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1932

Treasury Department : : : : Bureau of Internal Revenue

Internal Revenue Bulletin

Cumulative Bulletin X-2

JULY-DECEMBER, 1931

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

Treasury Department : : : : : Bureau of Internal Revenue

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JULY–DECEMBER, 1931

IN THIS ISSUE

	Page
Introductory Notes	III
Contents	V–VIII
Rulings Nos. 5125–5338—	
Board of Tax Appeals	1–106
Income Tax—	
Part I (1928 Act)	107–218
Part II (1926 Act)	219–299
Part III (1924 Act)	300–314
Part IV (1921 and Prior Acts)	315–400
Sales Tax	401–419
Estate Tax	420–440
Capital Stock Tax	441–443
Miscellaneous Tax	444–452
Miscellaneous	453–469
Index	471–483

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

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

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

UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON : 1932

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The Internal Revenue Bulletin service for 1932 will consist of weekly bulletins and semiannual cumulative bulletins.

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

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

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

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Cumulative Bulletin X–2 (July–December, 1931)	30 cents

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INTRODUCTORY NOTES.

The Internal Revenue Cumulative Bulletin X–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, sales, estate, capital stock, and miscellaneous taxes, as indicated on the title-page of this Bulletin, published in the weekly Bulletins (Volume X, Nos. 27 to 52, inclusive) for the period July 1 to December 31, 1931. 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 December 22, 1924, to December 31, 1931.

Income Tax rulings are printed in four parts. Rulings under the Revenue Act of 1928 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 74. Rulings under the Revenue Act of 1926 are published as Part II, the section and article headings corresponding with the section and article headings of the Revenue Act of 1926 and Regulations 69. Rulings under the Revenue Act of 1924 are printed as Part III, the section and article headings corresponding with the section and article headings of the Revenue Act of 1924 and Regulations 65. Rulings under the Revenue Act of 1921 or earlier Acts are printed as Part IV, the section and article headings corresponding with the section and article headings of the Revenue Act of 1921 and Regulations 62.

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.
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 Revenue Acts of 1924 and 1926, 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. 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. Decisions so acquiesced in should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases before the Bureau.

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

CONTENTS.

Ruling.	Ruling No.	Page.
Treasury decisions:		
4318	X-28-5138	456
4319	X-32-5167	453
4320	X-33-5171	145
4321	X-33-5172	169
4322	X-39-5224	420
4323	X-40-5234	187
4324	X-40-5235	256
4325	X-40-5236	366
4326	X-41-5247	445
4327	X-41-5250	157
4328	X-43-5270	444
4329	X-47-5300	453
Court decisions:		
356	X-27-5129	270
357	X-27-5130	291
358	X-28-5135	231
359	X-28-5136	342
360	X-29-5144	357
361	X-29-5145	359
362	X-29-5143	219
363	X-30-5152	292
364	X-30-5153	379
365	X-31-5158	348
366	X-31-5157	214
367	X-32-5165	346
368	X-32-5166	435
369	X-33-5176	410
370	X-33-5175	408
371	X-33-5174	361
372	X-34-5181	258
373	X-34-5183	392
374	X-34-5184	417
375	X-35-5188	209
376	X-35-5189	245
377	X-35-5191	412
378	X-36-5197	307
379	X-36-5196	295
380	X-36-5199	395
381	X-37-5204	286
382	X-37-5205	309
383	X-37-5206	406
384	X-38-5212	274
385	X-38-5214	447
386	X-38-5213	445
387	X-39-5217	300
388	X-39-5220	413
389	X-39-5221	402
390	X-39-5218	362
391	X-40-5228	211
392	X-40-5230	318
393	X-40-5231	328
394	X-40-5232	340
395	X-40-5229	224
396	X-41-5239	202
397	X-41-5242	311
398	X-41-5246	397
399	X-41-5245	388
400	X-41-5244	386
401	X-42-5254	259
402	X-42-5255	276
403	X-42-5257	422
404	X-42-5258	441
405	X-42-5256	384
406	X-43-5265	260
407	X-43-5264	233
Court decisions—Continued.		
408	X-43-5267	334
409	X-43-5268	364
410	X-44-5274	238
411	X-44-5276	250
412	X-44-5275	240
413	X-45-5282	257
414	X-45-5283	337
415	X-46-5290	249
416	X-46-5291	409
417	X-47-5297	315
418	X-47-5298	331
419	X-48-5304	266
420	X-48-5306	356
421	X-49-5311	401
422	X-49-5310	350
423	X-49-5312	425
424	X-50-5318	192
425	X-50-5319	370
426	X-50-5320	420
427	X-50-5321	427
428	X-51-5326	324
429	X-51-5328	367
430	X-51-5325	321
431	X-51-5329	391
432	X-52-5333	228
433	X-52-5335	297
434	X-52-5336	332
General Counsel's memoranda:		
8724	X-41-5238	197
9470	X-27-5128	162
9537	X-31-5159	374
9571	X-32-5162	153
9584	X-28-5137	372
9621	X-28-5134	111
9656	X-33-5170	127
9674	X-34-5182	354
9710	X-32-5163	205
9716	X-32-5164	304
9755	X-37-5202	120
9774	X-38-5210	137
9793	X-43-5262	142
9798	X-38-5211	221
9800	X-43-5266	271
9804	X-36-5198	353
9822	X-40-5226	140
9825	X-42-5252	146
9841	X-48-5305	279
9848	X-44-5273	158
9938	X-49-5309	115
9939	X-46-5287	152
9954	X-47-5296	253
9958	X-47-5294	158
9978	X-47-5295	208
10026	X-50-5317	189
10043	X-51-5324	124
10063	X-52-5332	159
10123	X-52-5334	254
Board of Tax Appeals: [1]		
7691	X-40-5225	23
8000	X-37-5201	8
8349	X-44-5271	98
8913	X-52-5331	63
9309	X-37-5201	23
9619	X-52-5331	83
10693	X-34-5179	71

[1] The contents contain references to Board of Tax Appeals acquiescences and nonacquiescences published only during the six months ended December 31, 1931, inasmuch as references to the remainder of the Board of Tax Appeals acquiescences and nonacquiescences contained in the cumulative list herein have been furnished in the cumulative bulletins covering the earlier respective periods.

Ruling.	Ruling No.	Page.
Board of Tax Appeals—Con.		
10966	X-38-5209	78
11242	X-39-5216	15
12868	X-29-5140	9, 62
13165	X-34-5179	60
13227	X-52-5331	31
13521	X-27-5125	3
14283	X-34-5179	23
14688	X-40-5225	17
14941	X-34-5179	50
15543	X-44-5271	6
16117	X-38-5209	105
16118	X-38-5209	105
16119	X-38-5209	105
16120	X-38-5209	105
16121	X-38-5209	105
16122	X-38-5209	93
16299	X-40-5225	5
16450	X-32-5161	86
16815	X-44-5271	81
17430	X-29-5140	16
17431	X-29-5140	16
17663	X-48-5301	68
17843	X-42-5251	33
18199	X-27-5125	23
18207	X-35-5186	27
18262	X-29-5140	16
18263	X-29-5140	16
18290	X-44-5271	24
18741	X-42-5251	75
18743	X-42-5251	33
18832	X-33-5169	35
18833	X-33-5169	35
19005	X-38-5209	98
19019	X-43-5260	79
19399	X-41-5237	71
19522	X-42-5251	21, 86
19639	X-34-5179	7
19773	X-47-5293	85
19881	X-37-5201	5, 25
20172	X-29-5140	48, 74
20176	X-42-5251	82
20368	X-39-5216	77
20493	X-31-5155	63
21042	X-45-5278	46
21249	X-30-5148	42
21556	X-36-5193	60
21745	X-30-5148	93
21760	X-32-5161	22
21762	X-40-5225	81
21856	X-39-5216	53
21930	X-38-5209	52
21942	X-52-5331	88, 99
22057	X-39-5216	86
22184	X-34-5179	60
22243	X-37-5201	52, 96
22400	X-38-5209	94
22401	X-38-5209	93
22402	X-38-5209	93
22403	X-38-5209	89
22404	X-38-5209	92
22405	X-38-5209	85
22406	X-38-5209	82
22407	X-38-5209	90
22408	X-38-5209	89
22409	X-38-5209	82
22410	X-38-5209	102
22411	X-38-5209	82
22412	X-38-5209	92
22413	X-38-5209	91
22414	X-38-5209	82
22415	X-38-5209	82
22416	X-38-5209	86
22417	X-38-5209	83
22418	X-38-5209	95
22427	X-38-5209	82
22428	X-38-5209	95
22429	X-38-5209	88
22464	X-38-5209	94
22496	X-38-5209	92
22532	X-38-5209	82
23156	X-39-5216	74, 104
23157	X-39-5216	74, 104
23158	X-39-5216	74, 104
23372	X-29-5140	16

Ruling.	Ruling No.	Page.
Board of Tax Appeals—Con.		
23373	X-29-5140	16
23374	X-29-5140	16
23380	X-42-5251	82
23535	X-32-5161	99
23594	X-38-5209	88
23595	X-38-5209	79
24105	X-45-5278	47
24154	X-51-5323	55, 98
24169	X-43-5260	77
24273	X-31-5155	32
24416	X-28-5133	21, 86
24486	X-38-5209	81
24632	X-36-5193	2
24633	X-36-5193	42
24634	X-36-5193	3
24635	X-36-5193	44
24636	X-36-5193	48
24784	X-43-5260	7
24956	X-38-5209	6
25037	X-31-5155	32
25131	X-47-5293	81, 97
25150	X-31-5155	82
25401	X-43-5260	73
25442	X-34-5179	34
25622	X-30-5148	84
25623	X-39-5216	18
25624	X-39-5216	18
25625	X-39-5216	18
25744	X-37-5201	22, 26
25976	X-44-5271	70
26059	X-38-5209	13
26074	X-27-5125	21
26253	X-50-5315	34
26272	X-31-5155	22
26374	X-39-5216	7
26636	X-35-5186	81
26828	X-35-5186	30
26843	X-44-5271	81
26919	X-52-5331	14, 31
27081	X-36-5193	31
27180	X-33-5169	102
27181	X-33-5169	82
27264	X-33-5169	88
27307	X-33-5169	87
27337	X-44-5271	56
27526	X-27-5125	43
27527	X-27-5125	27
27791	X-46-5286	32
27792	X-45-5278	32
27893	X-44-5271	6
27940	X-38-5209	105
27941	X-38-5209	105
27942	X-38-5209	105
27943	X-38-5209	105
27944	X-38-5209	93
28131	X-28-5133	34, 91
28132	X-28-5133	34, 91
28200	X-37-5201	96
28257	X-31-5155	14
28427	X-49-5308	84
28449	X-42-5251	24
28690	X-35-5193	18
28847	X-30-5148	103
28873	X-30-5148	92
28874	X-30-5148	93
29142	X-36-5193	100
29341	X-34-5179	53
29410	X-38-5209	55
29413	X-52-5331	22
29430	X-38-5209	25
29431	X-38-5209	32
29436	X-38-5209	19
29456	X-39-5216	9
29505	X-35-5186	30
29591	X-38-5209	41
29789	X-30-5148	87
29875	X-39-5216	78
29891	X-50-5315	49
29897	X-43-5260	79
29916	X-37-5201	91
29940	X-41-5237	91
29969	X-50-5315	53
30079	X-32-5161	105

Ruling.	Ruling No.	Page.
Board of Tax Appeals—Con.		
30146	X-37-5201	44
30274	X-40-5225	23
30285	X-36-5193	3, 44
30286	X-36-5193	48
30287	X-36-5193	2
30288	X-36-5193	44
30289	X-36-5193	42
30290	X-36-5193	3
30338	X-43-5260	37
30348	X-27-5125	40
30388	X-32-5161	4
30472	X-38-5209	88
30473	X-38-5209	88
30540	X-38-5209	22
30541	X-42-5251	32
30567	X-27-5125	102
30652	X-34-5179	93
30832	X-39-5216	21
31032	X-38-5209	26
31049	X-33-5169	11
31126	X-44-5271	21
31127	X-44-5271	76
31153	X-29-5140	53
31207	X-27-5125	85
31405	X-27-5125	41, 63
31406	X-33-5169	102
31407	X-33-5169	82
31408	X-33-5169	87
31409	X-33-5169	84
31434	X-34-5179	43
31477	X-27-5125	103
31530	X-39-5216	65
31550	X-33-5169	88
31568	X-44-5271	104
31793	X-45-5278	71
31838	X-36-5193	44
31868	X-49-5308	1
32053	X-27-5125	102
32156	X-39-5216	70
32157	X-39-5216	68
32158	X-39-5216	64
32159	X-39-5216	5
32160	X-39-5216	43
32241	X-39-5216	43, 49
32329	X-34-5179	53
32338	X-45-5278	10, 31
32339	X-45-5278	10, 31
32345	X-43-5260	12
32388	X-35-5186	19
32401	X-32-5161	82
32463	X-44-5271	6
32618	X-37-5201	49
32668	X-32-5161	25
32688	X-37-5201	59
32748	X-34-5179	98
32824	X-49-5308	41, 52
33029	X-29-5140	44
33070	X-39-5216	74
33075	X-44-5271	101
33118	X-30-5148	12
33271	X-32-5161	90
33301	X-39-5216	48, 95
33323	X-37-5201	31, 89
33351	X-27-5125	67
33366	X-32-5161	18
33367	X-32-5161	14
33377	X-43-5260	73
33532	X-43-5260	57
33582	X-47-5293	18
33648	X-32-5161	20
33710	X-32-5161	21
33711	X-32-5161	35
33768	X-40-5225	43
33996	X-37-5201	52
34078	X-32-5161	10
34097	X-38-5209	25
34128	X-42-5251	21
34156	X-34-5179	91
34242	X-37-5201	77
34275	X-49-5308	93
34313	X-38-5209	28
34315	X-52-5331	33, 90
34358	X-34-5179	12
34435	X-49-5308	14
Board of Tax Appeals—Con.		
34467	X-31-5155	13
34492	X-27-5125	83
34507	X-37-5201	18
34509	X-37-5201	16
34510	X-37-5201	48
34532	X-41-5237	18, 28, 40, 42
34640	X-46-5286	104
34683	X-33-5169	60, 78, 100, 106
34730	X-42-5251	11
34821	X-37-5201	82
34835	X-38-5209	35
34978	X-37-5201	78
35009	X-42-5251	22
35326	X-40-5225	92
35787	X-27-5125	102
35896	X-35-5186	74
36029	X-33-5169	88
36087	X-39-5216	63
36134	X-35-5186	35
36301	X-33-5169	14
36367	X-32-5161	60
36590	X-32-5161	85
36679	X-37-5201	59
36723	X-31-5155	32
36734	X-44-5271	50
36881	X-35-5186	19
36893	X-31-5155	32, 89
36909	X-34-5179	50
36930	X-42-5251	21
36934	X-40-5225	92
36958	X-32-5161	66
37098	X-45-5278	19, 58
37119	X-32-5161	48
37149	X-34-5179	20
37162	X-50-5315	40
37334	X-34-5179	34
37392	X-37-5201	11, 82
37396	X-37-5201	11, 82
37397	X-37-5201	31, 89
37660	X-27-5125	12
37841	X-51-5323	87
37853	X-37-5201	83
37943	X-40-5225	92
38011	X-38-5209	49
38023	X-33-5169	95
38060	X-37-5201	34
38431	X-52-5331	19, 85
38474	X-27-5125	53, 65
38555	X-50-5315	81
38643	X-49-5308	5
38754	X-43-5260	37
38902	X-38-5209	58
39137	X-37-5201	101
39299	X-30-5148	98
39349	X-37-5201	77
39350	X-37-5201	18
39351	X-37-5201	16
39374	X-30-5148	68
39376	X-30-5148	68
39377	X-30-5148	68
39465	X-39-5216	79
39466	X-39-5216	79
39467	X-39-5216	79
39566	X-39-5216	14
39686	X-37-5201	91
39802	X-37-5201	5
39868	X-49-5308	33
39869	X-49-5308	33
39870	X-49-5308	20
39887	X-49-5308	33
39888	X-49-5308	34
39916	X-34-5179	84
39975	X-49-5308	24
40019	X-29-5140	37
40168	X-49-5308	8, 27
40195	X-50-5315	69
40243	X-27-5125	93
40316	X-50-5315	69
40319	X-40-5225	23
40406	X-29-5140	44
40493	X-43-5260	60

Ruling.	Ruling No.	Page.
Board of Tax Appeals—Con		
40625	X-35-5186	74
40845	X-38-5209	38, 77
41203	X-27-5125	86
41217	X-27-5125	89
41246	X-32-5161	15
41319	X-36-5193	26, 76
41431	X-45-5278	25
41600	X-50-5315	40
41773	X-50-5315	81
41872	X-50-5315	34
41944	X-40-5225	92
41953	X-27-5125	97
41962	X-27-5125	83
41963	X-27-5125	84
41974	X-34-5179	41
41981	X-34-5179	41
41982	X-27-5125	53, 65
42168	X-31-5155	32, 89
42220	X-35-5186	93
42233	X-37-5201	48
42279	X-43-5260	78
42404	X-27-5125	72
42440	X-43-5260	37
42500	X-46-5286	85
42613	X-43-5260	57
42619	X-52-5331	84, 88
42742	X-38-5209	26
42778	X-39-5216	71
42815	X-37-5201	57
42847	X-31-5155	3
42854	X-38-5209	32
42940	X-38-5209	12
43073	X-40-5308	84, 92
43164	X-38-5209	73
43241	X-45-5278	61
43409	X-34-5179	23
43480	X-49-5308	98
43567	X-35-5186	104
43601	X-36-5193	54
43986	X-31-5155	13
44004	X-28-5133	28
44188	X-37-5201	64, 101
44254	X-39-5216	65
44278	X-37-5201	23
44280	X-45-5278	32
44623	X-37-5201	96
44676	X-31-5155	3
44755	X-47-5293	55
44828	X-50-5315	40
44997	X-40-5225	79
44998	X-40-5225	93
44999	X-40-5225	88
45000	X-40-5225	85
45008	X-38-5209	46
45364	X-49-5308	33
45365	X-49-5308	20
45913	X-44-5271	70
46003	X-38-5209	99
46153	X-50-5315	93
46297	X-27-5125	83
46326	X-49-5308	8
Board of Tax Appeals—Con.		
46510	X-38-5209	93
46511	X-38-5209	105
46512	X-38-5209	105
46513	X-38-5209	106
46561	X-47-5293	73
46873	X-27-5125	40
47105	X-49-5308	68
47114	X-42-5251	21
47344	X-45-5278	59, 61
47788	X-38-5209	26
47798	X-36-5193	39
47951	X-49-5308	5
48078	X-37-5201	23
48654	X-39-5216	65
49339	X-49-5308	98
Office decisions (I. T.):		
2579	X-27-5126	129
2580	X-27-5127	131
2581	X-29-5141	177
2582	X-30-5149	129
2583	X-30-5151	213
2584	X-31-5156	171
2585	X-33-5173	182
2586	X-34-5180	173
2587	X-35-5187	134
2588	X-35-5194	135
2589	X-36-5195	156
2590	X-37-5203	195
2591	X-39-5222	123
2592	X-40-5227	191
2593	X-41-5240	206
2594	X-41-5241	207
2595	X-41-5243	353
2596	X-42-5253	184
2597	X-43-5261	118
2598	X-43-5263	157
2599	X-44-5272	170
2600	X-45-5279	107
2601	X-45-5280	109
2602	X-45-5281	130
2603	X-46-5288	161
2604	X-46-5289	208
2605	X-48-5302	192
2606	X-48-5303	196
2607	X-50-5316	188
2608	X-51-5327	342
2609	X-52-5337	339
Office decisions (MS.):		
116	X-27-5131	458
117	X-33-5177	459
118	X-37-5207	460
119	X-41-5248	461
120	X-45-5284	462
121	X-49-5313	463
Mimeographs:		
3883	X-29-5142	180
3885	X-29-5147	454
3886	X-30-5150	164
3893	X-35-5190	464
3896	X-39-5219	466
Miscellaneous	X-52-5338	467

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

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

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 DECEMBER 22, 1924, TO DECEMBER 31, 1931, INCLUSIVE.

[1] X–52–5331

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.			
Aaron, Theodore	13055	12	556
Abattoir Realty Co	3346	3	415
Abbeville Cotton Mills	11903	10	646
Ackerman-Johnson Co	9265	11	820
Acme Mills, Inc	1598	6	1065
Acme, Palmers & DeMooy Foundry Co	4211	3	1126
Acme Products Co., Inc	31868	24	194
Acorn Refining Co	1929	2	253
Adams, Alva, estate of	14544	17	1324
Adams, Alva B., executor	14544	17	1324
Adams, B. G	4361	5	113
Adams, Honor B	25200 30661	21	98
Adams, Miner B	30661	21	98
Adams Motor Co	3522	4	589
Adamson, Charles B., trustee	17780	10	763
Adamson, Henry	21860	17	17
Adaskin, Herman	9591	8	460
Adler Co., The	10847	10	849
Adler, Siegmund	3078 4059	8	787
A. G. & S. Mining Co	9229	8	1260
Aguilar Land Association, The	3718	3	705
Ajax Coal Co	7476	7	305
Ajax Enameling & Foundry Co	7343	7	1230
Akron Rubber Mould & Machine Co	11838	12	1252
Alabama Coca-Cola Bottling Co	1164	1	837
Alabama Cooperage Co	13605	18	1287
Albia Box & Paper Co	1907	4	1184
Alexander Bros. Lumber Co	41748	22	153
Alexander County National Bank	12075	12	1238
Alexander County Savings Bank	12616	12	1238
Alexander Manufacturing Co	5656	9	347

[1] Ruling No. 5331 includes all acquiescence and nonacquiescence notices published in the Internal Revenue Bulletin service to and including December 31, 1931.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
All America Cables, Inc.[1]	9092	10	213
Allen, H. A	7290	7	1256
Allen, Mrs. H. A	7289	7	1256
Allen et al., James A., executors [2]	8690	8	693
	36157	20	713
Allen, Louis	383	2	1313
Allerton, Robert	16431	13	1385
Alliance Milling Co	15649	10	457
Alling & Cory Co.[3]	6606	7	574
Alphin, Mary	24632	21	1101
	30287		
Alsop, Edward B., estate of [4]	6519	7	848
Alsop, Edward H., executor [4]	6519	7	848
Aluminum Flake Co	4669	6	1193
	8444		
American Auto Trimming Co. et al	3430	6	1007
American Bag Co	31782	21	128
American Box Co	5418	3	824
American Colortype Co	7901	10	1276
American Cream of Tartar Co	2078	2	847
American Creosoting Co., Inc	17777	12	247
American Feature Film Co.[5]	4437	11	1271
American Felt Co	14882	18	509
American Finance & Mortgage Co	40018	22	32
American Fruit Growers, Inc	9043	11	635
American Hawaiian Steamship Co	4225	7	13
American Lace Manufacturing Co	8293	8	419
American LaDentelle, Inc	611	1	575
American Lawyers Co	23214	21	370
American Locker Co	34372	21	408
American Manganese Steel Co	8145	7	659
American Mills Co	1994	2	460
American National Bank of St. Paul	14702	14	476
	30751		
	33212		
American Packing Co., Inc	1173	3	195
American Photo Player Co	1290	2	419
American Seating Co.[6]	4772	4	649
American Seating Co.[7]	14676	14	328
American Seedless Raisin Co	15725	15	452
American Show & Entertainment Co	7679	5	954
American Steel Co	8368	7	641
American Stone Co	10898	9	242
American Telegraph & Cable Co	2967	2	991
American 3 Way Luxfer Prism Co., Inc	5935	9	571
American Trust Co., administrator [2]	12962	13	105
American Trust Co., trustee	29173	18	580
American Valve Co	4696	4	1204
American Warehouse Co	29330	19	8
Ames, Charles Lesley, executor	10520	14	1067
Ames, Charles W., estate of	10520	14	1067
Ames, John S	8895	9	1336

[1] Acquiescence relates to all issues except as to tentative tax.
[2] Estate tax decision.
[3] Acquiescence relates to all issues except the third issue.
[4] Estate tax decision; acquiescence relates only to 1912 trust.
[5] Acquiescence relates to issues involving officers' salaries and legal expenses.
[6] Acquiescence in decision in so far as it relates to inclusion in invested capital of (1) $25,000 paid by taxpayer in 1915 for invention on which patents were pending, (2) $500 for counsel fees.
[7] Acquiescence relates to first issue of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Amigo Coal Co	11684	8	598
Amory, Margaret E	42847 44676	22	1398
Anaheim Sugar Co	13521	21	1092
Anamosa Farmers Creamery Co	29352	13	907
Anderson, Alden	16058	19	371
Anderson, Gustave E., trustee	32561	10	1376
Anderson, Isabel	1394	5	27
Anderson, John, estate of	32561	10	1376
Anderson & Gustafson	1556	3	531
Anderson-Harrington Coal Co	743	6	759
Anderson & Lind Manufacturing Co	3074	2	1297
Anderson Lumber Co., J. F	9103	15	475
Andrews, Effie, estate of [1]	13096	13	651
Andrews et al., James M., executors [1]	13096	13	651
Angelo Co., G	10869	12	460
Angelo Fruit Co., G	10869	12	460
Angier, Edward H	25958	17	1081
Angier Corporation [2]	25960	17	1376
Anglo California Trust Co., trustee	19247	18	468
Anniston City Land Co	1368	2	526
Anthracite Trust Co., administrator estate of John Joseph Brown, deceased [1]	4947	3	486
Anticich, Grego A	19057	18	513
Antonoplos, George	3925	3	1236
Antonoplos, Kast	4013	3	1236
Apartment Corporation	26571 29140	17	876
Appalachian Realty Co	9685	12	52
Appell et al., Albert J., executors	7041	10	1225
Appell, Jacob, estate of	7041	10	1225
Appleby, jr., Scott B	25046	18	565
Applegate, Ralph Andrew, executor	7970	10	705
Aragon Mills	18044	17	257
Aranas Compress Co	4378	8	155
Arcade Department Store, Inc	6298	18	1172
Archbald, jr., et al., R. W., executors	4695	4	483
Archbold, John F., executor [3]	8629	8	919
Archer Paper Co., The	342	1	634
Archer-Strauss Rubber Co	17194 25188	9	809
Ardis & Co	13023	12	679
Armistead, D. L	14750 21952 28227	13	1248
Armstrong, Bird	3297	6	384
Armstrong, D. E., estate of	30285	21	1101
Armstrong, E. A	232	1	296
Armstrong, J. H	3297	6	384
Armstrong, W. B	24634 30290	21	1101
Art Brass Co	19841	15	583
Arter Paint & Glass Co	1574	2	1256
Arthurs, W. C	2468	3	374
Art Metal Construction Co	4943	4	493
Associated Building Co	12733	14	863

[1] Estate tax decision.
[2] Acquiescence does not relate to decision regarding 1918 taxes of Angier Mills.
[3] Estate tax decision; acquiescence relates to third issue of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Associated Dental Supply Co	5650	9	1022
Associated Gas & Electric Co	2296	2	263
Athol Manufacturing Co	30388	22	105
Atkins, Alma Foster	15485	9	140
Atkins, John B., estate of	3377	9	140
Atlantic City Electric Co.[1]	17871	15	1084
Atlantic Coast Line R. R. Co	2505	2	892
Atlantic Coast Line R. R. Co.[2]	10983	9	1193
Atlas Plywood Co	25797	17	156
Atlas Tack Co	4725	9	1322
Atterbury, Grosvenor [3]	195	1	169
Aubrey, George A	4409	8	70
Auchincloss, J. Howland, executor	24312	11	947
Auditorium Co	4483	5	163
Auerbach, Salo	1976	2	67
Ault & Wiborg Co	16655	10	183
	24376	17	665
Ault & Wiborg Co. of New York	24375	17	665
Ault & Wiborg Co. of Uruguay	24377	17	665
Austin, A. Plumer, estate of	9357	10	1055
Austin Co., M. B	14883	13	867
Authier, Joseph P	2778	5	736
Auto Specialties Manufacturing Co	10449	9	455
	15928		
Autovent Fan & Blower Co	240	5	282
Avery, Thomas J	27688	11	958
Avon Mills	6246	7	143
Avon Street Trust	4459	3	553
Axelrod, Herman	22505	18	927
Ayer, Charles F	6442	7	324
Ayer, William P. F	16230	10	11
B.			
Bach, L., estate of	10637	9	1404
Backus & Sons, jr., A	3777	6	590
Badger Talking Machine Co	10239	8	455
Badgley, Alfred E	36955	21	1055
	38562		
	41399		
Bahr, W. A	5020	10	637
Bailey, John W	3901	3	362
Baillie, Alexander	4784	12	1209
Baillie, Mrs. Alexander	4783	12	1209
Baird, James	9393	4	399
Baird Machine Co., The	201	2	1089
Baker Lumber Co	3271	2	907
Baker's Mutual Cooperative Association	33265	20	593
Balaban & Katz Corporation	5386	6	610
Balfour, Sir Robert	2344	2	747
Bamert, E. T	3227	8	1099
Bank of Brady	1899	3	391
Bank of Commerce	4800	10	73
Bank of Hartsville, The	999	1	920
Bank of London & South America, Ltd	22015	17	1263
	24282		

[1] Acquiescence relates to all issues except affiliation with American Gas & Electric Co.
[2] Acquiescence relates to first issue of decision.
[3] Nonacquiescence notice in the case of Grosvenor Atterbury (C. B. IV-1, 4) recalled.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Bank of New York & Trust Co., executor [1]	39037	21	197
Bank of Rockingham	4682	3	1137
Bank of Wyoming	16299	22	1132
Banna Manufacturing Co	762	1	1037
Banse, Andrew	20502	16	68
Banta Refrigerator Co	17164	15	1038
Bardwell, Pritchard & Co	36771 41521	20	350
Barker, George E., estate of	8728	13	560
Barker, O. B	3583	3	1182
Barker & Co., Ltd., C. B	32159	21	1431
Barkley, G. C	24352	19	855
Barnard, Mrs. C. J	22454	18	1022
Barnes Coal & Mining Co. and Columbus Coal & Mining Co	3209	3	891
Barnett, A	28743	18	632
Barnette, Katherine Wilkinson, sole and only heir [2]	16379 16743	16	1390
Barr, R. H	26868	21	400
Barrows, Fletcher L	3158	4	1221
Barry, E. J	99	1	156
Barry, John Anthony	1724	2	1092
Bartlett, A. G., estate of	19881	21	751
Bartley, R. A	2623	4	874
Barton & Willson, Inc	11913	13	971
Bartron, H. J	2721	3	1262
Bass Publishing Co., J. P	11742	12	728
Bastrop Mercantile Co., Ltd	8124	7	529
Batson-Cook Co	5458	6	1191
Battleson, E. W	39802	22	455
Baum, Louis S., estate of [1]	20263	21	176
Baumann et al., Max, executors	6981	8	107
Baumhoff, George W	1624	3	392
Bay City Fuel Co	34384	20	450
Bay Ridge Land & Improvement Co	21217	16	432
Bay State Securities Co	3685	3	43
Beach Amusement Corporation	18288	14	338
Beacon Coal Co.[3]	11894	9	280
Beaver Lumber Co	3534 9400	9	80
Becker, S. L	9949	8	65
Becker Bros	16954	9	1260
Becker Paper Co	4555	10	523
Beeler, Joseph G	2367	14	980
Behrend, Ernst R	38643 47951	23	1037
Bekins Household Shipping Co	8618 21981	13	353
Bell, F R	27272	19	881
Bell, James A	8859	7	621
Bell-Rogers & Zenmurray Bros. Co	1220	4	687
Bellamore, David H	6385	3	1133
Belle Isle Creamery Co	12317	14	737
Belle Isle East Side Creamery Co	12317	14	737
Bellingrath, W. A	2018	3	11
Belmont Hotel Co., August	16382	18	643

[1] Estate tax decision.
[2] Acquiescence relates to issues 2 and 4 of decision.
[3] Acquiescence relates to second and third issues of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Belmont Shore Co	25998	21	714
Belmont Stone Co	12410 28531	12	1159
Belridge Oil Co	6296	11	127
Belt Railway Co. of Chicago [1]	4289	9	304
Bemis, sr., Thomas	3100	2	255
Bendheim, A. M., estate of	7964	8	158
Bendheim, Henrietta	7963	8	158
Bendheim, Julius, executor	7964	8	158
Bendix Engineering Works, Inc	24956	23	1049
Benham Ice Cream Co	3401	5	97
Bennie, George E., estate of [2]	12962	13	105
Bentley, J. A	2512	5	314
Benton County Hardware Co	9896	10	869
Benz Bros. Co	19965	20	1214
Berg Industrial Alcohol Co., David	13102	13	1349
Bergfeld, Carolina	26459	19	312
Bergfeld, Rudolph	26458	19	312
Berizzi Bros. Co	22388	16	1307
Berlin, Inc., Irving	3049	2	377
Bermingham Lumber Co	2654	1	1201
Bermont Oil Co	15543 27893 32463	22	182
Bernard's, Inc., George	5410	8	716
Bernd, John M	3340	4	291
Bernicedale Coal Co	9824 13183 24997	16	696
Bernstein, E. R	1258	6	323
Bernstein, Fannie H	1258	6	323
Bernstorff, Hans	4054	8	787
Bernuth-Lembcke Co	17018	17	599
Berthold, Elizabeth	7248	12	1306
Bessell, Maxwell E	4971	3	567
Bessemer Investment Co	5295	8	1011
Best Brewery Co	19139	16	1354
Bettendorf, Joseph W	2035	3	378
Bettens, Albert	1488	2	535
Bickett-Swett Livestock Co	8347	12	326
Bickley, Milton H	297	1	544
Big Rapids Electric Co	14868	9	737
Big Western Oil & Gas Co	7150	9	427
Bill & Co., Raymond R	15399	15	320
Bills Bros. Memorial Corporation	1346	7	1182
Biloxi Packing & Trading Co	17216	18	733
Binger, Robert E	31984	22	111
Bingham, Arthur W., executor [3]	20303	15	1001
Bird, Samuel	6721	4	259
Birkeland, K. B	3464	3	209
Birmingham Trust & Savings Co., executor	7440	5	245
Birn, Henry	610	1	416
Biscayne Trust Co., executor	13686 16885	18	1015
Bishop, John E., trustee	29173	18	580

[1] Acquiescence relates only to issues involving computation of net income for 1918 and 1919 and excessive depreciation restored to income for 1918 and 1919.
[2] Estate tax decision.
[3] Estate tax decision; acquiescence relates to deductions for attorneys' fees and executors' commissions.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Bishop, Martha J., executrix [1]	20069	14	130
Bishop, Roland P	14007	13	784
Bishop, Samuel D., estate of [1]	20069	14	130
Bishop, William T	14008	13	784
Bissell, Anna	24784	23	572
Bitter Root Stock Farm	5777	10	81
Bivin, William T	39025	21	1051
Bixby Co., Jotham	15577	14	144
Bjornstad, Otto A	18115	12	20
Black River Sand Corporation [2]	19933	18	490
Black & Yates, Inc	3442	2	873
Blackie, A. W	2282	2	747
Blackstone, D. L., administrator	10401	12	456
Blair Veneer Co	6703	5	886
Blake, John A. L	7461	9	651
Blake, Lilian K	26374	23	554
Blitzer, Max	5443	3	696
Bloch, J. H	10076	6	563
Block, Blanche Leiter, estate of [1]	39270	20	782
Blodget, Fannie H	29393	13	1243
Blodget, William, estate of	10344	13	1243
Blodget, William, estate of [1]	28934	18	1050
Blodget, William P	29392	13	1243
Blodget et al., William P., executors	10344	13	1243
Blodget et al., William P., executors [1]	28934	18	1050
Blodgett, John W	35356	13	1388
Blogg & Littauer, Inc	5297	3	427
Bloom, David, estate of [3]	35160	20	933
Bloom, Jonas [3]	35159	20	933
Bloom, Jonas, executor [3]	35160	20	933
Bloom, Bros., Inc	9440	10	710
Bloomfield, Frederick	6501	6	298
Blow et al., Adele M., administrators [1]	30077	16	872
Blow, George P., estate of [1]	30077	16	872
Bludworth, Mrs. W. M	6285	7	495
Blue Limestone Co	19639	22	206
Blue Ridge Overalls Co	10210	6	1335
Blue River Placer Mining Co	6299	8	166
Blumenthal, S. J	17082	12	1205
Blum's, Inc.[4]	2523	7 17	737 386
Blumstein Realty Corporation, L. M	30353	20	582
Boadwee, Isabelle M	10743	11	1205
Boal's Rolls Corporation	22370	16	799
Board, R. V	18534	18	650
Boas, Charles S., estate of	1139	2	522
Bockhoff, Harry W	3206	3	560
Boericke & Runyon	2981	3	684
Boetticher et al., Emma C., executors [1]	32095	19	616
Bogart, Lacey L., administrator Leon C. Riggs estate	1932	2	668
Boggs, Mary Walker, executrix [1]	12309	11	824
Boggs, R. H., estate of [1]	12309	11	824

[1] Estate tax decision.
[2] Acquiescence relates to issue 2 of decision.
[3] Gift tax decision.
[4] Acquiescence relates to 1919 salary issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Boggs & Buhl, Inc	9269 18119	11	612
Boggs Oil Corporation	40165	19	940
Bogle & Co., Inc., W. S	2208	5	541
Boker Cutlery & Hardware Co., Inc	13267	12	1405
Boland, Mary E	25111	21	98
Boland, William P	25112	21	98
Bolinger-Franklin Lumber Co	8077	7	402
Bonaparte, Ellen C., estate of	1652	1	1101
Bonneville Lumber Co	3657	2	489
Bonnie Bros., Inc	7806	15	1231
Bonwit Teller & Co	21859 27824 28700	17	1019
Boone, D. W	3053	9	442
Boone, J. A	3052	9	442
Boone, James D	3051	9	442
Boone, W. F	3163	9	442
Booth Furniture & Carpet Co	426	6	886
Borden, Spencer, estate of [1]	5909	6	255
Borden, jr., Spencer, executor [1]	5909	6	255
Bosshardt, Frank J	4436	4	1262
Boston Oldsmobile Co	11239	16	114
Boston Safe Deposit & Trust Co. et al., executors [1]	31537	21	394
Boston Store, Inc., The	4216	7	970
Boston Structural Steel Co	836	1	602
Botsford-Constantine & Tyler	9759 11616	10	565
Boucher-Cortright Coal Co	6764	7	1
Boulden, Charles H	7965	7	490
Bourne, Louis M	46326	23	1287
Bowen, Allan H	2690	2	1043
Bowen, W. A., estate of	40168	23	804
Bowman, H. H.[2]	15850	16	1157
Bowman, J. W	7467	8	526
Bowman, J. William [2]	18935	16	1157
Boyce Extract Co	9327	9	34
Boyd, H. B	6751	6	1330
Boyer Co., B. F	5739	4	180
Boyertown Burial Casket Co	8000	21	1130
Boyne City Lumber Co	10495	10	382
Boynton, Charles T., estate of	840	5	294
Boynton, N. H	9145	11	1352
Boynton Gasoline Co	5342 6909 6910	6	434
Bradford Co	8384	14	339
Bradley, W. C	47	1	111
Bradshaw, Rosena W	5621	4	995
Brady, Edwin H	7434	7	818
Braley, E. R	17221	14	1153
Braly-Ferguson Gin Co	5399	5	1290
Brand, Alfred	8572	5	297
Brand, Philip R	8432	5	297
Brandeis Investment Co	1545	3	1086
Brandeis & Sons, J. L	1546	3	1086

[1] Estate tax decision.
[2] Acquiescence relates to deduction of expenses for annual picnic.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Brandenburg, Edwin C., executor estate of George M. Oyster, jr	7390	4	108
Brandon, D. S	20124	10	1118
Brannum Lumber Co	2836	2	821
Brauer, Paul, estate of	730	6	579
Brauer et al., Mary B., executors	730	6	579
Bray, Elizabeth J., administratrix estate of Richard Bray	2801	4	42
Bray, Richard, estate of	2801	4	42
Breevoort Hotel Co	539	1	269
Brehmer, August F. W., estate of [1]	5844	9	423
Brehmer et al., Otto T., executors [1]	5844	9	423
Brewer, J. R., administrator	21393	17	704
Brewer, Maggie, estate of	21393	17	704
Brewer Co., F	78	1	417
Brewster Laundry	14005	10	496
Brickell, Maude Estella [2]	14321	17	711
Brier Hill Collieries [3]	11406 19365 28186	12	500
Briggs & Turivas	11672	11	62
Briggs-Weaver Machinery Co	21074	14	1351
Brighton Syndicate No. 1	27921	17	1173
Brill, William	19187	20	495
Brinkerhoff-Faris Trust & Savings Co	13658	14	797
	20063	14	801
Bristol, P. L	9173	10	306
Britain, A. H	27702	20	127
Britain, Mrs. A. H	27704	20	127
Britt, Benjamin T	1905	2	53
Britt, Mary A., estate of	1904	2	48
Broadbent, Frederick M., estate of [1]	21038	20	890
Broadhead, Almet N., estate of	3897	7	414
Broadhead, Sheldon B., estate of	3896	7	414
Broadhead, William A., administrator	3897	7	414
Brodbeck, Lucy E	11647	8	969
Bronson, W. S	20527	9	1008
Brooklyn Trust Co., executor [1]	13792	13	174
Brooks & Sons, M. S	7747	10	510
Brown, Charles	13932 27779 31427	13	981
Brown, Edward T	7994	6	895
Brown, Edwin M	499	1	502
Brown, Frederick A	29456	22	581
Brown, George Warren, estate of [1]	12868	21	1201
Brown, Henry I	3675	4	1129
Brown, Jacob F., trustee	8191	9	521
Brown, James	11161	10	1036
Brown, James Crosby	11224	10	1036
Brown, John Joseph, estate of [1]	4947	3	486
Brown, Rives S., executor	6056	4	74
Brown, R. L	16200	14	609
Brown, Thatcher M	11162	10	1036
Brown, Walter F	12748	13	832

