., 575; *Snyder* v. *Marks*, 109 U. S., 189; *Dodge* v. *Osborn*, 240 U. S., 118; *Graham* v. *Dupont*, 262 U. S., 234 [T. D. 3486, C. B. II–1, 226].)

My conclusion is that the complainants have not brought themselves within the exceptions of section 3224 of the Revised Statutes, nor have they by their complaints or their proof established ground for equitable relief.

Decrees may be entered accordingly.

SECTION 603.—TOILET PREPARATIONS, ETC.

REGULATIONS 46, ARTICLE 22: Scope of tax. XII–31–6323
S. T. 693

Baby powder held to be taxable.

Question has been raised whether baby powder is taxable as a toilet preparation under section 603 of the Revenue Act of 1932.

It is contended that a powder used on babies to relieve and prevent chafing, prickly heat, etc., is not a toilet powder within the meaning of the law because it contains certain special ingredients with healing properties, and is, therefore, medicinal in its reaction.

Section 603 is broad in its scope. It imposes a tax of 10 per cent of the price for which the manufacturer, producer, or importer sells toilet powders, and any similar substances, articles, or preparations, by whatsoever name known or distinguished, which are used or applied or intended to be used or applied for toilet purposes.

Webster's New International Dictionary defines toilet powder as follows:

> A fine powder, usually with soothing or antiseptic ingredients, used to sprinkle or rub over the skin of the body, as after bathing, usually distinguished from powder used as a cosmetic for the face.

This definition does not distinguish between a powder used for babies and a powder used for adults, but defines it as one applied to the skin of the body. The fact that the article has soothing or antiseptic ingredients does not warrant any change in its classification as a toilet preparation.

It is, therefore, held that the powder in question is subject to the tax of 10 per cent imposed by section 603 of the Revenue Act of 1932.

SECTION 604.—FURS.

REGULATIONS 46, ARTICLE 24: Scope of tax. XII–44–6479
S. T. 709

Taxability of articles composed wholly or partly of sheepskin or lambskin.

Question is presented whether articles made of sheepskin or lambskin, or articles of which sheepskin or lambskin is the component material of chief value, are subject to the tax imposed by section 604 of the Revenue Act of 1932. That section imposes a tax of 10

per centum upon "articles made of fur on the hide or pelt or of which any such fur is the component material of chief value," when sold by the manufacturer, producer, or importer.

Upon careful consideration of the issue presented it is held that the following articles are commonly or commercially known as articles made of fur and that they are taxable as such under section 604 of the Revenue Act of 1932: Articles made of so-called "domestic type" sheepskin or lambskin which has been dyed and/or processed to resemble or imitate fur (such as imitation beaver, imitation wombat, or "electrified" sheepskin), and articles of which sheepskin or lambskin so dyed and/or processed is the component material of chief value.

It is also held that the following articles are not commonly or commercially known as articles made of fur and are not taxable under section 604 of the Revenue Act of 1932: Articles made of the so-called "domestic type" sheepskin or lambskin (ordinarily used as a protection against cold rather than for decorative or style purposes) which has not been dyed and/or processed to resemble or imitate fur. Examples of such exempt articles are boys' and workmen's sheep-lined coats and shearling-lined slippers and gloves.

The term "domestic type" used herein includes sheepskin or lambskin of either domestic or foreign origin, such as sheepskin or lambskin from merino or crossbred sheep or lambs.

S. T. 470 (C. B. XI–2, 460) is modified in so far as it is inconsistent herewith.

SECTION 605.—JEWELRY, ETC.

REGULATIONS 46, ARTICLE 28: Scope of tax. XII–30–6316
T. D. 4373

Tax on jewelry—Section 605 of the Revenue Act of 1932.—Article 28 of Regulations 46, amended.

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

To Collectors of Internal Revenue and Others Concerned:

The last paragraph of article 28 of Regulations 46, approved June 18, 1932, as amended by Treasury Decision 4351, approved August 30, 1932 [C. B. XI–2, 461], is further amended to read as follows:

Among the articles or parts of articles coming within the scope of section 605 which may be purchased tax free for further manufacture by a manufacturer or producer who complies with the registration provisions, are (1) all mountings made of or ornamented, mounted or fitted with precious metals or imitations thereof, or ivory; (2) pearls, precious and semiprecious stones and imitations thereof, whether uncut or cut and ready for use but not mounted; (3) watch cases, watch movements or mechanisms, parts for watches and clocks, etc.; and (4) other similar incomplete or unfinished articles subject to tax under section 605.

Parts for watches or clocks selling for more than 9 cents each may be sold tax free by the manufacturer, producer, or importer, to a manufacturer or producer of watches or clocks, if at the time of sale or prior thereto, the purchaser furnishes a written statement to the vendor to the effect that such

parts are to be used by him in the manufacture or production of a watch or clock to be sold for less than $3. Proper records of invoices, orders, and certificates relative to such sales must be retained as provided in article 69. If upon inspection it is found that the records with respect to any such sale do not contain proper certificates with supporting invoices, tax shall be payable on such sale.

A person who manufactures, produces, or imports parts for watches or clocks and uses such parts in the manufacture or production of watches or clocks to be sold for less than $3 is not liable for tax upon his use of such parts.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved July 17, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

SECTION 606.—AUTOMOBILES, ETC.

REGULATIONS 46, ARTICLE 8: Basis of tax. XII–40–6433
S. T. 703

The processing tax on cotton included in the price for which tire covers are sold may not be excluded in computing the manufacturers' excise tax on the sale of such articles.

Advice is requested whether, in computing the manufacturers' excise tax imposed by section 606(c) of the Revenue Act of 1932 on the sales price of tire covers, the processing tax previously paid on cotton used in their manufacture and included in the sales price may properly be excluded.

Manufacturers of tire covers are subject to excise tax under section 606(c) based on the price for which such articles are sold. In the manufacture of tire covers processed cotton is used on which a processing tax imposed by the Agricultural Adjustment Act (Public, No. 10, Seventy-third Congress) has been paid. The provision in section 9(a) of the latter Act permitting deduction of the weight of processed cotton content, on which a processing tax has been paid, from the weight of a finished article subject to tax under the Revenue Act of 1932 on the basis of weight, is applicable to tires and inner tubes, which are the only articles taxable by weight under that Act. Tire covers are taxable on the price for which sold.

It is held, therefore, that if a manufacturer of tire covers increases the sales price thereof to include a processing tax previously paid by him he is liable for the manufacturers' excise tax on the entire price for which the tire covers are sold, including the amount of the processing tax.

REGULATIONS 46, ARTICLE 36: Scope of tax. XII–34–6360
G. C. M. 12068

Hearse chassis held to be an automobile truck chassis taxable at the 2 per cent rate.

An opinion is requested whether a hearse chassis is an automobile truck chassis within the meaning of section 606(a), or is an "other

automobile chassis" within the meaning of section 606(b) of the Revenue Act of 1932.

The chassis under consideration is much longer than an automobile chassis generally used for the transportation of persons, except buses and other similar vehicles used for the transportation of persons in numbers. The axle construction, springs, clutch, transmission, propeller shaft assembly, and other parts are all stronger and heavier than similar parts generally used in the chassis of a vehicle used for the transportation of persons with the exceptions above noted. It is advertised, sold, and generally held out as a hearse chassis.

Under the regulations of the Bureau promulgated under the Revenue Act of 1921, automobile hearses were classified as automobile trucks, and under the regulations relating to the Revenue Act of 1924 (the first of the Revenue Acts which taxed the chassis and body separately) the hearse chassis was regarded as an automobile truck chassis. See article 12 of Regulations 47 under those laws and decision in the case of *The Sayers & Scoville Co.* v. *United States* (70 Ct. Clms., 85) (Ct. D. 219, C. B. IX–2, 420).

It is the opinion of this office that the classification under the earlier Revenue Acts is correct. Accordingly, it is held that a hearse chassis is an automobile truck chassis within the meaning of section 606(a) of the Revenue Act of 1932, and is subject to tax as such.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

REGULATIONS 46, ARTICLE 40: Credit for taxes on tires and inner tubes sold on automobiles and motor cycles. XII–27–6270 S. T. 687

Taxability of extra tires and inner tubes sold with a new automobile.

Advice is requested concerning the taxable status, under section 606 of the Revenue Act of 1932, of *extra* tires and inner tubes shipped in connection with a new automobile, as distinguished from *spare* tires and inner tubes furnished as original equipment.

In view of the provisions of section 606(e) of the Revenue Act of 1932, the tax of 3 per cent imposed by section 606(b) should be computed on the sale price of the automobile, including the tires and inner tubes normally sold thereon, as well as the spare tires and inner tubes furnished therewith as regular equipment (whether or not billed separately) and credit may be taken against such tax at the rate of 3 per cent of the purchase price of such tires and tubes.

If, however, any *extra* tires and inner tubes are sold with a new automobile, as distinguished from *spare* tires and inner tubes, they should be billed separately. The tax of 3 per cent imposed by section 606(b) of the Revenue Act of 1932 on automobiles should not be computed on such extra tires and inner tubes and no credit is allowable under section 606(e) of the Revenue Act of 1932.

SECTION 609.—SPORTING GOODS.

REGULATIONS 46, ARTICLE 7: Sales for further manufacture. XII-35-6382 G. C. M. 12076

A manufacturer or producer of tennis rackets may purchase tennis racket frames and strings tax-free for further manufacture or production.

An opinion is requested whether a manufacturer or producer of tennis rackets may purchase tennis racket frames and strings tax-free for the purpose of further manufacture or production.

Section 609 of the Revenue Act of 1932 provides in part as follows:

> There is hereby 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. Tennis rackets, tennis racket frames and strings, * * *.

Section 620 of the Revenue Act of 1932, as amended by the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), reads in part as follows:

> Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—
> (1) for use by the vendee as material in the manufacture or production of, or as a component part of an article enumerated in this title;
> (2) for resale by the vendee for such use by his vendee, if such article is in due course so resold;
>
> * * * * * * *
>
> For the purposes of this title the manufacturer or producer to whom an article is sold under paragraph (1) or resold under paragraph (2) shall be considered the manufacturer or producer of such article. * * *

Section 620, as originally enacted and as amended by the Act of June 16, 1933, clearly permits the sale of taxable parts without the imposition of the tax if the purchaser is to use such parts in producing a taxable article.

Under the provisions of article 7 of Regulations 46, if the purchaser desires to purchase taxable parts tax-free to produce a taxable article he must give his vendor a certificate setting forth that such parts are to be used in the production of an article to be taxable when sold.

The provisions of section 620 are based upon the theory that inasmuch as the purchaser of parts is required to pay a tax upon the sale of the completed article no tax will be lost to the Government by allowing the sales of the component parts tax-free. The purchaser may, if he desires, pay the tax to the vendor when he purchases such parts and after using them in producing a taxable article which he subsequently sells he may take a credit for the tax paid on the component parts. This credit is expressly allowable by the terms of section 621 of the Revenue Act of 1932.

If the purchaser of taxable parts is to produce a completed tennis racket and sell the same he has the right to purchase the parts therefor without paying the tax upon the sale. To deny a producer the right to purchase such parts tax-free for further manufacture or production would deny him a privilege which the statute expressly gives to him. Such a denial, in effect, would class tennis racket frames and strings among the articles which may not be purchased

tax-free for such purposes. If Congress had intended to except such articles it would have listed them among the exceptions in the statute. As it did not so list them, it is held that a manufacturer or producer of tennis rackets may purchase tennis racket frames and strings tax-free for further manufacture or production.

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

Regulations 46, Article 53: Scope of tax. XII–33–6346
S. T. 696

Sales made to a purchaser who subsequently goes into bankruptcy, held taxable.

Advice is requested concerning the taxability under section 609 of the Revenue Act of 1932 of sales of merchandise where the purchaser subsequently goes into bankruptcy.

Section 609 imposes a tax upon certain articles when sold by the manufacturer, producer, or importer. The tax attaches when title to the goods passes to the purchaser. If the purchaser subsequently goes into bankruptcy this does not in any way vitiate the original sale upon which the tax was imposed.

A similar issue was decided in the case of *Carter* v. *Slavick Jewelry Co.* (26 Fed. (2d), 571, T. D. 4198, C. B. VII–2, 345), wherein the court considered a statute containing language substantially the same as appears in section 609 of the Revenue Act of 1932, and held that the tax is measured by the full selling price, whether or not it is actually collected.

Accordingly, the tax imposed under section 609 is applicable to sales of merchandise where the purchaser subsequently goes into bankruptcy.

SECTION 615.—SOFT DRINKS.

Regulations 44, Article 9: Sales to States or political subdivisions thereof. XII–29–6298
S. T. 691

Operation of a soda fountain by a State educational institution held to be a proprietary function as distinguished from an essential governmental function.

Advice is requested whether the X University is subject to the tax on soft drinks imposed by section 615(a) of the Revenue Act of 1932.

It is contended by the X University that it is not subject to the tax because it is a State instrumentality; that the operation of the soda fountain is part of the activities of the university; and that as such activities are carried on in the exercise of a strictly governmental function no tax is payable.

While there is no doubt that the conduct of an educational institution by a State or a political subdivision thereof constitutes an essential governmental function (*Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S., 393 [Ct. D. 485, C. B. XI–1, 265]), yet it does not follow

that, if to carry on such a function the State enters into private business, exemption from Federal taxation will extend to that business. The fact that no profit is derived from the private business, or that if a profit is derived it is paid into the State treasury, does not alter the case where the tax is imposed on sales and not upon property. (*Snyder* v. *Bettman*, 190 U. S., 249.)

In the case of *South Carolina* v. *United States* (199 U. S., 437) the court pointed out the well established distinction between duties of a public character cast upon municipal corporations and those which relate to their private business. In the course of its opinion the court said:

* * * It is reasonable to hold that while the former [National Government] may do nothing by taxation in any form to prevent the full discharge by the latter [State] of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

(See also *Flint* v. *Stone Tracy Co.*, 220 U. S., 107.)

From a consideration of the decisions cited and other decided cases it is held that the operation of a soda fountain constitutes a proprietary function as distinguished from an essential governmental function, and that any person conducting such an activity is subject to the tax imposed by section 615(a) of the Revenue Act of 1932. The fact that the activity is carried on by an instrumentality of a State or political subdivision thereof does not change its proprietary nature or warrant exemption from tax.

REGULATIONS 44, ARTICLE 41: Scope of tax. XII–30–6311
G. C. M. 11989

Taxability of carbonic acid gas sold for pressure purposes in drawing beverages from receptacles. (S. T. 608 affirmed.)

Exception is taken to S. T. 608 (C. B. XI–2, 494), with reference to sales of carbonic acid gas subject to tax under section 615(a)7 of the Revenue Act of 1932. That portion of S. T. 608 to which exception is taken is the conclusion that all sales of carbonic acid gas to any person conducting a soda fountain, ice cream parlor, or similar place of business, are subject to the tax imposed under section 615(a)7 and that no exemption from the tax is provided because of use by such person other than in connection with the manufacture of beverages. The particular carbonic acid gas referred to is used for pressure purposes in drawing and dispensing draft beer.

The effect of S. T. 608 is that carbonic acid gas used for pressure in drawing draft beer will be subject to tax if the gas is sold to the operator of a soda fountain, ice cream parlor, or similar place of business, but will not be subject to the tax when sold to other persons to be used for the same purpose. The position of the Bureau as reflected in S. T. 608 is in accord with the only construction of the statute which the language of that statute permits.

Section 615(a)7 of the Revenue Act of 1932 provides as follows:

Upon all carbonic acid gas sold by the manufacturer, producer, or importer, or by a dealer in such gas, to a manufacturer of any carbonated beverages, or *to any person conducting a soda fountain, ice cream parlor, or other similar*

place of business, and upon all carbonic acid gas used by the manufacturer, producer, or importer thereof in the preparation of soft drinks, a tax of 4 cents per pound. [Italics supplied.]

The principal argument advanced in protest against S. T. 608 is that at the time of the enactment of section 602(f) of the Revenue Act of 1921, which reads the same as section 615(a)7 of the Revenue Act of 1932, the sale of beer by persons operating soda fountains was not contemplated by Congress. It is contended that Congress imposed a tax on carbonic acid gas sold to persons operating soda fountains in contemplation of the regular soda fountain business as it was conducted at the time of the passage of the Revenue Acts of 1921 and 1932, i. e., the business of compounding soft drinks. The attention of the Bureau is directed to the legislative committee reports with reference to the Revenue Act of 1921, and it is contended that the general language of those reports indicates that the taxes imposed under section 602 of the Revenue Act of 1921 are applicable to beverages or ingredients of beverages.

If the language of section 615(a)7 of the Revenue Act of 1932 (and the same language used in section 602(f) of the Revenue Act of 1921) were ambiguous, or if the terms used therein were readily susceptible of more than one construction, reference could properly be had to the legislative history of the taxing statutes for the purpose of determining the intent of the legislators. By the express terms of the statute the tax attaches "Upon all carbonic acid gas sold * * * to any person conducting a soda fountain, ice cream parlor, or other similar place of business * * *." The terms of the statute are clear and specific and, accordingly, there is no ambiguity presented and no uncertainty of meaning of terms which would either necessitate or permit a recourse to the rules of statutory construction ordinarily employed in resolving ambiguities in a statute. However, if the history of the various statutes imposing a tax on carbonic acid gas were to be considered, the result of that consideration would support a conclusion contrary to that now urged.

In section 315 of the Revenue Act of 1917 a tax was imposed on carbonic acid gas, and this section contained a specific provision which limited the tax to gas "intended for use in the manufacture or production of carbonated water or other drinks." Article 35 of Regulations 44, issued under the Revenue Act of 1917, provided that carbonic acid gas used in drawing beer from containers was not subject to the tax. In the enactment of the Revenue Act of 1918, section 315 of the Revenue Act of 1917 was repealed and a tax made applicable to various types of soft drinks, including those made with the use of carbonic acid gas. In the Revenue Act of 1921 a tax was imposed upon carbonic acid gas under section 602(f) in substantially the same language as is now contained in section 615(a)7 of the Revenue Act of 1932. It will be noted that the distinction between the Revenue Act of 1917 and the Revenue Acts of 1921 and 1932 is that in the 1917 Act it was provided that the carbonic acid gas subject to tax was that "intended for use" in the manufacture and production of beverages. The fact that in imposing a tax on carbonic acid gas under the Revenue Act of 1932 Congress saw fit to adopt the provisions of the Revenue Act of 1921 instead of the pro-

visions of the Revenue Act of 1917 is significant. Proper notice must be taken of the circumstance that had Congress intended to tax only carbonic acid gas intended for use in compounding beverages it would have used language specifically designed to accomplish this end, such as it had used previously in the Revenue Act of 1917.

That Congress was not unmindful of the significance of the term "used" is demonstrated by the fact that in section 615(a)7 of the Revenue Act of 1932 it is provided that the tax shall attach to all carbonic acid gas "used" by the manufacturer, producer, or importer thereof in the preparation of soft drinks. As before stated, there is no such limitation of use with respect to the carbonic acid gas sold to operators of soda fountains, ice cream parlors, or similar places of business. In section 615(a)6 of the Revenue Act of 1932, imposing the tax on finished or fountain sirups, the matter of use appears to have been particularly emphasized. The tax on sirups is applicable to the kinds "used" in manufacturing soft drinks at the rate of 6 cents per gallon, except that in the case of any sirups "intended to be used" in the manufacture of carbonated beverages sold in closed containers the rate shall be 5 cents per gallon. Where any person manufacturing carbonated beverages manufactures and "uses" sirups in the manufacture of carbonated beverages sold in closed containers, a tax is applicable to such sirups at the rate of 5 cents per gallon. The tax imposed on sirups is not applicable to sirups "sold for use" in the manufacture of certain beverages enumerated in other paragraphs of the taxing statute.

Attention has been directed to the fact that the imposition of the tax as proposed in S. T. 608 invokes a hardship on certain dispensers of beer in that carbonic acid gas may be used by other dispensers of beer without the incidence of the tax. It would not appear necessary that authority be cited in support of the principle that the hardship of a tax as an incident to the operation of any business is not a matter to be considered in determining the application of the tax where such application is specifically provided by the taxing statute. In this connection it might be stated that the actual hardship involved is negligible, as, according to statements made, the amount of tax applicable to the carbonic acid gas used in dispensing 15½ gallons of draft beer amounts only to about 4 cents.

As already indicated, by the plain provisions of the taxing statute, the tax imposed under section 615(a)7 attaches upon all carbonic acid gas sold to any person conducting a soda fountain, ice cream parlor, or similar place of business. There is no language in the statute which indicates that the purpose for which the gas may be used shall be considered in determining the application of the tax. Therefore, the position taken by the Bureau as set forth in S. T. 608 that sales of carbonic acid gas to any person conducting a soda fountain, ice cream parlor, or similar place of business are subject to tax regardless of the use by such person of the carbonic acid gas, reflects a proper interpretation of the language of the taxing statute. There appears to be no reason for a departure from a construction of the statute based upon its precise terms.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

REGULATIONS 44, ARTICLE 41: Scope of tax. XII–50–6558
S. T. 714

Taxability of carbonic acid gas sold under various conditions.

Question is raised whether sales of carbonic acid gas to bottler jobbers who resell such gas to persons not within the scope of section 615(a)7 of the Revenue Act of 1932 are subject to tax.

Section 615(a)7 imposes a tax of 4 cents per pound—

Upon all carbonic acid gas sold by the manufacturer, producer, or importer, or by a dealer in such gas, to a manufacturer of any carbonated beverages, or to any person conducting a soda fountain, ice cream parlor, or other similar place of business, * * *.

The taxability of a sale of carbonic acid gas, when made by a manufacturer, producer, importer or dealer, depends upon the type of business in which the purchaser is engaged and not upon the use to which the gas is subjected by the purchaser.

It is clear from a consideration of the terms of the law that a sale of gas made by a manufacturer, producer, importer, or dealer is subject to the tax when made (1) to a manufacturer of any carbonated beverages, or (2) to any person conducting a soda fountain, ice cream parlor, or other similar place of business.

If the purchaser comes within either of these general classes the tax is payable by the seller irrespective of the use or disposition of the gas by the purchaser. In no case may the manufacturer, producer, or importer of carbonic acid gas, or a dealer in such gas, take credit for a resale of gas by a purchaser who falls within either classification.

It is equally clear that sales of gas when made to persons who do not come within classification (1) or (2) are not subject to the tax. Sales to a dealer or to a dispenser of beer come within this class.

If a sale is made to a dealer no tax is due thereon, but sales made by the dealer are taxable or not taxable under the law, depending entirely upon whether his purchaser comes within class (1) or class (2), or conducts a type of business outside those classes.

One difficulty in the administration of the law arises in cases where the purchaser conducts more than one business. Under such circumstances certain sales to the same purchaser may be taxable and others may be exempt. Where a sale is made to a manufacturer of any carbonated beverages who is also a dealer, the sales made to him as a manufacturer are taxable and those made to him as a dealer are not taxable. If these sales are separable and the separate sales can be clearly identified by any reasonable method, the tax liability should be adjusted accordingly.

Where the capacity in which the purchase is made can not be established at the time of sale, the seller must pay the tax on the entire quantity of gas sold, but may subsequently claim credit for the tax to the extent that it is established that tax was paid on gas sold to the purchaser in his capacity as a dealer. In claiming credit the seller must comply with the requirements of article 52 of Regulations 44, as amended by Treasury Decision 4357 (C. B. XI–2, 515). Resales made by the purchaser in his capacity as a dealer are governed by the rules set forth above. Therefore, bottler jobbers referred to in the question raised are subject to tax on their resales depending upon the application of those rules.

SECTION 616.—ELECTRICAL ENERGY.

XII–40–6438
T. D. 4393

Tax on electrical energy—Section 616 of the Revenue Act of 1932, as amended by section 6 of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress).—Chapter V, Regulations 42, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 6(b) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress), provides:

(b) Despite the provisions of this section the tax imposed under section 616 of the Revenue Act of 1932 before its amendment by this section on electrical energy furnished before September 1, 1933, shall be imposed, collected, and paid in the same manner and shall be subject to the same provisions of law (including penalties) as if this section had not been enacted.

Chapter V of Regulations 42, approved October 22, 1932, as amended prior to this Treasury decision, remains in full force and effect with respect to the tax imposed by section 616 of the Revenue Act of 1932 on amounts paid for electrical energy furnished on or after June 21, 1932, and before September 1, 1933.

Section 616 of the Revenue Act of 1932 was amended by section 6(a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress). In conformity with the law as so amended, Chapter V of Regulations 42, approved October 22, 1932, is amended, effective with respect to electrical energy sold on or after September 1, 1933, to read as follows:

CHAPTER V.

TAX ON ELECTRICAL ENERGY.

Section 6(a) of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress).

SEC. 6. (a) Effective September 1, 1933, section 616 of the Revenue Act of 1932 is amended to read as follows:

"SEC. 616. *Tax on electrical energy for domestic or commercial consumption.*—

"(a) There is hereby 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."

* * * * * * *

ART. 39. *Effective period.*—The tax applies to electrical energy sold on or after September 1, 1933, and before July 1, 1935.

ART. 40. *Scope of tax.*—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.

Every person who purchases electrical energy for resale (except resale by the owner or lessee of a building to the tenants therein) must register with the collector for the district in which is located his principal place of business (or, if he has no principal place of business in the United States, with the collector at Baltimore, Md.). The application for registry must show the name and place, or places, of business of the applicant. The collector will issue registration numbers in a separate series, beginning with No. 1, for his district. Electrical energy so furnished for resale shall be exempt from tax only when the vendee furnishes to the vendor a certificate showing the vendee's registration number and that the energy is to be resold by him.

Where electrical energy is sold to a person registered under the provisions of the preceding paragraph, a portion of which is for domestic or commercial consumption by the vendee and a portion of which is for resale, the certificate furnished by such vendee must show the amount of such electrical energy sold to him for domestic or commercial consumption by him and the amount sold to him for resale. The vendor must pay tax on the portion of such electrical energy sold to the vendee for domestic or commercial consumption by the vendee. Such vendee must in turn pay tax on the portion of such electrical energy resold by him for domestic or commercial consumption. The tax in each case is based on the price for which the energy is sold.

The tax attaches to electrical energy sold for domestic or commercial consumption, irrespective of whether any of the energy sold is actually used or the charges therefor actually collected. The tax is due on all such sales whether the charge therefor is billed as a minimum charge, a flat charge, a service charge, or otherwise.

Where a discount is deductible from the gross charge for electrical energy if payment therefor is made by the consumer within a prescribed period, or where an additional amount is added for failure to make payment within a prescribed period, the tax shall be based on the entire amount actually due.

ART. 41. *Liability for tax.*—The Act, as amended, provides that the tax shall be paid by the vendor of electrical energy sold for domestic or commercial consumption.

ART. 42. *Rate of tax.*—The tax is imposed upon electrical energy sold for domestic or commercial consumption at the rate of 3 per centum of the price for which so sold.

EXEMPTIONS.

Section 616(c) of the Revenue Act of 1932, as amended by section 6(a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress).

"(c) No tax shall be imposed under this section upon electrical energy sold to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. None of the provisions of this section shall apply to publicly owned electric and power plants. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may, by regulation, prescribe."

ART. 43. *Exemptions.*—Electrical energy sold to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia, is exempt from the tax.

Sales of electrical energy by electric and power plants owned by the United States, or any State or Territory, or political subdivision thereof, or the District of Columbia, are exempt from the tax.

ADMINISTRATIVE PROVISIONS.

Section 616(b) of the Revenue Act of 1932, as amended by section 6(a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress).

"(b) The provisions of sections 619, 622, and 625 shall not be applicable with respect to the tax imposed by this section."

ART. 43½. *Administrative provisions.*—The provisions of articles 44 to 48, inclusive, of these regulations are in full force and effect with respect to electrical energy furnished before September 1, 1933, but are not applicable with respect to electrical energy sold on or after such date.

The return and payment of tax on electrical energy sold on or after September 1, 1933, will be governed, in so far as they are applicable, by the administrative provisions of Regulations 46, approved June 18, 1932, relating to the excise taxes on sales by manufacturers, producers, or importers. All of the applicable administrative provisions of Regulations 46 are hereby incorporated by reference in this article and chapter. (See articles 67 to 70, inclusive, 71 (as amended), 72, 73, and 77 to 79, inclusive, of Regulations 46, approved June 18, 1932.)

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 20, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

REGULATIONS 42, ARTICLE 40: Scope of tax. XII-32-6338
S. T. 695

Electrical energy furnished farmers and fruit growers for general purposes, held taxable; that furnished for irrigation purposes, held not taxable.

Advice is requested whether electrical energy furnished farmers and fruit growers for irrigation and other purposes is taxable under section 616 of the Revenue Act of 1932.

It is contended that the taxable status of electrical energy used for all irrigation purposes has not been definitely determined. It is also contended that the purely productive activities engaged in by farmers in the growing of food products for wholesale distribution are industrial in their scope and not taxable.

Upon careful consideration of the questions presented the Bureau holds that the general operations of farming are either domestic or commercial in character and that, therefore, electrical energy furnished for general use in these operations is subject to the tax. The mere fact that a few activities involving industrial processes are incidentally carried on at a farm will not affect the taxability of the electrical energy furnished at such a location through one meter.

The Bureau also holds that electrical energy furnished farmers and fruit growers, whether companies or individuals, exclusively for purposes of irrigation, is not furnished for domestic or commercial consumption, within the meaning and intent of the statute, and that, therefore, it is not subject to the tax.

For example, let it be supposed that X has one meter for residential lighting, etc., and one for operating a pump for irrigation and spraying. Only a small portion of the energy is used for spraying, and no part of the water pumped is used for domestic purposes.

The energy furnished on the residence meter is subject to the tax, whereas that furnished on the irrigation meter is not taxable.

Let it also be supposed that Y has three meters, one used for residential lighting, etc., one for operating a pump for irrigation, and one for operating another pump for spraying. No part of the water pumped is used for domestic purposes.

The energy furnished on the residence and spraying meters is subject to the tax, but that furnished on the irrigation meter is not taxable.

SECTION 616 OF THE REVENUE ACT OF 1932, AS AMENDED BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).

REGULATIONS 42, ARTICLE 40: Scope of tax. XII–39–6418
S. T. 701

Invoicing electrical energy furnished or sold before and after September 1, 1933.

Advice is requested by the X Power & Light Co. as to the proper method of invoicing its customers for electrical energy furnished or sold before and after September 1, 1933, the date when the change in the basis of computing the tax on electrical energy became effective under section 616 of the Revenue Act of 1932 as amended by the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress).

It is stated that the corporation does not invoice the energy as of the calendar month. A number of its bills are rendered for a period extending from the 10th of one month to the 10th of the succeeding month.

It is held that where bills rendered after September 1, 1933, include energy furnished both before and after that date, the tax on energy so furnished should be computed on a pro rata basis for the number of days covered by each taxable period. In other words, if a meter is read on September 10, 1933, and the bill rendered includes energy furnished from August 10 to September 10, the consumer will be liable under the old law for the tax on 21/31 of the amount paid for the energy furnished, and the vendor, pursuant to the provisions of the Act of June 16, 1933, will be liable for the tax on 10/31 of the amount charged for energy sold by it and included in the bill.

It will be necessary for the company to keep the same evidence and records after September 1, 1933, as it was required to keep prior to that date in order to determine tax liability.

REGULATIONS 42, ARTICLE 40: Scope of tax. XII–43–6468
S. T. 708

The tax attaches at the time the consumer is billed for electrical energy, irrespective of whether the amount due is collectible.

Inquiry is made as to when, under section 616 of the Revenue Act of 1932, as amended by the Act of June 16, 1933 (Public, No. 73,

Seventy-third Congress), the tax attaches to sales of electrical energy, and whether the tax attaches where the charges for the energy are uncollectible.

Since the measure of the tax imposed by section 616 of the Revenue Act of 1932, as amended by the Act of June 16, 1933, is the price for which the electrical energy is sold for domestic or commercial consumption, the tax is deemed to attach at the time the energy is billed to the consumer, because the price of the energy is first definitely fixed at that time. The tax is due on the basis of the sales price, as reflected by the bill furnished the consumer, irrespective of whether the amount due is collectible.

REGULATIONS 42, ARTICLE 40: Scope of tax. XII–45–6499
S. T. 711

A power company may take credit for taxes paid out of its own funds on electrical energy furnished for domestic or commercial consumption prior to September 1, 1933, where it is unable to collect from the consumers.

The question is presented whether a power company may take credit in its returns for periods subsequent to August 31, 1933, for taxes paid out of its own funds on electrical energy furnished for domestic or commercial consumption prior to September 1, 1933, where it is unable to collect from the consumers.

It was the practice of the X Power Co. to advance out of its own funds the total tax shown on bills sent to consumers each month for electrical energy furnished prior to September 1, 1933, the company being reimbursed for such taxes when the consumers paid the bills. Some of the bills have not been paid and are uncollectible. The power company desires to take credit in later returns for the uncollectible taxes in such cases.

Under the provisions of section 616(a) of the Revenue Act of 1932, as originally enacted, and the regulations pertaining thereto, the consumer was the taxpayer, and the power company was liable for collection of the tax on all payments made for electrical energy furnished for domestic or commercial consumption from June 21, 1932, to June 30, 1934, both dates inclusive, regardless of when such payments were made. In lieu of the tax imposed by section 616(a) of the Revenue Act of 1932, the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), effective September 1, 1933, imposes the tax upon the vendor of "electrical energy sold for domestic or commercial consumption and not for resale." With respect to amounts paid for electrical energy furnished prior to September 1, 1933, the tax was not due until the amounts were paid by the consumers. Where, as in the instant case, the power company paid in advance the taxes on electrical energy furnished for domestic or commercial consumption prior to September 1, 1933, the company may take credit in its returns filed on or after that date for the taxes advanced by it which it is unable to collect.

SECTION 617.—GASOLINE.

REGULATIONS 44, ARTICLES 44, 45, and 47. XII-44-6489
T. D. 4400

TAX ON GASOLINE.

Section 617 of the Revenue Act of 1932, as amended by section 211 of the National Industrial Recovery Act, approved June 16, 1933.—Articles 44, 45, and 47 of Regulations 44, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 44, approved June 18, 1932, are amended by inserting in lieu of the quotation from section 617 of the Revenue Act of 1932 and the caption thereof at the beginning of Chapter VII, the following:

SECTION 617 OF THE REVENUE ACT OF 1932, AS AMENDED BY SECTION 211 OF THE NATIONAL INDUSTRIAL RECOVERY ACT.

(a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1½ cents a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

(b) If a producer or importer uses (otherwise than in the production of gasoline) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this title be considered a sale.

(c) As used in this section—

(1) the term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.

(2) the term "gasoline" means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes. As used in this paragraph the term "benzol" does not include benzol sold for use otherwise than as a fuel for the propulsion of motor vehicles, motor boats, or airplanes, and otherwise than in the manufacture or production of such fuel.

The first paragraph of article 44 of Regulations 44 is amended to read as follows:

ART. 44. *Use of terms.*—The term "gasoline" includes (1) all products commonly or commercially known as gasoline regardless of their classifications or uses, (2) all products commonly or commercially known as benzol regardless of their classifications except benzol sold for use otherwise than as a fuel for the propulsion of motor vehicles, motor boats, or airplanes, and otherwise than in the manufacture or production of such fuel, and (3) any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or airplanes.

Article 45 is amended to read as follows:

ART. 45. *Sales not subject to tax.*—Section 617 provides that under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax shall be imposed upon sales of gasoline to a producer of gasoline. On and after November 1, 1933, no sales of gasoline may be made tax-free to producers of gasoline unless the purchaser has registered as such with the collector for his district and has obtained a registration certificate on Form 637 bearing his registration number, as provided in article 7 of these regulations, as

amended. In order to establish the right to this exemption the vendor must obtain from the purchaser prior to or at the time of sale, and retain in his possession, a certificate showing that the purchaser is a producer of gasoline and bearing the registration number of such purchaser. If upon inspection it is found that the records of an importer or producer do not contain proper certificates, with supporting invoices, establishing that the sales were exempt, such importer or producer will be required to pay the tax.

Tax-free sales of gasoline to producers of gasoline under section 617 may be made under an exemption certificate in substantially the following form:

EXEMPTION CERTIFICATE.

(For use by Producers of Gasoline Under Section 617(a).)

The undersigned hereby certifies that he is a producer of gasoline and holds certificate of registry No. ____, issued by the collector of internal revenue at _____.

It is understood that the undersigned is liable for tax as a producer of gasoline with respect to all gasoline sold or used by him, unless specifically exempted by law. It is also understood that the fraudulent use of this certificate to secure exemption will subject the guilty parties to the penalties provided by law.

_____,
Name.

_____.
Address.

On and after June 17, 1933, the tax does not attach to any sale of benzol made by the importer thereof, or by a producer of gasoline, if it is sold by him for use (1) otherwise than as a fuel for the propulsion of motor vehicles, motor boats, or airplanes, and (2) otherwise than as a material in the manufacture or production of such fuel. In order to establish the exemption the importer or producer must obtain from the purchaser, prior to or at the time of sale, a certificate to the effect that the benzol will be used by such purchaser for a purpose other than as fuel for the propulsion of motor vehicles, motor boats, or airplanes, and other than in the manufacture or production of such fuel.

Following is a form of exemption certificate which may be accepted by importers and producers as evidence of sales of benzol for tax-free purposes:

EXEMPTION CERTIFICATE.

(For use by Purchasers of Benzol for Industrial Purposes, Under Section 617(c)2.)

_____,
Date.

The undersigned purchaser hereby certifies that he is a _____
(State business and
_____ and that the benzol in the order covered by
article or articles manufactured.)
this certificate will not be used as a fuel for the propulsion of motor vehicles, motor boats, or airplanes, and will not be used in the manufacture or production of such fuel, but will be used by him for the following purpose:

_____

_____

_____

The undersigned understands that if the benzol is used, or otherwise disposed of by him, under circumstances where exemption from the tax is not warranted by the law, he will, if a registered producer of gasoline, be liable for the tax upon his sale or use of such benzol, and that whether or not a registered producer, he will, for fraudulent use of the certificate, be subject to the 100 per centum penalty provided by section 1114(d) of the Revenue Act of 1926. The undersigned also understands that he must be prepared to establish by competent evidence the purpose for which such benzol was used.

_____.

_____.

If it is impracticable to furnish a separate certificate for each order or contract, a certificate covering all orders between given dates (such period not to exceed a month) will be accepted. Such certificates and proper records of invoices, orders, etc., relative to tax-free sales must be retained as provided in article 50. Where upon inspection it is discovered that an importer's or producer's records with respect to any sale claimed to be tax-free do not contain a proper certificate, with supporting invoices and such other evidence as may be necessary to establish the character of the sale, the tax shall be payable by such importer or producer on such sale.

Article 47 is amended to read as follows:

ART. 47. *Rate of tax.*—The tax is payable by the importer or by a producer (1) at the rate of 1 cent a gallon on sales made prior to June 17, 1933; and (2) at the rate of 1½ cents a gallon on sales made on and after June 17, 1933.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved October 26, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

REGULATIONS 44, ARTICLE 47: Rate of tax. XII–52–6581
T. D. 4414

Tax on gasoline.—Section 617 of the Revenue Act of 1932, as amended by sections 211 and 217 of the National Industrial Recovery Act, approved June 16, 1933.—Article 47 of Regulations 44, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Pursuant to the provisions of section 217(a) of the National Industrial Recovery Act, the President on December 5, 1933, proclaimed December 5, 1933, as the date of the repeal of the eighteenth amendment to the Constitution. Under section 217(b) of the National Industrial Recovery Act the proclamation of the President affects the application of the tax on gasoline imposed by section 617(a) of the Revenue Act of 1932, as amended by section 211(a) of the National Industrial Recovery Act, by reducing the rate, effective January 1, 1934, from 1½ cents a gallon to 1 cent a gallon.

Article 47 of Regulations 44, approved June 18, 1932, as amended by Treasury Decision 4400, approved October 26, 1933 [see on page 327], is amended to read as follows:

ART. 47. *Rate of tax.*—The tax is payable by the importer, or by a producer, (1) at the rate of 1 cent a gallon on all sales made prior to June 17, 1933, and subsequent to December 31, 1933, and (2) at the rate of 1½ cents a gallon on all sales made during the period June 17, 1933, to December 31, 1933, both dates inclusive.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved December 19, 1933.

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

37408°—34——22

SECTION 620.—SALE OF ARTICLES FOR FURTHER MANUFACTURE.

REGULATIONS 44, ARTICLE 7: Sale for further manufacture. XII–44–6487 T. D. 4399

TAX-FREE SALES.

Section 620 of the Revenue Act of 1932, as amended by section 4(a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress).—Articles 7 and 9, Regulations 44, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 44, approved June 18, 1932, are amended by inserting, in lieu of article 7 and the captions and the excerpt from section 620 of the Revenue Act of 1932 preceding such article, the following:

TAX-FREE SALES FOR FURTHER MANUFACTURE.

SECTION 620 OF THE REVENUE ACT OF 1932, AS AMENDED (EFFECTIVE JULY 1, 1933) BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

(1) for use by the vendee as material in the manufacture or production of, or as a component part of, an article enumerated in this title;

(2) for resale by the vendee for such use by his vendee, if such article is in due course so resold;

* * * * *

For the purposes of this title the manufacturer or producer to whom an article is sold under paragraph (1) or resold under paragraph (2) shall be considered the manufacturer or producer of such article. * * *

ART. 7. *Tax-free sales.*—On and after July 1, 1933, where manufacturers and their vendees comply with these regulations, no tax shall be imposed under Title IV on any article when sold—

(1) for use by the vendee as material in the manufacture or production of, or as a component part of, an article enumerated in Title IV;

(2) for resale by the vendee for such use by his vendee if such article is in due course so resold.

Registration.—On and after November 1, 1933, no taxable article may be sold tax-free under paragraph (1) or (2) of section 620, as amended, unless the vendor and the vendee have each registered with the collector of internal revenue for the district in which is located his principal place of business (or if he has no principal place of business in the United States, with the collector of internal revenue at Baltimore, Md.), and unless the exemption certificate hereinafter prescribed shows the registration number of the vendee.

Every person qualifying as a manufacturer of articles taxable under Title IV, or as a vendee with an established place of business reselling direct to manufacturers of taxable articles, will be granted a registration certificate on Form 637, upon application to the collector for his district.

Collectors of internal revenue are hereby authorized to assign registration numbers to all manufacturers located in their districts who have filed returns under the Revenue Act of 1932 covering articles subject to tax under these regulations.

The fact that any person has registered in accordance with the provisions of section 615(c), relating to the tax on soft drinks (see article 23), will not relieve such person of the requirement for registration under this article if he desires to purchase articles tax-free in accordance with the provisions of paragraph (1) or (2) of section 620, as amended.

Jobbers or dealers who are not manufacturing or producing taxable articles or selling taxable articles direct to manufacturers for use in the manufacture or production of taxable articles are not entitled to purchase tax-free under paragraph (1) or (2) of section 620, as amended, and will not be granted a registration certificate.

The Commissioner is authorized to cancel the registration certificate and to deny the right to sell or purchase articles tax-free in any case where he is satisfied that the registrant is not a bona fide manufacturer of taxable articles, or a vendee reselling direct to manufacturers of such articles, or where tax-free sales are being made for purposes not warranted by the law and these regulations.

Articles sold to a vendee for use by him in the manufacture or production of taxable articles.—The exemption is provided with respect to a taxable article which is sold for use by the purchaser as material in the manufacture or production of a taxable article or as a component part of a taxable article.

For special provisions with respect to tax-free sales of lubricating oils or gasoline to manufacturers or producers of lubricating oils or gasoline, see articles 11 and 45, as amended.

To secure exemption under section 620(1) the manufacturer must obtain from his vendee, prior to or at the time of sale, and retain in his possession, a certificate showing that the vendee is a manufacturer of articles taxable under Title IV and that the article purchased is to be used by him as material in the manufacture or production of another taxable article or as a component part thereof.

A manufacturer who purchases an article under an exemption certificate for use in the manufacture or production of a taxable article shall, for the purposes of Title IV, be considered the manufacturer of the article so purchased, and is liable for tax on his use or resale of the article unless the exempt character of the use or resale is established.

Articles sold for resale for use in the manufacture or production of taxable articles.—The exemption is provided with respect to a taxable article which is sold by the manufacturer to any person (either a dealer or another manufacturer) for resale without change in form to a manufacturer for use by him as material in the manufacture or production of a taxable article or as a component part thereof, provided the article is in due course so resold.

In order to establish exemption from tax in accordance with section 620(2) it is necessary that (1) the manufacturer obtain from his vendee (hereinafter referred to as the "dealer"), prior to or at the time of sale, and retain in his possession, a certificate showing that the dealer is in the business of selling direct to manufacturers of taxable articles and that the article is to be resold by him only for use by his vendee as material in the manufacture or production of a taxable article or as a component part thereof, and (2) that the manufacturer obtain from the dealer proof that the article has been so resold by the dealer. Such proof shall be either (*a*) a certificate obtained by the dealer from his vendee showing that such vendee purchased the articles for use in the manufacture or production of a taxable article and not for resale, or (*b*) a sworn statement by the dealer that he has obtained from his vendee, and has in his possession, such a certificate. The certificate required by clause (1) above excuses the manufacturer for a period of not more than two months from the date when title passes or the date of shipment (whichever is prior) from paying tax on the article sold. If within two months the manufacturer has not received the proof required by clause (2) above, then the temporary exemption ceases and the manufacturer shall include the tax on the sale of such article in his return for the month in which such 2-month period expires. If such proof later becomes available, a claim for refund of tax paid may be filed, or a credit taken upon a subsequent return, within the 4-year period of limitation prescribed by section 3228 of the Revised Statutes, as amended.

Following are forms of exemption certificates which will be accepted for purposes of this article and which must be adhered to in substance:

EXEMPTION CERTIFICATE.

(Purchases for Further Manufacture under Section 620(1).)

The undersigned hereby certifies that he is a manufacturer or producer of articles taxable under Title IV of the Revenue Act of 1932, as amended, and holds certificate of registry No. ____, issued by the collector of internal revenue at _____, and that the article or articles specified in the accompanying order will be used by him as material in the manufacture or production of, or as a component part of, an article or articles, to be manufactured or produced by him, enumerated in such Title IV.

It is understood that for all the purposes of such Title IV the undersigned will be considered the manufacturer or producer of the articles purchased hereunder, and (except as specifically provided by law) must pay tax on resale or use, otherwise than as specified above, of the articles purchased hereunder. It is further understood that the fraudulent use of this certificate to secure exemption will subject the guilty parties to the penalties provided by law.

_____,
Name.

_____.
Address.

EXEMPTION CERTIFICATE.

(Purchases for Resale under Section 620(2).)

The undersigned hereby certifies that he is engaged in the business of selling direct to manufacturers or producers of articles taxable under Title IV of the Revenue Act of 1932, as amended, and holds certificate of registry No. ____, issued by the collector of internal revenue at _____, and that the article or articles specified in the accompanying order will be resold by him only for use by his vendee as material in the manufacture or production of, or as a component part of, an article or articles enumerated in such Title IV.

It is understood that the fraudulent use of this certificate to secure exemption will subject the guilty parties to the penalties provided by law.

_____,
Name.

_____.
Address.

If it is impracticable to furnish a separate exemption certificate for each order, a certificate covering all orders between given dates (such period not to exceed a calendar month) will be accepted.

Proper records, with the supporting orders, invoices, certificates, and sworn statements required by these regulations, must be maintained with respect to exempt sales as provided in article 50. If such evidence can not be produced on demand of any internal revenue officer, tax will be assessed. If any such documents are false or fraudulent, the guilty parties are liable to the penalties provided by law.

Where a manufacturer or a vendee makes a sale under exemption certificate, he must use reasonable diligence to satisfy himself that the use of the certificate is warranted by the law or regulations. If the original vendor has knowledge at the time of his sale that the article sold by him is not intended for use or resale by such vendee as specified in the certificate given by the vendee, the original vendor is liable for the tax and is not relieved of liability by the exemption certificate. Where any person attempts to defeat the tax imposed under Title IV by fraudulently giving an exemption certificate, he is liable for the penalties imposed by law.

For regulations as to other tax exemptions provided by law, see articles 9 (as amended), 11 (as amended), 14, 18, 33, 39, 45, 55 (as amended), 56 (as amended), 57, and 57½.

* * * * * * *

REGULATIONS 44, ARTICLE 9: Exempt sales to States and political subdivisions thereof. XII–44–6488 T. D. 4399

* * * * * * *

Regulations 44, approved June 18, 1932, are amended by inserting in lieu of article 9, as amended by Treasury Decision 4364, approved April 28, 1933 [C. B. XII–1, 416], the following:

SECTION 620 OF THE REVENUE ACT OF 1932, AS AMENDED (EFFECTIVE JULY 1, 1933) BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

* * * * * * *

(3) for resale by the vendee to a State or political subdivision thereof for use in the exercise of an essential governmental function, if such article is in due course so resold.

* * * * * * *

ART. 9. *Sales to States or political subdivisions thereof and to the United States.*—No tax will attach to the direct sale of articles by the manufacturer to States or political subdivisions thereof for use in the exercise of an essential governmental function, provided the exempt character of the sale is established by an exemption certificate in the form prescribed in this article.

Sales to the United States, the District of Columbia, or a Territory or possession of the United States are taxable, except shipments to possessions of the United States (see article 57) and sales to the United States for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war (see article 57½).

Section 620 of the Revenue Act of 1932, as amended by section 4(a) of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), provides, effective July 1, 1933, that under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under Title IV shall be imposed with respect to the manufacturer's sale of any article for resale by his vendee direct to a State or political subdivision thereof for use in the exercise of an essential governmental function, if such article is in due course so resold.

In order to establish exemption from tax in accordance with section 620(3) it is necessary that (1) the manufacturer obtain from his vendee (hereinafter referred to as the "dealer"), prior to or at the time of sale, and retain in his possession, a sworn statement showing that the article is to be resold by the dealer direct to a State or political subdivision thereof for use in the exercise of an essential governmental function, and (2) that the manufacturer obtain from the dealer proof that the article has been so resold by the dealer. Such proof shall be either (*a*) a certificate in the form prescribed below executed by an authorized officer of the State or political subdivision thereof, obtained by the dealer and forwarded to the manufacturer, or (*b*) a sworn statement by the dealer that he has in his possession such a certificate. The statement required by clause (1) above excuses the manufacturer for a period of not more than two months from the date when title passes or the date of shipment (whichever is prior) from paying tax on the article sold. If within two months the manufacturer has not received the proof required by clause (2) above, then the temporary exemption ceases and the manufacturer shall include the tax on the sale of such article in his return for the month in which such 2-month period expires. If such proof later becomes available, a claim for refund of tax paid may be filed, or a credit taken upon a subsequent return, within the 4-year period of limitation prescribed by section 3228 of the Revised Statutes, as amended.

The certificate required by this article must include an agreement that if any of the articles covered thereby are used otherwise than in the exercise of an essential governmental function, or if any of such articles are resold to employees or others, the State or political subdivision thereof will report such fact to the vendor. If the vendor is a dealer, he shall in turn report such fact to the manufacturer. The tax applicable to such articles shall be included by the manufacturer in his return for the month during which such report is made to him.

The certificate required by this article shall be in substantially the following form:

EXEMPTION CERTIFICATE.

(For Use by States or Political Subdivisions.)

_____ 193–.
(Date.)

The undersigned hereby certifies that he is the _____ of
(Title of officer.)
_____ and that the article or articles specified in the accom-
(State, City, etc.)
panying order are purchased for use by the _____ in the exercise
(Department.)
of essential governmental functions, namely:

_____

_____

_____

It is understood that the exemption from tax in the case of sales of articles to States or political subdivisions thereof is limited to articles purchased for use in the exercise of essential governmental functions, and it is agreed that where articles purchased tax-free under this exemption certificate are used for purposes other than in the exercise of essential governmental functions or are sold to employees or others, the vendee will report such fact to the vendor.

_____ (Signature.)
(Title of Officer.)

Where it is impracticable to furnish a separate certificate for each order, the manufacturer or vendee may accept a single certificate covering all orders between given dates; such period, however, not to exceed one calendar month.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved October 25, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

REGULATIONS 46, ARTICLE 7: Sales for further manufacture. XII–44–6485
T. D. 4398

TAX-FREE SALES.

Section 620 of the Revenue Act of 1932, as amended by section 4(a) of the Act of Congress approved June 16, 1933 (Public, No. 73, Seventy-third Congress).—Articles 7 and 17, Regulations 46, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 46, approved June 18, 1932, are amended by inserting, in lieu of article 7 and the captions and the quotation of section 620 of the Revenue Act of 1932 preceding such article, the following:

TAX-FREE SALES FOR FURTHER MANUFACTURE.

SECTION 620 OF THE REVENUE ACT OF 1932, AS AMENDED (EFFECTIVE JULY 1, 1933) BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

(1) for use by the vendee as material in the manufacture or production of, or as a component part of, an article enumerated in this title;

(2) for resale by the vendee for such use by his vendee, if such article is in due course so resold;

* * * * *

For the purposes of this title the manufacturer or producer to whom an article is sold under paragraph (1) or resold under paragraph (2) shall be considered the manufacturer or producer of such article. The provisions of paragraphs (1) and (2) shall not apply with respect to tires or inner tubes or articles enumerated in section 604, relating to the tax on furs.

ART. 7. *Tax-free sales.*—On and after July 1, 1933, where manufacturers and their vendees comply with these regulations, no tax shall be imposed under Title IV on any article, except tires and inner tubes and articles enumerated in section 604, relating to the tax on furs, when sold—

(1) for use by the vendee as material in the manufacture or production of, or as a component part of, an article enumerated in Title IV;

(2) for resale by the vendee for such use by his vendee if such article is in due course so resold.

Registration.—On and after November 1, 1933, no taxable article may be sold tax-free under paragraph (1) or (2) of section 620, as amended, unless the vendor and the vendee have each registered with the collector of internal revenue for the district in which is located his principal place of business (or if he has no principal place of business in the United States, with the collector of internal revenue at Baltimore, Md.), and unless the exemption certificate hereinafter prescribed shows the registration number of the vendee.

Every person qualifying as a manufacturer of articles taxable under Title IV, or as a vendee with an established place of business reselling direct to manufacturers of taxable articles, will be granted a registration certificate on Form 637, upon application to the collector for his district, except manufacturers of tires or inner tubes or articles enumerated in section 604, relating to the tax on furs.

Collectors of internal revenue are hereby authorized to assign registration numbers to all manufacturers located in their districts (except manufacturers of tires or inner tubes or articles enumerated in section 604, relating to the tax on furs) who have filed returns under the Revenue Act of 1932 covering articles subject to tax under these regulations.