[1] Estate tax decision.
[2] Acquiescence does not relate to net loss deduction.
[3] Acquiescence relates to deduction of amounts expended for resurveying, maintaining, and marking boundaries of petitioner's property and the cost of removing a boiler and installing a new one.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Brown, Warren E	2975	4	56
Brown Agency, Inc	38939	21	1111
Brown & Brown, Inc	9748	10	106
Brown Co., H. H	7967	8	112
Brown Coal & Coke Co., R. L	12709	14	609
Brown Lumber Co	12703	9	719
Browne, Edward I., estate of	11134 21634	9	1370
Brownell, Walter D	4937	4	1191
Brownfield, Maro	10995	8	1164
Browning, J. T	25154	16	485
Browning Co., J. M. & M. S	1037	6	914
Brownsville & Matamoros Bridge Co	93	1	320
Bruce Co., E. L	34404	19	777
Bruce & Human Drug Co	129	1	342
Bruckner et al., William T., trustees	23730	20	419
Bruere, Henry	4055	8	787
Bruin Coal Co	176	1	83
Bruner Woolen Co., Inc	7892	6	881
Brunner, Arnold W., estate of	3719	5	1135
Brunner, Emma B., executrix	3719	5	1135
Brunton Studios, Inc., Robert	7447	15	727
Brush, George De Forest	6568	9	171
Bryan, Alexander H	37420	20	573
Bryan, Helen H	37415	20	573
Bryan, Helen M	37417	20	573
Bryan, Isobel S	37416	20	573
Bryan, J. St. George	37412	20	573
Bryan, John Stewart	37411	20	573
Bryan, Norma S	37418	20	573
Bryan, 2d, Thomas Pickney	37419	20	573
Bryant, E. A	34078	21	677
Bryson, C. A	25155	16	485
Bryson, M. T	25157	16	485
Bryson, T. W	25172	16	485
Buck, Ellen B., estate of	12988	12	434
Buck, Truman, estate of [1]	17660	13	415
Buckeye Brewing Co	8779	15	435
Buckeye Producing Co	8779	15	435
Buechner, C. Fred	32338 32339	22	1079
Buedingen, Robert	5855	6	335
Buena Vista Hardwood Co	2306	3	503
Buffalo Forge Co	3170	5	947
Buffalo Steam Pump Co	3170	5	947
Bugher, Frederick H., estate of	6035	9	1155
Bugher et al., Frederick McLean, executors	6035	9	1155
Bull, Archibald H., estate of	6888	7	993
Bull, Ernest M., executor	6888	7	993
Bullard, Bernice K	7566	7	456
Bullock, H. E	13117	12	51
Burgess, Richard F	1311	3	1134
Burgi, Oscar	5782	6	1297
Burgio, A. E	4232	4	4
Burguieres Co., Ltd., J. M	8601	12	879
Burke, J. E	31949	19	743
Burke, Thomas, estate of	12626	13	781

[1] Estate tax decision; nonacquiescence notice published in Cumulative Bulletin VIII-1, page 52, recalled.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Burke Electric Co.[1]	1697	5	553
Burkhart, Rosa E	2749	11	275
Burkitt, George W., estate of[2]	2038	3	1158
Burley Tobacco Co. of Frankfort	21311	13	892
Burlington Overall Manufacturing Co., The	2106	2	143
Burns, J. R	12611	5	1003
Burns, Samuel	8673	13	579
Burns, W. J	4753	12	1209
Burnside Steel Co	3292	3	20
Burr, Jerome P	13099	11	1005
Burr, Walter C	13100	11	1005
Burton Co.[3]	37392 37396	23	119
Burtsell et al., Bertram W., executors	2650	6	412
Busche, F. C	9447 10202 10755	10	1345
Buss Co	2952	2	266
Butler, James M	34730	19	718
Butler, Inc., John W	1572	1	1105
Butler Grocery Co. et al., James	5978	4	378
Byers Co., A. M	7451	19	660
Byfield, Gladys R	989	2	19
Byrd, James L	31049	21	1183
Byrd Printing Co	14902	15	55
Byron Shoe Manufacturing Co., Inc	463	1	666
Bywaters, K. Hunter	6288	7	495
Bywaters, P. A	6287	7	495
Bywaters, R. S	6289	7	495
C.			
Cadillac Automobile Co. of Illinois	2657	5	604
Caflisch Lumber Co	24643	20	1223
Cairns, J. J	18143	12	20
California Brewing Association[4]	3903	5	347
California Canneries Co	2228	2	109
California Delta Farms, Inc	9820	6	1301
Callanan Road Improvement Co	13303	12	1109
Calloway, Fuller E., estate of	32146	18	1059
Calloway et al., Ida C., executors	32146	18	1059
Camden & Burlington County Ry. Co	4991	3	602
Camden Woolen Co	10655	12	1277
Cameron, W. J	9313	9	1123
Camp, Francis M	16618	21	962
Campen, Fritz B	21986	16	543
Campbell, A. O	5631	6	561
Campbell et al., Nancy Carver Lathrop, trustees	16617	15	414
Campbell, Nigel Leslie	373	1	441
Canaan, Harry and Kate	304	1	720
Cantine, Martin	16797	18	1109
Canton Art Metal Co	7111	6	446
Canton Steel Ceiling Co	7112	6	446
Cantrell Co., The Fred	3141	3	1067

[1] Acquiescence relates to issue 5, as to patent group No. 2, and issue 6.
[2] Estate tax decision.
[3] Acquiescence relates to issue 1 of decision.
[4] Acquiescente relates to deduction of contribution to State Brewers' Association and affiliation with the Remar Co.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Canyon Lumber Co	4917	4	940
Capel, A. W. E	7069	7	1076
Capital City Investment Co	5376	4	933
Capitol Hotel Co.[1]	6610 7134	4	441
Capitol Park Hotel Corporation	7705	5	1160
Capitol Securities Co	3031	3	75
Capitol Theatre Co	6224	8	287
Caplis, Mary, deceased, estate of [2]	6720	4	983
Capps, Lina J	4451	2	1271
Carbo Petroleum Co.[3]	9524	12	166
Carey, C. W.[4]	2432	6	539
Carlisle Garment Co	3632	3	1119
Carlston, J. F	33118	22	217
Carmichael, D. L	12061	5	456
Carmichael, J. H	12493	12	455
Carnahan, H. L	34915	21	893
Carnation Milk Products Co	19552 19789	20	627
Carney, Richard	7027	6	457
Carney Coal Co.[5]	5562 8496	10	1397
Carpenter, D. M	11072	8	675
Carpenter, John F	11073	8	675
Carpenter, Mary J	11071	8	675
Carpenter, Mary J., administratrix	11070	8	675
Carpenter, Maud E., estate of	11070	8	675
Carr, J. Lawrence	18282	15	1042
Carr, Kathleen M	18279	15	1042
Carroll, Ben L	37660	21	724
Carroll Chain Co.[6]	104	1	38
Carroll Mercantile Co., J. S	4222 11744	7	1157
Carter, David S	42940	21	1362
Carter, MacDonald & Miller, Inc	12954	14	522
Carthage Spoke Co	34358	21	1135
Cartier, Warren A	9605	11	900
Case Plow Works, J. I	664	3	981
Cass, Alvin C	19890	16	1341
Cassidy Co., Inc	9368	11	190
Castle, Frank E., estate of [2]	24878	19	174
Caswell Co., George W	13878	14	15
Cataract Ice Co	32345	23	654
Celluloid Co	8543 19459	9	989
Centadrink Filters Co., Inc	5214	6	662
Central Amusement Co	2418	2	886
Central Auto Market	8327	7	973
Central Bank Block Association	40984	19	1183
Central Savings Bank [7]	5006	10	1408
Central States Coal Co	8735	4	1134

[1] Acquiescence does not relate to that part of decision involving application of Ayers decision (1 B. T. A., 1135).
[2] Estate tax decision.
[3] Acquiescence relates to all issues of decision except fourth issue.
[4] Acquiescence relates only to issues 2 and 4 in decision.
[5] Acquiescence relates to issue No. 2 and with respect to fiscal year ended May 31, 1917, under issue No. 1.
[6] Nonacquiescence notice in case of Carroll Chain Co. (C. B. IV-1, 4) recalled.
[7] Acquiescence relates to cost of bank building, its physical life from date of acquisition, and March 1, 1913, value.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Central Union Trust Co. of New York et al., executors [1]	40790	21	279
Central Wisconsin Creamery Co	13350	15	396
Chamber of Commerce Building Co	9598	11	720
Champion Coated Paper Co	19279	10	433
Champion Stove Co	870	1	656
Chandler, J. E	4039	3	146
Channon Manufacturing Co., James H	6803	8	959
Chapin Laundry Co	7650	6	609
Chappelow Advertising Co	12688	13	1090
Charleston Security Co., executor	3843	4	1269
Chartiers Creek Coal Co	9652	10	984
Chase, Jessie	35942	19	1040
Chatham & Phenix National Bank	107	1	460
Chattanooga Mattress Co	3714	4	464
Chatterton & Son	6057	5	105
Cheeseman, W. C	20811	15	422
Cherokee Ochre Co	9846	9	406
Chesson, Oscar	34467 43986	22	818
Chicago Acceptance Co	12764	12	150
Chicago Fire Brick Co	11063	10	180
Chicago, Indianapolis & Louisville Ry. Co	11152	10	1143
Chicago Insulated Wire & Manufacturing Co	2380	10	1195
Chicago Railway Equipment Co	3964 18438	4 13	452 487
Chicago Starch Co	19427	13	1364
Chicago Talking Machine Co	12363	13	154
Chickasha Cotton Oil Co	30165	18	1144
Childs & Co., W. F	4127	3	855
Chisholm's Sons Co., Wm. (Chisholm Shovel Co.)	1840	3	1070
Choate, jr., Charles F., estate of	13552	16	71
Chormann et al., Agnes B. C., executors	10345	10	920
Chormann, Frederick, estate of	10345	10	920
Choynski, Herbert	14448	14	9
Christensen, N. P	4380	7	625
Christopher, L. J	8931	13	729
Christopher Co. of California, L. J	16085	13	729
Christopher Co. of Delaware, L. J	17448	13	729
Church & Hoiles Co	3526	4	1067
Cincinnati Mining Co	8427	8	79
Citizens Loan Association	412	1	518
Citizens National Bank	6148	5	156
Citizens Trust Co. of Utica	3373	2	1239
Citrus Soap Co. of California	13249	14	1155
City Gas Co. of Norfolk [2]	11730 14199	9	468
City National Bank	28912	17	637
City National Bank of Commerce	22111	17	637
City Park Brewing Co	7973	10	925
Clampitt, Edward A., estate of [1]	26059	22	230
Clampitt et al., Margaret M., executrix and transferees [1]	26059	22	230
Clark, A. A., estate of	820	6	1085
Clark, Frank H., executor	8015	12	425

[1] Estate tax decision.
[2] Acquiescence in so far as decision determines that City Gas Co. of Norfolk and Virginia Railway & Power Co. were affiliated with each other.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Clark, Grace Scripps	20103, 36901	16	453
Clark, Grace Scripps and Rex B	536	1	491
Clark, Harold B	1707	2	555
Clark, Lillie M	8049	9	460
Clark, Roy C	34191	19	736
Clark & Co	5785	4	356
Clark Co., James T	3660	5	1291
Clark Dredging Co	39566	23	503
Clarke, D. C	28257	22	314
Cleveland Home Brewing Co	73	1	87
Cleveland Snow-Church Co	169	1	234
Cleveland Trinidad Paving Co. of Delaware	17294	14	1209
Cleveland Trust Co., executor	26919	24	132
Cleveland Trust Co., trustee	28141	15	1410
Cleveland Woolen Mills	6029	8	49
Cline, Mrs. Ella Pipes [1]	6929	15	934
Cline, W. D.[1]	6930	15	934
Cloquet Cooperative Society	39021	21	744
Coates, Jane B	5456	3	429
Coatesville Boiler Works	8603, 16097	9	1242
Cobb, L. S	7136	9	547
Cochran, George I	33367	21	677
Cochrane, Henry F	34435	23	202
Cockran, H. T	3801	3	215
Cocks-Clark Engraving Co	6604	8	468
Codrington, Ethel M	4685	6	415
Coffey, Robert C	36301	21	1242
Coffin, Irene	5930	8	421
Coffin, Winthrop	11556, 12498, 28049	12	702
Coffman-Dobson Bank & Trust Co., executor [2]	21038	20	890
Coghlin Electric Co	1879	3	1071
Cohn & Sons Co., M.[3]	7361, 9238	9	87
Cohn-Goodman Co	7167	7	475
Cole, W. C	9133	7	903
Cole, Mrs. W. C	9134	7	903
Coleman, James F	4891	3	835
Colitz, Benjamin	3004	3	947
College Point Boat Corporation	764	1	534
Collins, Fred J	26672	16	1426
Collins, W. C. and C. C	5986	5	102
Collins and wife, W. D	11148	7	913
Collinson, John W	550	1	561
Collmus, jr., C. Carroll	24660	21	210
Colmer-Green Lumber Co.[4]	20916	12	256
Colonial Creosoting Co., Inc	17777	12	247
Colonial Trust Co., executor [2]	24878	19	174
Columbia Theatre Co	1414	3	622
Columbus Bread Co	5823	4	1126
Columbus Canning Co	9582	10	1085

[1] Acquiescence relates to issue as to whether proceeds of a note collected in 1919 represents income for that year; also decision as to fifth issue.
[2] Estate tax decision.
[3] Acquiescence relates to allowance of officers' salaries.
[4] Acquiescence relates to depreciation allowance.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Columbus Coal & Mining Co	3209	3	891
Colvert, Warner L	9170	6	623
Combs, sr., W. H	10182	6	249
Comey & Johnson Co	11133	8	52
Commercial Co. of Egypt, Inc	5810	3	1163
Commercial Furniture Co	6507	8	71
Commercial Trust Co	31926	18	1248
Commercial Trust Co.[1]	31927	21	732
Commodore's Point Terminal Co	13402	18	385
Compton, Anna L., executrix	8519	11	26
Compton, Horace F., estate of	8519	11	26
Comstock-Castle Stove Co	3347	4	114
Concord Electric Co	4355	7	1027
Concrete Engineering Co	19257	19	212
Conlen, William J	815	1	472
Conley Tin Foil Corporation	15693	17	65
Conn, Jacob	11978	16	73
Connecticut Electric Manufacturing Co	7549	6	1360
Connecticut National Pavements, Inc	3448	3	1124
Connell, Ezra H., estate of [2]	12368	11	1254
Connorized Music Co	7179	7	213
Connors Steel Co	11242	23	625
Conover Co., C. E	9830	7	1234
Conrad & Co., Inc	10042 18293 19582	13	1332
Conrad Hardware Co	11584	8	512
Conrad Shoe Co	597	1	798
Consolidated Brick Co	23120 30506	17	831
Consolidated Electric Lamp Co	555	1	616
Consumer's Coal Co	8131	10	851
Consumers Ice Co	12704	11	144
Conway, Adrian C	1614	9	664
Cook, H. G	1741	5	111
Cook, John F	6331	4	916
Cook, R. B	3643	3	668
Coon Valley State Bank [3]	11352	13	132
Cooper, A. F. T., estate of	12634	9	21
Cooper, A. T	3144	7	798
Cooper, C. E	2206	4	1267
Cooper, Edna V	2206	4	1267
Cooper, Samuel	959	1	615
Cooper-Brannan Naval Stores Co	10068	9	105
Copland, David	9557	15	238
Corbett, Elliott R	11836	8	438
Corbett, Hamilton F	16643	8	438
Corbett, Henry L	11837	8	438
Corbett, Merritt J	18733 22491	15 16	698 1231
Corman Co	6227	13	75
Corning Glass Works	9826	9	771
Coronado Oil & Gas Co	10503	14	1214
Corrado & Galiardi, Inc	41246	22	847
Corsicana Gas & Electric Co	4499	6	565
Cortez Oil Co	22233	20	462

[1] Acquiescence in so far as Board has ruled that petitioner is taxable as a trust for 1922 and 1923.
[2] Estate tax decision.
[3] Acquiescence relates to all issues except Galloway note issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Cosby-Wirth Sales Book Co	26175	19	1074
Cotter Co., R. E	18262, 18263	22	436
Cotton Concentration Co	4625	4	121
Couch, H. C	202	1	103
Coulter, jr., Charles J	8181	6	426
Coulter, O. M	34509, 39351	22	1194
Covert, Esther Belle [1]	20048	12	1343
Covington Cotton Oil Co	5534	12	1018
Cowell, H. E	17431, 23374	18	997
Cowell, I. M	17430, 23372	18	997
Cowell, Mattie, and Mona Cowell, executrices, estate Robert Cowell	691	3	432
Cowell, Robert, estate of	691	3	432
Cowell, S. H	23373	18	997
Coxe, jr., et al., Alfred C., trustees	6805	6	1322
Coxe, Sophia G	2121	5	261
Coyle, Arthur J	24513	17	368
Cragg, Thomas W	28293	17	368
Craig Oil Co	9706, 20230	9	823
Craik, John	2283	2	747
Crampton, Katharine S., executrix [1]	11362	10	157
Crampton, Orson L., estate of [1]	11362	10	157
Crandall Horse Co	7924	8	1132
Crane, Charles W	28881	19	577
Crane, Frederick G., estate of	10695, 15374, 16789	9	437
Crane, J. T	27271	19	881
Crane, Rose P., executrix	10695, 15374, 16789	9	437
Crary et al., Calvert, executors [1]	18366	19	634
Crary, Louise B., estate of [1]	18366	19	634
Cravens, Walter	3381	3	282
Crawford Loan & Abstract Co	7681	10	403
Cray, James R	6364	7	322
Crayton, J. S. F	11306	11	1375
Cremin, E. F	9197	5	1164
Cremin, T. O	9198	5	1169
Crescent Cap Co., Inc	10557	10	1
Crescent Coal & Mining Co	2208	5	541
Crews, C. W., estate of	981	8	301
Crews, David W., estate of [1]	9010	8	949
Crews et al., Frank H.[1]	9010	8	949
Crews, Kate Downing, administratrix	981	8	301
Crider Bros. Commission Co	128, 5085, 13847	10	338
Crilly, Daniel F., estate of [1]	17210, 18747	15	389
Crilly et al., George Snyder, executors [1]	17210, 18747	15	389

[1] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Crocker Co., Inc., H. S	11601	15	175
Croker, jr., Richard	6096	12	408
Crompton Building Corporation	4301	2	1056
Croninger Packing Co	12981	14	345
Crosby, Everett U	3764	4	1147
Crosby, Mainard E	2365	14	980
Crosby-Chicago	11674	14	19
Cross Investment Co	799	2	510
Crossman, Earle L	7052, 19619	10	248
Crothers, R. A	5841	5	670
Crouse, Calvin	3717	11	1327
Crowell Corporation	5411	5	737
Crowell Lumber & Grain Co	366	6	826
Crown Hill Cemetery Association	118, 532	6	773
Crown Manufacturing Co	9450	12	37
Crown Willamette Paper Co	11358, 31010	14	133
Cruger Co	11974	11	306
Crystal Block Coal & Coke Co	14518, 31305	15	600
Crystal Ice Co	13134	14	682
Cuba Grapefruit Co., Inc	7954, 15828, 16487	6	260
Cullinan, J. S	5914	5	996
Cullman, jr., Joseph F	29089	16	991
Cullum, Louis W	2678	3	334
Cummings, W. F	10640	9	1404
Cummins, Clyde R	14688	22	931
Cunningham & Sons Co., R. H	7099	10	113
Curlee, W. S	1638	6	557
Curry et al., Albert, administrators	17730	17	282
Curry, William L., estate of	17730	17	282
Curtis, Frank G., estate of	4720	6	472
Curtis, Harriet A., deceased, estate of	442	3	185
Curtis, Louis	11164	10	1036
Curtiss, George W	2327	4	269
Curtiss, Glenn H	27407	21	629
Curtiss, Lena P	27408	21	629
Cusack Co., Thomas	1887	3	828
Cushman Manufacturing Co., H. T	2143	2	39
Cuyahoga Co., The	3721	3	401
D.			
Daigger & Co., A	14733, 14734	13	35
Dail, jr., W. H	21115	19	1036
Daily News Publishing Co., The	4158	4	31
Daily Pantagraph, Inc.[1]	4126	9	1173
Dalriada Realty Co., Inc	3275	5	905
Dalton, Edward F	1657	2	615
Dalton Gymnasium and Swimming School, Inc	194	1	54
Daly, David R., estate of	1373	3	1042
Dana Co., Inc., William B	11064	11	90

[1] Acquiescence relates only to determination of paid-in surplus at date of organization and rates of depreciation.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Daniel Bros Co	10840	7	1086
Daniels Co., Oscar	33582	23	260
Darling, Jay N	6302	4	499
Darling-McDuff Coal Co	19866	15	110
Darrow, Frank D	929	8	276
Dartt Co., C. E	1372	5	76
Dastague, F. P	33974	19	1324
Davidson & Bros., Inc., S	25623, 25624, 25625	21	638
Davis, C. R	10299	10	1233
	32950	20	931
Davis, Frances [1]	34532	22	783
Davis, I. M	2616	2	359
Davis, Mary Cheney	20324	16	65
Davis, Mrs. W. E	8219	8	981
Davis, Sadie S., executrix [1]	3877	9	1212
Davis, William C	42219	22	595
Davis, William H	33366	21	677
Davis & Andrews Co	2691	2	328
Davis Co., The	5497	6	281
Davis Yarn Co., Inc	6885	8	299
Dayton Wright Airplane Co	16915	17	142
Dean, Annie L	1552	3	896
Deck Clamp Tank Co	11227	10	191
Deerland Turpentine Co	6182	4	1236
DeFord, Union C	28483	19	339
DeForrest, Robert W	33165	19	595
DeHart, jr., John S	34920	21	614
Deland, Francis H. and Lillian R	28690	23	1057
Delano, Eugene, estate of	15610	10	1036
Delano, Jennie W., estate of [1]	20178	19	580
Delano, Moreau	11165	10	1036
Delano, Moreau and William A., executors	15610	10	1036
Delatour Beverage Corporation	10892	12	412
De Lisser, Horace, estate of [1]	2459	2	102
Dell, William A., estate of [1]	25964	17	570
Deltox Grass Rug Co.[2]	6926	7	811
Denholm & McKay Co	643	2	444
	20950	15	225
Dental Co. of America	3331	3	343
Denton, Frank W	34507, 39350	22	1194
Denver & Crown Hill Ry. Co	118, 532	6	773
Deposit Trust & Savings Bank, executor	12195	11	706
Derby, Hilda Portner	27766	17	927
DeRoy et al., Abe J., executors	29111	19	452
DeRoy, Louis J., estate of	29111	19	452
Derschug, John N.[3]	18064	15	306
Des Cognets, sr., Louis	8112	7	286
Deshler Hotel Co	5025	7	158
Des Moines Improvement Co	8573	7	279
Detroit Egg Biscuit & Specialty Co	10563	9	1365
Detroit Opera House, Inc	13038	13	587
Detroit Vapor Stove Co	5663	4	1043

[1] Estate tax decision.
[2] Acquiescence relates to first issue in decision.
[3] Acquiescence relates to issue 2 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Deutsch, Julius W	3005	2	729
De Van & Co	8630	7	94
De Vaux, Norman	13574	14	205
De Ved, Sanford F	23968 29740	15	1035
De Vore, Fred F	19462	13	1376
Dewey, Mildred McLean	5040 10012	9	1155
Dexter Sulphite Pulp & Paper Co.[1]	38431	23	227
Diamond Pillow, Feather & Down Co	12733	14	863
Dibble, Leon N., executor [2]	2528	6	732
Dibble, Louis N., estate of [2]	2528	6	732
Dicenso, Fellipo	13526	11	620
Dick, J. Henry, estate of	16495	20	637
Dick et al., William K., executors	16495	20	637
Dickey, Walter S	11637	14	1295
Dickey Grocery Co., L. Z	156	1	108
Dickinson, E. E	5193	8	722
Dickinson, Jacob M., estate of	29208	18	790
Dickinson, jr., et al., Jacob M., executors	29208	18	790
Diesing, Fred D., executor	548	1	507
Dietrich, Gustav	8367	10	141
Dietrick, Herman T	9730	6	1371
Dill, Lewis	4563	3	65
Dill & Collins Co	25449	18	638
Dilling Cotton Mills	1794	2	127
Dillon Supply Co	26913	20	404
Dils Bros. & Co	3575	2	983
Dinkler, Carling, executor	32388	22	329
Dinkler, L. J., estate of	32388	22	329
Dismukes, John T., estate of [2]	37098	23	1187
Dixie Manufacturing Co	475	1	641
Dobson, James	863	1	1082
Dockum, Harry A	3874	11	39
Dodson, Bruce, estate of [3]	7382 24464	21	757
Doelger Brewing Co., Inc., Peter	29436	22	1176
Doerfler, Magdalen, beneficiary, etc	14551	13	921
Doernbecher Manufacturing Co	14387 19152	11	248
Doerschuck et al., George C., executors and trustees [2]	21392	17	1123
Doerschuck, Gustav J. L., estate of [2]	21392	17	1123
Doherty & Co., Ben C	10300	11	812
Doig, Inc., William S	13905 16312	13	256
Domenico Fante's Sons, Inc	4468	2	1098
Donaghey Real Estate & Construction Co	1050	5	766
Donaldson, R. Golden	30943	18	230
Donaldson Co., Inc., L. S	9974	12	271
Donaldson Iron Co	5762	9	1081
Donaldson Realty Co	25359	12	271
Donalson, Erle M., executor [2]	1629	6	455
Donalson, John E., estate of [2]	1629	6	455
Donnelley Corporation, Reuben H	36881	22	175
Dorn, Louis, estate of	11218	12	1102

[1] Acquiescence relates to issue 2 of decision
[2] Estate tax decision.
[3] Acquiescence relates to issues 6 and 8 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Dorn, Rene	11220	12	1102
Dorn, R. J	11219	12	1102
Dorn & Co., R. J	18030	12	1102
Douglas, George P. and Bessie P	288	1	372
Douglas Park Jockey Club	5738	9	496
Douty, F. A	13329	9	218
Dowling, Robert E	11449	8	676
Downing Co., T. D	2276	2	469
Drayton Mills	31064	19	76
Dregge, Bertha Hoult	39870	23	804
Dregge, Martin J	45365	23	804
Dudley, W. S	19392	15	570
Duffield et al., Divie B., executors	14954	14	1185
Duke, Nanaline H	17254	18	374
Dulany, George W., estate of [1]	20169	17	486
Dulany, jr., et al., George W., beneficiaries [1]	20169	17	486
Duncan Co., J	3152	9	1216
Dunigan, David J., estate of	37149	23	418
Dunigan, Helen M., administratrix	37149	23	418
Dunn, Bessie P	18280	15	1042
Dunn, Dewitt C	18281	15	1042
Dunn, Nellie M., executrix	33648	21	677
Dunn, William E., estate of	33648	21	677
Dunn Co., John A	7020	8	955
Dunn Manufacturing Co	15815	14	225
Dunson Mills [2]	17019	10	1150
Durabilt Steel Locker Co	3121	5	239
Duriron Co., Inc	23930	18	554
Durkin, P. Frank	3644	4	743
Dustin, Annie M., estate of [3]	8629	8	919
Dyer et al., George R., executors [1]	3351	5	711
E.			
Eagan, Mary V., estate of [1]	29452	18	875
Eagle Shoe Manufacturing Co., Inc	5593	4	24
Earle, Ellis P	13565	12	96
East Lynn Coal Co	12515	13	116
East Market Street Hotel Co	8664	11	796
Eastern Shoe Manufacturing Co	12163	8	1169
Eastlack, James L	4240	3	41
Eastland, Thomas B	9762	10	1245
Eaton, Charles F	2685	2	463
Eaton, Ezra Z	2684	2	463
Eaton, Malcolm H	2686	2	463
Eckstein, Elsie S	679	2	19
Eckstein, Louis	1171	2	19
Edgar, Clinton G	9354	10	110
Edmonds, Jeanne, executrix	3940	4	967
Edmonds, John W., estate of	3940	4	967
Edmunds, J. M	1842	1	998
Edmundson, D. Lee	17827	18	545
Edwards, Walter A	10021	10	39
Egan & Hausman Co., Inc	581	1	556
Eggink, Henry	6413	7	152

[1] Estate tax decision.
[2] Acquiescence relates to issue with respect to statute of limitations.
[3] Estate tax decision; acquiescence relates to third issue of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Ehrlich, jr., Franz, estate of	4695	4	483
874 Park Avenue Corporation	30832	23	400
Eimer & Amend	2270	2	603
Eisele, Anna, estate of	36900	21	1343
Eitingon-Schild Co., Inc., and subsidiaries	34128 36930 47114	21	1163
Ekdahl, Harry	24271	18	1230
Elba Manufacturing Co	6995	6	74
Electric Appliance Co	28543	19	707
Electro Magnetic Tool Co	7096	7	290
Elfreth, Emily Allen	17552	15	147
Elgin National Watch Co.[1]	19522	17	339
Elias & Bro., Inc., G	11954	10	508
Elias & Co., Joseph	20482	17	628
Elkins, Luther	18036	12	1058
Elliott, E. M	16693	15	494
Elliott, W. H	10639	9	1404
Ellis, Wade H	26136	15	1075
Elm City Cotton Mills	7636	5	309
Elm City Nursery Co	6503	6	89
Elmer, Lucius H	26074	22	224
Elmhurst Investment Co	22557	11	101
El Paso Electric Co	7049	10	79
El Paso Electric Ry. Co	7048	10	79
El Paso & Southwestern Co	672	2	44
Elsasser, Nelson A., executor [2]	11448	12	681
Emery, Bird, Thayer Dry Goods Co	46178	20	796
Emery, John T., estate of [3]	24416	21	1038
Emery, Mary Allen, executrix [3]	24416	21	1038
Empire State Finance Corporation	6805	6	1322
Emswiler, Charles C., estate of [2] Emswiler, Lizzie, executrix [2]	19858	18	1314
Engineers Oil Co	10399 11395 14631	14	1148
Englander, A. L	802	1	760
Engleman, F. J	6193	8	1289
Engleman, M. S	5981	8	1289
Ennis, E. N	24962	21	406
Ennis, Oscar M	24961	21	406
Ennis-Brown Co	8471	10	1248
Entress Brick Co	10006	9	588
Erie Silk Mills	13718	14	1124
Erwin, J. C	10251	7	919
Erwin, Mrs. J. C	10250	7	919
Escaville, jr., William M	2333	3	51
Esperson, Mrs. Niels (Mellie)	7376	13	616
Essanbee Mines Co	2208	5	541
Essellen Realty Corporation	14406	12	739
Essex, Frank B	31126	21	270
Ettenson Winnig Dry Goods Co	362	3	897
Evans, A. J	33710	22	440
Evans, Leroy G	7347	5	806

[1] Acquiescence in the Board's decision in respect to the two pension funds being separate taxable entities; in respect to the deductibility of the initial contribution of $100,000 par value of Liberty bonds to the general fund; and in respect to the selection of comparatives.
[2] Estate tax decision.
[3] Estate tax decision; acquiescence relates to issue 1 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Evans, W. L	3221	3	1180
Evansville Courier	29413	23	862
Evansville Tool Works	21760	22	369
Evens & Howard Fire Brick Co	6797	8	867
Everett, Aratus, estate of [1]	25744	22	748
Evergreen Road Land Co	21644	16	1042
Eves, J. C	1669	2	115
Ewald & Co	34226	18	1130
Ewing, Joseph Neff	14068	13	705
Exchange Bank & Trust Co. of Shreveport, La., administrator	17174	17	429
Exchange National Bank	19198	18	686
Eyestone, Frank E	6463	12	1232
Eysenbach, Oscar K	21107	10	716
F.			
Fair Stock Trust [2]	32137	21	664
Fairchild, Marcus D., estate of [1]	19022	9	416
Fairchild, Nellie B., executrix [1]	19022	9	416
Fairmont Home Furniture Co	30540	23	909
Faitoute Iron & Steel Co	10547	11	818
Fajardo Sugar Co. of Porto Rico	16544	20	980
Falketind Ship Co	3706	6	44
Faltico, George	1601	3	726
Fargason, J. T	26272	21	1032
Farlow, Samuel, estate of [1]	7268	7	172
Farm Implement Co	9823	6	1069
Farmers & Merchants Bank	35009	21	1383
Farmers & Merchants National Bank	5570	8	58
Farmers & Merchants National Bank of Nocona, Tex	12990	10	709
Farmers & Merchants State Bank	1811	2	130
Farmers Bank & Trust Co., executor [1]	10914	10	43
Farmers' Cooperative Association	654	7	657
Farmers Cooperative Co	16342	13	1080
Farmers Elevator Co	13424	13	1079
Farmers Feed Co. of New York	12398	17	507
Farmers' Fuel Co	210	1	1058
Farmers Loan & Trust Co., administrator [3]	1399	3	97
Farmers Loan & Trust Co., executor [4]	18234	16	181
Farmers' Loan & Trust Co., executor [1]	20178	19	580
Farmers' Loan & Trust Co. and Isabelle W. Tilford, executors	3286	3	884
Farmers' Union Co-Operative Association	11055	13	969
Farnsworth Hoyt Co	16287	16	309
Faroll-Bittel Co	737	1	467
Fawkes, Leslie H	11305	14	977
Fear & Co., Inc., Fred	9327	9	34
Federal Advertising Agency Inc	9835 11512 12957 19391 21196	19	1126
Federal Bearings Co., Inc	9233	9	1063
Federal Creosoting Co., Inc	17777	12	247

[1] Estate tax decision.
[2] Acquiescence does not relate to issue involving jurisdiction of Board.
[3] Nonacquiescence notice in this case, published in Cumulative Bulletin IV-2, recalled.
[4] Estate tax decision: acquiescence relates to issue 1 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Federal Development Co	14283	18	971
Federal Gas, Oil & Coal Co., trustees for	7888	15	273
Federal Holding Co	2003	1	1144
Federal Life Insurance Co	7691	22	132
Federal Plate Glass Co	1055	6	351
Feiges, Max	6036	13	1366
Feldman, David	5604	3	434
Feldman, Max	31263	18	1222
Fell, A. H	2089	7	263
Fellows Medical Manufacturing Co	5592 8980	6	232
Fenner, Charles E. and Virginia S	2216	5	772
Ferguson, Charles A	11313	14	820
Ferrer, Irene O'D	18199	20	811
Ferry Market, Inc	3671	5	167
Ferry & Son, Inc., C. S	23211 36759	18	1261
Fibre Container Co	7475	9	575
Fibre Yarn Co	7244	10	479
Ficklen Tobacco Co., E. B	10440	10	51
Fidelia Investment Co	983	2	512
Fidelity-Philadelphia Trust Co., executor	27597	16	1214
Fidelity-Philadelphia Trust Co., executor [1]	28469	17	910
Fidelity Trust Co	4920	4	411
Fidelity Trust Co.[2]	13638	13	109
Field, William B., estate of [1]	43409	22	915
Field & Co., Marshall	15279	14	755
Fifth Third Union Trust Co., trustee	36836	20	88
Filer Fibre Co	24877	14	757
Finance Exploration & Development Corporation of America	6805	6	1322
Fincham, Edward, estate of [1]	30071	16	1418
Fincham, Emma, executrix [1]	30071	16	1418
Finck Co., Henry	4339	4	1188
Fink Co., George A	1369	5	76
Finn, John, estate of	9309	22	799
Finn, Margaret A., executrix	9309	22	799
Finn, Russell G	9309	22	799
Finsilver, Charles	6468	8	391
Fippin, E. O	980	2	350
Firestone, Esther	740	2	309
First National Bank of Durant, Okla	6913	6	545
First National Bank of Evanston, Wyo	19	1	9
First National Bank of Fort Dodge, Iowa	8021	7	817
First National Bank of Goodland, Kans	1280	5	1174
First National Bank of Huntingdon, Pa	30274 40319	23	7
First National Bank of Los Angeles	2817	6	850
First National Bank of Marlow, Okla	9889	9	29
First National Bank of Omaha	30033	17	1358
First National Bank of Richmond et al., administrators [1]	32385	19	288
First National Bank of Rock Rapids, Iowa	687	6	816
First National Bank in St. Louis	44278 48078	23	1124
First National Bank of Sleepy Eye, Minn	2334	7	84

[1] Estate tax decision.
[2] Acquiescence relates to deduction of taxes on real estate and personal property.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
First National Bank of Stoughton, Wis	2790	2	586
First Savings & Trust Co., executor and trustee	38016	20	272
First State Bank	2581	5	1176
Fishel, Henry R	13912	14	87
Fishel & Marks	13912	14	87
Fisher, Carl G	7594	7	968
Fisher, Chauncey H	39975	23	804
Fitchburg Steam Engine Co	433	1	242
Flach, John H	12809	13	383
Fleitmann, William M., estate of	28449	22	1291
Fleitmann, jr., et al., William M., executors	28449	22	1291
Fleming, C. F., estate of [1]	7212	9	419
Fleming et al., Edmund H., executors [1]	7212	9	419
Fletcher, Charles H., estate of [1]	7856	9	514
Flexible File Co	13829	13	909
Flint, Ernest P	17945	12	20
Flint River Brick Co	746	2	31
Flood, Mrs. H. D	24558	16	1366
Florence Mills, Inc	10383	9	579
Florida Grocery Co	151	1	412
Floyd, T. B	12221	11	903
Flynn, Harrison & Conroy, Inc	28322	21	285
Foer Wall Paper Co	10103	9	377
Foley, D. O	13118	12	51
Fontius Shoe Co	9944	7	1098
Forbes, Rose D	10236	7	209
Forbes, W. S	7141	7	611
Forgeus, J. W	2881	6	291
Forrester, D. Bruce	10576	12	104
Forrester, S. W	18290	23	942
Forrester, W. S	10577	12	104
Forrester-Nace Box Co	19064	12	104
Forstmann, Julius	2521	6	21
Fort Orange Paper Co	641	1	1230
Fort Wayne Engineering & Manufacturing Co	489	2	1223
Fort Worth Warehouse & Storage Co	3864	6	536
Forve et al., C. S., administrators	27092	20	861
Forve, sr., Philip, estate of	27092	20	861
Foster, Ed	22754	19	958
Foster, Florence A	17414	18	819
Foster, J. M., estate of [2]	21928	16	1390
Foster, Mrs. James Martin, executrix [2]	21928	16	1390
Foster, Seffie	22753	19	958
Foster & Glassell, Ltd	9232	5	118
Fostoria Milling & Grain Co	17191	11	1401
Fowler, sr., J. S	3260	4	427
Fox, Richard M	28904 34477	15	774
Fox & Sons, Inc., W. P	16389	15	115
Fox River Iron Co	4743	5	810
France, George Henry, estate of [1]	28558	18	442
France, Nannie B., executrix [1]	28558	18	442
Francesconi & Co., J. C. [3]	10585	10	658
Francis, T. J	2525	2	1087
Frank & Seeder Co	10614	13	1

[1] Estate tax decision.
[2] Acquiescence relates to issues 2 and 4 of decision.
[3] Acquiescence relates to first issue of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Frank & Seeder, Inc	10615, 22514	13	1
Frank Sons Co., I	41431	22	40
Frankel et al., Cecil, administrators	19881	21	751
Frankel, Osmond K., executor [1]	3182	3	1207
Frankel, Inc., Sol	3253	3	494
Frankle & Tilton, Inc	307	1	510
Franklin, Wirt	9266	7	636
	9267	8	977
Franklin Mills	11423	7	1290
Frank-Sievers Undertaking Co	2194	3	94
Fraser, Arthur C	6495	6	346
Fraser Brick Co	12028	10	1252
Fraser, George H	5929	6	997
Frazer, Fred	9865	10	409
Freedom Oil Works Co	9707, 17882, 20128	9	823
Freeland Cattle Co	9518	8	1236
Freeman, Douglas S	37413	20	573
Frees, jr., Peter	11307	12	737
Frey, jr., et al., Mitchell M., executors William B. Scaife estate	391	1	338
Friedrich & Sons Co., A	3412	2	1318
Friedman Neckwear Corporation, L	19334	15	61
Friend, George B	5000	8	712
Friend, Oscar, executor estate of Herman A. Meyer	1062	4	686
Frischkorn, E. S	7879	7	431
Frishkorn Real Estate Co	14270	15	463
Frost, Charles	26422	16	554
Frost et al., B. Y., executors	10441	12	1295
Fruen Investment Co	1126	2	542
Fruit Belt Telephone Co	32668	22	440
Fuertel, Martha E	34097	22	201
Fuertel, S. W. and Martha	29430	22	201
Fuller, O. R	10801	11	1025
Fulton, Guy	9362	11	641
Furst Bros. & Co	3362	2	960
G.			
Galatis, Jerry	10747	8	213
Gallagher, Thomas P	21862	17	17
Gallen Paper Co	1377	5	76
Galumbeck, C	10641	9	1404
Galvin, John M., administrator	820	6	1085
Gambee, Wheeler B	3972	4	1234
Gamon Meter Co	395	1	1124
Gano, M. Rea	28421	19	518
Gantz Tank Co	1007	16	212
Garber, B. A.[2]	3708, 14097	11	979
Garber, M. C.[2]	3710, 13909	11	979
Garden, H. B	15926	16	592
Gardiner, H. K	5218	7	1089

[1] Estate tax decision.