Jobbers or dealers who are not manufacturing or producing taxable articles or selling taxable articles direct to manufacturers for use in the manufacture or production of taxable articles are not entitled to purchase tax-free under paragraph (1) or (2) of section 620, as amended, and will not be granted a registration certificate.

The Commissioner is authorized to cancel the registration certificate and to deny the right to sell or purchase articles tax-free in any case where he is satisfied that the registrant is not a bona fide manufacturer of taxable articles, or a vendee reselling direct to manufacturers of such articles, or where tax-free sales are being made for purposes not warranted by the law and these regulations.

Articles sold to a vendee for use by him in the manufacture or production of taxable articles.—The exemption is provided with respect to taxable articles (other than tires or inner tubes or articles enumerated in section 604, relating to the tax on furs) which are sold for use by the purchaser as material in the manufacture or production of a taxable article or as a component part of a taxable article.

To secure exemption under section 620(1) the manufacturer must obtain from his vendee, prior to or at the time of sale, and retain in his possession, a certificate showing that the vendee is a manufacturer of articles taxable

under Title IV and that the article purchased is to be used by him as material in the manufacture or production of another taxable article or as a component part thereof.

A manufacturer who purchases an article under an exemption certificate for use in the manufacture or production of a taxable article shall, for the purposes of Title IV, be considered the manufacturer of the article so purchased, and is liable for tax on his use or resale of the article unless the exempt character of the use or resale is established.

Articles sold for resale for use in the manufacture or production of taxable articles.—The exemption is provided with respect to taxable articles (other than tires or inner tubes or articles enumerated in section 604, relating to the tax on furs) which are sold by the manufacturer to any person (either a dealer or another manufacturer) for resale without change in form to a manufacturer for use by him as material in the manufacture or production of a taxable article or as a component part thereof, provided the article is in due course so resold.

In order to establish exemption from tax in accordance with section 620(2) it is necessary that (1) the manufacturer obtain from his vendee (hereinafter referred to as the "dealer"), prior to or at the time of sale, and retain in his possession, a certificate showing that the dealer is in the business of selling direct to manufacturers of taxable articles and that the article is to be resold by him only for use by his vendee as material in the manufacture or production of a taxable article or as a component part thereof, and (2) that the manufacturer obtain from the dealer proof that the article has been so resold by the dealer. Such proof shall be either (*a*) a certificate obtained by the dealer from his vendee showing that such vendee purchased the articles for use in the manufacture or production of a taxable article and not for resale, or (*b*) a sworn statement by the dealer that he has obtained from his vendee, and has in his possession, such a certificate. The certificate required by clause (1) above excuses the manufacturer for a period of not more than two months from the date when title passes or the date of shipment (whichever is prior) from paying tax on the article sold. If within two months the manufacturer has not received the proof required by clause (2) above, then the temporary exemption ceases and the manufacturer shall include the tax on the sale of such article in his return for the month in which such 2-month period expires. If such proof later becomes available, a claim for refund of tax paid may be filed, or a credit taken upon a subsequent return, within the 4-year period of limitation prescribed by section 3228 of the Revised Statutes, as amended.

Following are forms of exemption certificates which will be accepted for purposes of this article and which must be adhered to in substance:

EXEMPTION CERTIFICATE.

(Purchases for Further Manufacture under Section 620(1).)

The undersigned hereby certifies that he is a manufacturer or producer of articles taxable under Title IV of the Revenue Act of 1932, as amended, and holds certificate of registry No. ____, issued by the collector of internal revenue at _____, and that the article or articles specified in the accompanying order will be used by him as material in the manufacture or production of, or as a component part of, an article or articles, to be manufactured or produced by him, enumerated in such Title IV.

It is understood that for all the purposes of such Title IV the undersigned will be considered the manufacturer or producer of the articles purchased hereunder, and (except as specifically provided by law) must pay tax on resale or use, otherwise than as specified above, of the articles purchased hereunder. It is further understood that the fraudulent use of this certificate to secure exemption will subject the guilty parties to the penalties provided by law.

_____,
Name.

_____.
Address.

EXEMPTION CERTIFICATE.

(Purchases for Resale under Section 620(2).)

The undersigned hereby certifies that he is engaged in the business of selling direct to manufacturers or producers of articles taxable under Title IV of the Revenue Act of 1932, as amended, and holds certificate of registry

No. ____, issued by the collector of internal revenue at _____, and that the article or articles specified in the accompanying order will be resold by him only for use by his vendee as material in the manufacture or production of, or as a component part of, an article or articles enumerated in such Title IV.

It is understood that the fraudulent use of this certificate to secure exemption will subject the guilty parties to the penalties provided by law.

_____,
Name.

_____,
Address.

If it is impracticable to furnish a separate exemption certificate for each order, a certificate covering all orders between given dates (such period not to exceed a calendar month) will be accepted.

Under the specific provisions of section 620, as amended, tires and inner tubes and articles enumerated in section 604, relating to the tax on furs, may not be sold tax-free for use as material in the manufacture of, or as a component part of, an article or articles enumerated in Title IV. (See articles 26 and 40.)

Proper records, with the supporting orders, invoices, certificates, and sworn statements required by these regulations, must be maintained with respect to exempt sales as provided in article 69. If such evidence can not be produced on demand of any internal revenue officer, tax will be assessed. If any such documents are false or fraudulent, the guilty parties are liable to the penalties provided by law.

Where a manufacturer or a vendee makes a sale under exemption certificate, he must use reasonable diligence to satisfy himself that the use of the certificate is warranted by the law or regulations. If the original vendor has knowledge at the time of his sale that the article sold by him is not intended for use or resale by such vendee as specified in the certificate given by the vendee, the original vendor is liable for the tax and is not relieved of liability by the exemption certificate. Where any person attempts to defeat the tax imposed under Title IV by fraudulently giving an exemption certificate, he is liable for the penalties imposed by law.

For regulations as to other tax exemptions provided by law, see articles 17 (as amended), 42, 59, 74 (as amended), 75 (as amended), 76, and 76½.

* * * * * * *

REGULATIONS 46, ARTICLE 17: Sales to the United States Government or to a State. XII–44–6486 T. D. 4398

* * * * * * *

Regulations 46, approved June 18, 1932, are amended by inserting in lieu of article 17, as amended by Treasury Decision 4365, approved April 28, 1933 [C. B. XII–1, 417], the following:

SECTION 620 OF THE REVENUE ACT OF 1932, AS AMENDED (EFFECTIVE JULY 1, 1933) BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

* * * * * * *

(3) for resale by the vendee to a State or political subdivision thereof for use in the exercise of an essential governmental function, if such article is in due course so resold.

* * * * * * *

ART. 17. *Sales to States or political subdivisions thereof and to the United States.*—No tax will attach to the direct sale of articles by the manufacturer to States or political subdivisions thereof for use in the exercise of an essential governmental function, provided the exempt character of the sale is established by an exemption certificate in the form prescribed in this article.

Sales to the United States, the District of Columbia, or a Territory or possession of the United States are taxable, except shipments to possessions of the United States (see article 76) and sales to the United States for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war (see article 76½).

Section 620 of the Revenue Act of 1932, as amended by section (4a) of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), provides, effective July 1, 1933, that under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under Title IV shall be imposed with respect to the manufacturer's sale of any article for resale by his vendee direct to a State or political subdivision thereof for use in the exercise of an essential governmental function, if such article is in due course so resold.

In order to establish exemption from tax in accordance with section 620(3) it is necessary that (1) the manufacturer obtain from his vendee (hereinafter referred to as the "dealer"), prior to or at the time of sale, and retain in his possession, a sworn statement showing that the article is to be resold by the dealer direct to a State or political subdivision thereof for use in the exercise of an essential governmental function, and (2) that the manufacturer obtain from the dealer proof that the article has been so resold by the dealer. Such proof shall be either (*a*) a certificate in the form prescribed below executed by an authorized officer of the State or political subdivision thereof, obtained by the dealer and forwarded to the manufacturer, or (*b*) a sworn statement by the dealer that he has in his possession such a certificate. The statement required by clause (1) above excuses the manufacturer for a period of not more than two months from the date when title passes or the date of shipment (whichever is prior) from paying tax on the article sold. If within two months the manufacturer has not received the proof required by clause (2) above, then the temporary exemption ceases and the manufacturer shall include the tax on the sale of such article in his return for the month in which such 2-month period expires. If such proof later becomes available, a claim for refund of tax paid may be filed, or a credit taken upon a subsequent return, within the 4-year period of limitation prescribed by section 3228 of the Revised Statutes, as amended.

The certificate required by this article must include an agreement that if any of the articles covered thereby are used otherwise than in the exercise of an essential governmental function, or if any of such articles are resold to employees or others, the State or political subdivision thereof will report such fact to the vendor. If the vendor is a dealer, he shall in turn report such fact to the manufacturer. The tax applicable to such articles shall be included by the manufacturer in his return for the month during which such report is made to him.

The certificate required by this article shall be in substantially the following form:

EXEMPTION CERTIFICATE.

(For Use by States or Political Subdivisions.)

_____ 193–.
(Date.)

The undersigned hereby certifies that he is the _____ of
(Title of Officer.)
_____ and that the article or articles specified in the accom-
(State, City, etc.)
panying order are purchased for use by the _____ in the exercise
(Department.)
of essential governmental functions, namely:

_____

_____

_____

It is understood that the exemption from tax in the case of sales of articles to States or political subdivisions thereof is limited to articles purchased for use in the exercise of essential governmental functions, and it is agreed that where articles purchased tax-free under this exemption certificate are used for purposes other than in the exercise of essential governmental functions or are sold to employees or others, the vendee will report such fact to the vendor.

_____ (Signature.)
(Title of Officer.)

Where it is impracticable to furnish a separate certificate for each order, the manufacturer or vendee may accept a single certificate covering all orders between given dates; such period, however, not to exceed one calendar month.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved October 24, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

SECTION 620 OF THE REVENUE ACT OF 1932, AS AMENDED BY SECTION 4(a) OF THE ACT OF JUNE 16, 1933.

REGULATIONS 44 AND 46, ARTICLE 7: Tax-free sales. XII–45–6500 Mim. 4090

Tax-free sales—Section 620 of the Revenue Act of 1932, as amended by section 4(a) of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress).

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 27, 1933.

Collectors of Internal Revenue and Others Concerned:

Reference is made to the following Treasury decisions amending article 7 of Regulations 44 and 46 to comply with the requirements of section 4(a) of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress):

Treasury Decision 4399, tax-free sales, Regulations 44 [page 330, this Bulletin].

Treasury Decision 4398, tax-free sales, Regulations 46 [page 334, this Bulletin].

In accordance with the provisions of the above-mentioned Treasury decisions, on and after November 1, 1933, no taxable articles may be sold tax-free for further manufacture unless the vendor and the vendee have each registered with the collector of internal revenue for the respective district in which is located his principal place of business and unless the vendee furnishes the vendor prior to or at the time of sale an exemption certificate in the form prescribed.

Every person qualifying as a manufacturer of articles taxable under Title IV of the Revenue Act of 1932 (other than tires or inner tubes or articles enumerated in section 604, relating to the tax on furs) or as a vendee selling direct to manufacturers of taxable articles will be granted a registration certificate. However, registration certificates should be granted only to those persons who have established places of business and who are actually engaged in the business of manufacturing, producing, or importing articles taxable under Title IV, or reselling such articles without change in form to manufacturers of taxable articles for further manufacturing purposes.

The registration provisions of Treasury Decisions 4339 [C. B. XI–2, 446] and 4351 [C. B. XI–2, 461] have been revoked and all certificates of registry issued in accordance with the provisions of such Treasury decisions should be canceled.

Certificates of registry should be granted immediately, and without application, to all manufacturers, producers, or importers who

have been paying tax under Title IV of the Revenue Act of 1932 and who in your judgment are entitled to purchase tax-free under exemption certificate. On and after November 1, 1933, all certificates of registry should be issued on Form 637, except those certificates issued to persons liable for the tax imposed on soft drinks and ingredients thereof under section 615(a) of the Revenue Act of 1932.

Correspondence relative to this mimeograph should refer to the number and the symbol MT:ST.

GUY T. HELVERING,
Commissioner.

SECTION 621.—CREDITS AND REFUNDS.

REGULATIONS 44, ARTICLE 52: Credits and refunds. XII–50–6564 T. D. 4412

Credits and refunds—Section 621(a) of the Revenue Act of 1932, as amended by section 4(c) of the Act approved June 16, 1933 (Public, No. 73, Seventy-third Congress).—Article 52, Regulations 44, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 44, approved June 18, 1932, are amended as follows:

(a) In Chapter VIII, under the heading "Credits and refunds," the caption "Section 621 of the Revenue Act of 1932" is changed to "Section 621 of the Revenue Act of 1932, as amended by section 4(c) of the Act approved June 16, 1933 (Public, No. 73, Seventy-third Congress)."

(b) The following, being paragraph (3) added to subsection (a) of section 621 of the Revenue Act of 1932 by section 4(c) of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), is inserted in the quotation from section 621, immediately preceding subsection (b):

"(3) to a manufacturer, producer, or importer in the amount of tax paid by him under this title with respect to the sale of any article to a dealer, if the manufacturer, producer, or importer has in his possession such evidence as the regulations may prescribe that (A) such article has after the date this paragraph takes effect been delivered by the dealer to a State or political subdivision thereof for use in the exercise of an essential governmental function and (B) the manufacturer, producer, or importer has repaid or agreed to repay the amount of such tax to the dealer or has obtained the consent of the dealer to the allowance of the credit or refund." (Note.—Paragraph (3) of section 621(a) as amended is effective as of July 1, 1933.)

(c) Article 52, as amended by Treasury Decision 4357, approved November 4, 1932 [C. B. XI–2, 515], is further amended by adding thereto the following paragraph:

"Where articles taxable under Title IV are sold by a manufacturer tax-paid to a dealer who resells and delivers such articles direct to a State or political subdivision thereof after July 1, 1933, for use in the exercise of an essential governmental function, the manufacturer who paid the tax on such articles may be allowed a refund or may take credit against the tax due upon any subsequent monthly return, in the amount of tax paid by him under this title with respect to the sale of any such article to the dealer, provided the manufacturer has in his possession evidence showing that (A) such article has after the date section 621(a)3 takes effect been delivered by the dealer to a State or political subdivision thereof for use in the exercise of an essential governmental function and (B) the manufacturer has repaid or agreed to repay the amount of such tax to the dealer or has obtained the consent of the dealer to the allowance of the credit or refund. The claim for refund or credit must be supported by an affidavit of the manufacturer showing (1) the name and ad-

dress of each dealer; (2) the amount of tax allowable to each dealer; (3) the date the tax was paid to the United States in each case; and (4) whether the manufacturer has repaid or agreed to repay the amount of such tax to the dealer. The claim for refund or credit must also be accompanied with an affidavit of each dealer involved, stating (*a*) whether the articles on which the tax was paid have been resold and delivered after July 1, 1933, by him direct to a State or a political subdivision thereof for use in the exercise of an essential governmental function; (*b*) the State or political subdivision thereof to which the sales were made; (*c*) the nature of the governmental function, i. e., the kind of activities for which purchased; and (*d*) that the dealer has consented to the allowance of the credit or refund where the manufacturer has neither repaid nor agreed to repay the amount of such tax to the dealer."

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved December 6, 1933.

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

REGULATIONS 46, ARTICLE 71: Credits and refunds. XII-28-6288
S. T. 690

The term "ultimate purchaser" defined.

Advice is requested concerning the meaning of the term "ultimate purchaser" as used in section 621(d)2 of the Revenue Act of 1932.

It is held that the "ultimate purchaser" is a person who purchases an article (1) for consumption or (2) for use in the manufacture of other articles and not for resale in the form in which purchased.

In order to obtain either a credit or refund of manufacturers' excise tax imposed under Title IV of the Revenue Act of 1932, the provisions of section 621(d) of the Revenue Act of 1932 and article 71 of Regulations 46, as amended by Treasury Decision 4358 (C. B. XI-2, 516), must be strictly complied with. No claim for credit or refund will be favorably considered which does not include, among other things, the sworn statement of the taxpayer that he has either repaid the amount of the tax to the ultimate purchaser of the article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case, the written consent of the ultimate purchaser must accompany the sworn statement.

REGULATIONS 46, ARTICLE 71: Credits and refunds. XII-50-6565
T. D. 4413

Credits and refunds—Section 621 of the Revenue Act of 1932, as amended by section 4(c) of the Act approved June 16, 1933 (Public, No. 73, Seventy-third Congress).—Article 71, Regulations 46, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Regulations 46, approved June 18, 1932, are amended as follows:

(a) In Chapter XIV, under the heading "Credits and refunds," the caption "Section 621 of the Revenue Act of 1932" is changed to "Section 621 of the

Revenue Act of 1932, as amended by section 4(c) of the Act approved June 16, 1933 (Public, No. 73, Seventy-third Congress)."

(b) the following, being paragraph (3) added to subsection (a) of section 621 of the Revenue Act of 1932 by section 4(c) of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), is inserted in the quotation from section 621, immediately preceding subsection (b):

"(3) to a manufacturer, producer, or importer in the amount of tax paid by him under this title with respect to the sale of any article to a dealer, if the manufacturer, producer, or importer has in his possession such evidence as the regulations may prescribe that (A) such article has after the date this paragraph takes effect been delivered by the dealer to a State or political subdivision thereof for use in the exercise of an essential governmental function and (B) the manufacturer, producer, or importer has repaid or agreed to repay the amount of such tax to the dealer or has obtained the consent of the dealer to the allowance of the credit or refund." (Note.—Paragraph (3) of section 621(a) as amended is effective as of July 1, 1933.)

(c) Article 71, as amended by Treasury Decision 4358, approved November 4, 1932 [C. B. XI–2, 516], is further amended by adding thereto the following paragraph:

"Where articles taxable under Title IV are sold by a manufacturer tax-paid to a dealer who resells and delivers such articles direct to a State or political subdivision thereof on or after July 1, 1933, for use in the exercise of an essential governmental function, the manufacturer who paid the tax on such articles may be allowed a refund, or may take credit against the tax due upon any subsequent monthly return, in the amount of tax paid by him under this title with respect to the sale of any such article to the dealer, provided the manufacturer has in his possession evidence showing that (A) such article has after the date section 621(a)3 takes effect been delivered by the dealer to a State or political subdivision thereof for use in the exercise of an essential governmental function and (B) the manufacturer has repaid or agreed to repay the amount of such tax to the dealer or has obtained the consent of the dealer to the allowance of the credit or refund. The claim for refund or credit must be supported by an affidavit of the manufacturer showing (1) the name and address of each dealer; (2) the amount of tax allowable to each dealer; (3) the date the tax was paid to the United States in each case; and (4) whether the manufacturer has repaid or agreed to repay the amount of such tax to the dealer. The claim for refund or credit must also be accompanied with an affidavit of each dealer involved, stating (*a*) whether the articles on which the tax was paid have been resold and delivered after July 1, 1933, by him direct to a State or a political subdivision thereof for use in the exercise of an essential governmental function; (*b*) the State or political subdivision thereof to which the sales were made; (*c*) the nature of the governmental function, i. e., the kind of activities for which purchased; and (*d*) that the dealer has consented to the allowance of the credit or refund where the manufacturer has neither repaid nor agreed to repay the amount of such tax to the dealer."

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved December 6, 1933.

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

SECTION 622.—USE BY MANUFACTURER, PRODUCER, OR IMPORTER.

REGULATIONS 44, ARTICLE 8: Tax on use by manufacturer, producer, or importer. XII–31–6327 T. D. 4375

Use by manufacturer, producer, or importer—Section 622, Revenue Act of 1932.—Article 8, Regulations 44: Tax on use by manufacturer, producer, or importer.

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

To Collectors of Internal Revenue and Others Concerned:

Article 8 of Regulations 44, approved June 18, 1932, is hereby amended by adding a paragraph reading as follows:

The use by any person, in the operation of a business in which he is engaged, of any article enumerated in Title IV which has been manufactured, produced or imported by him or his agent, makes such person liable to tax under section 622 based on the fair market price of the article. However, the provisions of section 622 will not be deemed to apply in cases where an individual incidentally manufactures, produces or imports for his personal use or causes to be manufactured, produced or imported for his personal use any of the articles enumerated in Title IV of the Act.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved July 24, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

REGULATIONS 46, ARTICLE 16: Tax on use by manufacturer, producer, or importer. XII-31-6328 T. D. 4374

Use by manufacturer, producer, or importer—Section 622, Revenue Act of 1932.—Article 16, Regulations 46: Tax on use by manufacturer, producer, or importer.

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

To Collectors of Internal Revenue and Others Concerned:

Article 16 of Regulations 46, approved June 18, 1932, is hereby amended by adding a paragraph reading as follows:

The use by any person, in the operation of a business in which he is engaged, of any article enumerated in Title IV which has been manufactured, produced or imported by him or his agent, makes such person liable to tax under section 622 based on the fair market price of the article. However, the provisions of section 622 will not be deemed to apply in cases where an individual incidentally manufactures, produces or imports for his personal use or causes to be manufactured, produced or imported for his personal use any of the articles enumerated in Title IV of the Act.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved July 24, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

SECTION 629.—EFFECTIVE DATE.

REGULATIONS 44, ARTICLE 2: Effective period. XII-34-6358 T. D. 4381

Excise taxes on sales by the manufacturer.—Title IV of the Revenue Act of 1932, amended by section 212 of the National Industrial Recovery Act, and section 1 of the Act approved June 16, 1933 (Public, No. 73, Seventy-third Congress).—Article 2 of Regulations 44, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Title IV of the Revenue Act of 1932 was amended by section 212 of the National Industrial Recovery Act (approved June 16, 1933), which reads, in part, as follows:

SEC. 212. Titles IV and V of the Revenue Act of 1932 are amended by striking out "1934" wherever appearing therein and by inserting in lieu thereof "1935." * * *

Section 629 (Title IV) of the Revenue Act of 1932 was amended by section 1 of the Act approved June 16, 1933 (Public, No. 73, Seventy-third Congress), which reads as follows:

That section 629 of the Revenue Act of 1932 is amended by striking out the following: ", or after June 30, 1933, in the case of articles taxable under section 617, relating to the tax on gasoline."

In conformity with the provisions of law quoted above, article 2 of Regulations 44, approved June 18, 1932, is amended to read as follows:

ART. 2. *Effective period.*—The tax imposed under Title IV of the Revenue Act of 1932 is on articles sold, leased, or used by the manufacturer, producer, or importer, and other persons specified in certain sections of the Act, on or after June 21, 1932, and before July 1, 1935, irrespective of when manufactured, produced, or imported.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 9, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

REGULATIONS 46, ARTICLE 1: Effective period. XII–34–6359
T. D. 4380

Excise taxes on sales by the manufacturer.—Title IV of the Revenue Act of 1932, amended by section 212 of the National Industrial Recovery Act.—Article 1 of Regulations 46, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Title IV of the Revenue Act of 1932 was amended by section 212 of the National Industrial Recovery Act (approved June 16, 1933), which reads, in part, as follows:

SEC. 212. Titles IV and V of the Revenue Act of 1932 are amended by striking out "1934" wherever appearing therein and by inserting in lieu thereof "1935." * * *

In conformity with the provisions of law quoted above, the second paragraph of article 1 of Regulations 46, approved June 18, 1932, is amended to read as follows:

No such sale, lease, or use after June 30, 1935 (or after July 31, 1935, in the case of articles taxable under sections 602 and 606, relating to the tax on tires and inner tubes and automobiles, etc.), is taxable under the title.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 9, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

SECTION 630.—EXEMPTION FROM TAX OF CERTAIN SUPPLIES FOR VESSELS.

REGULATIONS 44, ARTICLE 57½: Exemption of certain supplies for vessels. XII–37–6404 T. D. 4388

Exemption from tax of certain supplies for vessels.—Title IV of the Revenue Act of 1932, as amended by section 5 of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress).—Regulations 44, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 5 of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), amended Title IV of the Revenue Act of 1932 by adding a new section entitled "Sec. 630. Exemption from tax of certain supplies for vessels." In conformity with these provisions of law, Regulations 44, approved June 18, 1932, are amended by adding after article 57 the following:

EXEMPTION FROM TAX OF CERTAIN SUPPLIES FOR VESSELS.

SECTION 630 OF THE REVENUE ACT OF 1932, AS ADDED BY SECTION 5 OF THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS), EFFECTIVE 15 DAYS AFTER ENACTMENT OF THE ACT OF JUNE 16, 1933.

Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this title shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this title, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 601(b).

ART. 57½. *Exemption of certain supplies for vessels.*—On and after July 1, 1933, no tax will attach to articles enumerated in Title IV when they are sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment, on (1) vessels of war of the United States or of any foreign nation, (2) vessels employed in the fisheries or in the whaling business, (3) vessels actually engaged in foreign trade, (4) vessels actually engaged in trade between the Atlantic and Pacific ports of the United States, or (5) vessels actually engaged in trade between the United States and any of its possessions.

Tax-free sales under section 630 must be restricted to such articles specified in Title IV as normally form a part of the supplies, stores, or equipment for the kinds of vessels enumerated. The exemption does not apply to articles which are to be resold to persons who are not passengers or members of the crew, or to those articles which are to be transported for the use of others, or to those which are to be used in any manner other than as specified in the Act. Articles may not be sold tax-free direct to passengers or crew but only to the owner, master, or responsible officer of the vessel for the use specified.

The terms "fuel supplies," "ships' stores," and "legitimate equipment" include all articles, materials, supplies, and equipment necessary for the navigation, propulsion, and upkeep of vessels.

The term "sea stores" includes any article purchased for use or consumption by the passengers and crew of a vessel upon its voyage.

The term "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation on water but does not include aircraft.

The term "trade" includes the transportation of persons or property for hire and the making of the necessary preparations for such a voyage.

The exemption from tax granted under section 630 is not applicable to vessels engaged in trade between domestic ports on the Pacific Ocean, or between domestic ports on the Atlantic Ocean and Gulf of Mexico, or engaged in trade on the inland waterways of the United States. Where 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 from the tax is not destroyed if the vessel stops at an intermediate port of call in the United States as a part of that voyage to the ultimate port of call.

The exemption provided in the case of articles sold for the prescribed use on vessels employed in the fisheries or in the whaling business is limited to articles sold for such use on vessels while employed, and to the extent employed, exclusively in the fisheries or in the whaling business.

No tax attaches to articles sold direct by the manufacturer thereof for use on any vessel (other than a vessel of war) if the manufacturer has in his possession, prior to or at the time of sale, a written order from, or a contract of sale with, the owner or master of the vessel (or authorized officer), together with a statement by such owner or master to the effect that the articles so purchased are for use as fuel supplies, ships' stores, sea stores, or as legitimate equipment for such vessel.

No tax attaches to articles sold by the manufacturer thereof to a vendee for the purpose of resale for use as fuel supplies, ships' stores, sea stores, or legitimate equipment for the kinds of vessels enumerated, where the vendee furnishes the manufacturer, prior to or at time of his purchase, a sworn statement establishing that the articles included in the order are to be sold for such use in filling an order or orders then in the possession of the vendee.

In the case of sales of articles for use by vessels of war of the United States or of any foreign country, the exemption may be

established if a manufacturer obtains a statement, prior to or at the time of sale, from the commanding officer or other authorized officer of the vessel having knowledge of the facts, to the effect that the articles are purchased for use on such vessel as fuel supplies, ships' stores, sea stores, or legitimate equipment. The statement should describe the articles purchased, the proposed uses of such articles, the name of the vessel, and the country of origin of the vessel.

Where articles subject to tax under Title IV are to be delivered to naval depots of the United States Navy instead of direct to designated vessels, exemption may be established by the manufacturer securing a written statement from an authorized officer of the United States Navy to the effect that the designated articles are purchased exclusively for use on vessels of war of the United States.

Any manufacturer who claims exemption from tax on sales of articles for use on vessels must maintain satisfactory records to substantiate that claim, and these records must be readily accessible for inspection at all times by internal revenue officers.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 2, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

REGULATIONS 46, ARTICLE 76½: Exemption of certain supplies for vessels — XII-37-6401, T. D. 4387

Exemptions from tax of certain supplies for vessels.—Title IV of the Revenue Act of 1932, as amended by section 5 of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress).—Regulations 46, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 5 of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), amended Title IV of the Revenue Act of 1932 by adding a new section entitled "Sec. 630. Exemption from tax of certain supplies for vessels." In conformity with these provisions of law, Regulations 46, approved June 18, 1932, are amended by adding after article 76 the following:

EXEMPTION FROM TAX OF CERTAIN SUPPLIES FOR VESSELS.

SECTION 630 OF THE REVENUE ACT OF 1932, AS ADDED BY SECTION 5 OF THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS), EFFECTIVE 15 DAYS AFTER ENACTMENT OF THE ACT OF JUNE 16, 1933.

Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this title shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this title, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 601(b).

ART. 76½. *Exemption of certain supplies for vessels.*—On and after July 1, 1933, no tax will attach to articles enumerated in Title IV when they are sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment, on (1) vessels of war of the United States or of any foreign nation, (2) vessels employed in the fisheries or in the whaling business, (3) vessels actually engaged in foreign trade, (4) vessels actually engaged in trade between the Atlantic and Pacific ports of the United States, or (5) vessels actually engaged in trade between the United States and any of its possessions.

Tax-free sales under section 630 must be restricted to such articles specified in Title IV as normally form a part of the supplies, stores, or equipment for the kinds of vessels enumerated. The exemption does not apply to articles which are to be resold to persons who are not passengers or members of the crew, or to those articles which are to be transported for the use of others, or to those which are to be used in any manner other than as specified in the Act. Articles may not be sold tax-free direct to passengers or crew but only to the owner, master, or responsible officer of the vessel for the use specified.

The terms "fuel supplies," "ships' stores," and "legitimate equipment" include all articles, materials, supplies, and equipment necessary for the navigation, propulsion, and upkeep of vessels.

The term "sea stores" includes any article purchased for use or consumption by the passengers and crew of a vessel upon its voyage.

The term "vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water but does not include aircraft.

The term "trade" includes the transportation of persons or property for hire and the making of the necessary preparations for such a voyage.

The exemption from tax granted under section 630 is not applicable to vessels engaged in trade between domestic ports on the Pacific Ocean, or between domestic ports on the Atlantic Ocean and Gulf of Mexico, or engaged in trade on the inland waterways of the United States. Where 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 from the tax is not destroyed if the vessel stops at an intermediate port of call in the United States as a part of that voyage to the ultimate port of call.

The exemption provided in the case of articles sold for the prescribed use on vessels employed in the fisheries or in the whaling business is limited to articles sold for such use on vessels while employed, and to the extent employed, exclusively in the fisheries or in the whaling business.

No tax attaches to articles sold direct by the manufacturer thereof for use on any vessel (other than a vessel of war) if the manufacturer has in his possession, prior to or at the time of sale, a written order from, or a contract of sale with, the owner or master of the vessel (or authorized officer), together with a statement by such owner or master to the effect that the articles so purchased are for use as fuel supplies, ships' stores, sea stores, or as legitimate equipment for such vessel.

No tax attaches to articles sold by the manufacturer thereof to a vendee for the purpose of resale for use as fuel supplies, ships' stores, sea stores, or legitimate equipment for the kinds of vessels enumerated, where the vendee furnishes the manufacturer, prior to or at time of his purchase, a sworn statement establishing that the articles included in the order are to be sold for such use in filling an order or orders then in the possession of the vendee.

In the case of sales of articles for use by vessels of war of the United States or of any foreign country, the exemption may be established if a manufacturer obtains a statement, prior to or at the time of sale, from the commanding officer or other authorized officer of the vessel having knowledge of the facts, to the effect that the articles are purchased for use on such vessel as fuel supplies, ships' stores, sea stores, or legitimate equipment. The statement should describe the articles purchased, the proposed uses of such articles, the name of the vessel, and the country of origin of the vessel.

Where articles subject to tax under Title IV are to be delivered to naval depots of the United States Navy instead of direct to designated vessels, exemption may be established by the manufacturer securing a written statement from an authorized officer of the United States Navy to the effect that the designated articles are purchased exclusively for use on vessels of war of the United States.

Any manufacturer who claims exemption from tax on sales of articles for use on vessels must maintain satisfactory records to substantiate that claim, and these records must be readily accessible for inspection at all times by internal revenue officers.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 2, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

TITLE IV.—MANUFACTURERS' EXCISE TAXES (1932), AS AMENDED BY THE ACT OF JUNE 16, 1933 (PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS).

REGULATIONS 44, ARTICLE 57½: Exemption of certain supplies for vessels. (Also Regulations 46, Article 76½.) — XII-44-6480, S. T. 710

Taxability of certain supplies for vessels.

Question is presented whether sales of supplies by the manufacturer, producer, or importer to be used for the purposes and by the classes of vessels specified in section 630 of the Revenue Act of 1932, as added by section 5 of the Act of June 16, 1933 (Public, No. 73, Seventy-third Congress), are exempt from tax where the purchaser stores the supplies for future delivery to vessels as and when needed; also, whether the status of supplies on board a vessel is affected by diversion of the vessel from one kind of trade to another.

The exemption provided by section 630 of the Revenue Act of 1932, as added by the Act of June 16, 1933, supra, is applicable to—

Any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign

nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. * * *

In order for sales to be exempt under the section of the statute quoted herein it must be definitely known at the time of sale by the manufacturer, producer, or importer that the articles sold are to be used for the purposes and by the classes of vessels specified in the statute. In the instant case the supplies are stored by the purchaser in various ports for future delivery to vessels as and when needed. It is clear that at the time of the sale of the supplies the particular vessel or vessels to which they will eventually be delivered (or the nature of their trade) is unknown. It is accordingly held that sales of supplies for vessels under such conditions are not exempt from the manufacturers' excise taxes under section 630, supra.

Under the provisions of that section articles may be sold tax-free by the manufacturer, producer, or importer for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on a vessel actually engaged in foreign trade at the time of the sale, even though in the course of or at the end of the voyage the vessel may be diverted to coastwise trade. On the other hand, where the vessel is engaged in coastwise trade at the time the supplies are sold for use thereon, the sales are taxable even though the vessel during the course of the voyage, or at the end thereof, may be diverted to any of the classes of trade specified in the statute. In such cases the nature of the trade in which the vessel is engaged at the time the supplies are sold for use thereon is controlling in determining whether the sale is exempt under section 630, supra.

TITLE V.—MISCELLANEOUS TAXES. (1932)

SECTION 711.—ADMISSIONS.

REGULATIONS 43 (1932), ARTICLE 1: Basis, rate, and computation of tax. XII-27-6274 T. D. 4369

Tax on admissions—Section 500(a)1 of the Revenue Act of 1926, as amended by section 411(a) of the Revenue Act of 1928 and by section 711(a) of the Revenue Act of 1932.—Articles 1 and 45 of Regulations 43, amended.

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

To Collectors of Internal Revenue and Others Concerned:

The last paragraph of article 1 of Regulations 43, approved June 14, 1932, is hereby amended to read as follows:

Newspaper reporters, photographers, telegraphers, radio announcers, and persons of similar vocation who are admitted free to any place for the purpose of performing special duties in connection with the event and whose special duties are the sole reason for their presence at the event and for free admission thereto, are not liable for any tax on admissions. Free admissions granted

to such persons who are not admitted solely for the purpose of performing their special duties in connection with the event are subject to tax equivalent to the tax on the admission charge paid by other persons for the same or similar accommodations.

* * * * * * *

REGULATIONS 43, ARTICLE 1: Basis, rate, and computation of tax. XII-34-6362 T. D. 4379

Tax on admissions.—Section 500(a)1 of the Revenue Act of 1926, as amended by section 411(a) of the Revenue Act of 1928 and section 711(a) of the Revenue Act of 1932, and further amended by section 219 of the National Industrial Recovery Act.—Section 711(e) of the Revenue Act of 1932, as amended by section 212 of the National Industrial Recovery Act.—Articles 1 and 45 (as amended by Treasury Decision 4369, approved June 23, 1933 [pages 350 and 352, this Bulletin]) and article 57 of Regulations No. 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 500(a)1 of the Revenue Act of 1926, as amended, was further amended by section 219 of the National Industrial Recovery Act (approved June 16, 1933) to read as follows:

SEC. 500. (a) There shall be levied, assessed, collected, and paid—

(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription, to be paid by the person paying for such admission; except that in case the amount paid for admission is less than 41 cents, no tax shall be imposed. In the case of persons (except bona fide employees, municipal officers on official business, and children under 12 years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, an equivalent tax shall be collected based on the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted, except that no tax shall be imposed in the case of persons admitted free to any spoken play (not a mechanical reproduction), whether or not set to music or with musical parts or accompaniments, which is a consecutive narrative interpreted by a single set of characters, all necessary to the development of the plot, in two or more acts, the performance consuming more than 1 hour and 45 minutes of time. Amounts paid for admission by season ticket or subscription shall be exempt only if the amount which would be charged to the holder or subscriber for a single admission is less than 41 cents;

In conformity with the provisions of law quoted above, Regulations 43, approved June 14, 1932, are amended as follows:

The first paragraph of article 1 is amended to read:

Basis, rate, and computation of tax.—Except as specifically amended by the Revenue Act of 1932 and section 219 of the National Industrial Recovery Act, the provisions of the Revenue Act of 1926, as amended by the Revenue Act of 1928, with respect to the tax on admissions, are still in full force and effect. The amendment to section 500(a)1 made by section 711(a) of the Revenue Act of 1932 was effective June 21, 1932, and the amendment made by section 219 of the National Industrial Recovery Act was effective June 16, 1933.

The seventh paragraph of article 1 is amended to read:

In the case of any person (except a bona fide employee, a municipal officer on official business, or a child under 12 years of age) admitted free to any place (except a spoken play as defined below) or admitted at a reduced rate

to any place at a time when and under circumstances under which an admission charge is made to other persons, the person so admitted free or at a reduced rate is liable to tax in an amount equivalent to the tax on the amount paid by such other persons for the same or similar accommodations. If tickets or cards of admission are issued, the tax due should be collected at the time of the issuance of such tickets or cards, while if no tickets or cards are used, tax should be collected when the persons are admitted. A bona fide employee of the management of the theater or other place, a municipal officer who is acting in his official capacity, or a child under 12 years of age is not liable to tax if admitted free; and if admitted at a reduced rate is liable to tax on the reduced price, provided such price is 41 cents or more. No tax attaches to free admissions to a spoken play (not a mechanical reproduction) whether or not set to music or with musical parts or accompaniments, which is a consecutive narrative interpreted by a single set of characters, all necessary to the development of the plot, in two or more acts, the performance consuming more than 1 hour and 45 minutes of time.

The last paragraph of article 1, as amended by Treasury Decision 4369, is further amended to read:

Newspaper reporters, photographers, telegraphers, radio announcers, and persons of similar vocation who are admitted free to any place for the purpose of performing special duties in connection with the event and whose special duties are the sole reason for their presence at the event and for free admission thereto, are not liable for any tax on admissions. Free admissions granted to such persons, except free admissions to a spoken play as defined above, who are not admitted solely for the purpose of performing their special duties in connection with the event are subject to tax equivalent to the tax on the admission charge paid by other persons for the same or similar accommodations.

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REGULATIONS 43 (1932), ARTICLE 45: Returns and payments—Admissions. XII-27-6275 T. D. 4369

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Article 45 of these regulations is hereby amended by adding thereto a third paragraph reading as follows:

Form 729 must also be accompanied by an affidavit setting forth the names and addresses of all persons to whom nontaxable free or complimentary tickets or admissions were furnished for the purpose of performing special duties and the nature of the special duty performed by each. This affidavit should be prepared in triplicate. One copy should be retained by the taxpayer, and the other copies attached to the original and duplicate Form 729 forwarded to the collector.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved June 23, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

REGULATIONS 43, ARTICLE 45: Returns and payment—Admissions. XII-34-6363 T. D. 4379

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The third paragraph of article 45, which was added by Treasury Decision 4369 [above], approved June 23, 1933, is amended to read:

Form 729 must also be accompanied by an affidavit setting forth the names and addresses of all persons (except persons admitted free to a spoken play

as defined in article 1) to whom nontaxable free or complimentary tickets or admissions were furnished for the purpose of performing special duties and the nature of the special duty performed by each. This affidavit should be prepared in triplicate. One copy should be retained by the taxpayer, and the other copies attached to the original and duplicate Form 729 forwarded to the collector.

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REGULATIONS 43, ARTICLE 57: Effective date of change in exemption. XII–34–6364 T. D. 4379

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Section 711(e) of the Revenue Act of 1932 was amended by section 212 of the National Industrial Recovery Act by striking out "1934" appearing therein and by inserting in lieu thereof "1935."

In conformity with the amendment of section 711(e) of the Revenue Act of 1932 referred to above, article 57 is 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 500(a)1 of the Revenue Act of 1926, as amended by section 711(a) of the Revenue Act of 1932, are those which are "less than 41 cents." Effective July 1, 1935, any sum of "$3 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, 1935, for an admission to take place after that date, the payment so made would be subject to tax.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 9, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

SECTION 500(a) OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 711(a) OF THE REVENUE ACT OF 1932.

REGULATIONS 43, ARTICLE 1: Basis, rate, and computation of tax. XII–33–6347 S. T. 697

Free or reduced admissions of ladies to baseball games, held taxable.

Advice is requested whether admissions of ladies to baseball games at free or reduced rates are taxable under section 711(a) of the Revenue Act of 1932.

On certain days a section in a baseball park, less desirable than other sections, is set aside for ladies who are admitted free or at a reduced rate through a separate gate. The ladies so admitted must remain in that section. It is contended that such admissions are not subject to the tax imposed under section 711(a).

The Bureau has consistently held that the setting aside of a section of a stand to which a certain class or group of persons is admitted free is not in itself sufficient to exempt the free admissions from tax. The facts that other persons are not admitted at all to

that section and that the persons admitted free are not allowed to sit in any other section, do not exempt the free admissions from tax. Under the law, all persons admitted free or at a reduced rate at a time when and under circumstances under which an admission charge is made to other persons must pay an equivalent tax based on the admission charge, that is, on the established price of admission to other persons for the same or similar accommodations. It is not necessary that the accommodations be identical or in all respects as good. If the accommodations are similar the tax attaches.

The established price of admission may vary in accordance with the accommodations to which admission is granted without affecting the question of taxability, but any scale of prices must be a regular scale based on a real difference in accommodations. Any reduction of established price must include all admissions of that particular established price and must grant an equal reduction in the case of all persons admitted to such accommodations.

In the particular case presented for consideration, it is evident that the free admission of ladies or their admission at a reduced rate, is not in any sense an established price of admission. This is true for the reason that ladies only are admitted free; that on other days the same admission charge is made to this section as to other sections; that the difference in the price of admission to the other sections and the free or reduced rate of admission to this section is not measured by any actual difference in the accommodations; and that the reduction in the established price does not apply to all persons, but to ladies only.

It is, therefore, held that admissions of ladies to baseball games at free or reduced rates are subject to tax under section 711(a) of the Revenue Act of 1932 based on the admission charge to other persons for similar accommodations.

SECTION 731.—TRANSPORTATION OF OIL BY PIPE LINE.

REGULATIONS 42, ARTICLE 28: Fair charge. XII–40–6434
T. D. 4394

Tax on transportation of oil by pipe line—Section 731(b) of the Revenue Act of 1932.—Article 28, Regulations 42, amended.

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

To Collectors of Internal Revenue and Others Concerned:

The second paragraph of article 28 of Regulations 42, approved October 22, 1932, is amended to read as follows:

Where no tariffs have been published, the fair charge will be determined on the basis of the ordinary or customary charge for like or similar services. If no reasonable basis of comparison can be found, a full statement of the facts surrounding the particular movement must be submitted to the Commissioner for his guidance and assistance in determining a fair charge. Such a statement should contain figures showing the original investment in the pipe-line system, additions and betterments, depreciation, obsolescence, sinking funds and reserves, present worth, operating expenses during the taxable period, fair income return,

and other information which may be of value, including an estimate as to the probable life of the field and of the pipe line.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 20, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

SECTION 751.—CHECKS, ETC.

REGULATIONS 42, ARTICLE 36: Scope of tax. XII–31–6324
S. T. 694

Checks issued by Civilian Conservation Corps and charged against company funds held not taxable.

Advice is requested whether the tax on checks imposed by section 751 of the Revenue Act of 1932 is applicable to checks issued by and charged against company funds of the Civilian Conservation Corps.

The Civilian Conservation Corps was established and is now being operated and regulated under and pursuant to the authority granted by an Act of Congress. It is clear that the corps is a governmental agency in so far as its public and governmental functions are concerned.

Inasmuch as the accounts against which these checks are charged consist wholly of appropriated moneys, and as they are drawn by officers of the United States in the discharge of their official duties, it is held that the checks are not subject to the tax imposed by section 751 of the Revenue Act of 1932.

REGULATIONS 42, ARTICLE 36: Scope of tax. XII–42–6458
T. D. 4396

Tax on checks, etc.—Section 751(a), Revenue Act of 1932.—Article 36, Regulations 42, amended.

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

To Collectors of Internal Revenue and Others Concerned:

The eighth paragraph of article 36 of Regulations 42, approved October 22, 1932, is hereby amended to read as follows:

Checks, drafts, or orders drawn against public funds by officers of the United States are not subject to the tax. Checks, drafts, or orders drawn against public funds by officers of a State or political subdivision thereof are not subject to the tax where drawn in connection with the exercise of an essential governmental function. The term "public funds" as here used includes funds on deposit for the benefit of the public.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved October 9, 1933.

W. H. WOODIN,
Secretary of the Treasury.

REGULATIONS 42, ARTICLE 36: Scope of tax. XII–48–6539
S. T. 713

Checks issued by trustees, receivers, or referees in bankruptcy held taxable.

The question is presented whether checks issued by trustees, receivers, or referees in bankruptcy are subject to the tax imposed by section 751 of the Revenue Act of 1932.

Under the provisions of article 36 of Regulations 42, as amended by Treasury Decision 4396 (page 355, this Bulletin), checks, drafts, or orders drawn against public funds by officers of the United States, or checks, drafts, or orders drawn against public funds by officers of a State or political subdivision thereof in connection with the exercise of an essential governmental function are not subject to the tax imposed by section 751(a) of the Revenue Act of 1932. The term "public funds" as here used includes funds on deposit for the benefit of the public.

Where checks, drafts, or orders are drawn against public funds by officers coming within the scope of the regulations, as amended, the burden of the tax, if collected, would fall upon the Federal, State, county, or municipal government, and for that reason such checks are not taxable. However, the term "public funds" does not include funds against which checks are drawn by trustees, receivers, or referees in bankruptcy, for the reason that such funds are primarily for the benefit of creditors rather than for the benefit of the public, as the term "public" is generally understood. If the funds are not "public funds," it follows that the burden of the tax, if collected, would not fall upon the Federal, State, county, or municipal government, but upon the private parties in interest.

It is held that checks drawn by trustees, receivers, or referees in bankruptcy in their official capacity are not drawn against public funds, within the meaning of article 36 of Regulations 42, as amended by Treasury Decision 4396, supra, and, accordingly, are subject to tax.

REGULATIONS 42, ARTICLE 37: Liability. XII–40–6435
S. T. 704

When interest should be included in proof of claim filed by a collector of internal revenue against banks in the hands of receivers, conservators, or examiners, for the Federal tax collected by such banks on checks.

Advice is requested whether proofs of claims for Federal taxes collected by banks on checks, filed by a collector of internal revenue against banks in the hands of receivers, conservators, or examiners, should include the statutory interest charge.

The foregoing inquiry is answered as follows:

(*a*) Proof of claim against any National or State bank, which is in the hands of a receiver, conservator, or examiner *for reasons other than actual insolvency*, for Federal taxes collected by the bank on checks should include interest.

(*b*) Proof of claim against any *State* bank, even though it is in the hands of a receiver, conservator, or examiner on account of insolvency, for Federal taxes collected by the bank on checks should include interest.

(*c*) Proof of claim against any *national* bank, which is in the hands of a receiver, conservator, or examiner *because of actual insolvency*, for Federal taxes collected by the bank on checks should *not* include interest, except interest which accrued prior to such receivership or suspension, unless the assets of the bank, together with the collectible double liability of its stockholders, are sufficient to pay interest on claims filed against it after its suspension, in addition to the amount of the claims, with interest, to the date of its suspension.

SECTION 761.—TAX ON THE USE OF BOATS.

REGULATIONS 72, ARTICLE 1: Effective period. XII–34–6366
T. D. 4384

Special tax upon the use of boats.—Section 761 of Title V of the Revenue Act of 1932, amended by section 212 of the National Industrial Recovery Act.—Articles 1 and 2 of Regulations 72, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Section 761 of Title V of the Revenue Act of 1932 was amended by section 212 of the National Industrial Recovery Act (approved June 16, 1933), which reads as follows:

SEC. 212. Titles IV and V of the Revenue Act of 1932 are amended by striking out "1934" wherever appearing therein and by inserting in lieu thereof "1935." Section 761 of the Revenue Act of 1932 is further amended by striking out "and on July 1, 1933" and inserting in lieu thereof "and on July 1, 1933, and on July 1, 1934,".

In conformity with the provisions of law quoted above, articles 1 * * * of Regulations 72, approved August 15, 1932, are amended to read as follows:

ARTICLE 1. *Effective period.*—The tax attaches to the use of boats on and after July 1, 1932, and before July 1, 1935.

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REGULATIONS 72, ARTICLE 2: Taxable period. XII–34–6367
T. D. 4384

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* * * articles * * * 2 of Regulations 72, * * * are amended to read as follows:

ART. 2. *Taxable period.*—The periods during which the use of boats is subject to the tax imposed under the Act are the fiscal years July 1, 1932, to June 30, 1933, July 1, 1933, to June 30, 1934, and July 1, 1934, to June 30, 1935. Where

an original purchase by the user is made of a boat on any date other than July 1, the taxable period in such case begins with the month in which first used and extends to the close of that fiscal year.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 11, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

STAMP TAXES.

REGULATIONS 71, ARTICLE 2: Effective period. XII-34-6365
T. D. 4383

Stamp taxes on issues and transfers of stocks and bonds, sales of produce for future delivery, and deeds of conveyance, under Title VIII of the Revenue Act of 1926, as amended by Title II, Part V, of the Revenue Act of 1928 and Title V, Part III, of the Revenue Act of 1932, and further amended by section 212 of the National Industrial Recovery Act.—Article 2 of Regulations 71, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Title V of the Revenue Act of 1932 was amended by section 212 of the National Industrial Recovery Act (approved June 16, 1933), which reads, in part, as follows:

SEC. 212. Titles IV and V of the Revenue Act of 1932 are amended by striking out "1934" wherever appearing therein and by inserting in lieu thereof "1935." * * *

In conformity with the provisions of law quoted above, article 2 of Regulations 71, approved July 16, 1932, is amended to read as follows:

ART. 2. *Effective period.*—The stamp tax provisions of the Revenue Act of 1926, as amended by the Revenue Act of 1928, are still in full force and effect, except as amended by the Revenue Act of 1932. The amendments made by the last-named Act are effective on and after June 21, 1932. The increased rates of tax, as well as the additional taxes, effected by the amendments made by the Revenue Act of 1932 to Schedule A of Title VIII of the Revenue Act of 1926, as amended by the Revenue Act of 1928, are effective only to and including June 30, 1935.

In conformity with the same provisions of law, the date July 1, 1934, wherever it appears in sections 721(c), 722(c), 723(c), 726(c), 725 and 724(c) of the Revenue Act of 1932 at the beginning of Chapters I, II, III, IV, VIII, and IX, respectively, should read July 1, 1935.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 9, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

SCHEDULE A-3 OF TITLE VIII OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 723(a) OF THE REVENUE ACT OF 1932.

REGULATIONS 71, ARTICLE 33: Computation of the tax. XII-30-6312 G. C. M. 12016

An exchange of stock for stock is taxable at the 4 cent rate.

An interpretation is requested concerning the provisions in Schedule A-3 of Title VIII of the Revenue Act of 1926, as amended by section 723(a) of the Revenue Act of 1932, on the following question:

A corporation offers to transfer to B, a new corporation, certificates of stock of various corporations in consideration for the issue of the entire capital stock of B Corporation. Does this exchange of stock involve a sale within the meaning of article 32(c) of Regulations 71, which reads: "However, in the case of a sale of stock, whether with or without par or face value, when the selling price is $20 or more per share, the rate is 5 cents instead of 4 cents"?

The law imposes a tax upon sales and transfers of shares or certificates of stock in a corporation or other organization. It provides that the tax on sales or transfers shall be imposed at the rate of 4 cents on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization and 4 cents on each share or certificate where they are without par or face value, but with the proviso—

That in case the selling price, if any, is $20 or more per share the above rate shall be 5 cents instead of 4 cents.

The congressional conference report on the Revenue Act of 1932 (page 25, amendment No. 220) states:

This amendment eliminates the provision of the House bill making the tax on stock transfers not less than one-fourth of 1 per cent of the selling price. The House recedes with an amendment providing that when stock is sold for $20 or more per share the rate shall be 5 cents instead of 4 cents.

Articles 32(c) and 33(d) of Regulations 71, approved July 16, 1932, are in accord with the statement in the conference report.

An exchange of stock for other stock is unquestionably a sale. (Sections 1(1) and 9(2), Uniform Sales Act.) The fact that the price is payable in personal property and not money is immaterial. (Section 170, Williston on Sales, second edition, volume 1, page 315.) The fact that an exchange of stock for stock is a sale, however, does not dispose of the question raised, because only certain sales are subject to the increased rate. An exchange of stock for stock comes within the general provisions of Schedule A-3. The proviso, however, is specific legislation raising the rate of tax where the selling price, if any, is $20 or more per share, and is, therefore, to be strictly construed. It is believed that Congress had particularly in mind such sales as are made on stock exchanges and intended to enact a simple test and to limit the proviso to cases where the stock was sold for a monetary consideration of $20 or more a share. If it had intended otherwise it would have provided that in case the selling price, if any, or the actual value, was $20 or more per share the rate should be 5 cents instead of 4 cents. The determination of the actual value of stock would present administrative difficulties in a large number of cases, and is undoubtedly another reason why the actual value of the stock was not intended to be used as a measure for increasing the rate of tax.

It is accordingly the opinion of this office that the proviso in Schedule A–3 of Title VIII of the Revenue Act of 1926, as amended by section 723(a) of the Revenue Act of 1932, imposing an increased rate of tax, does not apply to an exchange of stock for stock.

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

Regulations 71, Article 34: Sales or transfers subject to tax. (Also Article 35.) XII–36–6391 S. T. 699

Taxability of certain transfers of securities to a successor trustee.