[2] Acquiescence relates to issue as to whether the income realized under agreement of December 14, 1918, is taxable in proportionate amounts to the several petitioners or whether such proportionate amounts are taxable one-half to the petitioners and one-half to their respective wives.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Gardner Governor Co.[1]	321	5	70
Gardner, Louise A., coexecutor [2]	41319	22	1076
Gardner Printing Co	5061	4	37
Garretson, Sophia M	5818	10	1381
Garrison Co	15006	17	460
Gary, Ethel	34371	18	1204
Gary, W. W	34370	18	1204
Gaskins, F. W	4242	4	619
Gassner, Louis	4017	4	1071
Gate City Coffin Co	4517	3	226
Gatliff Coal Co	11084	8	726
Geiger & Braverman Furniture Co	1906	2	171
Gem State Lumber Co	3984	2	489
General Lead Batteries Co	718	2	392
George, Edwin S	31032 47788	22	189
George, Mike	5774	6	124
Georgia Car & Locomotive Co.[3]	3131	2	986
Georgia Creosoting Co., Inc	17777	12	247
Georgia Engineering Co	28143	21	532
Georgia-Florida Land Co	31095	16	1253
Georgia Manufacturing Co	1718	5	893
Georgia State Savings Association	5352	4	748
Georgia Veneer & Package Co	3479	2	584
Germantown Braid Co	5215	3	1336
Gerry, Edmund W., executor [2]	25744	22	748
Gerst et al., Herbert J	3879 3888 5365 5366 5367	4	658
Gessell et al., Egbert G., executors [2]	12394	15	624
Gettys, M. E	3495	3	441
Giant Tire & Rubber Co	9412	7	1249
Gifford, Harry N	2677	3	334
Gilbert, jr., Clinton, executor	21416	20	765
Gilbert, sr., Clinton, estate of	21416	20	765
Gilbert Creek Land Co	13848	14	921
Giles, Ada R	1536	1	1066
Giles Co., George A	5387	4	335
Gillen, Margaret	1785	2	75
Gillespie, Richard T	3851	2	1317
Gillespie Coal Co	12509	13	926
Gilliam Manufacturing Co	964	1	967
Gillis, Gaylord W	42742	21	1362
Gilovich & Co., Joe	7746	6	864
Gilson, Harry W	2395	2	1221
Girard Coal Co	3724	6	105
Glackner Realty Corporation, John	10338	11	151
Glady Manufacturing Co	227	1	337
Globe-Gazette Printing Co	3899 18457 24196	16	161
Globe Outlet Co	14029	10	165

[1] Acquiescence does not relate to that part of decision involving application of Ayers decision (1 B. T. A., 1135).
[2] Estate tax decision.
[3] Acquiescence relates only to issue 1 in decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Gloyd, Flemmon E	33183 39411	19	966
Godair, William H., estate of	23730	20	419
Goellner Furniture Co	3500	2	1290
Goerke Co., The	5992	7	860
Goethel Co., Alfred C	13273	15	199
Goiconda Oil Co	10176	7	955
Goldberg, Harry S	5389	4	1073
Goldberg, Louis M	11615	9	1355
Goldberger, Leo G	243	1	249
Goldenberg, Philip	27527	21	612
Goldman, H	11907	12	874
Goldman, I	11173	12	874
Goldman, Louis J., estate of [1]	11463	11	92
Goldman et al., Robert P., executors [1]	11463	11	92
Goldschmidt et al., Georgette, executors [1]	16138	14	1010
Goldschmidt, Henry P., estate of [1]	16138	14	1010
Goldsmith, Lillian M	6335	7	151
Goldstein, David S	5161	3	425
Goldstein, Elias	8268	6	1142
Goldstein, Mrs. Elias	8269	6	1142
Good Manufacturing Co	19840	15	583
Goodin, C. W., estate of [1]	4220	8	1277
Gooding, Mrs. E. G.[2]	3264	4	389
Gooding, Mrs. Fred W.[2]	3263	4	388
Goodlatte, Raymond R	4007	4	165
Goodman, Emma E., estate of [1]	10124	12	823
Goodwin, C. H	21337	9	1209
Goodwin, Mollie	21338	9	1209
Goodyear, Charles A., estate of [1]	10304	11	833
Gopher Granite Co	6631	5	1216
Gordon Furniture Co	2470	3	311
Goss Printing Press Co	5224	11	365
Gottfried, Hedwig B	8553	5	297
Gottlieb Bros	887	1	684
Gould, Ezra	21727	21	824
Gould-Mersereau Co., Inc	18207	21	1316
Goulston Advertising Agency, Inc., Ernest J	7396 18082	15	549
Graft, George E	24631	8	1166
Gramercy Investing Co. of New York	1356 2374	8	13
Gramercy Investing Co. of Pennsylvania	2373	8	13
Grand Rapids National Bank	19327	15	1166
Grand Rapids Show Case Co	9714 12770	12	1024
Grand Rapids Trust Co., executor	40168	23	804
Grant, Helen M. W., estate of [1]	13792	13	174
Grant Construction Co., George J	2584	5	395
Grant Trust & Savings Co., trustee	3659	3	[1] 1026
Gras, Rudolph	2340	5	1163
Graves, Calvin T	20666	17	1318
Graves, George K	8113	7	286
Gray, Mary C., estate of [1]	28937	19	455
Gray, jr., J. J	716	2	672
Gray et al., Ralph W., executors [1]	28937	19	455

[1] Estate tax decision.
[2] Revokes nonacquiescence published in Cumulative Bulletin VI-1 at page 7.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Gray, W. H	4552	6	347
Gray & Davis, Inc	143	1	222
Gray Printing Co., The	4503	4	1264
Graydon, Samuel	1477	2	552
Great Bear Spring Co.[1]	10489	12	383
Great Northern Ry. Co.[2]	8433 11850	8	225
Green Oil Soap Co	3574	3	467
Green River Distilling Co	10604	16	396
Greenbaum, Michael H	3836	2	979
Greenebaum, Moses E., executor[3]	10124	12	823
Greene Co., H. V	3127	5	442
Greenville Coal Co	3784	3	1323
Greenville Opera House Association	2311	5	887
Greenville Textile Supply Co	168	1	152
Greenwood Cemetery Association	3000	2	910
Greever, Mr. and Mrs. B. B	5690	6	587
Greylock Mills[4]	11926	9	1281
Griesemer, Chester D	10827	10	386
Griffin, P. P	11546	7	1094
Griffith, A. C	11400	11	565
Grill, Inc., August	7372	9	381
Grimmer, Henry	3393	3	313
Grittman, Fred	16025	11	122
Grover, Arthur B	1159	3	508
Guarantee Construction Co.[5]	1828 1848	2	1145
Guarantee Title & Trust Co	6063	10	599
Guelph Hotel Corporation	1064	7	1043
Guenther, Paul	1755	2	105
Guest, Amy	26039 33205	19	1293
Guggenheimer, H. Randolph	13625	9	418
Gump, A. L.[3]	34532	22	783
Gump, Mabel[3]	34532	22	783
Gunderson, Leonard M	44004	23	45
Gurnee, Walter S., estate of	10441	12	1295
Gus Sun Booking Exchange Co	10786	13	1066
Gutterman & Sons Co., A. M	10458	8	1187
Gutterman Strauss Co	234	1	243
Gwynne, A. C	34313	22	164
H.			
Haag, Elnora C	26942 36292	19	982
Haag, Elnora C., former executrix	26941 36290	19	982
Haag, Louis E., estate of	26941 36290	19	982
Haas, Otto	3542	3	72
Hadaway, John B	12717	13	986

[1] Acquiescence relates to depreciation and obsolescence adjustments.
[2] Acquiescence relates to all issues of decision except issue involving the question whether the company should accrue as income in the taxable years interest earned but not paid in those years on obligations of other corporations owned by it.
[3] Estate tax decision.
[4] Acquiescence in decision in so far as the Board holds that there is no deficiency for 1917.
[5] Acquiescence relates to fourth issue of decision.

ACQUIESCENCES—Continued.

Taxpayer	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Hadden, jr., et al., John Aspinwall, executors [1]	9421	10	741
Hadden, Marie Torrance, estate of [1]	9421	10	741
Hadden, T. Irving, executor	16398	17	956
Hagerstown Shoe & Legging Co	463	1	666
Hagerty Shoe Co., P	16023	15	1034
Haines, Frances W	31805	20	721
Hall, Charles Ward	11650	6	15
Hall et al., John S., executors	13552	16	71
Hall Co., Inc., F. A. [2]	4612	3	1172
Hallahan, Stephen J	6848	14	584
Hallam, Edwin C	3582	2	1220
Hallenbeck, Harry C., estate of	12470	10	1034
Hallenbeck, John J., executor	12470	10	1034
Haller, Mary [3]	14063 25751	14	488
Hamerslag, J. P	13597	15	96
Hamerslag, Julian L	13596	15	96
Hamilton & Chambers Co., Inc	131	1	694
Hamilton Manufacturing Co	2507	3	1045
Hammack, Rish Sons Co	10516	6	1054
Hammerschmidt & Franzen Co	13751	12	811
Hammersley, Charles E	20501	16	68
Hammon, Hiram F., estate of [4]	10914	10	43
Hammond, J. H	11163	10	1036
Hampton Co	2054	2	302
Hampton Cotton Mills	589	2	440
Hancock Construction Co. et al	11758	11	800
Hancock Knitting Mills	16520	15	592
Haney and wife, Edgar P	3486	5	1039
Hanly, W. W	8516	6	613
Hansen, Hans C., estate of	6744	6	860
Hansen, H. Alfred, executor	6744	6	860
Hanson, Maud Hastings	5109	8	670
Harding Glass Co	19708	15	621
Hardy, George W	7981	5	981
Harmel, Henry	38855	19	376
Harmony Grove Mills, Inc	4500	2	1200
Harnsberger's, Inc	7053	7	250
Harrell, Alfred, executor	25783	20	103
Harris, Allen	10980	10	1374
Harris, Carl C	33872	19	895
Harris, Charles L., administrator estate of William L. Harris, deceased [4]	4426	5	41
Harris, J. L	10430	14	1259
Harris, Sam H	8614 9623	11	871
Harris, William L., deceased, estate of [4]	4426	5	41
Harris Amusement Co. of Michigan	17841 17842	15	190
Harris & Co., A	12123 13998 22502	16	705
Harris-Emery Co	113	10	297
Harris Grocery Co., Inc., W. H	3884	3	216

[1] Estate tax decision; nonacquiescence notice in this case published in Cumulative Bulletin VII-2, page 47, revoked.
[2] Nonacquiescence notice in the case of F. A. Hall Co., Inc. (C. B. V-1, 6), recalled.
[3] Acquiescence does not relate to deductibility of charitable contributions.
[4] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Harrolds Motor Car Co	6184	5	429
Hart Cotton Mills	834	2	973
	9032	9	1062
	12781		
Hart, John W	3916	7	211
Hartford & Connecticut Western R. R. Co	2021	2	211
Hartford Hat & Cap Co	7400	7	714
Hartley, Harry	27725	16	1019
Hartman Co., W. H	40208	20	302
Hart-Wood Lumber Co	2984	5	1171
Haskell, George S., estate of	4335	2	1300
Haskell, J. Amory, estate of	7102	6	890
Haskell, Kathryn M., executrix George S. Haskell estate	4335	2	1300
Hass, E. S.[1]	14817	13	1352
Hastings, Alice M	5106	8	670
Hastings, O. B	5107	8	670
Hatcher, J. S	28742	18	632
Hatzell & Buehler, Inc.[1]	9501	10	993
	11454		
Haupt, Joseph J	5781	6	1297
Hausmann, Louis, executor [2]	5931	5	199
Hausmann, Theresa R., estate of [2]	5931	5	199
Haverstick, Edward E	9882	13	837
Hawkins, C. A	418	6	1023
Hawks Nursery Co	1469	1	1207
Hayes Textile Co., Inc	844	4	1274
Haynes, Charles H., executor	9584	6	1166
Haynes, Frederick J	7247	7	465
Haynes, R. R., estate of	9584	6	1166
Hayslett, John	13119	12	51
Hazlett & Moss, Inc	2247	2	154
Hearn, Benjamin F., estate of	10285	9	1362
Hearn, Ethel D., administratrix	10285	9	1362
Heaslet, James G	26828	23	50
	29505		
Heath, F. E	6015	7	114
Heathcote, Bruce, administrator [2]	11141	8	740
Heaton Construction Co., C. T	11944	11	1302
	13695		
Hecker, Daniel	7735	17	874
Heddon, Charles	15914	15	1372
Heifetz, Jascha	9237	15	410
Heineman Lumber Co.[3]	10175	11	1229
Held, Antoinette B., executrix of estate William D. Held	1988	3	408
Held, William D., estate of	1988	3	408
Heller et al., E. S., executors	4575	10	53
Heller Bros. Co	9073	9	1328
Heller Tool Co	9072	9	1328
Hellman, Isaias W., estate of	4575	10	53
Henderson, Mrs. Alice D., executrix	1875	2	327
Henderson, jr., Mrs. S. H	1917	2	327
Henderson, jr., S. H	1916	2	327
Henderson Co., F. C	5272	5	570

[1] Acquiescence relates to second issue of decision.
[2] Estate tax decision.
[3] Acquiescence relates to issue as to market value on March 1, 1913, of timber owned on that date.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No	Board of Tax Appeals.	
		Volume.	Page.
Henderson Cotton Mills	5504	4	1212
Henderson Overland Co., The	4776	4	1088
Henderson Tire & Rubber Co	11953	12	716
Heninger et al., J	205	9	1318
Henn, Dora V	13227	24	132
Henn, E. C., estate of	26919	24	132
Hennepin Holding Co.[1]	33323 37397	23	119
Henry, John	6375	6	131
Henry, Mattie F., conservatrix [2]	7268	7	172
Henry, R. D	3545	3	72
Hensler Brewing Co., Joseph	11874	12	25
Hentz, Leonard S	41597	21	1086
Hepburn, Alonzo Barton, estate of	9651	8	833
Herald-Despatch Co	4556	4	1096
Herenden, Ellen C., estate of [2]	6983	5	1272
Herff, Herbert	29036	20	1036
Hermalbrecht, John	752	6	1091
Heron Metal Bed Co	3236	2	305
Hess Bros.[1]	8039	7	729
Hess Building Co	13936 19251 20345 39003	15	891
Hessenbruch et al., Herman M., executors	17907	10	763
Hessenbruch, Ida M., estate of	17907	10	763
Hetherington, Elizabeth N. C	28334	20	806
Heublein, Inc., G. F	13125	13	911
Hewett Grain & Provision Co. of Escanaba	18683	14	281
Hexter, Percy K	7878	8	888
Heydrick, L. C	4120 5503	7	950
Heyn, Otto P	3788	4	1256
Hiatt, Mary J	27081	22	1245
Hibbard, Spencer, Bartlett & Co	7431	5	464
Hickory Spinning Co	367	2 1	439 409
Hickox, Lee	6702	7	142
Hicks, John A., estate of [2]	7253	9	1226
Hicks, L. R. and R. A., distributees [2]	7253	9	1226
Higginbotham-Bailey-Logan Co.[3]	4691	8	566
Higgins, Charles J	30008	22	170
High et al., Horace S., beneficiaries	6291	7	495
Highland Amusement Co	5316	3	534
Highland Land Co., Ltd	2320	2	100
Highlands Casket Manufacturing Co	532	6	773
Hill et al., Fritz	32338 32339	22	1079
Hill et al., G. H., administrators [2]	4220	8	1277
Hill, H. B	1689	3	761
Hill, J. L	6215	9	132
Hill, Lena G	5800	8	1159
Hillenmeyer, H. F., estate of [2]	1862	2	1322
Hillenmeyer, Mary, executrix estate of H. F. Hillenmeyer, deceased [2]	1862	2	1322

[1] Acquiescence relates to issue 1 of decision.
[2] Estate tax decision.
[3] Acquiescence relates to third issue of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Hillman, M. P. G	2372	2	1265
Hillyer, Deutsch, Edwards, Inc.[1]	36893 42168	21	452
Hilmer, Dutton & Kehlenbrinck Realty Co	30541	21	91
Hinckley, Ralph L	4193	6	312
Hinshaw, R. E	33021	16	1236
Hirsch Distilling Co., S	15816	14	1073
Hirst & Begley Linseed Co	7482	4	1160
Hitchcock, Halbert K	6107	4	273
Hochschild, Berthold	3081 4058	8	787
Hochschild, Harold K	3080 4057	8	787
Hodges, Fred G	7729	9	1353
Hodgson, William A	44280	24	256
Hoe & Co., Inc., R	7216	7	1277
Hof Brau Co.[2]	6134	6	442
Hof Brau Co	4636	12	1067
Hoffman, Ernest Gustav, estate of	7914	8	1272
Hoffman, H. C	6611	4	474
Holden, James S	42854	21	1362
Holden & Martin Lumber Co	826	2	511
Hollingsworth, Turner & Co	656	1	958
Holmes et al., Joseph H., executors[3]	42801	22	757
Holmes, Lelia V., estate of	7970	10	705
Holmes, Milton A	33300	21	584
Holmes, Sue E., estate of[3]	42801	22	757
Holt et al., James H., executors[3]	12636	14	564
Holt, Robert L., estate of[3]	12636	14	564
Holt-Granite Mills Co	1784	1	1246
Holt Plaid Mills, Inc., E. M	8745	9	1360
Holter, Gus and Josephine	29431	22	201
Holton & Co., Frank	10261	10	1317
Home Beneficial Association	19589	15	1319
Home Industry Iron Works	7991	8	1267
Home State Bank	14462	15	121
Honeyman, Marian Stewart	27792	24	130
Honeyman, jr., Robert B	27791	24	126
Honig-Cooper Co	15000	11	896
Hood, Charles H	6990	4	1020
Hood & Wheeler Furniture Co	21048	22	158
Hooper, Harry B	5271	8	397
Hoover et al., George S., executors[3]	25737	20	906
Hoover, George W., estate of[3]	25737	20	906
Hopkins, James Robert	32797	19	693
Hopkins, Walter L	1476	2	549
Horn & Hardart Baking Co	41764	20	486
Hortenstine, J. L., coadministrator[3]	3633	3	697
Hoskins, John	10241	7	299
Hoskins Lumber Co., J. S	2390	3	846
Hotel Charlevoix Co	21826	22	170
Hotel Grunewald Co., Ltd	1593	5	761
Hotel Patten Co. et al	5792	13	943
Hotel Waldorf Co	24273 25037 36723	22	430

[1] Acquiescence in issues decided adversely to respondent which pertain to depreciation allowances
[2] Acquiescence relates to first issue of decision.
[3] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Hotel Wisconsin Realty Co	11755, 22220, 22221	16	334
Houck Co., Ltd	8159	7	670
Hoult, Arline M	39869	23	804
Hoult, Florence L	39887	23	804
Hoult, J. Hampton	45364	23	804
Hoult, W. A	39868	23	804
House & Herrmann	14090, 30958	13	621
Houston Belt & Terminal Ry. Co.[1]	8494	6	1364
Houston Bros. Co	33597	21	804
Hovely, Peter P	1677	2	1099
Hovey Co., C. F	5448	4	175
Howard Theater Co	16310	16	57
Howell, Alfred L	20667	17	1318
Howell, Charles M., administrator[2]	7382, 24464	21	757
Howell, Fred H	12489	12	510
Howell, Thomas A	12492	12	510
Hower & Seaman, Inc	4196	4	261
Howland Bag & Paper Co.[3]	34315	23	227
Hub Dress Manufacturing Co	283	1	197
Hub, Inc., The	3553, 3554	3	1259
Hub Shoe Co	1170	2	836
Huber, William D	9975	12	1
Hudson, Charles I., estate of[4]	3351	5	711
Huey, A. L	6132	4	370
Huff, Andrews & Thomas	336	1	542
Hughes, John N	9104	8	206
Hughes Coal Co	7142	8	306
Hughes Co., Ed. S	6748, 14120	6	949
Hughson, Frank C	6690, 11294	10	242
Hulbert, Edmund D., estate of[5]	11204	12	818
Hulme, J. H	11027	9	31
Humphrey Co., A. B	15829, 18498	15	312
Humphries, C. C	3511, 29821	3, 17	441, 811
Huning Mercantile Co	15	1	130
Hunnicutt, Mary L	3621	10	1004
Hunt et al., Ethel P., executrices[4]	9801	12	396
Hunt, John K., estate of[4]	9801	12	396
Hunt, Warner D., estate of[4]	31968	19	624
Hunter, Mrs. Ollie	6292	7	495
Hunter Coal Co	2503	2	828
Huntington & Clearfield Telephone Co. and Summerville Telephone Co	358	1	731
Huntsville Warehouse Co	17843, 18743	22	1216

[1] Acquiescence relates to third issue of decision.
[2] Acquiescence relates to issues 6 and 8 of decision.
[3] Acquiescence relates to issue 2 of decision.
[4] Estate tax decision.
[5] Estate tax decision; acquiescence relates to issues concerning checking account, real estate, and pension fund.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Hupfel Co., Inc., J. Chr. G.[1]	9834	9	944
Hurley, A. W	7339	6	695
Huron Building Co	18127	15	1107
Huron Portland Cement Co	3334, 4973	9	181
Hutchins Lumber & Storage Co.[2]	3307	4	705
Hutchins Lumber & Storage Co	7129	13	956
Hutchinson, James M	11284	11	789
Hutchinson, William N	11285	11	789
Hutchison, Charles [3]	8053	13	1187
Hutterische Bruder Gemeinde et al., trustees, etc	15757	14	771
Huxford, C. C	34014	20	39
Huyler's	1357, 1445	8	13
Hyams Coal Co., Ltd., et al., Robert P	219	1	217
Hymans et al., Edwin C., executors [4]	17895	16	762
Hymel Planting & Manufacturing Co., Louis	2903	5	910
I.			
Iceland, Inc	38060	23	15
Idema, Edward Henry	39888	23	804
Illinois Merchants Trust Co., executor [5]	11204	12	818
Illinois Merchants Trust Co., executor estate of William R. Manierre, deceased	3106	4	103
Illinois Paper Box Co	770	4	1227
Illinois Smelting & Refining Co	21180	16	1410
Imperial Furniture Co	16929	9	713
Independent Aetna Sprinkler Co	10588, 25755	15	521
Independent Brewing Co. of Pittsburgh [6]	3242	4	870
Independent Electric Machinery Co	2742	3	1116
Independent Life Insurance Co. of America [7]	25295	17	757
Index Notion Co.[8]	1023	3	90
Index Visible, Inc	25442, 37334	21	941
Indian Creek Coal & Coke Co	26253, 41872	23	950
Indiana Creosoting Co., Inc	17777	12	247
Industrial Cotton Mills Co., Inc.[9]	28131, 28132	22	648
Innes-Behney Optical Co	3368	7	982
International Bedding Co	12733	14	863
International Boiler Works Co	2322	3	283
Inter-Urban Construction Co	4387	4	1030
Iron City Electric Co	6103	4	1178
Iron City Improvement Co	2138	4	305
Irving Bank-Columbia Trust Co. et al., executors	9651	8	833

[1] Acquiescence relates to good-will and bad-debt issues.
[2] Acquiescence does not relate to that part of decision involving application of Ayers decision (1 B. T. A., 1135).
[3] Acquiescence relates to deduction of cost of wardrobe and traveling expenses.
[4] Estate tax decision.
[5] Estate tax decision; acquiescence relates to issues concerning checking account, real estate, and pension fund.
[6] Acquiescence relates only to issue 1 in decision.
[7] Acquiescence relates to Board's interpretation of section 245(b) of the Revenue Acts of 1921 and 1924.
[8] Acquiescence does not apply to that part of decision relating to appeal of Guaranty Construction Co (2 B. T. A., 1145).
[9] Acquiescence relates to issue 2 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Irving Bank-Columbia Trust Co. et al., executors [1]	20055	16	897
Irvona Coal & Coke Co	23184	18	298
Irwin, Jennie I., executrix estate of Mary E. McCahill	2547	2	875
Irwin, J. F	9392	8	687
Irwin Fuel Co., J. F	9030	6	303
Isaacs & Co., Inc., Reub	59	1	45
Island Line Shipping Co	3414	4	1055
Israel, Joseph	27780 31428	13	981
Ives, Holmes	5646	5	934
J.			
Jack, Cecil M	14995 17662	13	726
Jackling, D. C	4272	9	312
Jack's	22561	18	454
Jacks, Romie C	23939	19	559
Jackson, Annette T.[2]	9001	11	1257
Jackson, Caroline Mather, estate of [3]	20303	15	1001
Jackson, George A.[2]	9002	11	1257
Jackson, James J	12944 12945 15996 17856	12	702
Jackson, Marion M., executor [4]	29452	18	875
Jackson, Willis K.[2]	9003	11	1257
Jackson & Tindle [2]	9000	11	1257
Jackson Sanatorium & Hospital Co	3089	9	734
Jacob, Ben B	30082	22	170
Jacob Bros. Co.[5]	18832	19	315
Jacobs, Arthur F	30629	20	934
Jacobs, William M	10742	11	496
Jaeger, Otto, estate of [1]	20055	16	897
James, Arthur Curtiss [2]	2509	13	764
James, J. R	4068	2	1071
James, Max L	33711	22	440
James Building Co	36134	22	658
James & Holmstrom Piano Co.[5]	18833	19	322
James Manufacturing Co., D. O	21943	17	205
Jameson, J. M., estate of	25783	20	103
Jamestown Worsted Mills	92	1	659
Jankowsky, Simon	20587	18	1039
Jarecki Manufacturing Co	10798	12	1165
Jaudon Engineering Co., H. S	14060	15	161
Jenckes Spinning Co	215	4	765
Jenks, William P	34835	22	910
Jennings, J. T	3222	3	1180
Jewelers Building Co	1533	2	540
Jewett, John H	8738	20	447
Jewett & Co	5416	3	854
Joel, B. F	6801	9	1027

[1] Estate tax decision; acquiescence relates to taxability of 415 shares of Peerless Plush Manufacturing Co. stock and 499 shares of Otto Jaeger & Son, Inc., stock.
[2] Acquiescence does not relate to tentative tax issue.
[3] Estate tax decision; acquiescence relates to deductions for attorneys' fees and executors' commissions.
[4] Estate tax decision.
[5] Nonacquiescence published in Cumulative Bulletin IX-2, at page 76, recalled.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Joel, L. B	6802	9	1027
John Hancock Mutual Life Insurance Co	9047	10	736
Johns, Margaret K	8353	9	232
Johns, Wallace C	8352	9	232
Johnson, C. L	7565	7	456
Johnson, Charles R	9877	8	992
Johnson, E. C., executor	11250	13	850
Johnson, Earl O	8259	5	253
Johnson, Edwin M	1415	10	95
Johnson, Fannie W	15301	8	108
Johnson et al., Homer S., executors [1]	9550	11	534
Johnson, J. L	10748	8	857
Johnson, jr., John E., estate of	3839	4	967
Johnson, Kate, estate of	7442	10	229
Johnson, Nels A	3265	6	472
Johnson, R. H., estate of	7441	10	229
Johnson, Robert G., executor	7441 7442	10	229
Johnson, Sarah L., estate of [2]	6812	10	411
Johnson et al., Seymour, executors [2]	6812	10	411
Johnson, Stephen O., estate of [1]	9550	11	534
Johnson, T. H	6870	7	556
Johnson, Theodosia, executrix	3839	4	967
Johnson Locke Mercantile Co	32226	15	1314
Johnston, J. T. M	8466 10928	9	325
Johnston, Mary Virgil, executrix [2]	6352	7	1054
Johnston, W. F	15298	12	1204
Johnstone, Edward K	30694	17	366
Johnstown Building and Loan Association	2898	6	463
Johnstown Democrat Co., Inc	1647	2	93
Joliet-Norfolk Farm Corporation	6795	8	824
Jones, E. W., administrator	8218	8	981
Jones, Mrs. E. W., estate of	8218	8	981
Jones, Frank H	28614	21	275
Jones, George C	4864	6	451
Jones, Henry M	7325 12662	4	1286
Jones, Herschel V	944	1	1226
Jones, Lillie M	28613	21	275
Jones, Walter E	28615	21	275
Jones & Co., T. P	4294	2	1218
Jones Hollow Ware Co	14751	12	48
Jones Lumber Co	3275	5	1159
Jordan Marsh Co	4458	3	553
Joslyn Manufacturing & Supply Co	9809	6	749
Joyce-Koebel Co., The	4267	6	403
Jumel Realty & Construction Co	11758	11	800
Justus & Parker Co	13770	13	127
K.			
Kahn, Albert	13842	14	125
Kahn, Eugene S	10430	14	1259
Kahuku Plantation Co	19156	12	977
Kaiser, Arthur	1289	2	609

[1] Estate tax decision; acquiescence relates to value of stock.
[2] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Kaltenbach & Stephens, Inc	9426 19702 22231	12	1009
Kamper, Louis	6100	14	762
Kanawha City Co	14630	13	919
Kansas City Southern Ry. Co. et al. [1]	12054	16	665
Kansas Milling Co	2835	3	707
Kansas Savings & Trust Co. et al., administrators of estate of A. W. Shulthis, deceased	1827	2	1253
Karges Hoisery Co	11384	8	767
Karno-Smith Co	14619	13	449
Karr, Edmund J	1525	2	635
Kartman, Abe	13244	10	174
Kasco Mills, Inc	22355	15	359
Kass, Max and Jennie	1259	1	1115
Katz & Besthoff, Ltd	4707	5	750
Kauai Railway Co., Ltd	11101	13	686
Kaufman, E. R	12811	9	1180
Kaufman, Mrs. E. R	12812	9	1180
Kaufman, Ltd., Harry S	8154 11845	5	823
Kaufman, Samuel R., estate of [2]	4698	5	31
Kaufman, Straus Co	2649	2	718
Kaufman, Una Libby, executrix [2]	4698	5	31
Kaufmann, Alfred D., estate of [2]	10907	11	412
Kaufmann, Raymond M., executor [2]	10907	11	412
Kaweah Lemon Co	4583	5	992
Kay, Wallace G	10102	10	534
Kay Manufacturing Co	26365 33608	18	753
Kean, Hamilton F	10745	10	97
Keeler, Isaac P	6379 30338 38754 42440	8 23	914 467
Keeler Brass Co	6218	9	293
Keeler Realty Co	6218	9	293
Keen, Herbert Ide	22262	15	1243
Keenan, Katherine P. [2]	6352	7	1054
Keener's Oil, Natural Gas & Fuel Co	7862	6	263
Keeney, Albert F. [3]	21916	17	560
Keewis Realty Co., Inc. [4]	10489	12	383
Keim, F. D	2488	4	1240
Kekaha Sugar Co., Ltd	15435	13	690
Keller, Ida E. B	291	2	494
Keller Mechanical Engineering Corporation	6741	6	990
Kelley, Edward T., estate of [2]	40019	22	421
Kelley, Harry P	6891	9	832
Kelley, Thomas F	7036	9	834
Kellogg Commission Co	3945	6	771
Kelly, Armin L., administrator [2]	7092	8	1193
Kelly, Daniel	8365	10	141
Kelly, H. J	1796	3	257
Kelly, Marie H., estate of [2]	12394	15	624

[1] Acquiescence relates to deduction from income of amortization of discount, commission, and expenses on bonds sold in prior years.
[2] Estate tax decision.
[3] Acquiescence in result only of decision.
[4] Acquiescence relates to depreciation and obsolescence adjustments.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Kelly, Mary L., estate of [1]	36157	20	713
Kelly, M. W., estate of [1]	32971	18	1049
Kelly, Oliver Warren, estate of [1]	7092	8	1193
Kelly, T. Jeff, coexcutor [1]	32971	18	1049
Kelsey, S. R	6082	6	1068
Kelso, Virginia	8351	9	232
Kemp, J. A	43981	20	875
Kemper, Jackson B., administrator	12198	14	931
Kenefick, Nellie, executrix estate of William Kenefick, deceased	523	3	659
Kenefick, William, estate of	523	3	659
Kennedy, D. J., deceased, estate of [1]	5244	4	330
Kennedy et al., Annie S., executors [1]	5244	4	330
Kennedy, John T	19785	16	1372
Kennington Co., R. E	7836 7837	8	1030
Kennington Realty Co	7834	8	1030
Kenny Bros. Co., The	1530	1	1019
Kenosha Fruit Co	410	2	63
Kensington Water Co	19018	16	630
Kentucky Electric Lamp Co	14337	14	603
Kentucky Land, Gas & Oil Co	1473	2	838
Kessler, George A., estate of [1]	3182	3	1207
Ketcham, H. R	14531	9	1208
Keystone National Bank of Pittsburgh, Pa	10805	13	786
Kier, E. L	15985	15	1114
Kier, W. E	15986	15	1114
Kierulff, Thomas C	29006	21	254
Kieser & Son Co., Inc., F	10990	15	359
Kilby Car & Foundry Co	6931	4	1294
Killian Co	37377	20	80
Kilmer, George L	23937	18	571
Kimball, David	11968	8	475
King, Earl	9942	9	502
King, Ella Daly, executrix	8283	10	698
King, Robert C., estate of	8283	10	698
King, William C	6729	10	308
King Lumber & Oil Co	9695	4	1253
King-Parker, Inc	8315	6	884
Kingsley, Louise	12288	11	296
Kingston, George M	8392	8	981
Kington, Hammond L	8216	8	981
Kington, O. M	8409	8	981
Kington, W. W	8217	8	981
Kins, Abraham	6760	3	1348
Kirk Coal Co	2879	3	755
Kirkendall, F. P., estate of [1]	3094	7	771
Kirkland Bros. & Co., Inc	4482	3	669
Kirkwood, Irwin R., executor [1]	40845	23	955
Kirkwood, Laura Nelson, estate of [1]	40845	23	955
Kissel, Caroline T [2]	21788	15	1270
Kistler et al., Florence L., administrators [3]	3707 11986 18061	11	979

[1] Estate tax decision.
[2] Acquiescence relates to deduction of fees paid to attorneys.
[3] Acquiescence relates to issue as to whether the income realized under agreements of December 14, 1918, is taxable in proportionate amounts to the several petitioners or whether such proportionate amounts are taxable one-half to the petitioners and one-half to their respective wives.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Kistler, William F., estate of [1]	3707, 11986, 18061	11	979
Kistler Land & Improvement Co.[2]	12355	9	671
Klau, Van Pietersom, Dunlap, Inc	6881	9	1335
Klauber Embroidery Works	12433	11	779
Kleeman Dry Goods Co	2874	2	369
Klein, Florence L.[3]	4004, 4005, 6061, 6102, 10157	6	617
Klein, Isadore	10430	14	1259
Klemyer, George N	30615	20	934
Kline, Henry, executor	16433	18	249
Kling, Mary Clark	1495	1	1048
Klise, Elmer	11318	10	1234
Klug & Smith Co	5191	18	966
Knapp, Kittie A	2775	7	790
Knapp Bros. Co	19430	13	1300
Knell, John	7420	12	1306
Kniffin, Leonard	7959	5	1274
Knoerschild, E. C	20503	16	68
Knowlton, Charles C., estate of	18884, 18885, 18886, 18887, 18888	19	947
Knowlton, Isabelle Hammond, administratrix	18884, 18885, 18886, 18887, 18888	19	947
Knox, Chester B	2441	2	1107
Knox et al., Grace M., executors estate of Seymour H. Knox	2936	3	143
Knox, Seymour H., estate of	2936	3	143
Knoxville Brick Co	8844	12	431
Knutson Hardware Co	4384	5	9
Kobbe Co., Inc., Philip	3308	4	663
Koch Co., Harry A	47798	23	161
Koch & Co., Inc., Isse	322	1	624
Koelle, William F. B	6093	7	917
Koen Bros., Inc	712	1	417
Koepfli, Joseph O	14006	13	784
Kolynos Co	4130	4	520
Konigsberg, Nathan	6016	4	1027
Konold, Barbara	9670	9	1194
Kossar & Co., Inc	18400	16	952
Kountze, Annie P	11878	17	928
Kountze, Luther, estate of	16398	17	956
Krauss, Alexander	3611	5	799
Kreipke, A. C	10716	7	777

[1] Acquiescence relates to issue as to whether the income realized under agreements of December 14, 1918, is taxable in proportionate amounts to the several petitioners or whether such proportionate amounts are taxable one-half to the petitioners and one-half to their respective wives.

[2] Acquiescence relates to all issues except issue with respect to question of allowance of amortization in 1918 of costs incurred in 1919.

[3] Acquiescence relates to all points of decision except that pertaining to the year 1919.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Krieg Tanning Co	3318	4	1081
Krueger Broughton Lumber Co.[1]	17130	18	1270
Krull, Francis	16985	10	1096
Kuhr et al., Jurgen	13436	12	465
Kuhr & Sons, Jurgen	13436	12	465
Kunkel & Co., Inc	3519	3	133
Kurtz, Max	11411 15960	8	679
Kurtz, Robert	11412 15959	8	679
Kurzman, Samuel	10659	8	412
Kyle, William J	16701	15	1247
L.			
Lacey, Mrs. H. L	25156	16	485
Lackawanna Trust Co. et al., executors [2]	12368	11	1254
Ladew, J. Harvey	30348 46873	22	443
La Francaise Piece Dye Works	15068	14	71
Laing, John	39944	22	380
Lake, H. W	2010	2	535
Lam, J. W	1323	8	785
Lamb Lumber & Implement Co	14242	6	429
Lamborn, Arthur H	9346	13	177
Lambrecht, Richard G	8366	10	141
La Montagne's Sons, Inc., E	10610	16	396
Lancaster Lens Co.[3]	11603	10	1153
Landreth Co., E. A.[4]	15835	11 15	1 655
Lang, John H	14370	12	435
Lang Broom Co	8281	9	39
Langdon, Harriet A	9842	7	1142
Langenbach, Edward A	2131	2	777
Langley & Co., W. C	2567	2	199
Langley & Co., W. H	37162 41600 44828	23	1296
Langley & Michaels Co	6420	9	1020
Lanteri, Bernard P., estate of [2]	20202	20	1065
Larrowe Milling Co	2733	3	245
Larsh, D. L	12621	6	1086
Lash Co., Lee	6190	6	165
Lassen Lumber & Box Co	3431	6	241
Lassiter & Co., Robert G	15882	16	1151
Latham, Helen, administratrix [2]	21479	16	48
Latham, J. H., estate of [2]	21479	16	48
Latham, Milton [2]	34532	22	783
Lathrop & Co., Inc., C. P	6603	5	879
Laurens Trust Co	3930	3	331
Lautz Marble Corporation	6674	5	1287
Law & Credit Co	508	5	57
Lawler, R. B., estate of	19395	17	1083

[1] Acquiescence does not relate to issue involving respondent's motion to dismiss because petition was not filed within 60-day period.

[2] Estate tax decision.

[3] Acquiescence relates to issue whether invested capital for 1919 should be reduced on account of the 1918 deficiency barred by the statute of limitations.

[4] Acquiescence relates to all issues in both decisions except invested capital question in decision published in 11 B. T. A., 1.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Lawler, Mrs. R. B., executrix	19395	17	1083
Lawrence, A. M	13566	13	463
Lawson, John	2284	2	747
Lawson, W. H	4510	12	1076
Leach, Mary W	13416 18690	16	781
Leach, W. H	7300	16	1309
Lee, Mrs. Jeanne	5985	6	1005
Lee, John C	5984	6	1005
Lee, Matilda Holz	7676	6	1132
Lee Co., Wilson H	10911	10	283
Leflang, E. M. F	7309	6	4
Leggett, David G., deceased, estate of [1]	3847	3	193
Lehigh Building Corporation	6607	7	460
Lehigh Valley Coal Sales Co	19751	15	1401
Lehmann et al., Edward J., trustees [2]	32137	21	664
Leichner & Jordan Co	4867	4	133
Leiter, Levi Z., estate of	16617	15	414
Leighton Bros. Printing Co	10329	8	1006
Leighton Supply Co	5744	7	99
Leland, Henry M	7768	8	974
Leland, Wilfred C	7769	8	974
Lembcke Co., Inc., Bernuth	849	1	1051
Lembeck, Gustav W	4863	16	250
Lemer, Marcel, estate of [3]	32824	23	256
Leng, Christian F	29591	22	149
Lenox Land Co	1083	5	1206
Lentz, Frances E. B	41974	21	1336
Lentz, LaFayette	41981	21	1336
Leon Iron Co	14771	14	830
Leonard, Arthur H	3156	4	1221
Leonard, Charles M	3157	4	1221
Lesser Bros Co	13725 13726 29404	14	139
Lester, George B	24356 28333	19	549
Lester, Lucy C., estate of	6056	4	74
Letts, Arthur, estate of	5846	13	871
Leubuscher, Frederic C., executor [3]	31405	21	1022
Levelle, Anna L. Stark, executrix [3]	10587	8	1150
Levin, N	6444	5	892
Levine, Hyman	7435	8	298
Levine Bros. Co., Inc. [4]	6832	5	689
Levinstein, B. E. [5]	25262	19	99
Levy, Achille, estate of [3]	20462	18	337
Levy et al., Joseph P., executors [3]	20462	18	337
Levy, M. L	29984	19	605
Levy & Co., Max	3247	3	422
Lewis, T. J	9987	10	536
Lewis Co., Charles C	9918	16	61
Lewis-Hall Iron Works	3097	2	788
Lexington Realty Co	4639	12	850
Leydig, J. V	7109	15	124

[1] Nonacquiescence notice in this case, published in Cumulative Bulletin IV-2, page 6, recalled.
[2] Acquiescence does not relate to issue involving jurisdiction of Board.
[3] Estate tax decision.
[4] Acquiescence relates to issues 3, 5, and 8 in decision.
[5] Acquiescence does not relate to issue 1 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
L'Hommedieu & Sons Co., Charles F	5902	6	41
Libby & Blouin, Ltd	7416	4	910
Liberman, Meyer	2212 2213	3	617
Liberty Agency Co	6257	5	778
Liberty Iron Works	4398	6	181
Liberty Light & Power Co	3760	4	155
Lichtenstein, Benjamin H.[1]	34532	22	783
Lickumovitz, Morris	6842	4	1181
Lidstone Co., R. D	4133	9	447
Liebes, Helena, executrix [1]	29944	20	731
Liebes, Isaac, estate of [1]	29944	20	731
Liebes & Co., H	14501	15	149
Liebman-Swaney Realty Co	8805	8	285
Life Saving Devices Co	2235	2	308
Liggett, J. T	3489	5	169
Lihue Plantation Co., Ltd	38	2	740
Lilly, V. T	13790	14	703
Limbert, Charles P., estate of	6725	9	24
Limbert Co., Charles P	6800 12738	9	1390
Limroth, Charles W., estate of	42201	22	595
Limroth et al., Caroline V., executors	42201	22	595
Lincoln, W. P	24354	19	855
Lincoln Cotton Mills	14541 17624 30395	15	680
Lindlahr Sanitarium, Inc	1619	4	1245
Lindsey-Long Coal & Lumber Co	11279 11669	5	243
Linn, Gus	1935	4	76
Lisk Manufacturing Co., Ltd.[2]	10031 11438 19050	11 15	179 1048
Lister, H. C	13732	18	699
Lister, James R	3411	3	475
Litaker, H. D	27273	19	881
Little, Andrew	21249	21	911
Little, Priscilla Armstrong	24633 30289	21	1101
Little, Theodore W	10699	10	11
Live Stock National Bank	2467	7	413
Livermore, Norman B	6423	11	428
Livermore & Co., Norman B	6422 6424	11	428
Livingston, Jefferson	30142	18	1184
Lloyd, Augustine M	12091	15	82
Lloyd, Edward H	12092	15	82
Lloyd, William S	12093	15	82
Lobsenz, Jesse [3]	29788	17	81
Locke, Thomas J	10616	8	534
Lockport Paper Co	4872	9	601
Locks and Canals on Merrimack River, Proprietors of the	299	1	242
Lockwood, R. H., estate of	3843	4	1269

[1] Estate tax decision.
[2] Acquiescence relates to invested capital issue.
[3] Acquiescence relates to first and second issues of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Loeb, Carl M	3082, 9191, 9192	8	787
Loeb, Julius	3083, 4061	8	787
Loetscher, Christian, estate of [1]	14325	14	228
Loetscher et al., John A., executors [1]	14325	14	228
Loffland, J. M	13425	10	14
Loffland, T. S	13426	10	14
Loftis, J. M. and J. S., administrators	7581	6	725
Loftis, S. T. A., deceased, estate of	7581	6	725
Logan & Bryan	4008	4	12
Logan, jr., John S., estate of [2]	32241	23	236
Lonergan, John E	6441	4	1209
Long, David T	20138	17	584
Long, M. A	7721	8	737
Long Island Foundry Co., Inc	2726	2	464
Loose, Ella C., executrix	8699	15	169
Loose, Jacob L., estate of	8699	15	169
Loper, H. T	10080	12	164
Lord, Elsie B	17189	9	807
Lord & Bushnell Co	10597, 12124	7	86
Lord Motor Car Co	4718	5	818
Lorie, E. J	27526	21	612
Loring et al., Augustus P., executors [2]	39872	20	440
Loring, E	12069	15	50
Loritan Investment Co	33768	21	1412
Lorraine Turpentine Co.[3]	34503	20	423
Los Angeles Cemetery Association	293	2	495
Los Angeles Towel Service Co	8866, 23391	9	665
Los Angeles Trust & Savings Bank	2818	6	850
Los Fabricantes Unidos, Inc	32160	21	1431
Loughborough, J. F	8746	10	361
Louisiana Jockey Club, Inc	14654	13	752
Louisville Veneer Mills	10180	12	1352
Lovelace-Eubanks Lumber Co	15235	10	1174
Loveland, Russell V	1926	10	95
Lovering, William M	31434	21	1260
Lovett, Joanna, executrix estate of Thomas J. Lovett	2940	3	192
Lovett, Thomas J., deceased, estate of	2940	3	192
Lowell, Amy, estate of [2]	39872	20	440
Lowry, F. Hunt	11972	11	409
Lozier, Charlotte C., estate of [2]	7513	7	1050
Lubell, Aaron D	26187	16	996
Lubell, Abraham P	26188	16	996
Lubell, Jacob J	26186	16	996
Lubell, Morris M	26185	16	996
Lubell, Samuel L	26184	16	996
Lucas, M	12068	13	642
Luce Furniture Co	6536	9	1413
Lucker, Laurence H	36368	21	93
Lukins, F. W	2544	3	204

[1] Estate tax decision; acquiescence relates to all issues, except those involving deductions for executors, commissions, attorneys' fees, and miscellaneous administration expenses.
[2] Estate tax decision.
[3] Acquiescence relates to issue 3 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Lummus, J. E	31350	21	79
Lumpkin, Cary A	31838	21	1101
Lupton, J. T	31855	19	166
Luton Mining Co., Inc	13680	12	720
Lynch Construction Co	3375	3	313
Lynes, Emily A	7089	7	1085
Lynes, Samuel	7090	7	1085
Lyon & Billiard Co., Inc	7486 11380	9	126
Lytle, C. F	33029	21	1423
Lytle Construction Co., C. F	40406	21	1423
M.			
Mabel Elevator Co.[1]	1110	2	517
MacAdam & Foster, Inc	10443	8	967
MacDonald-Kaitchuck Printing Co	279	4	996
Mackay, Milton A	6833	11	569
Mackenzie, R. J., estate of[2]	11141	8	740
Mackie, Josephine	20936	19	325
Mackintosh-Hemphill Co	20640	21	1259
MacMillan, H. R	6602	14	1367
Macmillan Co., The	5240	4	251
Macon Oil & Gas Co	30146	23	54
MacPherson, Warren	34673	19	651
MacRae, Hugh	4284 19271	9	428
Madison & Kedzie State Bank	1127	1	922
Maer, Mrs. W. N	7854	7	1256
Maer, W. N	7855	7	1256
Magee Furnace Co.[3]	5600	11	1216
Magill, Robert M	22482	20	799
Magnus, Mabee & Reynard, Inc	119	1	907
Maguire Estate, Ltd., John A	10390	17	394
Mahony et al., J. K., executors	30285	21	1101
Mahony, Roberta Armstrong	24635 30288	21	1101
Maine Dairy Co	4675	4	375
Maine Real Estate Title Co	30151	21	1395
Maisel, jr., Nicholas J	2422	2	66
Mallinckrodt, sr., Edward[4]	1750	4	1112
Mallinckrodt, sr., Edward, estate of	11032	14	323
Mallinson & Co., H. R	13719	14	1124
Malone, Edwin B	5225	5	1226
Malter, Maurice	14502	14	1208
Mandel Bros	1977	4	341
Maney Milling Co	7704	14	1001
Manierre, William R., deceased, estate of	3106	4	103
Mann, P. L	9123	8	221
Manning, Charles N	8111	7	286
Manning & Co., L. H	10230	10	633
Manomet Cranberry Co	341	1	706
Manorial Development Corporation	611	1	575
Mantle, Lee	5808	13	145
Manville Jenckes Co	215	4	765

[1] Nonacquiescence notice published in Cumulative Bulletin IV-2, page 6, recalled.
[2] Estate tax decision.
[3] Acquiescence relates to second issue of decision.
[4] Acquiescence relates to first issue in decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Mapel-Sterling Coal Co	32375	22	817
Marble & Shattuck Chair Co	14091 14092 32033	13	657
Marigold Garden Co	1580	6	368
Marine Insurance Co., Ltd	2242	4	867
Markenheim Co., The	544	1	1240
Markle, Alvan	6208	10	763
Markle (II) George B., estate of	17780	10	763
Markle, jr. (III), George B	3799	10	763
Markle, sr., George B., estate of	17646	10	763
Markle, John	3858	10	763
Markle, John, trustee	17646	10	763
Markowitz, Daniel S	20287	8	1100
Marks, H. Benjamin	10806	7	895
Marks, Isaac	10875	7	895
Marks, Joseph D	13912	14	87
Marks, Wilson	7132	6	729
Marlboro Fertilizer Co	3797	3	82
Marlin Grocery Co	15384	15	1080
Marqusee, Jack	34364	18	597
Marsh, J. W	8419	12	1376
Marsh Fork Coal Co	10453	11	685
Marshall, Edward E	20308	10	1140
Marshall & Spencer Co	4574	7	454
Martha Realty Co	10979	22	342
Martin, B. F	10617	12	267
Martin, Darwin D	3001	6	472
Maryott & Spencer Logging Co. et al	3341	10	1221
Mason Cotton Mill Co	448	1	449
Mason Machine Works Co	289	3	745
Massachusetts Protective Association, Inc	19803	18	810
Massengale Advertising Agency	1496 6514	2 11	26 973
Mather Paper Co.[1]	1378	3	1
Matheson, William J	26507	18	674
Mathews, W. B	10032	13	1133
Mathis Bros. Co	3861	9	338
Matthews, Bettie	33191	21	96
Matthews, jr., Charles D	33192	21	96
Matthews, Edward C	33194	21	96
Matthews, Joseph L	33193	21	96
Mattlage, Charles Henry	2116	3	242
Maurer, Charles J., estate of	14551	13	921
Maury Milling Co	10853	10	1189
Maus, Anna R. and L. M	1322	3	566
Mayer, C. P	26776	16	1239
Mayer, Henry, estate of	18325 37209	16	1164
Mayer's, Inc	3774	5	181
McAlester-Edwards Coal Co	4490	10	1368
McBride, F. T., estate of [2]	4885	8	435
McBride, Rose L., administratrix [2]	4885	8	435
McBryde Sugar Co., Ltd	11102	13	686
McCabe Co., M. J	21	1	57

[1] Nonacquiescence notice published in Cumulative Bulletin V-1, page 7, recalled.
[2] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
McCahill, Eugene P., administrator estate of Mary E. McCahill	2547	2	875
McCahill, Mary E., estate of	2547	2	875
McCallum, J. H	14311	14	805
McCann Co., Inc., H. K	6578	14	234
	8277	14	251
McCarthy, John Francis, estate of	17334	9	525
McCarthy, Walter R., executor	17334	9	525
McCarthy & Sons, Inc., John	354	1	1116
McCauley Co., C. R	1273	1	937
McCloud, Charles A	20405	13	311
McColgan, Adelaide, administratrix [1]	3147	10	958
McColgan, Daniel A., estate of [1]	3147	10	958
McConnell, E. H	3211	6	116
	22235	16	714
McCormick, sr., John	1880	1	1061
McCormick et al., Robert H	1605	2	430
McCoy-Brandt Machinery Co	10733	8	909
McCreery, Henry F	3557	4	967
McCreery, Walter A., estate of	19247	18	468
McCutcheon, Howard	24401	18	834
	25554		
McDonald, Eli	21042	23	521
McDonald, J. H	25158	16	485
McDonald, Mary E., executrix [1]	3042	2	1295
McDonald, Mrs. Lyde	9336	9	1340
McDonald, Patrick J., estate of [1]	3042	2	1295
McDonnell, Edward J	6194	4	49
McDonnell, J. S	13546	6	685
McFetridge, Edward P	11503	9	766
McFetridge, Georgiana	11210	9	759
McFetridge, Martha G	11209	9	763
McGinnis, Bob H	6647	4	209
McGlynn, A. P	4714	4	1005
McGowin-Foshee Lumber Co.[2]	10446	10	961
McGrath, B. R	495	6	1089
McGrath Co., William	5317	10	177
McIlhenny et al., Frances Plumber, executors [1]	45008	22	1093
McIlhenny, John D., estate of [1]	45008	22	1093
McIntosh, Richard E	15199	16	1400
McIntosh Mills	9832	9	301
McKenna, James P	121	1	326
McKinnon, L. E., estate of	2650	6	412
McKnight, J. Hudson	4048	3	1060
McKnight, R. C	10804	13	885
McLean, Caroline S	1534	4	487
McMichael, Morgan J	2221	4	266
McMillan Metal Co	3841	2	797
McMinnville Manufacturing Co	38833	19	486
McMullin, M. K., estate of	8015	12	425
McNaghten et al., Malcolm, executors	5846	13	871
McNeill, Robert H.[3]	17261	16	479
McReynolds, Joseph	21189	17	331
	31121		
McWilliams, J. W	14977	15	329
	25979		

[1] Estate tax decision.
[2] Acquiescence relates to third issue of decision.
[3] Acquiescence relates to deduction of loss on account of worthless stock.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Mead et al., William W., executors	7228	6	752
Meade Cycle Co	5756	10	887
Meadow Fork Coal Co	9770	9	835
Meagher, Charles F.[1]	24105	20	68
Mechanics Bank of Brooklyn	9755	9	1
Mechanics Realty Co., Inc., and Mechanics Realty Co. of Pennsylvania	2351	2	170
Megeath, Ida J	7119	5	1274
Megeath, S. A	2815	5	1274
Megeath, Samuel A	9248	5	1274
Megeath et al., George W	7118	5	1274
Meinel, Edward, estate of [2]	3098	6	341
Meinel, Ethel G., executrix [2]	3098	6	341
Meinhard, Carrie W	2100	3	612
Melick, J. J	7623	6	70
Melton, Alger	5699	7	717
Mepham, George S	1981	3	549
Mercantile Trust Co., executor [3]	9528	13	85
Mercer, John W	8233	6	564
Merchants Bank & Trust Co	21728	21	824
Merchants National Bank	8179	6	1167
Merchants Transfer & Storage Co	30906	17	290
Merckens, August	10108	7	32
Meredith, E. T	1540	2	290
Meredith, G. W., estate of	4478	9	1374
Mereen-Johnson Machine Co	3531	5	400
Merges & Co., F	11640 12438	11	444
Merillat, Charles H	10594	9	813
Merkle Broom Co	4953	3	1084
Merren, K. E.[4]	19847	18	156
Merrill Trust Co	30151	21	1395
Mertz, Edward P	5695	5	694
Messenger Publishing Co	1569	2	30
Mesta Machine Co	2841	12	523
Metairie Cemetery Association	437	4	903
Metal Crafters, Inc	19842	15	583
Metasap Chemical Co	13569	12	1402
Metcalf, Edwin D., estate of	13348	13	236
Metcalf, Morris	25479	16	881
Metro Pictures Corporation of New England [5]	4437	11	1271
Metro Pictures Film Exchange of Pennsylvania	747	1	721
Metropolitan Laundry Co	538	2	1062
Metzger, L	9682	5	1230
Metzger, William E	35169	21	1271
Meurer Steel Barrel Co., Inc	7749	7	64
Mexican Telegraph Co.[6]	9093	10	213
Meyer, Anton M	5737	3	1329
Meyer, Herman A., estate of	1062	4	686
Meyer & Bro. Co., F	5384	4	481
Meyers Machine Co., Willard F	35796	18	1069
Meyrowitz, Emil B	3241	3	1327

[1] Nonacquiescence notice published in Cumulative Bulletin IX-2, page 78, withdrawn.
[2] Estate tax decision.
[3] Estate tax decision; acquiescence relates to issue regarding taxability of proceeds of life insurance in excess of $40,000 exemption and issue as to bequest of works of art to or for the use of the Catholic Cathedral, St. Louis, Mo.
[4] Acquiescence in decision regarding promissory note and proceeds of oil runs.
[5] Acquiescence relates to issues involving officers' salaries and legal expenses.
[6] Acquiescence relates to all issues except as to tentative tax.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Miami Beach Improvement Co	14869	14	10
Michel, George E	439	5	979
Michigan Coin Lock Co	4368	2	1314
Michigan Lithographing Co	1423	1	989
Michigan Trust Co. et al., executors	6725	9	24
Mickel, Tom E	440	5	979
Middleton Compress & Warehouse Co	1125	1	1145
Midland Coal Co	27	1	311
Midland National Life Insurance Co	28889	14	200
Midland Refining Co	709	2	292
	1983	2	296
Midland Valley R. R. Co.[1]	25000	19	423
Midwest Hotel Co	2933	5	121
Miles, Dorothy Armstrong	24636	21	1101
	30286		
Miles Co., W. C	3439	5	625
	9555		
Millar, W. D	10638	9	1404
Millard et al., Everett L., trustees	840	5	294
Miller, Addison	1596	3	726
Miller, E. B	3465	7	921
Miller, Edward A	26342	20	379
Miller, G. A	4469	6	401
Miller, Jennie L., executrix	4397	11	854
Miller, John B	37119	21	677
Miller, John L., estate of	4397	11	854
Miller, Peter A	31389	20	230
Miller, Stanley R	17002	12	702
Miller, Daybill & Co	20267	15	13
Milliken, George W., estate of [2]	10123	7	785
Milling Moore Mercantile Co	7560	5	1060
Mills, Lucy M., estate of [2]	1028	3	1016
Milton, George F., estate of [2]	19224	17	380
Milton, jr., George F., executor [2]	19224	17	380
Milwaukee Brass Manufacturing Co	3424	10	936
	13542		
	21024		
Milwaukee Woven Wire Works	8163	16	75
Miner & Frees Lumber Co	10579	10	521
Miner Lithographing Co., E. C	468	1	588
Minneapolis Sash & Door Co	388	2	505
Minneapolis Syndicate	10163	13	1303
Minnesota Cement Construction Co	6284	6	151
Mississippi Valley Trust Co. et al., trustees [2]	20172	22	136
Missouri Pacific R. R. Co.[3]	33301	22	267
Mitchell, M. S	42233	22	1194
Mitchell, W. S	34510	22	1194
Mitchell Advertising Agency, Inc	10351	10	1311
Mitchell Auto Co., A. P	7597	10	1001
Mitten, Robert	10891	11	731
Moberly Fuel & Transfer Co	27862	17	1242
Moberly Oil Co	3552	3	163
Mobile Delivery Co	7124	8	1224
Mobile River Saw Mill Co	8700	8	368
Mobile Towing & Wrecking Co	9080	19	152
	17824		

[1] Acquiescence relates to issues 2 and 3 of decision.
[2] Estate tax decision.
[3] Acquiescence relates to issues 5, 7, and 17 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Mogg Coal & Coke Co	12408	10	588
Moline Dispatch Publishing Co	9235	11	934
Monarch Cooperage Co	11590	13	929
Monarch Electric & Wire Co	13405	12	158
Monk, Henry	11396	9	16
Monroe Cotton Mills	3310	6	172
Monroe Furniture Co., Ltd., et al	2543	2	743
Montague et al., William B., alleged custodians [1]	32618	23	800
Montague, William E., estate of [1]	32618	23	800
Montgomery, Lawrence J	28583	17	1308
Moon, Annie	8675	6	385
Moon, O. L	8674	6	385
Moore, Anna H., executrix [1]	10542	13	864
Moore, Edward, estate of [1]	40790	21	279
Moore, George A	14953	14	1185
Moore, H. B	3544	8	749
Moore, L. C.[2]	3709 13907	11	979
Moore, jr., Lucian S., trust	38011	21	1362
Moore, jr., Lucian S., trustee	38011	21	1362
Moore, Tom (Fayette T.) [3]	18273	19	140
Moore, William, estate of [1]	10542	13	864
Moore & Evans	29891	24	45
Moore Stave Co., Lucas E	5146	5	1211
Moore & Scriver Co	678	2	368
Moores, Harry C	4209	3	301
Moorhouse, Abraham, estate of [1]	5101	8	964
Moorhouse et al., Mary Elizabeth, administrators [1]	5101	8	964
Moors, John F	1021	1	868
Mooyer, Christian, estate of [1]	3404	2	723
Mooyer, Margaret A., executrix estate of Christian Mooyer, deceased [1]	3404	2	723
Moorefield and wife, W. H	5721	4	394
Moreland Co., Thomas B	18367	16	858
Morgan, Claud	6290	7	495
Morgan, John	10978	10	1138
Morgan, Walter G	3449	5	1035
Morris, Homer P	6510 6525	9	1273
Morris, John T	16604	15	260
Morris & Bailey Steel Co	9492	9	205
Morris & Cummings Dredging Co	9596	10	351
Morrison Woolen Co	9543	10	8
Morrison-Merrill & Co	4358	2	489
Morsman, Edgar M., estate of [4]	32075	14	108
Morsman, jr., Edgar M., administrator	[5] 17660 [4] 32075	13 14	415 108
Morton, A. D	3559	6	1295
Morton, Marmaduke B., administrator [1]	32241	23	236
Mosby & Co., Inc., J. B	2781	6	722
Mosenthal, Philip J., estate of	6994	12	365
Mosenthal, Walter J., executor	6994	12	365

[1] Estate tax decision.

[2] Acquiescence relates to issue as to whether the income realized under agreements of December 14, 1918, is taxable in proportionate amounts to the several petitioners or whether such proportionate amounts are taxable one-half to the petitioners and one-half to their respective wives.

[3] Acquiescence relates to deduction of expenditures for architect's services in 1920 and 1921.

[4] Estate tax decision; nonacquiescence notice published in Cumulative Bulletin VIII-1, page 57, recalled, in so far as same relates to issue 2 of decision.

[5] Estate tax decision; nonacquiescence notice published in Cumulative Bulletin VIII-1, page 57, recalled.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Moser & Wacker, Inc	4475	4	1021
Mosher Manufacturing Co	1886	7	187
Mosier, M. H	5304	5	674
Mosler, Moses, estate of [1]	17895	16	762
Mossberg Pressed Steel Corporation	8757	9	1161
Mossman, Yarnelle & Co.[2]	3269 11076	9	45
Mountain Ice Co	11459 20512	17	1246
Mount Vernon Car Mfg. Co	14207	13	810
Mount Vernon National Bank	237	2	581
Moyse, Sidney G	5967	4	834
Mudd Motor Co., Ray F	1192	3	629
Mueller Metals Co	4395	3	169
Muir, James S	3648	3	165
Mullins, William H	13917	14	426
Multibestos Co	7598	6	1060
Multiplate Valve Co	36734	22	182
Mumper, Hewlings	14053	13	977
Munger, L. S	28479	16	168
Munger, Trudie T	16897	16	168
Munn Hotel Co	13819	14	93
Munsey Trust Co., trustee	27766	17	927
Munson, Carols W	16562	18	232
Munson, Edgar, executor estate of Harriet A. Curtis, deceased	442	3	185
Murchison National Bank	608	1	617
Murphy, J. E	7137 26472	9	610
Murphy, Ray Slater, beneficiary	8191	9	521
Murphy Transfer & Storage Co	11554	7	1148
Musselman, C. H	160	1	41
Musser, R. C	4781	3	498
Mutual Chemical Co. of America	10083	12	578
Mutual Cotton Mills Co	16413	15	247
Myer Thread Manufacturing Co., Henry	3641	2	665
N.			
Nabors Oil & Gas Co	7962	7	1091
Nace, Bruce E	10578	12	104
Nahman, Alfred A	23145	21	121
Nartzik, Julius J., estate of	4316	8	685
Nash, Frederick H	14941	22	482
Nathan, Morris, estate of [1]	11448	12	681
National Bank of Baltimore	3844	3	1038
National Casket Co	19982	16	1141
National Film Publicity Co	1807	4	118
National Gauge & Equipment Co	13413	14	748
National Grocer Co	562	1	688
National Industrial Alcohol Co	4853	7	1241
National Iron Works	36909	22	382
National Land Co	11130	10	527
National Oil Products Co	13570	12	1402

[1] Estate tax decision.

[2] Acquiescenee relates to issues decided adversely to the Commissioner, with the exception of issues involving deduction of tentative taxes in determining the earnings available for payment of dividends in 1918 and 1919.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
National Piano Manufacturing Co.[1]	3333, 20486	11	46
National Pipe & Foundry Co	32997	19	242
National Pneumatic Co	3651	5	637
National Sash & Door Co	5788	5	931
National Straw Works	5065	16	463
National Talking Machine Sales Corporation	5272	5	570
National Tea Co	23189	17	1222
Naval Stores Equipment Co	13003	16	938
Nazareth Cement Co	2446	4	1121
Neapolitan Ice Cream Co	11793	8	437
Needles Brooker Co., Inc., L	41651	21	390
Neill, James	9290	8	299
Neisler, C. E	11796	18	184
Nekonegan Paper Co	21064	16	1000
Neuberger, Max and Rudolph	3035, 3036	2	911
Neusteter Suit Co	4001	8	477
Nevins, Frank J	3344	12	866
Nevins, Frank J., administrator	3350	12	869
Nevins, Thomas F., estate of	3350	12	869
Newbold & Son Co., R. S	5698	7	471
New Century Color Plate Co	10986	10	1032
Newell, John T	24094, 41675	17	93
Newlyn Coal Co	9753	9	835
Newman, Lewis D	19138	9	158
Newman Theatre Co	3694	4	390
Newman, William C.[2]	6530	10	158
Newmarket Co	1489	2	537
New Orleans Can Co	11994	7	1175
New Orleans, Texas & Mexico Ry. Co.[3]	400	6	436
News Leader Co	33675	18	1212
Newton, H. E	9626	7	1153
Newton, W. H	9627	7	1153
Newton Cotton Mills	10731	12	176
New York Blower Co	3861	9	338
New York, Brooklyn & Manhattan Beach Ry. Co	4945	3	606
New York, Ontario & Western Ry. Co	974	1	1172
New York Talking Machine Co	12363	13	154
Niagara Searchlight Co., Inc	9505	10	922
Nice Ball Bearing Co	2109	5	484
Nichols, A. M	12623	15	1155
Nichols, John W. T., estate of [4]	9599	10	919
Nichols et al., George, executors [4]	9599	10	919
Nichols, Roy	24016	17	580
Nichols Contracting Co	13399	15	102
Nicholson, Allie E., executrix [5]	24204	21	795
Nickey, A. B., estate of	1961	3	173
Nickey & Sons, A. B	1235, 1236, 1237, 1238, 1239	3	173

[1] Acquiescence does not relate to tentative tax issue.
[2] Acquiescence does not relate to deduction of amount of bad debts ascertained to be worthless and charged off in 1920.
[3] Acquiescence relates to second issue of decision.
[4] Revokes nonacquiescence published in Cumulative Bulletin VII-1, page 39.
[5] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Nickey, S. M	1967	3	173
Nickey, W. E	1962	3	173
Nixon, Kate I	1186	2	524
Noell, Richard A	3223	3	1180
Nokomis Cotton Mills	4557	2	1205
Nolan, Claude	27682	16	1233
Nolde & Horst Co.[1]	9867	12	417
Norfolk Southern R. R. Co.[2]	22243	22	302
Norfolk & Western Ry. Co	3601	3	597
North American Mortgage Co.[3]	15798	18	418
North American Oil Consolidated [4]	8714 16107	12	68
North Iowa Brick & Tile Co	5655	10	1290
North McAlester Coal Co	6831	5	200
North Street Trust	10545	6	947
Northeastern Oil & Gas Co	2231 3525	5	332
Northern Hotel Co	2768	3	1099
Northern Michigan Transportation Co	3168	3	255
Northern National Bank	16691	16	608
Northern Trust Co. et al., executors	4316	8	685
Northern Trust Co., executor [5]	7127	9	96
Northway Securities Co	33996	23	532
Northwest Lumber Co	10650 15310	9	1111
Northwestern States Portland Cement Co.[6]	5763 10456	7	835
Northwestern Yeast Co	1511	5	232
Northwood & Co., H	5122	4	697
Norton et al., Hiram S., executors [7]	19038	16	1115
Norton, James E., estate of [7]	19038	16	1115
Norvell, B. R	7720	6	56
Norvell, Mrs. B. R	7719	6	56
Norwood, Calef & Co	9	1	261
Noyes, Charles R., estate of [8]	18486	16	519
Number Nine Plantation	21930	23	974
O.			
Oakland Bank, executor [7]	32824	23	256
Oates, Mrs. Omer J	8393	8	981
O'Brien et al., Blanche, executors	13042 25747	10 12	682 1195
O'Brien Leather Finish Corporation, Joseph	9630	8	521
Ocean Accident & Guarantee Corporation, Ltd	3114	6	1045
O'Connor & Co., J. J	1060	1	1021
Oconto Falls Motor Car Co	12471	18	840
O'Day, A	24581	20	455
O'Day Investment Co	16632	13	1230
Oeltjen, C. G	11643	11	608
O'Hair, P. E., estate of	4184	3	1039

[1] Acquiescence relates to third issue of decision.
[2] Acquiescence relates to issue (b).
[3] Acquiescence relates to income from depreciated value of guilders.
[4] Acquiescence relates to determination of cost and value of oil properties and improvements thereon for invested capital and depletion purposes, and mathematical calculation of invested capital.
[5] Estate tax decision; acquiescence relates to trusts of 1912, 1919, and 1921.
[6] Acquiescence relates to first, second, third, fourth, and sixth issues of decision.
[7] Estate tax decision.
[8] Estate tax decision; acquiescence relates to issues 2 and 3 of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
O'Hare, J. Frank	30377	12	702
Ohio & Big Sandy Coal Co., trustees for	7888	15	273
Ohio Brass Co	13600	17	1199
Ohio Grease Co	6023	4	1207
Ohio Sheep & Wool Growers Association Co	15149	14	911
Oklahoma Operating Co	12660	17	1127
Old Colony Trust Co. et al., administrators	38474 41982	22	1062
Old Farmers Oil Co	2824	12	203
Olds, Millard D.[1]	8718	15	560
Oleet, Israel	9622	8	826
Olinger Highlanders, Inc	532	6	773
Olinger Mortuary Association	532	6	773
Olsen, John	1460	5	889
Olsen Water & Towing Co	1908	1	1149
Olympia Veneer Co., Inc	29341 32329	22	892
O'Meara, C. A	9822	11	101
O'Neal, Benjamin Paschal	22421	18	1036
O'Neill, John, estate of [2]	5185	4	78
O'Neill, jr., et al., John J., executors [2]	5185	4	78
O'Neill Machine Co	7922	9	567
Oppenheimer, Leon	9977	7	1156
Opperman Coal Co	3317 14729 15792	6	1215
Oregon Brass Works	10949	21	257
Orlando Petroleum Co	20399	11	101
Orr, Benjamin H	28294	17	368
Orth, Frank L	5588	9	249
Ortseifen, Adam [3]	12900	14	1403
Osage Steamship Co., Ltd	3396	3	141
Osborn, Chase S	21856	22	935
Osborne & Clark Lumber Co	10493	8	382
Osgood Land & Livestock Co	31153	22	387
Ostrow, Samuel D	14690	12	870
Otis, James	4711	7	882
Otis Steel Co	7520	6	358
O'Toole, James J	19402	12	769
Ottolander, C. J. W	4494	5	651
Overland Knight Co., Inc	19366	15	870
Overland Lumber Co	3946	2	489
Owen-Ames-Kimball Co	1637	5	921
Owen, Frank G., estate of [2]	19809	18	539
Owen, Leila S., administratrix [2]	19809	18	539
Owens Bottle Co	1033	8	1197
Oyster, jr., George M., estate of	7390	4	108
Ozark Mills, Inc	4377 29969	6 22	1179 1359
P.			
Paauhau Sugar Plantation Co	3879	13	500
Pabst, Fridolin	2227	6	843
Pacific Baking Co	84	2	391

[1] Acquiescence does not relate to partnership issue.
[2] Estate tax decision.
[3] Acquiescence relates only to deduction of contribution to church building fund.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Pacific Car & Equipment Co	1093	2	348
Pacific Coast Pipe Co.[1]	7961	11	1329
Pacific Coast Redwood Co	1847	5	423
Pacific Door & Sash Co.[2]	14481 18898 21186	20	72
Pacific Novelty Co	8162	5	1017
Pacific Pipe & Supply Co	1943	2	870
Pacific Realty Corporation	4526	5	1223
Pacific-Southwest Trust & Savings Bank, administrator[3]	20657	18	1314
Paducah & Illinois R. R. Co	3028	2	1001
Paducah Water Co	6055	5	1067
Paget, J. H	4279	6	310
Palais de Modes	5502	5	189
Palmer, Earl M	5447	3	403
Palmer, J. C	1181	1	882
Palmer, Thomas	43601	23	296
Pantazas, Charles	3382	5	975
Pantazas, James	3382	5	975
Pantlind Hotel Co. and Pantlind Building Co	18436	9	878
Par-a-Tex Oil Co.[4]	13896	13	540
Paris Cloak, Suit & Millinery House	5500	5	189
Parish, S. W	9504	9	1236
Parish-Watson, M	4684	3	840
Parish-Watson & Co., Inc	2833 4894	2 4	851 605
Parisian, The	583	2	415
Park Amusement Co	7926 16921	15 16	106 587
Park Bros. & Rogers, Inc	2460	6	719
Parker, Arthur M., estate of	14954	14	1185
Parker, Edward L	41873	19	171
Parker, George S	5602	10	854
Parker, Helen Pitts	14186	14	1185
Parker, Nora D	8647	13	1239
Parker, W. D	8646	13	1239
Parker Gravel Co	38348	21	51
Parker Wire Goods Co	3999 5452	8	448
Parkersburg & Marietta Sand Co	12050	11	87
Parma Co	14553	18	429
Parris, William	29437	20	320
Parshall, William W	6452	7	318
Patapsco Ballast Co	1800	1	1081
Patch, Bradford C	6332	4	916
Pate, Zebulon Vance	14955	13	1236
Patterson, George F., estate of[3]	20657	18	1314
Patterson, G. S	12345	16	716
Patterson, W. H	8901	7	621
Patterson Produce Co	3994	4	950
Pauli, Karl	13927	11	784
Paulson, Peder, estate of	13571	10	732
Paulson et al., William I., executors	13571	10	732

[1] Acquiescence relates to issue 1 of decision.
[2] Acquiescence in Board's finding as to value of certain machinery and equipment.
[3] Estate tax decision.
[4] Acquiescence does not extend to that part of the Board's decision which purports to hold that section 704(a) of the Revenue Act of 1928 is applicable to the case.

ACQUIESCENCES—Continued.

Taxpayer	Docket No.	Board of Tax Appeals. Volume.	Page.
Payne, Edward W	9065	12	781
Peabody Coal Co	19256	18	1081
Pearce et al., Arthur P., trustees	9615	13	150
Pearce, jr., Charles F	5606	6	450
Pearl, Ben, estate of	16433	18	249
Pearl, Bernard, sole distributee	16433	18	249
Pearsall, Gilbert H	11997	10	467
Pearsall & Co., Inc	12722	5	1177
Peavy-Byrnes Lumber Co.[1]	15824 16354 25984	14	625
Peavy-Moore Lumber Co.[1]	15823 16355 25986	14	625
Peavy-Wilson Lumber Co.[1]	15822 16356 25985	14	625
Peck, George H	29232	19	345
Peck & Hills Furniture Co.[2]	16108	16	1008
Pederson, Hans [3]	12329	14	1089
Pederson, Marie [3]	12328	14	1089
Peebles et al., W. S., administrators [4]	9380	5	386
Peerless Iron Pipe Exchange, Inc	44755	23	900
Peerless Pacific Co	14376	10	103
Peninsula Shipbuilding Co	5741	9	189
Penn Chemical Works	9247	7	442
Penna, P. H	21861	17	17
Pennington-Geissler Co	10082	11	648
Pennsylvania Co. for Insurances on Lives and Granting Annuities, executor under the will of Mary A. Britt, deceased	1904	2	48
Pennsylvania Co. for Insurances on Lives and Granting Annuities et al., executors [4]	20263	21	176
Pennsylvania Salt Manufacturing Co	27199 38453 41691	18	1148
Peoples Ice & Cold Storage Co	14365	10	16
Peoples Trust Co., trustees [4]	8472	10	1385
Perine, H. B. and Bonnie A	29410	22	201
Perine Machinery Co.[5]	24154	22	450
Perkins, B. F	5152	6	781
Perkins, Holten B	6851	14	584
Perkins Land & Lumber Co	11363 17041	9	528
Perkins Manufacturing Co	12741 23894 35148 37930	17	1345
Permanent Loan and Savings Association	2268	2	132
Perry, E. G	9023	9	796
Perry, Mary R	42492	20	58
Perry, V. K	9022	9	796

[1] Acquiescence does not relate to affiliation issue, except with regard to Peavy-Wilson Lumber Co. and Christie & Eastern Ry. Co. for 1917, 1918, and 1919.
[2] Acquiescence does not relate to leasehold issue.
[3] Acquiescence relates to issues (c), (d), and (e).
[4] Estate tax decision.
[5] Acquiescence relates to issues (b), (d), (e), and (f) of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Perry & Dorminey	852	1	995
Perryman, J. R	2735, 6301	6	311
Persons, James H	3250	5	716
Peru Chair Works	3408	3	29
Peruna Co.[1]	5102, 12333	11	1180
Petaluma & Santa Rosa R. R. Co.[2]	13830	11	541
Peters, John	25276	16	895
Peters Manufacturing Co	2091	1	1198
Peterson Co., George C	1266	1	690
Pevely Dairy Co	161	1	385
Pfaff, Charles, estate of [3]	31537	21	394
Phelps, B. M	14749, 21953, 28226	13	1248
Phelps, Martha B., executrix [3]	4803	6	648
Phelps, William L., estate of [3]	4803	6	648
Phelps-Waters Co.[4]	19419	15	1166
Phillips, Edward S	2376	9	1016
Phillips, George E.[3]	6352	7	1054
Phillips, John D., estate of [3]	6352	7	1054
Phillips, Joseph Edward, executor [3]	6352	7	1054
Phillips, Joseph W., estate of [3]	6352	7	1054
Phillips, Lee A	29493	20	438
Phillips, T. C	12802	9	153
Philmont Realty Co	11758	11	800
Philo Corporation, L. H	16673, 24755, 32327	16	130
Phipps, Henry C	26040, 33203	19	1293
Phipps, John S	26038, 33204	19	1293
Phoenix National Bank	13149	14	115
Phoenix Savings Bank & Trust Co	13149	14	115
Pickering, Loring	5908	5	670
Pickering, Rose C	5840	5	670
Pictorial Review Co., The	4487, 6661, 11303	5	416
Piedmont Lumber Co	12828	14	778
Piedmont-Mount Airy Guano Co	8542	8	72
Pierce-Arrow Motor Car Co	893	2	396
Pierson & Co	21340	12	678
Pike County Coal Corporation [5]	7189	4	625
Pine, E. Frank	27573	16	555
Pine Bluff Compress & Warehouse Co	7989	5	938
Pine Ridge Coal Co	27337	23	489
Pine Ridge Mines Co	2208	5	541
Pinhorn, Richard, estate of [3]	6388	7	1104
Pioneer Laundry Co	4739	5	821
Pittard, J. T	1804	5	929

[1] Acquiescence relates to issue as to value of good will for invested capital purposes for 1919.
[2] Acquiescence relates to that part of decision as to the purchase of taxpayer's own bonds at less than par which were held as an investment.
[3] Estate tax decision.
[4] Acquiescence does not relate to issue as to whether Phelps-Waters Co. was a transferee of Wisconsin Chemical Co.
[5] Acquiescence relates only to issue 1 in decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Pitts, John L., estate of [1]	32385	19	288
Pittsburgh & Bessemer Coal Co	5626 9004	5	45
Pittsburgh Grinding Wheel Co	2558 2559	2	712
Pittsburgh-Northern Coal Co	2837	6	105
Planters Nut & Chocolate Co	8788 10081	7	173
Planz, Inc., Theo	7866	10	1158
Plaut & Co., L. S	16563	15	535
Plumb, Ralph H	3370	7	295
Plunkett, Charles T	3701	3	1265
Plunkett, Florence C	3758	3	1265
Plunkett, Lyda F	3757	3	1265
Plunkett, William C	3756	3	1265
Plymouth Coal Mining Co	4003	3	1023
Poel & Kelly, Inc	30916	19	1317
Poinset Mills	83	1	6
Polichroniades, Paul	1265	2	1263
Pomeranz, Aaron	11759	11	507
Pomeranz, Abraham	11760	11	507
Pomeranz, Otto S	11761	11	507
Pomonis, Dennis	3382	5	975
Pomonis, Spiro	3382	5	975
Pond, D. H	14460	12	865
Poor's Publishing Co	17596	14	1389
Pope, Arthur K	6849	14	584
Pope, Clarence E	2151	3	595
Pope, Mrs. Clarence E	2500	3	595
Pope Sanatorium Co	4148	4	1085
Popular Dry Goods Co	2141	6	78
Popular Priced Tailoring Co	9222	8	831
Port Townsend & Puget Sound Ry. Co	2554	2	357
Porter et al., Esther Jackson, executrix and executor [1]	42815	23	1016
Porter, William H., estate of [1]	42815	23	1016
Portland Damascus Milk Co	33532 42613	22	1236
Post, James H	12488	12	510
Poston, Clarence E., estate of	27350	17	921
Poston et al., Floyd E., administrators	27350	17	921
Pottash, Harry	11992	12	190
Pottash, Max	11991	12	190
Pottash Bros	11990	12	190
Potter Farms, Inc	5928	6	110
Potts, Allen	37414	20	573
Potts Run Coal Co.[2]	26274 30358	19	1
Pound Hotel Co., J. B	5792	13	943
Powel, Hope Ives, estate of [1]	9888	10	166
Powel, T. I. Hare, executor [1]	9888	10	166
Powell Coal Co.[3]	11945	12	492
Power, Charles B. and John M., executors [1]	10400	11	1313
Power, Thomas C., estate of [1]	10400	11	1313
Power & Bro., T. C	3740	6	835
Powers, Mary A., executrix [1]	5422	6	633

[1] Estate tax decision.
[2] Acquiescence in issue relating to value of coal in lands in 1903.
[3] Acquiescence relates to all issues except jurisdiction issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Powers, Richard J., estate of [1]	5422	6	633
Powers, Samuel L	11558	12	702
Powers & Mayer, Inc	6862	6	329
Powers & Mayer Manufacturing Co	6862	6	329
Pratt et al., Emily J., executrices [1]	25729	18	377
Pratt, William B., estate of	8858	7	621
Pratt & Letchworth Co	4644	7	492
Premier Oil Co	7996 20629	12	322
Premier Packing Co	10192	12	637
Preston, Homer M	9816	9	645
Preston et al., Homer M., administrators	3896	7	414
Prestwood, F. M., estate of	7755	6	1116
Prestwood, N. J., administrator	7755	6	1116
Preuss, Ella A., executrix	8737	20	447
Preuss, Gustav A., estate of	8737	20	447
Price, Samuel B	11764	7	1237
Producers Fuel Co	159	1	202
Protective Finance Corporation	38902	23	308
Prouty et al., Anson V., executor [1]	2951	5	107
Prouty, C. C., estate of [1]	2951	5	107
Pryor, Luke, estate of [1]	9380	5	386
Pugh, sr., Mrs. John	17156		
Pugh, jr., J. C., estate of	17174		
Pugh, sr., J. C., estate of	17155		
Pugh, jr., Mrs. J. C	17173		
Pugh, sr., Mrs. J. C., executrix	17156	17	429
Pugh, L. G	17158		
Pugh, Mrs. L. G	17157		
Pugh, O. L	17153		
Pugh, Mrs. O. L	17154		
Puller, J. D., executor [1]	37098	23	1187
Purcell, Annie L., executrix	3838	4	967
Purcell, Joseph, estate of	3838	4	967
Purdy & Henderson Co	5198	4	70
Puritan Manufacturing Co	32157	21	1431
Purity Oats Co	4364	4	585
Purity Oats Co. of Davenport	4365	4	585
Putnam, Henrietta, deceased, estate of [1]	5273	3	823
Putney Mercantile Co., L. B	3195	3	836
Putzel, Henry V	4053	8	787
Q.			
Quadrica Manufacturing Co	2814	2	1119
Quealy, P. J	7196	6	419
Queen City Printing Co	6985	6	521
Quilp Gold Mining Co	16400	21	375
R.			
Radel Co., John J	5576	5	250
Radin, Etta, administratrix	8175	8	1077
Radin, Samuel, estate of	8175	8	1077
Rainbow Royalty Co	3619	3	71
Raiss, Albert	33908 37955	21	593

[1] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer	Docket No	Board of Tax Appeals. Volume.	Page.
Raiss, Carl	33909 37956	21	593
Raleigh Smokeless Fuel Co	7767	6	381
Ramming, R. W	5983	6	188
Randolph Hotel Co	1580	6	368
Ranier Grand Co	4236	11	520
Rankin, B. Kirk [1]	26191 41046	17	1301
Ransom, Inc., Stephen	7904 7905	9	120
Rapid Transit Land Sales Co	37850 45662	20	608
Rauh & Sons Fertilizer Co., E. [2]	10720	12	468
Ravlin Corporation	45481	19	1112
Ravner, William	8284	10	698
Ray, Paul B	41543	20	453
Raymond-Hadley Corporation	5128	4	889
Rayville Coal Co	38992	20	525
Read Phosphate Co	10238	13	39
Real Estate & Trust Co. et al., executors estate of George W. Milliken [3]	10123	7	785
Realty Associates, as syndicate manager	27921	17	1173
Realty Sales Co	18145	10	1217
Redlands Security Co	5703	5	956
Reed, David A., executor [3]	47344	24	166
Reed, F. M	6776	6	1140
Reed, James H., estate of [3]	47344	24	166
Reed, Leila H	5110	8	670
Rees, A. F	41138	21	698
Reese Drilling Co	27009	18	816
Regal Shoe Co	784	1	896
Rehm, Oscar E	20633	21	243
Reichenback, Harry L	2015	1	1026
Reid, Angie E	32688 36679	22	1150
Reinhardt, Elaine R	994	2	19
Reinhart, Patrick D	16702	15	1247
Reisner Mfg. Co., W. H	12436	13	841
Reizenstein, Louis, trustee	8146	9	1184
Reizenstein Trust Estate, Rosa	8146	9	1184
Renaker, V. B	13120	12	51
Renard, Louis, estate of [3]	35444	21	1350
Renard, Wallace, executor [3]	35444	21	1350
Renfro, E. T	6138	8	1295
Renfro, Mrs. Inez C	6138	8	1295
Reserve Loan Life Insurance Co. [4]	21489 29554 32965	18	359
Reserve Natural Gas Co. of Louisiana	8704 9006	12	219
	14185 17707	15	951