A number of questions have been presented concerning the taxability under Schedule A–3 of Title VIII of the Revenue Act of 1926, as amended by section 723(a) of the Revenue Act of 1932, of transfers of securities held in trust by the X Trust Co. and the Y Trust Co., both in process of liquidation under the laws of Ohio.

The trust companies are in the hands of the State superintendent of banks for the purpose of liquidation. Under State laws the superintendent has certain powers to continue the administration of trust estates and to act as trustee thereunder.

The questions and answers are as follows:

Question 1 (a). The X Trust Co. was trustee under a testamentary trust, the will making no provision for the appointment of a successor trustee. A beneficiary will make application to the probate court for the appointment of a successor trustee and a decree will be entered removing the old trustee and appointing the Z Bank as successor trustee, vesting in the latter, as successor trustee, full title to the trust assets, including securities, and authorizing and directing the State superintendent to execute and deliver such formal transfers as may be necessary for record purposes.

The proceedings so taken will be governed by section 10506–55 of the General Code of Ohio, which provides as follows:

Vacancy before termination of the trust; accounting; successor fiduciary.— If a sole fiduciary dies, is dissolved, declines to accept, resigns, is removed, or becomes incapacitated or otherwise unable to act, prior to the termination of the trust, the probate court shall require a final account of all dealings of such trust to be filed forthwith by such fiduciary if a living person and able to act; or if such fiduciary be a living person but unable to act, by his guardian, if any, or if there be no guardian, by some other suitable person in his behalf, appointed or approved by the court; or if such fiduciary be a deceased person, by his executor or administrator; or if such fiduciary be a dissolved corporation, by such person or persons as may be charged by law with winding up the affairs of such corporation. Thereupon the probate court shall cause such proceedings to be had as are provided by law as to other accounts filed by fiduciaries.

Whenever such a vacancy occurs and such contingency is not otherwise provided for by law, or by the instrument creating the trust, or whenever such instrument names no fiduciary whatever, the court shall, either on its own motion or on the application of any person beneficially interested, appoint and issue letters of appointment as fiduciary to some competent person or persons who shall qualify according to law and execute the trust to its proper termination. Such vacancy, and the appointment of a successor fiduciary shall not affect the liability of the former fiduciary, or his sureties, previously incurred.

Will the stamp tax attach to the transfer of securities included in the trust property?

Answer. The tax will not attach.

Question 1(b). Would it make any difference if, under the terms of the testamentary trust, a beneficiary (or a number of beneficiaries) is given authority to and does nominate a successor trustee whose appointment is confirmed by the Probate Court of R County under the above section of the General Code of Ohio in like proceedings?

Answer. No.

Question 2(a). The X Trust Co. was acting as trustee under an irrevocable living trust agreement containing no specific provision relating to the appointment of a successor trustee. If application is made by the beneficiary of the trust to the Common Pleas Court of R County for the removal of the State superintendent as trustee, and the appointment of a successor trustee (with the consent of the State superintendent), and the common pleas court in the exercise of its equity powers (there being no specific statute in the State of Ohio authorizing a particular court to appoint a successor trustee for a living trust as distinguished from a testamentary trust) enters a decree naming the Z Bank as successor trustee, vesting it with full title to the entire trust estate, and authorizing and directing the State superintendent to deliver such formal transfers as may be necessary for record purposes, will the stamp tax attach to the transfer of securities?

Answer. No. See MS. 42 (C. B. IV-1 338).

Question 2(b). Would it make any difference in the foregoing situation if the irrevocable trust agreement provides for the designation or nomination of a successor trustee by one or more of the beneficiaries (either including or not including the original settlor), and such designation or nomination is confirmed by the Common Pleas Court of R County in proceedings similar to those above outlined?

Answer. No.

Question 3(a). The X Trust Co. was acting as trustee under a revocable living trust agreement which contains a provision permitting the settlor to revoke in whole or in part, or modify, alter, or amend the trust agreement from time to time. If the settlor revokes the trust agreement in its entirety and directs the State superintendent of banks to convey the assets (including securities) of the trust estate directly to the Z Bank to be held by it as trustee under a new living trust agreement entered into between that bank and the settlor, does more than one taxable transfer occur?

Answer. The transaction results in two taxable transfers.

Question 3(b). If the State superintendent of banks, the Z Bank, and the settlor enter into a modification agreement wherein the Z Bank is substituted as trustee in place of the State superintendent under the same trust agreement, and the agreement provides that the successor trustee shall be immediately vested with full title to the entire trust estate, and further contemplates the delivery of formal transfers for record purposes to the Z Bank as trustee, does the stamp tax attach to such transfer?

Answer. The transfer is subject to tax.

Question 4. The X Trust Co. was acting as trustee under a revocable living trust agreement which provides that the settlor may at any time revoke in whole or in part, or may alter, amend, or modify the trust agreement. The agreement also provides that in the event the trustee named therein shall at any time resign, or become disabled, or be removed, the Z Bank shall immediately succeed as trustee and be vested with title to the entire trust estate. If the State superintendent in charge of the affairs of the X Trust Co. resigns and the Z Bank assumes its duties as trustee under the trust agreement, and formal transfer is made to it of the assets of the trust estate by the superintendent for record purposes, will the stamp tax attach to the transfer of securities, or is such transfer regarded as one by operation of law under Regulations 71, article 35(h)?

Answer. The tax will not attach. The provisions of article 35(h) of Regulations 71 control.

Question 5. The X Trust Co. was acting as trustee under a revocable living trust agreement wherein the settlor reserved the right to revoke in whole or in part at any time, or to alter, amend, or change the terms of the trust agreement. The trust agreement as originally drawn contained no provision for a successor trustee in the event of the resignation, removal, or other disability of the X Trust Co. Several years ago a modification of the trust agreement was made providing that in the event of the resignation, removal, or disability of the trustee named therein the Z Bank shall immediately succeed as trustee, and be vested with title to the entire trust estate, and directing the X Trust Co. in such event to deliver such formal transfers as may be necessary for record purposes. If the State superintendent resigns and the Z Bank assumes its duties as successor trustee under the terms of the trust agreement, will the stamp tax attach to the transfer of securities?

Answer. The transfer is not subject to tax.

Question 6. The X Trust Co. was acting as trustee under a revocable living trust agreement, which provides that the settlor may at any time revoke in whole or in part, or modify, alter, or amend the trust agreement. The agreement contains no specific provision designating a successor trustee in the event that the trustee named therein resigns, is removed, or is disabled from acting as trustee. If, in the exercise of the power to modify the trust agreement, the settlor and the State superintendent enter into a modification agreement providing that upon resignation, removal, or disability of the State superintendent the Z Bank shall immediately succeed as trustee and be vested with title to the entire trust estate, and providing further that in such event the State superintendent shall deliver such formal transfers as may be necessary for record purposes, will the stamp tax attach to the transfer of securities of the trust to the Z Bank as trustee in the event of the resignation, removal, or disability of the State superintendent?

Answer. The transfer is subject to tax. The situation is not materially different from that presented in question 3(b). The transaction does not have any of the attributes of a valid transfer by operation of law.

Question 7. The X Trust Co. was acting as trustee under a revocable living trust agreement, which provides that the settlor may at

any time revoke in whole or in part, or modify, alter, or amend the trust agreement. The trust agreement contains no specific provision for a successor trustee and no modification of the agreement has been made. If application is made to the Common Pleas Court of R County by the liquidator of the X Trust Co., the settlor, or any beneficiary under the trust agreement whereby a successor trustee is appointed by the common pleas court in the exercise of its equity powers (there being no specific statute in the State of Ohio conferring authority upon a particular court to appoint a successor trustee in the case of a living trust), and a decree is entered removing the State superintendent and designating the Z Bank as successor trustee, vesting it with full legal title to the entire trust estate and directing the State superintendent to deliver such formal instruments of transfer as may be necessary for record purposes, will the stamp tax attach to the transfer of securities in such a transaction?

Answer. The transfer is not subject to tax.

Question 8. Under the provisions of Regulations 71, article 35(k), deliveries or transfers from a fiduciary to a nominee of such fiduciary, and from the nominee to such fiduciary, are not subject to tax if such deliveries or transfers are accompanied by a certificate setting forth the facts. If the State superintendent in charge of the assets of the X Trust Co. and of the trust estates held by it transfers the assets of a particular living trust estate to a nominee, and thereafter and by agreement of the State liquidator, the settlor, and the Z Bank, the bank is substituted as trustee, the nominee agreeing to act as nominee of the successor trustee, will the stamp tax attach to the transfer of securities in such a case?

Answer. The transaction is subject to tax. The provision in the statute relating to nominees does not contemplate a situation which results in a substitution of fiduciaries as well as nominees.

Question 9. The State superintendent of banks of Ohio is an administrative officer of that State in charge of the liquidation of closed banks. If the State superintendent as liquidator of the X Trust Co. transfers assets belonging to a trust estate of which the X Trust Co. was trustee, does the Federal stamp tax attach in any event, the transfer being by an administrative officer of the State of Ohio in the performance of his duties?

Answer. The transfer of securities by the State superintendent as liquidator is not such a transfer as would be exempt from the tax. The immunity from Federal taxation attaches only in those cases where the burden of the tax falls upon the State or its agencies and not in a case where the tax is actually paid out of the assets of other parties.

Question 10. If the State superintendent of banks, in charge of the liquidation of the X Trust Co., transfers to a successor trustee bonds which are obligations of a State or a political subdivision thereof, and which constitutes a part of the assets of a trust estate held by the X Trust Co., are such transfers subject to the stamp tax?

Answer. The transfers referred to in this question are not subject to tax in view of the provisions of section 801 of the Revenue Act of 1926, as amended by section 441 of the Revenue Act of 1928.

SCHEDULE A–8 OF THE REVENUE ACT OF 1926, AS ADDED BY SECTION 725 OF THE REVENUE ACT OF 1932.—DEEDS OF CONVEYANCE.

REGULATIONS 71, ARTICLE 76: Actual value at time of conveyance the measures of the tax. XII–27–6272 S. T. 688

Taxability of a deed of conveyance where the consideration consists of annuities.

Advice is requested concerning the application of the stamp tax under section 725 of the Revenue Act of 1932 to a deed of conveyance of real property executed under the following circumstances:

The consideration recited in the deed is that the grantee shall pay to the grantor the sum of $—— per month for a period of 40 years, but the grantee has the right to have the present value of the annuity determined and to pay it in full at any time. Additional considerations provide for the payment of the sum of $—— to a designated party within five years and an annuity of $—— per month to the wife of the grantor for and during the term of her natural life.

Where the consideration for a conveyance of lands, tenements, or other real property is left open, to be fixed by future contingencies, the actual value of the property at the time of conveyance is the measure of the tax upon the deed, instrument, or writing whereby the conveyance is made. Therefore, the deed requires documentary stamps calculated on the actual value of the property at the time conveyed.

TITLES IV AND V.—MANUFACTURERS' EXCISE AND MISCELLANEOUS TAXES. (1932)

REGULATIONS 42, ARTICLES 1, 8, 25, 34: Effective period. XII–34–6361 T. D. 4382

Tax on telegraph, telephone, radio and cable facilities; transportation of oil by pipe line; safe deposit boxes; checks; and electrical energy.—Titles IV and V of the Revenue Act of 1932, amended by section 212 of the National Industrial Recovery Act.—Articles 1, 8, 25, and 34 of Regulations 42, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Titles IV and V of the Revenue Act of 1932 were amended by section 212 of the National Industrial Recovery Act (approved June 16, 1933), which reads, in part, as follows:

SEC. 212. Titles IV and V of the Revenue Act of 1932 are amended by striking out "1934" wherever appearing therein and by inserting in lieu thereof "1935". * * *

In conformity with the provisions of law quoted above, Regulations 42, approved October 22, 1932, are amended as follows:

Article 1 is 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 on or after June 21, 1932, and before July 1, 1935, regardless of the date of payment.

Article 8 is amended to read as follows:

ART. 8. *Effective period.*—The tax imposed under section 701(a)2 attaches, to the amount paid on or after June 21, 1932, for any leased wire or talking circuit special service furnished on or after June 21, 1932, and before July 1, 1935. If the rendition of the service occurs within the effective period of the law the tax attaches thereto even though the payment therefor is made on or after July 1, 1935.

Article 25 is amended to read as follows:

ART. 25. *Effective period.*—The tax imposed under section 731 applies to all transportation of crude petroleum and liquid products thereof by pipe line where the movement begins on or after June 21, 1932, and before July 1, 1935, except that the tax under section 731(a)1 is imposed only when payment for the transportation is made on or after June 21, 1932. In the case of any such transportation by pipe line where the movement originates prior to July 1, 1935, 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. 1935.

Article 34 is amended to read as follows:

ART. 34. *Effective period.*—The tax attaches to all instruments specified in section 751 when presented for payment to a bank, banker, or trust company on or after June 21, 1932, and before July 1, 1935.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 9, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

TITLE II.—MISCELLANEOUS TAXES. (1928)

SCHEDULE A–5 OF TITLE VIII OF THE REVENUE ACT OF 1926, AS AMENDED BY SECTION 442 OF THE REVENUE ACT OF 1928.

REGULATIONS 71, ARTICLE 58: Passage tickets to ports not in the United States, Canada, Mexico, or Cuba. XII–41–6446 S. T. 705

Where a return or a round the world ticket is sold abroad without containing data for passage from the United States, the entry of such data in this country constitutes the issuance of a passage ticket in the United States.

Advice is requested whether any stamp tax is due where a return or a round the world ticket is sold in a foreign country without containing data for passage from the United States, and is completed in the United States by indorsing thereon the name of the steamer, sailing date, etc.

It is held that where a round trip or round the world passage ticket sold abroad is incomplete, the name of the steamer and the date of sailing from the United States being omitted, the entry of such data by the steamship company in this country constitutes the issuance in the United States of a passage ticket, which is taxable under Schedule A–5 of Title VIII of the Revenue Act of 1926, as amended by section 442 of the Revenue Act of 1928. The underlying reason for this conclusion is that before the entry of the data

in this country the purchaser has no instrument which can be accepted for a continuation of the trip. The entry of the name of the ship and the date of sailing is required before the ticket can be used.

The delivery of the ticket with the complete data constitutes the issuance of a passage ticket, and thus brings the transaction within the provisions of the law imposing the tax.

TITLE V.—TAX ON ADMISSIONS AND DUES. (1926)

REGULATIONS 43–II(1926), ARTICLE 5: Social clubs. XII–50–6557 Ct. D. 762

DUES TAX—REVENUE ACTS OF 1921, 1924, AND 1926—DECISION OF COURT.

SOCIAL ORGANIZATION—AUTOMOBILE CLUB.

A country club organized for the convenience and accommodation of motorists, which furnishes to its members services similar to those rendered by the American Automobile Association, and which owns and occupies property used as a clubhouse equipped for social and athletic activities, is a social rather than a civic organization, and is properly subject to the tax imposed by section 801 of the Revenue Act of 1921 and section 501 of the Revenue Acts of 1924 and 1926.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI.

Southridge Country Club, a Corporation, plaintiff, v. *Noah Crooks, Collector of Internal Revenue, defendant.*

[June 25, 1933.]

OPINION.

The COURT. Gentlemen, I wish I had some time to read the authorities so that I could more easily make references in deciding this case, and by making such references support my views with citations of authorities. It is my opinion that this statute levying a tax upon clubs and the wording of it as well as the regulations that were promulgated by the Commissioner of Internal Revenue had in mind the exemption of those clubs which were in fact an incident to some other prime business, and as counsel made their arguments and cited cases I had in mind, for instance particularly did I have in mind the church as an illustration, for the reason that is referred to by the Commissioner in interpreting his regulations. It is not unusual for churches to have swimming pools and athletic equipment, athletic rooms, reading rooms and various means of entertainment and social improvement, all conducted as an incident to the main object of the church. I have no doubt it was the intention of Congress to exempt such social features from taxation. And in doing that it was provided that where the object was some other purpose, such as religion or civic matters, and where but incidental and for the purpose of promoting the main object, whether it be civic or religious, Congress intended to excuse or exempt such incidental organizations from the tax otherwise imposed.

I was interested in the case that I assume came from the District of Columbia, and I didn't understand it was before the Court of Claims—yes, it was before the Court of Claims and not in the District of Columbia—it had to do with the bank organizations.

Mr. DONNELLY. Of Chicago.

The COURT. It was Chicago was it? (Continuing.) Where it was the custom of these men to meet for luncheon and there discuss business problems, and then incidentally there were some club features and entertainment features. Apparently from the court's decision the whole organization was designed to discuss business problems and these problems were discussed there. I can readily see where the courts would exempt a club of that sort from taxation

upon the ground that the predominant and chief object of each day's meeting was for the purpose of discussing business problems and that incidentally for the purpose of making their work more effective and to facilitate their work they provided some social features. These were but incidental, as held by the court.

The question in this case is whether or not the Automobile Club of Kansas City was exclusively a civic organization and whether the social features attending it were but incidental. The testimony discloses that the clubhouse and grounds utilized by the Automobile Club were some 16 miles from Kansas City, beautifully located, and moreover that the club was equipped with ample and large grounds and with a commodious building. The original building had been consumed by fire and another building was constructed in 1916, is my recollection of the evidence. The prime question would be at the beginning as to whether or not the clubhouse thus situated could justly have for its object some civic purposes. An analysis might bring out the question as to whether or not a civic club would be organized with greater convenience to the immediate public so that its contacts would be greater and the objects of its organization could be made more effective. In other words would a civic organization, having in mind some civic benefit or purpose, or the promotion of the public good, would it organize and construct its clubhouse and buy equipment some 16 miles from the center of the city wherein resided the greater number, probably all, of the club members? That presents a serious question, that is on the question as to whether or not the social features were a material part of this club's organization.

There was evidence that there were civic features and that committees were appointed and that the funds of the club were used for the purpose of marking streets and highways, old trails, acquainting the public with the best means of travel. There was evidence that they had a legislative committee, the object of which was to provide for improvement of the highways. Moreover that the club gave its influence, which must have been a very considerable one, to the promotion of bonds, both for the building of highways in Missouri and for the purpose of providing for their retirement by the imposition of an appropriate tax upon gasoline. No question but that the club participated in civic enterprises. On the other hand, there was evidence that the club maintained club rooms, as I said, some 16 miles from Kansas City, rooms and a clubhouse that would be reached by persons who drove automobiles; that meals were served, the club members were accommodated by the convenience that was given them to have parties, dinner parties and dances; provision was made for the playing of golf, and also for those members who desired to participate in trap shooting, that this convenience was also provided for them, although it appears that the traps were rented instead of being bought outright by the club, yet the club furnished much of the equipment used in carrying on this particular diversion.

The income from the various social features of the club was considerable. The facts are that the annual dues paid by the membership when it reached 3,200, if upon the basis of $10 per member, as is contended, these dues would amount to approximately $30,000, whereas the social features, that is the income from other features, was greater than that. The club grounds and equipment for the accommodation of the members had a valuation in excess of $50,000, as I understood was carried upon the books of the club.

The organization of the club and its association with the American Automobile Association—I believe is the name of the national club—did not within itself mark it as a civic club. The American Automobile Association undoubtedly has some civic features, but as I gathered from the testimony the formation of this club and its association with the American Automobile Clubs had for its main objects the convenience and accommodation of the members because of the reciprocal courtesies that could be extended.

I think this is a feature of every social club in the United States. Most of them are affiliated with other clubs; courtesies are extended to members of each club when such member happens to be within the jurisdiction, or rather near the association's club and its quarters. The very fact that the members did find it convenient to have somebody tow them in when their automobile refused to run was not a civic matter. That was purely a matter of the membership and the social benefit that came, or rather a business benefit that came to them by reason of the fact that they were members of the same club. The very fact that the arrangement was made whereby the members enjoyed a reasonable degree of immunity from arrest where they transgressed the ordinances of

the city was not a civic matter. On the other hand that was contrary to civic benefits. A club member who because of his association with others and through a committee could make an arrangement with the police department to excuse him from violating the traffic ordinances does not promote public good; on the contrary, that of course is more or less selfish. It was designed to give members of the Automobile Club special immunity from arrest, detainment and detention when they violated the law. That was emphasized as one of the civic virtues of this Automobile Club.

The only services that I was able to gather from the testimony that the club rendered in a civic way was the fact that through some appropriate committee it advocated improved road systems, promoted the adoption of bonds, the constitutional amendment providing for bonds, and some other matters of that sort. I think it is a matter of common knowledge that all clubs may be called upon at different times to do that.

The circumstance that the clubhouse was some 16 miles from Kansas City and designed for the use and accommodation of the members, the fact members repaired thereto for the purpose of entertainment, such as dinners, dances, golf, trap shooting, all would negative the thought it was engaged exclusively in civic enterprises, but, on the contrary, it would not be denied that these were material factors of the club. Moreover, as a practical proposition, what possible service could 3,000 members render in promoting some civic good by going out to a clubhouse 16 miles from the city? It did not appear from the evidence that they met there in convention or in mass meeting of the club members for the purpose of adopting resolutions or jointly advocating the enactment of a law. The work that was done on civic matters, as I gathered from the testimony, was done by committees. Practically all the activities about the clubhouse were of a social nature. There was evidence there was some activities there where a few members of the club would meet, such as committees, for the purpose of promoting civic matters, but, as I stated, these committees appointed by the club for the purpose of promoting civic matters were certain members of the club appointed on this committee, which was one of many committees. There were other committees appointed, apparently, and equally active, for the purpose of promoting the entertainment of members.

I have listened, gentlemen, to all the evidence in the case and it was my opinion from this evidence that whatever the original object of the club, which it is said here was for the purpose of debate, literature and the study of mechanics, these are not civic only in so far as the improvement of one in debate and the study of literature or an acquaintance with mechanics would benefit the general public. The general welfare is always promoted by literature, art and a knowledge of mechanics, but that could equally be said of athletics, that it promotes the general welfare because men and women who participate in athletics and make their bodies strong are more helpful to the public than those who go around with weak bodies. So that anything that promotes health and well-being of the individual contributes to the general welfare. But I am very frank to say that the study of the testimony as it was admitted does not convey to me very much in the activities of this club that pertains to civic matters. I am not saying that it did not have some of those features and in saying that I am not at all critical of the things they did, because I think they were commendable—these people forming an Automobile Club where they could come together and have their lunches and mutually help each other out of the mud when they got stuck, if I may use that expression, are helpful to each other. That was an organization formed for mutual benefit, one to the other. As the necessity for tow-in and for courtesies disappeared because of the convenience that the whole public has enjoyed, why, then the work of the club as a club for each other in that regard disappeared.

But it appeared from the evidence that they had dancing and luncheon arrangements there and provisions for golf and also for trap shooting at the time that these taxes were first assessed in 1923, although the matter of golf did not become conspicuous until probably 1925.

It is my opinion upon all the evidence in the case that this club is not exempt from the tax and it is proper for the Government to levy the tax, and that the Government is entitled to retain the tax that was paid. So that the issues in the case must be found for the Government.

SCHEDULE A-7 OF TITLE VIII OF THE REVENUE ACT OF 1926.—STAMP TAX ON FOREIGN INSURANCE POLICIES.

REGULATIONS 71, ARTICLE 64: What instruments must bear a stamp. XII-27-6273 S. T. 689

Taxability of a foreign insurance policy originally issued for one amount but subsequently canceled and a new policy issued for a less amount.

Advice is requested whether the execution of a foreign insurance policy under the following circumstances will incur the tax imposed by Schedule A-7 of Title VIII of the Revenue Act of 1926.

Certain underwriters of London, England, underwrote an insurance policy in the amount of $20x$ dollars for a period of one year. When the year was three-quarters past, the underwriters did not care to continue the risk and proposed to either furnish a new policy or amend the old one so as to show a risk of $15x$ dollars only. Other underwriters of London agreed to underwrite the remaining $5x$ dollars of the original $20x$ dollars policy, by issuing a new policy in the amount of $5x$ dollars, which will expire simultaneously with the original $20x$ dollars policy.

It is held that the premium paid on the $5x$ dollars policy will incur the tax imposed by Schedule A-7 of Title VIII of the Revenue Act of 1926. If the original policy for $20x$ dollars is canceled and a new policy written in the amount of $15x$ dollars and a premium is charged on such amount, a stamp tax will also be incurred on the new policy for $15x$ dollars. However, if the original policy is merely amended so as to show a risk of $15x$ dollars only and no premium is charged, no stamp tax liability will be incurred.

TITLE VI.—EXCISE TAXES. (1924)

AUTOMOBILE PARTS AND ACCESSORIES.

REGULATIONS 47(1924), ARTICLE 16: Definition of "parts and accessories." XII-27-6271 Ct. D. 696

EXCISE TAXES—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

1. AUTOMOBILE ACCESSORIES—SALE BY MANUFACTURER.

"Weed" chains sold by a manufacturer to jobbers and distributors were primarily designed and adapted for use and chiefly used upon motor vehicles the sale of which was taxable under the provisions of section 900(3) of the Revenue Act of 1921 and section 600(3) of the Revenue Act of 1924, and were properly taxed as accessories within the meaning of the sections referred to, even though they may have been actually used for some other purpose.

2. DECISION REVERSED.

The decision of the district court (58 Fed. (2d), 248) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Robert O. Eaton, Collector of Internal Revenue of the United States for the District of Connecticut, defendant-appellant, v. *American Chain Co., a Corporation, plaintiff-appellee.*

[March 7, 1933.]

OPINION.

Appeal from the District Court for the District of Connecticut. Actions at law to recover taxes paid under duress. Judgments for plaintiff; defendant appeals. Reversed.

MANTON, Circuit Judge: These three consolidated causes resulted below in judgments for refunds of manufacturer's excise taxes, amounting to $640,508.43, paid on the manufacture and sale of Weed chains, a product of the appellee. The tax was imposed under the terms of section 900(3) of the Revenue Act of 1921 and section 600(3) of the Revenue Act of 1924 for the periods of July, 1922, to July, 1924. The taxing statute requires a monthly return. The 1921 Act provides:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—(1) Automobile trucks and automobile wagons * * *; (2) Other automobiles and motor cycles * * * except tractors, * * *; (3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2) * * *."

The Act of 1924 reads:

"On and after the expiration of 30 days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—(1) Automobile truck chassis and automobile wagon chassis * * *; (2) Other automobile chassis and bodies and motor cycles * * *; (3) Tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles; * * *."

Appellee manufactures Weed chains and the sales taxed were made to others than manufacturers of automobile trucks, automobiles, and motor cycles—to jobbers and distributors. The tax was imposed only where the purchaser did not indicate the purchase was being made for a nontaxable use and was imposed in conformity with articles 15 and 16 of Regulations 47 promulgated by the Treasury Department. These regulations, in substance, defined accessories as articles designed to be attached to and used in connection with automotive vehicles, referred to in subdivision (1) and (2) of each Act, to add to their utility or ornamentation and which are primarily adapted for use in connection with such vehicles whether or not essential to their operation. The Weed chains were advertised by the appellee to the public as adapted for and meeting the essential requirements of every known make of automobile and auto truck and the Commissioner found them to be accessories. No tax was imposed by the jobber or distributor when he sold to the dealer who in turn sold to the user. The chains were patented and were designed and primarily adapted for automobile use. Later, when the automobile truck came into use, they were redesigned and adapted for use on trucks. Appellees have classified their chains as "truck chains," "Weed Regulars" and "Weed Regular Cord Chains." Some chains were usable by tractors and fire trucks, but their use was chiefly for automobiles and automobile trucks. The tax is imposed as a revenue-raising measure.

It is true, if there is a doubt as to the taxpayer's liability, it should be resolved in his favor (*American-La France Fire Engine Co.* v. *Riordan*, 6 Fed.

(2d), 964 (C. C. A. 2) [T. D. 3536, C. B. II-2, 303]). Still, the purpose of the statutes must be given full effect, if possible, and the claim of exemption from taxation must be clear enough. (*Bank of Commerce* v. *Tennessee*, 161 U. S., 124.) The scheme of the statute seems clear. The 1921 Act and the 1924 Act both show an intent by Congress to tax (first) automobile trucks and automobile wagons and accessories therefor, sold on or in connection therewith and with the sale thereof at a fixed rate of 3 per cent; (second) other automobiles and motor cycles including the accessories sold on or in connection therewith and with the sale, except tractors, 5 per cent; and (third) it imposes the tax when the parts and accessories are sold unattached, 5 per cent. In each instance the tax is imposed upon the manufacturer or the producer of the articles enumerated. If the chains are accessories, it is clear that Congress imposed a tax upon them when sold by this manufacturer.

The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose. If Congress had intended to give exemption to such an accessory to an automobile, it would have so stated as it did in the case of tractors by reference in the statute, or it would have limited the language of the statute so as to afford clearly an exemption therefor, but it used the word "parts or accessories." The use of such generic words intended, we think, that they should be given a broad signification to effectuate the purposes of the statute. (*Worth Bros.* v. *Lederer*, 251 U. S., 507; *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S., 511.) In *Universal Battery Co.* v. *United States* (281 U. S., 580 [Ct. D. 220, C. B. IX-2, 422]), speaking of the statute, the court said:

"Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts and accessories 'for' such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends."

The Supreme Court referred to Regulations 47 of the Commissioner with approval, saying:

"The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle. This construction of those terms has been adhered to in the Internal Revenue Bureau for about 10 years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but it is an admissible construction * * *. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that 'articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the article for which they are not so well adapted.'"

It can not be seriously doubted that the Weed chains made under the circumstances described were designed and primarily adapted for use in automobile trucks, wagons, other automobiles and motor cycles. The testimony establishes that the Weed chains were designed, adapted and advertised to meet the essential requirements of automotive power vehicles and were necessary to the accomplishment of their functions. In a fixed way, they are a part of the machine and consequently are accessory to the machine.

The court below considered 49 specific sizes of the appellee's production of the Weed chains and their parts, and held that their sales are exempt from the statute and that no tax should be paid. It was concluded below that the primary adaption rule, referred to in *Universal Battery Co.* v. *United States* (supra), has no application to cases where the appellee, by evidence of subsequent untaxed resales, shows two uses, one of which is the admitted principal use on automobiles and the other is a possible exempted use even though it be a diverted use. We think such a conclusion ignores the chief or principal use as being determinative of the primary adaption rule, referred to by the Supreme Court, and it also assumes evidence of untaxed resales for possible diverted uses, sufficient to override the primary adaption rule. In the absence of evidence showing that such diverted uses required an article of the same design and primary adaption as is required for the automobile truck and other motor vehicle uses, the appellee could not succeed. No effort has been made to show that the tensile strength, twisting strains or weight of the

chains were different from those used and usable on automobile trucks or other automobiles. On the contrary, the evidence supports the claim of the appellant that a chain designed and primarily adapted for use on an automobile truck may be applied and used on the wheels of a tractor having comparable sized rubber tires. Indeed, there is no evidence that the chains referred to by the court below had the same design or primary adaption for use on tractors.

We therefore conclude that the chains for which the tax has been imposed were primarily adapted for use and chiefly or principally used for motor vehicles, enumerated in the statute, which were taxable, and are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted. (*Universal Battery Co.* v. *United States*, supra.)

Moreover, the burden of proof was upon the appellee to establish the invalidity of the tax. (*United States* v. *Mitchell*, 271 U. S., 12 [T. D. 3865, C. B. V–1, 233]; *United States* v. *Anderson*, 269 U. S., 444 [T. D. 3839, C. B. V–1, 179]; *Union Co.* v. *United States*, 46 Fed. (2d), 717 (Ct. of Claims).) It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles and motor cycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles. It is not enough to show that of the 49 specific sizes referred to below, at least one other vehicle might have used them. The appellee admits that the chains involved were chiefly used and adapted for use on the vehicles referred to as taxable in the statute and seeks its refund on the basis that such chains were applicable for performing certain duties such as furnishing traction only with respect to other vehicles. Such assumption does not mean that the chains were not designed nor primarily adapted for use on automobile trucks or other vehicles referred to in the statute as taxable. To succeed, the appellee should have shown by evidence adaptation for other uses. In the absence of evidence of such a showing, it was erroneous to hold that chains equally adapted for a variety of uses for traction purposes only and commonly put to such uses, one of which is on automobiles, can not be classified as parts or accessories of such vehicles. This does not mean that the chains involved can be so classified only where they are adapted solely for use on motor vehicles and are exclusively so used. (*Magone* v. *Wiederer*, 159 U. S., 555.) But where the chains were sold, and are predominantly and chiefly used, as parts or accessories of such automobile trucks, other automobiles and motor cycles, the sales are taxable in the absence of evidence showing the chains involved were not designed and primarily adapted for such use. The appellee has failed to establish its nontaxable sales.

It is an insufficient answer to say that the appellee did not know and has no way of ascertaining the amount of the sales of chains for use on other than automobile trucks, other automobiles and motor cycles. (*Perfection Gear Co.* v. *United States*, 41 Fed. (2d), 561 (Ct. of Claims); *Burnet* v. *Houston*, 283 U. S., 223 [Ct. D. 328, C. B. X–1, 343].)

We need not consider whether the claim that section 424 of the Revenue Act of 1928 precludes a recovery because of the view we take that the appellant has failed to establish the right to recover back the taxes paid.

Judgments reversed.

REGULATIONS 47(1924), ARTICLE 21: Coin-operated devices and machines.

XII–44–6481
Ct. D. 747

EXCISE TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. AUTOMATIC PLAYER PIANOS—COIN-OPERATED DEVICES.

Automatic player pianos are subject to tax as "coin-operated devices," within the meaning of section 600(8) of the Revenue Act of 1924.

2. CASE DISTINGUISHED.

Seeburg Piano Co. v. *United States* (62 C. Cls., 281 [T. D. 3893, C. B. V–2, 225]) distinguished.

DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF NEW YORK.

Remington-Rand, Inc., plaintiff, v. *Bert P. Gage, as Collector of Internal Revenue, as Amended, Executor Unknown, of the Estate of Mrs. Bert P. Gage, Deceased, defendant.*

[July 12, 1933.]

OPINION.

ADLER, District Judge: This is an action brought by Remington-Rand, Inc., for the recovery of manufacturers' excise tax paid by the Rand Co., Inc., for the period July 3, 1924, to September 30, 1925, in the amount of $6,237.88, and the sum of $2,312.38 paid by the Rand Cardex Co., Inc., for the period September 30, 1925, to February, 1926, making a total amount assessed of $8,550.26, together with interest thereon.

The principal question involved in this case is whether or not the automatic player piano sold by the Rand company is subject to taxation as a coin-operated device under the provisions of section 600 of the Revenue Act of 1924. A further question involved is whether the Remington-Rand, Inc., succeeded to the claims of its predecessor companies.

Recent Acts of Congress providing for excise taxes applicable to this case were passed in 1918, 1921, and 1924. The Revenue Act of 1918, section 900, provides for a tax on (4) pianos, organs (other than pipe organs), piano players, graphophones, phonographs, talking machines, music boxes, and records used in connection with any musical instruments, piano players, graphophones, phonographs, or talking machines. Paragraph (16) provides for a tax upon automatic slot device vending machines, etc. This Act of 1918 was superseded by the Revenue Act of 1921, which omitted paragraph (4) of the 1918 Act on pianos, etc., and retained the tax on automatic slot device vending machines using the same language in paragraph (11) of the 1921 Act as was used in paragraph (16) of the 1918 Act. The Revenue Act of 1921 was in turn superseded by the Revenue Act of 1924, which is in substantially the same language as the Act of 1921 with the single exception that instead of using the words "automatic slot device vending machines," the Act of 1924 has changed the language to "coin operated device, coin operated machine, and devices and machines operated by any substitute for a coin." It is under the Act of 1924 that the tax was levied in this case. The history of the legislation is pertinent in determining whether the player piano manufactured and sold by the plaintiff is taxable under the 1924 Act.

It is clear that it was the intention of Congress in passing the Revenue Act of 1921 to remove from taxation under that Act musical instruments which were taxed under paragraph (4) of the 1918 Act. Paragraph (4) of the 1918 Act made no reference to slot devices in connection with musical instruments. Paragraph (16) of the 1918 Act taxing "automatic slot device vending machines" was retained with the same language in the 1921 Act.

The case of *Seeburg Piano Co.* v. *United States*, reported in 62 Court of Claims Reports, page 281, was decided under the Revenue Act of 1921. It was there held that an electrical piano operated upon the deposit of a coin in a slot provided for that purpose is not a slot device vending machine within the meaning of paragraph (11) of that Act. The opinion in that case, while it states that the repeal of paragraph (4) of the Act of 1918 is significant, finds it necessary to discuss the question of whether the coin device on the piano brings it within the paragraph levying a tax upon automatic slot device vending machines, and concludes with "we do not treat the hearing of music as a sale of the same." By this language the court in that case took the position that operating a piano by depositing a coin did not make it a vending machine. It is true that the opinion goes further and states the view that the repeal of paragraph (4) of the 1918 Act discloses an intention to relieve all music from taxation however produced. I am not inclined to agree with this conclusion, especially in view of the change in the law made by the Act of 1924.

In 1924 the language "automatic slot device vending machines" was changed to "coin operated devices, coin operated machines, and devices and machines operated by any substitute for a coin." This language makes it unnecessary to discuss whether or not the piano in question is a vending machine. It seems to me clear that if plaintiff's piano is a coin operated device or a coin operated

machine, it comes within the language of the things it was intended to tax. Whatever it was, it was a device or a machine operated by a coin or by a substitute for a coin. There was evidence at the trial that the piano could be played from the keyboard without the use of the coin operating device. The statute, however, is not made to apply to exclusively coin operated devices and the fact that the device or machine could be made to operate in some other way than by the insertion of a coin, would not take it out of the statute. Nor do I think that the fact that a comparatively small part of the cost of the instrument is chargeable to the coin operating mechanism has weight in determining whether or not the instrument is coin operated.

The case of *American Meter Co.* v. *McCaughn* (1 Fed. Supp., 753), although recently decided, arose under the Revenue Act of 1921 and is not in point.

My conclusion is that the plaintiff's piano is a coin operated device within the meaning of the taxing statute.

The defendant contends that the plaintiff can not maintain this action for the reason that it was not the party in interest in this transaction and paid none of the taxes in question, and that this case is brought within the provisions of section 3477 of the Revised Statutes. While I am inclined to the opinion that section 3477 does not apply in this case, yet I find it unnecessary to pass upon that question in view of my conclusion that the tax paid has been properly levied.

Judgment may be entered accordingly.

Regulations 47(1924), Article 30: Credits and refunds. XII-31-6325 Ct. D. 712

FEDERAL TAXES—REVISED STATUTES—DECISION OF COURT.

SUIT—STATUTE OF LIMITATIONS—REOPENING OF CLAIM FOR REFUND.

When application is made by a taxpayer for reopening and reconsideration of a rejected claim for refund, a reexamination by the Commissioner of Internal Revenue of the files of his office pertaining to the case for the purpose of determining whether there is any basis for taxpayer's request and notification to taxpayer of denial thereof can not be regarded as a reconsideration of the claim upon its merits, and a suit filed more than two years after rejection of the claim but within two years after denial of reopening is barred by the period of limitation prescribed in section 3226 of the Revised Statutes.

COURT OF CLAIMS OF THE UNITED STATES.

Ford Motor Co., a Corporation, to the use and benefit of Jewel Tea Co., Inc., a Corporation, v. *The United States.*

[May 8, 1933.]

OPINION.

WILLIAMS, Judge, delivered the opinion of the court.

The Government interposes two defenses to plaintiff's right to recover, (1) that the taxes involved were legally imposed and collected under the provisions of section 900 of the Revenue Act of 1921, and section 600 of the Revenue Act of 1924, and (2) that the suit was not instituted within the time required by section 3226 of the Revised Statutes, as amended.

Since we are of the opinion plaintiff's right of action was barred by the statute of limitations at the time of filing the petition, it is not necessary to consider and determine the question as to whether the plaintiff is otherwise entitled to recover.

The claim for refund was disallowed by the Commissioner of Internal Revenue on August 31, 1928. The suit was instituted on March 17, 1931. More than two years having elapsed after disallowance of the claim before suit was brought, the action is clearly barred unless the Commissioner thereafter, within the time he was by law permitted to do so, reopened the case and reconsidered

his former action. It is the contention of plaintiff that the Commissioner did this, and that the 2-year limitation on the right to bring suit started to run from March 18, 1929, the date on which it is contended the Commissioner finally acted on the claim for refund.

The statute makes no provision as to the reopening and reconsideration of a claim for refund after it has been formally disallowed by the Commissioner of Internal Revenue, but his right to do so is recognized in Treasury Decision 3240 [C. B. 5, 313], effective at the time reconsideration was requested by plaintiff on September 17, 1928. The right of the Commissioner of Internal Revenue to reopen and reconsider a disallowed claim for refund is also recognized by the courts. (*Southwestern Oil & Gas Co.* v. *United States*, 29 Fed. (2d), 404 [Ct. D. 36, C. B. VIII–1, 211]; *Mobile Drug Co.* v. *United States*, 39 Fed. (2d), 940; *McKesson & Robbins, Inc.*, v. *Edwards*, 57 Fed. (2d), 147.)

The rule established by the decisions is that when the Commissioner, upon application made after a decision disallowing a claim, again enters upon a consideration of the merits of the case, and later renders his final decision thereon, the taxpayer has two years thereafter under section 3226 of the Revised Statutes within which to bring suit. It must appear, however, that the Commissioner has in fact reopened the case and reconsidered it upon the merits. Where, however, the Commissioner after the receipt of a request from a taxpayer to have his case reopened and reconsidered merely reexamines the files of his own office and reviews the papers in the case for the purpose of determining whether there is any basis for the taxpayer's request to have his case reopened, and later notifies the taxpayer of his refusal to reopen the case for further consideration, it can not be said he reconsidered the case upon the merits. (*Hickman* v. *United States*. 47 Fed. (2d), 328 [Ct. D. 299, C. B. X–1, 332].) This seems to be what the Commissioner did, and all he did in the instant case. Immediately after receipt of notice of disallowance of its claim by the Commissioner on August 31, 1928, plaintiff through its counsel went to the office of the General Counsel of Internal Revenue and interviewed attorneys there and orally asked for a reconsideration of the case. Plaintiff's counsel at that time protested the Commissioner's ruling and called to the attention of the attorneys with whom he talked a former ruling of the Bureau of the date of March 16, 1920, holding that the chassis in question were taxable at the 3 per cent rate on automobile trucks or automobile wagons. Later, on October 1, 1928, plaintiff's counsel called again at the General Counsel's office and left a copy of this order. Subsequently on November 16, 1928, plaintiff's counsel filed with the Bureau a formal written request for reconsideration of the case, to which request he attached a copy of the ruling of March 16, 1920, and also a copy of the subsequent order of August 20, 1923, revoking and modifying such order.

No further conferences were held between plaintiff's counsel and Bureau officials, and no letters or communications were thereafter exchanged between them. The Commissioner thereafter, on March 18, 1929, wrote a letter to plaintiff in which it was stated, "* * * The Bureau is therefore constrained to adhere to its previous rejection of the claim in question and must decline to reopen the same for further consideration." The plaintiff places some importance on the fact that the Bureau copy of the Commissioner's letter declining to reopen the case is stamped "Closed." This indorsement has no special significance. The plaintiff, as we have seen, had the right at any time within the 2-year period following disallowance of the claim within which suit could be instituted, to request the Commissioner to reopen the case and reconsider his action. Plaintiff exercised that right and had requested that the case be reopened and reconsidered. The Commissioner upon a consideration of the request declined to reopen the case and consider it further. On his decision not to reopen the case it was closed so far as further action upon it by the Commissioner was concerned, and the word "closed" was very properly, though not necessarily, stamped on the Bureau copy of the letter notifying plaintiff that the case would not be reopened.

The plaintiff was not misled, and had no reason to believe the case had been reopened and reconsidered by the Commissioner. It had been definitely and in explicit language informed by the Commissioner that he had declined to reopen the case. More than 17 months then remained of the 2-year period within which suit could be instituted under section 3226 of the Revised Statutes. The plaintiff did not institute suit within the time provided, and its present action, brought after the bar of the statute had fallen, can not be maintained.

The petition is therefore dismissed. It is so ordered.

ACT OF MAY 12, 1900, AS AMENDED BY SECTION 1013(a) OF THE REVENUE ACT OF 1924.—REDEMPTION OF STAMPS.

XII–38–6412
S. T. 700

Held that no allowance may be made for liquor stamps which are stolen.

Advice is requested whether any allowance may be made for fermented malt liquor stamps which were stolen from the office of the X Brewing Co. and alleged to have been destroyed.

Pursuant to the Act of May 12, 1900, as amended by section 1013(a) of the Revenue Act of 1924, the Commissioner of Internal Revenue is authorized to make allowance for or redemption of stamps which have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected.

The mere fact that stamps have been stolen does not warrant the conclusion that they have been destroyed. To justify allowance or redemption on the ground that the stamps were destroyed the claim must be supported by an affidavit of an eye-witness establishing that destruction actually took place. Obviously, the theft of stamps does not render them useless or unfit for the purpose intended.

Congress has made no provision for any allowance for stamps which have been lost or stolen. In such cases the loss must fall on the owner and not on the Government. In other words, the Bureau is without authority to extend any relief for the loss of fermented malt liquor stamps which are stolen.

TITLE IX.—EXCISE TAXES. (1921)

REGULATIONS 47(1921), ARTICLE 23: Automatic slot-device machines.

XII–44–6482
Ct. D. 748

EXCISE TAXES—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. PREPAYMENT GAS METER—AUTOMATIC SLOT-DEVICE VENDING MACHINE.

A gas meter with a slot device attached as a means of releasing and delivering a certain amount of gas to the consumer upon the deposit of a coin is an automatic slot-device vending machine within the meaning of section 900(16) of the Revenue Act of 1918 and section 900(11) of the Revenue Act of 1921, and is therefore subject to tax.

2. DECISION REVERSED.

The decision of the district court (1 Fed. Supp., 753) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Blakely D. McCaughn, Collector of Internal Revenue, defendant-appellant, v. *American Meter Co., plaintiff-appellee.*

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

[August 7, 1933.]

OPINION.

BUFFINGTON, J.: The decisive question in this tax case is whether the taxpayer's gas meter was, under the Revenue Acts of 1918 and 1921, an "automatic, slot vending machine."

The taxpayer made a patented device adapted to operate a release when a coin is dropped in its slot. The device when soldered, as was intended should be done, to a gas meter, a quarter dollar deposited in its slot, released and delivered to the depositor of the coin 250 feet of gas. To answer the question whether such apparatus was an "automatic, slot vending machine," we take these four words and ascertain their common, everyday meaning. Is the apparatus a machine? Assuredly so, for the dictionary defines a machine as "any combination of inanimate mechanism for utilizing or applying power." In the use of the present device we have two parties—a seller and a buyer; the commodity, gas; the quantity desired, 250 feet; the price, 25 cents. Without the agency of either party, the device automatically receives the money from the buyer and holds it for the seller, automatically measures the product, automatically delivers it to the buyer. The sale is effected by a slot which receives the coin of the buyer; by gravity takes it out of the control of the buyer; and by gravity puts it in control of the seller; and at the same time releases the bargained amount of gas and delivers it to the buyer. The contract, sale, delivery and payment are all effected by mechanism, automatically, and without any working human agency.

Such terms as "slot machine" as an agency for selling small articles, "nickel in the slot" were in common use and clearly defined in the public speech this type of selling agencies. Presumably Congress used these words and terms in their common everyday meaning and consequently there is no uncertainty in the statute. Vending is a synonym for selling. It is a mere abstraction now to say that the transaction here involved was a license, a permit, a privilege of using gas and not a sale of a commodity. Where, as here, the words of a statute are clear and unambiguous, there is no call for testimony or reasoning to attribute some imaginary meaning to them. The facts show that the device in question works automatically, that it is a machine, that it is a selling machine, a product delivery machine and a price collecting machine; that it does away with human control, agency, work and exercise of will power. What was meant and effected was a slot-made sale. We hold, therefore, that it is an "automatic, slot vending machine" and comes within the statutes in question. Accordingly the judgment below is reversed and the record remanded for procedure in accord with this opinion.

MISCELLANEOUS TAX RULINGS.

TITLE IV.—TAX ON CIGARS, TOBACCO, AND MANUFACTURES THEREOF. (1926)

SECTION 317 (TARIFF ACT OF 1930).—TOBACCO, ETC., FOR SEA STORES.

REGULATIONS 76(1931), ARTICLE 11: Bond. XII–46–6516
T. D. 4405

TOBACCO SEA STORES WAREHOUSE BOND.

Section 317, Tariff Act of 1930.—Article 11, Regulations 76, amended.

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

To Collectors of Internal Revenue and Others Concerned:

The first sentence of article 11, Regulations 76, approved July 3, 1931, is hereby amended to read as follows:

ART. 11. *Bond.*—Upon approval of the application to establish a bonded warehouse, a bond must be executed on Form 549–B, in duplicate, in a penal sum sufficient to cover the amount of tax which may at any time constitute a charge against the bond and in no case less than $1,000.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 7, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

REGULATIONS 76(1931), ARTICLE 20: Credit for shipment in account kept with each bond. XII–42–6460
T. 2

Where tobacco products withdrawn for use as sea stores are destroyed before delivery to the vessels to which consigned, the manufacturer is liable for the tax thereon.

The question is presented whether a manufacturer of tobacco products (cigarettes) is liable for the tax on such products which were withdrawn as sea stores without payment of the tax thereon, but were destroyed by fire before delivery to the vessels to which consigned.

Section 317 of the Tariff Act of 1930 reads as follows:

The shipment or delivery of manufactured tobacco, snuff, cigars, or cigarettes, for consumption beyond the jurisdiction of the internal-revenue laws of the United States, as defined by section 3448 of the Revised Statutes, shall be deemed exportation within the meaning of the customs and internal-revenue

laws applicable to the exportation of such articles without payment of duty or internal-revenue tax.

This provision is designed to permit the withdrawal and shipment of tobacco products without payment of tax for use as sea stores on vessels beyond the 3-mile limit (article 1 of Regulations 76). The shipment of tobacco products for use as sea stores is not specifically exempted as such but the exemption is granted by the indirect method of declaring that such shipment "shall be deemed exportation within the meaning of the customs and internal-revenue laws applicable to the exportation of such articles without payment of duty or internal-revenue tax." The law here made applicable to the shipment in question is section 1 of the Act of August 4, 1886, which provides:

> That manufactured tobacco, snuff, and cigars may be removed for export to a foreign country without payment of tax, under such regulations, and the making of such entries, and the filing of such bonds and bills of lading as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.

The controlling principle in the instant case is identical with that involved in the case of withdrawals for export. Section 1 of the Act of August 4, 1886, supra, authorizes the withdrawal of tobacco products for export without payment of tax only under the conditions prescribed by the regulations. Such withdrawals are governed by Regulations 73, article 3 of which prescribes the giving of a bond (Form 549) so conditioned as to require evidence of actual exportation. There is no provision of law under which tobacco products withdrawn for export without payment of tax and not exported may be exempted from liability to the tax, since exemption is granted not upon withdrawal for export but upon proof of exportation.

The same rule applies to cigarettes withdrawn for use as sea stores and destroyed before delivery to the vessels to which consigned. The tax on cigarettes is imposed by section 400(a) of the Revenue Act of 1926 and is laid upon all cigarettes manufactured in or imported into the United States and sold or removed for consumption or sale. The only authority for their withdrawal for use as sea stores without payment of tax is that conferred by section 317 of the Tariff Act of 1930, which, through the application of the export provisions of section 1 of the Act of August 4, 1886, requires as a condition precedent to the exemption, compliance with the requirements of the regulations made in pursuance thereof. Upon any other theory tobacco products intended for use as sea stores would be tax exempt upon withdrawal whether or not they were used for the purpose for which withdrawn, which is obviously not the intent of the statute. To give the law such an interpretation would ignore entirely its specific reference to the laws applicable to exportation and render nugatory the requirement of the regulations that a bond be furnished covering the goods after their withdrawal.

Section 317 of the Tariff Act of 1930 affords no authority for the withdrawal of tobacco products for use as sea stores without payment of tax, except where such products were laden on a vessel which cleared from the port of embarkation. Inasmuch as the cigarettes in question were destroyed before delivery to the vessel to which consigned, they are subject to the tax.

TOBACCO.

REGULATIONS 8(1928), ARTICLE 76: Subdivision packages. XII–46–6515 T. D. 4404

CIGARETTES AND SMALL CIGARS—SUBDIVISION PARCELS.

Subdivision of the statutory number of cigarettes or small cigars into parcels of not more than 5 cigarettes or small cigars, each, authorized. Section 400(d), Revenue Act of 1926, article 76, Regulations No. 8, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 76 of Regulations No. 8, approved April 24, 1928, as amended by Treasury Decision 4353, approved September 14, 1932 [C. B. XI–2, 562], is further amended to read as follows:

ART. 76. *Subdivision parcels.*—The statutory number of cigars and cigarettes contained in the box or package may be subdivided by the use of paper or ribbon bands, or separated into parcels, each containing not more than 10 cigars weighing more than 3 pounds per thousand, or 5 cigarettes, or 5 cigars weighing not more than 3 pounds per thousand, by inclosure in foil, wax paper, cellophane, or lightweight cardboard with cut-out windows or open at one end.

The caution notice label (article 84), factory brand (article 85), and classification label (article 86), must not appear on any subdivision or parcel of a statutory package, but must appear only on the statutory package on which the requisite stamp is affixed.

Cigars and cigarettes so subdivided into parcels must remain in the stamped statutory box or package until they are sold or delivered direct to the consumer, and the whole number of cigars or cigarettes packed in each statutory box or package must correspond to the denomination of the stamp affixed to the box or package.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 7, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

XII–50–6563
T. D. 4411

Leaf tobacco—Types to be reported.—Dealers in leaf tobacco required to report types of leaf tobacco received from farmers and cooperative associations.—Regulations No. 8, article 24, amended accordingly.

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

To Collectors of Internal Revenue and Others Concerned:

Paragraphs (f) and (g), subdivision (4), article 24 of Regulations No. 8, approved April 24, 1928, are amended to read as follows:

(f) *Receipts from farmers.*—Since farmers are not required to make reports of their transactions, Form 774, covering tobacco received from farmers, shall

be executed by the dealers by whom the tobacco is received. A dealer will cover the entire quantity of leaf tobacco received on a given day from farmers by the execution of a single Form 774, in duplicate, provided he keeps an accurate supplementary record showing the name and address of each farmer, the quantity of tobacco received from each, and the dates of receipt. The words "From farmers" and the letter "F" should be entered under the heads of "Shipped or delivered by" and "Bus.," respectively, shown by the Form 774, in each such case. The type number according to the official classification of leaf tobacco by the United States Department of Agriculture, Bulletin S. R. A.—B. A. E. No. 118, issued November, 1929, should be entered under the head of "Type" in every case where tobacco is received from farmers by dealers. In the case of receipts from farmers, the duplicate or yellow copy shall be pinned to the back of the original or white copy and both shall be treated as an original or white copy and handled as though received from the persons from whom the tobacco is obtained.