[1] Acquiescence in issue relative to deduction of wages and expenses of expert pressman in 1923.
[2] Acquiescence relates to issue 1 of decision.
[3] Estate tax decision.
[4] Acquiescence in so far as decision holds that petitioner is entitled to a deduction in the amount of 4 per cent of the mean of the reserve funds required by law and held at the beginning and end of the taxable years undiminished by the amount of exempt interest.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Retailers Fire Insurance Co	3733	3	1186
Retlaw Mines Co	2208	5	541
Rex Machinery & Supply Co	1791	3	182
Reynolds, J. D	7829	10	651
Reynolds, J. E	25575	17	693
Rhodes, Brownson & Kampman, Inc	894	2	194
Ribbon Cliff Fruit Co	12337	12	13
Rice & Fielding, Inc	5219	3	1080
Rich and wife, C. R	2823	6	822
Richland County Building and Loan Association	19420 21259 38675	15	537
Richmond Hosiery Mills	3703 7763	6	1247
Richmond Mica Co., Inc	13065	13	915
Rickard, George L	15606	15	316
Ricker, George A	6817	10	11
Ricks, W. R	12803	12	1381
Riffel, Henry	3576	3	436
Riggs, Leon C., estate of, Lacey L. Bogart, administrator	1932	2	668
Rigsby, G. D	5599	6	194
Rike, Frederick H	24335	18	149
Riker, jr., Samuel, executor	7102	6	890
Ringler & Co., George	8565	10	1134
Rio Electric Co	12756	9	1332
Rising Sun Brewing Co	13165	22	826
Riter, Joseph	14392	13	57
River & Rail Storage Co	1233	1	1098
Riverview State Bank	11180	12	1261
Roach Studios, Hal E	29227	20	917
Roanoke Mills Co.[1]	23221	18	474
Robert Treat Hotel Co	20985	20	968
Roberts, B. S	5344	7	1162
Roberts, Frances A., estate of	17698	10	763
Roberts, H. H	9579	9	376
Roberts Co., U. N	1270	2	1176
Roberts, Vincent G	5344	7	1162
Robertson, Charles E	595	1	501
Robertson, Harry F	5436	5	748
Robertson, J. E	17227	13	550
Robertson, James L	34709	20	112
Robinson, Andrew P	14924	12	1195
Robinson, Henry M	36367	21	677
Robinson, Herbert D., executor[2]	34683	21	1373
Robinson, F. M., estate of	6341	4	47
Robinson Co., A. M.[3]	5652	5	1217
Robinson Shows Co., John	13893	12	806
Robison, Lester L	22184	22	395
Roby Realty Co	40493	19	696
Roche, Frank L	21556	21	1139
Rock Island Sash & Door Works	7258	13	635
Rockford Brick & Tile Co	3873	4	313
Rockford Malleable Iron Works	2451	2	817
Rockwell Manufacturing Co	29672	19	277

[1] Acquiescence relates to claim for paid-in surplus; depreciation prior to August 31, 1916; and depreciation during fiscal years ended August 31, 1917, 1918, 1920, and 1921.
[2] Estate tax decision; acquiescence in portion of decision with respect to mortgage of November 5, 1924.
[3] Acquiescence relates to issues 2, 3, 4, 5, and 6 in decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals, Volume.	Page.
Rodefer Oil Co., David	10184	11	782
Roden Coal Co	7915	5	654
Roe, Charles F., estate of [1]	11030	14	312
Roebling, Karl G., estate of	13042	10	682
	25747	12	1195
Roesch, William V	2551	7	293
Roessel & Co., Ltd., Louis	1009	2	1141
Rogers, Clinton, estate of [1]	41239	21	1124
Rogers, C. Marshall	22484	20	799
Rogers, Katie	10843	7	711
Rogers, Noah C., executor [1]	25964	17	570
Rogers, R. M	10842	7	711
Rogers, Robert C	13581	12	816
	24740		
Rogers, Rochester H., executor [1]	41239	21	1124
Rogers, T. J. and Victoria V	15536	15	638
Rolfe, Willard G., executor [2]	18486	16	519
Rollo, Louis C	22477	20	799
Rolnick, Lillie	35386	20	989
Rolnick, Nathan	35325	20	989
Romayor Gravel Co	7532	11	828
Romberger et al., Georgianna M., executors [1]	41184	21	193
Romberger, Henry A., estate of [1]	41184	21	193
Rome Wire Co	8759	8	369
Roos, Moritz	3079	8	787
	4060		
Roper, Elisha	8642	7	1112
Roper, Mrs. Elisha	8643	7	1112
Rose Co., Edward	2092	2	341
Rose Investment Co., Walter W	43241	24	215
Rosenthal, Benjamin J	990	2	19
Rosenthal, Hannah S	991	2	19
Rosenwald & Weil, Inc	8596	11	921
Roshek Bros. Co. & Roshek Realty Co	1844	2	260
Roslyn Fuel Co. [3]	9074	16	285
	22072		
Ross Co., Inc., F. J	7281	7	196
Ross, James, estate of [1]	8690	8	693
Ross-Spiller Glove Co	10212	10	1340
Rossell, Robert T., executor [1]	47344	24	166
Rosser, Luther Z., estate of [1]	2161	3	809
Roth, Charles F., estate of	1508	3	868
Roth, W. A	37355	22	587
	45065		
Roth Hotel Co	542	1	1111
Roth Shoe Co., Whitney	89	1	453
Rottenberg, Samuel	38720	20	589
	41165		
Rouse, Hempstone & Co., Inc. [4]	7673	7	1018
	10987		
Rowe, Henry C	18216	19	906
Rowe, John J	3067	2	1159
Rowe, M. D. [5]	9063	7	903
Rowe, Mrs. M. D. [5]	9064	7	903

[1] Estate tax decision.
[2] Estate tax decision; acquiescence relates to issues 2 and 3 of decision.
[3] Acquiescence relates to tentative tax issue.
[4] Acquiescence relates to issue concerning opening inventory at December 1, 1917.
[5] Acquiescence relates to first issue of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Royal Collieries Co., The	233	1	369
Royal Fuel Co	9386	8	741
Royal Wet Wash Laundry, Inc	11481	14	470
Rubens & Co., Charles	5736 6356 12569	6	626
Rubenstein, Gertrude G., executrix [1]	3795	10	864
Rubenstein, Louis, estate of [1]	3795	10	864
Rub-No-More Co	57	1	228
Rucker, B. J	2928	9	921
Rucker, W. J	2929	9	921
Ruckman Coal Co	4277	5	534
Rudolph, E. L	4571	6	265
Rudolph, T. T	4570	6	265
Rudolph Co., Inc., M. J	2069	4	476
Ruf, Frank A., estate of [2]	9528	13	85
Ruos, H. D	9119	13	240
Ruprecht, Charles C	22638	16	919
Russell, Charles H., estate of	24312	11	947
Russell, Mary I. B., estate of	11250	13	850
Russell Milling Co	183	1	194
Russell Wheel & Foundry Co	2029	3	1168
Ruud Manufacturing Co	16278	15	819
Ryan, John C., estate of	1986	2	1130
Ryan, Kate C., executrix	1986	2	1130
Ryan Co	54	2	764
Rye Beach Pleasure Park Co., Inc	13108	6	1373
Ryman, B. A., estate of	1706	5	1288
Ryman, Nancy J	1705	5	1288
S.			
St. Clair Guaranty & Title Co	7578	8	688
St. Louis Malleable Casting Co. [3]	5490 15168	9	110
St. Louis Screw Co	2077	2	649
St. Louis Union Trust Co., executor	11032	14	323
St. Louis Union Trust Co. et al., executors [1]	12868	21	1201
Saehs, Charles H	7561	6	68
Sackett, A. T	7577	4	1074
Saddler, John E	3796	2	1305
Safe Guard Check Writer Corporation	11451	10	1262
Sakowitz, Louis	10807	7	267
Salmon, George H	5733	3	838
Salmon, Walter J	3115	3	723
Salomon, Leon	3725 12231	4 8	1109 979
Sample Hat Stores Co., Inc	6042	13	1366
Sampson, William C	204	1	73
Sanborn, Fred C. [4]	40963	19	495
Sanborn Bros., successors, etc	11082	14	1059
Sand Springs Home	4871	6	198
Saner-Ragley Lumber Co	431	3	927

[1] Estate tax decision.

[2] Estate tax decision; acquiescence relates to issue regarding taxability of proceeds of life insurance in excess of $40,000 exemption and issue as to bequest of works of art to or for the use of the Catholic Cathedral, St. Louis, Mo.

[3] Acquiescence does not relate to issue involving "tentative tax" adjustment.

[4] Nonacquiescence published in Cumulative Bulletin IX-2, 83, withdrawn. See I. T. 2567 (C. B. X-1, 230).

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Sanford, T. F	36087	22	1254
Sanford Cotton Mills	12813	14	1210
San Francisco Hotel Co	8913	22	740
San Francisco Lumber Co	10643	10	1242
Sanger, Elias A., estate of	6981	8	107
Santa Maria Gas Co	11507	10	1412
Sargent, Estelle B	20493	22	1270
Sargent, Marjorie L	3678	4	298
Saul, Maurice B	14067	13	705
Savannah River Lumber Co. et al [1]	14354 16130 26936	14	165
Savannah Ship Chandlery & Supply Co	14805	13	958
Savinar Co., Inc	3624	9	465
Sawyer Milling Co	20924	17	160
Sayre Stamping Co	3040	2	166
Scaife, William B., estate of	391	1	338
Scales, H. L	11408	10	1024
Schalkenbach, Robert, estate of [2]	31405	21	1022
Schatzinger, Bernhard, estate of [2]	11383	12	1353
Schatzinger, Sabina, executrix [2]	11383	12	1353
Scheer, Abraham	10857	11	836
Scheuer, Herman, estate of [2]	4621	9	486
Schick, Andrew, deceased, estate of	3659	3	1026
Schiff, Benjamin J	4742	3	640
Schilling Grain Co	5939	8	1048
Schelmmer & Graber Co., The	1422	2	823
Schlesinger, Armin A	13728	11	601
Schlett, Adolph	10016	7	150
Schlossberg, Edwin	2006	2	683
Schmick, Wilson E	1971	3	1141
Schmid, John A	11714	10	1152
Schmidlapp Fund, Charlotte R	36836	20	88
Schmidt, Edward A	43991	21	1400
Schmidt, Edward A., trustee	43990	21	1400
Schmidt, Edward C	43994	21	1400
Schmidt, Frederick W	43989	21	1400
Schmidt, II, Frederick W	43992	21	1400
Schmidt & Sons, Inc., C	43988	21	1400
Schoellkopf, Walter H	6212	4	1032
Schoenheit et al., William, executors	9857 9858	14	33
Schofield, John H	34036	19	234
Schroll, William H	25776	20	1027
Schroth, Joseph, estate of [2]	3914	5	326
Schroth, Julia Anna, executrix [2]	3914	5	326
Schubert, Andrew H	6667	4	35
Schulein Co., S	34828	20	264
Schultze, J. William	21581	18	444
Schulz, A. J., estate of [2]	5686	7	900
Schulz, Emma Jane, executrix [2]	5686	7	900
Schulz Baking Co	2074	3	470
Schwarzler Co., A. J	667	3	535
Schwing, Samuel P., estate of [2]	3633	3	697
Schwinn, Ignaz	8441	9	1304
Scott, John	10418	6	761

[1] Acquiescence relates to affiliation for 1917 and inclusion of Savannah River Lumber Co. in consolidated group for 1918–1921.
[2] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Scott, Shelby D	6180	9	1219
Scoville, George S	2443	2	813
Scranton Electric Co.[1]	17872	15	1084
Scripps et al., William E., trustees under declaration of trust executed by James E. Scripps	434	1	491
Seaboard Mills, Inc. (Fleitmann & Co., Inc., successor)	5499	5	575
Secor Hotel Co	5023 5024	7	158
Securities Investing Fund, Inc	224	1	279
Security Trust & Savings Bank, trustee[2]	10304	11	833
Security Trust Co., executor[2]	6720	4	983
Seligman, George W., executor	9758	10	840
Seligman, Isaac N., estate of	9758	10	840
Sells Floto Circus Co	13964	12	806
Selwyn Operating Corporation	4851	5	723
Seneca Coal Mining Co	1049	2	513
Senner, Herman[3]	44188	22	655
Sentinel Publishing Co	5712	8	325
Serrien, Anna, executrix[2]	8836	7	1129
Serrien, John, estate of[2]	8836	7	1129
Service Recorder Co., The	2201	2	96
Seven Nineteen Fifth Avenue Co	6031	5	565
Severa Co., W. F	1702	3	664
Sevier, Marion Shainwald[4]	14410	14	709
Sewing Machine Supplies Co. of Massachusetts	32158	21	1431
Shaffer, John C	1072	9	504
Shainwal, Marion D.[4]	14410	14	709
Shamokin Valley & Pottsville R. R. Co	4944	3	604
Shanley & Furness, Inc	26029	21	146
Sharp, W. Z	10598	8	399
Sharpe, Mary A.[5]	17127	17	135
Sharpe, Richard	17126	17	135
Shaw, A. W	15612	13	716
Shaw, Caroline J., executrix	26804	21	400
Shaw, Guthrie, executor	9644	9	459
Shaw, James G., jr., estate of	9644	9	459
Shaw, R. S., estate of	26804	21	400
Shawver Co., W. F	34252	20	723
Sheakley & Kennedy Bros	6282	7	1156
Sheane Auto Co., W. W	5187	9	1317
Sheen, Jessie G	543	6	114
Sheet Metal Construction Co., Inc	5089	3	461
Sheffield Dentifrice Co.[6]	11814	13	877
Sheldon Manufacturing Co., H	12836	13	1296
Shelton et al., Charles B., executors[2]	2161	3	809
Shepard, Stuart G	17132	15	627
Sheridan, Thomas F	13698	4	1299
Sheridan Meat Co	5493	10	211
Sherman Stalter Co	4313	4	23
Sherrod, Archibald	22257	16	622
Sherrod, Henry Lambert	22258	16	622

[1] Acquiescence relates to all issues except affiliation with American Gas & Electric Co.
[2] Estate tax decision.
[3] Acquiescence relates to issues (a) and (d) of decision.
[4] Acquiescence relates to issue as to whether certain income accruing to estate of petitioner's father was taxable income to petitioner.
[5] Acquiescence in so far as decision relates to reduction of distributable royalty income to an amount equal to that found for each of the other two petitioners.
[6] Acquiescence relates to allocation of tax in consolidated return.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Sherwood, John W	7748	8	103
Shiner Oil Mill & Manufacturing Co	2875	11	805
Shipowners & Merchants Tugboat Co	3955	4	403
Shope Brick Co	6531	5	1042
Shorb, Louise Glassell	32219	22	644
Shotter, S. O. and Isabel, executors	3134	2	912
Shotter, S. P., deceased, estate of	3134	2	912
Shreveport Creosoting Co., Inc	17777	12	247
Shugrue, Charles J., estate of	38474 41982	22	1062
Shulthis, A. W., deceased, estate of	1827	2	1253
Shure Co., N	3655	4	1181
Shutter, Marion D	1316	2	23
Shuttleworth, Wollny Co., Inc	1362	5	76
Sibley et al., John R., executors	24921	16	915
Sibley, Rufus A., estate of	24921	16	915
Sickles, Mrs. A	10430	14	1259
Siegel, Eugene, executor [1]	18879	19	683
Siegel, Jacob, estate of [1]	18879	19	683
Silk, W. W	10864	7	1256
Silk, Mrs. W. W	10864	7	1256
Sillix, Mrs. S. A	25171	16	485
Silver & Co., Inc., William	9708	10	1328
Silverman, Alexander	10389	6	1329
Simmons, W. H	31530 44254 48654	22	1106
Simmons Co	1927	8	631
Simon, H. S	4912	4	1078
Simon, Kate M	9993	10	1186
Simonds Co., C. H	267	1	105
Simons, jr., and wife, James A	5329	5	480
Simons Brick Co.[2]	13973 24509 27247	14	878
Sinsheimer, Sidney W	11068	7	1099
Sioux City Stock Yards Co.[3]	12228 20210	21	973
Skinker et al., Isabella N., executrices [4]	11155	13	846
Skinker, Thomas K., estate of [4]	11155	13	846
Skinner, Frederika	41568	20	491
Slater, Chas. W	4134	5	804
Slater, H. N., trust	8191	9	521
Slattery, Stephen J	9312	9	1123
S. & L. Building Corporation	36950	19	788
Sline, John T	6752	9	1222
Smith, Bert K	5329	5	480
Smith, Mrs. Bert K	5329	5	480
Smith, Burns Lyman	25149	19	809
Smith, Mrs. D. Sydney [5]	3262	4	385
Smith, Francis E	1020	1	868
Smith, Harry A., executor [4]	3098	6	341
Smith, Harry A. P	2552	7	293

[1] Estate tax decision; acquiescence in Board's finding that transfer of a certain leasehold by decedent was not made to take effect in possession or enjoyment at or after death.
[2] Acquiescence does not relate to contribution to the All Year Club.
[3] Acquiescence relates to issue 4 of decision.
[4] Estate tax decision.
[5] Revokes nonacquiescence published in Cumulative Bulletin VI-1 at page 8.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Smith, jr., Mark	20942	19	325
Smith, Theodore H	1054	9	57
Smith, Walter T	4841	4	397
Smith Corporation, Robert	31639	21	1400
Smith Insurance Service, Inc	10901	9	284
Smith & Son Co., Lee S	3328	3	343
Smith Machine Co., H. B	7519	7	525
Smythe, Ernest E., estate of	12198	14	931
Snitzler-Warner Co	12964 19220	16	342
Snow, Francis S	6850	14	584
Snyder, William J	13186	11	807
Solfisburg, Louise K	7249 7250	12	1306
Solof, J. W	482	1	776
Solomon, Harry	20112	15	419
Somers Lumber Co	2401	2	106
Sonenblick, David	3665	4	986
Sonora Bank & Trust Co	7838	7	66
Sooy, Charles H	2882	10	493
South Chicago Drug Co	15157	13	1374
South Euclid Savings & Loan Co	19508	14	1079
Southack, Augusta G., estate of	6359	3	1063
Southeastern Express Co.[1]	24172 32373 40021 42431	19	490
Southern Amusement Co., Inc	13753 13754	14	300
Southern Feed Co	13587	6	736
Southern Press Cloth Mfg. Co	13004	10	303
Southern Sand & Gravel Co., Inc	6603	5	879
Southern Tire & Rubber Co	22717	18	210
Spalding, Katherine A	7302	7	588
Spang-Chalfant & Co., Inc	10469	9	858
Spelzer, Lena	2389	3	413
Spencer, Frank A	20635	21	859
Spencer, Mary R	25255	20	58
Spencer Lumber Co. et al., A. B	7639	10	452
Sphar Brick Co	2086	2	946
Spofford, Hannah M., administratrix of estate of Lucy M. Mills[2]	1028	3	1016
Sporborg, William D., administrator	7914	8	1272
Sprague, Elizabeth S	6740	8	173
Sprague Tire & Rubber Co	4717	11	610
Spring Brook Ice Co	12862	12	433
Springdale Cemetery Association	4169	3	223
Sprinkle, James L., estate of	10401	12	456
Squier, J. Bentley	12078	13	1223
Staats et al., Isabel, legatees and trustees	36958	21	677
Staats, William R., estate of	36958	21	677
Stafford, William F	14313	14	1199
Stafford-Lowdon Co	9088	7	1121
Staley, J. A	6435	9	932
Staley, Wilmer C	10750	9	1038
Stamey-Mackey Construction Co	1271	4	383

[1] Acquiescence relates to issue 1 of decision.
[2] Estate tax decision.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Standard Brewery, Inc	10226 10492	10	374
Standard Gas Products Co	9843	5	1221
Standard Marine Insurance Co., Ltd	4822	4	853
Standard Refractories Co	3617 3618	6	24
Standard Silk Dyeing Co	11694	9	648
Standifer Construction Corporation, G. M	5550	4	525
Stanfield, Theodore	3076 4056	8	787
Stanley, James T	17323	15	158
Stanley Insulating Co	2983	2	967
Stapley Co., Inc., O. S	7685	13	557
Star Porcelain Co	5002	4	989
Starck, Philip A., estate of [1]	4051	3	514
Starck, Philip T., executor estate of Philip A. Starck [1]	4051	3	514
Stark, Arthur L., estate of [1]	10587	8	1150
Stark Brick Co	12582	12	667
Starks, Nils O., estate of	20933	19	325
Starks, Sanford P	20934	19	325
Starks, Sanford P., administrator	20933	19	325
Starr, C. L	12739	9	886
Starr, Howard W	101	1	681
Starrett, Paul	6557	4	398
State Bank of Alcester	5913	8	878
State Consolidated Oil Co	35047	19	239
Stearns, Frank B., executor	16672 19922	16	889
Stearns, F. M., estate of	16672 19922	16	889
Steele, Wedeles Co	10215	11	279
Stein et al., Sadie S., executors [1]	4621	9	486
Steinbach Co	2888	3	348
Steinle, Clinton R	20941	19	325
Steinle, George A	20939	19	325
Steinle, Joseph A., administrator	20932	19	325
Steinle, Joseph E., estate of	20932	19	325
Steinle, Katherine	20938	19	325
Steinle, William	20937	19	325
Stelwagon, John W., estate of [1]	28469	17	910
Stephens Fuel Co., Inc	15343 26383	13	666
Sterling Realty Co	6333	8	1000
Stern, Carl	19377	5	871
Stern, Emil	2186	5	89
Stern, Joseph	5887	14	838
Stern, Jules	2187	5	89
Stern, Louis	19376	5	870
Stern, Samuel	5943	14	838
Stern et al., Samuel E. A., executors [1]	2459	2	102
Sternberg, H. J	26486	21	728
Stevenson, D. M	14698	9	552
Steverson, J. N	11179	18	1099
Steverson, John M	33351	22	485
Stewart, Mellie Esperson	27894	18	1010
Stewart & Bennett, Inc	32754	20	850

[1] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Stewart Co., Fred S	5975	5	436
Stewart Co., G. S	3065	2	1016
Stieglitz, Treiber Co., Inc	653	1	452
Still, George W	6521	8	391
Stillwater Milling Co	5687	5	280
Stillwell Paper Co., E. J	7301	6	531
Stimpson, Dorothy Baker [1]	25061	19	1059
Stockbridge, M. C	1866	2	327
Stockbridge, Mrs. M. C	1867	2	327
Stollwerck Chocolate Co	6030	4	467
Stott, Enoch, estate of	12195	11	706
Stouts Mountain Coal Co	6542	4	1292
Stratton Grocery Co	7645	8	317
Strauss, David, estate of [2]	3877	9	1212
Strauss Market, Inc	3378	2	1264
Street & Finney, Inc	17663	24	187
Striffler, Inc., Edward C	5533	7	887
Stroh Brewery Co	16537	16	1192
Stromberg Electric Co	3398	8	1170
Strong, Hewat & Co., Inc	5069	3	1035
Strong, Homer L	19507	14	902
Strong, J. E	1909	6	417
Strong, Stella	1909	6	417
Strother Lumber Co., G. F	15235	10	1174
Struthers-Ziegler Cooperage Co	32884	18	537
Stryker, Arthur	30204 39931	17	1033
Stumer, Aline Blanche	992	2	19
Stumer, Blanche G	993	2	19
Stumer, Lois M	904	2	19
Stumer (II), Louis M	905	2	19
Sturdivant, M. P	47105	23	1384
Suburban Investment Co., The	1923	1	1121
Sugar Run Coal Mining Co	9236	11	587
Sugarland Industries	25063	15	1265
Suhr, Charles L	6406	4	1198
Sullivan Granite Construction Co	8790	6	703
Sultan, Abraham	39374	22	889
Sultan, Joseph	39376	22	889
Sultan, Judah	39377	22	889
Sumitomo Bank, Ltd	18599	19	480
Summit Coal Co	13852	18	983
Summit Wholesale Grocery Co	676	1	1040
Sumpter Coca-Cola Bottling Co	9079	7	890
Sumpter Valley Ry. Co	13145	10	1325
Sunflower Packing Corporation	531	2	1104
Sunnyside Coal & Coke Co.[3]	9442	9	984
Sunshine Cloak & Suit Co	11810	16	540
Superheater Co	8383	12	5
Superior Engraving Co	7949 17814	8	861
Superior Motor Parts Co.[3]	10348	8	407
Superior Pocahontas Coal Co	5377	7	380
Superior Tube Co.[4]	16104 16553	20	749

[1] Acquiescence relates to issue 1 of decision.
[2] Estate tax decision.
[3] Acquiescence relates to second issue of decision.
[4] Acquiescence does not relate to special assessment.

ACQUIESCENCES—Continued.

Taxpayer	Docket No.	Board of Tax Appeals. Volume.	Page.
Susman, Otto	3077 9190	8	787
Sutliff, S. D	2786	4	1068
Swaney, Ewing B	2863	5	990
Swanston George, estate of [1]	21268	18	379
Swanston, Robert, executor [1]	21268	18	379
Swartz & Co., Inc., A. R	3688	5	264
Sweeney, Edward F., estate of [1]	6322	15	1287
Sweeney, Jessie Gair, executrix [1]	6322	15	1287
Sweeney & James Co	10266 19783	10	966
Sweet, Gertrude H	9240	8	404
Sweeten, P. P	4331	3	37
Swinehart Tire & Rubber Co	1436	2	223
Sydco Photoplay Corporation	10221	7	445
Sylvan Electric Bath, Inc	7411	5	1293
Syracuse Food Products Corporation	40195 40316	21	865
Syracuse Washing Machine Corporation	26851 41474	17	11
T.			
Tagliabue, Charles J., estate of [1]	32095	19	616
Tait, James [2]	13908	11	979
Takamine Laboratory, Inc	3199	7	963
Talcott, Henrietta E., estate of [1]	16136	15	1025
Talcott et al., J. Frederick, executors [1]	16136	15	1025
Tampa Electric Co	13344 28332 29593	12	1002
Tarr, Frank A	3543	3	72
Taylor, Eli J	3050	9	442
Taylor, Ella D., executrix	7617	7	931
Taylor, Harriet A	3066	2	1159
Taylor, Howard M	12732	14	863
Taylor, Louis R	20940	19	325
Taylor, Moses	8789	7	59
Taylor, P. L	10020	11	441
Taylor, T. J., estate of	7617	7	931
Taylor Construction Co., Inc., J. H	11877	13	238
Teague, E. B	4040	3	146
Tel-Electric Co	315	1	434
Temple, Walter P	12018	10	1238
Templeman, Walter E	20463	20	493
Templeton, Kenly & Co., Ltd	6145 18432	6	61
Tennessee Fibre Co	10717	15	133
Ter Bush, David A	4015	4	984
Terminal Properties Co	39451	19	584
Terminal Railroad Association of St. Louis [3]	26162 28661	17	1135
Terrell, Edgar B	3132	7	773

[1] Estate tax decision.

[2] Acquiescence relates to issue as to whether the income realized under agreements of December 14, 1918, is taxable in proportionate amounts to the several petitioners or whether such proportionate amounts are taxable one-half to the petitioners and one-half to their respective wives.

[3] Acquiescence relates to issues involving contributions to Y. M. C. A. and amortization of discount on bonds.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Texarkana Cotton Oil Co., Inc	1888	1	1142
Texas Chemical Co	6360	11	390
Theis, jr., George	3958	3	1030
Thomas, E. L	9213	6	297
Thomas Shoe Co., The	209	1	124
Thompson, Alfred C	30690	18	843
Thompson, J. W	7412	10	390
Thompson, Melville W.[1]	23609	18	1192
Thompson, Seletha O. (Mrs. J. C.)	1895	9	1342
Thompson, Sudie F	30691	18	843
Thompson, T. C., estate of [2]	5280	3	902
Thompson, Mrs. T. C., executrix [2]	5280	3	902
Thompson, W. B	677	5	193
Thompson, W. Van E	17509	10	1125
Thompson & Black	10837	11	729
Thompson Co., John R	7917	10	57
Thompson Pacific Coast Co., L. A	1869	2	661
Thompson Scenic Railway Co., L. A	9679 10315	9	1203
Thompson Scenic Railway Co. of New Jersey, L. A	26611	21	718
Thorkildsen, Thomas	385	2	570
Thorn, Susan K., estate of [3]	18234	16	181
Thorpe, Helen Converse	4206	3	1006
Thorwarth, John F., estate of	7638	12	1306
315 West 97th Street Realty Co., Inc	9898	10	368
373 Park Avenue Corporation	45913	23	969
375 Park Avenue Corporation	25976	23	969
Threefoot, K., estate of	521	9	499
Tibbs, William F	21647	16	68
Tietz, Louise C., administratrix	9314	9	1123
Tietz, Robert M., estate of	9314	9	1123
Tifft, Layer & Co., Inc	12456	12	481
Tilford, Henry Morgan, deceased, estate of	3286	3	884
Tilt, C. A	18041 19963	14	437
Tilton, S. U., estate of	6378	8	914
Tindle, Frank T.[4]	8999	11	1257
Title Insurance & Trust Co	9195	11	288
Titus, Louis	85	2	582
	2450	2	754
Titusville Trust Co., executor	1508	3	868
Tivoli Theatre Co	7452	6	610
Toccoa Furniture Co	14429	12	804
Todd, C. Lee	1022	1	868
Todd, George W	2959	3	327
Todd, Libanus M	2960	3	327
Tomfohrde, Andreas, estate of	9615	13	150
Tomlinson, J. G	7068	7	961
Tonawanda Power Co	2889 3870 6506	3	1195
Tooke, C. A	25837	17	690
Topeka Tent & Awning Co	3440	3	521
Torrington Co. of Connecticut	32156	21	1431

[1] Acquiescence relates to amounts received from partnership of Thompson & Worley during 1920 and 1922.
[2] Estate tax decision.
[3] Estate tax decision; acquiescence relates to issue 1 of decision.
[4] Acquiescence does not relate to "tentative tax" issue.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Tower Co., A. J.	11402	16	101
Towle, George E.	16218	19	208
Towns Hospital, Charles B.	2317	2	701
Townsend, Anna M.[1]	20046	12	1343
Townsend, V. Ray [1]	20047	12	1343
Townsend Lumber Co.	830	1	894
Toxaway Tanning Co.	5084 5694	5	371
Trace Fork Mining Co.	16030	15	872
Tracy, Thomas H.	15152	15	1107
Transatlantic Clock & Watch Co.	4897	3	1064
Trathen, Mrs. J. Ries	8270	8	981
Travelers Equitable Insurance Co.	31793	22	784
Treat Hardware Corporation	4524	6	768
Trefry, W. S.	3397	10	134
Tri County Light & Power Co.	2710	2	1165
Troost Avenue Cemetery Association	1114	4	1169
Trorlicht-Duncker Carpet Co.	19399	22	466
Troxel Manufacturing Co., The	587	1	653
Troy Manufacturing Co.	6585	7	119
Trust Co. of Georgia, executor	12988	12	434
Trustee Property No. 4	38012	21	627
Tschiffely, Frederick A.	6407	5	1242
Tsivoglou, Constantine J.	3634	3	743
Tucker, E. G.	7863	13	932
Tucker, Genevieve	3470	2	796
Tucker, Henry St. George, executor	19016	17	135
Tucker, Martha S., estate of	19016	17	135
Tullgren, Herbert W.	32599	16	1242
Tullgren, S. Minard	32600	16	1242
Tulsa Oxygen Co.	20925	18	1283
Tunnelton Bank	11433	12	187
Turl Iron & Car Co., Inc.	9255	9	740
Turner, Mrs. W. A.	4162	5	1006
Turner Terminal Co.	3934	3	827
Tuthill, H. S.	42778	22	887
Tuttle, Howard B.	32998	19	502
Twelve East Thirty-first Street Hotel Co.	3645	3	76
Twin City Sand & Gravel Co.	7171	11	517
Two Ninety-Two Flatbush Avenue Corporation	5189	3	830
Tyler, May L.	995	6	636
Tyler & Hippach, Inc.	10722	10	300
Tyler Warehouse Co.	512	1	504
U.			
Ucita Investment Co.	5792	13	943
Uhrbrand & Lervick Construction Co.	29892	21	230
Ulferts, J. J.	14034	11	408
Ullendorff, Phillip, estate of	13686 16885	18	1015
Ullman et al., Frederic, executors [1]	39270	20	782
Una Gasoline Co.	10693	22	45
Underwood, H. A.	25761	20	1117
Uniola Real Estate Co.	3457	3	1113
Union Co.	15630	14	1310

[1] Estate tax decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Union Department Store Co	7835	8	1030
Union Metal Manufacturing Co	35	1	395
	2524	4	287
Union Pacific R. R. Co.[1]	24449	17	793
Union Plate & Wire Co	28823	17	1229
Union Stock Yards Co	7078	12	63
	7388		
Union Terminal Elevator Co	16271	14	55
Union Trust Co., executor	4478	9	1374
Union Trust Co. of Cleveland, Ohio, executor [2]	6983	5	1272
United Business Corporation of America	24641	19	809
United Motor Co	12744	12	743
United States Envelope Co	7422	10	84
	12432		
United States Fidelity & Guaranty Co	4263	5	23
United States Merchants & Shippers Insurance Co.[3]	10439	13	164
United States Mortgage & Trust Co., executor [2]	2459	2	102
United States Playing Card Co	19305	15	975
United States Refractories Corporation [4]	5642	9	671
United States Tool Co	4650	3	492
United States Trust Co. of New York et al., executors [2]	7856	9	514
United States Trust Co. of New York, executor [2]	11030	14	312
United States Varnish Tile Co	15069	15	1366
United Studios, Inc	23900	15	737
United Thacker Coal Co., trustees for	7888	15	273
Unity School of Christianity	1799	4	61
Universal Steel Co	12380	16	788
Untermyer, Alvin	26612	11	405
Updike, Nelson B	42404	22	12
Utica Motor Car Co	9086	10	878
V.			
Valentine, Maria Cristina Midence Flores, estate of [2]	39037	21	197
Vance, Edgar F	19545	18	1315
Vanco Mills, Inc	13276	12	557
Vancouver Home Co	5550	4	525
Van de Kamps Holland Dutch Bakers	1430	2	1247
Van Hoozer, W. C., estate of [2]	24204	21	795
Van Kannel Revolving Door Co	9988	11	1209
Vanderbilt et al., William K., executors	13030	11	291
Vanderbilt, William K., estate of	13030	11	291
Van Cleave Trust	13584	18	486
	13585		
	30673		
Van Etten, Charles H	8793	8	611
Van Fleet, Carey	2047	2	825
Van Hook, A. H	9358	8	68
Van Hook, Mrs. A. H	9359	8	68
Van Horn Co., Inc., Oliver H	8252	9	76
Van Lindley Nursery Co., J	3109	2	1084
Van Lindley Orchard Co., J	3109	2	1084

[1] Acquiescence with respect to affiliation issue.
[2] Estate tax decision.
[3] Acquiescence relates to issue as to losses.
[4] Acquiescence relates to all issues except issue with respect to question of allowance of amortization in 1918 of costs incurred in 1919.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Van Schaick, Ellen L., estate of [1]	7127	9	96
Van Winkle, Marshall, executor	36900	21	1343
Vauclain, Samuel M	18488	16	1005
Vaudreuil Lumber Co	6908	8	383
Vaughan, John Charles, estate of [2]	10514	10	140
Vaughan, J. W	21782	19	478
Vaughan, Leonard Holden, coexecutor [2]	10514	10	140
Vaughan & Barnes, Inc	7311	6	1279
Veitch, Edwin P	1179	1	680
Virden, M. L	5200	6	1123
Virginia Beach Golf Course Annex Corporation	46561	23	1169
Virginia Lumber & Box Co	3546	3	341
Virginia Railway & Power Co.[3]	9040 11731	9	468
Viscose Co., The	3164	3	444
Vista del Arroyo	10231	11	893
Vitamin Co	24936	21	311
Voelbel, Jacob, estate of [2]	6009	7	276
Voelbel, Walter W., executor [2]	6009	7	276
Voltz, Albert L., estate of	25604	16	167
Voltz, Katherine L., executrix	25604	16	167
Von Platen, Karl	16959	10	250
Von Ruck, Karl, estate of	9857 9858	14	33
Vosburgh, Edwin	25401	23	780
Voyer, A. L	5453	4	1192
W.			
Wade, Jeptha H., estate of [2]	43164	21	339
Wade, jr., et al., Jeptha H., executors [2]	43164	21	339
Wade & Dunton Carriage Co	28394	21	439
Wadsworth, Harold B., estate of	1982	1	1043
Wadsworth, Jessie B., executrix estate of Harold B. Wadsworth, deceased	1982	1	1043
Wagner, Alfred T	23744	17	1030
Wahl, Henry	2292	2	1106
Wahl, J. S	24762	21	822
Wahl, W. Wiley	2004	2	1106
Waimanalo Sugar Co	24879	13	323
Wald, Louis	4629	8	1093
Walker, jr., H. C	8266	6	1142
Walker, jr., Mrs. H. C	8267	6	1142
Walker-Crim Co., Inc., The	446	1	599
Wall, Frank E	7359	4	915
Wall & Ochs, Inc	3857	4	1093
Wallace Barnes Co	3653	10	1304
Wallingford, C. A	231	4	634
Wallingford, Elmer R	230	4	634
Wallis Tractor Co	663	3	981
Walnut Realty Trust	33377	23	850
Walsdorf, Mr. and Mrs. Edward	2410	4	887
Walsh, Joseph J., executor [2]	6388	7	1104
Walsh, J. M	13150	18	571
Walsh, Joseph M	34196	18	571

[1] Estate tax decision; acquiescence relates to trusts of 1912, 1919, and 1921.
[2] Estate tax decision.
[3] Acquiescence in so far as decision determines that City Gas Co. of Norfolk and Virginia Railway & Power Co. were affiliated with each other.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Walter, George L., estate of [1]	1782	2	453
Walter et al., Howard K., executors estate of George L. Walter, deceased [1]	1782	2	453
Walter & Co., Inc., D. N. & E	4006	4	142
Walter & Co., Inc., et al., D. N. & E	7618	10	620
Walter Real Estate Co	7618	10	620
Wanamaker New York, John [2]	23158	22	487
Wanamaker Philadelphia, John [2]	23156 23157	22	487
Ward, Hamilton	11322	8	704
Ward, Wm	10471	7	1107
Warmack, Robert N., estate of [1]	20172	22	136
Warner Co., T. W. (a Delaware corporation)	22109	19	872
Warren Co., The	4588	3	1154
Warren, Kib H	2550	7	293
Warren, Raymond L	42218	22	595
Washburn, Cheney D	2475	7	483
Washington Cadillac Co	4471	3	844
Washington Catering Co	7051	9	743
Washington Hotel Co.[3]	6609 7133	4	441
Washington Paper Stock Co	1321	1	1117
Washington Piece Dyeing & Finishing Co	4619	4	987
Wasserman, Isaac, estate of	27597	16	1214
Watson, C. C	20810	15	422
Watson, H. K	39193	20	270
Watson, Katherine H	39192	20	270
Watson, Martha A., estate of	7228	6	752
Watson, Mrs. Myrtle B	6286	7	495
Watsontown Brick Co	3580	3	85
Watterson Hotel Co	5792	13	943
Wausau Canning Co	13966	14	765
Wayne Body Corporation	35896	22	401 1207
Waynesboro Manufacturers Association	1277	1	911
Weakley Cloak & Suit Co	4001	8	477
Weatherwax, C. M	40625	21	861
Weaver, Belle R	2925	2	976
Weaver, Belle R.[4]	2924	4	15
Weaver, James A	8488	8	943
Weaver, M. E	2922	2	976
Weaver, M. E., estate of [4]	3852	4	15
Weaver, S. P	2921	2	976
Weaver, T. L	2923	2	976
Weaver, Walter B	7955	4	664
Webb, Leland D	1279	1	759
Webb, jr., Nat	33070	22	1249
Webb, Paul	33070	22	1249
Webb & Bocorselski, Inc	178	1	871
Webb Press Co., Ltd	2404 2724 7070	3 3 9	247 247 238
Webb, Stuart W	5591	5	366

[1] Estate tax decision.
[2] Acquiescence relates to jurisdiction issue.
[3] Acquiescence does not relate to that part of decision involving application of the Ayers decision (1 B T. A., 1135).
[4] Revokes nonacquiescence published in Cumulative Bulletin V-2, page 4.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Weber-Bunke-Lange Coal Co	9146	11	503
Weber-King Lumber Co	22574	20	1011
Wedgwood & Sons, Ltd., Josiah	3647	3	355
Weed, Henry D	2563	2	84
Weeks, Co., L. S	2604	6	300
Wehner, Robert K	31379	21	614
Weill-Jamison Co., Inc	9645	13	1342
Weiner, A. L	13048 14672	10	1184
Weingarten, David, estate of [1]	10433	13	249
Weis, A. W. D	11917	13	1284
Weiss, Paul E	10059	7	615
Weissenbach, Minna K	4004 4005 6061 6102 10157	6	617
Welch et al., E. Sohier, trustees	11134 21634	9	1370
Welch, Frank P	12587	12	800
Welfare Loan Society of Lancaster, Pa	30910	20	1113
Wells, D. S., estate of	38016	20	272
Welsh Packing Co	5199	9	1169
Wenzel, Ernst, estate of	548	1	507
Werbelovsky, Abraham, executor	10106	8	442
Werbelovsky, J. H., estate of	10106	8	442
Werk Co., M	8019 19871	15	954
Werner, Henry P	24497	15	482
Werner & Werner Clothing & Furnishing Goods Co	6984	9	69
Weser Bros., Inc	10548 17055 25239	12	1394
West, Edward	42238	22	595
West Bay Co., The	2843	2	483
West Corporation, F. C	6872	4	629
West End Consolidated Mining Co	2172	3	128
West Huntsville Cotton Mills Co	18741	22	1216
West Point Investment Co	300	1	436
West 28th Street Corporation	6032	4	147
West Virginia Coal Co	14790	16	378
West Virginia Malleable Iron Co	16883	17	1120
Westergren, Inc., M. F	2723	5	1185
Westermann & Pagano, Inc	3763	2	1308
Western American Oil Co.[2]	14452	10	17
Western Bank & Trust Co	28542 29180 39948	19	401
Western Elaterite Roofing Co	33931	19	467
Western Maryland Ry. Co.[3]	6475	12	889
Western Star Milling Co	2852	5	109
Western Wheeled Scraper Co.[4]	12001	14	496
Western Zinc Oxide Co	8604	7	972
Westland Co	19755	15	553

[1] Estate tax decision.
[2] Acquiescence relates to second issue of decision.
[3] Acquiescence relates to reduction by 2 per cent of income tax of taxpayer for calendar years 1918 and 1919.
[4] Acquiescence does not relate to that portion of decision which holds that section 284(c) of the Revenue Act of 1926 is applicable to the case.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Wharton et al., Gerald A., executors [1]	26439	13	302
Wharton, John G., estate of [1]	26439	13	302
Wheary, George H	4799	5	829
Wheatley, James A.[2]	9665	8	1246
Wheeler, D. E	21093	16	96
When Clothing Co	428	1	973
Whisnant, J. F	31522	17	811
White, Adelaide E., estate of [1]	41319	22	1076
White, Asa L., estate of [1]	12768	15	470
White, jr., James	5622	4	995
White, John B., estate of [1]	31246	21	500
White, Julia A	5623	4	995
White, R. B., executor [1]	31246	21	500
White, Robert P	5554	4	995
White et al., W. T., executors [1]	12768	15	470
White Trust No. 1, R. H. and K. K	28141	15	1410
Whitehead, C. P	23948	11	461
Whitehouse Leather Products Co., Inc	10673	12	714
Whiteley, Burt H., estate of	8472	10	1385
Whiting, C. L., Inc	11046	7	1170
Whiting Lumber Co	29071	21	721
Whitman, Clarence	14110	16	197
Whitman, Nathaniel, deceased, estate of [3]	1399	3	97
Whitman & Sons, Inc., Clarence	10316 15888	11	1192
Whitmeyer, Ella	3090	6	472
Whitmore, Alvah P	7086	5	1274
Whitson, Thomas J	3478	2	747
Whitty, Richard P	31127	21	270
Whorton et al., Glen C., executors [1]	3094	7	771
Whybrow, Clarence	609	1	725
Wickens Co	16476	16	968
Wickwire, Theodore H., estate of	5574	10	102
Wickwire et al., Theodore H., jr., executors	5574	10	102
Wiedemann Brewing Co., George	7955	4	664
Wiedenbeck, Emilie T	20935	19	325
Wiengarten, Melville D., executor [1]	10433	13	249
Wiess, H. C	7615	7	467
Wiess, Olga	7637	7	467
Wigginton, George P	11425	9	1030
Wilber, George I., estate of [1]	21666	17	654
Wilber National Bank of Oneonta, N. Y., executor and trustee [1]	21666	17	654
Wilbur, Loyd H	5636 10611	5	597
Wildermann Co., C	8289	8	771
Wiley, Edward N	22485	20	799
Wilhite et al., Hugh, executors and trustees	7462	11	85
Wilkens & Lange	10649 29037	15	1183
Wilkes, J. Frank	12024	11	717
Wilkes, J. Renwick	12023	11	717
Wilkes-Barre Lace Manufacturing Co	452	1	467
Wilkins, L. H	4208	6	593

[1] Estate tax decision.
[2] Acquiescence relates to item (2) of decision.
[3] Nonacquiescence notice in this case, published in Cumulative Bulletin IV-2, page 6, recalled.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Wilkinson, W. A., estate of [1]	16379, 16743	16	1390
William Penn Hotel Co	24169	23	566
Williams, Harry E	4207	6	593
Williams, Robert W., executor of estate of Ellen C. Bonaparte	1652	1	1101
Williams Foundry & Machine Co	10190	15	297
Williams Steamship Co	8725	7	451
Williamson, Alexander B	2343	2	747
Williamson & Rauers Co	11292	12	476
Williamson Milling Co	1042	5	814
Willis, W. T	15679	7	1256
Willis, Mrs. W T	15679	7	1256
Willmore, Thomas F	32850	18	1044
Willow Junction Tract Co	31186	21	378
Wilson, Charles Scotto, estate of [2]	4909	5	615
Wilson, F. H	6911	12	403
Wilson, Fannie L., executrix [2]	4909	5	615
Wilson, J. H	18157	15	536
Wilson, John E., executor [2]	40845	23	955
Wilson, Josephine K., estate of [2]	25729	18	377
Wilson Bros. & Co	8460	7	820
Wilson Co., William	14505	18	1107
Wilson Furniture Co	11317	10	1294
Winant, John G	28295	17	368
Windfall Grain Co	20368	23	725
Wing, R. E	24499	17	1028
Winship, Charles N	6754	10	237
Winston, Gus V	34242, 39349	22	1194
Winter Garden, Inc	8246	10	71
Wisconsin Hydro-Electric Co	9601	10	933
Wissner, Anna M	43993	21	1400
Wolf, J. H. G	2970	8	1121
Wolf Manufacturing Co	8626	10	1161
Wolfe, Emma S., estate of [3]	16149	15	835
Wolfe, L. G., administrator [2]	20202	20	1065
Wolfe, Russel, executor [3]	16149	15	835
Wolfe Co., Udolpho	16010	15	485
Wolferman, Fred, executor [4]	11291	10	285
Wolferman, Louis, estate of [4]	11291	10	285
Women's Apparel Co	4001	8	477
Wood Bros. Thresher Co	5877	4	43
Wood, Kay	13014	11	740
Wood, T. J	11029	9	1206
Woodbury Shoe Co	10229	19	433
Woodcliffe Silk Mills	559	1	715
Woodmar Realty Co	30984	17	88
Woodruff Lumber Co	7262	6	515
Woodruff & Son, John T	6864	6	535
Woods & Sons Co., Joseph W	9156	8	705
Woods Theatre Co., A. H	11067	12	827
Woods, William Stone, estate of	7462	11	85

[1] Acquiescence relates to issues 2 and 4 of decision.
[2] Estate tax decision.
[3] Acquiescence relates to deduction of Pennsylvania and New Jersey inheritance taxes.
[4] Estate tax decision; acquiescence relates to first issue of decision.

ACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Woodward, George	42279	23	1258
Worcester Bank & Trust Co. et al., administrators	14230	13	630
Wright, George M	20555	19	541
Wright, Gilbert S	34978	22	1045
Wright, Herbert N., estate of	14230	13	630
Wright, O. A., estate of	12096	12	999
Wright, Pearl Ross, administratrix	12096	12	999
Wright, W. Q	4270	10	806
Wright & Co., E. T	10966	23	351
Wright's Automatic Tobacco Packing Machine Co	1837	1	1260
Wurzburger, Bernard, estate of [1]	34683	21	1373
Wyatt et al., Elizabeth C. R., executors	17698	10	763
Wyckoff, Richard D	32016	19	263
Wyman & Co., C. C	10676	8	408
Wyoming National Bank	29875	23	408
Wyoming Tie & Timber Co	21370 24574	9	1143
Y.			
Yahola Sand & Gravel Co	2281	6	820
Yakima Hop Co	9527	8	441
Yalden, Percy A	38505	20	372
Yale Brevda Paper Box Manufacturing Co	3353	2	900
Yamhill Electric Co	29270	20	1232
Yellow Poplar Lumber Co	9894	12	1050
Yoder, Edward E	3220	3	1180
Yokohama Ki-Ito Kwaisha, Ltd	2653	5	1248
Yost & Herrell	2085	2	745
Youell, George	20756	18	599
Young, I. F., estate of	7440	5	245
Young, May S., executrix [2]	3847	3	193
Young, Minal E., executor	4720	6	472
Young, S. Marsh	1839	2	457
Young Iron Works	33329	21	1238
Young Men's Christian Association Retirement Fund, Inc.[3]	36261 41599	18	139
Youngstown Bread Co	1333	2	402
Younker Bros., Inc	5522	8	333
Yow, Frances White	5555	4	995
Z.			
Zeigen, Frederick H	6426	10	844
Zenith Milling Co	5454	8	1279
Ziegler, jr., William	123	1	186
Zimmerman, E. W	2513	5	314
Zimmerman, Jennie E	2145	2	667
Zouri Drawn Metals Co	4908	8	853

[1] Estate tax decision; acquiescence in portion of decision with respect to mortgage of November 5, 1924.
[2] Nonacquiescence notice in this case, published in Cumulative Bulletin IV-2, page 6, is recalled.
[3] Acquiescence is in the result only.

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

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
A.			
Adams, Cecil Q	41167	20	243
Adams, William P	24341	16	497
Aitkin, A. King	13189	12	692
Alabama By-Products Corporation	21808	18	919
All Americas Cable, Inc.[1]	9092	10	213
Alling & Cory Co.[2]	6606	7	574
Alsop, Edward B., estate of [3]	6519	7	848
Alsop, Edward H., executor [3]	6519	7	848
Amalgamated Sugar Co	6439	4	568
American Chicle Co	29897	23	221
American Express Co	350	2	498
American Feature Film Co.[1]	4437	11	1271
American Leather Products Co	10619	7	1043
American Refrigerator Transit Co	19019	14	616
American Seating Co.[4]	4772	4	649
American Seating Co.[5]	14676	14	328
American Steel Co	669	1	839
American Tobacco Co	38773 46660	20	586
Angell, Ray	23595	22	358
Angier Corporation [6]	25960	17	1376
Ankeny, John D., executor [7]	8904	9	1302
Ankeny, Levi, estate of [7]	8904	9	1302
Anthony, E. D	38607	20	5
Archbold, John F., executor [8]	8629	8	919
Arnold et al., John B.[9]	20887 20888 20889 20890	14	954
Arrott, Albert E	39467	23	478
Arrott, Charles F	39466	23	478
Arrott, jr., James W	39465	23	478
Arrow Coal & Ice Co	44997	22	1341
Athens Brick & Tile Co	12926 19339	14	1359
Atherton et al., C. H., trustees	28263 29547	19	1172
Atlantic City Electric Co. [10]	17871	15	1084
Atlantic Coast Line R. R. Co. [11]	10983	9	1193
Atlas Tack Co [12]	11497	12	3
Audubon Park Realty Co	9629	6	875
Auld, J. W	12169	13	1213

[1] Nonacquiescence relates to issue as to tentative tax.
[2] Nonacquiescence relates to third issue.
[3] Estate tax decision; nonacquiescence relates only to 1917 trust.
[4] Nonacquiescence in so far as it relates to inclusion in invested capital of the sum of $198,716.37.
[5] Nonacquiescence relates to second and third issues of decision.
[6] Nonacquiescence relates to decision regarding 1918 taxes of Angier Mills.
[7] Estate tax decision.
[8] Estate tax decision; nonacquiescence relates to first and second issues of decision.
[9] Nonacquiescence relates to fraud penalties.
[10] Nonacquiescence relates to issue respecting affiliation with American Gas & Electric Co.
[11] Nonacquiescence relates to second issue of decision.
[12] Nonacquiescence relates to issue involving reduction of invested capital on account of dividend payment.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Automatic Fire Alarm Co. of Delaware [1]	10292	13	1195
Automatic Fire Alarm Co. of New York [1]	10292	13	1195
Automobile Underwriters, Inc	21877 22213	19	1160
Avenue Agency & Loan Corporation [2]	19727	19	858
Averill, Glenn M	28787 40075	20	1196
Ayers & Co., L. S. [3]	1217	1	1135
B.			
Bailey, B. P	33724	18	105
Bailey, Mrs. B. P	33725	18	105
Baker, Edward H	25080	17	733
Baker Lumber Co	32359	21	124
Ball et al., Walter J., coexecutors	6858	8	180
Ball & Roller Bearing Co. [4]	15233	15	862
Bamberg Cotton Mills Co	9445 10104	8	1236
Bancker, jr., E. A	18617	11	420
Bank of Duplin	12950	12	652
Bank of Italy, San Francisco, Calif	15810	13	1226
Bank of Topeka	18850	15	1301
Barnes, Adelaide C	17411	17	1002
Barnes et al., Charles G., executors	8624 8625	8	360
Barnes, jr., John, estate of	5266	7	924
Barnes, Joseph	9577	7	924
Barnes, Joseph, administrator	5266	7	924
Barnes, William C	17410	17	1002
Barnette, Katherine Wilkinson, sole and only heir [5]	16379 16743	16	1390
Barron-Anderson Co	24769	17	686
Bartlett, Herschel, estate of	23581	16	510
Bartlett et al., Philip C. K., executors	23581	16	510
Barton, Mary L., trustee	12934	5	1008
Barton, Otis, estate of	12934	5	1008
Bates, E. W. (Mrs.)	18611	11	420
Bates-Bowman Corporation	11357	20	460
Baucum, Bamma	20085	17	1312
Beacon Coal Co. [6]	11894	9	280
Beck, Marion A. Burt [6]	19593	17	413
Behlow Estate Co	12670	12	1365
Bellwill Cotton Mills [7]	9561	14	912
Belmont Iron Works	10454	6	722
Belowsky, Morris	9656	7	424
Belt Railway Co. of Chicago [8]	4289	9	304

[1] Acquiescence notice published in Cumulative Bulletin VIII–2, page 3, recalled.
[2] Nonacquiescence relates to issue with respect to affiliation with Avenue State Bank.
[3] This notice, which was originally published in Bulletin IV–41, page 1, was republished in Cumulative Bulletin V–1, page 6, for the reason that the case was erroneously included in the list of cases acquiesced in, published in Cumulative Bulletin IV–2, page 1.
[4] Revokes acquiescence published in Cumulative Bulletin VIII–2, page 4.
[5] Nonacquiescence relates to first issue of decision.
[6] Nonacquiescence in so far as decision allows petitioners to deduct for the years 1920 and 1921 their allocable portion of Federal estate and State transfer taxes paid on shares received by them by virtue of a compromise agreement modifying the terms of the will and in excess of their shares receivable under the will.
[7] Nonacquiescence in that part of decision allowing special assessment.
[8] Nonacquiescence relates to issues involving Federal income taxes added to income for 1917, 1918, and 1919, in respect of which petitioner was entitled to be reimbursed by its tenant companies.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Benedict, James A., estate of [1]	21621	16	438
Benson Lumber Co	19519	9	593
Benson Timber Co	16311	9	593
Berger, Mathilda W	6110	10	747
Berger, Walter J	6111	10	747
Berks Foundry & Manufacturing Co	6998	5	756
Berlin Dye Works	15714	13	1354
Best Steel Castings Co	8326	6	274
Biggs, sr., J. E	15255	15	1092
Bilicke, A. Constant	23933	20	784
Bilicke, Carl A	28932	20	784
Bilicke, Gladys	28930	20	784
Bilicke, Gladys, guardian	28932 28933	20	784
Bingham, Arthur W., executor [2]	20303	15	1001
Bingham, Robert W	8823	8	603
Birmingham Coke & By-Products Co	21808	18	919
Birmingham Machine & Foundry Co	21762	22	483
Bishop, Cortlandt F., executor [1]	25131	23	920
Black River Sand Corporation [3]	1993	18	490
Blair, Edward T	25684	18	69
Blair, W. A., estate of [1]	2440	4	959
Blair Co., J. C	7147	11	673
Blaney, Edith H	10613	13	1315
Block, E. Bates	18792	11	420
Block, E. Bates, executor	18793	11	420
Block, Frank E., estate of	18793	11	420
Block & Kohner Mercantile Co	4576	4	673
Blossburg Mercantile Co	2880	4	690
Blum's, Inc.[4]	2523	7 17	737 386
Blumberg Bros. Co.[5]	12137	12	1021
Blydenburgh, Vail	9921	5	834
Boger & Crawford, Inc	14745	13	835
Bonwit Teller & Co	26037	10	1300
Boston & Providence R. R. Corporation	16815 26843	23	1135
Boston Safe Deposit & Trust Co. et al., executors [1]	32131	20	1159
Boulevard Building Co	43918	21	864
Bourne, Emily H., estate of [6]	7883	8	582
Bowman, J. William [7]	18935	16	1157
Boykin, Elizabeth W	29784	16	477
Boyne City Lumber Co	4635	7	36
Brackenridge, George W., estate of	6515	11	148
Bradbury, L. C	24486	22	358
Bradley, M. A., estate of	30638	19	49
Bradstreet Co. of Maine	38555 41773	23	1093
Braunstein, Louise R	13776	16	1330
Braunwarth, Otto	26636	22	1008
Brawner, Alexander Harrison, estate of [1]	16092	15	1122

[1] Estate tax decision.
[2] Estate tax decision; nonacquiescence relates to deduction of the amount under paragraph (2), section 403(a), Revenue Act of 1921, undiminished by $21,753.40 of the deductions under paragraphs (1) and (3) of said section.
[3] Nonacquiescence relates to issue 1 of decision.
[4] Nonacquiescence relates to issues as to procedure for handling installment sales.
[5] Nonacquiescence relates to first issue of decision.
[6] Nonacquiescence does not relate to deductibility of New York inheritance tax.
[7] Nonacquiescence relates to deduction of contributions to a trust.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Brawner, Frances, executrix [1]	16092	15	1122
Brenneman, David E	8361	10	544
Brenneman, E. L. E	8323	10	544
Brenneman, Verna L	8324	10	544
Briant, E. S., administrator	8860	6	651
Brickell, Maude Enella [2]	14321	17	711
Brier Hill Collieries [3]	11406 19365 28186	12	500
Brittingham, Juan F	13557 16535 18435	13	375
Brittingham, Juan G	18535	13	375
Bronson et al., James D., trustees [1]	7702	7	127
Brooklyn Union Gas Co	20176 23380	22	507
Brooks et al., Ernest, executors [1]	32401	22	71
Brooks, Ernest Augustus, estate of [1]	32401	22	71
Brooks, W. B.[4]	10991	12	31
Brouillard, A. M	22427	22	358
Brouillard, H. E	22406	22	358
Brown, Henry W., estate of [1]	33042	20	47
Brown, Jacob F	16469	18	859
Brown, Reynolds D., administrator [1]	33042	20	47
Brown & Co., M	24864	9	753
Brunn, W. H	22414	22	358
Bryan, Charles M	25150	21	364
Bryant, P. L	22532	22	358
Bryant & Stratton Commercial School, Inc	43	1	32
Buckie Printers' Ink Co	40500	19	943
Bullock, H. E	28612	16	451
Burdick, Helene Baldwin, executrix	21065	20	742
Burdick, Julian, estate of	21065	20	742
Burdine Realty Co., John M	33071	20	54
Burges, Richard F	25908	17	275
Burke et al., Caroline E., administrators	34821	22	337
Burke, Thomas, estate of	34821	22	337
Burke Electric Co.[5]	1697	5	553
Burns, George H	22409	22	358
Burns, J. M	22415	22	358
Burns, T. F	22411	22	358
Burton, Lawrence Elmer	2689	5	99
Burton Co.[6]	37392 37396	23	119
Butler, James P	27181 31407	22	686
Byck, W. S	2260	4	842
Byers, Howard Webster	10319	8	1191
C.			
Cadwalader, John, estate of	13296	15	1
Cadwalader, jr., et al., John, executors	13296	15	1

[1] Estate tax decision.
[2] Nonacquiescence relates to net loss deduction.
[3] Nonacquiescence relates to depletion issue.
[4] Revokes acquiescence published in Cumulative Bulletin VIII-1 at page 6.
[5] Nonacquiescence relates to issues 1 and 2, and issue 5 as to patent group No. 1.
[6] Nonacquiescence relates to issue 2 of decision.

NONACQUIESCENCES—Continued.

Taxpayer	Docket No.	Board of Tax Appeals. Volume.	Page.
California Brewing Association [1]	3903	5	347
Callaway, Fuller E	2264	4	842
Cambridge Ice Co	7282	9	156
Campbell, Archer Maynard	18320	6	60
Campbell, H. L	18321	8	1076
Campbell, J. C	22417	22	358
Campbell Co., John F	19591	15	458
Campe, Minne L	30688	17	575
Capitol Hotel Co.[2]	6610 7134	4	441
Carbo Petroleum Co.[3]	9524	12	166
Carey, C. W.[4]	2432	6	539
Carney Coal Co.[5]	5562 8496	10	1397
Carroll, Leigh	32852	20	1029
Carruthers, Mabel G	25741	16	515
Carter Co., W. W.[6]	689	1	849
Central Savings Bank [7]	5006	10	1408
Central Union Trust Co. of New York, guardian	26518	17	881
Century Music Publishing Co	12840	12	647
Chadbourne & Moore	17066	16	961
Chamberlain, Ellen Steele	16598 24285 29479	19	126
Chamberlain, Selah	16597 24284 29480	19	126
Chambers, Anna M	17686 26057	17	820
Chandler, Marian Otis [8]	16259	16	1248
Chandler Shipbuilding Co., Ralph J	9619	22	5
Chapin, W. E	2267	4	842
Chapin Construction Co	3200	3	25
Chicago Lumber Co. of Omaha	28516	18	916
Chicago Portrait Co	21396	16	1129
Chicago Title & Trust Co. et al., trustees (estate Louis M. Stumer)	22438	18	395
Citizens Investment Co	9094 20975	15	356
Citron-Byer Co	37853	21	308
City Builders Finance Co	34492	21	800
City Button Works	15826	16	839
City National Bank	19641	19	1080
Clark, James B	11918	12	615
Cleveland, Painesville & Ashtabula R. R. Co	4927	4	637
Cleveland, Painesville & Eastern R. R. Co	4927	4	637
Cleveland Trinidad Paving Co., Ohio	41962 46297	20	772
Cline, Mrs. Ella Pipes [9]	6929	15	934

[1] Nonacquiescence relates to question of affiliation as to the companies included in the "units."
[2] Nonacquiescence relates only to that part of decision which relates to application of the Ayers decision (1 B. T. A., 1135).
[3] Nonacquiescence relates to fourth issue of decision.
[4] Nonacquiescence relates to issues 1 and 3 in decision.
[5] Nonacquiescence relates to issue No. 1 in so far as it relates to fiscal year ended May 31, 1919.
[6] Acquiescence notice published in Cumulative Bulletin V-2, page 1, recalled.
[7] Nonacquiescence relates to obsolescence issue.
[8] Acquiescence notice published in Cumulative Bulletin IX-1, page 10, recalled.
[9] Nonacquiescence relates to deduction in 1919 of commissions incurred in sale of property; also decision as to fourth issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Cline, W. D.[1]	6930	15	934
Clingan, Margaretta T	4227	6	8
Coastwise Transportation Corporation	39916	22	373
Coca-Cola Bottling Co	31409	22	686
Cohn & Sons Co., M.[2]	7361 9238	9	87
Collins-McCarthy Candy Co	4302	4	1280
Colmer-Green Lumber Co.[3]	20916	12	256
Colonial Trust Co. et al., executors [4]	43073	22	1377
Commercial Trust Co.[5]	31927	21	732
Connecticut & Passumpsic Rivers R. R. Co.[6]	8424 9100	8	492
Connell, G. H	18405	15	1309
Connell, Mrs. G. H	18406	15	1311
Connellee, C. U	3363	4	359
Conover Co., S. A	3926	6	679
Conrades, Edwin H	25622	21	213
Consolidated Investment Co	13603	13	1252
Consolidated Textile Corporation	15983	16	178
Consorzio Veneziano di Armamento e Navigazione	39759	21	984
Continental National Bank & Trust Co., executor	26814	20	829
Continental Oil Co	28427	23	311
Continental Screen Co	30350	19	1095
Contractors Construction & Supply Co	41963	20	772
Converse Cooperage Co	12518	17	1285
Conway, J. W	2263	4	842
Coon Valley State Bank [7]	11352	13	132
Corbett & Stuart	11855	11	540
Corn Products Refining Co	24374	22	605
Cornelius Lumber Co	4273	5	215
Crabtree Co., E. B	5889	5	732
Crane, T. I	27769	17	720
Crocker Co., H. S	4581	5	537
Cromwell et al., William Nelson, executors [4]	42619	24	461
Cross Mountain Coal Co	1219	2	587
Crown Potteries Co	10043	12	1412
Cunningham-Beckemeier Supply Co	15838	14	992
Curran, Maurice J	793	5	180
Curtis Leather Co., J. G	14397	13	1259
D.			
Dahlinger, Charles W	33721	20	176
D'Aramon, Henrietta	10644	7	600
Daily Pantagraph, Inc.[8]	4126	9	1173
Daily Record Co	12058	13	458
Daniel, Charles R	20037 22044	16	925
Daniel, S. B	20036	16	925
Darby, Rufus C	2265	4	842

[1] Nonacquiescence relates to question of affiliation as to the companies included in the "units."
[2] Nonacquiescence relates to 25 per cent penalty for failure to file a return.
[3] Nonacquiescence relates to issue whether the consolidated return for 1919 started the running of the statute of limitations as to the Colmer-Green Lumber Co.
[4] Estate tax decision.
[5] Nonacquiescence in so far as Board has ruled that petitioner is not taxable as an association for 1924.
[6] Nonacquiescence relates to first issue of decision in so far as it holds that the income was not realized until the year in which the taxes became due and payable; and also to the second issue of decision.
[7] Nonacquiescence relates to issue involving loss of $1,000 on Galloway note.
[8] Nonacquiescence relates only to issues involving reducing invested capital by reducing current earnings available for dividends by tax accrued for current year.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Darnell, Inc., R. J	22314	18	125
Dauphin Deposit Trust Co., trustee	41387	21	1214
Davis, Chas. A	18622	11	420
Davis, Oscar	18625	11	420
Day, Henry M	30193	12	161
Death Valley R. R. Co	36590	23	783
De Forest, Julia N	5857	4	1059
Deinert, sr., Oscar	6937	11	651
Delray Lumber Co	41867	20	8
Deltox Grass Rug Co.[1]	6926	7	811
Dennett, Fred	11498	7	1173
DeReuter, Ronald	6243	7	600
DeRoulet, Nancy	28931	20	784
Derschug, John N.[2]	18064	15	306
Desmond's, Inc	14465	15	738
Dexter Sulphite Pulp & Paper Co.[2]	38431	23	227
Dickerman & Englis, Inc	4928	4	447
Dieckerhoff, Raffloer & Co	25079	17	1251
Diescher, Alfred J	13121	18	353
Dillon, John P	10985	9	177
Dodson, Bruce, estate of [3]	7382 24464	21	757
Doe, Frank P., estate of [3]	20681	18	427
Doe et al., Laura F. M., executors [3]	20681	18	427
Doehne, George, estate of	9344	6	1071
Don, Harriet M., estate of [4]	5594	9	450
Dorothy-Bill Mining Co	19773	22	1126
Dothan Oil Mill Co	25565	19	933
Dowling, Mary M	2394	6	976
Duckwitz, H. G	22405	22	358
Duggan, Hanna, estate of [3]	4706	8	482
Duggan, James, executor [3]	4706	8	482
Duhme, Ophelia, estate of	6858	8	180
Duke, James B., estate of [3]	42500	23	1103
Duke et al., Nanaline H., executors [3]	42500	23	1103
Duncan Coal Co., W. G	12347	13	672
Dunson Mills [5]	17019	10	1150
Duplex Envelope Co., Inc	31207	21	692
DuPont, Pierre S	26996	18	1028
Dustin, Annie M., estate of [6]	8629	8	919
Dwight & Lloyd Sintering Co	120	1	179
Dwyer Bros., Inc	45000	22	1341
E.			
Eastern Steamship Lines, Inc	24870	17	787
Eastside Manufacturing Co	22722	18	461
Edgar Co., James	14606	16	120
Egyptian Powder Co	28918	17	174
Eidlitz & Son, Inc., Marc	22251 24711 28952 37180	18	187

[1] Nonacquiescence relates to second issue in decision.
[2] Nonacquiescence relates to issue 1 of decision.
[3] Estate tax decision.
[4] Nonacquiescence does not relate to deductibility of New York inheritance tax.
[5] Nonacquiescence relates to issue regarding jurisdiction.
[6] Estate tax decision; nonacquiescence relates to first and second issues of decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Elam, Harvey J	18001	16	1428
1148 Fifth Avenue Corporation	34032	20	288
Elgin National Watch Co.[1]	19522	17	339
Elkin, Dr. Wm. S	18629	11	420
Elkins, William M	27807	16	1405
Ellison, J. R	30309	15	1375
Emery et al., Earle C., executors	9766	9	328
Emery, John T., estate of [2]	24416	21	1038
Emery, jr., Lewis, estate of	9766	9	328
Emery, Mary Allen, executrix [2]	24416	21	1038
Empire Machine Co	19745 25570	16	1099
Ennis, E. N. and O. M	15281	21	406
Esperson, Niels, estate of [3]	7071	11	1283
Esperson, Mrs. Niels (Mellie), executrix [3]	7071	11	1283
Evans, J. H	41203	21	549
Evergreen Cemetery Association of Chicago	37307	21	1194
Excelsior-Leader Laundry Co	9221	8	183
Exclusive Prescription Pharmacy, Inc	34062	21	33
Extension Oil Co	28764	16	1028
F.			
Fair Stock Trust [4]	32137	21	664
Fane, Evelyn Francis	16725	15	1332
Farmers Cooperative Creamery	31444	21	265
Farmers Deposit National Bank and Affiliated Banks	6220	5	520
Farmers Loan & Trust Co., executor [5]	18234	16	181
Farmers' Loan & Trust Co., executor [3]	21621	16	438
Farmers & Planters' Tobacco Warehouse Co	16450	22	1331
Fidelity & Columbia Trust Co., executor [3]	40672	21	142
Fidelity Trust Co.[6]	13638	13	109
Field, Marshall	11840	15	718
Fifth Third Union Trust Co., trustee	26127	20	88
Finch & Co., Joseph S	22057	23	1152
First National Bank of Bridgeport, Conn., executor	18721	18	775
First National Bank of Duluth, administrator	18502 18503	13	1096
First National Bank, Fresno, Calif	15811	13	1226
First State Bank of Brackettville, Tex	12876	9	975
First State Bank of Weimar	12657 16011	10	396
First Trust & Savings Bank	11746	11	1034
Fitzgerald, Mary A	810	5	178
550 Park Avenue Corporation	33838	20	288
Flaxlinum Insulating Co.[7]	5120	5	676
Fletcher, O. E	33059	20	1234
Fletcher Savings & Trust Co., executor [3]	37099	20	1049
Flint, Goering & Co., Ltd	20078	19	421
Fluent, Walter J	22416	22	358
Forshay, Stewart	23847	20	537
Foster, Alice Fisher	10126	7	1137

[1] Nonacquiescence in the Board's decision in respect of the initial contribution of cash and securities to the special pension fund, and in respect to the allowance of special assessment.
[2] Estate tax decision; nonacquiescence relates to issue 3 of decision.
[3] Estate tax decision.
[4] Nonacquiescence relates to issue involving jurisdiction of Board.
[5] Estate tax decision; nonacquiescence relates to issue 2 of decision.
[6] Nonacquiescence relates to issue concerning invested capital for 1920 and 1921.
[7] Revokes acquiescence notice published in Cumulative Bulletin VI-1 at page 2.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Foster, J. M., estate of [1]	12928	16	1390
Foster, James F., estate of [2]	11493	13	496
Foster, Mrs. James Martin, executrix [1]	21928	16	1390
Foster, Lee B	37841	22	717
Fox, Eugene	20535	17	1002
Francesconi & Co., J. C.[3]	10585	10	658
Francis, Francis, guardian	16724	15	1332
Francis, jr., Francis	16724	15	1332
Frank, William G., administrator	9344	6	1071
Franklin et al. Thomas H., executors and trustees	6515	11	148
Freeman, Alfred B	27307 31408	22	686
Fresh Pond Ice Co	7282	9	156
Fuller, jr., James W	3068	7	28
G.			
Gallum, Albert F., trustee	6101	10	747
Ganahl Lumber Co	24289	21	118
Garber, B. A.[4]	3708 14097	11	979
Garber, M. C.[4]	3710 13909	11	979
Gardner Governor Co.[5]	321	5	70
Garneau Co., Inc., Joseph	40	1	75
General Box Corporation	32198	22	725
General Manifold & Printing Co	14577	12	436
Georgia Car & Locomotive Co.[6]	3131	2	986
Gibson, Kate Viola, estate of [2]	7402	7	1144
Gideon-Anderson Co	22365	18	329
Gillette, Carl W	27010	18	434
Gillette, Katherine K	18754	14	580
Ginsburg Co., Inc., Ben	45556	19	81
Girard Trust Co., executor [2]	11298	10	1100
Girard Trust Co. et al., executors	23208	16	308
Glass, Andrew, estate of	28361	19	378
Gleichman, Phil	18121	17	147
Glenn, Thomas K	2262	4	842
Goddard, John N	18621	11	420
Godfrey, Jonathan	18720	18	775
Gong Bell Manufacturing Co	17584	15	152
Gonzolus Creek Oil Co. (dissolved), trustee for creditors of	13393	12	310
Goodrum, jr., J. J	18613	11	420
Gordon, Henry J	13838	12	1191
Gover, W. D	29789	21	1150
Grand Rapids National Bank [7]	21116	9	1119
Grandin, Florence	25740	16	515
Grandin, George W., trustee	25742	16	515
Grandin, Henry B	25742	16	515

[1] Nonacquiescence relates to issue 1 of decision.
[2] Estate tax decision.
[3] Nonacquiescence relates to third issue of decision.
[4] Nonacquiescence relates to issue as to whether the agreements of December 14, 1918, and the discharge thereof were productive of income taxable for the years involved, and, if so, to what extent.
[5] Nonacquiescence relates only to that part of decision which relates to application of the Ayers decision (1 B. T. A., 1135).
[6] Nonacquiescence relates to third issue of decision.
[7] Acquiescence notice published in Cumulative Bulletin VIII-2, page 20, recalled.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Graves et al., A. H., committee for creditors of Whittaker & Bacon	22631	12	124
Great Bear Spring Co. [1]	10489	12	383
Great Northern Ry. Co.[2]	8433 11850	8	225
Greenbaum, Ben	28888	20	469
Greene et al., Richard T., trustees	23973	15	401
Grelck Condensed Buttermilk Co	3691	7	79
Greylock Mills [3]	11926	9	1281
Griswold et al., Harold T., executors [4]	21942	23	635
Ground Gripper Shoe Co., Inc	17940 19371	21	646
Guarantee Construction Co.[5]	1828 1848	2	1145
Guarantee Liquid Measure Co	36209	20	758
Guild Co., Inc., J. H	8741	11	914
Gulf States Steel Co	9276 18358 18359	12	1244
Gunter, F. E	27264 31550	22	686
Gurnee, Augustus Coe [4]	42619	24	461
Gwin, Earl S	17983	14	393
H.			
Haight, George W	6141	4	1075
Haller, Mary [6]	14063 25751	14	488
Hamilton, Harris & Co	4170 15687	12	735
Hamilton Woolen Co	29670	21	334
Hamlet Ice Co	25516	16	433
Hammond, B. R	23594	22	358
Hanify, Aloysius [4]	20996	21	379
Hanify, Martha M.[4]	20996	21	379
Hanlon, Mary E	27251	16	809
Hannibal Missouri Land Co	9084	9	1072
Hanrahan Brick & Ice Co	44999	22	1341
Hansell, C. M	22429	22	358
Harbour-Longmire Co	6905	7	314
Harkness, Anna M., estate of	30473	21	1068
Harkness, Edward Stephen	30472	21	1068
Harkness, Edward Stephen, executor	30473	21	1068
Harlan & Co., O. A	1374	1	1027
Harper, Harry F	29087	20	143
Harriet Cotton Mills	6228	5	734
Harris, Elizabeth H	11820	11	420
Harris Oil Co., C. C	8011	13	937
Harry Co., S. J	1644	4	211
Hartford-Fairmont Co.[7]	9016	12	98

[1] Nonacquiescence does not relate to depreciation and obsolescence adjustments.
[2] Nonacquiescence relates to issue involving the question whether the company should accrue as income in the taxable years interest earned but not paid in those years on obligations of other corporations owned by it.
[3] Nonacquiescence in decision in so far as the Board holds that it has jurisdiction to determine the overpayment for 1917.
[4] Estate tax decision.
[5] Nonacquiescence relates to second issue of decision.
[6] Nonacquiescence relates to issue concerning deductibility of charitable contributions.
[7] Revokes acquiescence published in Cumulative Bulletin VIII-1, page 19.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Hartmann, Charles	18930	14	146
Haskell & Barker Car Co	7009	9	1087
Hass, E. S.[1]	14817	13	1352
Hatzel & Buehler, Inc.[2]	9501 11454	10	993
Haubens, Henry, executor	11418	17	738
Hawkins, Frank	2572	4	842
Hay, Jane Burt[3]	19614	17	413
Haynes, Elwood, estate of	11724	13	796
Healy, Henry W	19560	18	27
Healy, Raymond	19649	18	27
Heasley, Harry	41217	21	549
Heineman Lumber Co.[4]	10175	11	1229
Heinrich, Samuel G., estate of	2420	2	406
Heipershausen et al., George, executors[5]	24911	18	218
Heipershausen, Philip, estate of[5]	24911	18	218
Hemlock Hollow Coal & Coke Co	8837	10	1176
Henaghan, Elizabeth	27252	16	809
Hendricks, Harmon W	4554	4	1257
Henn, A. W., trustee	4303	8	190
Hennepin Holding Co.[6]	33323 37397	23	119
Hepburn, C. Fisher, estate of[5]	9690	11	1386
Hermance, H. P	11192	11	420
Herndon, James	32297	18	892
Hershey Manufacturing Co	28862 32108	14	867
Herzog, Philip W	6245	10	747
Hess Bros.[6]	8039	7	7
Hewitt Rubber Co	325	1	4
Hickey, J. E	19107	11	[illegible]
Higginbotham-Bailey-Logan Co.[7]	4691	8	[illegible]
Hillyer, Deutsch, Edwards, Inc.[8]	36893 42168	21	452
Hilton et al., Laura R.[5]	40131	21	3
Hind, George U	19167	18	96
Hind, Rolph & Co	19167	18	96
Hinman, Thos. P	18615	11	420
Hirsch & Co., Adolph	3230	7	707
Hirsch-Weis Manufacturing Co	30494	14	796
Hobert, E. G	22403	22	358
Hof Brau Co., The[2]	6134	6	442
Hoffman, Isabella C., estate of[5] Hoffman et al., Meyer C., executors[5]	5338	3	1361
Hoffmann, Frederick H	3361	3	964
Holden, C. L	22408	22	358
Holifield, Mary D. Moore	10089	7	1302
Holloway, W. W., administrator	28361	19	378
Holyoke & Westfield R. R. Co	8425	9	127

[1] Nonacquiescence relates to first issue of decision.
[2] Nonacquiescence relates to third issue in decision.
[3] Nonacquiescence in so far as decision allows petitioners to deduct for the years 1920 and 1921 their allocable portion of Federal estate and State transfer taxes paid on shares received by them by virtue of a compromise agreement modifying the terms of the will and in excess of their shares receivable under the will.
[4] Nonacquiescence relates to issue as to tentative tax.
[5] Estate tax decision.
[6] Nonacquiescence relates to second issue of decision.
[7] Nonacquiescence relates to first, second, and fourth issues of decision.
[8] Nonacquiescence as to portion of decision allowing value to a contract for purpose of exhaustion deduction.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Home Builders Shipping Association	7044	8	903
Home Ice Cream & Ice Co	37633	19	762
Home Laundry Co	6047	4	45
Hood, Charles C	27466	19	962
Houghton & Dutton Building Trust	34558 41601 45738 49130	20	591
Houston Belt & Terminal Ry. Co.[1]	8494	6	1364
Howard, H. M	33271	22	375
Howard Co., J. W. & A. P	19863	15	1096
Howell, Charles H	27805	16	1405
Howell, Charles M., administrator [2]	7382 24464	21	757
Howland Bag & Paper Co	34315	23	227
Hulbert, Edmund D., estate of [3]	11204	12	818
Humphreys, E. C	4069	9	656
Hunt, J. C	19888	15	1388
Hunter, O. C	22407	22	358
Huntington, Annie	25807	15	851
Huntington, Wallace	25806	15	851
Hupfel Co., Inc., J. Chr. G.[4]	9834	9	944
Hutchings, Emma Burt [5]	19567	17	413
Hutchins Lumber & Storage Co.[6]	3307	4	705
Hutchison, Charles [7]	8053	13	1187
Hutt Cattle Co	26433	17	818
Hutt Contracting Co	26433	17	818
Hynes, William J	21382	16	1272
I.			
Illinois Merchants Trust Co., executors [8]	11204	12	818
Illinois Rural Credit Association	5058	3	1178
Imperial Coal & Coke Co	21808	18	919
Independent Brewing Co. of Pittsburgh [9]	3242	4	870
Independent Brick Co	8198	11	862
Independent Life Insurance Co. of America [10]	25295	17	757
Indiana Harbor Belt R. R. Co	21550 37661	16	279
Indiana Rolling Mills Co	12259	13	1141
Indiana Stove Works [11]	8148	8	1008
Indianapolis Street Ry. Co	8787	7	397
Individual Towel & Cabinet Service Co	1231 12586	5	158

[1] Nonacquiescence relates to second and fourth issues of decision.
[2] Nonacquiescence relates to issue 1 of decision.
[3] Estate tax decision; nonacquiescence relates to issue concerning transfer of stock.
[4] Nonacquiescence relates to obsolescence issue.
[5] Nonacquiescence in so far as decision allows petitioners to deduct for the years 1920 and 1921 their allocable portion of Federal estate and State transfer taxes paid on shares received by them by virtue of a compromise agreement modifying the terms of the will and in excess of their shares receivable under the will.
[6] Nonacquiescence relates only to that part of decision which relates to application of the Ayers decision (1 B. T. A., 1135).
[7] Nonacquiescence relates to deduction of amount expended for "training" to keep in condition for "stunt" acting.
[8] Estate tax decision; nonacquiescence relates to issue concerning transfer of stock.
[9] Nonacquiescence relates only to issue 2 in decision.
[10] Nonacquiescence in assumption of authority by the Board to pass upon constitutionality of section 245(b) of the Revenue Acts of 1921 and 1924 and refusal to administer same.
[11] Nonacquiescence relates to second issue of decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Industrial Cotton Mills Co., Inc.[1]	28131, 28132	22	648
Industrial Loan & Investment Co	20664	17	1328
Inglewood Park Cemetery Association	3249	6	386
Inland Finance Co	29916, 39686	23	199
Inman, Edward H	2501	4	842
Interurban Construction Co	2687	5	529
	7028	5	1292
Irving Bank-Columbia Trust Co. et al., executors [2]	20055	16	897
J.			
Jackson, Annette T.[3]	9001	11	1257
Jackson, Caroline Mather, estate of [4]	20303	15	1001
Jackson, George A.[3]	9002	11	1257
Jackson, Minnie L., estate of [5]	4219	3	832
Jackson, Willis K.[3]	9003	11	1257
Jackson & Tindle [3]	9000	11	1257
Jacobs, Samuel Keller	34156	22	1166
Jaeger, Otto, estate of [2]	20055	16	897
James, Arthur Curtiss [3]	2509	13	764
Jefferson Gas Coal Co	14951, 33247	16	1135
Jergins Trust, A. T	29940	22	551
Johnson et al., Homer S., executors [6]	9550	11	534
Johnson, Stephen O., estate of [6]	9550	11	534
Johnston, Mrs. E. V., deceased	14355	12	185
Johnston, R. H., heir at law	14355	12	185
Jones, John M., estate of [5]	39743	20	441
Jones, Loula B., executrix [5]	39743	20	441
Jones, S. J	27220	17	1131
K.			
Kaauila Land Trust	28263, 29547	19	1172
Kalb, Louis	19421	15	865
	19422	15	886
Kansas City Southern Ry. Co. et al.[7]	12054	16	665
Keefe, T. J	22413	22	358
Keen, Herbert Ide	8423	6	275
Keeney, George E., estate of	11715, 14424	15	715
Keeney, Raymond G., executor	11715, 14424	15	715
Keewis Realty Co., Inc.[8]	10489	12	383
Kehota Mining Co	1117	3	885