(g) *Receipts from tobacco growers' cooperative associations.*—A dealer receiving tobacco from a tobacco growers' cooperative association, exempt from registry as a dealer in leaf tobacco, must execute Form 774 showing the quantity of tobacco received. The name and address of the association from which received and not "received from farmers" should be entered under the head of "Shipped or delivered by" and letter "A" under "Bus.," on Form 774, in each case. The type number should be entered, as in the case of receipts from farmers, under the heading "Type" when a dealer receives tobacco from a tobacco growers' cooperative association exempt from registry as a dealer in leaf tobacco. As in the case of receipts from farmers, the duplicate or yellow copy shall be pinned to the back of the original or white copy, and both shall be treated as an original or white copy and handled as though received from the associations from which the tobacco is obtained.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved December 5, 1933.

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

MISCELLANEOUS RULINGS.

NATIONAL INDUSTRIAL RECOVERY ACT.

XII-27-6277

H. R. 5755. PUBLIC, NO. 67, SEVENTY-THIRD CONGRESS.

An Act To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

REEMPLOYMENT AND RELIEF TAXES.

SEC. 211. (a) Effective as of the day following the date of the enactment of this Act, section 617(a) of the Revenue Act of 1932 is amended by striking out "1 cent" and inserting in lieu thereof "1½ cents."

(b) Effective as of the day following the date of the enactment of this Act, section 617(c)(2) of such Act is amended by adding at the end thereof a new sentence to read as follows: "As used in this paragraph the term 'benzol' does not include benzol sold for use otherwise than as a fuel for the propulsion of motor vehicles, motor boats, or airplanes, and otherwise than in the manufacture or production of such fuel."

SEC. 212. Titles IV and V of the Revenue Act of 1932 are amended by striking out "1934" wherever appearing therein and by inserting in lieu thereof "1935." Section 761 of the Revenue Act of 1932 is further amended by striking out "and on July 1, 1933," and inserting in lieu thereof "and on July 1, 1933, and on July 1, 1934,".

SEC. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act.

(b) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the collector of the district in which its principal place of business is located, or, if it has no principal place of business in the United States, to the collector at Baltimore, Md.

(c) Every such corporation is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payment made in accordance with the provisions of this section.

(d) The provisions of sections 115, 771 to 774, inclusive, and 1111 of the Revenue Act of 1932 shall be applicable with respect to the tax imposed by this section.

(e) The taxes imposed by this section shall not apply to the dividends of any corporation enumerated in section 103 of the Revenue Act of 1932.

SEC. 214. Section 104 of the Revenue Act of 1932 is amended by striking out the words "the surtax" wherever occurring in such section and inserting in lieu thereof "any internal-revenue tax." The heading of such section is amended by striking out "surtaxes" and inserting in lieu thereof "internal-revenue taxes." Section 13(c) of such Act is amended by striking out "surtax" and inserting in lieu thereof "internal-revenue tax."

SEC. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

(b) For each year ending June 30 there is hereby 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.

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

(1) to any corporation enumerated in section 103 of the Revenue Act of 1932;

(2) to any insurance company subject to the tax imposed by section 201 or 204 of such Act;

(3) to any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or

(4) to any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Md. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until

paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than 60 days.

(e) Returns required to be filed for the purpose of the tax imposed by this section 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.

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for 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. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

(g) The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

SEC. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or 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 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) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

(b) The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law (including penalties), as the taxes imposed by title I of the Revenue Act of 1932.

SEC. 217. (a) The President shall proclaim the date of—

(1) The close of the first fiscal year ending June 30 of any year after the year 1933, during which the total receipts of the United States (excluding public-debt receipts) exceed its total expenditures (excluding public-debt expenditures other than those chargeable against such receipts), or

(2) the repeal of the eighteenth amendment to the Constitution, whichever is the earlier.

(b) Effective as of the 1st day of the calendar year following the date so proclaimed section 617(a) of the Revenue Act of 1932, as amended, is amended by striking out "1½ cents" and inserting in lieu thereof "1 cent".

(c) The tax on dividends imposed by section 213 shall not apply to any dividends declared on or after the 1st day of the calendar year following the date so proclaimed.

(d) The capital-stock tax imposed by section 215 shall not apply to any taxpayer in respect of any year beginning on or after the 1st day of July following the date so proclaimed.

(e) The excess-profits tax imposed by section 216 shall not apply to any taxpayer in respect of any taxable year after its taxable year during which the date so proclaimed occurs.

SEC. 218. (a) Effective as of January 1, 1933, sections 117, 23(i), 169, 187, and 205 of the Revenue Act of 1932 are repealed.

(b) Effective as of January 1, 1933, section 23(r) (2) of the Revenue Act of 1932 is repealed.

(c) Effective as of January 1, 1933, section 23(r)(3) of the Revenue Act of 1932 is amended by striking out all after the word "Territory" and inserting a period.

(d) Effective as of January 1, 1933, section 182(a) of the Revenue Act of 1932 is amended by inserting at the end thereof a new sentence as follows: "No part of any loss disallowed to a partnership as a deduction by section 23(r) shall be allowed as a deduction to a member of such partnership in computing net income."

(e) Effective as of January 1, 1933, section 141(c) of the Revenue Act of 1932 is amended by striking out "except that for the taxable years 1932 and 1933 there shall be added to the rate of tax prescribed by sections 13(a), 201(b), and 204(a), a rate of three fourths of 1 per centum" and inserting in lieu thereof the following: "except that for the taxable years 1932 and 1933 there shall be added to the rate of tax prescribed by sections 13(a), 201(b), and 204(a), a rate of three fourths of 1 per centum and except that for the taxable years 1934 and 1935 there shall be added to the rate of tax prescribed by sections 13(a), 201(b), and 204(a), a rate of 1 per centum."

(f) No interest shall be assessed or collected for any period prior to September 15, 1933, upon such portion of any amount determined as a deficiency in income taxes as is attributable solely to the amendments made to the Revenue Act of 1932 by this section.

(g) In cases where the effect of this section is to require for a taxable year ending prior to June 30, 1933, the making of an income-

tax return not otherwise required by law, the time for making the return and paying the tax shall be the same as if the return was for a fiscal year ending June 30, 1933.

(h) Section 55 of the Revenue Act of 1932 is amended by inserting before the period at the end thereof a semicolon and the following: "and all returns made under this Act after the date of enactment of the National Industrial Recovery 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."

SEC. 219. Section 500(a)(1) of the Revenue Act of 1926, as amended, is amended by striking out the period at the end of the second sentence thereof and inserting in lieu thereof a comma and the following: "except that no tax shall be imposed in the case of persons admitted free to any spoken play (not a mechanical reproduction), whether or not set to music or with musical parts or accompaniments, which is a consecutive narrative interpreted by a single set of characters, all necessary to the development of the plot, in two or more acts, the performance consuming more than 1 hour and 45 minutes of time."

* * * * * * *

SHORT TITLE.

SEC. 304. This Act may be cited as the "National Industrial Recovery Act."

Approved, June 16, 1933, 11.55 a. m.

REEMPLOYMENT AND RELIEF TAXES.

SECTION 211.

Tax on gasoline effective January 1, 1934. (See Mim. 4116, page 422.)

EXCISE TAX ON DIVIDENDS.

SECTION 213. XII–27–6276
Mim. 4033

Withholding of excise tax at source on dividends.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., June 24, 1933.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, Dividend-Paying Corporations, and Others Concerned:

The National Industrial Recovery Act (Public, No. 67, Seventy-third Congress, H. R. 5755), which was approved by the President June 16, 1933, 11.55 a. m., eastern standard time, contains the following provisions requiring the withholding of tax at the source on dividends:

SEC. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the

Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act.

(b) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the collector of the district in which its principal place of business is located, or, if it has no principal place of business in the United States, to the collector at Baltimore, Md.

(c) Every such corporation is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payment made in accordance with the provisions of this section.

(d) The provisions of sections 115, 771 to 774, inclusive, and 1111 of the Revenue Act of 1932 shall be applicable with respect to the tax imposed by this section.

(e) The taxes imposed by this section shall not apply to the dividends of any corporation enumerated in section 103 of the Revenue Act of 1932.

It is to be observed that section 213(a) of the Act expressly provides that the tax imposed by section 213 shall not apply to dividends declared before the date of the enactment of the Act, that is, the tax does not apply to dividends declared before midnight of June 15, 1933. It is also to be observed that the first withholding return required to be made under section 213 is the withholding return of the tax required to be deducted and withheld from the dividends paid during June, 1933, which were declared on or after June 16, 1933, and that such withholding return need not be made before July 31, 1933.

The instructions and return forms necessary for the administration of the above-quoted provisions of the Act are now being prepared. As soon as they are completed due publicity will be given to the instructions and forms through the usual channels. When the instructions and forms are available for distribution they may be obtained from collectors of internal revenue.

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

GUY T. HELVERING,
Commissioner.

SECTION 213. XII-30-6314
T. D. 4372

National Industrial Recovery Act.—Withholding of excise tax on dividends at source.

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

To Collectors of Internal Revenue and Others Concerned:

Section 213 of the National Industrial Recovery Act (Public, No. 67, Seventy-third Congress, H. R. 5755), approved by the President June 16, 1933, provides:

SEC. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. The

tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act.

(b) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the collector of the district in which its principal place of business is located, or, if it has no principal place of business in the United States, to the collector at Baltimore, Md.

(c) Every such corporation is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payment made in accordance with the provisions of this section.

(d) The provisions of sections 115, 771 to 774, inclusive, and 1111 of the Revenue Act of 1932 shall be applicable with respect to the tax imposed by this section.

(e) The taxes imposed by this section shall not apply to the dividends of any corporation enumerated in section 103 of the Revenue Act of 1932.

Section 104 of the Revenue Act of 1932 as amended by section 214 of the National Industrial Recovery Act provides:

SEC. 104. ACCUMULATION OF SURPLUS TO EVADE INTERNAL-REVENUE TAXES.

(a) If any corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of any internal-revenue tax upon its shareholders through the medium of permitting its gains and profits to accumulate instead of being divided or distributed, there shall be levied, collected, and paid for each taxable year upon the net income of such corporation a tax equal to 50 per centum of the amount thereof, which shall be in addition to the tax imposed by section 13 and shall be computed, collected, and paid upon the same basis and in the same manner and subject to the same provisions of law, including penalties, as that tax.

(b) The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to escape any internal-revenue tax.

(c) As used in this section the term "net income" means the net income as defined in section 21, increased by the sum of the amount of the dividend deduction allowed under section 23(p) and the amount of the interest on obligations of the United States issued after September 1, 1917, which would be subject to tax in whole or in part in the hands of an individual owner.

(d) 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 distributive shares, whether distributed or not, of the 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 the earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his distributive share, be exempt from tax in the amount of the share so included.

DIVIDENDS TO WHICH TAX IS APPLICABLE.

Section 213 imposes an excise tax upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation. The tax is 5 per cent of the amount of the dividends and is required to be deducted and withheld from such dividends by the payor corporation.

DIVIDENDS TO WHICH TAX IS NOT APPLICABLE.

The tax imposed by section 213 does not apply to—

(a) Dividends declared before midnight June 15, 1933;

(b) Dividends received from any corporation enumerated in section 103 of the Revenue Act of 1932 (relating to organizations exempt from income tax under Title I of that Act); or

(c) Dividends not required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932.

DEFINITIONS.

For the purposes of section 213, the term "dividends" has the same meaning as the term "dividend" as defined in section 115 of the Revenue Act of 1932, that is, a distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913. As used in section 213 the term "corporation" includes associations, joint stock companies, and insurance companies.

Where a corporation has leased the property of another corporation, in consideration thereof agreeing, inter alia, to pay as rental a certain amount in periodical installments directly to the lessor's shareholders (including cases where the payment of such amounts is secured by a guarantee of annual dividends indorsed by the lessee on the certificates of stock of the lessor, or otherwise), such payments for the purpose of section 213 constitute dividends to the recipients received as from the lessor corporation. In such cases the lessee corporation shall be regarded as the "payor corporation" as that term is used in section 213(a) and must make the returns required by section 213(b) and withhold and pay the taxes shown thereon to be due in respect of such dividends.

Section 213 imposes an excise tax upon the receipt of dividends, except those which were validly declared before the date of the enactment of the Act. A declaration of dividends payable periodically in the future will be regarded as void for the purposes of section 213 unless the declaring corporation at the time had sufficient earnings and profits accumulated subsequent to February 28, 1913, to enable it to pay all such future dividends so declared. No attempt to bind a corporation to pay future dividends out of anticipated earnings and profits will be recognized as a valid declaration for the purposes of that section.

REQUIREMENT TO WITHHOLD.

Every corporation (except corporations which are exempt from income tax under section 103 of the Revenue Act of 1932) making payment of dividends to any person after the enactment of the National Industrial Recovery Act, shall deduct and withhold the tax imposed by section 213 from such dividends except as provided in (1), (2), and (3), below. Where a dividend is paid by a corporation in securities or other property (other than its own stock), the tax to be withheld and paid under section 213 is 5 per cent of the fair market value of such property when receivable by the shareholders.

RELIEF FROM WITHHOLDING.

(1) No withholding of tax under section 213 is required from dividends declared prior to June 16, 1933, if evidence that the dividends were declared prior to that date is submitted with the withholding return of the payor corporation as hereinafter provided.

(2) No withholding of tax under section 213 need be made if at a reasonable time before the payment of the dividends (such time to

be determined by the payor corporation) there is filed with the payor corporation an exemption certificate certifying that the actual owner of the shares of stock in respect of which the dividends are paid is a domestic corporation.

(3) No withholding of tax under section 213 need be made if before the payment of the dividends it is established to the satisfaction of the Commissioner, and the Commissioner so notifies the payor corporation, that under the provisions of section 119(a)2 (A) or (B) of the Revenue Act of 1932 the dividends are not to be treated as income from sources within the United States, and there is filed with the payor corporation, as in (2) above, an exemption certificate certifying that the actual owner of the shares of stock in respect of which the dividends are paid is a nonresident alien individual or a foreign corporation.

If the exemption certificates provided for in (2) and (3) above are not filed prior to the payment of the dividends but are filed prior to the making by the payor corporation of the withholding return, the tax deducted and withheld may be released and paid over by the payor corporation to the recipient of the dividends.

FORM OF EXEMPTION CERTIFICATES.

Form 1043A is prescribed as the exemption certificate for use in complying with the provisions of (2) above. Such certificate shall be in substantially the following form:

FORM 1043A.

EXEMPTION CERTIFICATE.

For use in disclosing actual ownership of stock by domestic corporations and to establish nonliability to withholding tax at source on dividends. (Section 213, National Industrial Recovery Act.)

RECORD OWNER.	ACTUAL OWNER.
Name_____	Name_____
Address_____	Address_____
_____	_____

Number of shares: Common stock_____ Preferred stock_____
Dividends payable_____, 193__, $_____
date
Payor corporation_____
Address _____

I HEREBY CERTIFY that the actual owner of the stock described above is the domestic corporation named above, and that such corporation is entitled to receive the dividends on such stock.

_____
(Signature and title of person authorized to sign for actual owner, or signature of record owner.)

Date:_____193__

If in executing Form 1043A the record owner of the shares of stock who is not the actual owner of such shares, does not disclose to the payor corporation the name and address of the actual owner, the record owner shall write in the space provided for such name and address the following: "Actual owner domestic corporation, name and address of which furnished Commissioner," and shall file directly with the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., a duplicate of the Form 1043A so executed, except

that the name and address of the actual owner must appear on the Form 1043A filed with the Commissioner. Such duplicate certificate shall be accompanied with a statement showing that the original is being filed with the payor corporation as herein provided.

Form 1043B is prescribed as the exemption certificate for use in complying with the provisions of (3) above. Such certificate shall be in substantially the following form:

FORM 1043B.

EXEMPTION CERTIFICATE.

For use in disclosing actual ownership of stock by nonresident aliens and foreign corporations and to establish nonliability to withholding tax at source on dividends. (Section 213, National Industrial Recovery Act.)

RECORD OWNER.	ACTUAL OWNER.
Name_____	Name_____
Address_____	Address_____

Number of shares: Common stock _____ Preferred stock _____
Dividends payable_____, 193__, $_____
Payor corporation_____
Address_____

I HEREBY CERTIFY that the actual owner of the stock described above is with respect to the United States a nonresident alien/foreign corporation, entitled to receive dividends on such stock.

_____.
(Signature of actual owner or signature and title of the person authorized to sign for actual owner, or signature of record owner.)

Date: _____, 193__.

If in executing Form 1043B the record owner of the shares of stock who is not the actual owner of such shares, does not disclose to the payor corporation the name and address of the actual owner, the record owner shall write in the space provided for such name and address the following: "Actual owner nonresident alien individual or foreign corporation, name and address of which furnished Commissioner," and shall file directly with the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., a duplicate of the Form 1043B so executed, except that the name and address of the actual owner must appear on the Form 1043B filed with the Commissioner. Such duplicate certificate shall be accompanied with a statement showing that the original is being filed with the payor corporation as herein provided.

All exemption certificates herein prescribed shall be 3½ inches wide, shall not exceed 8 inches in length, and shall be printed on yellow paper. Persons desiring to print their own exemption certificates for use as herein provided may do so, but the certificates so printed must be of the size and color herein prescribed.

WITHHOLDING RETURN.

Every corporation paying dividends after the enactment of the National Industrial Recovery Act shall, on or before the last day of the month following the month in which the dividends were paid, make a return thereof on Form 1043 to the collector of internal revenue of the district in which its principal place of business is

located, or, if it has no principal place of business in the United States, to the collector of internal revenue at Baltimore, Md., and pay the tax shown thereon to be due. The return must be sworn to before an officer duly authorized to administer oaths.

The total amount of the dividends paid during the month for which the return is made (or paid after the enactment of the Act, in the case of a return made for dividends paid during June, 1933) shall be reported on the return regardless of whether such dividends were declared on or after June 16, 1933, or before that date. In computing on the return the tax imposed by section 213 there is to be deducted from such total amount of dividends reported, the sum of (a) the dividends in respect of which exemption certificates are filed as herein provided and (b) the dividends declared prior to June 16, 1933. The deduction for the dividends declared prior to June 16, 1933, must be substantiated by a statement accompanying the return showing the date the dividends were declared, the amount thereof, the amount of the corporate earnings or profits available for distribution at the date of the declaration, and a copy of the corporate resolution declaring the dividends. The return shall contain all the other information called for by Form 1043. All exemption certificates (or where necessary, the evidence establishing a valid declaration prior to June 16, 1933), shall be forwarded by the payor corporation to the collector of internal revenue with the withholding return on Form 1043 to which they relate. However, if the number of exemption certificates exceeds 100, they may be forwarded directly to the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., in which event they shall be accompanied by a letter of transmittal stating the month covered by the return to which they relate. Where exemption certificates are filed as provided in (3) above, a copy of the letter of notification from the Commissioner referred to therein should also accompany the withholding return.

APPLICATION OF ADMINISTRATIVE PROVISIONS OF REVENUE ACT OF 1932.

The administrative provisions of sections 771 to 774, inclusive, of the Revenue Act of 1932 are applicable to the tax imposed by section 213. See also, inter alia, sections 3176 and 3184 of the Revised Statutes and section 1114 of the Revenue Act of 1926.

In deducting and withholding the tax under section 213, a fractional part of a cent may be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

Credit or refund of any overpayment of the tax imposed by section 213 and withheld and paid by the payor corporation to the United States may be allowed to the payor corporation if the payor corporation establishes to the satisfaction of the Commissioner that the tax was overpaid and that it has repaid the amount of the tax to the person from whom withheld or has obtained the consent of such person to the allowance of such credit or refund. The payor corporation so entitled to the refund of tax withheld and paid to the United States may take credit therefor against the tax due upon any subsequent monthly return on Form 1043.

Every corporation required by section 213 and this Treasury decision to file a return and withhold and pay the tax imposed by that section shall keep on file at its principal place of business or

some other convenient or safe location, records and accounts of all dividends paid after the enactment of the National Industrial Recovery Act. The records shall contain sufficient information relating to the declaration and payment of the dividends to enable the Commissioner to determine whether the correct amount of the tax has been paid. Such records shall at all times be open for inspection by internal-revenue officers, and shall be maintained for a period of at least four years from the date the tax became due or, in the case of dividends from which no tax was withheld, for a period of at least four years from the last day of the month following the month in which the dividends were paid.

MISCELLANEOUS.

A payor corporation may appoint a duly authorized agent to act in its behalf under the withholding provisions of section 213 provided notice of such appointment is filed with the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., giving the name and address of the agent.

The 50 per cent tax levied by section 104 of the Revenue Act of 1932 as amended by section 214 of the National Industrial Recovery Act applies to any corporation formed or availed of for the purpose of defeating the tax imposed by section 213 through the medium of permitting its gains and profits to accumulate instead of being divided or distributed.

Any person receiving dividends required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932 must include the gross amount of such dividends in gross income in his income tax return without reduction for the tax withheld under the provisions of section 213. However, such person may deduct in his income tax return the tax so withheld, in the same manner as other taxes allowed as a deduction by section 23(c) of the Revenue Act of 1932.

The determination, assessment, and collection of the tax and the examination of returns and claims filed pursuant to section 213 and this Treasury decision, will be made under such procedure as may be prescribed from time to time by the Commissioner.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved July 14, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

SECTION 213. XII–32–6335
I. T. 2706

Dividends received on stock held by a fiduciary required to file a return as such are subject to the tax imposed by section 213 of the National Industrial Recovery Act, irrespective of whether the ultimate beneficiary is an organization exempt from income tax under section 103 of the Revenue Act of 1932.

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SECTION 213. XII–33–6348
I. T. 2707

No withholding of excise tax is required under section 213 of the National Industrial Recovery Act on dividends paid to organizations which furnish proof that they are held by the Bureau to be exempt from income tax under section 103 of the Revenue Act of 1932.

SECTION 213. XII–35–6379
I. T. 2713

The excise tax imposed by section 213 of the National Industrial Recovery Act on the receipt of dividends should be withheld by the payor corporation from a corporate trustee receiving dividends distributable to individual beneficiaries. The trustee should report the gross amount of dividends in its fiduciary return of income and claim a deduction for the tax. The beneficiaries should report in their returns only the net amounts of dividends distributable to them.

SECTION 213. XII–35–6380
I. T. 2714

A corporation distributing dividends of a foreign corporation to citizens of the United States must withhold and pay the excise tax imposed by section 213 of the National Industrial Recovery Act.

Advice is requested whether the excise tax upon the receipt of dividends imposed by section 213 of the National Industrial Recovery Act must be withheld and paid by a corporation distributing dividends of a foreign corporation to citizens of the United States.

The excise tax applies to dividends of a foreign corporation received by citizens of the United States. Treasury Decision 4372 (page 387, this Bulletin) requires that every corporation (except corporations which are exempt from income tax under section 103 of the Revenue Act of 1932) *making payment* of dividends to any person shall deduct and withhold an excise tax of 5 per centum of the amount thereof. The term "payor corporation" used in section 213(a) of the National Industrial Recovery Act means a corporation acting as paying or distributing agent as well as a corporation which itself declares and pays a dividend. Accordingly, a corporation distributing dividends of a foreign corporation to citizens of the United States must withhold and pay the excise tax imposed by section 213 of the National Industrial Recovery Act.

SECTION 213. XII–35–6381
I. T. 2715

All of the stock of the M Company was deposited with voting trustees and voting trust certificates were issued against the stock. Some of the voting trust certificates are owned by domestic corporations to which payment is made by the trustees of dividends received on the stock represented by the certificates.

As the chief activities of the voting trustees consist of holding stock for voting and management purposes, the owners of the voting trust certificates are regarded as the actual owners of the stock. No withholding of excise tax under section 213 of the National Industrial Recovery Act is required from dividends on such stock actually owned by domestic corporations where the trustees file with the payor corporation exemption certificate Form 1043A.

SECTION 213. XII–39–6419
G. C. M. 12206

Where a corporation pays the excise tax on dividends paid by it to its stockholders, the amount of such tax constitutes an additional dividend. The withholding liability of the payor corporation must be computed upon the dividend plus such tax. The stockholders are required to report the dividend plus the tax in gross income and may claim a deduction for the tax paid at the source.

The M Company advised the Commissioner that its directors declared a dividend on June 20, 1933, which was payable July 1, 1933, and inquired whether the corporation could pay the stockholders the full amount of the dividend and assume payment of the 5 per centum excise tax.

It is well established that the payment of a tax by a person other than the taxpayer constitutes income to the taxpayer in whose behalf the tax is paid. In *Old Colony Trust Co. et al.* v. *Commissioner* (279 U. S., 716, 49 S. Ct., 499, Ct. D. 80, C. B. VIII–2, 222) the United States Supreme Court decided that the payment by an employer of income taxes assessed against an employee constituted additional income to the employee, and numerous cases were cited in support of the court's conclusion. The same conclusion was reached by the Supreme Court in *United States* v. *Boston & Maine Railroad* (279 U. S., 732, 49 S. Ct., 505, Ct. D. 73, C. B. VIII–2, 315), wherein income taxes paid by a lessee railroad for and on behalf of its lessor were held to constitute additional income to the lessor.

It is held, therefore, that if a corporation pays the excise tax on dividends paid by it to its stockholders, the amount of such tax constitutes an additional dividend. Accordingly, the withholding liability of the payor corporation must be computed upon the dividend plus such tax. Stockholders are required to include in gross income (as dividends) the amount of the dividend plus the tax and may claim a deduction for the tax paid at the source.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

SECTION 213. XII–39–6420
I. T. 2718

Section 213 of the National Industrial Recovery Act, which imposes an excise tax upon the receipt of dividends, is not applicable to distributions in complete liquidation. No liability for withholding excise tax attaches to the payor corporation with respect to such distributions.

SECTION 213. XII–40–6437
Mim. 4070

Examination of returns of tax on dividends withheld at source and determination of correct tax.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., September 21, 1933.

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

1. Treasury Decision 4372 [page 387, this Bulletin], approved July 14, 1933, provides that the determination, assessment, and collection of the tax and the examination of returns and claims filed pursuant to section 213 of the National Industrial Recovery Act and that Treasury decision, will be made under such procedure as may be prescribed from time to time by the Commissioner. Accordingly, the following procedure is prescribed:

OFFICES OF COLLECTORS OF INTERNAL REVENUE.

2. Returns, Forms 1043, with accompanying remittances, exemption certificates Forms 1043-A and 1043-B, and other documents will be handled according to instructions heretofore given to collectors. Returns will be arranged and transmitted to the Bureau in substantially the same manner as provided for income tax returns. Due to the size of Forms 1043, 1043-A, and 1043-B, small quantities of these forms should be plainly marked or inclosed in envelopes properly identified, when forwarded with the assessment lists.

INCOME TAX UNIT.

PROVING SECTION.

3. The Proving Section will verify the returns with the assessment lists in substantially the same manner as in the case of income tax returns. The returns will then be forwarded to the Sorting Section.

SORTING SECTION.

4. The Sorting Section will make such review of the returns, both taxable and nontaxable, as may appear necessary before filing, which will include verification of (*a*) the amount deducted (line 2) as evidenced by accompanying exemption certificates; (*b*) credit claimed for prior month (line 5); and examination of letters, copies of minutes, etc., attached to returns. The Sorting Section will take cognizance of any general information with respect to payments of dividends which will assist in a proper administration of this section of the law. Such test comparison as may appear necessary for the purpose of securing delinquent returns will be made with the corporation returns, Form 1120, at such time and place as will not interfere in any manner with the movement of the corporation returns.

5. Contact will be had with the Audit Review Division, the Valuation Division, and the Rules and Regulations Section with respect to such questions as are considered and determined by those offices.

6. Returns, exemption certificates, and correspondence will be filed according to collection districts.

7. In the event it appears information is needed which may better be secured by a field investigation, the returns, Forms 1043, and attached exemption certificates, correspondence, etc., may be forwarded to internal revenue agents in charge with the corporation return (Form 1120) or separately; but agents will prepare a separate report dealing with the liability on each return.

8. Any additional tax will be assessed under authority of section 213 of the National Industrial Recovery Act and section 771 of the Revenue Act of 1932.

9. Credits and refunds will be allowed in accordance with section 772 of the Revenue Act of 1932 and Treasury Decision 4372. When credit is taken on any return for tax paid on a return for a prior month, the credit claimed must be accompanied by an affidavit explaining the basis of the claim and stating that any amount previously withheld in error has been or will be refunded to the recipients of the dividends, or that the payor corporation has obtained the consent of the recipients to the allowance of such credit.

10. Claims for refund shall be made on Form 843 and there must be embodied therein or attached thereto an affidavit stating that the excess tax withheld has been or will be refunded to the recipients of the dividends or that the payor corporation has obtained the consent of the recipients to the allowance of such refund.

11. In cases where credit or a claim for refund is based on the exemption of the recipients of the dividends, the exemption certificates, Forms 1043-A and 1043-B, if properly executed and filed with the Form 1043 on which the credit is taken or with the claim for refund, will be accepted as the written consents of such stockholders to the allowance of the credit or refund.

GENERAL.

12. In the determination of questions of liability for tax the payor corporation, to the extent that appears reasonable and proper, will be granted the privilege of a protest and/or a conference.

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

GUY T. HELVERING,
Commissioner.

SECTION 213. XII–43–6470
I. T. 2728

Where dividends are distributed by the paying corporation direct, Form 1043, showing the amount of excise tax required to be withheld at the source on dividends, should be executed by a principal officer of the corporation. If the dividends are distributed by a fiscal agent, the form may be executed by such agent.

SECTION 213. XII–45–6496
I. T. 2730

The payor corporation should not refrain from withholding the excise tax on dividends merely upon the basis of an exemption certificate, Form 1043A, which has been amended by changing the words "domestic corporation" to "exempt organization."

If an organization receiving dividends is not a domestic corporation or association but has been held by the Bureau to be an exempt organization under section 103 of the Revenue Act of 1932, it should file with the payor corporation a copy of the Bureau letter holding it to be exempt. Thereafter the organization should file with the payor corporation, at a reasonable time before each dividend-paying date, Form 1043A, with a notation thereon reading substantially as follows:

The above-named actual owner was held by the Bureau to be an exempt organization in letter dated ---------- a copy of which has previously been filed with you.

SECTION 213. XII–45–6497
G. C. M. 12393

True patronage dividends paid by farmers' cooperative associations are not subject to the excise tax on dividends imposed by section 213 of the National Industrial Recovery Act. However, to the extent that such distributions are made from profits on business transacted with or for others than the distributees, they are not true patronage dividends and are subject to the excise tax on dividends imposed by section 213 of that Act.

An opinion is requested whether patronage dividends paid by farmers' cooperative associations are subject to the excise tax imposed by section 213 of the National Industrial Recovery Act irrespective of sales to nonmembers.

I. T. 1499 (C. B. I–2, 189) reads, in part, as follows:

This office has consistently held that, * * * cooperative associations, even though not exempt from taxation, may deduct from gross income for the years 1917, 1918, 1919, and 1920 the amounts returned to their patrons, whether members or nonmembers, upon the basis of the purchases or sales, or both, made by or for them. This is upon the theory that a cooperative association is organized for the purpose of furnishing its patrons goods at cost or for obtaining the highest market price for the produce furnished by them. In the case of purchases, instead of allowing a discount at the time of the purchase, the full price is collected and the discount is allowed by way of rebate. In the case of sales of produce furnished by patrons, the refunds based upon the quantity of produce furnished are in reality only part payment for the produce furnished. If the association is organized in accordance with the laws governing farmers' and other cooperative associations in the State in which it operates and if its constitution or by-laws provides for refunds or rebates to its patrons, whether members or nonmembers, upon the basis of goods purchased or produce furnished, or if it actually conducts its business upon such basis, the refunds or rebates so made may be deducted by the association in computing net income under the Revenue Acts of 1917 and 1918. It is to be understood, of course, that any profits made on business with nonmembers which may be distributed to members in the guise of rebates are taxable to the association and the members.

To the same effect is Solicitor's Memorandum 2595 (C. B. III–2, 238).

It is apparent, therefore, that true patronage dividends are recognized by the Bureau to be discounts or rebates on purchases made in the case of farmers' cooperative purchasing organizations, or part payment for produce furnished in the case of farmers' cooperative marketing organizations, when paid with respect to purchases or sales made for the account of the distributees. The fact that such cooperative organizations transact business with nonmembers is immaterial if nonmembers are dealt with as members in the distribution of patronage dividends. However, to the extent that such distribu-

tions are made from profits on business transacted with or for others than the distributees, they are not true patronage dividends and are subject to the excise tax on dividends imposed by section 213 of the National Industrial Recovery Act.

E. BARRETT PRETTYMAN.
General Counsel, Bureau of Internal Revenue.

SECTION 213. XII–47–6523
Mim. 4102

Withholding of excise tax from dividends on stock of domestic and foreign corporations paid to nonresident alien individuals and foreign corporations.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE.
Washington, D. C., November 8, 1933.

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

It has been brought to the attention of the Bureau that in several instances collectors and corporations have misinterpreted the provisions of paragraph (3) under the heading "Relief from withholding" in Treasury Decision 4372 (page 387, this Bulletin), relating to the withholding of the 5 per cent excise tax from dividends by the payor corporation, under section 213 of the National Industrial Recovery Act.

The paragraph under consideration provides:

No withholding of tax under section 213 need be made if before the payment of the dividends it is established to the satisfaction of the Commissioner, and the Commissioner so notifies the payor corporation, that under the provisions of section 119(a)(2) (A) or (B) of the Revenue Act of 1932 the dividends are not to be treated as income from sources within the United States, and there is filed with the payor corporation, as in (2) above, an exemption certificate certifying that the actual owner of the shares of stock in respect of which the dividends are paid is a nonresident alien individual or a foreign corporation.

Under these provisions of Treasury Decision 4372, there are two conditions to be met before relief may be obtained from the withholding of the tax from dividends paid by domestic or foreign corporations to nonresident alien individuals and foreign corporations. These conditions are as follows:

(1) The determination must be made by the Commissioner that the dividends paid on the stock of the payor corporation are not to be treated as income from sources within the United States, within the meaning of section 119(a)2 (A) or (B) of the Revenue Act of 1932, and the Commissioner must notify the payor corporation of such determination; and

(2) In cases where the Commissioner has notified the payor corporation that the dividends paid by it are not to be treated as income from sources within the United States, there must be filed with the payor corporation an exemption certificate, Form 1043B, certifying that the actual owner of the shares of stock in respect of which the dividends are paid is a nonresident alien individual or a foreign corporation.

Section 119 of the Revenue Act of 1932 provides in part as follows:

(a) *Gross income from sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

* * * * * * *

(2) *Dividends.*—The amount received as dividends—

(A) from a domestic corporation other than a corporation entitled to the benefits of section 251, and other than a corporation less than 20 per centum of whose gross income is shown to the satisfaction of the Commissioner to have been derived from sources within the United States, as determined under the provisions of this section, for the three-year period ending with the close of the taxable year of such corporation preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence), or

(B) from a foreign corporation unless less than 50 per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of this section;

* * * * * * *

Unless a corporation has furnished the Commissioner the facts and figures which are essential for the determination of the status of its dividends and subsequent to the receipt of such information the Commissioner has notified the payor corporation that the dividends paid by it are not to be treated as income from sources within the United States, the excise tax of 5 per cent must be withheld from dividends paid on stock actually owned by nonresident alien individuals and foreign corporations as provided in Treasury Decision 4372, and the use of Form 1043B is not permitted.

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

GUY T. HELVERING,
Commissioner.

SECTION 213. XII–49–6548
I. T. 2739

The 5 per cent excise tax imposed by section 213 of the National Industrial Recovery Act upon the receipt of dividends by any person other than a domestic corporation should not be withheld from dividends paid to an employees' trust of the type specified in section 165 of the Revenue Act of 1932, provided exemption has been properly established.

Advice is requested whether the 5 per cent excise tax imposed by section 213 of the National Industrial Recovery Act should be withheld from dividends paid to an employees' trust of the type specified in section 165 of the Revenue Act of 1932.

Section 213 of the National Industrial Recovery Act reads in part as follows:

(a) There is hereby imposed upon the receipt of dividends (required to be excise tax equal to 5 per centum of the amount thereof, such tax to be deducted by this section shall not apply to dividends declared before the date of the enactment of this Act.
included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an

The excise tax imposed by section 213 of the National Industrial Recovery Act should not be withheld from dividends paid to an employees' trust which is exempt from income tax under section 165 of the Revenue Act of 1932, even though the trust is not a corporation or association within the meaning of section 1111 of the Revenue Act of 1932, provided (1) the exempt status of the trust is established to the satisfaction of the Commissioner, (2) the Commissioner notifies the trust that it is exempt from income tax under section 165 of the Revenue Act of 1932, and (3) at a reasonable time before the payment of the dividends (such time to be determined by the payor corporation), the trust files with the payor corporation a copy of the letter of notification from the Commissioner.

If the copy of the Commissioner's letter of notification is not filed prior to the payment of the dividends, but is filed prior to the making by the payor corporation of the withholding return required under section 213 of the National Industrial Recovery Act, the tax deducted and withheld from the dividends may be released and paid over by the payor corporation to the recipient of the dividends.

SECTION 213. XII–49–6549
I. T. 2740

In the case of a stockholder other than a domestic corporation the 5 per cent excise tax imposed by section 213 of the National Industrial Recovery Act should be withheld by the payor corporation from dividends paid on stocks deposited as collateral for loans, and held in the names of receivers of national banks as pledgees. Such receivers may file Form 1043A with the payor corporations where the debtor is a domestic corporation.

A ruling is requested whether the 5 per cent excise tax imposed by section 213 of the National Industrial Recovery Act should be withheld from dividends paid to receivers of insolvent national banks.

It is stated that receivers of many insolvent national banks hold stocks in corporations as security for indebtedness due the banks. The stocks have been placed in the names of the receivers as pledgees in order that they may collect the dividends and apply them against the indebtedness. It is further stated that where the collateral security for a loan, together with the personal responsibility of the debtor, is not sufficient to liquidate the indebtedness in full, the payment of the 5 per cent excise tax would directly reduce the amount which the receiver can recover, and would be a payment from the assets in his hands.

Section 22 of the Act of March 1, 1879 (20 Stat., 351), provides:

That whenever and after any bank has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall so appear to him, is authorized to remit so much of said tax against insolvent State and savings banks as shall be found to affect the claims of their depositors.

It is the opinion of this office that the provisions of section 22 of the Act of March 1, 1879, are not applicable to the instant case. The tax in question is imposed by section 213 of the National Industrial Recovery Act upon the *receipt* of dividends by any person other than a domestic corporation. Where stock is pledged by a debtor as security for a loan the pledgee obtains only a special and limited interest in such stock; primarily, the pledgee has only a right to possession and a right to sell upon default. (See, for example, 21 R. C. L., Pledge, paragraphs 1, 2, 15, and 16, and cases cited.) While dividends declared and paid during the period of the pledge are payable to the pledgee, such dividends are required to be credited in reduction of the debtor's pledgor's liability. (See 21 R. C. L., Pledge, paragraphs 28 and 29, and cases cited.) Under these circumstances dividends paid on pledged stock represent income to the debtor for income tax purposes; that is, when the dividends are paid to the receiver and credited to the debtor's account or applied in reduction of his indebtedness, they are at the same time reportable as dividends constructively received by the debtor. The fact that the receiver is required to apply the dividends in reduction of the debtor's liability shows that the dividends as such are in substance received by the debtor and applied to his use. The imposition of the tax does not diminish the assets of the bank necessary for payment of depositors, but reduces only one of the assets (the dividend itself) of the debtor applicable in satisfaction of his obligation. Otherwise stated, the withholding of the 5 per cent excise tax on dividends simply diminishes the income of the debtor and to the same degree diminishes his assets available to pay his loan. Thus the tax is not "assessed or collected, or paid into the Treasury of the United States, on account of such [insolvent] bank," but on account of the debtor.

It is accordingly held, in the case of a stockholder other than a domestic corporation, that the 5 per cent excise tax imposed by section 213 of the National Industrial Recovery Act should be withheld by the payor corporation from dividends paid on stocks deposited as collateral for loans where such stocks are held in the names of receivers of insolvent national banks as pledgees. However, if any debtors are domestic corporations the receivers of the insolvent national banks may file exemption certificates, Form 1043A, with the payor corporations showing that the actual owners of the stock are domestic corporations, which action will relieve the payor corporations from withholding the excise tax.

SECTION 213. XII-50-6559
I. T. 2744

In order for a dividend to be fully "declared" within the meaning of section 213 of the National Industrial Recovery Act the action taken by the board of directors must be such as to create the relationship of debtor and creditor between the corporation and the stockholder, and the debt so created must be a legal and enforceable debt which is definite, final, and irrevocable.

Advice is requested relative to the applicability of the excise tax of 5 per cent imposed upon the receipt of dividends by section 213 of the National Industrial Recovery Act with respect to the dividends

paid or to be paid by the M Company subsequent to June 15, 1933, pursuant to the action taken by the board of directors at a meeting held on March —, 1933. It is provided in the statute that the excise tax so imposed shall not apply to dividends declared prior to the date of enactment, June 16, 1933. The action taken at the meeting of the board of directors, as recorded, is as follows:

On the motion of A, seconded by B, it was unanimously decided to continue the present regular dividend of — cents per share per month, payable on the —— of each month until further action by the board.

Following the established rule of construction, the expression "dividends declared" as used in the statute is to be construed and applied according to its accepted legal meaning. Stated briefly, the declaration of a dividend by the board of directors of a corporation has the legal effect of creating the relationship of debtor and creditor between the corporation and the stockholder, and the rights of the stockholder as such creditor become immediately vested regardless of the fact that the dividend may be payable at some future time. In order for a dividend to be fully "declared" within the meaning of the statute the action taken by the board of directors must be such as to create the relationship of debtor and creditor between the corporation and the stockholder, and the debt so created must be a legal and enforceable debt which is definite, final, and irrevocable. A dividend so declared of course effects an appropriation of surplus to the payment of the debt thereby created.

In the instant case, although the action taken at the meeting held on March —, 1933, indicated an intention to continue to pay dividends at the specified rate, the corporation was not bound thereby to continue such payments. While the corporation had a substantial surplus on hand at the time, there is nothing in the action taken at such meeting to prevent it from discontinuing dividend payments at any time in the future, thereby making the surplus then on hand available for other purposes. Obviously, the action taken did not carry the finality necessary to create a debt payable to the stockholders. Inasmuch as there was no actual declaration of dividends by the action taken on March —, 1933, it is held that the dividends paid pursuant thereto on or after June 16, 1933, are subject to the excise tax of 5 per cent imposed by section 213 of the National Industrial Recovery Act.

SECTION 213.

Termination of excise tax on dividends. (See Mim.4116, page 422.)

CAPITAL STOCK TAX.

XII–34–6368
S. T. 698

Capital stock tax held to be effective at least for the year ended June 30, 1933, and the year ending June 30, 1934.

There appears to be some misunderstanding as to the duration of the capital stock tax imposed by section 215 of the National Industrial Recovery Act.

Section 215 of the National Industrial Recovery Act provides as follows:

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

(b) For each year ending June 30 there is hereby 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.

Section 217 of that Act contains the following provisions:

(a) The President shall proclaim the date of—

(1) The close of the first fiscal year ending June 30 of any year after the year 1933, during which the total receipts of the United States (excluding public-debt receipts) exceed its total expenditures (excluding public-debt expenditures other than those chargeable against such receipts), or

(2) The repeal of the eighteenth amendment to the Constitution, whichever is the earlier.

* * * * * * *

(d) The capital-stock tax imposed by section 215 shall not apply to any taxpayer in respect of any year beginning on or after the 1st day of July following the date so proclaimed.

From the foregoing extracts from the law it will be seen that the tax is imposed for each year ending June 30. As the law is effective from June 16, 1933, the first year "ending June 30" is the one which terminated on June 30, 1933. The second year began July 1, 1933, and will terminate June 30, 1934. Section 217 is prospective. It makes certain provisions concerning the issuance by the President of a proclamation in futuro and provides that, should such a proclamation be issued, the capital stock tax shall not apply in respect of any year beginning on or after the 1st day of July following the date proclaimed. As the first year ended June 30, 1933, has already expired and the second year has already begun, and as the law terminating the tax is prospective, it follows that the capital stock tax will be in effect for at least two years, i. e., the year ended June 30, 1933, and the year ending June 30, 1934; and that any proclamation issued by the President under the terms of the law will not affect any period prior to the year beginning July 1, 1934, and ending June 30, 1935.

SECTION 215. XII-35-6385
T. D. 4386

Capital stock tax.—National Industrial Recovery Act.—Further extension of time for filing returns and paying tax.—Article 55 of Regulations 64, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Form 707 (Revised) and Form 708 (Revised) for the filing of returns in respect of the capital stock tax imposed under section 215 of the National Industrial Recovery Act, approved June 16, 1933, for the year ended June 30, 1933, are required to be filed, and the

tax paid, on or before July 31, 1933, unless the time for filing returns and paying the tax is extended under the provisions of section 215(d) of the Act. Under that section no extension can be granted for more than 60 days.

By Treasury Decision 4368 [C. B. XII–1, 473] and the third paragraph of article 55 of Regulations 64, promulgated August 15, 1933, an extension to on or before August 31, 1933, was granted in the case of returns required to be filed in the continental United States, and an extension to on or before September 20, 1933, was granted in the case of returns required to be filed with the collectors of internal revenue for the Territories of Alaska and Hawaii.

In accordance with the provisions of section 215(d) of the National Industrial Recovery Act, the time during which all returns in respect of the capital stock tax for the year ended June 30, 1933, may be filed, and the tax paid, is hereby further extended to on or before September 29, 1933; and collectors of internal revenue are authorized to accept returns without the assertion of penalties for delinquency if the returns are filed, and the tax paid, on or before that date.

The third paragraph of article 55 of Regulations 64, promulgated August 15, 1933, is hereby amended to read as follows:

The time for filing all returns for the year ended June 30, 1933, is extended to on or before September 29, 1933.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 24, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

SECTION 215. XII–39–6422
REGULATIONS 64, ARTICLE 21: Application of tax. S. T. 702

Corporations in the hands of receivers and banks in the hands of conservators are not liable for capital stock tax.

Advice is requested concerning the capital stock tax liability of corporations in the hands of receivers and banks in the hands of conservators or officers with similar powers.

The capital stock tax imposed by section 215 of the National Industrial Recovery Act, approved June 16, 1933 (Public, No. 67, Seventy-third Congress), is a tax upon the doing of business in a corporate capacity. Where a corporation is in the hands of a receiver, the receiver and not the corporation is carrying on the business. This is true with respect to both operating receivers and liquidating receivers. Accordingly, where a corporation is in the hands of a receiver appointed to liquidate the business and distribute the proceeds, the corporation is not carrying on or doing business within the meaning of section 215 of the National Industrial Recovery Act and is not subject to the capital stock tax imposed by that Act. The same is true of a corporation in the hands of a receiver appointed to conserve the assets, rehabilitate the business, and turn the corporation back to its owners as a going concern.

A National bank in the hands of a conservator appointed by the Federal Government, or a State bank in the hands of a conservator or officer with similar powers, appointed by the State, is not carrying on or doing business within the meaning of the law.

Where a National bank or a State bank was in the hands of a conservator or officer with similar powers prior to July 1, 1933, and a plan was worked out and put into effect before that date whereby a portion of the assets of the bank was sold to a new bank which was organized for that purpose and carried on the business after June 15, 1933, and prior to July 1, 1933, the new bank is subject to the capital stock tax for the period ended June 30, 1933.

Where a receiver or conservator is in charge of the affairs of a corporation during a part of the taxable year, and the corporation carries on its business during any remaining portion of the year, the capital stock tax is due and payable for the entire year without any allowance or deduction for the period during which the corporate affairs were administered by a receiver or conservator. However, the capital stock tax for the year ended June 30, 1933, will not attach to any domestic corporation which was in the hands of a receiver, conservator, or officer with similar powers during the entire period from June 16, 1933, to June 30, 1933, inclusive.

While some corporations may not be subject to the capital stock tax, every domestic corporation will be required to file a capital stock tax return on Form 707, with the exception of insurance companies subject to income tax under sections 201 and 204 of the Revenue Act of 1932. (See article 42, Regulations 64.) If exemption is claimed, the information part of the return, namely, items 1 to 8, inclusive, should be completed in detail. Under item 9 no value need be declared, but a notation "exemption claimed" should be entered. The return as thus prepared and duly executed should be filed with the collector of internal revenue accompanied by Form 717 which should clearly set forth the fact upon which the claim for exemption is based.

When the return is received by the Bureau the claim for exemption will be considered and if sustained the corporation will not be required to file a capital stock tax return for subsequent taxable years, provided its status remains unchanged.

The above procedure should be followed in the cases of all corporations in the hands of receivers or conservators.

REGULATIONS 64, ARTICLE 31: Application of tax. XII–41–6447 S. T. 706

Mere investments in the United States by a foreign corporation do not constitute "carrying on or doing business" in the United States.

Question has been raised whether investments made in this country by a foreign corporation constitute "carrying on or doing business" in the United States, for capital stock tax purposes.

The mere investment by a foreign corporation of its funds in stocks and securities in the United States, or in foreign securities payable in the United States, does not constitute carrying on or doing business in the United States within the meaning of section

215(b) of the National Industrial Recovery Act so as to incur liability to the capital stock tax. Such investments do not constitute capital employed in the transaction of its business in the United States unless made in connection with the conduct of a business carried on in this country.

SECTION 215.

Termination of capital stock tax. (See Mim. 4116, page 422.)

EXCESS PROFITS TAX.

SECTION 216. XII–30–6313
Mim. 4040

Excess-profits tax imposed by section 216 of the National Industrial Recovery Act.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., July 1, 1933.

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

The National Industrial Recovery Act (Public, No. 67, Seventy-third Congress, H. R. 5755) was approved by the President June 16, 1933, 11.55 a. m., eastern standard time. Section 216 of that Act provides:

(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or 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 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) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

(b) The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law (including penalties), as the taxes imposed by title I of the Revenue Act of 1932.

The section of the Act referred to in section 216 as section 215 provides:

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

(b) For each year ending June 30 there is hereby 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.

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

(1) to any corporation enumerated in section 103 of the Revenue Act of 1932;

(2) to any insurance company subject to the tax imposed by section 201 or 204 of such Act;

(3) to any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or

(4) to any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Md. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than 60 days.

(e) Returns required to be filed for the purpose of the tax imposed by this section 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.

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for 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. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

(g) The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

It is to be observed that the excess-profits tax imposed by section 216 is upon the net income of corporations for each income-tax taxable year ending after the close of the first year in respect of which they are taxable under section 215. The first excess-profits tax returns required to be made under section 216 are the excess-profits tax returns of corporations taxable under section 215 for the year ending June 30, 1933, and having an income-tax taxable year which is the fiscal year ending July 31, 1933. Such excess-profits tax returns for the income-tax taxable year ending July 31, 1933, need not be made before October 15, 1933.

The instructions and return forms necessary for the administration of the above-quoted provisions of the Act are now being pre-

pared. As soon as they are completed due publicity will be given to the instructions and forms through the usual channels. When the instructions and forms are available for distribution they may be obtained from collectors of internal revenue.

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

P. R. BALDRIDGE,
Acting Commissioner.

SECTION 216. XII–36–6392
I. T. 2716

Foreign income tax may not be credited against the excess-profits tax imposed by section 216 of the National Industrial Recovery Act.

SECTION 216. XII–39–6423
T. D. 4390

EXCESS PROFITS TAX.

Section 216 of the National Industrial Recovery Act, approved June 16, 1933 (Public, No. 67, Seventy-third Congress).

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

To Collectors of Internal Revenue and Others Concerned:

Section 216 of the National Industrial Recovery Act (Public, No. 67, Seventy-third Congress), approved by the President June 16, 1933, provides:

(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or 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 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) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

(b) The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law (including penalties), as the taxes imposed by Title I of the Revenue Act of 1932.

The section of the Act referred to in section 216 as section 215 provides:

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

(b) For each year ending June 30 there is hereby 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.

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

(1) to any corporation enumerated in section 103 of the Revenue Act of 1932;

(2) to any insurance company subject to the tax imposed by section 201 or 204 of such Act;

(3) to any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or

(4) to any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Md. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than 60 days.

(e) Returns required to be filed for the purpose of the tax imposed by this section 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.

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value can not be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for 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. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

(g) The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Section 218 of the National Industrial Recovery Act, in so far as it affects the computation of the net income of corporations for the purposes of the excess-profits tax imposed by section 216 of that Act, provides:

SEC. 218. (a) Effective as of January 1, 1933, sections 117, 23(i), * * * of the Revenue Act of 1932 are repealed.

(b) Effective as of January 1, 1933, section 23(r)2 of the Revenue Act of 1932 is repealed.

LIABILITY FOR AND COMPUTATION OF EXCESS-PROFITS TAX.

Section 216 of the National Industrial Recovery Act imposes an excess-profits tax upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in respect of which it is subject to the capital stock tax imposed by section 215 of that Act. The excess-profits tax is equivalent to 5 per centum of such portion of the corporation's net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or 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 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) determined as provided in section 215. No variation between the adjusted declared value of capital stock set forth in the capital stock tax return and the adjusted declared value embodied in the excess-profits tax return is permissible. As used in section 216 of the National Industrial Recovery Act and this Treasury decision the term, "income-tax taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the corporation's net income is computed and its income-tax returns are made under the Revenue Act of 1932. The term, "net income" and other terms used in section 216 of the National Industrial Recovery Act have the same meaning as when used in the Revenue Act of 1932. The application of this paragraph may be illustrated by the following examples:

Example (1): The M Corporation, the income-tax taxable year of which is the calendar year, is subject to the capital stock tax imposed by section 215 for the year ended June 30, 1933. The value declared in its capital stock tax return for the year ended June 30, 1933, of its capital stock as of the close of its preceding income-tax taxable year (the calendar year 1932) is $100,000. The net income of the corporation for the calendar year 1933 is $24,500. The excess-profits tax for the calendar year 1933 would be $600, computed as follows:

Net income for calendar year 1933	$24,500
Less:	
12½ per centum of the value declared in the capital stock tax return for the year ended June 30, 1933, of the capital stock as of December 31, 1932 (12½ per centum of $100,000)	12,500
Amount subject to excess-profits tax under section 216 of the National Industrial Recovery Act	12,000
Excess-profits tax, 5 per centum of $12,000	600

Example (2): The O Corporation, the income-tax taxable year of which is the fiscal year ending July 31, is subject to the capital stock tax imposed by section 215 for the year ended June 30, 1933. The value declared in its capital stock tax return for the year ended June 30, 1933, of its capital stock as of the close of its preceding income-tax taxable year (the fiscal year ended July 31, 1932) is $108,000. The net income of the corporation for the fiscal year ended July 31, 1933, computed both under the Revenue Act of 1932, and under the Revenue Act of 1932 as amended by section 218 of the National Industrial Recovery Act, is $24,500. The excess-profits tax

for the fiscal year ended July 31, 1933, would be $550, computed as follows:

Net income for fiscal year ended July 31, 1933	$24,500
Less:	
12½ per centum of the value declared in the capital stock tax return for the year ended June 30, 1933, of the capital stock as of July 31, 1932 (12½ per centum of $108,000)	13,500
Amount subject to excess-profits tax under section 216 of the National Industrial Recovery Act	11,000
Excess-profits tax, 5 per centum of $11,000	550

Where a corporation having an income-tax taxable year which is a fiscal year ending after June 30, is subject to the capital stock tax imposed by section 215 for the year ended June 30, 1933, and the net income of such corporation for its income-tax taxable year ending in 1933 computed under the Revenue Act of 1932 is different from such net income computed under the Revenue Act of 1932 as amended by section 218 of the National Industrial Recovery Act, the net income upon which the excess-profits tax is to be computed for such income-tax taxable year ending in 1933 is the sum of the following:

(a) The net income attributable to the calendar year 1932, found by computing the net income of the corporation for the fiscal year under the provisions of the Revenue Act of 1932, and by taking the proportion of such net income which the portion of the fiscal year period falling within the calendar year 1932 is of the entire fiscal year.

(b) The net income attributable to the calendar year 1933, found by computing the net income of the corporation for the fiscal year under the provisions of the Revenue Act of 1932 as amended by section 218 of the National Industrial Recovery Act, and by taking the proportion of such net income which the portion of the fiscal year falling within the calendar year 1933 is of the entire fiscal year.

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

Example: The P Corporation, the income-tax taxable year of which is the fiscal year ending July 31, is subject to the capital stock tax imposed by section 215 for the year ended June 30, 1933. The value declared in its capital stock tax return for the year ended June 30, 1933, of its capital stock as of the close of its preceding income-tax taxable year (the fiscal year ended July 31, 1932) is $88,000. As computed both under section 117 of the Revenue Act of 1928 and section 117 of the Revenue Act of 1932, the corporation had a net loss of $12,000 for its fiscal year ended July 31, 1932. Its net income for the fiscal year ended July 31, 1933, computed both under the Revenue Act of 1932 and under the Revenue Act of 1932 as amended by section 218 of the National Industrial Recovery Act (but without regard to the net loss of $12,000) is $24,000. Under the Revenue Act of 1932, the net loss of $12,000 is an allowable deduction in computing the net income of the corporation for the fiscal year ended July 31, 1933. Such net loss is not an allowable deduction in computing the net income of the corporation for the fiscal year ended July 31, 1933, under the Revenue Act of 1932 as amended by section 218 of the National Industrial Recovery Act. The net income of the corporation for its fiscal year ended July 31, 1933, upon which

the excess-profits tax is to be computed, would be $19,000, such net income being computed as follows:

Net income for fiscal year ended July 31, 1933 (computed under the Revenue Act of 1932), $24,000—$12,000	$12,000
Net income for fiscal year ended July 31, 1933 (computed under the Revenue Act of 1932 as amended by section 218 of the National Industrial Recovery Act)	24,000
Net income subject to excess-profits tax under section 216 of the National Industrial Recovery Act, 7/12 of $12,000 ($5,000) plus 7/12 of $24,000 ($14,000)	19,000

The excess-profits tax on $19,000 would be $400, computed as follows:

Net income for fiscal year ended July 31, 1933	$19,000
Less:	
12½ per centum of the value declared in the capital stock tax return for the year ended June 30, 1933, of the capital stock as of July 31, 1932 (12½ per centum of $88,000)	11,000
Amount subject to excess-profits tax under section 216 of the National Industrial Recovery Act	8,000
Excess-profits tax, 5 per centum of $8,000	400

EXCESS-PROFITS TAX RETURNS AND PAYMENT OF TAX.

Every corporation which is subject to the capital stock tax imposed by section 215 of the National Industrial Recovery Act shall make an excess-profits tax return for each income-tax taxable year ending after the close of the first year in respect of which it is subject to the capital stock tax. The excess-profits tax return for such income-tax taxable year is required to be made within the time prescribed by the Revenue Act of 1932 for making the income tax return of the corporation for such taxable year and shall be made to the collector of internal revenue to whom such income tax return is required to be made by that Act.

An affiliated group of corporations as defined by section 141 of the Revenue Act of 1932, as amended by section 218(e) of the National Industrial Recovery Act, which pursuant to that section has the privilege of making a consolidated income-tax return, and has exercised such privilege, shall make a consolidated excess profits tax return. The excess profits tax shall be computed on such portion of the consolidated net income for the income-tax taxable year of the affiliated group as is in excess of 12½ per centum of the combined adjusted declared value of the capital stock of the members of the group as separately returned under section 215. In the case of a corporation which is a member of an affiliated group for a fractional part of the year, the consolidated excess profits tax return shall include the income of such corporation for such part of the year as it is a member of the affiliated group, and a like proportionate part of the adjusted declared value of the capital stock of such corporation shall be included in the combined adjusted declared value of the capital stock of the affiliated group.

The excess-profits tax imposed by section 216 of the National Industrial Recovery Act for any income-tax taxable year is required to be paid within the time prescribed by the Revenue Act of 1932 for paying the income tax imposed by the Revenue Act of 1932 for such taxable year.

The determination, assessment, and collection of the excess-profits tax and the examination of returns and claims filed pursuant to section 216 and this Treasury decision will be made under such procedure as may be prescribed from time to time by the Commissioner.

GUY T. HELVERING,
Commissioner.

Approved September 16, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

SECTION 216. XII-39-6421
I. T. 2719

The National Industrial Recovery Act, section 216, imposes an excess profits tax upon the "net income" of every corporation taxable under section 215 of that Act, and declares that the "terms" used in section 216 "shall have the same meaning as when used in the Revenue Act of 1932."

"Net income" is defined by section 21 of the Revenue Act of 1932 as "gross income" computed under section 22 "less the deductions allowed by section 23." Among the deductions allowed by section 23 (paragraph (p) thereof) are certain dividends received by corporations. To the extent therefore that a dividend received by a corporation is allowed as a deduction in computing "net income" as defined by section 21 of the Revenue Act of 1932, such dividend is not a part of the "net income" which is subject to the excess profits tax imposed by section 216 of the National Industrial Recovery Act.

SECTION 216. XII-41-6452
G. C. M. 12357

As interest on obligations of the United States is excluded from the net income of a corporation for income tax purposes under the Revenue Act of 1932, it must also be excluded from net income for excess profits tax purposes under section 216 of the National Industrial Recovery Act.

An opinion is requested whether interest on obligations of the United States should be excluded from the net income of a corporation for the purpose of excess profits tax imposed by section 216 of the National Industrial Recovery Act.

Section 216 of the National Industrial Recovery Act reads as follows:

(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or 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 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) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

(b) The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law (including penalties), as the taxes imposed by Title I of the Revenue Act of 1932.

Section 21 of the Revenue Act of 1932 provides as follows:

"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

Section 22(b) of the Revenue Act of 1932 provides that the following items shall not be included in gross income and shall be exempt from taxation under Title I (income tax):

(4) * * * Interest upon * * * (C) the obligations of the United States or its possessions. * * * In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and *to the extent it is wholly exempt to the taxpayer from the taxes imposed by this title.* [Italics supplied.]

A corporation in reporting its gross income for income tax purposes, under the Revenue Act of 1932, should exclude interest on obligations of the United States, as such interest, in the case of a corporation, is wholly exempt from income tax imposed by Title I of the Revenue Act of 1932.

The term "net income" as used in section 21 of the Revenue Act of 1932 means the net income for the purpose of income tax. The "net income" of a corporation for the purpose of income tax is its gross income, less the deductions allowed by section 23 of the Revenue Act of 1932, as amended. Consequently, any item which is excluded from gross income is likewise excluded from net income.

Certain obligations of the United States, for example, the Liberty 4 per cent and 4¼ per cent bonds, are exempt both as to principal and interest from all taxation imposed by the United States except (a) estate or inheritance taxes, and (b) surtaxes and excess-profits and war-profits taxes, in effect at the time of issuance or thereafter imposed. (See article 87, Regulations 77.) A corporation is not subject to the surtax imposed by section 12 of the Revenue Act of 1932, and that Act does not impose an excess-profits or war-profits tax. It follows that in computing net income of a corporation for *income tax purposes* the interest on obligations of the United States is excluded. As such interest is excluded from net income of a corporation for income tax purposes, it must also be excluded from net income for excess profits tax purposes under section 216 of the National Industrial Recovery Act, since the term "net income" as used in that section has the same meaning as when used in the Revenue Act of 1932.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

SECTION 216.

XII–42–6459
I. T. 2724

Where a taxpayer has elected to report its entire profits from long-term contracts in the year in which such contracts are completed, the profits derived by it in the year of completion must be included in net income for that year and will be subject to the excess profits tax provisions of section 216 of the National Industrial Recovery Act, as well as the income tax provisions of section 13 of the Revenue Act of 1932.

Advice is requested in regard to reporting income from long-term contracts for excess profits tax purposes under section 216 of the National Industrial Recovery Act.

For many years the taxpayer has been engaged in the contracting and construction business, dealing almost entirely with municipalities. As a general rule several years are required to complete a contract. The taxpayer reports the entire profits on each separate contract in its Federal income tax return for the particular year in which the contract is completed. At the present time the taxpayer has but one project outstanding covered by contracts with the city of R. Under the election heretofore made by the taxpayer of reporting income on the completed contract basis, the entire profits from the contracts will be reported for income tax purposes on its income tax return for the year in which the contracts are completed in accordance with article 334(b) of Regulations 77.

The taxpayer requests to be advised whether for excess profits tax purposes it may report its income from these contracts upon the basis of percentage of completion as provided by article 334(a) of Regulations 77, or whether it must report all such income for the year of completion, as provided by article 334(b) of Regulations 77, in view of its election for income tax purposes.

Section 42 of the Revenue Act of 1932, relating to the period in which items of gross income shall be included, provides:

> The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

Article 334 of Regulations 77 promulgated thereunder reads as follows:

> *Long-term contracts.*—Income from long-term contracts is taxable for the period in which the income is determined, such determination depending upon the nature and terms of the particular contract. As used herein the term "long-term contracts" means building, installation, or construction contracts covering a period in excess of one year. Persons whose income is derived in whole or in part from such contracts may, as to such income, prepare their returns upon the following bases:
>
> (*a*) Gross income derived from such contracts may be reported upon the basis of percentage of completion. In such case there should accompany the return certificates of architects or engineers showing the percentage of completion during the taxable year of the entire work to be performed under the contract. There should be deducted from such gross income all expenditures made during the taxable year on account of the contract, account being taken of the material and supplies on hand at the beginning and end of the taxable period for use in connection with the work under the contract but not yet so applied. If, upon completion of a contract, it is found that the taxable net income arising thereunder has not been clearly reflected for any year or years, the Commissioner may permit or require an amended return.
>
> (*b*) Gross income may be reported in the taxable year in which the contract is finally completed and accepted if the taxpayer elects as a consistent practice so to treat such income, provided such method clearly reflects the net income. If this method is adopted there should be deducted from gross income all expenditures during the life of the contract which are properly allocated thereto, taking into consideration any material and supplies charged to the work under the contract but remaining on hand at the time of completion.
>
> A taxpayer may change his method of accounting to accord with paragraphs (*a*) and (*b*) of this article, only after permission is secured from the Commissioner as provided in article 322.

Section 216 of the National Industrial Recovery Act provides:

(*a*) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or 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 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) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

(*b*) The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law (including penalties), as the taxes imposed by Title I of the Revenue Act of 1932.

It will be observed that section 216(a), supra, specifically provides that "The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932." In view of the provisions of section 216 of the National Industrial Recovery Act, the taxpayer must use the same method in reporting its net income for excess profits tax purposes which it has elected to use in reporting its net income for income tax purposes.

Inasmuch as the taxpayer has elected under article 334(b) of Regulations 77 to report its entire profits from its long-term contracts in the year in which such contracts are completed, the profits derived by it in the year of completion must be included in net income for that year and will be subject to the excess profits tax provisions of section 216 of the National Industrial Recovery Act, as well as the income tax provisions of section 13 of the Revenue Act of 1932.

SECTION 216. XII–43–6469
Mim. 4079

Collectors given authority to grant extensions of time for filing excess profits tax returns.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 11, 1933.

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

Section 216(b) of the National Industrial Recovery Act (Public, No. 67, Seventy-third Congress), approved by the President June 16, 1933, provides that the excess profits tax imposed by section 216 shall be assessed, collected, and paid in the same manner and shall be subject to the same provisions of law (including penalties) as the taxes imposed by Title I of the Revenue Act of 1932.

Treasury Decision 4390 (see on page 409, this Bulletin), promulgated under section 216 of the National Industrial Recovery Act, provides in part that every corporation which is subject to the capital stock tax imposed by section 215 of that Act shall make an excess profits tax return for each income-tax taxable year ending after the close of the first year in respect of which it is subject to the capital stock tax; that the excess profits tax return for such

income-tax taxable year is required to be made within the time prescribed by the Revenue Act of 1932 for making the income tax return of the corporation for such taxable year; and that the excess profits tax return shall be made to the collector of internal revenue to whom such income tax return is required to be made by the Revenue Act of 1932.

Collectors of internal revenue are hereby authorized to grant extensions of time for making excess profits tax returns required under section 216 of the National Industrial Recovery Act and Treasury Decision 4390. In granting such extensions of time collectors will (except as hereinafter provided with respect to the fiscal year ended July 31, 1933) follow the instructions in Mimeograph 3361 (C. B. IV–2, 69) and Mimeograph 3759 (C. B. VIII–2, 123), relating to the granting of extensions of time for filing returns of income.

The first excess profits tax returns required to be made under section 216 of the National Industrial Recovery Act and Treasury Decision 4390 are the excess profits tax returns of corporations taxable under section 215 of that Act for the year ended June 30, 1933, and having an income-tax taxable year which is the fiscal year ended July 31, 1933. If no extension of time were granted, such returns would be required to be made on or before October 15, 1933. The forms for use in making excess profits tax returns by corporations for income tax fiscal years ending in 1933 after June 30, 1933, are now in the course of preparation. Such forms will not be available in the offices of collectors of internal revenue in sufficient time to enable returns for the fiscal year ended July 31, 1933, to be made on or before October 15, 1933. However, it is expected that the forms will be available in sufficient time for making such returns on or before November 15, 1933.

Under the circumstances, requests for extensions of time for making excess profits tax returns for the fiscal year ended July 31, 1933, will be granted to November 15, 1933, without requiring a tentative return and payment of one-fourth of the estimated tax, as provided in paragraph numbered 4 of Mimeograph 3361. Where, for reasons other than the nonavailability of the forms, a corporation requests an extension for a period extending beyond November 15, 1933, for making the excess profits tax return for the fiscal year ended July 31, 1933, the extension should be granted upon condition that a tentative return be filed and one-fourth of the estimated tax be paid on or before November 15, 1933.

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

GUY T. HELVERING,
Commissioner.

SECTION 216. XII–44–6477
I. T. 2729

A foreign corporation engaged in transportation service between ports in the United States and foreign ports is not subject to the excess-profits tax on that portion of its income which consists exclusively of earnings derived from the operation of ships documented under the laws of a foreign country with which a reciprocal exemption agreement has been concluded under section 231(b) of the Revenue Act of 1932.

A ruling is requested whether a foreign corporation engaged in transportation service between ports in the United States and foreign ports is liable for excess-profits tax under section 216 of the National Industrial Recovery Act, with respect to earnings derived from the operation of ships documented under the laws of a foreign country with which a reciprocal agreement has been concluded under section 231(b) of the Revenue Act of 1932 exempting such income from taxation.

Section 216 of the National Industrial Recovery Act reads as follows:

(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or 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 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) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

(b) The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law (including penalties), as the taxes imposed by title I of the Revenue Act of 1932.

The last sentence of section 216(a) of the National Industrial Recovery Act quoted above specifically provides that the terms used in that section shall have the same meaning as when used in the Revenue Act of 1932. It follows that the excess-profits tax equivalent to 5 per centum of such portion of the corporation's "net income" as is in excess of 12½ per centum of the adjusted declared value of its capital stock has reference to "net income" as computed for income tax purposes under Title I of the Revenue Act of 1932. Under section 231(a) of the Revenue Act of 1932 it is provided that in the case of a foreign corporation gross income includes only the gross income from sources within the United States. The manner of computing the net income from sources within the United States is prescribed by section 119(b) of the Revenue Act of 1932, but that section must be construed in connection with section 231(b) of that Act, which reads as follows:

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

Inasmuch as the "net income" for the purpose of excess-profits tax has the same meaning as it has for the purpose of income tax, it is held that a foreign corporation engaged in transportation service between ports in the United States and foreign ports is not subject to the excess-profits tax on that portion of its income which consists exclusively of earnings derived from the operation of ships documented under laws of a foreign country with which a reciprocal exemption agreement has been concluded under section 231(b) of the Revenue Act of 1932. In other words, in those cases where the term

"net income" of a foreign corporation does not, for income tax purposes, include income derived from the operation of ships by reason of the provision of section 231(b) of the Revenue Act of 1932, the term likewise does not include such income for the purpose of the excess-profits tax imposed by section 216 of the National Industrial Recovery Act.

SECTION 216. XII-45-6498
G. C. M. 12313

In determining the "net income" of a corporation for excess-profits tax purposes under section 216 of the National Industrial Recovery Act, the amount of income, war-profits, and excess-profits taxes paid to a foreign country or to a possession of the United States, which was claimed as a credit against income tax, may not be allowed as a deduction.

An opinion is requested whether in determining the "net income" of a corporation for excess-profits tax purposes under section 216 of the National Industrial Recovery Act, there may be allowed as a deduction from gross income the amount of income, war-profits, and excess-profits taxes paid to a foreign country or to a possession of the United States, which was claimed as a credit against income tax.

Section 216 of the National Industrial Recovery Act imposes an excess profits tax on "net income" and provides that the terms used in that section shall have the same meaning as when used in the Revenue Act of 1932.

Section 23 of the Revenue Act of 1932 provides that 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); * * *.

Since the Revenue Act of 1932 provides that a deduction for taxes paid to foreign countries and possessions of the United States is allowable only where the taxpayer does not signify in his return his desire to have to any extent the benefits of section 131, and as "net income" for excess profits tax purposes is computed in the same manner as for income tax purposes, it follows that if the taxpayer has elected to claim such taxes as a credit against his income tax they may not be allowed as a deduction for excess-profits tax purposes.

E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue.

SECTION 216. XII-48-6540
I. T. 2738

Where any corporation in an affiliated group is subject to the capital stock tax imposed by section 215 of the National Industrial Recovery Act, all the other corporations in the affiliated group must be included in a consolidated excess-profits tax return made under Treasury Decision 4390 (page 409, this Bulletin). The income and losses of the corporations not subject to the capital stock tax

are to be included in computing the consolidated net income for excess-profits tax purposes. The combined adjusted declared value of the capital stock in such a case is the combined adjusted value actually declared by those corporations in the affiliated group which are subject to the capital stock tax imposed by section 215 of the National Industrial Recovery Act.

A certain group of affiliated corporations has in the past made and will continue to make consolidated Federal income tax returns, and several members of the group will claim exemption from the capital stock tax imposed by section 215 of the National Industrial Recovery Act on the ground that they were not doing business during the period June 16, 1933, to June 30, 1933, inclusive. A ruling is requested whether the affiliated group is required to make a consolidated excess-profits tax return for the purpose of the excess-profits tax imposed by section 216 of the Act and, if so, whether the net income or net loss of the members of the group which are exempt from the capital stock tax is to be included in such consolidated excess-profits tax return. Inquiry is also made as to the basis to be used in determining the combined adjusted declared value of the capital stock for the purpose of computing the excess-profits tax.

Treasury Decision 4390, supra, provides in part:

An affiliated group of corporations as defined by section 141 of the Revenue Act of 1932, as amended by section 218(e) of the National Industrial Recovery Act, which pursuant to that section has the privilege of making a consolidated income-tax return, and has exercised such privilege, shall make a consolidated excess profits tax return. The excess profits tax shall be computed on such portion of the consolidated net income for the income-tax taxable year of the affiliated group as is in excess of 12½ per centum of the combined adjusted declared value of the capital stock of the members of the group as separately returned under section 215. In the case of a corporation which is a member of an affiliated group for a fractional part of the year, the consolidated excess profits tax return shall include the income of such corporation for such part of the year as it is a member of the affiliated group, and a like proportionate part of the adjusted declared value of the capital stock of such corporation shall be included in the combined adjusted declared value of the capital stock of the affiliated group.

It is held that where any corporation in an affiliated group is subject to the capital stock tax imposed by section 215 of the National Industrial Recovery Act, all other corporations in the affiliated group must be included in a consolidated excess-profits tax return made under Treasury Decision 4390, supra. It is also held that the income and losses of the corporations not subject to the capital stock tax are to be included in computing the consolidated net income for excess-profits tax purposes. It is held further that the combined adjusted declared value of the capital stock in such a case is the combined adjusted value actually declared by those corporations in the affiliated group which are subject to the capital stock tax imposed by section 215 of the National Industrial Recovery Act. A corporation (a member of an affiliated group filing a consolidated income tax return) which *properly* refrained from declaring a value for capital stock tax purposes on the ground of exemption, may not declare any such value for consolidated excess profits tax purposes only.

SECTION 216.

Termination of excess profits tax. (See Mim. 4116, page 422.)

SECTION 216. XII–51–6572
I. T. 2746

Life insurance companies, as defined in section 201 of the Revenue Act of 1932, are not subject to the excess-profits tax imposed on corporations by section 216 of the National Industrial Recovery Act.

The question is presented whether life insurance companies which are subject to the income tax imposed by section 201 of the Revenue Act of 1932 are also subject to the excess-profits tax imposed by section 216 of the National Industrial Recovery Act, approved June 16, 1933.

The excess-profits tax imposed by section 216 of the National Industrial Recovery Act applies to every corporation for each income-tax taxable year ending after the close of the first year in respect of which it is subject to the capital stock tax imposed by section 215 of that Act. (T. D. 4390, page 409, this Bulletin.) Under the provisions of section 215(c)2 of the National Industrial Recovery Act, life insurance companies, as defined in section 201(a) of the Revenue Act of 1932, are not subject to the capital stock tax imposed by section 215 of that Act. As such life insurance companies are not subject to the capital stock tax imposed by section 215 of the National Industrial Recovery Act, it follows that they are not subject to the excess-profits tax imposed by section 216 of that Act.

REDUCTION OR TERMINATION OF CERTAIN INTERNAL REVENUE TAXES.

SECTION 217. XII–51–6573
Mim. 4116

Effect of President's proclamation of date of repeal of eighteenth amendment to the Constitution on certain internal revenue taxes imposed by the National Industrial Recovery Act.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., December 7, 1933.

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

Section 217 of the National Industrial Recovery Act provides:

(a) The President shall proclaim the date of—

(1) the close of the first fiscal year ending June 30 of any year after the year 1933, during which the total receipts of the United States (excluding public-debt receipts) exceed its total expenditures (excluding public-debt expenditures other than those chargeable against such receipts), or

(2) the repeal of the eighteenth amendment to the Constitution,

whichever is the earlier.

(b) Effective as of the 1st day of the calendar year following the date so proclaimed section 617(a) of the Revenue Act of 1932, as amended, is amended by striking out "1½ cents" and inserting in lieu thereof "1 cent."

(c) The tax on dividends imposed by section 213 shall not apply to any dividends declared on or after the 1st day of the calendar year following the date so proclaimed.

(d) The capital-stock tax imposed by section 215 shall not apply to any taxpayer in respect of any year beginning on or after the 1st day of July following the date so proclaimed.

(e) The excess-profits tax imposed by section 216 shall not apply to any taxpayer in respect of any taxable year after its taxable year during which the date so proclaimed occurs.

Pursuant to the provisions of section 217(a) of the National Industrial Recovery Act, the President on December 5, 1933, proclaimed December 5, 1933, as the date of the repeal of the eighteenth amendment to the Constitution. Under section 217 of the National Industrial Recovery Act the proclamation of the President affects the application of certain internal revenue taxes as follows:

1. Effective January 1, 1934, the tax on gasoline imposed by section 617(a) of the Revenue Act of 1932, as amended by section 211(a) of the National Industrial Recovery Act, will be at the rate of 1 cent a gallon instead of 1½ cents a gallon.

2. The tax on dividends imposed by section 213 of the National Industrial Recovery Act will not apply to any dividends declared after December 31, 1933.

3. The capital-stock tax imposed by section 215 of the National Industrial Recovery Act will not apply in respect of any year beginning on or after July 1, 1934.

4. The excess-profits tax imposed by section 216 of the National Industrial Recovery Act will not apply to any taxpayer in respect of the calendar year 1934 or any subsequent income-tax taxable year (calendar year or fiscal year).

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

GUY T. HELVERING,
Commissioner.

MISCELLANEOUS.

SECTIONS 214 AND 218. XII–29–6297
Mim. 4035

Amendments to and repeal of certain income tax provisions of the Revenue Act of 1932 by National Industrial Recovery Act.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., June 28, 1933.

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

The National Industrial Recovery Act (Public, No. 67, Seventy-third Congress; H. R. 5755) was approved by the President June 16, 1933, 11.55 a. m., eastern standard time. Sections 214 and 218 of that Act provide:

SEC. 214. Section 104 of the Revenue Act of 1932 is amended by striking out the words "the surtax" wherever occurring in such section and inserting in lieu thereof "any internal-revenue tax." The heading of such section is amended by striking out "surtaxes" and inserting in lieu thereof "internal-revenue taxes." Section 13(c) of such Act is amended by striking out "surtax" and inserting in lieu thereof "internal-revenue tax."

SEC. 218. (a) Effective as of January 1, 1933, sections 117, 23(i), 169, 187, and 205 of the Revenue Act of 1932 are repealed.

(b) Effective as of January 1, 1933, section 23(r)2 of the Revenue Act of 1932 is repealed.

(c) Effective as of January 1, 1933, section 23(r)3 of the Revenue Act of 1932 is amended by striking out all after the word "Territory" and inserting a period.

(d) Effective as of January 1, 1933, section 182(a) of the Revenue Act of 1932 is amended by inserting at the end thereof a new sentence as follows: "No part of any loss disallowed to a partnership as a deduction by section 23(r) shall be allowed as a deduction to a member of such partnership in computing net income."

(e) Effective as of January 1, 1933, section 141(c) of the Revenue Act of 1932 is amended by striking out "except that for the taxable years 1932 and 1933 there shall be added to the rate of tax prescribed by sections 13(a), 201(b), and 204(a), a rate of three fourths of 1 per centum" and inserting in lieu thereof the following: "except that for the taxable years 1932 and 1933 there shall be added to the rate of tax prescribed by sections 13(a), 201(b), and 204(a), a rate of three fourths of 1 per centum and except that for the taxable years 1934 and 1935 there shall be added to the rate of tax prescribed by sections 13(a), 201(b), and 204(a), a rate of 1 per centum."

(f) No interest shall be assessed or collected for any period prior to September 15, 1933, upon such portion of any amount determined as a deficiency in income taxes as is attributable solely to the amendments made to the Revenue Act of 1932 by this section.

(g) In cases where the effect of this section is to require for a taxable year ending prior to June 30, 1933, the making of an income-tax return not otherwise required by law, the time for making the return and paying the tax shall be the same as if the return was for a fiscal year ending June 30, 1933.

(h) Section 55 of the Revenue Act of 1932 is amended by inserting before the period at the end thereof a semicolon and the following: "and all returns made under this Act after the date of enactment of the National Industrial Recovery 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."

The above-quoted provisions of the Act may be summarized as follows:

TAX ON UNREASONABLE SURPLUS ACCUMULATIONS BROADENED.

Section 214 amends section 104 of the Revenue Act of 1932 by striking out the words "the surtax" wherever occurring in such section and inserting in lieu thereof "any internal-revenue tax," the heading of section 104 being amended by striking out "surtaxes" and inserting in lieu thereof "internal-revenue taxes." Section 13(c) of the Revenue Act of 1932 is amended by striking out "surtax" and inserting in lieu thereof "internal-revenue tax." In effect these provisions amend section 104 of the Revenue Act of 1932 which taxes accumulation of earnings to avoid surtaxes so that accumulations of earnings to avoid payment of the excise tax on dividends will also be subject to tax under that section.

REPEAL OF NET LOSS PROVISIONS.

Section 218(a) repeals, effective as of January 1, 1933, sections 117, 23(i), 169, 187, and 205 of the Revenue Act of 1932. This repeal removes the privilege granted under the Revenue Act of 1932 to a taxpayer of carrying over and deducting from his net income for the taxable year, a net loss for the preceding taxable year.

REPEAL OF STOCK-LOSS CARRYOVER INTO SUCCEEDING YEAR.

Section 218(b) repeals, effective as of January 1, 1933, section 23(r)2 of the Revenue Act of 1932, which permitted a taxpayer to carry over losses from the sale or exchange of stocks and bonds

which are not capital assets (capital assets as defined in section 101 being in general assets held for more than two years) and apply such losses against gains from similar transactions in the succeeding taxable year.

REPEAL OF PRIVATE BANK EXEMPTIONS FROM STOCK-LOSS LIMITATIONS.

Section 218(c) amends, effective as of January 1, 1933, section 23(r)3 of the Revenue Act of 1932 by striking out the following: "nor to persons carrying on the banking business (where the receipt of deposits constitutes a major part of such business) in respect of transactions in the ordinary course of such banking business." This amendment removes the exemption allowed to private banks from the stock-loss limitation provided under the Revenue Act of 1932. Under this limitation, losses from the sale or exchange of stocks or bonds which are not capital assets (as defined in section 101) can be applied only against gains from similar transactions, and can not be used to reduce income from other sources.

PARTNERSHIP STOCK-LOSS LIMITATIONS.

Section 218(d) amends, effective as of January 1, 1933, section 182(a) of the Revenue Act of 1932 by inserting at the end of that section a new sentence as follows: "No part of any loss disallowed to a partnership as a deduction by section 23(r) shall be allowed as a deduction to a member of such partnership in computing net income." Section 218(d) denies to the individual members of a partnership a deduction in their individual income tax returns for any part of the losses sustained by the partnership from the sale or exchange of stocks and bonds which are not capital assets and disallowed as a deduction to the partnership by section 23(r) of the Revenue Act of 1932.

INCREASED INCOME TAX RATE ON CONSOLIDATED RETURNS.

Section 218(e) amends section 141(c) of the Revenue Act of 1932 by imposing an income tax of 14¾ per cent for the years 1934 and 1935 upon corporations which file consolidated returns for such years. Such increased rate does not apply for the taxable years 1932 and 1933 and the rate of tax in the case of corporations filing consolidated returns for such years remains at 14½ per cent.

INTEREST ON TAX.

Section 218(f) provides that no interest shall be assessed or collected for any period prior to September 15, 1933, upon such portion of any amount determined as a deficiency in income taxes as is attributable solely to the amendments made to the Revenue Act of 1932 by section 218 of the National Industrial Recovery Act.

TIME TO FILE RETURNS.

Section 218(g) provides that in cases where the effect of section 218 of the National Industrial Recovery Act is to require for a taxable year ending prior to June 30, 1933, the making of an income-tax return not otherwise required by law, the time for making the return and paying the tax shall be the same as if the return was for a fiscal year ending June 30, 1933.

RETURNS TO BE PUBLIC RECORDS.

Section 218(h) amends section 55 of the Revenue Act of 1932 by inserting before the period at the end thereof a semicolon and the following: "and all returns made under this Act after the date of enactment of the National Industrial Recovery 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."

The instructions and return forms necessary for the administration of the above-mentioned changes in the Revenue Act of 1932 are now being prepared. As soon as they are completed due publicity will be given to such instructions and forms through the usual channels. When the instructions and forms are available for distribution they may be obtained from collectors of internal revenue.

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

P. R. BALDRIDGE,
Acting Commissioner.

SECTION 218. XII-47-6524
T. D. 4408.

National Industrial Recovery Act—Income tax.—Income tax returns to be made for fiscal years ended in 1933.

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

To Collectors of Internal Revenue and Others Concerned:

Section 218 of the National Industrial Recovery Act, approved June 16, 1933, provides in part:

SEC. 218. (a) Effective as of January 1, 1933, sections 117, 23(i), 169, 187, and 205 of the Revenue Act of 1932 are repealed.

(b) Effective as of January 1, 1933, section 23(r)(2) of the Revenue Act of 1932 is repealed.

(c) Effective as of January 1, 1933, section 23(r)(3) of the Revenue Act of 1932 is amended by striking out all after the word "Territory" and inserting a period.

(d) Effective as of January 1, 1933, section 182(a) of the Revenue Act of 1932 is amended by inserting at the end thereof a new sentence as follows: "No part of any loss disallowed to a partnership as a deduction by section 23(r) shall be allowed as a deduction to a member of such partnership in computing net income."

* * * * * * *

(f) No interest shall be assessed or collected for any period prior to September 15, 1933, upon such portion of any amount determined as a deficiency in income taxes as is attributable solely to the amendments made to the Revenue Act of 1932 by this section.

(g) In cases where the effect of this section is to require for a taxable year ending prior to June 30, 1933, the making of an income-tax return not otherwise required by law, the time for making the return and paying the tax shall be the same as if the return was for a fiscal year ending June 30, 1933.

Revised forms prescribed for use in making returns of income under the provisions of the Revenue Act of 1932 as amended by section 218 of the National Industrial Recovery Act, are available in the offices of collectors of internal revenue. Such forms are:

Individual income tax return Form 1040FY.
Corporation income tax return Form 1120A.

Every individual, estate or trust, or corporation which heretofore made an income tax return for a fiscal year ended in 1933 but in doing so did not give effect to the amendments made to the Revenue Act of 1932 by section 218 of the National Industrial Recovery Act, shall make an amended income tax return for such fiscal year on the appropriate revised form. Such amended return shall be made on or before November 15, 1933. Any excess of income tax shown on such amended return over the income tax shown on the original return plus any amounts previously assessed (or collected without assessment) and minus any amounts previously abated, credited, refunded, or otherwise repaid, will constitute a deficiency; however, in the cases covered by this paragraph no interest shall be payable for any period prior to September 15, 1933, upon that portion of any deficiency in income tax for such fiscal year which is attributable solely to the amendments made to the Revenue Act of 1932 by section 218 of the National Industrial Recovery Act. The taxpayer may at the time of filing the amended return herewith required pay the entire deficiency disclosed on such return with interest at 6 per cent per annum (except in cases where interest at the rate of 1 per cent per month may be specifically required by law) either from the date prescribed for the payment of the tax shown to be due by the taxpayer on the original return or from September 15, 1933, or both, as circumstances may require, and such payment will constitute a waiver of all restrictions upon the assessment and collection of such deficiency in tax. In case the taxpayer pays the entire deficiency with interest at the time of filing the amended return, no notice of such deficiency will be sent by the Commissioner to the taxpayer; in all other cases the notice of deficiency authorized by section 272 of the Revenue Act of 1932 will be mailed to the taxpayer.

Every individual, or estate or trust, having as an annual accounting period a fiscal year ending in 1933 before June 30, 1933, which was not required to make an income tax return for the fiscal year ended in 1933 under the provisions of the Revenue Act of 1932 prior to its amendment by section 218 of the National Industrial Recovery Act, but which is required to do so by virtue of the amendments made by that section, shall make such return on the appropriate revised form on or before November 15, 1933. The tax shown to be due by the taxpayer on such return shall be paid at the time the return is required to be made, unless the taxpayer elects to pay the tax in installments, in which event all installments of the tax for such fiscal year due on or before November 15, 1933, shall be paid on or before that date. In the cases covered by this paragraph interest at the rate of 6 per cent per annum on the tax shown to be due by the taxpayer on the return will run from September 15, 1933, or, if the taxpayer elects to pay the tax in installments, from the dates prescribed for payment of the installments. If the taxpayer fails to pay the tax shown on the return, or the proper installments thereof, plus interest, as herein required, interest will be due on the entire amount of such tax or installments, plus interest, at the rate of 1 per cent per month from November 15, 1933, until paid.

The tax on returns filed for fiscal years ended in 1933 shall be computed under section 105 of the Revenue Act of 1932 and shall be the sum of:

(*a*) The tax attributable to the calendar year 1932, found by computing the tax upon the income of the taxpayer for the fiscal year under the provisions of the Revenue Act of 1932 prior to their amendment by section 218 of the National Industrial Recovery Act, and by taking the proportion of such tax which the portion of the period falling within the calendar year 1932 is of the entire period; and

(*b*) The tax attributable to the calendar year 1933, found by computing the tax upon the income of the taxpayer for the fiscal year under the provisions of the Revenue Act of 1932 as amended by section 218 of the National Industrial Recovery Act, and by taking the proportion of such tax which the portion of the period falling within the calendar year 1933 is of the entire period.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 11, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

XII–27–6278

H. R. 5040. PUBLIC, NO. 73, SEVENTY-THIRD CONGRESS.

An Act To extend the gasoline tax for one year, to modify postage rates on mail matter, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 629 of the Revenue Act of 1932 is amended by striking out the following: ", or after June 30, 1933, in the case of articles taxable under section 617, relating to the tax on gasoline."

* * * * * * *

SEC. 4. (a) Effective 15 days after the date of the enactment of this Act, section 620 of the Revenue Act of 1932 is amended to read as follows:

SEC. 620. TAX-FREE SALES.

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax under this title shall be imposed with respect to the sale of any article—

(1) for use by the vendee as material in the manufacture or production of, or as a component part of an article enumerated in this title;

(2) for resale by the vendee for such use by his vendee, if such article is in due course so resold;

(3) for resale by the vendee to a State or political subdivision thereof for use in the exercise of an essential governmental function, if such article is in due course so resold.

For the purposes of this title the manufacturer or producer to whom an article is sold under paragraph (1) or resold under paragraph (2) shall be considered the manufacturer or producer of such article. The provisions of paragraphs (1) and (2) shall not apply with respect to tires or inner tubes or articles enumerated in section 604, relating to the tax on furs.

(b) Effective 15 days after the date of the enactment of this Act, section 601(c)(1) of the Revenue Act of 1932 is amended by adding at the end thereof the following:

Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax shall be imposed under this section upon lubricating oils sold to a manufacturer or producer of lubricating oils for resale by him, but for the purposes of this title such vendee shall be considered the manufacturer or producer of such lubricating oils.

(c) Effective 15 days after the date of the enactment of this Act, section 621(a) of the Revenue Act of 1932 is amended by inserting after paragraph (2) thereof the following new paragraph:

(3) to a manufacturer, producer, or importer in the amount of tax paid by him under this title with respect to the sale of any article to a dealer, if the manufacturer, producer, or importer has in his possession such evidence as the regulations may prescribe that (A) such article has after the date this paragraph takes effect been delivered by the dealer to a State or political subdivision thereof for use in the exercise of an essential governmental function and (B) the manufacturer, producer, or importer has repaid or agreed to repay the amount of such tax to the dealer or has obtained the consent of the dealer to the allowance of the credit or refund.

SEC. 5. Effective 15 days after the date of the enactment of this Act, Title IV of the Revenue Act of 1932 is amended by adding at the end thereof a new section to read as follows:

SEC. 630. EXEMPTION FROM TAX OF CERTAIN SUPPLIES FOR VESSELS.

Under regulations prescribed by the Commissioner, with the approval of the Secretary, no tax under this title shall be imposed upon any article sold for use as fuel supplies, ships' stores, sea stores, or legitimate equipment on vessels of war of the United States or of any foreign nation, vessels employed in the fisheries or in the whaling business, or actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. Articles manufactured or produced with the use of articles upon the importation of which tax has been paid under this title, if laden for use as supplies on such vessels, shall be held to be exported for the purposes of section 601(b).

SEC. 6. (a) Effective September 1, 1933, section 616 of the Revenue Act of 1932 is amended to read as follows:

SEC. 616. TAX ON ELECTRICAL ENERGY FOR DOMESTIC OR COMMERCIAL CONSUMPTION.

(a) There is hereby 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.

(b) The provisions of sections 619, 622, and 625 shall not be applicable with respect to the tax imposed by this section.

(c) No tax shall be imposed under this section upon electrical energy sold to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. None of the provisions of this section shall apply to publicly owned electric and power plants. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may, by regulation, prescribe.

(b) Despite the provisions of this section the tax imposed under section 616 of the Revenue Act of 1932 before its amendment by this section on electrical energy furnished before September 1, 1933,

shall be imposed, collected, and paid in the same manner and shall be subject to the same provisions of law (including penalties) as if this section had not been enacted.

Approved, June 16, 1933, 1 p. m.

AGRICULTURAL ADJUSTMENT ACT.

SECTION 9.—PROCESSING TAX.

XII–39–6426
T. D. 4392

Processing taxes under the Agricultural Adjustment Act.—Amending article 7, Regulations 81, approved July 12, 1933, relative to when tax attaches.

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

To Collectors of Internal Revenue and Others Concerned:

Article 7 of Regulations 81, relating to processing tax and compensating tax under the Agricultural Adjustment Act (Title I, Public, No. 10, Seventy-third Congress), is hereby amended to read as follows:

ART. 7. *When tax attaches.*—The tax attaches at the beginning of the first domestic processing of the commodity. When the first domestic processing begins before the effective date, no tax attaches, although it is not completed until after the effective date. When the first domestic processing begins while the tax is in effect, it is subject to the processing tax, notwithstanding it is not completed until after the tax is terminated.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 20, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

REGULATIONS 81, ARTICLE 7: When tax attaches. XII–45–6502
T. D. 4403

Processing taxes under the Agricultural Adjustment Act.—Articles 7 and 11, Regulations 81, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 7 of Regulations 81 (as amended by Treasury Decision 4392, approved September 20, 1933 [above]), relating to processing tax under the Agricultural Adjustment Act, is further amended, effective July 9, 1933, to read as follows:

ART. 7. *When tax attaches.*—The tax is imposed upon the first domestic processing, and is measured by the amount of the commodity put into such processing. The tax attaches to a particular quantity of the commodity (1) if it is in process on the effective date, provided the first domestic processing

has not been completed prior to that date, or (2) if the first domestic processing is begun during the period while the tax is in effect, provided it is completed before the termination of the tax. Where the first domestic processing of a particular quantity of the commodity is completed prior to the effective date, but on the effective date such quantity is in secondary processing, it is subject to the tax on floor stocks (see Regulations 82).

* * * * * * *

SECTION 15.—EXEMPTIONS AND COMPENSATING TAXES.

REGULATIONS 81, ARTICLE 9: Exemptions from processing tax. XII–40–6436
REGULATIONS 81. ARTICLE 32: Refund of tax paid on products delivered for charitable distribution or use. G. C. M. 12159

Processing of wheat produced by a school for its own use is not exempt from tax since the school is not an individual producer. Use of the product by the school is not "charitable distribution or use" under section 15(c) of the Agricultural Adjustment Act.

Advice is requested whether a school which operates 600 acres of land, produces wheat thereon, delivers the wheat to a mill, and takes flour in exchange, is a "producer" within the meaning of section 15(b) of the Agricultural Adjustment Act and article 9(a)1 of Regulations 81: and whether, if the school is not a "producer," there was a "charitable distribution or use" of the flour within the meaning of section 15(c) of that Act and article 32 of Regulations 81.

Section 15(b) reads as follows:

(b) No tax shall be required to be paid on the processing of any commodity by or for the producer thereof for consumption by his own family, employees, or household; * * *.

Article 9(a)1 of Regulations 81 reads as follows:

(1) *For consumption.*—No processing tax is required to be paid on the processing of any commodity by or for an individual producer thereof for consumption by him, his own family, his own employees, or his own household. * * *

Since section 15(b) of the Agricultural Adjustment Act clearly refers to an *individual* producer, the school in question can not be considered as a producer within the meaning of that section so as to exempt from taxation the processing of a commodity for such school.

The second issue relates to the refund permitted under the provisions of section 15(c) of the Agricultural Adjustment Act, which reads as follows:

(c) Any person delivering any product to any organization for charitable distribution or use shall, if such product or the commodity from which processed, is under this title subject to tax, be entitled to a refund of the amount of any tax paid under this title with respect to such product so delivered.

Article 32 of Regulations 81 reads as follows:

If a product, or the processing of the commodity from which processed, has been taxed under the provisions of the Act, and the owner of such product delivers it to an organization for charitable distribution or use (i. e., for distribution or use exclusively in the relief of the poor and indigent), such person shall be entitled to a refund in the amount of tax which has been paid with respect to such product or the commodity from which processed. * * *

The character of the distribution or use, namely, to or by the poor and indigent, determines the right to refund, and not the character of the organi-

zation to which the delivery is made. Even though the product be delivered to a charitable organization, there is no right to refund unless the distribution or use of the product delivered is exclusively in the relief of the poor and indigent. * * *

In the instant case it does not appear that the flour, or the articles made from the flour, are distributed or used exclusively for the relief of the poor and indigent. Apparently the flour is used by the institution in conducting its school activities. There is nothing to indicate that payment for tuition is not received from many of the pupils, or that much of the flour is not used in feeding the employees of the institution, including the instructors, administrative officers, and servants. Under such circumstances it must be held that the flour is not delivered by the processor "to any organization for charitable distribution or use" within the meaning of section 15(c) of the Agricultural Adjustment Act.

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

Regulations 81, Article 9: Exemptions from processing tax. XII-46-6512 P. T. 1

Wheat processed for consumption by the producer's family, employees, or household; claims for exemption by the processor; penalties for evasion of the tax.

Under the provisions of section 15(b) of the Agricultural Adjustment Act no processing tax is required to be paid on the processing of wheat by or for the producer thereof for consumption by the producer's own family, employees, or household.

In order to be entitled to exemption from the tax upon the processing of such wheat the processor must procure from the producer thereof the prescribed form of affidavit or certificate, as the case may be, required under article 9 of Regulations 81. Where the producer delivers a quantity of wheat to a processor to be processed for consumption by the producer's own family, employees, or household, and on subsequent dates withdraws flour of the same kind or grade as would be processed from the wheat so delivered, a separate affidavit or certificate for each withdrawal of flour must be procured from the producer. The processor may not take credit in his return with respect to wheat processed for the producer for consumption by his family, employees, or household, except to the extent of the flour actually delivered to the producer during the period for which the return is made and upon which the credit is claimed.

The affidavit or the certificate signed by the producer contains the statement that the flour "so received by me from said processor is solely for consumption by my own family or my employees or my household; and that no part thereof will be sold or used for any other purpose."

The processor must bear in mind that it is the processor and not the producer who is exempted from the processing tax in such cases. It is therefore incumbent upon the processor, in order to be entitled to such exemption, to make sure that each exemption certificate or affidavit procured from the producer is in fact signed by the actual producer. The processor must also ascertain how many people con-

stitute the family, employees, or household of the producer and must assure himself that the amount of wheat processed, for which exemption is claimed, is reasonably required for their consumption. Unless these requirements are met the exemption will not be allowed. The processor should also, as a check, ascertain how much wheat was processed for the producer in 1932, and how much wheat was processed elsewhere for him during the current year for which an exemption certificate or affidavit was executed.

Section 19(b) of the Agricultural Adjustment Act provides in part that:

All provisions of law, including penalties, applicable with respect to the taxes imposed by section 600 of the Revenue Act of 1926, and the provisions of section 626 of the Revenue Act of 1932, shall, in so far as applicable and not inconsistent with the provisions of this title, be applicable in respect of taxes imposed by this title: * * *.

Section 1114(c) of the Revenue Act of 1926, which is made applicable by the provisions of section 19(b), supra, reads as follows:

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 3451 of the Revised Statute provides:

Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal-revenue laws, or by any regulation made in pursuance thereof, or who procures the same to be falsely or fraudulently executed, or who advises, aids in, or connives at such execution thereof, shall be imprisoned for a term not less than one year nor more than five years; and the property to which such false or fraudulent instrument relates shall be forfeited.

Any person who willfully makes or aids or assists in the execution or procurement of a false or fraudulent exemption affidavit or certificate, or of a false or fraudulent return, or claim for refund or credit, violates the provisions of the statute above quoted and is subject to the penalties therein provided.

REGULATIONS 81, ARTICLE 11: Return. XII–45–6503
T. D. 4403

* * * * * * *

Paragraph (*a*) of article 11 of Regulations 81, relating to processing tax under the Agricultural Adjustment Act, is amended, effective July 9, 1933, to read as follows:

ART. 11. *Return.*—(*a*) As of the last day of the calendar month in which the effective date falls a return shall be made by each processor showing (1) the quantity of the commodity which the processor has on the effective date in the first domestic processing, and (2) the quantity of the commodity put in the first domestic processing by him during such calendar month beginning with the effective date. A like return shall be made as of the last day of each subsequent calendar month showing the quantity of the commodity put in the first domestic processing by him during such calendar month. The return shall be made on the prescribed form, which may be obtained from any collector of internal revenue. A different form of return will be required for each com-

modity. The return shall be filled out in accordance with the instructions given on the form and in accordance with these regulations. A separate return shall be made for each separate plant, mill, factory, or other place where processing is done. Each return shall be made in duplicate. Both the original and the duplicate shall be signed and sworn to, before any officer authorized to administer oaths, by the processor, if an individual, or, in other cases, by one of the executive officers of the concern.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 2, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

XII–50–6561
T. D. 4409

Processing taxes under the Agricultural Adjustment Act.—Article 11, Regulations 81, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Paragraph (*a*) of article 11 of Regulations 81, relating to processing tax under the Agricultural Adjustment Act (as amended by Treasury Decision 4403, approved November 2, 1933 [page 433, this Bulletin]), is further amended to read as follows:

ART. 11. *Returns.*—(*a*) Except as hereinafter provided in the case of a particular commodity, returns shall be made as follows: For the calendar month in which the effective date falls, a return shall be made by each processor showing (1) the quantity of the commodity which the processor has on the effective date in the first domestic processing, and (2) the quantity of the commodity put in the first domestic processing by him during such calendar month, beginning with the effective date. A like return shall be made for each subsequent calendar month showing the quantity of the commodity put in the first domestic processing by him during such calendar month.

In the case of returns with respect to tobacco processed into snuff, in view of the unusual length of time required for such processing, a return shall be made by each processor for the calendar month in which the effective date falls and for each subsequent calendar month showing the quantity of such tobacco with respect to which the first domestic processing into snuff is completed (on or after the effective date) during such calendar month.

The return shall be made on the prescribed form, which may be obtained from any collector of internal revenue. A different form of return will be required for each commodity. The return shall be filled out in accordance with instructions given on the form and in accordance with these regulations. Only one return shall be made by each taxpayer, but where the taxpayer has more than one mill, factory, plant, or other place of manufacture where processing is done, there shall be attached to the return a separate schedule for each such factory, mill, plant, or other place, giving information as required above. Each return shall be made in duplicate. Both the original and duplicate shall be signed and sworn to, before any officer authorized to administer oaths, by the processor, if an individual, or, in other cases, by one of the executive officers of the concern.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved December 4, 1933.

H. MORGENTHAU, JR.,
Acting Secretary of the Treasury.

COTTON.

XII–32–6336
T. D. 4377

Processing and other taxes with respect to cotton under the Agricultural Adjustment Act.

Processing tax, effective August 1, 1933, on the first domestic processing of cotton, domestic or imported; tax on floor stocks of articles processed wholly or in chief value from cotton, held on August 1, 1933, for sale or other disposition; compensating tax on articles processed or manufactured wholly or in chief value from cotton and imported on or after August 1, 1933.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *

PAR. B. The proclamation of the Secretary of Agriculture, dated July 14, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to cotton, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations, with respect to the processing tax on cotton, made by the Secretary of Agriculture, with the approval of the President, dated July 14, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for cotton shall begin August 1, 1933.

I do hereby determine as of August 1, 1933, that the processing tax on the first domestic processing of cotton shall be at the rate of 4.2 cents per pound of lint cotton, net weight, which rate equals the difference between the current average farm price for cotton and the fair exchange value of cotton, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture.

I do hereby establish that the conversion factor for articles (other than nonspinnable waste, hereby defined as including only opener, breaker and finisher picker waste, card motes and fly, sweepings, and clearer waste, and the products thereof), processed from cotton, to determine the amount of tax imposed or refunds to be made with respect thereto, is, per pound of cotton content, 105.2 per centum of the per pound processing tax. The cotton content of such articles shall be deemed to include the weight of cotton in the form

of yarn, fabric, thread, twines, roving, sliver, laps and all other forms. No deduction shall be made from the weight of such articles for normal moisture content, but reasonable deductions shall be made for sizing, buttons, and such other noncotton materials.

PAR. E. The rate of tax governing the amount of tax imposed or refund to be made with respect to all articles processed wholly or in chief value from cotton, as computed upon the basis of the determination by the Secretary of Agriculture of a processing tax rate of 4.2 cents per pound of lint cotton, net weight, and upon the basis of his prescription of a conversion factor (per pound of cotton content) of 105.2 per centum of the per pound processing tax, is 4.4184 cents per pound of the cotton content of such articles.

PAR. F. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. G. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. H. Section 1101 of the Revenue Act of 1926, made applicable by section 19(b) of the Agricultural Adjustment Act, provides:

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

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws, the following regulations are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act and the proclamation and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of cotton becomes effective beginning at the earliest moment of August 1, 1933, at the rate of 4.2 cents per pound of lint cotton, net weight. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from cotton and imported on or after August 1, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from cotton, which, on August 1, 1933, are held for sale or other disposition. The rate of tax shown in paragraph E shall be used in computing such compensating tax and such tax on floor stocks.

(*b*) For regulations relating generally to the processing tax and to the compensating tax, see Regulations 81; for regulations relating generally to the tax on floor stocks, see Regulations 82; for regulations relating to exportation, see Regulations 83. Regulations 81, Regulations 82, and Regulations 83 are general in their scope and apply to all commodities with respect to which a tax is in effect under the Act. By virtue of the proclamation of the Secretary of Agriculture, set forth above, Regulations 81, Regulations 82, and Regulations 83 become applicable with respect to cotton. These present regulations apply specifically to cotton alone, and they supplement, but are not intended to change, modify, or revoke, in any way, Regulations 81, Regulations 82, or Regulations 83. These present regulations apply, as respects cotton, to all the taxes—the processing tax, the compensating tax, and the tax on floor stocks.