[1] Nonacquiescence relates to affiliation issue.
[2] Estate tax decision; nonacquiescence relates to deduction for executors' commissions and attorneys' fees.
[3] Nonacquiescence relates to tentative tax issue.
[4] Estate tax decision; nonacquiescence relates to deduction of the amount under paragraph (2), section 403(a), Revenue Act of 1921, undiminished by $21,753.40 of the deductions under paragraphs (1) and (3) of said section.
[5] Estate tax decision.
[6] Estate tax decision; nonacquiescence relates to trust instruments of 1918 and 1921.
[7] Nonacquiescence relates to exclusion from income for the year 1919 of additional compensation for transporting United States mails, awarded by the Interstate Commerce Commission in 1919.
[8] Nonacquiescence does not relate to depreciation and obsolescence adjustments.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Keller, Samuel	38096 38098	21	84
Kellogg-Mackay Co	21594	20	635
Kentucky Oil Corporation	28873	21	1150
Key Largo Shores Properties, Inc	40529	21	1008
Keystone Coal & Mining Co	10168	10	295
Keystone Steel & Wire Co	17496	16	617
Kinnett-Odom Co.[1]	20659	19	1124
Kirby Lumber Co	44954	19	1046
Kirk & Co., James S	30175	17	916
Kissel, Caroline T	18203	15	705
Kissel, Caroline T.[2]	21788	15	1270
Kistler et al., Florence L., administrators [3]	3707 11986 18061	11	979
Kistler, William F., estate of [3]	3707 11986 18061	11	979
Kistler Land & Improvement Co.[4]	12355	9	671
Kittery Realty Co	15114 34274	14	569
Klein, Florence L.[5]	4004 4005 6061 6102 10157	6	617
Klinetop, W. P	22412	22	358
Klyman, E	6753	4	832
Knight-Campbell Music Co. et al	35326 36934 37943 41944	23	1233
Koebrich, J. A	22496	22	358
Kohn, Achilles H	16478	16	662
Kohn, Lillie V	16477	16	662
Krueger Broughton Lumber Co.[6]	17130	18	1270
Kuhn, J. J	18631	11	420
Kurtz, William B., estate of [7]	43073	22	1377
Kynett, Harold K	13190	12	692
L.			
Lancaster et al., John L., receivers	9863	9	365
Lancaster Lens Co.[8]	11603	10	1153
Land Improvement & Supply Co	28773	18	963
Landreth Co., E. A.[9]	15835	11	1
Langlas, W. H	22404	22	358

[1] Nonacquiescence relates to transferee liability.
[2] Nonacquiescence relates to deduction of aliquot part of cost of improvements to certain property.
[3] Nonacquiescence relates to issue as to whether the agreements of December 14, 1918, and the discharge thereof were productive of income taxable for the years involved, and, if so, to what extent.
[4] Nonacquiescence relates to issue with respect to question of allowance of amortization in 1918 on costs incurred in 1919.
[5] Nonacquiescence relates to question in decision pertaining to the year 1919.
[6] Nonacquiescence relates to issue involving respondent's motion to dismiss because petition was not filed within 60-day period.
[7] Estate tax decision.
[8] Nonacquiescence relates to the isssue as to whether a return signed by the president and secretary was the return required by statute, the filing of which started the running of the statute of limitations.
[9] Nonacquiescence relates only to invested capital issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Langwell Real Estate Corporation	23758	17	196
Lawson, John S	6108	10	747
Leasing & Building Co	14423	16	105
LeBus, Mary Belle Burt [1]	18745	17	413
Lee Live Stock Commission Co	280	7	532
Lee Shoe Co., Inc., John	10061	11	187
Leffingwell Rancho Co	30652	22	1303
Lehmann et al., Edward J., trustees [2]	32137	21	664
Lenahan Co., R	44998	22	1341
Leonard, A. W	40243	21	549
Lepic, Charlotte A. W	16122 27944 46510	22	118
Levine Bros. Co., Inc.[3]	6832	5	689
Levinstein, B. E.[4]	25262	19	99
Lewis, John B	26118	19	997
Lewis, M. R	28874	21	1150
Lexington Ice & Coal Co	42220	23	463
Ley, Fred T	37005	21	216
Ley & Co., Inc., Fred T	18168	9	749
Libby, Margaretta A., estate of [5]	28979	18	221
Liberty Insurance Bank	5070	14	1428
Liberty National Co	22372	18	510
Lieber et al., H. W., executors	9720	13	1175
Lightning Creek Oil & Gas Co	8584 23204	9	1150
Lindaman, W. D	22402	22	358
Linnell, Frank M	22401	22	358
Lisk Manufacturing Co., Ltd.[6]	10031 11438 19050	11 15	179 1048
Livezey, F. M	20440	15	806
Lloyd, Ernest E	24414	8	1029
Lobsenz, Jesse [7]	29788	17	81
Lock, Moore & Co., Ltd	9295	7	1008
Loetscher, Christian, estate of [8]	14325	14	228
Loetscher et al., John A., executors [8]	14325	14	228
Loewenstein Bros. Garment Co	8465	13	446
Lorraine Turpentine Co.[9]	34503	20	423
Los Angeles & Salt Lake R. R. Co	21741	18	168
Louisiana Naval Stores, Inc	18449	18	533
Ludington, Charles H., estate of	23208	16	308
Lyman, Elizabeth W. and William H., jr., executors [10]	34275	23	540
Lyman, William H., estate of [10]	34275	23	540
Lynch, S. A	46153	23	435

[1] Nonacquiescence in so far as decision allows petitioners to deduct for the years 1920 and 1921 their allocable portion of Federal estate and State transfer taxes paid on shares received by them by virtue of a compromise agreement modifying the terms of the will and in excess of their shares receivable under the will.
[2] Nonacquiescence relates to issue involving jurisdiction of Board.
[3] Nonacquiescence relates to issue 6 in decision.
[4] Nonacquiescence relates to issue 1 of decision; acquiescence as to this issue published in Cumulative Bulletin IX-2, page 35, recalled.
[5] Estate tax decision.
[6] Nonacquiescence relates to depreciation issue.
[7] Nonacquiescence relates to third and fourth issues of decision.
[8] Estate tax decision; nonacquiescence relates to issues involving executors' commissions, attorneys' fees, and miscellaneous administration expenses.
[9] Nonacquiescence relates to issue 2 of decision.
[10] Gift tax decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
M.			
Magee Furnace Co.[1]	5600	11	1216
Maher, Josephine [2]	20996	21	379
Mahoning Coal R. R. Co	2202	4	923
Majestic Coal Co	21808	18	919
Malley Co., Edward	9677	6	462
Mallinckrodt, jr., Edward	11031	14	194
Mallinckrodt, sr., Edward [3]	1750	4	1112
Malta Temple Association	29476	16	408
Manhattan Brewing Co	693	6	952
Mann, Franklin P., estate of	6101	10	747
Mansfield, Henry F., estate of [2]	12165	17	335
Mansfield, Minnie I., executrix [2]	12165	17	335
Maritime Securities Co.[4]	324	2	188
Marston, Edgar L	20955	18	558
Martin Advertising Agency, Inc., Mac	8115	11	162
Mastick, Lizzie S.[2]	20509	18	428
Matern, William A	27965	21	384
Mathews, John E	9583	8	209
Matthiessen, Conrad Henry	28250	20	162
Matthiessen, jr., F. W	2125	2	921
McAvoy Co	9216	10	1017
McClung et al., Hu L., executors	12468	13	335
McClure Pine Co	37009 41314	20	560
McCormick et al., Cyrus H., executors [5]	22731	13	423
McCormick, James, estate of	41387	21	1214
McCormick, Nettie Fowler, estate of [5]	22731	13	423
McCutchen, C. E	19819	16	569
McDonough, James B	21462	16	556
McDowell, S. L	11272	15	947
McDowell, Mrs. S. L	11271	15	947
McGee, Nellie B	13292 29938	13	1181
McGlone, F. E	22400	22	358
McGowin-Foshee Lumber Co.[3]	10446	10	961
McLeod, J. H	22464	22	358
McMurtrie, Adnah	19740	8	1301
McNeill, Robert H.[6]	17261	16	479
Mercantile Trust Co., executor [7]	9528	13	85
Merren, K. E. [8]	19847	18	156
Merritt, Thomas A., estate of	18502 18503	13	1096
Metro Pictures Corporation of New England [9]	4437	11	1271
Metropolitan Securities Corporation	27956	19	299
Mexican Telegraph Co.[9]	9093	10	213
Mianus Motor Works, Inc	6052	5	435

[1] Nonacquiescence relates to first issue of decision.
[2] Estate tax decision.
[3] Nonacquiescence relates to second issue of decision.
[4] This notice which was originally published in Bulletin IV-41, page 1, was republished in Cumulative Bulletin V-1, page 7, for the reason that the case was erroneously included in the list of cases acquiesced in, published in Cumulative Bulletin IV-2, page 3.
[5] Estate tax decision; nonacquiescence in so far as decision holds as nontaxable the value of property placed in trust under the instrument of July 27, 1918.
[6] Nonacquiescence relates to deduction of commission paid to agents for negotiating lease.
[7] Estate tax decision; nonacquiescence relates to deductibility of remainder value of the residuary estate bequeathed to charity.
[8] Nonacquiescence in decision regarding certain shares of stock.
[9] Nonacquiescence relates to tentative tax issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Michell, Glenn S	22428	22	358
Michell, Gus O	22418	22	358
Middlesex Ice Co. et al	7282	9	156
Midland Valley R. R. Co.[1]	25000	19	423
Mid-West Box Co	11066	11	1223
Milan, M. A	21555	16	1111
Miller, Clarence A	14087	13	1081
Missouri Pacific R. R. Co.[2]	33301	22	267
Mitchell, Antoinette J., administratrix	38023	22	1365
Mitchell, John M., estate of	38023	22	1365
Modern Inventions Corporation	25377	16	1267
Moir, Harry C	19135	14	23
Moisseiff, Leon	36111 45700	21	515
Molter, Carrie E	25730	19	911
Moore, L. C.[3]	3709 13907	11	979
Moore, Tom (Fayette T.)[4]	18273	19	140
Moore Corporation, John C	18861	15	1140
Moore Cotton Mills Co	29543	17	662
Morgan, Brooks	18614	11	420
Morrell & Co., John	15114 34274	14	569
Morris, Caspar W	27806	16	1405
Morsman, Edgar M., estate of[5]	32075	14	108
Morsman, jr., Edgar M., administrator[5]	32075	14	108
Moser, Carl F	13473	12	672
Moser, George J	13475	12	672
Moser, Josephine T	13474	12	672
Moser, Julius C	13471	12	672
Mossman, Yarnelle & Co.[6]	3269 11076	9	45
M. S. C. Holding Corporation et al	4620	7	216
Muller, Carl, estate of	9720	13	1175
Murphy, Edward J	40798	21	216
Murphy et al., James C., executors[7]	4166	5	952
Murphy Oil Co	14440	15	1195
M. W. S. Realty Co	30188	21	133
Myers, Long & Co	12358 24511	14	460
N.			
National Bank of Topeka	18850	15	1301
National Electric Ticket Register Co	13097	17	48
	37745	17 18	42 1103
National Piano Manufacturing Co.[8]	3333 20486	11	46

[1] Nonacquiescence relates to issue 1 of decision.
[2] Nonacquiescence relates to issues 4, 12, 15, and 33 of decision.
[3] Nonacquiescence relates to issue as to whether the agreements of December 14, 1918, and the discharge thereof were productive of income taxable for the years involved, and, if so, to what extent.
[4] Nonacquiescence relates to issue involving gifts and sale of certain stock.
[5] Estate tax decision; nonacquiescence notice published in Cumulative Bulletin VIII-1, page 57, recalled in so far as same relates to issue 2 of decision.
[6] Nonacquiescence relates to issue involving deduction of tentative taxes in determining the earnings available for payment of dividends in 1918 and 1919.
[7] Estate tax decision.
[8] Nonacquiescence relates to tentative tax issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
National Products Co	6136	7	632
	12120	11	511
National Refining Co. of Ohio et al., The	186	1	236
National Sugar Manufacturing Co	10605	7	577
National Tank & Export Co	3274	3	1217
Nelson, C. N., estate of [1]	7702	7	127
Neuman Co. et al., H. L	18348	16	533
Nevin, William L., executor [1]	31551	16	15
New Jersey Bergen Square Realty Corporation	44623	22	1324
New Jersey Porcelain Co	29568	15	1059
Newman, Lillian D	15940	15	369
Newman, Lloyd D	15936	15	369
Newman et al., Lloyd D., executors	15939	15	369
Newman, Louis, estate of	15939	15	369
Newman, William C.[2]	6530	10	158
New Orleans, Texas & Mexico Ry. Co.[3]	400	6	436
Newport Co	28200	22	833
New York Trust Co., trustee	28250	20	162
Niles Fire Brick Co	2628	6	8
950 Park Avenue Corporation	34034	20	288
907 Fifth Avenue, Inc	34033	20	288
960 Park Ave. Co., Inc., et al	6978	7	216
920 Holding Corporation	34031	20	288
Nolde & Horst Co.[4]	9867	12	417
Nord Hop Ranch	6149	10	835
Nordholt, John B	3766	4	509
Norfolk Knitting Mills Corporation	4341	5	792
Norfolk Southern R. R. Co.[5]	22243	22	302
North American Mortgage Co.[6]	15798	18	418
North American Oil Consolidated [7]	8714	12	68
	16107		
North Star Granite Corporation	37299	21	222
Northern Trust Co., executor [1]	2473	9	1310
Northern Trust Co., executor [8]	7127	9	96
Northside Viaduct Co.[9]	11728	9	468
	14200		
Northwestern Improvement Co	12106	14	79
Northwestern States Portland Cement Co.[10]	5763	7	835
	10456		
Norton et al., Frank E., executors [11]	5594	9	450
Norton Construction Co., Inc	41042	21	443
Norwich & Worcester R. R. Co	2020	2	215
Norwood Lumber Co	3785	6	341
Noyes, Charles R., estate of [12]	18486	16	519
Nunnally, J. H	18627	11	420
Nunnally, Winship	18620	11	420

[1] Estate tax decision.
[2] Nonacquiescence relates to deduction of amount of bad debt ascertained to be worthless and charged off in 1920.
[3] Nonacquiescence relates to issues 1 and 4 in decision.
[4] Nonacquiescence relates to first issue of decision.
[5] Nonacquiescence relates to issues (a) and (d) of decision.
[6] Nonacquiescence relates to issue regarding income from purchase of own debentures.
[7] Nonacquiescence relates to basis of charging depletion on cost of defending title to oil properties; and to issue involving income earned in 1916 and released to taxpayer in 1917.
[8] Estate tax decision; nonacquiescence relates to trust created on February 9, 1917.
[9] Nonacquiescence in so far as decision determines that Highland Park Co. and Northside Viaduct Co. were affiliated with Virginia Railway & Power Co.
[10] Nonacquiescence relates to fifth issue of decision.
[11] Nonacquiescence does not relate to deductibility of New York inheritance tax.
[12] Estate tax decision; nonacquiescence relates to issue 1 of decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
O.			
Ohio Falls Dye & Finishing Works	20395	16	1038
Oilbelt Motor Co	14700	16	831
Old Colony R. R. Co	7820	6	1025
Old Dominion Steamship Co	24462	16	264
Olds, Millard D.[1]	8718	15	560
Olinda Gasoline Co	15799, 19077	13	1050
Olinger Corporation	25469	9	170
O'Neil, John	16864	16	614
O'Neil, Mrs. John (Frances)	16864	16	614
Ortseifen, Adam [2]	12900	14	1403
Ostenberg, W. H	19306, 34015	17	738
Ott, Will M	13713	15	867
Ottley, John K	18623	11	420
Ottumwa Serum Co	15114, 34274	14	569
Oul Building and Loan Association	3865	6	1196
P.			
Pacific Coast Pipe Co.[3]	7961	11	1329
Pacific Door & Sash Co.[4]	14481, 18898, 21186	20	72
Pacific Southwest Trust & Savings Bank, executor [5]	12136	14 16	1372 1437
Palmetto Coal Co	9478, 18272, 20306	11	154
Paramount Knitting Mills	29902	17	91
Parrett, O. S	6766	4	833
Parsons, Florence V. C., estate of [5]	25131	23	920
Paso Robles Mercantile Co	11655, 28038	12 18	750 415
Patterson, Benjamin Franklin	41953	21	8
Payne, Martha	32298	18	892
Pearson, Eric A	27804	16	1405
Peavy-Byrnes Lumber Co.[6]	15824, 16354, 25984	14	625
Peavy-Moore Lumber Co.[6]	15823, 16355, 25986	14	625
Peavy-Wilson Lumber Co.[6]	15822, 16356, 25985	14	625
Peck & Hills Furniture Co.[7]	16108	16	1008

[1] Nonacquiescence relates to partnership issue.
[2] Nonacquiescence does not relate to deduction of contribution to church building fund.
[3] Nonacquiescence relates to issue 6 of decision.
[4] Nonacquiescence in Board's conclusion that section 331 of the Revenue Act of 1918 is not applicable.
[5] Estate tax decision.
[6] Nonacquiescence relates to affiliation issue, except with regard to Peavy-Wilson Lumber Co. and Christie & Eastern Ry. Co. for 1917, 1918, and 1919.
[7] Nonacquiescence relates to leasehold issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Pederson, Hans [1]	12329	14	1089
Pederson, Marie [1]	12328	14	1089
Peerless Woolen Mills	12038	13	1119
Pelton, Honoro Gibson, executrix [2]	7402	7	1144
Perbohner, Jacob	38096 38098	21	84
Perine Machinery Co.[3]	24154	22	450
Perry, John H	32748	22	13
Peruna Co.[4]	5102 12333	11	1180
Petaluma & Santa Rosa R. R. Co.[5]	13830	11	541
Petroleum Exploration	43480 49339	23	890
Pettis, Lizzie Ada, estate of [2]	37099	20	1049
Phelps-Waters Co.[6]	19419	15	1166
Philadelphia Quartz Co	6677	13	1146
Piedmont-Mount Airy Guano Co.[7]	1757	3	1009
Pietsch, Amy Lake, deceased, estate of [8]	5424	6	582
Pietsch, Walter G., executor [8]	5424	6	582
Pike County Coal Corporation [9]	7189	4	625
Pittsburgh Gasoline Co	39463 41854	21	297
Pittsburgh Knife & Forge Co	7464	6	1083
Pittsburgh Provision & Packing Co	9219 15813 32370	16	139
Pittsburgh Supply Co.[10]	18864	14	620
Pittsburgh Terminal Coal Corporation	19005	23	248
Pittsburgh Union Stock Yards Co	9219 15813 32370	16	139
Pittsburgh Valve Foundry & Construction Co	9089	6	460
Pittsburgh & West Virginia Ry. Co., and affiliated companies	8349	22	876
Pitzman's Company of Surveyors & Engineers	21745 39299	21	1368
Planters National Bank	22455	18	705
Potter, A. E	7432	10	563
Potter, E. L	25544	20	252
Potter, Elmore L	33878	18	549
Potts Run Coal Co.[11]	26274 30358	19	1
Powell Coal Co.[12]	11945	12	492
Prescott et al., Oliver, executors [13]	7883	8	582
Prescott, Wm. R	18626	11	420
Prindible, John F	15344	16	187

[1] Nonacquiescence relates to issue (a).
[2] Estate tax decision.
[3] Nonacquiescence relates to issues (a) and (c) of decision.
[4] Nonacquiescence relates to issue as to whether the Board had jurisdiction to hear and determine a deficiency for 1920.
[5] Nonacquiescence relates to that part of decision as to the purchase of taxpayer's own bonds at less than par which were retired.
[6] Nonacquiescence relates to issue as to whether Phelps-Waters Co. was a transferee of Wisconsin Chemical Co.
[7] Revokes acquiescence notice published in Cumulative Bulletin V-2, page 3.
[8] Nonacquiescence relates to fifth issue of decision.
[9] Nonacquiescence relates only to issue 2 in decision.
[10] Nonacquiescence relates to issue involving special assessment.
[11] Nonacquiescence does not relate to issue regarding value of coal in lands in 1903.
[12] Nonacquiescence relates to jurisdiction issue.
[13] Nonacquiescence does not relate to deductibility of New York inheritance tax.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Prindible, Loretta H	15345	16	187
Pritzlaff, Frederick C	6109	10	747
Progress Paper Co	39648	20	234
Prosser, Seward	8520	7	734
Providence & Worcester R. R. Co	6297, 7775	5	1186
Provident Trust Co. et al., administrators [1]	4976	5	1004
Q.			
Quaker Maid, Inc	11421	10	301
R.			
Radford Grocery Co., J. M	21500	19	1023
Rail Joint Co	46003	22	1277
Ralston Steel Car Co	7640, 18158	15	1416
Randall, George W., estate of	5850, 6765	4	679
Rankin, B. Kirk [2]	26191, 41046	17	1301
Rauh & Sons Fertilizer Co., E. [3]	10720	12	468
Rebadow, Anna N	15937	15	369
Red Salmon Canning Co	4146	15	790
Redington, William H., estate of [1]	21942	23	635
Reeb, M. A	9847	8	759
Reed, John L. [1]	20996	21	379
Reese, J. H	18404	15	1261
Reilly, Warren	5380	7	1327
Reinbold, Herman, estate of	11418	17	738
Reliance Manufacturing Co	6021	7	583
Remington Rand, Inc	34726	11	773
Remington Typewriter Co	2788	4	880
Renyx, Guy W	23535	21	1248
Renziehausen Frederick C	10658	8	87
Reserve Loan Life Insurance Co. [4]	21489, 29554, 32965	18	359
Reynolds, Mary G., estate of	8625	8	360
Reynolds, Philip M., estate of	8624	8	360
Rhode Island Tool Co	2832	3	180
Richfield Oil Co	15799, 19077	13	1050
Richmond Belt Ry. Co	7218	13	1291
Riggs National Bank	30903	17	615
Rindge Land & Navigation Co	3698	2	1179
Roach, Hal E	29256, 36156, 42069	20	919
Roanoke Mills Co. [5]	23221	18	474

[1] Estate tax decision.
[2] Nonacquiescence as to issue involving deduction of item of $1,205.95 in 1924.
[3] Nonacquiescence relates to issues 3 and 4 of decision.
[4] Nonacquiescence in decision involving issues regarding (1) the deductibility of reserves to cover liability on outstanding coupons attached to guaranteed premium reduction policies, and (2) the disallowance by the Commissioner as a deduction of $5,642.15 representing taxes paid and other real estate expenses.
[5] Nonacquiescence relates to March 1, 1913, value of water rights.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Robertson, E. G	28867	19	534
Robertson Co., H. P	14104	14	887
Robeson, Emma H	26268	18	323
Robeson, George W	26267	18	323
Robeson, Irving S	22126	18	323
Robeson, Robert H	26269	18	323
Robinson, Carel	24584	19	751
Robinson, Mrs. C. H	8271	8	972
Robinson, Herbert D., executor [1]	34683	21	1373
Robinson Co., A. M.[2]	5652	5	1217
Rodenbough, Elizabeth McCahan, estate of [3]	465	1	477
Rodenbough, Elmer E., executor of the estate of Elizabeth McCahan Rodenbough, deceased [3]	465	1	477
Rolfe, Willard G., executor [4]	18486	16	519
Root, Henry L., estate of [3]	2825	5	696
Root, Susie M., executrix [3]	2825	5	696
Rosenbaum Bros., Inc	13050	11	736
Roslyn Fuel Co.[5]	9074 22072	16	285
Rosseter, John H	6179	12	254
Roth, W. A	6012	4	834
Rothschild Colortype Co	12663	14	718
Rouse, Hempstone & Co., Inc.[6]	7673 10987	7	1018
Rowe, M. D.[7]	9063	7	903
Rowe, Mrs. M. D.[7]	9064	7	903
Royal Syndicate	37374 39101 40685	20	255
Royal Tailors	21998	18	731
Ruf, Frank A., estate of [8]	9528	13	85
S.			
St. Louis Malleable Casting Co.[9]	5490 15168	9	110
St. Louis National Baseball Club	26798	15	1192
Saeger, Wilford C	7562	9	890
Sage, Margaret Olivia, estate of	5882	6	36
Saks & Co	21258	20	1151
Sanderson, Benjamin B., executor [3]	28979	18	221
Sandler, Harry	29142	23	137
San Joaquin Fruit & Investment Co	6988 6989 20801	16	1290
Sansome, Frederick A	26032	22	1171
Sarfert, Max	3436	5	977
Sass, Morris	6922	12	156

[1] Estate tax decision; nonacquiescence in portion of decision with respect to mortgage of September 5, 1923.
[2] Nonacquiescence relates to first issue in decision.
[3] Estate tax decision.
[4] Estate tax decision; nonacquiescence relates to issue 1 of decision.
[5] Nonacquiescence relates to issue involving notice of deficiency for fiscal year 1917 and special assessment issue.
[6] Nonacquiescence relates to final issue of decision.
[7] Nonacquiescence relates to second issue of decision.
[8] Estate tax decision; nonacquiescence relates to deductibility of remainder value of the residuary estate bequeathed to charity.
[9] Nonacquiescence relates to "tentative tax" issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Savannah River Lumber Co. et al.[1]	14354 16130 26936	14	165
Scarbrough, J. W	17099 24483	17 18	317 951
Scarbrough, Mrs. J. W	17098 24484	17 18	317 951
Scarbrough, Lemuel	17097 24482	17 18	317 951
Schall, William	9721 19163	13	1175
Schmidlapp Trust Fund No. 1340, Jacob G	26127	20	88
Schoenheit et al., William, executors [2,3]	16626	14	33
Schoettle Co., Edwin J	1941	13	950
Schreier Co., Konrad	3600	9	407
Scioto Valley Supply Co	27602	17	173
Scowcroft & Sons Co., John	29583	18	532
Scranton Electric Co.[4]	17872	15	1084
Scudder, sr., Clifton R., estate of	33075	22	1294
Scudder, S. Cupples, executor	33075	22	1294
Scully Syrup Co., D. B	10005	10	90
Seaboard National Bank of New York, N. Y., executor [2]	9690	11	1386
Seals, Victoria D. (Mrs.)	18624	11	420
Seas Shipping Co., Inc	20714 22077 41648	16	841
Senner, Herman [5]	44188	22	655
Sevier, Marion Shainwald [6]	14410	14	709
Shaffer, C. B	9872	12	298
Shaffran, Mollie	29987	18	91
Shainwald, Marion D.[6]	14410	14	709
Sharpe, Mary A.[7]	17127	17	135
Sheffield Dentifrice Co.[8]	11814	13	877
Shepard Co	39137	22	1368
Shillito Co., John	6187	8	665
Shillito Realty Co	6186	8	665
Shoemaker, Flora H.[9]	25640	16	1145
Shuttleworth, James A., estate of [2]	40672	21	142
Siegel, Eugene, executor	[10]18879	19	683
	28360 29619	20	563
Siegel, Jacob, estate of	[10]18879	19	683
	28360 29619	20	563
Siegel, Inc., Joe	1739	1	1113
Silver King Consolidated Mining Co. of Utah	15153	8	41
Simmons Gin Co	21523	16	793

[1] Nonacquiescence relates to affiliation of Savannah River Timber Co. and Port Wentworth Lumber Co. with group for 1918–1921.
[2] Estate tax decision.
[3] This case was inadvertently printed in Bulletin VIII–48 as having been acquiesced in by the Commissioner.
[4] Nonacquiescence relates to issue respecting affiliation with American Gas & Electric Co.
[5] Nonacquiescence relates to issue (c) of decision.
[6] Nonacquiescence relates to issue as to whether Board had jurisdiction to hear and determine deficiencies.
[7] Nonacquiescence with respect to Board's action in excluding from income the amount received from Mary A. Sharp trust.
[8] Nonacquiescence relates to loss sustained through obsolescence of trade-mark.
[9] Nonacquiescence relates to deduction for exhaustion of life estate.
[10] Estate tax decision; nonacquiescence in Board's determination that transfer of a certain leasehold by decedent constituted a bona fide sale for a fair consideration in money or money's worth.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Simons Brick Co.[1]	13973 24509 27247	14	878
Simplex Engineering Co	15548 22667 40643 29560	17	504
Sinsheimer Bros., Inc	6498	5	918
Sioux City Stock Yards Co.[2]	12228 20210	21	973
Slocum, Ada M., executrix [3]	30040	21	169
Slocum, Grant H., estate of [3]	30040	21	169
Slocum et al., Herbert Jermain, executors	5882	6	36
Small, G. G	27976	16	658
Smith, Clarence C	3767	4	514
Smith, George S	22410	22	358
Smith Agricultural Chemical Co	13179	11	902
Smithers, Francis S., estate of [3]	665	1	1086
Souers, Sidney W	27180 31406	22	686
Southeastern Express Co.[4]	24172 32373 40021 42431	19	490
South Penn Oil Co	20785	20	1180
Southwestern Investment Co., Inc	30567 32053 35787	19	30
Sowers Manufacturing Co	14464	16	268
Spencer, Marion Parsons [5]	22194	11	437
Sproehnle, Albert W., estate of	24859 30362	20	417
Sproehnle, Isabel G., executrix	24859 30362	20	417
Sproehnle, John R	24860	20	417
Sprunt, Benevolent Trust, James	30966 35016	20	19
Sprunt et al., James Laurence, trustees	30966 35016	20	19
Standard Life Insurance Co. of America [6]	12475 25842 29779	13	13
Stange, A. H.[7]	553	1	810
Starbuck, A. E., administrator	11724	13	796
Steiner Manufacturing Co	22371	18	740
Stephens-Adamson Manufacturing Co	13462 18641 25010 30443	16	41
Stetson & Ellison	8736	11	397
Stevens, H. G	16318	14	1120
Stevens & Thompson Paper Co	3501	5	1213

[1] Nonacquiescence relates to contribution to the All Year Club.
[2] Nonacquiescence relates to issue 3 of decision.
[3] Estate tax decision.
[4] Nonacquiescence relates to issue 2 of decision.
[5] Revokes acquiescence published in Cumulative Bulletin VII-2, 37.
[6] Nonacquiescence relates to issue involving the question of "reserve."
[7] Acquiescence notice in the case of A. H. Stange (C. B. IV-2, 4) recalled.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Stewart, David [1]	18309	17	604
Stimpson, Dorothy Baker [2]	25061	19	1059
Stimson, C. W	28847	22	26
Stone, George L	10756	9	20
Stoney, Mary M. (Mrs.)	18628	11	420
Strain Bros., Inc.[3]	30915	19	601
Strickland, D. F	40707	16	419
Strickland, Olive	40708	16	419
Strickland, D. F. and Olive	23159	16	419
Strong, B. R., estate of	12468	13	335
Sugg, J. D., estate of	8860	6	651
Sunlin, L. F	7483	6	1232
Sunnyside Coal & Coke Co.[4]	9442	9	984
Superior Motor Parts Co.[5]	10348	8	407
Superior Tube Co.[6]	16104, 16553	20	749
Swenson, Cristina, estate of	16177	14	675
Swenson, S. T., executor	16177	14	675
Swift, Lucile W	18516	11	420
Swift, Theodore J	31477	20	1099
Swift Co., C. J	12315	12	974
Sykes, Richard, estate of [7]	12136	14 16	1372 1437
T.			
Tait, James [8]	13908	11	979
Taylor, Thalia C	17799	17	820
Temoyan et al., Annie, trustees	22239	16	923
Temoyan, Mrs. Hormig, estate of	22239	16	923
Terminal Railroad Association of St. Louis [9]	26162, 28661	17	1135
Texas & Pacific Ry. Co	9863	9	365
Textile Mill Supply Co	10382	8	145
Thomas, C. R	7139	8	118
Thomas, Thomas E., estate of	4230	6	8
Thomas, W. Aubrey	4229	6	8
Thomas Coal Co.[10]	8098	10	639
Thompson, Melville W.[11]	23609	18	1192
Thorn, Susan K., estate of [12]	18234	16	181
Thorne, Neale & Co., Inc	12491	13	490
Tighe, Anna M	13472	12	672
Tindle, Frank T.[13]	8999	11	1257
Tobin, Charles J	25922	17	1261
Trippensee Manufacturing Co	13261	15	15

[1] Nonacquiescence relates to issue 1 of decision.
[2] Nonacquiescence relates to issue involving taxable profit derived from sale of securities.
[3] Nonacquiescence relates to deduction of net loss for 1921 in computing net income for fiscal year ended January 31, 1924.
[4] Nonacquiescence relates to the third issue of decision.
[5] Nonacquiescence relates to final issue of decision.
[6] Nonacquiescence relates to special assessment.
[7] Estate tax decision.
[8] Nonacquiescence relates to issue as to whether the agreements of December 14, 1918, and the discharge thereof were productive of income taxable for the years involved, and, if so, to what extent.
[9] Nonacquiescence does not relate to issues involving contributions to Y. M. C. A. and amortization of discount on bonds.
[10] Nonacquiescence relates to second issue of decision.
[11] Nonacquiescence relates to period of limitation for collection of $31,205.51 assessed on original calendar-year return for 1919; also conclusion that books were kept on accrual basis during 1918 and 1919.
[12] Estate tax decision; nonacquiescence relates to issue 2 of decision.
[13] Nonacquiescence relates to "tentative tax" issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Trumble Refining Co. of Arizona	11763, 17492, 26434, 32151	14	348
Turners Falls Power & Electric Co	26306	15	983
Turnure, George E	10045	9	871
Two-Republics Life Insurance Co	29363	21	1355
U.			
Underwood, Lucy C., estate of [1]	2473	9	1310
United States Merchants & Shippers Insurance Co.[2]	10439	13	164
United States Refractories Corporation [3]	5642	9	671
United States Refractories Corporation	34640	23	872
United States Trust Co. of New York et al., executors of Francis S. Smithers, deceased.[4]	665	1	1080
Upham, Roy	16105	16	950
V.			
Van Schaick, Ellen L., estate of [5]	7127	9	96
Van Vorst, C. B., estate of	43567	22	632
Van Vorst, George W., executor	43567	22	632
Van Zandt, Jacobs & Co	6863, 11605	8	561
Virginia Carolina Securities Corporation et al	7484	6	84
Virginia Railway & Power Co.[6]	9040, 11731	9	468
Von Ruck, Karl, estate of [4,7]	16626	14	33
W.			
Waddell, Mary T	4228	6	8
Waggoner, Ada	5881	9	629
Waggoner, R. M	4265	9	629
Wagner, Richard G	5880	9	925
Walcott Lathe Co	1142	2	1231
Walden Knife Co	12977, 26163	17	1236
Waldo, Charles G., estate of	18721	18	775
Walker, William Hall, estate of	23973	15	401
Walters, Frances W. (Mrs.)	18616	11	420
Walworth, Charles W	8794	6	788
Wanamaker, John, estate of [4]	31551	16	15
Wanamaker New York, John [8]	23158	22	487
Wanamaker Philadelphia, John [8]	23156, 23157	22	487
Ward & Sons, Aaron	31568	23	1278
Wardlaw, W. C	2261	4	842
Warner, Fred W	3713	5	963
Warren, Wm. C	18632	11	420

[1] Nonacquiescence relates to third issue of decision.
[2] Nonacquiescence relates to premium reserve issue.
[3] Nonacquiescence relates to issue with respect to question of allowance of amortization in 1918 on costs incurred in 1919.
[4] Estate tax decison.
[5] Estate tax decision; nonacquiescence relates to trust created on February 9, 1917.
[6] Nonacquiescence in so far as decision determines that Highland Park Co. and Northside Viaduct Co. were affiliated with Virginia Railway & Power Co.
[7] This case was inadvertently printed in Bulletin VIII–43 as having been acquiesced in by the Commissioner.
[8] Nonacquiescence relates to installment sales issue.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Washburn, J. L.	27590	16	1091
Washington Hotel Co.[1]	6609, 7133	4	441
Washington Post Co.	8085	10	1077
Weil, Joseph, estate of [2]	18960	15	965
Weil, Sophia, administratrix [2]	18960	15	965
Weissenbach, Minna K.[3]	4004, 4005, 6061, 6102, 10157	6	617
Wells Bros. Construction Co.	11015	16	79
Western Exchange Bank	4967	12	66
Western Maryland Ry. Co.[4]	6475	12	889
Western Wheeled Scraper Co.[5]	12001	14	496
Wheatley, James A.[6]	9665	8	1246
Wheeler, Charles S., estate of [2]	22391	20	695
Wheeler, Lillian M., executrix [2]	22391	20	695
Whitcomb, Louise A.	16118	22	118
Whitcomb, Louise A. F. E.	27940, 46513	22	118
Whitcomb, Louise P. V., estate of	16119, 16120, 27942	22	118
Whitcomb, Lydia L.	16121	22	118
Whitcomb, Lydia L. I.	27943, 46511	22	118
Whitcomb, Marguerite T.	16117	22	118
Whitcomb, Marie M. E. G.	46512	22	118
Whitcomb, Marie M. E. G. T.	27941	22	118
White, C. H.	30308	15	1375
White & Wells Co.	20035	19	416
White Eagle Oil & Refining Co.	30448	19	185
Whitehouse, Sybil	13220	7	600
Whitehurst et al., John L.	12446	12	1416
Whitehurst et al., Mary M.	12447	12	1416
Wickersham, Chas. A.	18612	11	420
Widener, George D.	7723	8	651
Widner, Joseph E.	7724, 7725	8	651
Wilder, Herbert A., estate of [2]	32131	20	1159
Wilkinson, W. A., estate of [7]	16379, 16743	16	1390
Williams Harvey Corporation	19409, 19941, 29697	16	752
Wilshire Oil Co., Inc.	3927	13	1150
Wilson, Alice	30079	23	644
Wilson, Elihu Clement	8500	11	963
Wilson, George B.	8501	11	963

[1] Nonacquiescence relates only to that part of decision which relates to application of the Ayers decision (1 B. T. A., 1135).
[2] Estate tax decision.
[3] Nonacquiescence relates to question in decision pertaining to the year 1919.
[4] Nonacquiescence relates to issues concerning contributions to Association of Railway Executives and accrual in calendar year 1919 of increased compensation for transportation of mail, awarded by Interstate Commerce Commission on December 23, 1919.
[5] Nonacquiescence relates to that portion of decision which holds that section 284(c) of the Revenue Act of 1926 is applicable to the case.
[6] Nonacquiescence relates to item (3) in decision.
[7] Nonacquiescence relates to issue 1 of decision.

NONACQUIESCENCES—Continued.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Wilson, Mrs. Henry	35075	16	1280
Wilson, Milton H., estate of	26814	20	829
Wilson, William W	8502	11	963
Wilson Syndicate Trust	12427 27808	14	508
Wilson Trust	39383	20	549
Windfelder, John H., estate of [1]	4166	5	952
Winkler & Bro. Co., Isaac	11932 13775	15	38
Winship, C. R	18618	11	420
Winship, Elizabeth T. (Mrs.)	18630	11	420
Wire Wheel Corporation of America	26555	16	737
Wisconsin Bridge & Iron Co	13739	13	246
Wofford, G. T	12529	15	1225
Wolf et al., Max, trustees	6149	10	835
Wolfe, Emma S., estate of [2]	16149	15	835
Wolfe, Russel, executor [2]	16149	15	835
Wolferman, Fred, executor [3]	11291	10	285
Wolferman, Louis, estate of [3]	11291	10	285
Wood, S. A	35128	22	535
Woodrow Lee Trust	15563	17	109
Woodruff, Ernest	2050	4	842
Woodruff, Geo. C	18518	11	420
Woodruff, Jas. W	18619	11	420
Woods Machine Co., S. A	32015	21	818
Woodward, David	2266	4	842
Wollston, Beulah H. J., estate of [1]	11298	10	1100
Worstell Co., Ltd	14707	15	413
Wright, George M	24851	18	471
Wright, Inc., Ben T	12164	12	1149
W. T. & M. Co	8778 13093	11	722
Wurts-Dundas, Muriel H	26518	17	881
Wurzburger, Bernard, estate of [4]	34683	21	1373
Wyoming Central Association	9965 20546	8	1064
Y.			
York Ice & Milk Co	18348	16	533
Yorkshire Creamery Co	15114 34274	14	569
Young, Howard S	18000	16	1428
Young, James K., estate of [1]	4976	5	1004
Z.			
Zakon, William	5450	7	687
Zellerbach, Isadore	2028	2	1076
Zellerbach, Theresa	883	2	1076
Zinn, Arthur	2789	3	974
Zinn, Martin	3444	3	969

[1] Estate tax decision.
[2] Nonacquiescence relates to deduction of Connecticut and West Virginia inheritance taxes.
[3] Estate tax decision; nonacquiescence relates to second issue of decision.
[4] Estate tax decision; nonacquiescence in portion of decision with respect to mortgage of September 5, 1923.

INCOME TAX RULINGS.—PART I.

REVENUE ACT OF 1928.

SUBTITLE B.—GENERAL PROVISIONS.

PART I.—RATES OF TAX.

SECTION 11.—NORMAL TAX ON INDIVIDUALS.

ARTICLE 14: Who is a citizen. X–45–5279
I. T. 2600

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

Under the Act of September 22, 1922 (published as T. D. 3406, C. B. I–2, 42), a woman citizen of the United States who marries an alien and resides abroad is liable, in general, to tax upon income from all sources until such time as the presumption of expatriation arises and such presumption can not be overcome. When such presumption becomes conclusive, her status is that of a nonresident alien.

A woman subject of Great Britain who marries a citizen of the United States is considered a British subject, unless she becomes a citizen of the United States by naturalization. Until she acquires a residence in the United States her status is that of a nonresident alien. If she acquires a residence in the United States, her liability is similar to that of her husband, with two exceptions, namely, the credit for income, war-profits, and excess-profits taxes paid to a foreign country, and the termination of her taxable period when leaving the United States. For the purpose of determining Federal estate tax, citizenship of the decedent is not material.

A ruling is requested relative to the effect of the Act of September 22, 1922 (Public, No. 346, Sixty-seventh Congress, H. R. 12022, published as T. D. 3406, C. B. I–2, 42), upon the income tax liability of a woman citizen of the United States marrying an alien and an alien woman marrying a citizen of the United States.

The specific questions submitted are as follows:

Where a woman citizen of the United States marries a subject of Great Britain and under the Act of September 22, 1922, renounces her United States citizenship, such renunciation not taking place in a court of jurisdiction as required by the Act but occurring after she reached England, how would the Act affect her?

Where a woman subject of Great Britain marries a citizen of the United States, how would her income tax and estate tax differ from that of her husband and her husband's estate?

Where a woman citizen of the United States marries a subject of Great Britain and does not renounce her allegiance, can she deduct

from her income any tax she might pay Great Britain? Does it make any difference if she resides in Great Britain? Must she, as a citizen of the United States, continue to pay an income tax to the United States?

The Act of September 22, 1922, provides but one method by which a woman citizen of the United States may renounce her citizenship upon her marriage to an alien, and that is "before a court having jurisdiction over naturalization of aliens." Accordingly, if a woman citizen of the United States did not make a formal renunciation of her citizenship in the manner provided by the Act referred to, under such Act she "shall not cease to be a citizen of the United States" unless and until the presumption of expatriation arises by reason of her continuous residence for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States.