(*c*) With respect to cotton and articles or products processed or manufactured wholly or in chief value from cotton, the date, August 1, 1933, is the "effective date," as defined and used in Regulations 81, Regulations 82, and Regulations 83.

(*d*) The term "cotton" as used in the present regulations means lint cotton (that is, cotton which has been ginned), of any kind, classification, type, or grade.

(e) The cotton content of an article or product processed wholly or in chief value from cotton shall be deemed to mean the weight of cotton, or of any form of cotton (including yarn, fabric, thread, twines, roving, slivers and laps), in the article or product. In ascertaining for tax purposes the cotton content of any such article or product, no deduction shall be made from the weight of such article or product for normal moisture content, but a reasonable deduction is allowable for sizing, buttons, or materials not made of or from cotton.

ART. 2. *Processing tax.*—(a) The processing tax on the first domestic processing of cotton becomes effective at the first moment of August 1, 1933. The rate, as shown above, is 4.2 cents per pound of lint cotton, net weight. The net weight of the cotton shall be the net weight of the cotton in its condition at the moment of beginning the processing of such cotton. For detailed general regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 2. The first return of processing tax shall embrace the period August 1, 1933, to August 31, 1933, both inclusive, and shall be filed on or before September 30, 1933. The tax shown thereon must be paid at the time when the return is filed. See article 6 for list of prescribed forms.

(b) For the period from August 1, 1933, to August 31, 1933, both inclusive, and for each calendar month thereafter, each processor of cotton shall keep a record of (1) the quantity of cotton on hand at the beginning of the period; (2) the quantity of cotton received during the period; (3) the quantity of cotton shipped or delivered during the period; (4) the quantity of cotton sold or otherwise disposed of as waste during the period; and (5) the quantity of cotton on hand at the end of the period. These quantities must be ascertained by actual weighing on accurate scales and not by estimation.

ART. 3. *Floor stocks.*—On August 1, 1933, the tax on floor stocks becomes effective on certain stocks of articles processed wholly or in chief value from cotton, which on that date are held for sale or other disposition. The Secretary of Agriculture has prescribed a conversion factor for such articles, as set forth in paragraph D, above. The rate of tax applicable to the cotton content of such articles is given in paragraph E, above. For detailed regulations as to tax on floor stocks, see Regulations 82. The form prescribed for return of floor tax on separate retail stocks is P. T. Form 42, Floor tax inventory, record and return (separate retail stocks). This return must be filed on or before September 30, 1933. The tax shown thereon must be paid at the time when the return is filed. The form prescribed for return of the floor tax on all articles other than separate retail stocks is P. T. Form 32, Floor tax inventory and return (stocks other than separate retail stocks). This return must be filed on or before August 31, 1933. The tax shown thereon must be paid at the time when the return is filed. See article 6 for list of prescribed forms.

ART. 4. *Compensating tax on imported articles.*—On and after August 1, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from cotton and imported into the United States or any possession thereof to which the Act applies, from any foreign country, or from any possession of the United States to which the Act does not apply. The Secretary of Agriculture has prescribed a conversion factor for such articles, as shown in paragraph D, above. The rate of tax applicable to the cotton content of such articles is given in paragraph E, above. For detailed regulations as to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 12. See article 6 for list of prescribed forms.

ART. 5. *Existing contracts.*—For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

If a processor has such a contract for delivery of an article processed wholly or in chief value from cotton on or after August 1, 1933, the tax on such processing must be returned on the current monthly return and then paid. The rate shown in paragraph E should be used in determining the amount of tax to be collected from the vendee.

ART. 6. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83; and must be carefully filled out in exact accordance with the

applicable provisions of the proper regulations, and the instructions contained on such form. The following forms with respect to cotton are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 2.	Processing tax return	Regulations 81, article 11.
P. T. Form 12.	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24.	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32. Regulations 82, articles 19, 20.
P. T. Form 32.	Floor tax inventory and return, by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 42.	Floor tax inventory, record and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 28.	Claim for credit on monthly return.	Regulations 81, article 31(b).
P. T. Form 52.	Monthly statement of importer of cotton products.	Regulations 81, article 21.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved July 29, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

XII–37–6405
T. D. 4389

Processing and other taxes with respect to cotton under the Agricultural Adjustment Act.

Revoking Treasury Decision 4377, approved July 29, 1933 [page 435, this Bulletin], and prescribing regulations in conformity with Cotton Regulations, Series 2, made by the Secretary of Agriculture and approved by the President July 14, 1933, as supplemented, revised, and, in part, superseded by Cotton Regulations, Series 2, Supplement 1, made by the Secretary of Agriculture and approved by the President July 28, 1933.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *

PAR. B. The proclamation of the Secretary of Agriculture, dated July 14, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to cotton, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations, with respect to the processing tax on cotton, made by the Secretary of Agriculture, with the approval of the President, dated July 14, 1933, as supplemented, revised and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated July 28, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for cotton shall begin August 1, 1933.

I do hereby determine as of August 1, 1933, that the processing tax on the first domestic processing of cotton shall be at the rate of 4.2 cents per pound of lint cotton, net weight, which rate equals the difference between the current average farm price for cotton and the fair exchange value of cotton, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture.

The net weight of lint cotton subject to the processing tax shall be determined by deducting the weight of tare (bagging, ties, and patches) from the gross weight of the bale.

I do hereby establish that the conversion factor for articles, processed from cotton, to determine the amount of tax imposed or refunds to be made with respect thereto, is, per pound of cotton content, 105.2 per centum of the per pound processing tax; provided, however, that the conversion factor shall be zero for (*a*) motes and fly, flat strips, comber waste, slasher waste, cuttings, rags, and other waste (not including substandard products and short length piece goods), incident to the processing, manufacturing, or fabricating of cotton or of cotton products, (*b*) secondhand articles, and (*c*) such part of the content of any article or product as is made from any article or combination of articles described in (*a*) or (*b*). No deduction shall be allowed from the weight of any article for normal moisture content, but a reasonable deduction shall be allowable for the sizing, buttons, or other noncotton materials.

PAR. E. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. F. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. G. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

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

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws, the following regulations, effective as of August 1, 1933, are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act and the proclamation and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of cotton becomes effective beginning at the earliest moment of August 1, 1933, at the rate of 4.2 cents per pound of lint cotton, net weight. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from cotton and imported on or after August 1, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from cotton, which, on August 1, 1933, are held for sale or other disposition. The rate of tax shown in article 2 of these regulations shall be used in computing such compensating tax and such tax on floor stocks.

(*b*) For regulations relating generally to the processing tax and to the compensating tax, see Regulations 81; for regulations relating generally to the tax on floor stocks, see Regulations 82; for regulations relating to exportation, see Regulations 83. Regulations 81, Regulations 82, and Regulations 83 are general in their scope and apply to all commodities with respect to which a tax is in effect under the Act. By virtue of the proclamation of the Secretary of Agriculture, set forth above, Regulations 81, Regulations 82, and Regulations 83 become applicable with respect to cotton. These regulations apply specifically to cotton alone, and they supplement, but are not intended to change, modify, or revoke, in any way, Regulations 81, Regulations 82, or Regulations 83. These regulations apply, as respects cotton, to all the taxes—the processing tax, the compensating tax, and the tax on floor stocks.

(*c*) With respect to cotton and articles or products processed or manufactured wholly or in chief value from cotton, the date, August 1, 1933, is the "effective date," as defined and used in Regulations 81, Regulations 82, and Regulations 83.

(*d*) The term "cotton" as used in these regulations means lint cotton (that is, cotton which has been ginned) of any kind, classification, type, or grade.

(*e*) The cotton content of an article or product processed wholly or in chief value from cotton shall be deemed to mean the weight of cotton or of any form of cotton (including yarn, fabric, thread, twines, roving, sliver, laps, and any other product of the first domestic processing) in the article or product. In ascertaining, for tax purposes, the cotton content of any such article or product, no deduction shall be made from the weight of such article or product for normal moisture content, but a reasonable deduction is allowable for sizing, buttons, or materials not made of or from cotton.

ART. 2. *Conversion factors—Rate of tax.*—The conversion factor, per pound of cotton content, for all articles or products processed wholly or in chief value from cotton is 105.2 per centum of the processing tax (except in so far as a zero conversion factor has been prescribed for all or part of the cotton content, as set forth in the following paragraph). Computed on the basis of 4.2 cents per pound of lint cotton, the rate of tax governing the amount of tax to be imposed or refund to be made with respect to such articles is 4.4184 cents per pound of the cotton content of such article, except that to which the zero conversion factor applies.

The conversion factor is zero for the following, namely, (*a*) motes and fly, flat strips, comber waste, slasher waste, cuttings, rags, and other waste incident to the processing, manufacturing, or fabricating of cotton or of cotton products, (*b*) secondhand articles, and (*c*) such part of the content of any article or product as is made from any article or combination of articles described in (*a*) and (*b*). The term "waste," as used in (*a*), does not include any substandard products or short length piece goods, both of which have a conversion factor of 105.2. Based on a conversion factor of zero the rate of tax governing the amount of tax imposed or refund to be made with respect to (*a*) or (*b*) or (*c*) is, likewise, zero.

In determining whether an article is processed wholly or in chief value from cotton (for the purposes of the tax on floor stocks, the compensating tax on imported articles, and the provisions of the Act with respect to exportation) the combined values of the cotton and of every processed form of it used in making the article (including any processed form of cotton for which the con-

version factor is zero) shall be the value of the cotton as a component. In determining the amount of tax with respect to an article processed wholly or in chief value from cotton, as thus determined, the weight of the content consisting of any processed form of cotton for which the conversion factor is zero may be disregarded. The amount of the tax (in cents) is 4.4184 multiplied by the number of pounds of cotton content (exclusive of the number of pounds of the content consisting of any processed form of cotton for which the conversion factor is zero).

ART. 3. *Processing tax.*—(*a*) The processing tax on the first domestic processing of cotton becomes effective at the first moment of August 1, 1933. The rate is 4.2 cents per pound of lint cotton, net weight. The net weight of lint cotton subject to the processing tax shall be determined by deducting the weight of tare (bagging, ties, and patches) from the gross weight of the bale. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 2. The first return of processing tax shall embrace the period August 1, 1933, to August 31, 1933, both inclusive, and shall be filed on or before September 30, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

(*b*) For the period from August 1, 1933, to August 31, 1933, both inclusive, and for each calendar month thereafter, each processor of cotton shall keep a record of (1) the quantity of cotton on hand at the beginning of the period, (2) the quantity of cotton received during the period, (3) the quantity of cotton shipped or delivered during the period, (4) the quantity of cotton sold or otherwise disposed of as waste during the period, and (5) the quantity of cotton on hand at the end of the period. These quantities must be ascertained by actual weighing on accurate scales and not by estimation.

ART. 4. *Floor stocks.*—On August 1, 1933, the tax on floor stocks becomes effective on certain stocks of articles processed wholly or in chief value from cotton, which on that date are held for sale or other disposition. The Secretary of Agriculture has prescribed a conversion factor for such articles, as set forth in paragraph D, above. The rate of tax applicable to the cotton content of such articles is given in article 2 of these regulations. For detailed regulations as to tax on floor stocks, see Regulations 82. The form prescribed for return of floor tax on separate retail stocks is P. T. Form 42, Floor tax inventory, record and return (separate retail stocks). This return must be filed on or before September 30, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. The form prescribed for return of the floor tax on all articles other than separate retail stocks is P. T. Form 32, Floor tax inventory and return (stocks other than separate retail stocks). This return must be filed on or before August 31, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

ART. 5. *Compensating tax on imported articles.*—On and after August 1, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from cotton and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The Secretary of Agriculture has prescribed a conversion factor for such articles, as shown in paragraph D, above. The rate of tax applicable to the cotton content of such articles is given in article 2 of these regulations. For detailed regulations as to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 12. See article 7 for list of prescribed forms.

ART. 6. *Existing contracts.*—For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

If a processor has such a contract for delivery of an article processed wholly or in chief value from cotton on or after August 1, 1933, the tax on such processing must be returned on the current monthly return and then paid. The rate shown in article 2 of these regulations should be used in determining the amount of tax to be collected from the vendee.

ART. 7. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83; and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to cotton are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 2	Processing tax return	Regulations 81, article 11.
P. T. Form 12	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32. Regulations 82, articles 19, 20.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(b).
P. T. Form 32	Floor tax inventory and return, by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 42	Floor tax inventory, record and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 52	Monthly statement of importer of cotton products.	Regulations 81, article 21.

ART. 8. Treasury Decision 4377, approved July 29, 1933 [page 435, this Bulletin], is hereby revoked.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 6, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

REGULATIONS 81, ARTICLE 12: Payment of processing tax. XII-34-6369 T. D. 4385

Postponement of payment of processing tax and floor tax with respect to cotton.

Payment of processing tax with respect to cotton authorized to be made in installments of one-third of the amount due on each return for the first six months on or before the due date for filing such return; one-third not later than 30 days after the due date, and one-third not later than 60 days after the due date. Payment of tax on floor stocks of cotton products authorized to be made in installments of one-fourth of the amount due on each return on or before the due date for filing each such return; one-fourth not later than 30 days after the due date; one-fourth not later than 60 days after the due date, and one-fourth not later than 90 days after the due date.

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

To Collectors of Internal Revenue and Others Concerned:

Payment of processing tax with respect to cotton under the provisions of Treasury Decision 4377, approved July 29, 1933 [page 435, this Bulletin], and the provisions of article 12 of Regulations 81 relating to processing tax under the Agricultural Adjustment Act, is hereby authorized to be made as follows:

One-third of the amount of the tax must be paid on or before the due date for filing each return for the first six months, one-third not later than 30 days after the due date, and one-third not later than 60 days after the due date. Payment of each installment of one-third of the amount of the tax shown on each month's return will be due as follows:

Return.	August, 1933.	September, 1933.	October, 1933.	November, 1933.	December 1933.	January, 1934.
					1934	
One-third, due date	Sept. 30	Oct. 31	Nov. 30	Dec. 31	Jan. 31	Feb. 28
One-third, 30 days after due date	Oct. 30	Nov. 30	Dec. 30	Jan. 30	Mar. 2	Mar. 30
One-third, 60 days after due date	Nov. 29	Dec. 30	Jan. 29	Mar. 1	Apr. 1	Apr. 29

* * * * * * *

REGULATIONS 82, ARTICLE 17: Payment of tax; postponement of payment; loans of money to pay tax. XII-34-6370 T. D. 4385

* * * * * * *

Payment of the tax on floor stocks of articles processed wholly or in chief value from cotton under the provisions of the Treasury decision above named, and article 17 of Regulations 82 relating to tax on floor stocks, is hereby extended as follows:

With respect to the amount of tax due on return on P. T. Form 32, one-fourth must be paid on or before the due date for filing returns, August 31, 1933, one-fourth not later than 30 days after the due date, or September 30, 1933, one-fourth not later than 60 days after the due date, or October 30, 1933, and one-fourth not later than 90 days after the due date, or November 29, 1933. With respect to the amount of tax due on return P. T. Form 42, one-fourth must be paid on or before the due date for filing returns, September 30, 1933, one-fourth not later than 30 days after the due date, or October 30, 1933, one-fourth not later than 60 days after the due date, or November 29, 1933, and one-fourth not later than 90 days after the due date, or December 29, 1933.

These extensions apply only to payment of the tax and not to the time for filing each return.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved August 17, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

REGULATIONS 81, ARTICLE 12: Payment of processing tax. XII–45–6495 T. D. 4402

Postponement of payment of processing tax with respect to cotton.

Time for payment of processing tax with respect to cotton, shown by processing tax returns for February, 1934, and subsequent months, postponed to the last day of the calendar month following the time fixed for filing the processing tax return.

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

To Collectors of Internal Revenue and Others Concerned:

The time for payment of the processing tax with respect to cotton shown to be due by each return covering the calendar month of February, 1934, or any subsequent calendar month, required under the provisions of Treasury Decision 4389, approved September 6, 1933 [page 438, this Bulletin], and the provisions of article 11 of Regulations 81, relating to the processing tax under the Agricultural Adjustment Act, is hereby postponed to the last day of the calendar month next following the time fixed for filing such processing tax return.

These postponements apply only to the payment of the taxes and not to the time for filing the processing tax returns.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 2, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

FIELD CORN.

XII–47–6526
T. D. 4407

Processing and other taxes with respect to field corn under the Agricultural Adjustment Act.

Processing tax, effective November 5, 1933, on the first domestic processing of field corn, domestic or imported; tax on floor stocks of articles processed wholly or in chief value from field corn held on November 5, 1933, for sale or other disposition; compensating tax on articles processed or manufactured wholly or in chief value from field corn and imported on or after November 5, 1933.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect

to such commodity from the beginning of the marketing year therefor next following the date of such proclamation.

PAR. B. The proclamation of the Secretary of Agriculture, dated October 12, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to field corn, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations with respect to field corn, made by the Secretary of Agriculture, with the approval of the President, dated October 23, 1933, as supplemented, revised, and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated November 4, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for field corn shall begin November 5, 1933.

I do hereby find, after investigation and due notice and opportunity for hearing to interested parties and due consideration having been given to all of the facts, that the rate of tax as of November 5, 1933, which equals the difference between the current average farm price for field corn and the fair exchange value of field corn, which price and value both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture, will cause such reduction in the quantity of field corn, or products thereof, domestically consumed as to result in the accumulation of surplus stocks of field corn, or products thereof, or in the depression of the farm price of field corn. I do hereby, accordingly, determine: As of November 5, 1933, that the rate of the processing tax on the first domestic processing of field corn shall be five (5) cents per bushel of fifty-six (56) pounds; and that, as of December 1, 1933, the rate of the processing tax on the first domestic processing of field corn shall be twenty (20) cents per bushel of fifty-six (56) pounds, which rate, as of the effective date thereof, will prevent such accumulation of surplus stocks and depression of the farm price of field corn.

I. DEFINITIONS.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing.—The first domestic processing of field corn is the milling or other processing of field corn for market (except cleaning and drying), including cutting, grinding, cracking, breaking, by mechanical or other means, and custom milling for toll as well as commercial milling, but does not include cutting, grinding, cracking or breaking, not in the form of flour, for feed purposes only.

Cracked corn, corn chop, or ground corn.—Cracked corn, corn chop, or ground corn is the entire product made by cutting, grinding, cracking or breaking corn.

Screened cracked corn, screened corn chop, or screened ground corn.—Screened cracked corn, screened corn chop, or screened ground corn is the coarse portion of the corn chop, ground corn, or cracked corn from which most of the fine particles have been removed.

Corn bran or hulls.—Corn bran or hulls is the outer coating of the corn kernels, with little or none of the starchy part or germ.

Corn feed meal.—Corn feed meal is the fine siftings obtained in the manufacture of screened corn chop, screened ground corn or screened cracked corn, with or without its aspiration products added.

Bolting.—Bolting is the sifting of any meal through wire screens or cloths.

Corn meal, maize meal, or Indian-corn meal.—Corn meal, maize meal, or Indian-corn meal is meal made by grinding corn, with or without bolting, or with or without the extraction of the corn germ.

Degermed and nondegermed corn meals.—Corn meal, maize meal or Indian-corn meal may be classified according to the process of manufacture as degermed or nondegermed meals.

(*a*) Degermed corn meal: Degermed corn meal is bolted or unbolted corn meal from which the corn germ has been removed in whole or in part by a degerming process, and is sometimes branded for sale as cream meal, standard meal or pearl meal. Degermed meal contains not more than 1½ per cent of fat, by ether extraction.

(*b*) Nondegermed corn meal: Nondegermed corn meal is bolted or unbolted corn meal from which the corn germ has not been removed. Nondegermed meal may be treated by a blast of air to remove chaff and/or bran, and is sometimes branded for sale as old-fashioned meal, water-ground meal or stone-ground meal. Nondegermed meal contains more than 1½ per cent of fat, by ether extraction.

Hominy grits, corn grits, or brewers' grits.—Hominy grits, corn grits, or brewers' grits are the hard, flinty portions of the corn kernels, containing little or none of the bran or the germ. Hominy grits, corn grits, or brewers' grits may be classified as coarse, medium, or fine. The granular particles of fine grits average larger than those of coarse corn meal.

Corn flour or brewers' flour.—Corn flour or brewers' flour is the residue from the manufacture of corn grits and/or corn meal. To be so classified, it must be of a texture fine enough so that not less than 75 per cent will sift through No. 9XX bolting silk and the balance sift through a No. 72 grits gauze.

White hominy feed, white hominy meal, or white hominy chop.—White hominy feed, white hominy meal, or white hominy chop is the kiln-dried mixture of the mill-run bran coating, the mill-run germ, with or without a partial extraction of the oil, and a part of the starchy portion of the white corn kernel obtained in the manufacture of hominy, hominy grits, and corn meal by the degerming process.

Yellow hominy feed, yellow hominy meal, or yellow hominy chop.—Yellow hominy feed, yellow hominy meal, or yellow hominy chop is the kiln-dried mixture of the mill-run bran coating, the mill-run germ, with or without a partial extraction of the oil, and a part of the starch portion of the yellow corn kernel obtained in the manufacture of yellow hominy grits and yellow corn meal by the degerming process.

Brewers' corn flakes.—Brewers' corn flakes are flakes produced by passing corn grits through rolls.

Corn flakes (breakfast food type).—Corn flakes of the breakfast food type are corn grits which have been treated with malt and/or sugar, sirups, and salt, and subsequently flaked by rolls. The flakes are then dried and toasted.

Pearl or table hominy.—Pearl or table hominy is degermed hulled corn.

Pastes, adhesives, or binders.—Pastes, adhesives, or binders are flour, starches, or other starchy materials that have been partially gelatinized and/or dextrinized so as to increase their power of absorption and/or adhesiveness without further treatment.

Cornstarch (not modified).—Cornstarch (not modified) is the white, odorless, tasteless, carbohydrate obtained from corn after the bran, gluten, and germ have been separated from soaked and cracked corn, and includes products, commercially known as pearl, powdered, crystal, and lump cornstarch.

Corn gluten.—Corn gluten is that portion of the endosperm of the corn kernel which can be separated from cornstarch and other soluble matter in a current of water.

Corn germ.—Corn germ is the embryo of the corn kernel. The commercial product contains some bran and endosperm.

Cornstarch (modified).—Cornstarch (modified) is cornstarch the fluidity of which has been increased by treatment with heat and/or chemicals, and includes products commercially known as "thin boiling starches."

Dextrine.—Dextrine is a powdery product formed by treating cornstarch with heat and/or chemicals. Dextrines with water form a viscous gum having adhesive properties.

Glucose, mixing glucose, confectioners' glucose or sirup.—Glucose, mixing glucose, confectioners' glucose or sirup is a thick, viscous, colorless product made by incompletely hydrolyzing cornstarch, and decolorizing and evaporating the product.

Corn sugar, crude, "70."—Corn sugar, crude, "70" is hydrous starch sugar containing between 68 and 72 per cent of dextrose.

Corn sugar, crude, "80."—Corn sugar, crude, "80" is hydrous starch sugar containing between 79 and 81 per cent of dextrose.

Dextrose.—Dextrose is the product chiefly made by the hydrolysis of cornstarch followed by refining and crystallization. Dextrose is known commercially as refined corn sugar.

Anhydrous dextrose.—Anhydrous dextrose is dextrose containing not less than 99.5 per cent of dextrose and not more than 0.5 per cent of moisture.

Hydrated dextrose.—Hydrated dextrose is dextrose containing not less than 92 per cent of dextrose and not more than 8 per cent of moisture, including water of crystallization.

Corn molasses or hydrol.—Corn molasses or hydrol is a by-product in the manufacture of dextrose from cornstarch.

Corn oil, crude.—Corn oil, crude, is the oil obtained from the pressing of corn germs.

Corn oil, refined.—Corn oil, refined, is the oil resulting from the purification of the crude corn oil.

Soap stock or foots.—Soap stock or foots is the residue resulting from the purification of crude corn oil.

Corn oil cake.—Corn oil cake consists of the corn germ from which part of the oil has been removed.

Corn oil-cake meal.—Corn oil-cake meal is ground corn oil cake.

Corn germ cake.—Corn germ cake consists of the corn germ with other parts of the corn kernel from which part of the oil has been removed.

Corn germ meal.—Corn germ meal is ground corn germ cake.

Corn gluten feed.—Corn gluten feed is that part of the corn kernel that remains after the separation of the larger part of the starch and the oil. It may or may not contain corn solubles and the germ.

Corn gluten meal.—Corn gluten meal is that part of the corn kernel that remains after the separation of the larger part of the starch, oil, and bran. It may or may not contain corn solubles and the germ.

Distillers' dried grains.—Distillers' dried grains are the dried residue obtained in the manufacture of alcohol and other distilled spirits from corn.

Distillers' corn solubles.—Distillers' corn solubles is a by-product from the manufacture of alcohol from corn solids obtained by the evaporation of the mash liquor after the removal of the alcohol and wet grains.

Mash.—Mash is materials, of which corn is the product of chief value, assembled and combined in such manner as to produce distilled spirits.

Distilled spirits.—Distilled spirits are alcoholic liquors made by the distillation of mash, and include alcohol and whisky.

II. Conversion Factors.

I do hereby establish that the conversion factors for articles processed wholly or in chief value from corn, to determine the amount of tax imposed or refunds to be made with respect thereto, are as follows:

The following tables of conversion factors fix the percentage of the per bushel processing tax on corn with respect to 100 pounds, net weight, or proof gallon of the following articles processed from corn:

Article.	Unit.	Conversion factor.
	Pounds.	*Per cent.*
Cracked corn, corn chop, or ground corn (except for feed [1])	100	178. 57
Screened cracked corn, screened corn chop, or screened ground corn (except for feed [1])	100	185. 19
Corn bran or hulls	100	0
Corn feed meal	100	0
Corn meal, maize meal, or Indian-corn meal:		
Degermed	100	300. 00
Nondegermed	100	200. 00
Hominy grits, corn grits or brewers' grits (coarse, medium and/or fine)	100	300. 00

[1] To be exempt from the floor stocks tax, cracked corn, corn chop, or ground corn, screened or not screened, must be the product of field corn processed for feed purposes only.

Article.	Unit.	Conversion factor.
	Pounds.	*Per cent.*
Corn flour or brewers' flour	100	300. 00
Hominy feed, white or yellow, resulting from manufacture of hominy, hominy grits, or corn meal by the degerming process	100	0
Brewers' corn flakes	100	325. 00
Corn flakes (breakfast food type)	100	350. 00
Pearl or table hominy	100	300. 00
Pastes, adhesives, or binders	100	350. 00
Cornstarch (not modified):		
Cornstarch, standard powdered (less than 11 per cent moisture)	100	281. 39
Cornstarch, standard pearl (11 per cent to 13 per cent moisture)	100	275. 11
Cornstarch, lump (more than 13 per cent moisture)	100	265. 80
Cornstarch used as brewers' materials	100	275. 11
Cornstarch (modified):		
Starch, laundry	100	281. 39
Dextrines (4 per cent or less moisture)	100	300. 19
Dextrines (more than 4 per cent moisture)	100	293. 87
Glucose, mixing glucose, confectioners' glucose, or sirup and sugars:		
Sirup or glucose 41° Baumé	100	237. 50
Sirup or glucose 42° Baumé	100	243. 60
Sirup or glucose 43° Baumé	100	249. 05
Sirup or glucose 44° Baumé	100	253. 84
Sirup or glucose 45° Baumé	100	258. 68
Sugar, crude, "70"	100	233. 01
Sugar, crude, "80"	100	260. 46
Dextrose, anhydrous	100	288. 11
Dextrose, hydrous	100	313. 16
Corn molasses, hydrol	100	0
Corn oil:		
Crude	100	311. 52
Refined	100	331. 61
Soap stock or foots	100	0
Corn oil cake or corn oil-cake meal	100	0
Corn germ cake or corn germ meal	100	0
Corn gluten feed	100	0
Corn gluten meal	100	0
Corn in secondary processing, including mash [2]	100	178. 57
Distilled spirits [2]	([3])	20. 00
Distillers' dried grains	100	0
Distillers' corn solubles	100	0
Canned field corn	100	23. 00
Canned hominy	100	60. 00

[2] The above conversion factors for mash and distilled spirits are based upon a mash containing only corn. The conversion factors for mash and distilled spirits, in chief value of field corn, shall be the proportion of the above conversion factor which the weight of the field corn in the mash bears to the total weight of grains and grain products in the mash.

[3] Per gallon 100 proof.

Field-corn products for which no specific conversion factor is prescribed in these regulations are not excluded from the payment of the compensating or floor stocks taxes.

As to any article for which no conversion factor is specifically assigned, I hereby establish (1) that if such article is made, directly or indirectly, in some part from another article to which a conversion factor is assigned, then as to each 100 pounds of such part the conversion factor shall be the conversion factor for such other article, and (2) if such article is made, directly or indirectly, in some part from field corn but not (as to such part) from another article to which a conversion factor is assigned, then as to each 100 pounds of such part the conversion factor shall be 178.57 per cent of the per bushel processing tax on field corn.

PAR. E. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. F. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. G. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

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

PAR. H. Section 1119, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

Whether or not the method of collecting any tax imposed by Titles IV, V, VI, or VII is specifically provided therein, any such tax may, under regulations prescribed by the Commissioner with the approval of the Secretary, be collected by stamp, coupon, serial-numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax. All administrative and penalty provisions of Title VIII, in so far as applicable, shall apply to the collection of any tax which the Commissioner determines or prescribes shall be collected in such manner.

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws the following regulations are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act and the proclamations and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of field corn becomes effective at the earliest moment of November 5, 1933. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from field corn, and imported on or after November 5, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from field corn which, on November 5, 1933, are held for sale or other disposition.

The rate of processing tax is given in article 2 of these regulations. The rates of compensating tax and tax on floor stocks are given in article 3 of these regulations.

(*b*) By virtue of the proclamation of the Secretary of Agriculture, set forth in paragraph B, above, Regulations 81, relating to the processing tax and compensating tax; Regulations 82, relating to the tax on floor stocks; and Regulations 83, relating to exportation, which are general regulations under the Agricultural Adjustment Act, become applicable to field corn. These regulations supplement, but are not intended to change or revoke in any way, Regulations 81, Regulations 82, or Regulations 83.

(*c*) With respect to articles or products processed or manufactured wholly or in chief value from field corn, the date, November 5, 1933, is the "effective date," as defined and used in Regulations 81, Regulations 82, and Regulations 83.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph D, above, are hereby adopted as part of these regulations.

ART. 2. *Processing tax.*—(*a*) The processing tax on the first domestic processing of field corn, becomes effective at the first moment of November 5, 1933. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 3. The first return of processing tax shall embrace the period November 5, 1933, to November 30, 1933, both inclusive, and shall be filed on or before December 31, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

(*b*) In accordance with the regulations of the Secretary of Agriculture, the rates of tax applicable to the first domestic processing of field corn are: As of November 5, 1933, 5 cents per bushel of 56 pounds, and as of December 1, 1933, 20 cents per bushel of 56 pounds.

The weight of field corn subject to the processing tax shall be the weight of clean field corn not artificially dried.

(*c*) For the period from November 5, 1933, to November 30, 1933, both inclusive, and for each calendar month thereafter, each processor of field corn shall keep a record of (1) the quantity of field corn on hand at the beginning of the period, (2) the quantity of field corn received during the period, (3) the quantity of field corn shipped or delivered during the period, (4) the quantity of field corn sold or otherwise disposed of during the period, (5) the quantity ground for feed during the period, and (6) the quantity on hand at the end of the period. These quantities on each such record and report shall be shown in accordance with the elevator scale weights after deducting the dockage allowance indicated by the licensed inspector's certificate. Where elevator scale weights are not obtainable, the most reliable weight should be used; where there is no licensed inspector's certificate available, the dockage actually calculated should be used.

(*d*) The processing of field corn by or for the producer thereof for consumption by his own family or employees or household is exempt from the processing tax. This applies to what is known as custom milling (for toll or for money), but not to cases such as, for example, where a producer delivers field corn to an elevator or store in exchange for corn meal and/or other corn product. Nor is there any exemption where a producer who has his field corn processed receives a kind or grade of product other than that which could have been processed from the field corn delivered by such producer.

ART. 3. *Rates of tax.*—(*a*) The amounts of tax imposed with respect to certain articles processed wholly or in chief value from field corn, as determined upon the basis of the determination by the Secretary of Agriculture of processing tax rates given in article 2 and of his prescription of conversion factors in his regulations set forth in paragraph D, above, are as follows:

Rates of tax on floor stocks of articles or products processed wholly or in chief value from field corn held for sale or other disposition on November 5, 1933, and rates of compensating tax on such articles or products, effective from November 5, 1933, to November 30, 1933, both inclusive, and on and after December 1, 1933.

Article.	Rates of tax effective—	
	Nov. 5, 1933.	Dec. 1, 1933.
	Cents per lb.	*Cents per lb.*
Cracked corn, corn chop, or ground corn (except for feed [1])	0. 089	0. 357
Screened cracked corn, screened corn chop, or screened ground corn (except for feed [1])	. 092	. 37
Corn meal, maize meal or Indian-corn meal:		
Degermed	. 15	. 6
Nondegermed	. 1	. 4
Hominy grits, corn grits or brewers' grits (coarse, medium and/or fine)	. 15	. 6
Corn flour or brewers' flour	. 15	. 6
Brewers' corn flakes	. 162	. 65
Corn flakes (breakfast food type)	. 175	. 7
Pearl or table hominy	. 15	. 6
Pastes, adhesives or binders	. 175	. 7
Cornstarch (not modified):		
Standard powdered (less than 11 per cent moisture)	. 14	. 562
Standard pearl (11 per cent to 13 per cent moisture)	. 137	. 55
Lump (more than 13 per cent moisture)	. 132	. 531
Cornstarch used as brewers' materials	. 137	. 55
Cornstarch (modified), laundry	. 14	. 562

[1] To be exempt from the floor stocks tax, cracked corn, corn chop or ground corn, screened or not screened, must be the product of field corn processed for feed purposes only.

Rates of tax on floor stocks of articles or products processed wholly or in chief value from field corn held for sale or other disposition on November 5, 1933, and rates of compensating tax on such articles or products, effective from November 5, 1933, to November 30, 1933, both inclusive, and on and after December 1, 1933—Continued.

Article.	Rates of tax effective—	
	Nov. 5, 1933.	Dec. 1, 1933.
	Cents per lb.	*Cents per lb.*
Dextrines (4 per cent or less moisture)	0. 15	0. 6
Dextrines (more than 4 per cent moisture)	. 146	. 587
Glucose, mixing glucose, confectioners' glucose or sirup and sugars:		
Sirup or glucose 41° Baumé	. 118	. 475
Sirup or glucose 42° Baumé	. 121	. 487
Sirup or glucose 43° Baumé	. 124	. 498
Sirup or glucose 44° Baumé	. 126	. 507
Sirup or glucose 45° Baumé	. 129	. 517
Sugar, crude, "70"	. 116	. 466
Sugar, crude, "80"	. 13	. 52
Dextrose, anhydrous	. 144	. 576
Dextrose, hydrous	. 156	. 626
Corn oil, crude	. 155	. 623
Corn oil, refined	. 165	. 663
Corn in secondary processing, including mash [2]	. 089	. 357
	Cents per gallon, 100 proof.	
Distilled spirits [2]	1. 00	4. 00
	Cents per lb.	*Cents per lb.*
Canned field corn	0. 011	0. 046
Canned hominy	. 03	. 12

[2] The above rates of tax for mash and distilled spirits are based upon a mash containing only corn. The rates of tax for mash and distilled spirits in chief value of corn, shall be the proportion of the above rates which the weight of the field corn in the mash bears to the total weight of grains and grain products in the mash.

(*b*) In the case of any article processed wholly or in chief value from field corn (but not named in the list set forth in paragraph (*a*) of this article of these regulations), which is made, directly or indirectly, in some part from an article designated in such list, the rate of tax for such part of the article is the same as for the listed article from which the taxable article was made.

(*c*) If part of an article processed wholly or in chief value from field corn is made directly or indirectly from field corn (but is not made, directly or indirectly, from an article listed in paragraph (*a*) of this article of these regulations), the rate of tax per pound of field corn content of such part of the article is 0.089 of a cent.

(*d*) In determining whether an article is processed wholly or in chief value from field corn, the combined values of every processed form of field corn used in making the article (including any processed form of field corn for which the conversion factor is zero) shall be the value of the field corn as a component. In determining the amount of tax with respect to an article processed wholly or in chief value from field corn as thus determined, so much of the field corn content as consists of any processed form of field corn for which the conversion factor is zero may be disregarded.

ART. 4. *Floor stocks.*—(*a*) On November 5, 1933, the tax on floor stocks becomes effective on certain articles, processed wholly or in chief value from field corn, which on that date are held for sale or other disposition. The respective rates of tax applicable to such articles are given in article 3 of these regulations. For detailed regulations as to tax on floor stocks, see Regulations 82.

The form prescribed for return of the floor tax on all articles other than separate retail stocks is P. T. Form 33, Floor tax inventory and return (stocks other than separate retail stocks). This return must be filed on or before December 5, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

The form prescribed for return of tax on floor stocks (separate retail stocks) is P. T. Form 43, Floor tax inventory, record and return. This return must be filed on or before January 4, 1934. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

See article 7 for list of prescribed forms.

(*b*) Every person who, on November 5, 1933, owns a warehouse receipt for products processed wholly or in chief value from field corn, shall indorse plainly on such receipt a statement showing his name and address and that he owned such receipt on the first moment of November 5, 1933, and is responsible for payment of the floor tax on the products represented by the receipt.

If, on the said date, any such receipt is in the possession of any person other than the owner, such person shall indorse such statement for the owner of the receipt, together with such person's name and official title, if any.

If, on or after November 5, 1933, any person buys for himself or as agent for his principal any such products, and in such sale delivery of the products is made either in whole or in part by a warehouse receipt issued prior to such date, such person shall not accept as valid delivery any such receipt unless the statement required above is indorsed on the receipt, or unless there is attached thereto the owner's receipt on Form 1, showing payment of the tax on floor stocks on the products represented by such warehouse receipt.

When any such receipt (issued before November 5, 1933) is presented to the warehouse, either for the purpose of withdrawing all or part of the products represented thereby, or for the purpose of surrendering the receipt and receiving a new receipt or new receipts covering the same products or any part thereof, the warehouseman, before delivering such products or any part thereof, or such new receipt or new receipts, shall require that the receipt so presented or surrendered has attached thereto a receipt from the collector of internal revenue for the district, on Form 1, showing that the floor tax has been paid on the products represented by the receipt so presented or surrendered, or shall forthwith notify the collector that a receipt has been presented or surrendered without there being attached thereto Form 1. The notice to the collector shall give the date and serial number of the receipt, the kind and quantity of products covered thereby, the name of the person to whom the receipt was issued, and the name or names of all persons who have indorsed such receipt, and the name and address of the person who presents or surrenders such receipt.

Each person who, on November 5, 1933, owns such products in a warehouse, for which a warehouse receipt has been issued before that date, shall, before such receipt is presented or surrendered to the warehouse (as set forth above), and in any event not later than December 5, 1933, file with the collector of internal revenue for the district, an inventory and return on P. T. Form 33 in accordance with the provisions of article 11 of Regulations 82. The payment of the tax shown on any such return may be postponed to December 5, 1933, except that the tax on any product in a warehouse, for which a warehouse receipt has been issued prior to November 5, 1933, must be paid on or before the presentation or surrender of such warehouse receipt to the warehouse, but not later than December 5, 1933.

(*c*) Each person who, on the effective date, holds for sale or other disposition articles of any kind made from field corn, shall make a true and correct inventory thereof, as of the earliest moment of that date, and shall preserve such inventory, together with a record of all facts necessary to the determination of the correctness of such inventory. Such record shall be preserved and kept open for inspection and subject to all the requirements relative to records set forth in Regulations 82, article 21.

ART. 5. *Compensating tax on imported articles.*—On and after November 5, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from field corn, and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The respective rates of tax applicable to such articles are given in article 3

(*a*), (*b*), and (*c*) of these regulations. For detailed regulations as to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 13. See article 7 for list of prescribed forms.

ART. 6. *Existing contracts.*—For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

If a processor has such a contract for delivery on or after November 5, 1933, of an article processed wholly or in chief value from field corn, the tax on such processing (if done on or after November 5, 1933) must be returned on the current monthly return and then paid. The rate shown in article 3 of these regulations should be used in determining the amount of tax to be collected from the vendee.

ART. 7. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83, and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to field corn are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 3	Processing tax return	Regulations 81, article 11.
P. T. Form 13	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(b).
P. T. Form 33	Floor tax inventory and return, by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 43	Floor tax inventory, record, and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 51, revised.	Monthly statement of importer	Regulations 81, article 21.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 11, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

HOGS.

XII-47-6525
T. D. 4406

Processing and other taxes with respect to hogs under the Agricultural Adjustment Act.

Processing tax, effective November 5, 1933, on the first domestic processing of hogs; domestic or imported; tax on floor stocks of articles processed wholly or in chief value from hogs held on November 5, 1933, for sale or other disposition; compensating tax on articles processed or manufactured wholly or in chief value from hogs and imported on or after November 5, 1933.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *

PAR. B. The proclamation of the Secretary of Agriculture, dated August 17, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, have determined and hereby proclaim that benefit payments are to be made with respect to hogs, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations, with respect to hogs, made by the Secretary of Agriculture, with the approval of the President, dated October 18, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for hogs shall begin November 5, 1933.

I do hereby find that the rate of tax as of November 5, 1933, which equals the difference between the current average farm price for hogs and the fair exchange value of hogs, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture, will cause such reduction in the quantity of hogs, or products thereof, domestically consumed as to result in the accumulation of surplus stocks of hogs, or products thereof, or in the depression of the farm price of hogs. I do accordingly hereby determine: As of November 5, 1933, that the rate of the processing tax on the first domestic processing of hogs shall be fifty (50) cents per hundred (100) weight, live weight; as of December 1, 1933, that the rate of the processing tax on the first domestic processing of hogs shall be one (1) dollar per hundred (100) weight, live weight; as of January 1, 1934, that the rate of the processing tax on the first domestic processing of hogs shall be one (1) dollar fifty (50) cents per hundred (100) weight, live weight; as of February 1, 1934, that the rate of the processing tax on the first domestic processing of hogs shall be two (2) dollars per hundred (100) weight, live weight, which rate, as of the effective date thereof, will prevent such accumulation of surplus stocks and depression of the farm price of hogs.

I. DEFINITIONS.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

First domestic processing.—The first domestic processing is the slaughtering of hogs for market.

Slaughtering.—Slaughtering is the actual killing of hogs. Hogs condemned by an authorized Federal, State, county or municipal inspector as being totally unfit for human food shall not be considered hogs slaughtered for market within the meaning of these regulations.

Live weight.—Live weight is the weight of the live animal at the time of slaughter. However, the actual weight at the time of purchase may be used as live weight in the meaning of these regulations, provided the hogs are shipped direct to the slaughterhouse for immediate slaughter within three (3) days after purchase is made.

Carcass.—Carcass is the animal body after the blood, hair, toes, and viscera have been removed.

Wiltshire.—A Wiltshire is half of a hog carcass with head, feet and part of jowl removed, consisting of the ham, side, and shoulder in one piece.

Cumberland.—A Cumberland is similar to a Wiltshire except that the ham is removed.

Cuts.—Cuts are the various parts into which the hog carcass is divided in the operation of converting the carcass into products which go into commercial trade.

Ham.—A ham is that part of the hog carcass which consists of the hind leg extending from the foot to the backbone (not inclusive). It may include part or all of the hock and part or all of the pelvic bone.

Regular ham.—A regular ham is a ham, either long-cut or short-cut, from which skin has not been removed. This classification includes such styles as American, English, Italian and all other varieties of unskinned hams.

Skinned ham.—A skinned ham is a ham, either long-cut or short-cut, of any description from which all or part of the skin has been removed.

Boneless ham.—A boneless ham is a ham of any description from which all of the bone has been removed.

Rough shoulder.—A rough shoulder is that part of the hog carcass extending from near the third rib to but not including the jowl, with the foot removed.

Regular shoulder.—A regular shoulder is a rough shoulder with neck and rib bones removed. This classification includes such styles as English, New York, New Orleans, and all other varieties of unskinned shoulders.

Skinned shoulder.—A skinned shoulder is a regular shoulder from which part or all of the skin has been removed.

Picnic.—A picnic is a cut comprising about the lower two-thirds of the shoulder. This classification includes regular shank, short shank, shankless and skinned or unskinned picnics; and also shanks (sometimes called hocks) which may have been previously separated.

Boneless picnic.—A boneless picnic is a picnic of any description from which all of the bone has been removed.

Shoulder butt.—A shoulder butt is the top portion of the shoulder which is removed from the shoulder in making a picnic.

Butt.—The butt is the portion of the shoulder butt after removal of plate. This classification includes such styles as Boston, Milwaukee, Buffalo, and all other types of butts excepts boneless butts.

Boneless butt.—A boneless butt is a Boston or other style butt with bone removed.

Plate.—A plate is the fat portion of the shoulder butt.

Rough short ribs.—Rough short ribs are the middle portion of the hog carcass after removal of the hams and shoulders.

Short ribs.—Short ribs are the rough short ribs with the backbone and tenderloin removed.

Extra short ribs.—Extra short ribs are the rough short ribs with the loin removed.

Short clears.—Short clears are the rough short ribs with the backbone, spareribs, and tenderloin removed.

Extra short clears.—Extra short clears are the rough short ribs with the loin and spareribs removed.

Rib back.—The rib back is the upper half of the rough side with the tenderloin removed.

Pork loin.—Pork loin is that portion of the side of the carcass from which the belly and fat back have been removed; it usually contains the backbone, back

ribs, and tenderloin and has but a small amount of fat on the outside. This classification however includes bladeless loin, tenderloin, and boneless loin, either domestic trim or Canadian style.

Fat back.—Fat back is that portion of the side which remains after removal of the pork loin and belly. This classification includes skinned, unskinned, and long-cut and short-cut fat backs.

Spareribs.—Spareribs are the meaty ribs taken from the side in half or whole sheets.

Belly (when cured and smoked, commonly known as bacon).—

Dry salt trim (commonly known as "belly D. S. trim"): The roughly trimmed portion of the rough side remaining after removal of loin and fat backs and including or excluding spareribs, whether or not put down in dry salt.

Pickle trim (commonly known as "belly S. P. trim"): Same as above except trimmed reasonably square. This classification includes English style bellies and all belly cuts not otherwise described, including fancy trimmed bellies and briskets.

Briskets.—Briskets are pieces removed from the shoulder ends of bellies.

Jowl.—A jowl is the cheek and part of the neck. This classification includes jowl butts and bacon squares.

Head.—The head is the hog skull and jawbones with attached organs and fleshy covering, except the jowls.

Trimmings.—The trimmings are the boneless meat of all degrees of lean and fat derived from any portion of the hog carcass which has lost its identity as a major cut.

Foot.—The foot is that part of the front or hind leg from approximately the knee joint downward.

Neck bones.—Neck bones are bones of the neck with adhering flesh after removal from the rough shoulder.

Cheek meat and temple meat.—Cheek meat and temple meat consist of the fleshy covering of the upper jawbone and fore part of skull.

Lard.—Lard is edible hog fat after rendering. This includes refined and unrefined lard, neutral lard, and leaf lard. Unrendered fats should be converted to a lard yield basis.

Viscera.—Viscera are the intestines, with their contents, and vital organs of the body cavities, with their attached fats.

Edible offal.—Edible offal are the various edible products obtained from hog viscera and hog heads; also the hog feet and tails.

Inedible offal.—Inedible offal are the various inedible products obtained in the slaughter of hogs, consisting largely of blood, hair, bristles, parts of the viscera and their contents, and skin.

Tankage.—Tankage is the residue from rendering or cooking operations in the production of lard or grease from hog products.

Fresh, chilled, or green meat.—Fresh, chilled, or green meat is meat which has not been subjected to any preservative treatment, such as cooking, drying, freezing, or the use of curing agents.

Frozen meat.—Frozen meat is fresh meat held below the freezing temperature of such meat.

In cure.—In cure (usually called by the trade "in process of cure") is meat under treatment of curing or preservative agents. This includes all meat packed as barreled pork.

Cured meat.—Cured meat is meat which has gone through a complete curing or preservative process.

Put down or pack.—To place meat in cure.

Smoked meat.—Smoked meat is meat exposed to a smoking treatment.

Cooked meat.—Cooked meat is meat exposed to a cooking treatment.

Canned meat.—Canned meat is meat cooked and packed in hermetically sealed metal or glass containers.

Dried meat.—Dried meat is meat preserved by a drying treatment.

General.—Barreled pork is to be classified according to the cut from which derived, and reported on basis of put-down green weight.

Sausage.—Sausage is chopped or ground meat composed wholly or in chief value from pork and seasoned. It may be in bulk, or stuffed in animal casings, or packed in other containers.

Fresh sausage.—Fresh sausage is sausage made of fresh or frozen meat and not subjected to a treatment of smoking, cooking or drying.

Smoked and/or cooked sausage.—Smoked and/or cooked sausage is sausage made from fresh, frozen or cured meat and further treated by smoking or cooking, or both, but not treated by drying.

Dried sausage.—Dried sausage is sausage made from fresh, frozen or cured meat and further treated by drying. It may be further treated by smoking or cooking, or both. It includes all cervelats, salamis and mettwursts of Italian, German, Polish or other styles.

Luncheon meats.—Luncheon meats are mixtures prepared for eating without further cooking and include such articles as pork loaf, sandwich meat, head cheese, souse and similar combinations. This classification does not include canned loins or canned tongue; whole or part pieces of canned ham, which are derived from hams; canned deviled ham, canned spiced ham and canned spiced luncheon meats which are derived from trimmings. They are to be considered as cooked products of the cuts from which derived and are subject to the conversion factor prescribed therefor.

II. Conversion Factors.

I do hereby establish the following conversion factors for articles processed from hogs, to determine the amount of tax imposed or refunds to be made with respect thereto.

The following table of conversion factors fixes the percentage of the per pound processing tax on hogs with respect to a pound of the following articles processed wholly or in chief value from hogs:

Article.	Conversion factor.
Carcass:	*Per cent.*
Head and leaf included	132
Head included, leaf removed	134
Head removed, leaf included	138
Head and leaf removed	139
Wiltshire side	145
Cumberland side	132

Article.	Conversion factor.				
	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Regular ham	194	194	184	206	242
Skinned ham	219	219	205	229	292
Boneless ham	252	252	239	267	340
Rough shoulder	85	85	81	90	115
Regular shoulder	89	89	86	94	120
Skinned shoulder	94	94	89	100	127
Picnic	76	76	72	81	103
Boneless picnic	99	99	95	105	129
Shoulder butt and butt	123	123	116	130	166
Boneless butt	179	179	170	190	242
Plate	80	80	76	85	108
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	135	135	129	143	182
Pork loin	216	216	205	229	292
Fat back	87	87	83	92	117
Spareribs	66	66	63	70	89

Article.	Conversion factor.				
	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
	Per cent.	*Per cent.*	*Per cent.*	*Per cent.*	*Per cent.*
Belly D. S. trim	124	124	118	131	167
Belly S. P. trim, briskets	180	180	171	191	243
Jowl	80	80	76	85	108
Head	60	60	58	63	81
Trimmings	80	80	76	85	108
Neck bones	19	19	18	20	26
Feet	19	19	18	20	26
Tails	44	44	42	47	59
Livers, hearts, and kidneys	44	44	42	47	59
Snouts, ears, lips, and miscellaneous edible offal	22	22	21	23	30
Cheek meat	88	88	84	94	118
Brains	44	44	42	47	59
Tongues	166	166	157	176	224
Lard	110				
Pork sausage	80	80	76	85	112
Dried sausage (including cervelats and salamis)	60	60	57	63. 75	84
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	76	76	72. 20	81. 75	106. 40
Inedible offal	0	0	0	0	0

In the event that any taxpayer or person entitled to a refund establishes that any or all of the types of sausages, processed wholly or in chief value from hogs, on which a tax is imposed, or which may be the subject of a claim for refund, which are included in the above list, contain more or less pork, green weight, than represented by the listed conversion factor, then the conversion factor, for each pound of pork, green weight, which said sausages are established to contain, shall be the following percentage of the per pound processing tax on hogs:

(*a*) If fresh meat, 80 per cent.
(*b*) If cured, dry salt meat, 80 per cent.
(*c*) If cured, sweet pickle meat, 76 per cent.
(*d*) If smoked meat, 85 per cent.
(*e*) If cooked, dried or canned meat, 112 per cent.

Edible products, wholly or in chief value of pork, for which no specific conversion factor is prescribed in these regulations are not excluded from the payment of the compensating or floor stocks taxes. They shall be subject, with respect to the amount of their pork content, to the conversion factor prescribed for the cut from which they are derived in whole or in chief part.

PAR. E. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. F. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. G. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

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

PAR. H. Section 1119, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

Whether or not the method of collecting any tax imposed by Titles IV, V, VI, or VII is specifically provided therein, any such tax may, under regulations prescribed by the Commissioner with the approval of the Secretary, be collected by stamp, coupon, serial-numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax. All administrative and penalty provisions of Title VIII, in so far as applicable, shall apply to the collection of any tax which the Commissioner determines or prescribes shall be collected in such manner.

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws the following regulations are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act and the proclamation and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of hogs becomes effective at the earliest moment of November 5, 1933. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from hogs, and imported on or after November 5, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from hogs which, on November 5, 1933, are held for sale or other disposition.

The rates of processing tax are given in article 2 of these regulations. The rates of compensating tax and tax on floor stocks are given in article 3 of these regulations.

(*b*) By virtue of the proclamation of the Secretary of Agriculture, set forth in paragraph B, above, Regulations 81, relating to the processing tax and compensating tax; Regulations 82, relating to the tax on floor stocks; and Regulations 83, relating to exportation, which are general regulations under the Agricultural Adjustment Act, become applicable to hogs. These regulations supplement, but are not intended to change or revoke in any way, Regulations 81, Regulations 82, or Regulations 83.

(*c*) With respect to products processed or manufactured wholly or in chief value from hogs, the date, November 5, 1933, is the "effective date" as defined and used in Regulations 81, Regulations 82, and Regulations 83, that is, the date when the processing tax on hogs first takes effect. See article 2(*b*) for the dates subsequent to November 5, 1933, when increased rates of processing tax become effective.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph D, above, are hereby adopted as part of these regulations.

ART. 2. *Processing tax.*—(*a*) The processing tax on the first domestic processing of hogs becomes effective at the first moment of November 5, 1933. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 4. The first return of processing tax shall embrace the period November 5, 1933, to November 30, 1933, both inclusive, and shall be filed on or before December 31, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

(*b*) In accordance with the regulations of the Secretary of Agriculture, the rates of tax applicable to the first domestic processing of hogs are: As of November 5, 1933, 50 cents per hundredweight, live weight; as of December 1, 1933, $1 per hundredweight, live weight; as of January 1, 1934, $1.50 per hundredweight, live weight; as of February 1, 1934, $2 per hundredweight, live weight.

(*c*) For the period from November 5, 1933, to November 30, 1933, both inclusive, and for each calendar month thereafter, each processor of hogs shall keep a record of (1) the number and weight of hogs on hand at the beginning of the period, (2) the number and weight of hogs received during the period, (3) the number and weight of hogs shipped or delivered during the period, (4) the number and weight of hogs on hand at the end of the period. The number

and weight must be ascertained by actual count and weight and not by estimation.

ART. 3. *Rates of tax.*—(*a*) The amounts of tax imposed with respect to certain articles processed wholly or in chief value from hogs, as determined upon the basis of the determination by the Secretary of Agriculture of processing tax rates given in article 2 and of his prescription of conversion factors in his regulations set forth in paragraph D, above, are as follows:

Rates of tax on floor stocks of articles or products processed wholly or in chief value from hogs held for sale or other disposition November 5, 1933, and rates of compensating tax on such articles or products effective from November 5, 1933, to November 30, 1933, both inclusive.

[Rates of tax shown are cents per pound.]

Article.	Head and leaf included.	Head included, leaf removed.	Head removed, leaf included.	Head and leaf removed.	Wiltshire side.	Cumberland side.
Carcass	.66	.67	.69	.69	.72	.66

Articles.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Regular ham	.97	.97	.92	1.03	1.21
Skinned ham	1.09	1.09	1.02	1.14	1.46
Boneless ham	1.26	1.26	1.19	1.33	1.7
Rough shoulder	.42	.42	.4	.45	.57
Regular shoulder	.44	.44	.43	.47	.6
Skinned shoulder	.47	.47	.44	.5	.63
Picnic	.38	.38	.36	.4	.51
Boneless picnic	.49	.49	.47	.52	.64
Shoulder butt and butt	.61	.61	.58	.65	.83
Boneless butt	.89	.89	.85	.95	1.21
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	.67	.67	.64	.71	.91
Pork loin	1.08	1.08	1.02	1.14	1.46
Fat back	.43	.43	.41	.46	.58
Spareribs	.33	.33	.31	.35	.44
Belly D. S. trim	.62	.62	.59	.65	.83
Belly S. P. trim and briskets	.9	.9	.85	.95	1.21
Plate, jowl, and trimmings	.4	.4	.38	.42	.54
Head	.3	.3	.29	.31	.4
Neck bones and feet	.09	.09	.09	.1	.13
Tails, livers, hearts, kidneys, and brains	.22	.22	.21	.23	.29
Snouts, ears, lips, and miscellaneous edible offal	.11	.11	.1	.11	.15
Cheek meat	.44	.44	.42	.47	.59
Tongues	.83	.83	.78	.88	1.12
Lard	.55				
Pork sausage	.4	.4	.38	.42	.56
Dried sausage (including cervelats and salamis)	.3	.3	.28	.31	.42
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	.38	.38	.36	.4	.53
Sausage, pork content (see note 1)	.4	.4	.38	.42	.56

(b) Rates of compensating tax on articles or products processed wholly or in chief value from hogs effective from December 1, 1933, to December 31, 1933, both inclusive.

[Rates of tax shown are cents per pound.]

Article.	Head and leaf included.	Head included, leaf removed.	Head removed, leaf included.	Head and leaf removed.	Wiltshire side.	Cumberland side.
Carcass	1. 32	1. 34	1. 38	1. 39	1. 45	1. 32

Articles.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Regular ham	1. 94	1. 94	1. 84	2. 06	2. 42
Skinned ham	2. 19	2. 19	2. 05	2. 29	2. 92
Boneless ham	2. 52	2. 52	2. 39	2. 67	3. 4
Rough shoulder	. 85	. 85	. 81	. 9	1. 15
Regular shoulder	. 89	. 89	. 86	. 94	1. 2
Skinned shoulder	. 94	. 94	. 89	1.	1. 27
Picnic	. 76	. 76	. 72	. 81	1. 03
Boneless picnic	. 99	. 99	. 95	1. 05	1. 29
Shoulder butt and butt	1. 23	1. 23	1. 16	1. 3	1. 66
Boneless butt	1. 79	1. 79	1. 7	1. 9	2. 42
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	1. 35	1. 35	1. 29	1. 43	1. 82
Pork loin	2. 16	2. 16	2. 05	2. 29	2. 92
Fat back	. 87	. 87	. 83	. 92	1. 17
Spareribs	. 66	. 66	. 63	. 7	. 89
Belly D. S. trim	1. 24	1. 24	1. 18	1. 31	1. 67
Belly S. P. trim and briskets	1. 8	1. 8	1. 71	1. 91	2. 43
Plate, jowl, and trimmings	. 8	. 8	. 76	. 85	1. 08
Head	. 6	. 6	. 58	. 63	. 81
Neck bones and feet	. 19	. 19	. 18	. 2	. 26
Tails, livers, hearts, kidneys, and brains	. 44	. 44	. 42	. 47	. 59
Snouts, ears, lips, and miscellaneous edible offal	. 22	. 22	. 21	. 23	. 3
Cheek meat	. 88	. 88	. 84	. 94	1. 18
Tongues	1. 66	1. 66	1. 57	1. 76	2. 24
Lard	1. 1				
Pork sausage	. 8	. 8	. 76	. 85	1. 12
Dried sausage (including cervelats and salamis)	. 6	. 6	. 57	. 63	. 84
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	. 76	. 76	. 72	. 81	1. 06
Sausage, pork content (see note 1)	. 8	. 8	. 76	. 85	1. 12

(c) *Rates of compensating tax on articles or products processed wholly or in chief value from hogs, effective from January 1, 1934, to January 31, 1934, both inclusive.*

[Rates of tax shown are cents per pound.]

Article.	Head and leaf included.	Head included, leaf removed.	Head removed, leaf included.	Head and leaf removed.	Wiltshire side.	Cumberland side.
Carcass	1. 98	2. 01	2. 07	2. 08	2. 17	1. 98

Articles.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Regular ham	2. 91	2. 91	2. 76	3. 09	3. 63
Skinned ham	3. 28	3. 28	3. 07	3. 43	4. 38
Boneless ham	3. 78	3. 78	3. 58	4.	5. 1
Rough shoulder	1. 27	1. 27	1. 21	1. 35	1. 72
Regular shoulder	1. 33	1. 33	1. 29	1. 41	1. 8
Skinned shoulder	1. 41	1. 41	1. 33	1. 5	1. 9
Picnic	1. 14	1. 14	1. 08	1. 21	1. 54
Boneless picnic	1. 48	1. 48	1. 42	1. 57	1. 93
Shoulder butt and butt	1. 84	1. 84	1. 74	1. 95	2. 49
Boneless butt	2. 68	2. 68	2. 55	2. 85	3. 63
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	2. 02	2. 02	1. 93	2. 14	2. 73
Pork loin	3. 24	3. 24	3. 07	3. 43	4. 38
Fat back	1. 3	1. 3	1. 24	1. 38	1. 75
Spareribs	. 99	. 99	. 94	1. 05	1. 33
Belly D. S. trim	1. 86	1. 86	1. 77	1. 96	2. 5
Belly S. P. trim and briskets	2. 7	2. 7	2. 56	2. 86	3. 64
Plate, jowl, and trimmings	1. 2	1. 2	1. 14	1. 27	1. 62
Head	. 9	. 9	. 87	. 94	1. 21
Neck bones and feet	. 28	. 28	. 27	. 3	. 39
Tails, livers, hearts, kidneys, and brains	. 66	. 66	. 63	. 7	. 88
Snouts, ears, lips, and miscellaneous edible offal	. 33	. 33	. 31	. 34	. 45
Cheek meat	1. 32	1. 32	1. 26	1. 41	1. 77
Tongues	2. 49	2. 49	2. 35	2. 64	3. 36
Lard	1. 65				
Pork sausage	1. 2	1. 2	1. 14	1. 27	1. 68
Dried sausage (including cervelats and salamis)	. 9	. 9	. 85	. 95	1. 26
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	1. 14	1. 14	1. 08	1. 22	1. 59
Sausage, pork content (see note 1)	1. 2	1. 2	1. 14	1. 27	1. 68

(d) Rates of compensating tax on articles or products processed wholly or in chief value from hogs, effective on and after February 1, 1934.

[Rates of tax shown are cents per pound.]

Article.	Head and leaf included.	Head included, leaf removed.	Head removed, leaf included.	Head and leaf removed.	Wiltshire side.	Cumberland side.
Carcass	2. 64	2. 68	2. 76	2. 78	2. 9	2. 64

Article.	Fresh, frozen, in cure, or barreled pork.	Cured.		Smoked.	Cooked, dried, or canned.
		Dry salt.	Pickle.		
Regular ham	3. 88	3. 88	3. 68	4. 12	4. 84
Skinned ham	4. 38	4. 38	4. 1	4. 58	5. 84
Boneless ham	5. 04	5. 04	4. 78	5. 34	6. 8
Rough shoulder	1. 7	1. 7	1. 62	1. 8	2. 3
Regular shoulder	1. 78	1. 78	1. 72	1. 88	2. 4
Skinned shoulder	1. 88	1. 88	1. 78	2.	2. 54
Picnic	1. 52	1. 52	1. 44	1. 62	2. 06
Boneless picnic	1. 98	1. 98	1. 9	2. 1	2. 58
Shoulder butt and butt	2. 46	2. 46	2. 32	2. 6	3. 32
Boneless butt	3. 58	3. 58	3. 4	3. 8	4. 84
Rough short ribs, short ribs, extra short ribs, short clears, extra short clears, rib back	2. 7	2. 7	2. 58	2. 86	3. 64
Pork loin	4. 32	4. 32	4. 1	4. 58	5. 84
Fat back	1. 74	1. 74	1. 66	1. 84	2. 34
Spareribs	1. 32	1. 32	1. 26	1. 4	1. 78
Belly D. S. trim	2. 48	2. 48	2. 36	2. 62	3. 34
Belly S. P. trim and briskets	3. 6	3. 6	3. 42	3. 82	4. 86
Plate, jowl, and trimmings	1. 6	1. 6	1. 52	1. 7	2. 16
Head	1. 2	1. 2	1. 16	1. 26	1. 62
Neck bones and feet	. 38	. 38	. 36	. 4	. 52
Tails, livers, hearts, kidneys, and brains	. 88	. 88	. 84	. 94	1. 18
Snouts, ears, lips, and miscellaneous edible offal	. 44	. 44	. 42	. 46	. 6
Cheek meat	1. 76	1. 76	1. 68	1. 88	2. 36
Tongues	3. 32	3. 32	3. 14	3. 52	4. 48
Lard	2. 2				
Pork sausage	1. 6	1. 6	1. 52	1. 7	2. 24
Dried sausage (including cervelats and salamis)	1. 2	1. 2	1. 14	1. 27	1. 68
Luncheon meats (including pork loaf, head cheese, souse, and sandwich meat)	1. 52	1. 52	1. 44	1. 63	2. 12
Sausage, pork content (see note 1)	1. 6	1. 6	1. 52	1. 7	2. 24

NOTE.—(1) In the event that the taxpayer can establish that any or all of the types of sausages processed wholly or in chief value from hogs listed above contain more or less pork, green weight, than that represented by the rate listed, then for each pound of pork, green weight, which said sausages are established to contain, the rate of tax applicable in such case shall be as shown in the schedule above. The whole (actual) weight as well as the total pork content shall be reported.

(2) Edible products wholly or in chief value of pork, which are not specifically listed, are subject, with respect to the amount of their pork content, to tax at the rate listed for the cut from which they are derived in whole or in chief part. Each product shall be described, and the cut from which it was derived in whole or in chief part shall be shown. With respect to each described product there shall be entered on the return (*a*) the whole (actual) weight, (*b*) the pork content, and (*c*) the rate of tax, corresponding with that shown for the cut in the schedule above.

(3) Establishment of the pork content of products, as provided in (1) and (2), shall be substantiated by authentic records or other satisfactory proof.

ART. 4. *Floor stocks.*—(*a*) On November 5, 1933, the tax on floor stocks becomes effective on certain articles, processed wholly or in chief value from hogs, which on that date are held for sale or other disposition. The respective rates of tax applicable to such articles are given in article 3(*a*) of these regulations. For detailed regulations as to tax on floor stocks, see Regulations 82.

The form prescribed for return of the floor tax on all articles other than separate retail stocks is P. T. Form 34, Floor tax inventory and return (stocks other than separate retail stocks). This return must be filed on or before December 5, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

The form prescribed for return of tax on floor stocks (separate retail stocks) is P. T. Form 44, Floor tax inventory, record and return. This return must be filed on or before January 4, 1934. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

See article 7 for list of prescribed forms.

(*b*) Every person who, on November 5, 1933, owns a warehouse receipt for products processed wholly or in chief value from hogs, shall indorse plainly on such receipt a statement showing his name and address and that he owned such receipt on the first moment of November 5, 1933, and is responsible for payment of the floor tax on the products represented by the receipt.

If, on said date, any such receipt is in the possession of any person other than the owner, such person shall indorse such statement for the owner on the receipt, together with such person's name and official title, if any.

If on or after November 5, 1933, any person buys for himself or as agent for his principal any such products, and in such sale delivery of the products is made either in whole or in part by a warehouse receipt issued prior to said date, such person shall not accept as valid delivery any such receipt unless the statement required above is indorsed on the receipt, or unless there is attached thereto the owner's receipt on Form 1, showing payment of the tax on floor stocks on the products represented by such warehouse receipt.

When any such receipt (issued before November 5, 1933) is presented to the warehouse, either for the purpose of withdrawing all or part of the products represented thereby, or for the purpose of surrendering the receipt and receiving a new receipt or new receipts covering the same products or any part thereof, the warehouseman, before delivering such products or any part thereof, or such new receipt or new receipts, shall require that the receipt so presented or surrendered has attached thereto a receipt from the collector of internal revenue for the district, on Form 1, showing that the floor tax has been paid on the products represented by the receipt so presented or surrendered, or shall forthwith notify the collector that a receipt has been presented or surrendered without there being attached thereto Form 1. The notice to the collector shall give the date and serial number of the receipt, the kind and quantity of products covered thereby, the name of the person to whom the receipt was issued, and the name or names of all persons who have indorsed such receipt, and the name and address of the person who presents or surrenders such receipt.

Each person who, on November 5, 1933, owns such products in a warehouse, for which a warehouse receipt has been issued before that date, shall, before such receipt is presented or surrendered to the warehouse (as set forth above), and in any event not later than December 5, 1933, file with the collector of internal revenue for the district, an inventory and return on P. T. Form 34 in accordance with the provisions of article 11 of Regulations 82. The payment of the tax shown on any such return may be postponed to December 5, 1933, except that the tax on any product in a warehouse, for which a warehouse receipt has been issued prior to November 5, 1933, must be paid on or before the presentation or surrender of such warehouse receipt to the warehouse, but not later than December 5, 1933. (For further postponement in the case of certain existing contracts, see article 6(*b*).)

(*c*) Each person who, on the effective date, holds for sale or other disposition any hog products, shall make a true and correct inventory thereof, as of the earliest moment of that date, and shall preserve a copy of such inventory, together with a record of all facts necessary to the determination of the correctness of such inventory. Such copy of inventory record shall be preserved

and kept open for inspection and subject to all the requirements relative to records set forth in Regulations 82, article 21.

ART. 5. *Compensating tax on imported articles.*—On and after November 5, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from hogs, and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The respective rates of tax applicable to such products are given in article 3 of these regulations. For detailed regulations as to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 14. See article 7 for list of prescribed forms.

ART. 6. *Existing contracts.*—(*a*) For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

If a processor has such a contract for delivery on or after November 5, 1933, of an article processed wholly or in chief value from hogs, the tax on such processing (if done on or after November 5, 1933) must be returned on the current monthly return and then paid. The rate shown in article 3 of these regulations should be used in determining the amount of tax to be collected from the vendee.

The vendee under such a contract is entitled, where optional rates may be applicable, to exercise such option.

(*b*) If a processor, jobber, or wholesaler has such a contract, made before November 5, 1933, calling for delivery on or after that date of products processed wholly or in chief value from hogs, which products are on November 5, 1933, in a public warehouse and a receipt therefor has been issued and the receipt for such products is not presented to the warehouse before December 5, 1933, payment of the floor tax on such products may be postponed until such receipt is so presented, but in any event not later than February 3, 1934. The collector's receipt on Form 1 must be attached to such receipt when presented.

ART. 7. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83, and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to hogs are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 4	Processing tax return	Regulations 81, article 11.
P. T. Form 14	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(b).
P. T. Form 34	Floor tax inventory and return, by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 44	Floor tax inventory, record and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 51, revised.	Monthly statement of importer	Regulations 81, article 21.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved November 11, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

TOBACCO.

XII–41–6451
T. D. 4395

Processing and other taxes with respect to tobacco under the Agricultural Adjustment Act.

Processing tax, effective October 1, 1933, on the first domestic processing of cigar-leaf tobacco, domestic or imported, and on the first domestic processing of Maryland, Burley, flue-cured, fire-cured, and dark air-cured tobacco, domestic or imported; tax on floor stocks of articles processed wholly or in chief value from any such tobacco held on October 1, 1933, for sale or other disposition; compensating tax on articles processed or manufactured wholly or in chief value from any such tobacco and imported on or after October 1, 1933.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * *

PAR. B. A proclamation of the Secretary of Agriculture, dated August 10, 1933, provides:

I, REXFORD G. TUGWELL, Acting Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to cigar-leaf tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to Maryland tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to Burley tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the

Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to flue-cured tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to fire-cured tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

A proclamation of the Secretary of Agriculture, dated September 5, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to dark air-cured tobacco, a market classification of tobacco hereby determined to be a basic agricultural commodity within the meaning of the above Act.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulations shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations, with respect to cigar-leaf tobacco, made by the Secretary of Agriculture, with the approval of the President, dated September 14, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for cigar-leaf tobacco shall begin October 1, 1933.

I do hereby find that the rate of tax as of October 1, 1933, which equals the difference between the current average farm price for cigar-leaf tobacco, farm sales weight, and the fair exchange value of cigar-leaf tobacco, farm sales weight, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture, will cause such reduction in the quantity of cigar-leaf tobacco, or products thereof, domestically consumed as to result in the accumulation of surplus stocks of cigar-leaf tobacco, or products thereof, or in the depression of the farm price of cigar-leaf tobacco. I do accordingly hereby determine, as of October 1, 1933, that the rate of the processing tax on the first domestic processing of cigar-leaf tobacco shall be three (3) cents per pound, unsweated, farm sales weight, which rate will prevent such accumulation of surplus stocks and depression of the farm price of cigar-leaf tobacco. Whenever sweated cigar-leaf tobacco from which stem has not been removed is processed, the measure of tax to be paid by the processor in respect of each pound of such tobacco processed shall be three and seventy-five hundredths (3.75) cents; whenever sweated cigar-leaf tobacco from which stem has been removed is processed, the measure of tax to be paid by the processor in respect of each pound of such tobacco processed shall be five (5) cents; these amounts being in accordance with the respective weight relationships determined to exist between cigar-leaf tobacco in such States and the farm sales weight of unsweated cigar-leaf tobacco.

I. Definitions.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

"*First domestic processing.*"—The first domestic processing of cigar-leaf tobacco is the fabricating of the product to be used by the consumer. The acts of stemming, sweating or fermenting and conditioning shall not be deemed processing.

(*a*) In the case of cigars, stogies, cheroots or small cigars, it is the fabricating of cigar-leaf tobacco into the form to which no tobacco is added and from which no tobacco is subtracted; all scrap, cuttings and clippings not left in such products shall be deemed not to have been processed.

(*b*) In the case of scrap chewing and/or smoking tobacco, it is the preparing of any form of cigar-leaf tobacco for consumption as scrap chewing and/or smoking tobacco.

"*Leaf tobacco.*"—Leaf tobacco is tobacco in the forms in which it appears between the time it is stripped from the stalk, or primed and cured, and the time it enters into a manufacturing process.

"*Cigar-leaf tobacco.*"—Cigar-leaf tobacco is leaf tobacco, classified in the United States Department of Agriculture, Bureau of Agriculture Economics, Service and Regulatory Announcements No. 118 in classes 4, 5, 6, and 8; and other types and/or grades of leaf tobacco, when used in the fabrication of cigars, stogies, cheroots, small cigars, or scrap chewing and/or smoking tobacco.

"*Cigar-leaf tobacco from which stem has not been removed:*"

"Unstemmed:" Unstemmed cigar-leaf tobacco is cigar-leaf tobacco from which stem or mid-rib has not been removed, including both whole leaf and leaf scrap.

"Leaf scrap:" Leaf scrap is cigar-leaf tobacco consisting of loose and tangled whole and/or broken leaves.

"*Cigar-leaf tobacco from which stem has been removed:*"

"Stemmed or strips:" Stemmed or strips are cigar-leaf tobacco from which stem or mid-rib has been removed.

"Strip scrap:" Strip scrap is cigar-leaf tobacco consisting of loose and tangled portions of stemmed or strips.

"Shredded filler:" Shredded filler is leaf tobacco commonly known as such and usually consisting of strip scrap of two or more types of tobacco.

"Cuttings:" Cuttings are portions of cigar wrapper and/or cigar binder strips.

"Clippings:" Clippings are small portions of strips, frequently including small portions of wrapper, binder, and filler strips.

"*By-products:*"

"Siftings:" Siftings are particles of leaf tobacco salvaged from residue of tobacco after processing.

"Dust:" Dust is the residue of tobacco resulting from processing, after siftings have been salvaged.

"Sweating:" Sweating is the handling of cigar-leaf tobacco as it passes through one or more fermentations.

"Sweated:" Sweated is the condition of cigar-leaf tobacco which has passed through one or more seasonal fermentations or which has reached a corresponding degree of fermentation.

"Fermenting:" See "Sweating."

"Conditioning:" Conditioning is the preparing of cigar-leaf tobacco for storage.

"Unsweated:" Unsweated is the condition of unfermented cigar-leaf tobacco.

"Order:" Order is the state of tobacco, with respect to its moisture content.

"Cigars"—"Stogies"—"Cheroots": Cigars, stogies and cheroots are rolls of tobacco wrapped with tobacco.

"Small cigars:" Small cigars are cigars weighing not more than three (3) pounds per thousand (1,000).

"Farm sales weight:" The farm sales weight of cigar-leaf tobacco is the weight of such tobacco in its unstemmed form, unsweated, and in the order in which it is usually delivered by the grower.

II. Conversion Factors.

I do hereby establish the following conversion factors for articles processed from cigar-leaf tobacco, to determine the amount of tax imposed or refunds to be made with respect thereto.

The following table of conversion factors fixes the percentage of the per pound processing tax on cigar-leaf tobacco with respect to a pound of the following articles processed wholly or in chief value from cigar-leaf tobacco:

Cigars, stogies, cheroots, small cigars	167
Scrap chewing and/or smoking tobacco	110
Siftings and/or dust	0

In the computation of the weight of cigars, stogies, cheroots, or small cigars for the purposes of the application of the above table of conversion factors, in order to compute the tax adjustment on floor stocks, 1,000 cigars, stogies, or cheroots shall be deemed to weigh seventeen and one-half (17½) pounds, if the taxpayer so elects, and 1,000 small cigars shall be deemed to weigh two and seventy-five hundredths (2.75) pounds, if the taxpayer so elects.

PAR. E. The regulations, with respect to Maryland, Burley, flue-cured, fire-cured, and dark air-cured tobacco, made by the Secretary of Agriculture, with the approval of the President, dated September 14, 1933, provide:

I. MARKETING YEAR.

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for Maryland, Burley, flue-cured, fire-cured, and dark air-cured tobacco shall begin October 1, 1933.

II. RATES.

I do hereby determine as of October 1, 1933:

A. That the processing tax on the first domestic processing of Maryland tobacco shall be at the rate of one and seven-tenths (1.7) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for Maryland tobacco and the fair exchange value of Maryland tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever Maryland tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be one and eight-tenths (1.8) cents per pound of such tobacco; whenever Maryland tobacco in processing order from which stem has been removed is processed the measure of tax shall be two and four-tenths (2.4) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between Maryland tobacco in such states and the farm sales weight of Maryland tobacco.

B. That the processing tax on the first domestic processing of Burley tobacco shall be at the rate of two (2) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for Burley tobacco and the fair exchange value of Burley tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever Burley tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be two and three-tenths (2.3) cents per pound of such tobacco; whenever Burley tobacco in processing order from which stem has been removed is processed, the measure of tax shall be three and one-tenth (3.1) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between Burley tobacco in such states and the farm sales weight of Burley tobacco.

C. That the processing tax on the first domestic processing of flue-cured tobacco shall be at the rate of four and two-tenths (4.2) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for flue-cured tobacco and the fair exchange value of flue-cured tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever flue-cured tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be four and seven-tenths (4.7) cents per pound of such tobacco; whenever flue-cured tobacco in processing order from which stem has been removed is processed, the measure of tax shall be six and one-tenth (6.1) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between flue-cured tobacco in such states and the farm sales weight of flue-cured tobacco.

D. That the processing tax on the first domestic processing of fire-cured tobacco shall be at the rate of two and nine-tenths (2.9) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for fire-cured tobacco and the fair exchange value of fire-cured tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever fire-cured tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be three and two-tenths (3.2) cents per pound of such tobacco; whenever fire-cured tobacco in processing order from which stem has been removed is processed, the measure of tax shall be four and one-tenth (4.1) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between fire-cured tobacco in such states and the farm sales weight of fire-cured tobacco.

E. That the processing tax on the first domestic processing of dark air-cured tobacco shall be at the rate of three and three-tenths (3.3) cents per pound, farm sales weight, which rate equals the difference between the current average farm price for dark air-cured tobacco and the fair exchange value of dark air-cured tobacco, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture. Whenever dark air-cured tobacco in processing order from which stem has not been removed is processed, the measure of tax shall be three and eight-tenths (3.8) cents per pound of such tobacco; whenever dark air-cured tobacco in processing order from which stem has been removed is processed, the measure of tax shall be five and one-tenth (5.1) cents per pound of such tobacco; these amounts being in accordance with the respective weight relationships determined to exist between dark air-cured tobacco in such states and the farm sales weight of dark air-cured tobacco.

III. Definitions.

The following terms, as used in these regulations, shall have the meanings hereby assigned to them:

"*Maryland:*" Maryland tobacco is the kind of air-cured tobacco classified as type 32 in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements No. 118. It shall be deemed to include also all the other domestic light air-cured tobacco excepting Burley when processed in the manufacture of cigarettes, smoking tobacco, chewing tobacco and/or snuff.

"*Burley:*" Burley tobacco is the kind of air-cured tobacco classified as type 31, in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements No. 118.

"*Flue-cured:*" Flue-cured tobacco is the kind of tobacco classified as types 11, 12, 13, 14, and 90 in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements No. 118. It shall be deemed to include also all other flue-cured tobacco when processed in the manufacture of cigarettes, smoking tobacco, chewing tobacco, and/or snuff.

"*Fire-cured:*" Fire-cured tobacco is the kind of tobacco classified as types 21, 22, 23, and 24, in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements No. 118. It shall be deemed to include also all other domestic fire-cured tobacco when processed in the manufacture of cigarettes, smoking tobacco, chewing tobacco, and/or snuff.

"*Dark air-cured:*" Dark air-cured tobacco is the kind of tobacco classified as types 35, 36, and 37, in the United States Department of Agriculture, Bureau of Agricultural Economics, Service and Regulatory Announcements No. 118. It shall be deemed to include also all other domestic dark air-cured tobacco when processed in the manufacture of cigarettes, smoking tobacco, chewing tobacco, and/or snuff.

"*Cigar-leaf tobacco:*" When any of the above kinds of tobacco is used in the manufacture of cigars, stogies, cheroots, small cigars, or scrap chewing and/or smoking tobacco, that part so used shall be deemed not to be included in the above commodities. Such tobacco when so used is defined as cigar-leaf tobacco by Tobacco Regulations, Series 1.

"*First domestic processing:*" The first domestic processing of Maryland, Burley, flue-cured, fire-cured, or dark air-cured tobacco is the fabricating of

the product to be used by the consumer. In the case of cigarettes, smoking tobacco, chewing tobacco, and snuff, it is the fabricating of any one or more of the above kinds of tobacco into the articles to be consumed.

"*Processing order:*" Processing order is the state of Maryland, Burley, flue-cured, fire-cured and/or dark air-cured tobacco at the time of processing thereof.

"*Cigarettes:*" Cigarettes are rolls of tobacco wrapped in paper.

"*Snuff:*" Snuff is tobacco that has been cut, ground, or pulverized into small particles for use in sniffing, dipping, or chewing.

"*Smoking tobacco:*" Smoking tobacco is tobacco of different kinds prepared for use principally for smoking purposes.

(*a*) "Granulated smoking tobacco:" Granulated smoking tobacco is tobacco that is cut, threshed, or broken into small particles suitable particularly for pipe smoking or hand rolled cigarettes.

(*b*) "Other smoking tobacco:" Other smoking tobacco is tobacco not granulated which is prepared for use principally for pipe smoking.

"*Chewing tobacco:*" Chewing tobacco is tobacco of different kinds prepared for use principally for chewing purposes.

(*a*) "Plug:" Plug tobacco is tobacco which is manufactured and pressed into flat cakes.

(*b*) "Other chewing tobacco:" Other chewing tobacco is tobacco prepared for use principally for chewing.

"*Leaf tobacco:*" Leaf tobacco is tobacco in the forms in which it appears between the time it is stripped from the stalk, or primed and cured, and the time it enters into a manufacturing process.

"*Leaf tobacco from which stem has not been removed:*"

"Unstemmed:" Unstemmed leaf tobacco is leaf tobacco from which stem or mid-rib has not been removed, including both whole leaf and leaf-scrap.

"Leaf-scrap:" Leaf-scrap is leaf tobacco consisting of loose and tangled whole and/or broken leaves.

"*Leaf tobacco from which stem has been removed:*"

"Stemmed or strips:" Stemmed or strips are leaf tobacco from which stem or mid-rib has been removed.

"Strip-scrap:" Strip-scrap is leaf tobacco consisting of loose and tangled portions of stemmed or strips.

"*By-products:*"

"Siftings:" Siftings are particles of leaf tobacco salvaged from the residue of tobacco after processing.

"Dust:" Dust is the residue of tobacco resulting from processing, after siftings have been salvaged.

"*Sweating:*" Sweating is the handling of leaf tobacco as it passes through one or more fermentations.

"*Order:*" Order is the state of tobacco with respect to its moisture content.

"*Farm sales weight:*" The farm sales weight of leaf tobacco is the weight of leaf tobacco in its unstemmed form and in the order it is usually delivered by the grower.

IV. Conversion Factors.

I do hereby establish the following conversion factors for articles processed from Maryland, Burley, flue-cured, fire-cured, and/or dark air-cured tobacco to determine the amount of tax imposed or refunds to be made with respect thereto:

Article.	Unit.	Conversion factor.
Cigarettes	1,000	183 per centum of the per pound processing tax on flue-cured tobacco.
Smoking tobacco:		
(1) Granulated smoking tobacco.	Pound	88 per centum of the per pound processing tax on flue-cured tobacco.
(2) Smoking tobacco, other than granulated.	Pound	59 per centum of the per pound processing tax on Burley tobacco.

Article.	Unit.	Conversion factor.
Chewing tobacco:		
(1) Plug chewing tobacco	Pound	45 per centum of the per pound processing tax on Burley tobacco.
(2) Chewing tobacco other than plug.	Pound	81 per centum of the per pound processing tax on dark air-cured tobacco.
Snuff	Pound	102 per centum of the per pound processing tax on fire-cured tobacco.
Siftings and dust	Pound	

In the event that any taxpayer or any person entitled to a refund establishes that any article, processed wholly or in chief value from Maryland, Burley, flue-cured, fire-cured, or dark air-cured tobacco, on which a tax is imposed or which may be the subject of a claim for refund, which is included in the above list is processed wholly or in chief value from a kind of tobacco other than that listed above for such article, or contains more or less of the kind of tobacco so listed than represented by the listed conversion factor, the conversion factor for such article shall be:

(*a*) If processed wholly or in chief value from Maryland tobacco, 144 per centum of the per pound processing tax on Maryland tobacco for each pound of Maryland tobacco said article is established to contain.

(*b*) If processed wholly or in chief value from Burley tobacco, 155 per centum of the per pound processing tax on Burley tobacco for each pound of Burley tobacco said article is established to contain.

(*c*) If processed wholly or in chief value from flue-cured tobacco, 145 per centum of the per pound processing tax on flue-cured tobacco for each pound of flue-cured tobacco which said article is established to contain.

(*d*) If processed wholly or in chief value from fire-cured tobacco, 143 per centum of the per pound processing tax on fire-cured tobacco, for each pound of fire-cured tobacco which said article is established to contain.

(*e*) If processed wholly or in chief value from dark air-cured tobacco, 156 per centum of the per pound processing tax on dark air-cured tobacco which said article is established to contain.

PAR. F. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. G. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. H. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

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

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws the following regulations are hereby prescribed:

ARTICLE 1. *General.*—(*a*) By virtue of the provisions of the Agricultural Adjustment Act and the proclamations and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of cigar-leaf tobacco, Maryland tobacco, Burley tobacco, flue-cured tobacco, fire-cured tobacco, and dark air-cured tobacco becomes effective at the earliest moment of

October 1, 1933. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from any type or kind of tobacco enumerated in this paragraph, and imported on or after October 1, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from any such type or kind of tobacco which, on October 1, 1933, are held for sale or other disposition.

The rates of processing tax are given in article 2 of these regulations. The rates of compensating tax and tax on floor stocks are given in article 3 of these regulations.

(*b*) By virtue of the proclamations of the Secretary of Agriculture, set forth in paragraph B, above, Regulations 81, relating to the processing tax and compensating tax; Regulations 82, relating to the tax on floor stocks; and Regulations 83, relating to exportation, which are general regulations under the Agricultural Adjustment Act, become applicable to the types and kinds of tobacco referred to in such proclamations. These regulations supplement, but are not intended to change or revoke in any way, Regulations 81, Regulations 82, or Regulations 83.

(*c*) With respect to the above types or kinds of tobacco and articles or products processed or manufactured wholly or in chief value therefrom, the date, October 1, 1933, is the "effective date," as defined and used in Regulations 81, Regulations 82, and Regulations 83.

(*d*) The various definitions set forth in the regulations of the Secretary of Agriculture in paragraph D and paragraph E, above, are hereby adopted as part of these regulations.

ART. 2. *Processing tax.*—(*a*) The processing tax on the first domestic processing of any type or kind of tobacco mentioned in paragraph D and paragraph E, above, becomes effective at the first moment of October 1, 1933. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 6. The first return of processing tax shall embrace the period October 1, 1933, to October 31, 1933, both inclusive, and shall be filed on or before November 30, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

(*b*) In accordance with the regulations of the Secretary of Agriculture, based upon the following rates per pound, farm sales weight, of unsweated, unstemmed tobacco: cigar-leaf tobacco, 3 cents; Maryland, 1.7 cents; Burley, 2 cents; flue-cured, 4.2 cents; fire-cured, 2.9 cents; dark air-cured, 3.3 cents, the following rates of tax are applicable to the first domestic processing:

	Rates of tax per pound—	
	Stem not removed.	Stem removed.
Cigar-leaf tobacco, sweated	$0. 0375	$0. 05
Maryland tobacco, in processing order	. 018	. 024
Burley tobacco, in processing order	. 023	. 031
Flue-cured tobacco, in processing order	. 047	. 061
Fire-cured tobacco, in processing order	. 032	. 041
Dark air-cured tobacco, in processing order	. 038	. 051

(*c*) For the period from October 1, 1933, to October 31, 1933, both inclusive, and for each calendar month thereafter, each processor of the types or kinds of tobacco covered by these regulations shall keep a record (by type or kind) of (1) the quantity of tobacco on hand at the beginning of the period, (2) the quantity of tobacco received during the period, (3) the quantity of tobacco shipped or delivered during the period, (4) the quantity of tobacco sold or

otherwise disposed of as waste during the period, and (5) the quantity of tobacco on hand at the end of the period. These quantities must be ascertained by actual weighing on accurate scales and not by estimation.

(*d*) The processing of tobacco in the production of insecticides or fertilizers is exempt from the tax.

ART. 3. *Rates of compensating tax and tax on floor stocks.*—

(*a*) *Articles processed from cigar-leaf tobacco.*—The respective rates of tax on floor stocks of, or of compensating tax with respect to, articles or products processed wholly or in chief value from cigar-leaf tobacco, are as follows:

Cigars, stogies, cheroots	per pound	$0.0501
Small cigars	do	.0501
Scrap chewing or smoking tobacco	do	.033

In computing the tax on *floor stocks* of cigars, stogies, cheroots, or small cigars, if the taxpayer elects to pay by count instead of by weight, 1,000 cigars, stogies, or cheroots shall be deemed to weigh seventeen and one-half (17½) pounds, and 1,000 small cigars shall be deemed to weigh two and seventy-five hundredths (2.75) pounds. The election must be made at the time the return is filed, and must embrace the taxpayer's entire stock of cigars, stogies, cheroots, and small cigars, and not a portion of such stock. If the taxpayer elects to pay by count, the rates shall be as follows:

Cigars, stogies, cheroots	per thousand	$0.87675
Small cigars	do	.137775

In the inventory and return of floor stocks as required by Regulations 82, the number of cigars and stogies and cheroots and small cigars must, in any event, be given, whether the taxpayer elects to pay the floor tax by weight or by count.

(*b*) *Articles processed from Maryland, Burley, flue-cured, fire-cured, and dark air-cured tobacco.*—The rates of tax governing the amount of tax on floor stocks of, or of compensating tax with respect to, articles or products processed wholly or in chief value from Maryland, Burley, flue-cured, fire-cured, or dark air-cured tobacco are as follows:

Cigarettes	per 1,000	$0.07686
Smoking tobacco, granulated	per pound	.03696
Smoking tobacco, other than granulated, except scrap	do	.0118
Chewing tobacco, plug	do	.009
Chewing tobacco, other than plug, except scrap	do	.02673
Snuff	do	.02958

If the taxpayer can show the type or kind of tobacco from which an article is processed wholly or in chief value, and the actual amount of that type or kind of tobacco contained in the article, and elects to pay the tax on the basis of such actual content, the rates of tax given below shall be used. The election must be made at the time the return is filed, and the return must show: (1) the type or kind of tobacco from which the article has been processed wholly or in chief value, and (2) the actual amount of that type or kind of tobacco contained in the article. The applicable rates of tax are:

Type or kind of tobacco constituting whole or chief value.	Rate per pound of content of such tobacco.
Maryland	$0.02448
Burley	.031
Flue-cured	.0609
Fire-cured	.04147
Dark air-cured	.05148

ART. 4. *Floor stocks.*—(*a*) On October 1, 1933, the tax on floor stocks becomes effective on certain stocks of articles, processed wholly or in chief value from any type or kind of tobacco with respect to which a processing tax is in

effect, which on that date are held for sale or other disposition. The respective rates of tax applicable to such articles are given in article 3 (*a*) and (*b*) of these regulations. For detailed regulations as to tax on floor stocks, see Regulations 82.

The form prescribed for return of the floor tax on all articles other than separate retail stocks is P. T. Form 36, Floor tax inventory and return (stocks other than separate retail stocks). This return must be filed on or before October 31, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

The form prescribed for return of tax on floor stocks (separate retail stocks) is P. T. Form 46, Floor tax inventory, record and return. This return must be filed on or before November 30, 1933. The tax shown thereon must be paid at the time when the return is filed, or, if the time for payment be postponed or extended, then at the time or times designated for payment in such postponement or extension.

See article 7 for list of prescribed forms.

(*b*) Each person who, on the effective date, holds for sale or other disposition articles of any kind made from any type or kind of tobacco, shall make a true and correct inventory thereof, as of the earliest moment of that date, and shall preserve such inventory, together with a record of all facts necessary to the determination of the correctness of such inventory. Such record shall be preserved and kept open for inspection and subject to all the requirements relative to records set forth in Regulations 82, article 21.

ART. 5. *Compensating tax on imported articles.*—On and after October 1, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from any type or kind of tobacco with respect to which a processing tax is in effect, and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The respective rates of tax applicable to such articles are given in article 3 (*a*) and (*b*) of these regulations. For detailed regulations as to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 16. See article 7 for list of prescribed forms.

ART. 6. *Existing contracts.*—For general provisions relating to existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

If a processor has such a contract for delivery on or after October 1, 1933, of an article processed wholly or in chief value from any type or kind of tobacco mentioned above, the tax on such processing (if done on or after October 1, 1933) must be returned on the current monthly return and then paid. The rate shown in article 3 of these regulations should be used in determining the amount of tax to be collected from the vendee.

The vendee under such a contract is entitled, where two or more optional rates may be applicable, to exercise such option.

ART. 7. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provisions of Regulations 81, Regulations 82, or Regulations 83, and must be carefully filled out in exact accordance with the applicable provisions of the proper regulations and the instructions contained on such form. The following forms with respect to tobacco are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 6	Processing tax return	Regulations 81, article 11.
P. T. Form 16	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(b).

Form No.	Designation.	Required by—
P. T. Form 36----	Floor tax inventory and return, by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 46----	Floor tax inventory, record, and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 51, revised.	Monthly statement of importer.	Regulations 81, article 21.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 30, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

WHEAT.

XII–29–6301
T. D. 4371

Processing and other taxes with respect to wheat under the Agricultural Adjustment Act.

Processing tax, effective July 9, 1933, on the first domestic processing of wheat, domestic or imported; tax on floor stocks of articles processed wholly or in chief value from wheat, held on July 9, 1933, for sale or other disposition; compensating tax on articles processed or manufactured wholly or in chief value from wheat and imported on or after July 9, 1933.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation.

PAR. B. The proclamation of the Secretary of Agriculture dated June 20, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to wheat, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulations shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations made by the Secretary of Agriculture, with the approval of the President, dated June 26, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for wheat shall begin July 9, 1933.

I do hereby determine as of July 9, 1933, that the processing tax on the first domestic processing of wheat shall be at the rate of 30 cents per bushel of 60 pounds, which rate equals the difference between the current average farm price for wheat and the fair exchange value of wheat, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture.

I do hereby establish the following conversion factors for articles processed from wheat to determine the amount of tax imposed or refunds to be made with respect thereto:

TABLE OF CONVERSION FACTORS.

This table of conversion factors fixes the percentage of the per bushel processing tax on wheat with respect to 100 pounds of the following articles processed from wheat. These percentages are based upon a basic conversion factor of 4.6 bushels of wheat as equaling 196 pounds of the flour designated in item 1(b) below.

Articles processed from wheat.

	Conversion factors.
Products of first domestic processing:	
1. Flour—	
(*a*) Whole wheat and graham	166.67
(*b*) All flour except whole wheat and graham	234.7
(*c*) Semolina and farina	234.7
2. Prepared flour—	
(*a*) Doughnut	133.8
(*b*) Biscuit	223.0
(*c*) Pancake	164.3
(*d*) Pie crust	140.8
3. Cereal preparations made chiefly from wheat—	
(*a*) Whole-wheat type, including those consisting chiefly of whole wheat	166.67
(*b*) All others except those consisting chiefly of bran	234.7
Products of secondary processing:	
4. Bread—	
(*a*) All bread except rye	161
(*b*) Rye	120
(*c*) Zwieback	154
(*d*) Rolls (all types) and coffee cake	161
5. Crackers	230
6. Pretzels	244
7. (*a*) Macaroni and spaghetti, except canned	250
(*b*) Canned macaroni and spaghetti	62.5
8. Noodles	238
9. Paste	185.8
10. Foundry molding materials	132.0

PAR. E. The amounts of tax imposed or refund to be made with respect to certain articles processed wholly or in chief value from wheat, as determined upon the basis of the determination by the Secretary of Agriculture of a processing tax rate of 30 cents per

bushel of 60 pounds and of his prescription of conversion factors in his regulations set forth in paragraph D above, are as follows:

Articles processed from wheat.

Products of first domestic processing:	Rates of tax. (Cents per pound.)
1. Flour—	
(a) Whole wheat and graham (=½ cent)	.500
(b) All flour except whole wheat and graham	.704
(c) Semolina and farina	.704
2. Prepared flour—	
(a) Doughnut	.401
(b) Biscuit	.669
(c) Pancake	.493
(d) Pie crust	.422
3. Cereal preparations made chiefly from wheat—	
(a) Whole-wheat type, including those consisting chiefly of whole wheat	.500
(b) All others except those consisting chiefly of bran	.704
Products of secondary processing:	
4. Bread—	
(a) All bread except rye	.483
(b) Rye	.360
(c) Zwieback	.462
(d) Rolls (all types) and coffee cake	.483
5. Crackers	.690
6. Pretzels	.732
7. (a) Macaroni and spaghetti, except canned	.750
(b) Canned macaroni and spaghetti	.188
8. Noodles	.714
9. Paste	.557
10. Foundry molding materials	.396

PAR. F. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. G. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. H. Section 1101 of the Revenue Act of 1926, made applicable by section 19(b) of the Agricultural Adjustment Act, provides:

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

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws, the following regulations are hereby prescribed:

ARTICLE 1. *General.*—(a) By virtue of the provisions of the Agricultural Adjustment Act and the proclamation and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of wheat becomes effective beginning at the earliest moment of July 9, 1933, at the rate of 30 cents per bushel of 60 pounds. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from wheat and imported on or after July 9, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from wheat held on July 9, 1933, for sale or other disposition. The rates shown in paragraph E for the articles there listed shall be used in computing the compensating tax and the tax on floor stocks.

(b) For regulations relating to the processing tax and the compensating tax, see Regulations 81; for regulations relating to the floor tax, see Regula-

tions 82; for regulations relating to exportation, see Regulations 83. Regulations 81, Regulations 82, and Regulations 83 are general in their scope and apply to all commodities with respect to which a tax is in effect under the Act. By virtue of the proclamation of the Secretary of Agriculture, set forth above, Regulations 81, Regulations 82, and Regulations 83 become applicable with respect to wheat. These regulations apply specifically with respect to wheat alone, and they supplement, but are not intended to change, modify, or revoke, in any way, Regulations 81, Regulations 82, or Regulations 83. These regulations apply, as respects wheat, to all the taxes—the processing tax, the compensating tax, and the tax on floor stocks.

(*c*) With respect to wheat and articles or products processed or manufactured wholly or in chief value from wheat, the date, July 9, 1933, is the "effective date," as defined and used in Regulations 81, Regulations 82, and Regulations 83.

ART. 2. *Processing tax.*—(*a*) The processing tax on the first domestic processing of wheat becomes effective at the first moment of July 9, 1933. The rate, as shown above, is 30 cents per bushel of 60 pounds. The number of bushels shall be determined on the basis of the weight of the wheat in its condition at the moment of beginning the processing of such wheat. The term "wheat" as used in these regulations means wheat of any kind, classification, type or grade. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is Form P. T. 1. The first return of processing tax shall embrace the period July 9, 1933, to July 31, 1933, both inclusive, and shall be filed on or before August 31, 1933. The tax shown thereon must be paid at the time return is filed. See article 6 for list of prescribed forms.

(*b*) As respects the period from July 9, 1933, to July 31, 1933, both inclusive, and as respects each calendar month thereafter, each processor of wheat shall keep a record and make a report in the monthly return on P. T. Form 1, of (1) the quantity of wheat on hand at the beginning of the period; (2) the quantity of wheat received during the period; (3) the quantity shipped or delivered during the period; (4) the quantity ground for feed during the period; (5) the quantity on hand at the end of the period. These quantities on each such record and report shall be shown in accordance with the elevator scale weights after deducting the dockage allowance indicated by the licensed inspector's certificate. Where elevator scale weights are not obtainable, the most reliable weight should be used; where there is no licensed inspector's certificate obtainable, the dockage actually calculated should be used.

(*c*) The processing of wheat by or for the producer thereof for consumption by his own family or employees or household is exempt from the processing tax. There is no exemption from the processing tax in a case where a producer delivers wheat to an elevator or store in exchange for flour. Nor is there any exemption where a producer who has his wheat processed into flour receives a kind or grade of flour other than that which could have been processed from the wheat delivered by such producer.

ART. 3. *Floor stocks.*—On July 9, 1933, the tax on floor stocks becomes effective on certain stocks of articles processed wholly or in chief value from wheat and held on July 9, 1933, for sale or other disposition. The Secretary of Agriculture has prescribed conversion factors for certain articles. A list of such articles with the respective rate of tax applicable to each article is given above in paragraph E. For detailed regulations as to this tax, see Regulations 82. The form prescribed for return of the floor tax on separate retail stocks is Form P. T. 41, Floor tax inventory, Record and return (Separate retail stocks). The return must be filed on or before September 7, 1933. The tax shown thereon must be paid at the time the return is filed. The form prescribed for return of the floor tax on all articles other than separate retail stocks is Form P. T. 31, Floor tax inventory and return (Stocks other than separate retail stocks). The return must be filed on or before August 8, 1933. The tax shown thereon must be paid at the time the return is filed. See article 6 for list of prescribed forms.

ART. 4. *Compensating tax on imported articles.*—On and after July 9, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from wheat and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The Secretary of Agriculture has prescribed conversion factors for certain articles.

A list of such articles with the respective rate of tax applicable to each article is given above in paragraph E. For detailed regulations relative to this tax, see Regulations 81. The form prescribed for return of the compensating tax is Form P. T. 11. See article 6 for list of prescribed forms.

ART. 5. *Existing contracts.*—For general provisions respecting existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

Where a processor has such a contract for delivery of an article processed wholly or in chief value from wheat, and delivers in fulfillment of such contract such an article which was processed on or after July 9, 1933, he must collect the tax from the vendee and return the tax on the current monthly return. The rates shown in paragraph E should be used in determining the amount to be collected from the vendee.

ART. 6. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provision of Regulations 81, Regulations 82, or Regulations 83; and must be carefully filled out in exact accordance with the instructions printed thereon and with the applicable provisions of the proper regulations. The following forms with respect to wheat are hereby prescribed:

Form No.	Designation.	Required by—
P. T. Form 1	Processing tax return	Regulations 81, article 11.
P. T. Form 11	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32. Regulations 82, articles 19, 20.
P. T. Form 31	Floor tax inventory and return, by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 41	Floor tax inventory, record and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31 (b).
P. T. Form 51	Monthly statement of importer of wheat products.	Regulations 81, article 21.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved July 10, 1933.

DEAN ACHESON,
Acting Secretary of the Treasury.

XII–39–6425
T. D. 4391

Processing and other taxes with respect to wheat under the Agricultural Adjustment Act.

Revoking Treasury Decision 4371, approved July 10, 1933 [page 476, this Bulletin], and prescribing regulations in conformity with Wheat Regulations, Series 1, made by the Secretary of Agriculture and approved by the President June 26, 1933, as supplemented, revised, and, in part, superseded by Wheat Regulations, Series 1, Supplement 1, made by the Secretary of Agriculture and approved by the President August 11, 1933.

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

To Collectors of Internal Revenue and Others Concerned:

PARAGRAPH A. Section 9(a), Agricultural Adjustment Act, provides, in part:

When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation.

PAR. B. The proclamation of the Secretary of Agriculture dated June 20, 1933, provides:

I, HENRY A. WALLACE, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to wheat, a basic agricultural commodity.

PAR. C. Section 10(c), Agricultural Adjustment Act, provides:

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title, including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto. Any violation of any regulations shall be subject to such penalty, not in excess of $100, as may be provided therein.

PAR. D. The regulations with respect to wheat, made by the Secretary of Agriculture, with the approval of the President, dated June 26, 1933, as supplemented, revised, and, in part, superseded by regulations made by the Secretary of Agriculture, with the approval of the President, dated August 11, 1933, provide:

I do hereby ascertain and prescribe that for the purposes of said Act the first marketing year for wheat shall begin July 9, 1933.

I do hereby determine as of July 9, 1933, that the processing tax on the first domestic processing of wheat shall be at the rate of 30 cents per bushel of 60 pounds, which rate equals the difference between the current average farm price for wheat and the fair exchange value of wheat, which price and value, both as defined in said Act, have been ascertained by me from available statistics of the Department of Agriculture.

The weight of wheat subject to the processing tax shall be the weight of clean wheat not artificially dried.

I. DEFINITIONS.

The following terms as used in these regulations have reference to articles processed wholly or in chief value from wheat and for all the purposes of said regulations shall have the meanings hereby assigned to them:

"*Whole wheat and graham flour*" is any flour containing in their approximate natural proportions substantially all of the constituents of cleaned wheat.

"*All flour except whole wheat and graham*" is any flour (except whole wheat, graham, semolina and farina) obtained in the commercial milling of wheat, consisting essentially of the starch and gluten of the endosperm, which contains not more than 1 per cent of ash (in the case of durum flour not more than 1.2 per cent of ash).

"*Semolina*" is the granular product obtained in the commercial process of milling durum wheat, and is that portion of the endosperm retained on 10XX silk bolting cloth.

"*Farina*" is the same as semolina except that it is made from hard wheat other than durum.

"*Prepared doughnut flour*" is a commercial preparation (consisting of flour, shortening, and other ingredients) commonly used in the preparation of crullers (i. e., doughnuts other than raised doughnuts) and fried cakes.

"*Prepared biscuit flour*" is a commercial preparation (consisting of flour, shortening, and other ingredients) commonly used in the preparation of short bread.

"*Prepared pancake flour*" is a commercial preparation (consisting of at least 50 per cent of wheat flour and varying amounts of other flour, e. g., corn, rice, rye, and buckwheat) commonly used in the preparation of pancakes, griddlecakes, or waffles.

"*Prepared piecrust flour*" is a commercial preparation (consisting of flour, shortening, and other ingredients) commonly used in the preparation of piecrusts or shells.

"*All bread except rye*" includes any type of bread except (*a*) rye as herein defined, (*b*) zwieback, and (*c*) rolls (all types), and coffee cake.

"*Rye bread*" is the bread obtained by baking a dough which differs from wheat bread dough in that not less than one-third (⅓) of the flour ingredient has been replaced by rye flour.

"*Zwieback*" is a commercially toasted bread.

"*Rolls (all types)*" and "*coffee cake*" include any product commonly called a roll or coffee cake, the flour content of which consists of at least 95 per cent of wheat flour.

"*Crackers*" include articles commonly known as biscuits.

"*Pretzels*" are made from a yeast raised dough, submerged or precooked in a caustic solution.

"*Macaroni and spaghetti*" are plain alimentary pastes, including vermicelli, prepared and shaped from the dry doughs made from semolina, farina, wheat flour, or from a mixture of any two or all of these flours, and with one or more other ingredients.

"*Canned macaroni and spaghetti*" consists of a mixture of cooked macaroni or spaghetti, as defined herein, mixed with cheese or other products and hermetically sealed.

"*Noodles*" are a form of egg alimentary paste.

"*Gluten*" is the product made from wheat flour by the almost complete removal of starch, and consists primarily of protein.

"*Wheat starch*" is a product of wheat flour resulting from the removal from such flour of practically all of the protein, mineral, and fibrous material.

II. Conversion Factors.

I do hereby establish the following conversion factors for articles processed from wheat to determine the amount of tax imposed or refunds to be made with respect thereto.

The following table of conversion factors fixes the percentage of the per bushel processing tax on wheat with respect to 100 pounds of the following articles processed wholly or in chief value from wheat. These percentages are based upon a basic conversion factor of 4.6 bushels of wheat as equaling 196 pounds of the flour designated in item 1(*b*) below.

Articles processed wholly or in chief value from wheat.	Conversion factors.
Products of first domestic processing:	
1. Flour—	
(*a*) Whole wheat and graham	166. 67
(*b*) All flour except whole wheat and graham	234. 7
(*c*) Semolina and farina	234. 7
(*d*) Bran, shorts, middlings, red dog, and all of the product of wheat (other than whole wheat and graham flour) resulting from the commercial milling thereof which contains more than 1 per cent of ash (in the case of such product of durum wheat, more than 1.2 per cent of ash)	0. 0
2. Prepared flour—	
(*a*) Doughnut	133. 8
(*b*) Biscuit	223. 0
(*c*) Pancake	164. 3
(*d*) Piecrust	140. 8
3. Cereal preparations made chiefly from wheat—	
(*a*) Whole wheat type, including those consisting chiefly of whole wheat	166. 67
(*b*) All others except those consisting chiefly of bran	234. 7

Articles processed wholly or in chief value from wheat.	Conversion factors.
Products of secondary processing:	
4. Bread—	
(a) All bread except rye	161
(b) Rye	120
(c) Zwieback	154
(d) Rolls (all types) and coffee cake	161
5. Crackers	230
6. Pretzels	244
7. (a) Macaroni and spaghetti, except canned	250
(b) Canned macaroni and spaghetti	31. 2
8. Noodles	238
9. Gluten	1, 173. 5
10. Wheat starch	0. 0

The articles to which conversion factors are specifically assigned above are hereby defined, for the purposes of these regulations, as "factored articles."

As to all articles not hereby specifically assigned conversion factors which are made, directly or indirectly, in some part from a factored article, I do hereby establish that as to each 100 pounds of such part the conversion factor is the conversion factor hereby specifically assigned for such factored article.

As to all articles not hereby specifically assigned conversion factors and which in some part are made, directly or indirectly, from wheat but not (as to such part) from a factored article, I do hereby establish that as to each 100 pounds of such part the conversion factor is 166.67 per cent of the per bushel processing tax on wheat.

PAR. E. Section 19(a), Agricultural Adjustment Act, provides:

The taxes provided in this title shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the Treasury of the United States.

PAR. F. Section 10(d), Agricultural Adjustment Act, provides:

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this title.

PAR. G. Section 1101, Revenue Act of 1926, made applicable by section 19(b), Agricultural Adjustment Act, provides:

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

Pursuant to the above-quoted provisions and the provisions of the various internal revenue laws, the following regulations, effective as of July 9, 1933, are hereby prescribed:

ARTICLE 1. *General.*—(a) By virtue of the provisions of the Agricultural Adjustment Act and the proclamation and regulations of the Secretary of Agriculture, a processing tax on the first domestic processing of wheat becomes effective beginning at the earliest moment of July 9, 1933, at the rate of 30 cents per bushel of 60 pounds. At the same moment there becomes effective a compensating tax on all articles processed or manufactured wholly or in chief value from wheat and imported on or after July 9, 1933. At the same moment there becomes effective a tax on floor stocks of articles processed wholly or in chief value from wheat held on July 9, 1933, for sale or other disposition. The rates shown in article 2 of these regulations shall be used in computing the compensating tax and the tax on floor stocks.

(b) For regulations relating to the processing tax and the compensating tax, see Regulations 81; for regulations relating to the floor tax, see Regulations 82; for regulations relating to exportation, see Regulations 83. Regulations 81, Regulations 82, and Regulations 83 are general in their scope and apply to all commodities with respect to which a tax is in effect under the Act. By virtue of the proclamation of the Secretary of Agriculture, set forth above,

Regulations 81, Regulations 82, and Regulations 83 become applicable with respect to wheat. These regulations apply specifically with respect to wheat alone, and they supplement, but are not intended to change, modify, or revoke, in any way, Regulations 81, Regulations 82, or Regulations 83. These regulations apply, as respects wheat, to all the taxes—the processing tax, the compensating tax, and the tax on floor stocks.

(*c*) With respect to wheat and articles or products processed or manufactured wholly or in chief value from wheat, the date, July 9, 1933, is the "effective date," as defined and used in Regulations 81, Regulations 82, and Regulations 83.

(*d*) The term "wheat," as used in these regulations, means wheat of any kind, classification, type, or grade.

ART. 2. *Rates of tax.*—(*a*) The amounts of tax imposed or refund to be made with respect to certain articles processed wholly or in chief value from wheat, as determined upon the basis of the determination by the Secretary of Agriculture of a processing tax rate of 30 cents per bushel of 60 pounds and of his prescription of conversion factors in his regulations set forth in paragraph D, above, are as follows:

Articles processed wholly or in chief value from wheat.	Rates of tax (cents per pound) (.500=½ cent).
Products of first processing:	
1. Flour—	
(*a*) Whole wheat and graham	0. 500
(*b*) All flour except whole wheat and graham	. 704
(*c*) Semolina and farina	. 704
(*d*) Bran, shorts, middlings, red dog, and all of the product of wheat (other than whole wheat and graham flour) resulting from the commercial milling thereof which contains more than 1 per cent of ash (in the case of such product of durum wheat, more than 1.2 per cent of ash)	0. 0
2. Prepared flour—	
(*a*) Doughnut	. 401
(*b*) Biscuit	. 669
(*c*) Pancake	. 493
(*d*) Piecrust	. 422
3. Cereal preparations made chiefly from wheat—	
(*a*) Whole wheat type, including those consisting chiefly of whole wheat	. 500
(*b*) All others except those consisting chiefly of bran	. 704
Products of secondary processing:	
4. Bread—	
(*a*) All bread except rye	. 483
(*b*) Rye	. 360
(*c*) Zwieback	. 462
(*d*) Rolls (all types) and coffee cake	. 483
5. Crackers	. 690
6. Pretzels	. 732
7. (*a*) Macaroni and spaghetti, except canned	. 750
(*b*) Canned macaroni and spaghetti	. 094
8. Noodles	. 714
9. Gluten	3. 521
10. Wheat starch	0. 0

(*b*) In the case of any article processed wholly or in chief value from wheat (but not named in the list set forth in paragraph (*a*) of this article of these regulations), which is made, directly or indirectly, in some part from an article designated in such list, the conversion factor for such part of the article is the same factor as that for the listed article from which such part has been made, and the rate of tax for such part of the article, computed from such conversion

factor, is the same as for the listed article from which the taxable article was made.

(c) If part of an article processed wholly or in chief value from wheat is made from wheat (but is not made, directly or indirectly, from an article listed in paragraph (a) of this article of these regulations), a conversion factor of 166.67 per centum of the per bushel processing tax has been assigned to such part of the article, and, computed on the basis of such conversion factor, the rate of tax, per pound of wheat content of such part of the article, is one-half of 1 cent.

(d) In determining whether an article is processed wholly or in chief value from wheat, the combined values of every processed form of wheat used in making the article (including any processed form of wheat for which the conversion factor is zero) shall be the value of the wheat as a component. In determining the amount of tax with respect to an article processed wholly or in chief value from wheat, as thus determined, so much of the wheat content as consists of any processed form of wheat for which the conversion factor is zero may be disregarded.

ART. 3. *Processing tax.*—(a) The processing tax on the first domestic processing of wheat becomes effective at the first moment of July 9, 1933. The rate, as shown above, is 30 cents per bushel of 60 pounds. The number of bushels shall be determined on the basis of the weight of the wheat at the moment of beginning the processing of such wheat. The weight of wheat subject to the processing tax shall be the weight of clean wheat not artificially dried. For detailed regulations as to the tax on processing, see Regulations 81. The form prescribed for return of processing tax is P. T. Form 1. The first return of processing tax shall embrace the period July 9, 1933, to July 31, 1933, both inclusive, and shall be filed on or before August 31, 1933. The tax shown thereon must be paid at the time the return is filed, or, if the time for payment be postponed or extended, then on or before the date or dates designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

(b) As respects the period from July 9, 1933, to July 31, 1933, both inclusive, and as respects each calendar month thereafter, each processor of wheat shall keep a record and make such report thereof as may be required, as to (1) the quantity of wheat on hand at the beginning of the period, (2) the quantity of wheat received during the period, (3) the quantity shipped or delivered during the period, (4) the quantity ground for feed during the period, (5) the quantity on hand at the end of the period. These quantities on each such record and report shall be shown in accordance with the elevator scale weights after deducting the dockage allowance indicated by the licensed inspector's certificate. Where elevator scale weights are not obtainable, the most reliable weight should be used; where there is no licensed inspector's certificate available, the dockage actually calculated should be used.

(c) The processing of wheat by or for the producer thereof for consumption by his own family or employees or household is exempt from the processing tax. This applies to what is known as custom milling (for toll or for money), but not to cases such as, for example, where a producer delivers wheat to an elevator or store in exchange for flour. Nor is there any exemption where a producer who has his wheat processed into flour receives a kind or grade of flour other than that which could have been processed from the wheat delivered by such producer.

ART. 4. *Floor stocks.*—On July 9, 1933, the tax on floor stocks becomes effective on certain stocks of articles processed wholly or in chief value from wheat and held on July 9, 1933, for sale or other disposition. The Secretary of Agriculture has prescribed conversion factors for certain articles. The rates of tax for such articles are given in article 2 of these regulations. For detailed regulations as to this tax, see Regulations 82. The form prescribed for return of the floor tax on separate retail stocks is P. T. Form 41, Floor tax inventory, record and return (separate retail stocks). The return must be filed on or before September 7, 1933. The tax shown thereon must be paid at the time the return is filed, or, if the time for payment be postponed or extended, then on or before the date or dates designated for payment in such postponement or extension. The form prescribed for return of the floor tax on all articles other than separate retail stocks is P. T. Form 31, Floor tax inventory and return (stocks other than separate retail stocks). The return must be filed on or before August 8, 1933 The tax shown thereon must be paid at the time the return is filed, or, if the time for payment be postponed or

extended, then on or before the date or dates designated for payment in such postponement or extension. See article 7 for list of prescribed forms.

ART. 5. *Compensating tax on imported articles.*—On and after July 9, 1933, a compensating tax is in effect on all articles processed or manufactured wholly or in chief value from wheat and imported into the United States or any possession thereof to which the Act applies, from any foreign country or from any possession of the United States to which the Act does not apply. The Secretary of Agriculture has prescribed conversion factors for certain articles. The rates of tax for such articles are given in article 2 of these regulations. For detailed regulations relative to this tax, see Regulations 81. The form prescribed for return of the compensating tax is P. T. Form 11. See article 7 for list of prescribed forms.

ART. 6. *Existing contracts.*—For general provisions respecting existing contracts, see Regulations 81, articles 27 and 28, and Regulations 82, article 7.

Where a processor has such a contract for delivery of an article processed wholly or in chief value from wheat, and delivers in fulfillment of such contract such an article which was processed on or after July 9, 1933, he must collect the tax from the vendee and return the tax on the current monthly return. The rates of tax given in article 2 of these regulations should be used in determining the amount to be collected from the vendee.

ART. 7. *Forms.*—To insure the proper return of the taxes imposed by the Act, and to facilitate the collection and refund of taxes, certain forms have been prescribed for use by taxpayers. The prescribed form must be used as required by the applicable provision of Regulations 81, Regulations 82, or Regulations 83; and must be carefully filled out in exact accordance with the instructions printed thereon and with the applicable provisions of the proper regulations. The following forms (No. 11 being revised) are hereby prescribed with respect to wheat:

Form No.	Designation.	Required by—
P. T. Form 1	Processing tax return	Regulations 81, article 11.
P. T. Form 11	Return of compensating tax on imports.	Regulations 81, article 20.
P. T. Form 24	Claim for refund under Agricultural Adjustment Act.	Regulations 81, articles 30, 31(a), 32. Regulations 82, articles 19, 20.
P. T. Form 28	Claim for credit on monthly return.	Regulations 81, article 31(b).
P. T. Form 29	Producer's affidavit or certificate.	Regulations 81, article 9(a).
P. T. Form 31	Floor tax inventory and return, by a person other than one engaged in retail trade, by a person engaged in retail trade if articles are held by him elsewhere than in his retail stock.	Regulations 82, article 11.
P. T. Form 41	Floor tax inventory, record and return, by a person engaged in retail trade.	Regulations 82, article 16.
P. T. Form 51	Monthly statement of importer of Wheat products.	Regulations 81, article 21.

ART. 8. Treasury Decision 4371, approved July 10, 1933 [page 476, this Bulletin], is hereby revoked.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved September 18, 1933.

THOMAS HEWES,
Acting Secretary of the Treasury.

OLEOMARGARINE.

XII–28–6290
MS. 140

Schedule of oleomargarine produced and materials used during the month of May, 1933, as compared with May, 1932.

	May, 1933.	May, 1932.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 19,689,069	[2] 14,016,070
Total withdrawn tax-paid	18,961,291	14,013,848
Ingredient schedule for uncolored oleomargarine:		
Butter	390	1,178
Cocoanut oil	12,172,625	8,403,799
Corn oil	11,443	5,508
Cottonseed oil	1,435,290	1,084,365
Derivative of glycerine	35,794	21,613
Lecithin	132	261
Milk	4,711,188	3,422,197
Neutral lard	719,346	607,823
Oleo oil	1,041,658	877,705
Oleo stearine	296,346	321,862
Oleo stock	40,578	16,616
Palm oil	44,253	3,325
Peanut oil	179,061	197,958
Salt	1,111,571	871,622
Soda (benzoate of)	8,236	4,820
Soya bean oil	----------	240
Sugar	7,632	----------
Total	21,815,543	15,840,897
Total production of colored oleomargarine	312,424	[3] 321,748
Total withdrawn tax-paid	41,460	84,930
Ingredient schedule for colored oleomargarine:		
Cocoanut oil	98,974	93,408
Color	299	192
Corn oil	12	----------
Cottonseed oil	55,830	52,715
Derivative of glycerine	74	68
Milk	102,741	89,566
Neutral lard	25,783	25,164
Oleo oil	56,023	55,118
Oleo stearine	5,788	10,239
Oleo stock	18,087	2,936
Palm oil	19,900	19,819
Peanut oil	2,444	2,586
Salt	26,892	28,317
Soda (benzoate of)	17	73
Soya bean oil	7	----------
Sugar	11	----------
Total	412,932	380,206

[1] Of the amount produced, 21,470 pounds were reworked.
[2] Of the amount produced, 18,837 pounds were reworked.
[3] Of the amount produced, 416 pounds were reworked.

XII–33–6349
MS. 141

Schedule of oleomargarine produced and materials used during the month of June, 1933, as compared with June, 1932.

	June, 1933.	June, 1932.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 15,367,048	[2] 11,850,720
Total withdrawn tax-paid	15,577,478	12,028,172
Ingredient schedule for uncolored oleomargarine:		
Butter	200	11,524
Cocoanut oil	8,677,792	7,093,105
Corn oil	41,533	872
Cottonseed oil	1,361,828	946,980
Derivative of glycerine	28,281	17,928
Lecithin	244	206
Milk	3,722,605	2,814,939
Neutral lard	680,684	492,769
Oleo oil	1,041,549	733,843
Oleo stearine	235,220	288,141
Oleo stock	109,597	34,709
Palm oil	34,188	8,140
Peanut oil	207,712	155,767
Salt	864,625	774,595
Soda (benzoate of)	6,282	3,921
Soya bean oil		240
Sugar	6,630	
Total	17,018,970	13,377,679
Total production of colored oleomargarine	163,228	[3] 260,588
Total withdrawn tax-paid	31,952	56,982
Ingredient schedule for colored oleomargarine:		
Butter		125
Cocoanut oil	37,605	87,609
Color	162	238
Cottonseed oil	16,936	39,226
Derivative of glycerine	112	50
Milk	50,048	74,738
Neutral lard	13,882	20,277
Oleo oil	43,167	46,847
Oleo stearine	1,147	8,829
Oleo stock	18,858	1,375
Palm oil	3,030	15,668
Peanut oil	2,000	2,715
Salt	10,936	25,076
Soda (benzoate of)	10	9
Sugar	18	
Total	197,911	322,782

[1] Of the amount produced, 38,233 pounds were reworked.
[2] Of the amount produced, 16,010 pounds were reworked.
[3] Of the amount produced, 806 pounds were reworked.

XII–37–6400
MS. 142

Schedule of oleomargarine produced and materials used during the month of July, 1933, as compared with July, 1932.

	July, 1933.	July, 1932.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 18, 269, 947	[2] 11, 223, 272
Total withdrawn tax-paid	18, 638, 770	11, 341, 635
Ingredient schedule for uncolored oleomargarine:		
Butter	200	1, 034
Cocoanut oil	10, 699, 968	6, 831, 677
Corn oil	69, 338	1, 093
Cottonseed oil	1, 259, 152	899, 607
Derivative of glycerine	43, 156	19, 446
Lecithin	312	151
Milk	4, 382, 335	2, 727, 195
Neutral lard	865, 049	444, 466
Oleo oil	1, 370, 812	611, 707
Oleo stearine	250, 128	242, 561
Oleo stock	153, 876	66, 852
Palm oil	50, 606	6, 200
Peanut oil	223, 241	119, 771
Salt	1, 037, 385	684, 749
Soda (benzoate of)	7, 780	3, 981
Soya bean oil		330
Sugar	8, 256	
Total	20, 421, 594	12, 660, 820
Total production of colored oleomargarine	[3] 136, 104	[4] 185, 143
Total withdrawn tax-paid	40, 166	43, 938
Ingredient schedule for colored oleomargarine:		
Cocoanut oil	50, 044	48, 877
Color	169	257
Cottonseed oil	14, 372	30, 958
Derivative of glycerine	51	6
Milk	43, 471	53, 880
Neutral lard	9, 638	17, 428
Oleo oil	28, 805	35, 705
Oleo stearine	1, 868	5, 717
Oleo stock	3, 165	475
Palm oil	3, 600	10, 500
Peanut oil	2, 075	1, 887
Salt	10, 308	15, 648
Soda (benzoate of)	15	2
Sugar	12	
Total	167, 593	221, 340

[1] Of the amount produced, 22,898 pounds were reworked.
[2] Of the amount produced, 14,129 pounds were reworked.
[3] Of the amount produced, 64 pounds were reworked.
[4] Of the amount produced, 874 pounds were reworked.

XII–41–6449
MS. 143

Schedule of oleomargarine produced and materials used during the month of August, 1933, as compared with August, 1932.

	August, 1933.	August, 1932.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 20,705,445	[2] 15,678,807
Total withdrawn tax-paid	20,072,875	15,437,038
Ingredient schedule for uncolored oleomargarine:		
Butter	816	200
Cocoanut oil	12,606,556	9,533,823
Corn oil	77,074	13,000
Cottonseed oil	1,312,020	1,188,307
Derivative of glycerine	50,031	27,767
Lecithin	226	171
Milk	4,997,716	3,694,860
Neutral lard	708,835	720,690
Oleo oil	1,359,007	961,793
Oleo stearine	262,820	318,437
Oleo stock	136,858	82,816
Palm oil	40,111	11,470
Peanut oil	274,399	209,565
Salt	1,197,271	922,160
Soda (benzoate of)	9,111	5,169
Sugar	7,815	
Total	23,040,666	17,690,228
Total production of colored oleomargarine	153,056	[3] 336,734
Total withdrawn tax-paid	35,704	38,958
Ingredient schedule for colored oleomargarine:		
Cocoanut oil	52,922	87,545
Color	480	354
Cottonseed oil	20,394	52,276
Derivative of glycerine	77	10
Milk	45,963	97,286
Neutral lard	14,118	22,900
Oleo oil	29,410	68,747
Oleo stearine	2,150	11,192
Oleo stock	1,026	3,605
Palm oil	8,700	10,837
Peanut oil	1,795	2,959
Salt	12,295	28,514
Soda (benzoate of)	7	8
Sugar	15	
Total	189,352	386,233

[1] Of the amount produced, 10,112 pounds were reworked.
[2] Of the amount produced, 17,538 pounds were reworked.
[3] Of the amount produced, 212 pounds were reworked.

XII–46–6513
MS. 144

Schedule of oleomargarine produced and materials used during the month of September, 1933, as compared with September, 1932.

	September, 1933.	September, 1932.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 21,424,870	[2] 16,918,812
Total withdrawn tax-paid	21,668,108	16,840,421
Ingredient schedule for uncolored oleomargarine:		
Butter	2,978	225
Cocoanut oil	13,199,298	10,345,092
Corn oil	38,930	13,997
Cottonseed oil	1,475,605	1,265,694
Derivative of glycerine	54,732	24,963
Lecithin	264	124
Milk	5,184,713	3,993,078
Neutral lard	677,260	789,044
Oleo oil	1,318,343	1,049,776
Oleo stearine	270,044	328,559
Oleo stock	120,881	47,514
Palm oil	35,809	5,391
Peanut oil	221,928	178,152
Salt	1,253,058	988,926
Soda (benzoate of)	10,842	5,704
Sugar	6,962	
Total	23,871,647	19,036,239
Total production of colored oleomargarine	128,474	[3] 208,888
Total withdrawn tax-paid	40,262	43,094
Ingredient schedule for colored oleomargarine:		
Cocoanut oil	52,000	80,103
Color	155	283
Cottonseed oil	13,589	25,806
Derivative of glycerine	120	6
Milk	34,891	60,706
Neutral lard	9,416	20,657
Oleo oil	24,493	37,014
Oleo stearine	1,803	2,841
Oleo stock	955	605
Palm oil	4,000	8,250
Peanut oil	1,580	2,109
Salt	10,618	17,056
Soda (benzoate of)	12	15
Sugar	22	
Total	153,659	255,451

[1] Of the amount produced, 10,360 pounds were reworked.
[2] Of the amount produced, 7,043 pounds were reworked.
[3] Of the amount produced, 88 pounds were reworked.

XII–49–6550
MS. 145

Schedule of oleomargarine produced and materials used during the month of October, 1933, as compared with October, 1932.

	October, 1933.	October 1932.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 23,513,349	[2] 19,358,643
Total withdrawn tax-paid	22,559,587	19,500,840
Ingredient schedule for uncolored oleomargarine:		
Butter	476	11,505
Cocoanut oil	14,644,746	11,854,848
Corn oil	32,594	1,094
Cottonseed oil	1,759,543	1,253,055
Derivative of glycerine	64,514	31,039
Lecithin	304	68
Milk	5,297,695	4,595,522
Neutral lard	782,200	943,422
Oleo oil	1,626,201	1,207,594
Oleo stearine	291,153	271,259
Oleo stock	46,219	30,167
Palm oil	38,181	9,100
Peanut oil	200,681	204,194
Salt	1,360,886	1,163,992
Soda (benzoate of)	8,485	6,539
Sugar	8,906	----------
Total	26,162,784	21,583,398
Total production of colored oleomargarine	151,101	[3] 168,943
Total withdrawn tax-paid	42,676	48,852
Ingredient schedule for colored oleomargarine:		
Butter	74	125
Cocoanut oil	42,239	64,994
Color	194	163
Cottonseed oil	17,032	16,787
Derivative of glycerine	160	3
Milk	46,069	50,449
Neutral lard	12,437	10,346
Oleo oil	43,863	36,075
Oleo stearine	1,450	1,590
Oleo stock	733	745
Palm oil	4,000	4,650
Peanut oil	2,208	2,684
Salt	19,131	11,305
Soda (benzoate of)	8	6
Sugar	16	----------
Total	189,614	205,922

[1] Of the amount produced, 10,772 pounds were reworked.
[2] Of the amount produced, 9,942 pounds were reworked.
[3] Of the amount produced, 228 pounds were reworked.

MISCELLANEOUS.

XII–37–6402
Supp. to D. C. 230 (Revised)

LAWS AND REGULATIONS GOVERNING THE RECOGNITION OF ATTORNEYS, AGENTS, AND OTHER PERSONS REPRESENTING CLAIMANTS AND OTHERS BEFORE THE TREASURY DEPARTMENT AND OFFICES THEREOF.

[1933. First Supplement to Department Circular No. 230 (Revised) of July 1, 1927.]

COMMITTEE ON ENROLLMENT AND DISBARMENT.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, August 8, 1933.

Treasury Department Circular No. 230 (Revised), dated July 1, 1927, prescribing rules and regulations governing the recognition of attorneys and agents and other persons representing claimants before the Treasury Department and offices thereof, is hereby amended by striking out the third and fourth paragraphs of section 1, prescribing the duties of the secretary of the committee and the attorney for the committee, and inserting in lieu thereof the following:

The Secretary of the Treasury shall appoint an attorney for the committee who shall not be a member of the committee. Such attorney shall be the legal adviser of the committee, present all formal complaints against enrolled attorneys or agents, and represent the Government in all proceedings before the committee. Such attorney shall also be the secretary of the committee and shall keep and maintain its records and shall have the custody of all of its papers, records, rolls, etc.

THOMAS HEWES,
Acting Secretary of the Treasury.

XII–41–6450
Mim. 4071

Symbols for use in correspondence.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., September 21, 1933.

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

The following directions supersede those contained in Mimeograph 3893 [C. B. X–2, 464] and all other instructions in conflict therewith. Also section 66, Part I, of the Internal Revenue Manual is amended to conform to the following:

Every letter prepared in the Bureau in Washington will bear in the upper left-hand corner of the first page, and immediately below the instructions "Address reply to," etc., a symbol that will indicate the office of origin: *Provided*, That this practice will not apply to congressional correspondence, nor to letters prepared for signature by other than officials of this Bureau.

Every letter addressed to the Bureau by a field office, if it is in reply to a communication from the Bureau, will bear, immediately

above the body of the letter and near the center of the sheet, the symbols that appear in the communication that is being answered; thus: "Attention: IT: AR: B3: STK." If the letter is not in reply to a Bureau communication, the symbol of the unit, division, or section in the Bureau concerned will be indicated in the same manner, provided there is no question as to the proper symbol; *if any doubt exists, no symbol whatever will be used.*

Where a field office uses a system of symbols in conducting its correspondence, the symbol used in this connection will be placed in the upper left-hand corner of the first sheet of each letter addressed to the Bureau just below the instructions "In reply refer to." The Bureau letter, if any, replying to such communication will show the field office symbols above the body of the letter in the same manner as is prescribed in the next preceding paragraph.

Envelopes with printed or typewritten address will be used by field offices in transmitting mail to the Bureau, rather than window envelopes. Also, every such envelope or wrapper will bear, in the lower left-hand corner of the face thereof, the same symbol that is quoted in the communication which it incloses. There is no objection to forwarding in one envelope a number of communications intended for the same unit or division of the Bureau; in fact, this is desirable. Under no circumstances, however, should correspondence pertaining to the work of one unit be inclosed in an envelope addressed to another unit.

Information which will assist the field officer in determining the destination of correspondence that is not in reply to Bureau letters may be obtained by directing an inquiry to the Administrative Division, Communication Section.

Only one subject will be treated in any one letter.

The following represents the organization and symbols used:

OFFICE OF THE COMMISSIONER.

Ad—Administrative Division.
Ad: C—Communication Section.
Ad: PB—Printing and Binding Section.
Ad: SL—Space and Lease Section.
Ad: SE—Supplies and Equipment Section.
P—Personnel Division.
Pub. Rel.—Public Relations Division.
SA—Special Advisory Committee.
SD—Special Deputy Commissioner.
SD: Tn—Training Division.

ACCOUNTS AND COLLECTIONS UNIT.

A&C: DC—Deputy Commissioner.
A&C: AD—Assistant Deputy Commissioner.
A&C: D—Disbursement Accounting Division.
A&C: Col—Collection Accounting Division.
A&C: PES—Personnel, Equipment, and Space Division.

OFFICE OF THE GENERAL COUNSEL.

GC: I—Interpretative Division.
GC: P—Penal Division.
GC: A—Appeals Division.
GC: R—Review Division.
GC: C—Civil Division.

GC: Adm—Administrative Division.
Mail and Records Section.
Library and Manuscript Section.
GC: Adm: C—Compromise Section.

INCOME TAX UNIT.

IT: E—Deputy Commissioner.
Assistant Deputy Commissioner.
IT: E: Aj—Special Adjustment Section.
IT: E: C—Conference Section.
IT: E: RR—Rules and Regulations Section.
IT: E: Sr—Service Section.
IT: E: F—Field Procedure Division.

AUDIT REVIEW DIVISION.

IT: AR—Head of Division.
IT: AR: A—Section A.
IT: AR: B—Section B.
IT: AR: C—Section C.
IT: AR: D—Sectio
IT: AR: E—Sect

CLEARING DIVISION.

IT: C—Head of Division.
IT: C: CC—Claims Control Section.
IT: C: P—Proving Section.
IT: C: St—Statistical Section.

RECORDS DIVISION.

IT: R—Head of Division.
IT: R: F—Files Section.
IT: R: S—Sorting Section.

VALUATION DIVISION.

IT: V—Head of Division.
IT: V: Ap—Appraisal Section.
IT: V: M—Mining Section.
IT: V: OG—Oil and Gas Section.
IT: V: Se—Securities Section.
IT: V: T—Timber Section.

INTELLIGENCE UNIT.

SI—Chief, Intelligence Unit.

MISCELLANEOUS TAX UNIT.

MT: DC—Deputy Commissioner.
MT: ET—Estate Tax Division.
MT: PT—Processing Tax Division.
MT: ST—Sales Tax Division.
MT: T—Tobacco Division.

GUY T. HELVERING,
Commissioner.

XII–47–6527

The United States Board of Tax Appeals has issued a new edition of rules of practice before the Board, revised to November 1, 1933. These revised rules will not be published in the Internal Revenue Bulletin, but copies may be obtained from the Superintendent of Documents, Washington, D. C., price 5 cents.

XII–47–6529
Mim. 4100

The Technical Staff.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., November 7, 1933.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, Officials and Employees of the Bureau of Internal Revenue, and Others Concerned:

In order to facilitate and expedite the settlement without formal trial of tax disputes arising out of the mailing of deficiency notices under the various Revenue Acts, the following changes in the organization of the Bureau are hereby made, effective as of November 16, 1933:

(1) The Special Advisory Committee will be abolished.

(2) A Technical Staff will be attached to the office of the Commissioner and assigned to the duties heretofore performed by the Special Advisory Committee.

(3) The Technical Staff will consider and act upon, subject to the approval of the Commissioner, the following matters and classes of cases:

(*a*) Questions involving determinations of Bureau policy, specific cases, and other matters assigned or submitted to it by the Commissioner; and

(*b*) Proposals submitted for the settlement without litigation of income, profits, estate and gift taxes, asserted in deficiency notices mailed under the various Revenue Acts.

(4) Complete records shall be maintained by the Technical Staff of its action on cases. The Technical Staff shall not reconsider any case on which the review division of the General Counsel's office took action prior to July 1, 1930, or on which the Special Advisory Committee has taken action prior to November 16, 1933, in the absence of newly discovered evidence, recent decisions by the courts or by the United States Board of Tax Appeals in which the Bureau has acquiesced, or changes in the law and regulations.

GUY T. HELVERING, *Commissioner.*

XII–47–6530
Mim. 4101

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., November 8, 1933.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, Officials and Employees of the Bureau of Internal Revenue, and Others Concerned:

In conformity with Mimeograph 4100 [see above], dated November 7, 1933, abolishing the Special Advisory Committee of the Bureau of Internal Revenue as of November 16, 1933, and creating in lieu thereof a Technical Staff in the office of the Commissioner of Internal Revenue, the following-named persons have been selected for the position of senior technical advisor, Technical Staff:

Paul F. Cain, Milton E. Carter, Frank T. Eddingfield, Leslie Gillis, Grover C. Hammond, Aubrey R. Marrs, Leonard C. Mitchell, Joseph K. Moyer, Arthur H. Murray, Craig L. Reddish, Fred O. Replogle, Perley J. Rose, William J. Steiner, Henry L. Young.

Aubrey R. Marrs is designated Head, Technical Staff.

General correspondence relating to the work of the Technical Staff shall be addressed to the Commissioner of Internal Revenue for the attention of the Head, Technical Staff. Correspondence will contain the usual reference symbols identifying particular cases.

GUY T. HELVERING, *Commissioner.*

XII–50–6562
T. D. 4410 [1]

Order of the Secretary of the Treasury amending Treasury Decision No. 1 [Prohibition], of April 1, 1927 [C. B. VI–1, 350], issued pursuant to the Act of March 3, 1927.

TREASURY DEPARTMENT,
December 4, 1933.

To the Commissioner of Industrial Alcohol, The Commissioner of Internal Revenue, and all Officials and Employees of the Treasury Department Concerned:

1. Treasury Decision No. 1 (Bureau of Prohibition) of April 1, 1927, and any decision or order supplementary thereto or amendatory thereof are hereby amended as follows:

2. There are hereby transferred to, conferred and imposed upon the Commissioner of Internal Revenue subject to the general supervision and direction of the Secretary of the Treasury all rights, privileges, powers and duties conferred or imposed upon the Secretary of the Treasury by section 4 of the Act of March 3, 1927, and which have been heretofore by the said Treasury Decision No. 1 and/or any other orders conferred or imposed upon the Commissioner of Prohibition (now the Commissioner of Industrial Alcohol), and any other officer or employee of the Bureau of Industrial Alcohol, except such rights, privileges, powers and duties as were transferred to or conferred or imposed upon the Attorney General by the Act of May 27, 1930, and except such other rights, privileges, powers and duties as may have been heretofore withdrawn from the Secretary of the Treasury or the Commissioner of Prohibition (now the Commissioner of Industrial Alcohol).

3. Except as may hereafter be otherwise provided all regulations prescribed, all orders and instructions issued and all forms adopted for the enforcement of the laws administered by the Bureau of Industrial Alcohol, Treasury Department, remaining in effect after repeal of the eighteenth amendment, are hereby continued in effect as regulations, orders, instructions and forms of the Bureau of Internal Revenue, Treasury Department.

4. The personnel of the Bureau of Industrial Alcohol shall perform such duties as the Secretary of the Treasury or the Commissioner of Internal Revenue may prescribe.

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[1] Treasury Decision 4410, Internal Revenue, is also Bureau of Industrial Alcohol Treasury Decision 23.

5. Except as herein provided nothing in this order shall be construed to affect the validity of any act done, power exercised, or order, decision, or finding made, or to relieve any person from any liability incurred prior to the effective date of this order.

6. This order shall take effect at 12.01 a. m., December 6, 1933. The right to amend or supplement this order or any provisions thereof from time to time or to revoke this order or any provision thereof at any time is hereby reserved.

HENRY MORGENTHAU, Jr.,
Acting Secretary of the Treasury.

ACT APPROVED MARCH 22, 1933, TO PROVIDE REVENUE BY TAXATION OF CERTAIN NONINTOXICATING LIQUOR, AND FOR OTHER PURPOSES.

XII–29–6299
S. T. 692

Liability of dealers in fermented malt liquors to special tax.

There appears to be considerable misunderstanding upon the part of dealers in malt liquors, wines, and fermented fruit juices as to their liability for special tax required by law to enable them to carry on their business as such. In order to remove any misunderstanding in regard to the matter, the following statement is issued for the information of all concerned:

Purchasers of special tax stamps, at the rate of $20 per year, bearing the title "Retail Dealer in Fermented Liquors," may legally engage only in the sale, in less quantities than 5 gallons at one time, of fermented (malt) liquors of 3.2 per cent alcoholic content by weight.

Every person who sells or offers for sale fermented malt liquors in quantities of not less than 5 gallons at one time, but who does not deal in wines and fermented fruit juices, is considered a wholesale dealer in malt liquor and, as such, is required to purchase a special tax stamp at the rate of $50 per year.

Purchasers of special tax stamps, at the rate of $25 per year, bearing the title "Retail Liquor Dealer," may be engaged not only in the sale of fermented (malt) liquors but also in the sale of 3.2 per cent wines and fermented fruit juices, in less quantities than 5 gallons at one time, without incurring additional liability.

A wholesale liquor dealer shall pay $100 per year. Such dealers may not only sell wines and fermented fruit juices containing not more than 3.2 per cent of alcohol by weight, but may likewise sell fermented malt liquors of like alcoholic strength in quantities of not less than 5 gallons at one time, without incurring additional special tax liability.

A person who is duly qualified as a wholesale dealer in malt liquor and one who has qualified as a wholesale liquor dealer can not sell in quantities of less than 5 gallons without incurring additional special tax liability as a retail dealer, nor can a person who has qualified as a retail dealer in malt liquor, or as a retail liquor dealer, sell in quantities of 5 gallons or more at one time without incurring additional special tax liability as a wholesale dealer.

Special taxes are payable on a fiscal year basis beginning July 1 of each year, and every dealer in malt liquors or wines and fermented fruit juices is required to purchase a new special tax stamp effective July 1, 1933. A person who commences business as a dealer after July 1, 1933, must purchase a special tax stamp and pay special tax from the 1st day of the month in which he commences business until the 1st day of July following.

The purchase of a special tax stamp as retail or wholesale dealer in malt liquors or wines and fermented fruit juices does not authorize the purchaser thereof to transact such business in conflict with State laws or authorize the sale of spirituous liquors for beverage purposes.

SPECIAL TAXES ON DEALERS IN FERMENTED LIQUORS.

XII–41–6448
S. T. 707

A fermented malt liquor dealer removing his business to a location other than that specified in his special tax stamp must either register the change of location or pay another tax.

Advice is requested whether a dealer in fermented malt liquors holding a special tax stamp may sell malt liquors at locations other than those specified in the stamp.

Section 3235, Revised Statutes, provides that the payment of the special tax imposed by law shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the collector's register and on the special tax stamp.

Whenever a special-tax payer desires to remove his business to a location other than the one specified in his latest return on Form 11 and as recorded in his special tax stamp, he should, not later than the end of the month in which the removal occurs, register the change of location with the collector of the district within which the old place of business is located, by filing an additional Form 11, executed under oath and designated "removal registry," setting forth when and where he intends to engage in the business described.

If a qualified dealer in malt liquor desires to transfer his stamp *temporarily*, for example, while a county fair is in progress, from his regular place of business to a stand located on the fair grounds, in order to sell beer at that place, he may do so without paying another special tax by following the procedure outlined herein, provided a new return on Form 11 is filed, and the stamp transferred, prior to the commencement of business at the new location. Since the special tax stamp is issued to cover a business carried on at a specified address, it will be necessary that the business be discontinued at the old address immediately upon the transfer of the stamp. Otherwise, additional special tax liability will be incurred. After the conclusion of the fair it will be necessary for the taxpayer having only one special tax stamp to file another return on Form 11 transferring the stamp back to the original address. No sales at the original address may be made until this transfer is registered with the collector.

A dealer is prohibited from conducting the sale of beer at more than one fair at the same time without qualifying at each place where such liquor is sold. In the event that one person has the exclusive privilege of selling malt liquor at a particular fair, one special tax stamp will cover the sale of beer from any number of stands located on the grounds.

Any special-tax payer whose business is such as to require him to travel from place to place in different States of the United States may procure a special tax stamp "At large" covering his activities throughout the United States with the payment of but one special tax.

MISCELLANEOUS.

XII–43–6471
Mim. 4077

Provisions of law relating to internal revenue taxes and duties at present in effect and continuing with the repeal of the eighteenth amendment until otherwise changed by legislation, in respect to distilled spirits, wines, fermented malt liquors, and special taxes.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., October 4, 1933.

Collectors of Internal Revenue and Others Concerned:

There are a number of internal revenue taxes and duties imposed upon domestic and imported distilled spirits, wines, and fermented liquors, as well as the special taxes imposed upon the several occupations related thereto, which are at present in effect and which will continue if and when the eighteenth amendment is repealed. In view of the number of inquiries concerning this matter, the following data has been compiled relative to the various sections of the Revenue Acts, Revised Statutes, and the Tariff Act of 1930, which rates are applicable until otherwise changed:

DISTILLED SPIRITS.

Act of February 4, 1909 (35 Stat., 594; section 1150(5), title 26, U. S. C.).—Imposes a tax of $1.10 a proof gallon on bay rum, or any article containing alcohol, brought from Puerto Rico into the United States for consumption.

Revenue Act of 1918 (40 Stat., 1108).—Section 605 imposes a tax of 30 cents a proof gallon on all rectified spirits, in addition to the tax imposed by the Revenue Act of 1926 (44 Stat., 104).

Revenue Act of 1918 (40 Stat., 1106).—Section 600(c) imposes a tax of $1.10 a proof gallon on all perfumes imported into the United States containing distilled spirits.

Revenue Act of 1926 (44 Stat., 104).—Section 900 imposes a tax of $1.10 a proof gallon on all distilled spirits produced in or imported into the United States.

Revenue Act of 1928 (amends section 612, Revenue Act of 1918).—Section 452 imposes a tax of 10 cents a proof gallon on grape brandy or wine spirits used in fortification of wines.

WINES.

Revenue Act of 1918 (40 Stat., 1111) (as amended by Revenue Act of 1928).—Section 451 amended section 611 of the Revenue Act of 1918, which at present imposes a tax on domestic and imported still wines, including vermuth, and all artificial or imitation wines as follows:

	Wine gallon.
Containing not more than 14 per centum alcohol by volume	$0.04
Containing more than 14 per centum and not exceeding 21 per centum alcohol	.10
Containing more than 21 per centum and not exceeding 24 per centum alcohol	.25
Containing more than 24 per centum alcohol	1.10

Revenue Act of 1918 (40 Stat., 1110).—Section 613 imposes a tax on domestic and imported champagne, sparkling wines, and cordials as follows:

	Each half pint or fraction thereof.
On each bottle of champagne or sparkling wine	$0.12
On each bottle of artificially carbonated wine	.06
On each bottle or other container of liqueurs, cordials, or similar compounds, containing sweet wine fortified with grape brandy	.06

Act of March 22, 1933.—Section 1 imposes a tax of $5 per barrel of 31 gallons on all wines, and at a like rate on a fractional part of a barrel, when alcoholic content is one-half of 1 per centum or more by volume, and not more than 3.2 per centum by weight.

FERMENTED LIQUORS.

Revenue Act of 1918 (40 Stat., 1109).—Section 608 imposes a tax of $6 per barrel of 31 gallons on all fermented liquors, and at a like rate on a fractional part of a barrel, containing one-half of 1 per centum of alcohol by volume or more.

Act of March 22, 1933.—Section 1 imposes a tax of $5 per barrel of 31 gallons on all fermented malt liquors, and at a like rate on a fractional part of a barrel, where alcoholic content is one-half of 1 per centum or more by volume, and not more than 3.2 per centum by weight.

SPECIAL TAXES.

Section 3244, Revised Statutes.—

Second. Manufacturers of stills shall each pay $50 a year and $20 for each still or worm for distilling made by him.

Third. Rectifiers of distilled spirits manufacturing 500 barrels or more a year shall pay $200 a year.

Rectifiers of distilled spirits manufacturing less than 500 barrels a year shall pay $100 a year.

Fourth. Section 18, Act of February 8, 1875 (18 Stat., 311), as amended by section 4, Act of March 1, 1879 (20 Stat., 334).—Retail dealers in liquors shall pay $25 a year. Wholesale dealers in liquors shall pay $100 a year.

NOTE.—This includes the sale of distilled spirits, wines, and malt liquors.

Fifth. Act of February 8, 1875 (18 Stat., 311), as amended by section 4, Act of March 1, 1879 (20 Stat., 333).—Retail dealers in

malt liquors only shall pay $20 a year. Wholesale dealers in malt liquors only shall pay $50 a year.

Section 3244, Revised Statutes (as amended by the Act of March 22, 1933).—

First. All brewers required to pay tax of $1,000 a year.

DUTIES RELATING TO SPIRITS, WINES, AND OTHER BEVERAGES.

Tariff Act of 1930 (Schedule 8, Title I).—

PAR. 801. (a) Nothing in this schedule shall be construed as in any manner limiting or restricting the provisions of Title II or III of the National Prohibition Act, as amended.

(b) The duties prescribed in Schedule 8 and imposed by Title I shall be in addition to the internal revenue taxes imposed under existing law, or any subsequent Act.

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

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

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

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

GUY T. HELVERING,
Commissioner.

XII–32–6337

S. 1580. PUBLIC, NO. 68, SEVENTY-THIRD CONGRESS.

An Act to relieve the existing national emergency in relation to interstate railroad transportation, and to amend sections 5, 15a, and 19a of the Interstate Commerce Act, as amended.

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 "Emergency Railroad Transportation Act, 1933."

* * * * * * *

TITLE II—AMENDMENTS TO INTERSTATE COMMERCE ACT.

* * * * * * *

SEC. 206. (a) All moneys which were recoverable by and payable to the Interstate Commerce Commission, under paragraph (6) of section 15a of the Interstate Commerce Act, as in force prior to the enactment of this title, shall cease to be so recoverable and payable; and all proceedings pending for the recovery of any such moneys shall be terminated. The general railroad contingent fund established under such section shall be liquidated and the Secretary of the Treasury shall distribute the moneys in such fund among the carriers which have made payments under such section, so that each

such carrier shall receive an amount bearing the same ratio to the total amount in such fund that the total of amounts paid under such section by such carrier bears to the total of amounts paid under such section by all carriers; except that if the total amount in such fund exceeds the total of amounts paid under such section by all carriers such excess shall be distributed among such carriers upon the basis of the average rate of earnings (as determined by the Secretary of the Treasury) on the investment of the moneys in such fund and differences in dates of payments by such carriers.

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

* * * * * * *

Approved June 16, 1933, 12.05 p. m.

[1] XII–52–6580

Disbarments and suspensions from practice before Treasury Department of attorneys and agents.[2]

DISBARMENTS.

The Secretary of the Treasury, after due notice and opportunity for hearing, has ordered the disbarment from further practice before the Treasury Department of the following-named attorneys and agents:

Name.	Address.	Date of disbarment.	Cause.
Ainslie, E. G	Formerly Houston, Tex., now Pontiac, Mich.	June 30, 1933	Charged with embezzling funds of an employer. Charges found proven.
Bacchus, Robert R	Springfield, Ill	Mar. 1, 1933	Charged with knowingly preparing false income tax returns for 2 taxpayers. Charges found proven.
Barnett, Lewis	New York, N.Y	Jan. 4, 1933	Charged with attempting to extort money from a client to settle an alleged deficiency in income tax. Charges found proven.
Beal, Henry W	Boston, Mass	Sept. 29, 1932	Charged with having been disbarred by the Superior Court of Suffolk County, Mass., for misappropriation of client's funds. Charges found proven.
Behrendt, Henry A	Detroit, Mich	Dec. 5, 1932	Charged with having been disbarred from practice as an attorney in courts of Michigan. Charges found proven.
Clark, Paul E	Orange, Calif	June 30, 1933	Charged with theft of funds and conviction for such offense in State court. Charges found proven.
Clarke, Forrest S	Modesto, Calif	June 30, 1933	Charged with embezzling funds of a taxpayer, paid to respondent to be delivered to collector of internal revenue. Charges found proven.
Crane, Richard M	Denver, Colo	June 28, 1933	Charged with having been convicted for conspiracy to defraud, in State court. Charges found proven.
Davis, James C	Fort Smith, Ark	June 30, 1933	Charged with preparing false income tax returns, and fraudulently procuring a closing agreement in two tax cases. Charges found proven.
Ellis, F. L	Council Bluffs, Iowa.	July 11, 1932	Charged with preparing false articles of copartnership showing 5 partners when there were but 2 and preparing false returns for such taxpayers. Charges found proven.
Everett, S. H	Formerly Valdosta, Ga., later Orlando, Fla.	Oct. 27 1932	Charged with defrauding numerous persons by issuing worthless checks and drafts. Charges found proven.
Gorman, John J	Chicago, Ill	Feb. 23, 1933	Charged with having been disbarred by the Supreme Court of the State of Illinois. Charges found proven.
Herlehy, Catherine G.	Detroit, Mich	Aug. 2, 1933	Charged with having been disbarred from practice as an attorney in the Federal court of the eastern district of Michigan. Charges found proven.
Hindenlang, Theodore G.	Newark, N.J	June 30, 1933	Charged with having been disbarred by the Supreme Court of New Jersey. Charges found proven.
James, David H	Indianapolis, Ind	June 30, 1933	Charged with embezzling funds paid to respondent to be delivered to the collector of internal revenue. Charges found proven.
Keller, Al. S	Los Angeles, Calif	Feb. 2, 1933	Charged with having been convicted and sentenced in a criminal case in a State court. Charges found proven.
Lichtenberg, Joseph	Baltimore, Md	July 20, 1933	Charged with having been disbarred from practice as an attorney before the courts of Baltimore, Md. Charges found proven.

[1] This ruling (6580) includes also rulings Nos. 6279, 6289, 6302, 6315, 6326, 6339, 6350, 6352, 6384, 6393, 6403, 6413, 6424, 6439, 6453, 6461, 6473, 6483, 6501, 6514, 6528, 6541, 6552, 6560, and 6569. These rulings have been thus consolidated because publication of each one separately would be largely duplication.

[2] This list includes all attorneys and agents whose disbarment from practice before the Treasury Department was published during the 12-month period ended December 31, 1933, and all suspensions in effect during the 6-month period July 1–December 31, 1933, inclusive. It does not include those barred from practice by reason of disapproval of their application for enrollment.

Name.	Address.	Date of disbarment.	Cause.
Moore, J. Edward	New Bedford, Mass.	Sept. 29, 1932	Charged with having unlawfully attempted to extort a large fee from a client by threats of disclosure. Charges found proven.
Moss, Clair D	Pittsburgh, Pa	Dec. 30, 1932	Charged with proposing to Federal prohibition agents that such agents furnish the respondent confidential information relative to complaints received in the Federal prohibition enforcement office against clients of the respondent, for which such clients would pay a reasonable sum of money through the respondent to such agents. Charges found proven.
Neely, Robert E	Chicago, Ill	Aug. 3, 1933	Charged with handling a tax case in which respondent gained knowledge of the facts and issues involved while employed as acting collector of internal revenue, and with retaining funds of the taxpayer after demand made therefor by the taxpayer, said funds having been received in trust and intended for payment to the collector of internal revenue. Charges found proven.
Pickett, Thomas Y	Dallas, Tex	Feb. 23, 1933	Charged with having been convicted and sentenced in a criminal case in the United States district court. Charges found proven.
Ransom, Don E	Formerly Wichita, Kans., later Fort Worth, Tex.	Sept. 28, 1932	Charged with knowingly preparing a false offer of compromise in a tax matter. Charges found proven.
Sandler, Alvin M	Formerly Tampa, Fla.	Dec. 5, 1932	Charged with having been convicted of a criminal offense in United States district court and disbarred as an attorney by such court. Charges found proven.
Siegal, Abner	Formerly Washington, D.C.	June 30, 1933	Charged with having been convicted of crime, and disbarred as attorney by the Supreme Court of the District of Columbia. Charges found proven.
Stone, Ralph W	Formerly Chicago, Ill., now Middletown, Ill.	Nov. 2, 1932	Charged with giving money to prohibition officers to procure the approval of applications for permits for withdrawal of wine. Charges found proven.
Van Riper, Harold	Formerly New York, N.Y.	Nov. 30, 1932	Charged with conviction in a criminal case in the United States district court. Charges found proven.
Weinstock, Leonard H.	St. Paul, Minn	June 30, 1933	Charged with filing false income tax returns for himself. Charges found proven.
Wolford, H. C	Erie, Pa	Feb. 24, 1933	Charged with having been convicted and sentenced in a criminal case in the United States district court. Charges found proven.

DISBARMENT MODIFIED TO A SUSPENSION.

The Acting Secretary of the Treasury has ordered that the order of disbarment entered against the following-named person on February 11, 1928, be modified as indicated below:

Name.	Address.	Remarks.
Wagner, Peter H	New York, N.Y.	Disbarment modified on July 12, 1933, to a suspension from practice before the Treasury Department from February 11, 1928, to July 15, 1933.

SUSPENSIONS.

The Secretary of the Treasury, after due notice and opportunity for hearing, has ordered the suspension from practice before the Treasury Department for the period stated in each case of the following-named attorneys and agents:

Name.	Address.	Period of suspension.	Cause.
Holcombe, J. LeRoy	Formerly Macon, Ga., later Atlanta, Ga.	1 year, from Dec. 30, 1932.	Charged with soliciting employment in Federal income tax matters. Charges found proven.
Love, Harold R	Minneapolis, Minn.	3 months, from July 25, 1933.	Charged with issuing worthless checks, and with unethical advertising. Charges found proven.
Phillips, Martin I	New York, N.Y.	1 year, from June 30, 1933.	Charged with filing false income tax returns for himself. Charges found proven.
Sackman, Harry	Formerly New York, N.Y., later Seattle, Wash., now San Francisco, Calif.	30 days, from July 20, 1933.	Charged with having solicited employment in Federal tax matters and falsely advertising himself as a certified public accountant, when he did not hold a certificate of certified public accountant from any legally constituted board authorized by law to issue such certificates. Charges found proven.

RESIGNATION FROM ENROLLMENT TO PRACTICE BEFORE THE TREASURY DEPARTMENT.

The following-named person has tendered his resignation from enrollment to practice before the Treasury Department. By direction of the Secretary of the Treasury his resignation was accepted and his name ordered stricken from the roll of attorneys and agents enrolled to practice before the Treasury Department. He is therefore no longer entitled to practice before the Treasury Department.

Name.	Address.	Designation.	Date of acceptance.
Stratman, Herman	Pittsburgh, Pa	Agent	June 29, 1933

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