For the purpose of Federal income tax a woman citizen of the United States who marries an alien and resides abroad is liable, in general, to tax upon her income from all sources until such time as the presumption of expatriation arises and can not be overcome. When such presumption becomes conclusive, the individual in question is considered a nonresident alien and only liable to Federal income tax upon income from sources within the United States.

Where a woman subject of Great Britain marries a citizen of the United States, she is considered a British subject unless she becomes a citizen of the United States by naturalization. Until such time as she acquires a residence in the United States her status is that of a nonresident alien and, therefore, she is liable for Federal income tax only with respect to income from sources within the United States. If, however, she acquires a residence within the United States, her Federal income tax is computed upon her income from sources within and without the United States, and is similar to that of her husband, with two exceptions, namely, the credit for income, war-profits, and excess-profits taxes paid to a foreign country and the termination of her taxable period when leaving the United States. If during the taxable year she paid an income, war-profits, or excess-profits tax to a foreign country, she is not entitled to credit her Federal income tax with any part of the foreign tax, as Great Britain does not meet the similar credit requirement of section 222(a)3 of the Revenue Acts of 1921, 1924, and 1926 and section 131(a)3 of the Revenue Act of 1928.

The foreign tax is, however, an allowable deduction in computing net income. Upon her departure from the United States, the taxable period of the British subject is terminated in accordance with section 250(g) of the Revenue Act of 1921, section 282(e) of the Revenue Act of 1924, section 285(e) of the Revenue Act of 1926, and section 147(e) of the Revenue Act of 1928. Under these provisions of law and the regulations pertaining thereto a woman alien is required to pay any income tax found to be due upon her income received up to and including the last day of the calendar month next preceding that of her intended departure. A United States citizen who is the husband of a British subject is, however, entitled to a credit for income, war-profits, or excess-profits taxes paid to a

foreign country, and upon his departure from the United States his taxable period is not terminated unless it is found that his departure would tend to prejudice or to render ineffectual proceedings to collect the tax for the taxable year then last past, or the taxable year then current.

For the purpose of determining the Federal estate tax, the citizenship of the decedent is not material. In determining the Federal estate tax, however, the residence or nonresidence of the decedent is a very material factor. In this connection, see articles 5, 11, and 51, Regulations 70 (1929 edition).

A woman citizen of the United States who marries an alien and does not make a formal renunciation of her citizenship, under the provisions of the Act of September 22, 1922, does not cease to be a citizen of the United States until such time as the presumption of expatriation arises by reason of her residence without the United States and such presumption is not overcome. As long as she remains a citizen of the United States she is liable for Federal income tax upon her income from all sources in the same manner and to the same extent as any other citizen of the United States. If she paid any income, war-profits, or excess-profits taxes to Great Britain, she is entitled to a credit against her Federal income tax on account of the payment of such foreign tax. If, after marriage, she acquired a residence in Great Britain and after the expiration of two years was not in a position to overcome the presumption of expatriation, she is liable for Federal income tax during such two years' residence, upon her income from all sources in the same manner as if she had remained in the United States. During such 2-year period she is not deprived of her right to a credit for any income, war-profits or excess-profits taxes paid to Great Britain. After the expiration of the 2-year period, if the presumption of expatriation is not rebutted, she is taxed as a nonresident alien, but only upon her income from sources within the United States. No credit, however, for any taxes paid to Great Britain is allowable against her Federal income tax, but any taxes paid to Great Britain upon her income from sources within the United States is deductible in computing her net income for the purpose of Federal income tax.

ARTICLE 14: Who is a citizen. X–45–5280
I. T. 2601

REVENUE ACT OF 1928.

Since the enactment of the Act of July 3, 1930 (Public, No. 508, Seventy-first Congress, H. R. 10960, T. D. 4301, C. B. IX–2, 89), a woman citizen of the United States by birth, who marries after July 3, 1930, an alien eligible to citizenship under the Act of July 3, 1930, does not cease to be a citizen of the United States unless she makes a formal renunciation of her citizenship, as the presumption of expatriation by residence abroad is not applicable to her. As a citizen of the United States she is liable in general to tax upon her income from all sources.

Under the Act of July 3, 1930, a woman citizen of the United States by naturalization, who marries an alien eligible to citizenship after the approval of such Act, is taxed in general upon her income from all sources as a citizen of the United States, until the presumption of expatriation arises and can not be overcome.

A ruling is requested whether, since the enactment of the Act of July 3, 1930 (Public, No. 508, Seventy-first Congress, H. R. 10960, published as T. D. 4301, C. B. IX–2, 89), which amended the Act of September 22, 1922 (Public, No. 346, Sixty-seventh Congress, H. R. 12022, published as T. D. 3406, C. B. I–2, 42), by repealing the presumptive loss of citizenship by residence abroad, the conclusions reached in I. T. 2600 (see page 107) would be applicable to a woman citizen of the United States against whom the presumption of expatriation by residence abroad would not arise unless she were a citizen by naturalization, as distinguished from a citizen by birth.

Since the enactment of the Act of July 3, 1930, which repealed the last three sentences of section 3 of the Act of September 22, 1922, a woman citizen of the United States by birth, who marries an alien eligible to citizenship after July 3, 1930, would not cease to be a citizen of the United States unless she made a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens, as the presumption of expatriation by residence abroad would not be applicable to her. As a citizen of the United States she would be liable in general to tax upon her income from all sources.

With reference to a woman citizen of the United States by naturalization, section 2 of the Act of March 2, 1907 (Public, No. 193, Fifty-ninth Congress, H. R. 24122, 34 Stat., 1228), reads in part as follows:

> When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

There is nothing in the subsequent Acts relative to the nationality of a woman citizen of the United States who is married to an alien which modifies the above-quoted provision. Therefore, under the Act of July 3, 1930, a woman citizen of the United States by naturalization, who marries an alien eligible to citizenship after the approval of such Act, is taxed in general upon her income from all sources as a citizen of the United States, until such time as the presumption of expatriation arises and such presumption can not be overcome. When such presumption becomes conclusive, the individual in question is considered a nonresident alien and only liable to Federal income tax upon her income from sources within the United States.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 51: What included in gross income. X–28–5134
G. C. M. 9621

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

Income of a restricted Indian of the Five Civilized Tribes, including the Choctaw Tribe, from the reinvestment by the Interior Department of income from his tax-exempt restricted *allotted* lands is taxable to the same extent as the investment income of other citizens and residents of the United States.

An opinion is requested relative to the basis for the rejection of A's claims for refund for the years 1922 to 1928, inclusive.

A, the taxpayer, is a restricted Choctaw Indian. The allotted lands of allottees of the Choctaw Tribe, both homestead and surplus, were made nontaxable so long as the title remained in the original allottee, but not to exceed 21 years from the date of patents. (Section 29, Act of June 28, 1898, 30 Stat., 505.) These allotments were conveyed to the allottees in fee simple, with restrictions against the alienation thereof. In addition to the specific provision for nontaxability contained in the original allotment Act, Congress has also provided in section 19 of the Act of April 26, 1906 (34 Stat., 137, 144), that restricted allotted lands of the Five Civilized Tribes, including the Choctaw Tribe, shall be exempt from taxation during the continuance of the restrictions on alienation so long as the title remains in the original allottee. Therefore, the original allotments, homestead or surplus, of A, or such portion thereof as still remains in her ownership as restricted lands, have been exempt from taxation during the taxable years mentioned on one or both of the grounds indicated above. The income from such restricted lands is exempt from Federal income taxation. (34 Ops. A. G., 275, published as T. D. 3570, C. B. III–1, 85.) Since the promulgation of the Attorney General's opinion it has been the rule of the Bureau that the income from the original allotments of restricted land of the Five Civilized Tribes is exempt from taxation.

The claims for refund which have been rejected in this case are based upon the ground that income from interest on notes, bonds, mortgages, etc., purchased by the Superintendent for the Five Civilized Tribes with income derived from an allottee's restricted lands, is also nontaxable. The taxpayer's returns for the years involved, 1922 to 1928, inclusive, were made by the superintendent. They reflect substantial items of interest from deposits and notes and taxable interest from Liberty bonds derived from a reinvestment by the superintendent of income from the taxpayer's restricted allotted lands. The rejection of said claims is based upon the decision in the case of *R. E. Snell, jr.*, and *Katie Snell* v. *Commissioner* (10 B. T. A., 1081) wherein the Board said:

* * * it does not follow that the income from the exempt income is also not subject to tax. We have held, in *Appeal of Leah Brust, Administratrix*

(5 B. T. A., 134), that the question of whether Indians shall or shall not be taxed is a matter of legislative discretion which, when clearly exercised by statute, may not be limited by construction, and that the Revenue Act of 1918, imposing a tax "upon the net income of every individual," included Indians in its application. Therefore, if the income derived by the petitioners in the year 1919 from the homestead allotment of Katie Snell is not taxable, it is not because of any exemption contained in the Revenue Act of 1918, for there is none, but because, the land having been exempted from taxation by a prior Act of Congress, a tax upon the income therefrom would be a direct tax on the land in contravention of such prior Act.

The source of the income which we are considering here is not the petitioner's homestead allotment, but is United States notes purchased and deposits made with the income from the allotment. When that income was received for the petitioners by the Superintendent of the Five Civilized Tribes, it was separated from its nontaxable source and when invested became itself a new source of income, which is not protected from taxation either by the Revenue Act of 1918 or by the prior Acts of Congress under which the homestead allotment was made. We are therefore of the opinion that the interest on the Government notes and bank deposits involved herein is subject to tax under the Revenue Act of 1918.

Attention has been called to the case of *Mary Blackbird* v. *Commissioner* (38 Fed. (2d), 976) which held that restricted Indians whose properties are under the supervising control of the United States are not within the purview of the Federal Revenue Acts in the absence of special language bringing them within the operation thereof. In *Choteau* v. *Burnet* (51 S. Ct., 598; Ct. D. 352, C. B. X–1, 355) the Supreme Court overruled the broad proposition that restricted Indians are not within the operation of the Revenue Acts. The court said that the Revenue Acts apply to all residents of the United States (which must include all Indians, whether restricted or not) and that such Acts reach all sorts of income, including income received by the Government from leases of Indian lands, unless the intent to exclude it is definitely expressed in some legislation of Congress. The tax is imposed upon "income derived from any source whatever" which must include interest items received by the Government of the character here in question. The court, however, avoided making any comment as to the effect in the application of the Revenue Acts of the personal status of restricted Indians, since it found that Choteau, as to the income involved in his case, was not a restricted Indian.

There is no provision of law to the effect that interest otherwise taxable shall be tax-free when received by the Government as the result of a reinvestment of income from restricted allotted lands. The only possible ground for exemption is the taxpayer's personal status as a restricted Indian, as a result of which the Government takes charge of his income, credits it to his individual account on the Interior Department's books, together with any reinvestment income, and releases the moneys so credited to him when and as the proper official decides the best interest of the Indian requires the disbursement thereof. The relationship between the Government and the restricted Indian has often been described as that of guardian and ward. (*Tiger* v. *Western Investment Co.*, 221 U. S., 286.) This would appear to be especially true where, as in the case of the Five Civilized Tribes of Oklahoma, including the Choctaw Tribe, the original allotments of land of restricted Indians, and lands *purchased* for them under the supervision of the Government, have been conveyed to them in *fee simple*, subject to restrictions on alienation and

where the Interior Department's power to control the same and all income derived therefrom arises out of such restrictions. The question here, therefore, is whether such a restricted Indian ward is taxable on reinvestment income received for him by the Government as guardian, and whether there is anything in the relationship which makes it inconsistent for the Government to assert a tax against income in its custody under such conditions.

The Supreme Court in *Choteau* v. *Burnet*, supra, made the following comment which seems pertinent here:

* * * Royalties received by the Government from mineral leases of Indian lands have been held to be beyond a State's taxing power (*Gillespie* v. *Oklahoma*, 257 U. S., 501; *Shaw* v. *Oil Corporation*, supra) on the ground that, while in the possession of the United States they are a Federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they can not be subjected to a Federal tax. The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter. (*Heiner* v. *Colonial Trust Co.*, 275 U. S., 232; *Shaw* v. *Oil Corporation*, supra. * * *.)

Land *purchased* for a restricted Indian of the Five Civilized Tribes and paid for out of accumulated royalties from restricted *allotted* lands under the control of the Interior Department has not been protected from State *ad valorem* taxes, even though such purchased land has usually been conveyed to the restricted Indian subject to the condition prescribed by the Interior Department's regulations that the "land shall not be alienated or leased during the lifetime of the grantee prior to April 26, 1931, without the consent of and approval by the Secretary of the Interior." (*U. S.* v. *Ransom*, 284 Fed., 108, affirmed 263 U. S., 691, and *U. S.* v. *Gray*, 284 Fed., 103.) (See also *U. S.* v. *Brown*, 8 Fed. (2d), 564, and *U. S.* v. *Mummert*, 15 Fed. (2d), 926.)

A distinction is thus set up by the courts between the original allotments of tribal property distributed to the restricted Indians of the Five Civilized Tribes and subsequent acquisitions of land for such Indians. This distinction is described in *Shaw* v. *Gibson-Zahniser Oil Corporation* (276 U. S., 575) where the Supreme Court said:

The early legislation affecting the Indians had as its immediate object the closest control by the Government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners. The present statute which enabled Miller Tiger to become the owner of the lands leased to the plaintiff is typical of the latter course of Indian legislation, which discloses a purpose to accomplish that end not only by the gradual relinquishment of restrictions upon the lands originally allotted to the Indians, but by encouraging their acquisition of other property and gradually enlarging their control over it until independence should be achieved. (See *McCurdy* v. *United States*, supra.)

* * * In this as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.

In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the State in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted *allotted* lands, and the accomplishment of their purpose obviously does not require entire independence of State control in matters of taxation. To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would

present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from State taxation, will nevertheless be subject to that taxation unless Congress speaks. (See *Goudy* v. *Meath*, 203 U. S., 146, 149; *Gromer* v. *Standard Dredging Co.*, 224 U. S., 362, 371; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S., 319, 323; *Railroad Co.* v. *Peniston*, 18 Wall., 5; *Choctaw, O. & G. R. R.* v. *Mackey*, 256 U. S., 531, 537; *Central Pac. R. R.* v. *California*, 162 U. S., 91, 126.) These lands we take to be of that character.

Little need be said as to the power of the Secretary of the Interior to exempt the land and its uses from taxation. The power, if it exists, is one conferred by Congress, but neither it nor the Secretary has in terms purported to make or authorize such an exemption.

* * * * * * * *

* * * In any case the Secretary of the Interior has never, by rule or regulation or other action, purported to exempt such lands from State taxation. No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land. (See *United States* v. *Ransom*, supra; *United States* v. *Brown*, 8 Fed. (2d), 564; *United States* v. *Gray*, 284 Fed., 103; *United States* v. *Mummert*, 15 Fed. (2d), 926.) (Italics supplied.)

The Supreme Court thus sets up a dividing line between the original restricted *allotted* lands of the Five Civilized Tribes and new acquisitions of property for a restricted allottee of such tribes. With respect at least to new acquisitions of land, even though the Interior Department extends its control over the same, the court says that to hold them immune would be inconsistent with one of the very purposes of Indian administration, i. e., to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. The court then held not only that such lands were not such an instrumentality of the Federal Government as should be protected from State taxation, at least under existing Federal legislation, but that the lands as such were not tax exempt despite the Secretary's restriction on alienation. The principle thus announced would appear to be just as applicable to new acquisitions of personal property and the income therefrom.

The returns for the taxable years involved in this case were made by the Superintendent for the Five Civilized Tribes, who is the officer of the Interior Department directly in charge of the restricted Indians of such tribes. The income returned consists entirely of reinvestment income credited to the individual account of the taxpayer on the superintendent's books, and would appear to cover all of the taxpayer's income from taxable sources. The relationship between the Government and a restricted Indian of the Five Civilized Tribes being that of guardian and ward, the returns so made were properly made by the guardian within the meaning of article 422 of Regulations 62, 65, and 69, and article 742 of Regulations 74.

This office concludes that income of a restricted Indian of the Five Civilized Tribes, including the Choctaw Tribe, from the reinvestment by the Interior Department of income from his tax-exempt restricted *allotted* lands is taxable to the same extent as the investment income of other citizens and residents of the United States. It is of the opinion, therefore, that the claims for refund for 1922 to 1928, in-

clusive, filed for A by the Superintendent for the Five Civilized Tribes, have been properly rejected.

This case is to be distinguished from the case of *Mary Blackbird* v. *Commissioner*, supra, as modified in effect by the decision of the Supreme Court in *Choteau* v. *Burnet*, supra, on the ground that substantially all of the income involved in that case was derived from the original tribal property or restricted *allotted* lands. The status of reinvestment income was not considered in that case. Furthermore, the conclusion reached herein is not in conflict with the opinion of the Attorney General in re the restricted Quapaw Indians (34 Ops. A. G., 439) published as Treasury Decision 3754 (C. B. IV–2, 37), since that ruling dealt with the taxability of restricted *allotted* lands and did not have to do with the status of reinvestment income.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 51: What included in gross income. X–49–5309
G. C. M. 9938

REVENUE ACT OF 1928.

Under section 161(a) of the Civil Code of California, which became effective July 29, 1927, a husband's earnings in California constitute community income. An agreement between husband and wife domiciled in California, executed August 1, 1927, which provides that the husband's personal earnings and salary are his separate property and income, is not effective to preclude the taxation of his salary as community income.

An opinion is requested whether under an agreement between husband and wife domiciled in California the entire salary of the husband may be regarded as his separate property and income and be reported by him for Federal income tax purposes.

The husband and wife filed separate returns, including therein income consisting of rents, interest, dividends, etc., from their separate properties. The wife derived substantial income from these sources. The husband reported his entire salary in his return. His action in this respect was based on an agreement dated August 1, 1927, reading as follows:

It is agreed that the personal earnings and salary of A are his separate property and income. We understand that this makes a change in the division of these earnings as divided by the community property laws of the State of California.

(Signed) B.
A.

The taxpayers contend that under the laws of California husband and wife may contract to change the character of their property.

The pertinent provisions of the Civil Code of California are as follows:

SEC. 158. *Husband and wife may make contracts.*—Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

* * * * * * *

SEC. 161a. *Interests in community property.*—The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the civil code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

SEC. 162. *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.

SEC. 163. *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.

SEC. 164. *Community property.*—All other property acquired after marriage by either husband or wife, or both, including real property situated in this State, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property.

Section 161(a), supra, became effective July 29, 1927, three days before the date of the agreement here involved. Prior to the passage of that section, it was generally considered that the wife had a mere expectancy in the community, as distinguished from a vested interest operating in praesenti.

In *United States* v. *Malcolm* (282 U. S., 792) the husband and wife were domiciled in the State of California in the year 1928. Half of the husband's salary was reported by him as income in his separate income tax return and half by his wife in her separate return. Two questions were certified to the United States Supreme Court, as follows:

(1) Under the applicable provisions of the Revenue Act of 1928, must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

(2) Has the wife, under section 161(a) of the Civil Code of California, such an interest in the community income that she should separately report and pay tax on one-half of such income?

The first question was answered " no " and the second " yes."

The questions submitted and answered related to community income the rights to which were determinable under the code amendment of July 29, 1927. The Supreme Court's decision is regarded as deciding that it is the legal duty of each spouse domiciled in California to report separately and pay tax on one-half of such community income.

The remaining question is whether by agreement between themselves husband and wife can each legally report more or less than one-half of the community income.

Blair v. *Roth* (C. C. A., 22 Fed. (2d), 932, T. D. 4152, C. B. VII–1, 215, certiorari denied, 277 U. S., 588) involved the taxable year 1921. A husband and wife domiciled in California were both employed and earned salaries. It appears from the court's findings that their agreement was to " contribute their earnings to a common fund, out of which their personal and community expenses would be paid; and of the savings, if any, and the property in which such savings were invested, they were to be the owners upon an equal footing."

The husband and wife each reported their respective salaries in separate returns.

It was contended on behalf of the Government that the effect of the agreement was "an assignment by each of the parties of one-half of his or her earnings to the other; that, at the instant they were received, the salaries were, by the law, impressed with the status of community property, and were taxable with reference to that status; and that the obligation to pay the tax so computed could not be escaped by contributing such incomes to the so-called partnership between the two members of the community, any more effectually than by contributing it to a like enterprise as between one member of the community and a third person."

The court concurred in this view and reversed the Board of Tax Appeals. The apparent effect of that decision is that irrespective of any agreement between the husband and wife as to community income, it is nevertheless all taxable to the husband even though part of it is a wife's salary, and that for the purposes of Federal income taxes an agreement amounting to an assignment of income is not effective to split up the income to avoid the tax. It should be noted that this decision relates to a taxable year prior to the amendment to the Civil Code of California.

In *Lucas* v. *Earl* (281 U. S., 111) the question presented was whether the husband domiciled in California could be taxed for the whole of his salary and attorney's fees earned by him in the years 1920 and 1921 or should be taxed for only one half and the other half taxed to his wife, in view of a contract between the husband and wife, made in 1921, providing—

> that any property either of us now has or may hereafter acquire * * * in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of any and all such property 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.

The case originated in the Board of Tax Appeals (10 B. T. A., 723). The Board stated "that under the law of California the petitioner's wife had a right under the contract to receive one-half of her husband's earnings, but this was at most an assignment of a portion of the petitioner's earnings," and held that "the salary and fees involved here first became his earnings," and were taxable to petitioner when received.

On appeal the Circuit Court of Appeals reversed the Board (30 Fed. (2d), 898), but the Supreme Court of the United States sustained the Board, saying in part:

> * * * 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.

The Supreme Court had previously decided in *United States* v. *Robbins* (269 U. S., 315, T. D. 3817, C. B. V–1, 188) that, under the California Code provisions which existed prior to the amendment of July 29, 1927, the husband in that State was the proper person to tax, and, accordingly, in *Lucas* v. *Earl*, supra, the court did not dis-

cuss the community property law of California but based its decision upon the ground that the contract would not serve to shift the tax from the person properly liable under the income tax law to some other person.

In *Poe, Collector*, v. *Seaborn* (282 U. S., 101, Ct. D. 259, C. B. IX–2, 202) the question arose whether a husband and wife domiciled in the State of Washington could each report one-half the community income. The court held that each spouse was "entitled" to report one-half the community income in separate returns. In discussing the case of *Lucas* v. *Earl*, supra, the court said, in part:

* * * The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, *because here, by law, the earnings are never the property of the husband, but that of the community.* [Italics supplied.]

When the decision in *Lucas* v. *Earl*, supra, is considered in connection with the fact that the husband's earnings in California since July 29, 1927, constitute community income, the conclusion is inevitable that the assignment in this case should not be recognized for tax purposes, even though valid under the local law. (See *Blair* v. *Roth*, supra.)

It is, therefore, the opinion of this office that inasmuch as the husband's salary in this case constitutes community income, it is taxable one-half to the wife and one-half to the husband and that the agreement is not effective to preclude the taxation of such salary as community income.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 58: Sale of stock and rights. X–43–5261
(Also Section 113, Article 600.) I. T. 2597

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

The proper rule required by the regulations to be applied in all cases, both before and after January 1, 1925, where rights were or are issued entitling the recipient to acquire stock of a character or preference materially different from the stock in respect of which the rights were issued, is that the cost or other basis of the old shares shall be apportioned between the old shares and the rights in proportion to the respective values of such shares and rights at the time the rights were issued. Where the rights were or are exercised, the basis of the shares so acquired is the sum of the portion of the basis of the old shares apportioned to the rights and the subscription price of the shares of stock so acquired.

A ruling is requested relative to the treatment to be accorded stock rights issued prior to January 1, 1925, entitling the holder to acquire stock of the issuing corporation of a character or preference different from that of the stock in respect of which the rights were issued.

In presenting the question reference is made to the rights issued to the holders of its preferred stock on May —, 1920, by the M Company entitling them to subscribe for its common stock. For

each 4 shares of the preferred stock then held the holder was entitled to subscribe for 3 shares of common stock at a subscription price of x dollars a share. The question presented pertains to the determination of the basis on which to compute the gain or loss in the case of the sale or other disposition of the two classes of stock held as a result of the issuance and exercise of such rights. With reference to rights entitling the holder to subscribe for stock of the same class or preference as the stock in respect of which the rights are issued, a different method of computation is prescribed in the case of such rights issued on or after January 1, 1925, from that applicable to such rights issued prior to that date. The method in effect on and after such date is that prescribed by article 39 of Regulations 69 and article 58 of Regulations 74, an application of the two methods being found in the ruling published as I. T. 2383 (C. B. VI–2, 29).

In the ruling published as I. T. 2509 (C. B. VIII–2, 78) it was held that the method of apportionment prescribed by article 58 of Regulations 74 in the case of rights entitling the holder to subscribe for stock of the same class or preference as the stock in respect of which the rights are issued is equally applicable in the case of rights entitling the holder to acquire stock of a character or preference different from that of the stock in respect of which the rights are issued, and that the apportionment of the cost or other basis of the stock in respect of which the rights are received is to be made in the ratio or proportion of the respective values of the stock and rights as of the date of the issuance of the rights in accordance with article 600 (rule 2) of Regulations 74.

Article 39 of Regulations 69 provides that if the rights issued deal with stock of a character or preference different from the stock in respect of which the rights are issued, the basis for determining the gain or loss from the sale of the old shares, or of the rights in cases where the rights are sold, shall be ascertained in accordance with the principles laid down in article 1599. Article 1599(2) of Regulations 69 provides that where the stock distributed (in connection with a reorganization) is of a character or preference different from the stock in respect of which the distribution is made, the cost or other basis of the old shares of stock shall be divided between such old stock and the new stock in proportion, as nearly as may be, to the respective values of each class of stock, old and new, at the time the new shares of stock are distributed. The principle thus expressed in article 1599 is that of a simple proportion, pursuant to which the cost or other basis of the old shares is apportioned between the old and new shares according to the relative values of each. In substance, it is the same principle of apportionment as that prescribed in article 39.

Substantially the same provisions and the same reference to article 1599 are contained in article 39 of Regulations 65 and corresponding articles of the prior regulations. It will, therefore, be seen that in all cases where the rights entitled the recipient to subscribe for stock of a character or preference different from the stock in respect of which the rights were issued, the rule consistently prescribed by the regulations is that the cost or other basis of the

stock in respect of which the rights were issued shall be apportioned between such stock and rights in proportion, as nearly as may be, to their respective values at the time the rights were issued. In accordance with the regulations, the apportionment is to be made according to the relative values of the stock and rights at the time the rights are issued, and in cases where the rights are exercised, the basis of the shares so acquired is properly determined by adding the subscription price of the new shares to the portion of the basis of the old shares allocated to the rights. I. T. 2383, above cited, does not require a contrary conclusion, inasmuch as that ruling pertains to rights entitling the holder to subscribe for stock of the same class or preference as the stock in respect of which the rights were received.

In accordance with the foregoing it is held that the proper rule required by the regulations to be applied in all cases, both before and after January 1, 1925, where rights were or are issued entitling the recipient to acquire stock of a character or preference materially different from the stock in respect of which the rights were issued, is that the cost or other basis of the old shares shall be apportioned between the old shares and the rights in proportion to the respective values of such shares and rights at the time the rights were issued. Where the rights were or are exercised, the basis of the shares so acquired is the sum of the portion of the basis of the old shares apportioned to the rights and the subscription price of the shares of stock so acquired.

ARTICLE 63: Improvements by lessees. X–37–5202
G. C. M. 9755

REVENUE ACT OF 1928.

> No income is realized by the lessor by reason of improvements by the lessee until the lessor either comes into beneficial use or possession thereof, or, under the terms of the lease, it is clear that the lessor will come into such use and possession while such improvements are yet valuable—and in the latter case only to the extent of the present value of the future right to such use and possession.

An opinion is requested whether the taxpayer (lessor) received income in the year 1929 as a result of the surrender of a lease in that year by the M Company (lessee).

On December —, 1907, the trustees of the N Trust, parties of the first part, entered into an agreement whereby they as lessors granted, demised, and let the coal underlying certain lands for a period of 40 years or until the coal should be exhausted, the lease providing that if the coal was not exhausted at the end of the 40-year period, the lease was to continue in effect until such exhaustion occurred. On December —, 1908, the lessees under this lease agreement assigned all of their right, title, and interest therein to the M Company. The lease provided that the lessee should pay to the lessor a minimum annual royalty, a specific royalty for every ton of coal mined, and a specific royalty for every ton of coke manufactured from the coal. The lease also required the lessee to make at its own expense the necessary openings for the mines and "to construct, erect, make, or place upon the said tract of land and in the said

mines all of the necessary buildings, structures, improvements, machinery, fixtures, and appliances for the successful prosecution of the business of mining coal and manufacturing coke." Paragraph 8 of the lease agreement provided as follows:

The parties of the second part shall keep in good repair all the buildings, structures, improvements, machinery, fixtures, and appliances constructed, erected, made, or placed upon the said tract of land, or in the said mines, and the same shall be regarded as part of the realty and shall not be removed from the said described or demised premises without the written consent of the parties of the first part; but nothing herein contained shall be construed as prohibiting the removal of machinery, fixtures, or appliances worn out or otherwise unfit for use when such removal shall be for the purpose of renewing, replacing, or improving the same or substituting new or more suitable appliances therefor.

Paragraph 15 of the lease contained the following provisions:

In case of any breach or nonperformance of any of the covenants, conditions, or requirements of this lease, which, on the part of the parties of the second part, are to be performed, fulfilled, and kept, the parties of the first part may, at their option, give to the parties of the second part, and to any mortgagee or trustee entitled to notice under the provisions above set forth, notice in writing that unless the said covenant or covenants, condition or conditions, requirement or requirements shall be performed within sixty (60) days thereafter, this lease and the estate hereby granted shall be forfeited and determined, and at the expiration of the said sixty (60) days, unless the said covenant or covenants, condition or conditions, requirement or requirements have in the meantime been performed, this lease shall be and become absolutely void and of no effect, and it shall and may be lawful for the parties of the first part to at once reenter and take possession of the said described and demised premises, and of the buildings, structures, improvements, machinery, fixtures, and appliances constructed, erected, made, and placed thereupon, or attached thereto, without compensation therefor to the parties of the second part, so as to vest the title to the said described and demised premises and the buildings, structures, improvements, machinery, fixtures, and appliances in the parties of the first part, with like effect as if the parties of the first part had at their own cost constructed, erected, made, and placed all of the said buildings, structures, improvements, machinery, fixtures, and appliances, and had never demised the said premises.

Paragraph 18 of the lease provided in part as follows:

Whenever during the said term of forty (40) years, or any renewal or extension thereof, the parties of the second part shall have taken out and removed from the said described or demised premises all of the said coal, and shall have paid to the parties of the first part all of the rents and royalties due or accruing under the terms of this lease up to such time, the covenants of this lease as to the payment of rents and royalties shall at once cease and become inoperative, anything heretofore expressed to the contrary notwithstanding, and within a period of six (6) months thereafter the parties of the second part shall and will surrender to the parties of the first part peaceable and quiet possession of the said premises; IT BEING UNDERSTOOD AND AGREED that during the said period of six (6) months the parties of the second part may remove from the said premises any and all buildings, structures, improvements, machinery, fixtures, and appliances affixed or placed thereon by the parties of the second part.

In June, 1929, the lease was forfeited because of the failure of the M Company and its inability to continue to mine coal and pay the royalties fixed by the lease. Upon forfeiture of the lease the N Trust came into possession of the leased premises, including the mine shafts, buildings, and other improvements stated to have been placed upon the leased property by the lessee prior to March 1, 1913.

The Income Tax Unit has taken the position that the termination of the lease resulted in income to the lessor (taxpayer) in the year 1929 to the extent of the value of the improvements placed upon the

property by the lessee which at the time of the forfeiture came into possession of the lessor.

The taxpayer contends that no income was derived by it in the year 1929 through the termination of the lease agreement for the reason that the buildings, mine shafts, and other improvements were acquired by it when placed upon the property by the lessee prior to March 1, 1913, or, in other words, that title to such assets vested in the taxpayer prior to March 1, 1913, and not in the year 1929. The taxpayer relies primarily upon the specific provisions of paragraph 8, quoted above, to the effect that the buildings and other improvements placed upon the property "shall be regarded as a part of the realty and shall not be removed * * * without the written consent of the parties of the first part." The taxpayer also contends that it was the intention of the parties to the agreement that title to all improvements should vest immediately in the lessor, and that under Pennsylvania law the test whether property annexed to land constitutes a part of the realty or personal property depends upon the intention. (*Hill* v. *Sewald*, 53 Pa., 271; *Seeger* v. *Pettit*, 77 Pa., 437; *Kinnear* v. *Scenic Railways Co. of America*, 228 Pa., 390.)

In the opinion of this office it is immaterial for purposes of the question submitted whether legal title vested in the lessor at the time the improvements were made. If such title did vest, it was at most a bare legal title, the beneficial use remaining in the lessee.

In *Miller* v. *Gearin* (258 Fed., 225) it was held that no income was received by the lessor by reason of repossession of property upon which the lessee had erected a building, but in that case the lessee did not have the right to remove the fixtures upon termination of the lease period. To the same effect is *Cryan* v. *Wardell* (263 Fed., 248). In the instant case, however, at the termination of the lease period the lessee was entitled to remove the improvements. Thus, the lessor could not come into beneficial use and possession of the improvements at any time unless and until there was a forfeiture by the lessee. Any actual gain or advantage to the lessor depended upon the happening of the forfeiture contingency. Similarly, acquisitions derived from forfeitures may not be anticipated—i. e., realization thereon must await the act or event of forfeiture.

The provisions of the regulations dealing with income and deductions of the various parties to a lease on account of improvements erected by the lessee are in accord with the above discussion. Article 63 of Regulations 74 treats the lessor as realizing income by reason of the erection of improvements that may not be removed by the lessee. The clear inference therefrom is that no income is realized by the lessor by improvements that may be removed by the lessee. The same article provides that such income (that may be optionally reported in the year the improvements are made or over the life of the lease) is measured by the value of such improvements subject to the terms of the lease. That article limits such income to the value of the improvements at the expiration of the lease period, which means (at least as respects those lessors who elect to return it all in one year) the value of the improvements at the end of the lease period discounted to reach the present value of the expectancy.

Article 130 of Regulations 74, which approaches the question from a different viewpoint, is in accord. The lessee who erects buildings

at his own expense is the one recognized as having made the capital investment. The lessee is entitled to recover his capital either through annual deductions spread over the period of the lease or through depreciation deductions based on the life of the improvements, depending upon whether the remaining term of the lease is less or more than the life of the improvements.

Article 204 recognizes that the lessor has no right to depreciate such improvements while the beneficial use and possession is in another. When the applicable regulations are read together, it is clear that no income is realized by the lessor by reason of improvements by the lessee until he either comes into beneficial use or possession thereof, or, under the terms of the lease, it is clear that he will come into such use and possession while such improvements are yet valuable—and in the latter case only to the extent of the present value of the future right to such use and possession. The position of the Bureau in this respect has been generally sustained by the Board. (See *Gilbert Butler et al.*, 4 B. T. A., 756; *Shelby D. Scott*, 9 B. T. A., 1219, C. B. VII–1, 28; and *Joseph L. B. Alexander et al.*, 13 B. T. A., 1169.)

It is, therefore, the opinion of this office that gain was realized by the taxpayer in 1929, when the forfeiture occurred, to the extent of the value of such improvements at that time.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

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

ARTICLE 82: Proceeds of insurance—Compensation—Pensions. X–39–5222 I. T. 2591

REVENUE ACT OF 1928.

Where an insurance policy, taken out by a member of a partnership on the life of another one of the partners, is assigned for a cash consideration to the firm by the insurer's executor, the insurer having died, the firm, as transferee, is only entitled to exemption from taxation of the actual value of the consideration and the amount of premiums and other sums subsequently paid by it.

Inquiry is made whether the firm of A & Bro. comes within the meaning of the term "transferee" as used in section 22(b)2 of the Revenue Act of 1928.

B, one of the partners in the firm of A & Bro., took out life insurance policies on the life of A, also a member of the firm. B died and the executors of his estate assigned the policies to the firm for a cash consideration, and thereafter the firm paid the premiums. Upon the death of A the proceeds of the policies were paid to the firm.

Section 22(b) of the Revenue Act of 1928 provides for the exclusion from gross income and exemption from tax of—

(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 * * *.

(2) ANNUITIES, ETC.—* * * 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) * * *.

It is apparent from the foregoing statement of facts that the transfers here in question were made for the purpose of protecting the financial interests of the firm, so that the policies after the transfers constituted contracts of indemnity. For the purposes of section 22(b)2, supra, such transfers should be distinguished from transfers which result in designating beneficiaries who are the natural objects of the insured's bounty. In this latter type of case the policy after transfer is not a contract of indemnity. In this connection see *Central Bank of Washington* v. *Hume* (128 U. S., 195) and *Connecticut Mutual Life Insurance Co.* v. *Schaefer* (94 U. S., 457).

In view of the fact that the transfers here in question were for the purpose of indemnifying the transferee, it is held that the transfers of policies fall within the meaning of section 22(b)2, supra, and the firm as transferee is only entitled to exemption from taxation of the actual value of the consideration and the amount of the premiums and other sums subsequently paid by it.

ARTICLE 84: Interest upon State obligations. X–51–5324
G. C. M. 10043

REVENUE ACT OF 1928 AND PRIOR REVENUE ACTS.

The interest paid by a State, or a political subdivision thereof, upon an award for property condemned for public purposes is not exempt from income tax as interest on an "obligation" of a State, or a political subdivision thereof.

Recommended that Office Decision 591 (C. B. 3, 113) be revoked.

An opinion is requested relative to the taxability of interest on the proceeds of a condemnation award made to the taxpayer by the city of R.

It is contended that under Office Decision 591 (C. B. 3, 113) the interest on the award constitutes interest on an obligation of a State, or political subdivision thereof, and is exempt from Federal income tax under section 22(b) of the Revenue Act of 1928. Careful consideration has been given to Office Decision 591, in which it was held that interest on an award made by a city for property condemned for public purposes constituted interest on an obligation of a political subdivision of a State within the meaning of section 213(b)4 of the Revenue Act of 1918. However, the position taken in that decision is not, in the opinion of this office, in harmony with the position taken by the Board of Tax Appeals in more recent decisions. In the case of *Kansas City Southern Railway Co. et al.* v. *Commissioner* (16 B. T. A., 665), the Board of Tax Appeals (pages 688, 691) said:

The word obligation "is in its general and most extensive sense, synonymous with duty"; it has been defined "to be 'the constraining power or authoritative character of a duty, a moral precept, a civil law, or a promise or contract voluntarily made; that to which one is bound; that which one is obliged or bound to do, especially by moral or legal claim; a duty.'" The word as used in a will reciting, "Whereas, I now hold obligations against certain of my friends, I direct my executor not to urge the payment of any such obligations before the space of two full years after my decease" has been defined to mean "a written instrument like a note or bond"; in a strictly technical sense it

has been defined to mean a "bond." See Words and Phrases, First Series, volume 6, pages 4878–4879.

Thus it will be seen that the word obligation may include, in the broader sense, a mere duty, or it may mean a contract, either express or implied, and in a stricter sense, it may be confined to bonds or other similar evidences of indebtedness.

* * * * * * *

There are further considerations which lead us to the conclusion that the petitioner's contention is fallacious. Although the word "obligation" is broad enough to cover the duty resting upon the Government to pay just compensation, we are of the opinion that its application is more restricted under section 213(b)4 of the Revenue Act of 1918. We have examined the Congressional Record so far as practicable with respect to all the Acts containing these exemption clauses, but unfortunately we find no expressions upon the part of the legislators which would aid in determining precisely what should be treated as an obligation under the statute. The apparent purpose for exempting from taxation the interest upon obligations of the United States was to facilitate the flotation of low-interest-bearing Government securities, thus partially compensating for the higher interest rates of competitive private issues. The reason for the exemption does not apply to interest on obligations, construing that word in the broad sense for which the petitioner contends.

In that case the Board of Tax Appeals had under consideration the question of what constituted an obligation of the United States within the meaning of section 213(b)4(C) of the Revenue Act of 1918, which corresponds with section 22(b)4(C) of the Revenue Act of 1928. However, the statute there involved extended the same exemption to interest on "obligations of a State, Territory, or any political subdivision thereof." (See section 213(b)4(A) of the Revenue Act of 1918, which corresponds with section 22(b)4(A) of the Revenue Act of 1928.) In view of this fact, the definition of an obligation, as laid down in the above case, must be accepted as controlling in the instant case. In this connection see *H. Oliver Thompson* v. *Commissioner* (17 B. T. A., 987), where it was urged before the Board that ground rent received from the mayor and city council of Baltimore was exempt from tax under section 213(b)4(A) of the Revenue Act of 1924 as interest upon an obligation of a State. In disposing of this contention the Board (page 988) said:

* * * But even though the annual payment required under the lease can be considered as in the nature of interest, it is still not interest upon an "obligation" within the meaning of the Revenue Act, but would rather fall within the principles laid down in *Kansas City Southern Railway Co. et al.* (16 B. T. A., 665), holding that interest due from the United States Government to railroads on the use of property during the period of Federal control is not interest on "obligations of the United States" as that term is used in the statute.

The reasoning of the Board in these cases is sustained by the principle underlying the exemption of State obligations from Federal taxation.

This principle was stated by Chief Justice Marshall in the case of *Weston* v. *The City Council of Charleston* (2 Peters, 449, 468) in the following language:

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct Government. To any extent, however inconsiderable, it is a burden on the operations of Government. It may be carried to an extent which shall arrest them entirely.

* * * * * * *

The tax on Government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.

In that case the court had under consideration the question of the power of the city of Charleston, S. C., to impose a tax on Federal obligations. However, the same reasoning was followed by the Supreme Court in *Pollock* v. *Farmers' Loan & Trust Co.* (157 U. S., 429, 586), in holding invalid a Federal tax on the interest from municipal securities. In the latter case the court, after quoting from *Weston* v. *The City Council of Charleston*, supra, said:

* * * Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution.

The extent of this limitation on the power of Congress to tax received consideration by the Supreme Court in the case of *Willcuts* v. *Bunn* (282 U. S., 216), which presented for consideration by the court the question of the power of Congress to tax gain from the sale of county and city bonds. In the course of its opinion in this case the Supreme Court (pages 225, 234) said:

The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. 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. * * *

The history of income tax legislation is persuasive, if not controlling, upon the question of practical effect. (*Plummer* v. *Coler*, supra, pages 137, 138.) 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. * * *

It is evident from the foregoing statements of the Supreme Court that the implied limitation upon the power of Congress to tax obligations of the States precludes the imposition of a tax upon such obligations only if the tax so levied imposes a real and substantial burden on the States' borrowing power. The obligation of a State to pay compensation for property taken for public purposes arises as a result of the exercise of a State's power of eminent domain, not as a result of, or in the course of, the exercise of a State's borrowing power. Clearly, therefore, a tax upon the interest paid on such an obligation does not adversely affect the States' power to borrow money.

It is the opinion of this office that under the foregoing authorities interest paid by a State, or a political subdivision thereof, upon an award for property condemned for public purposes is not exempt from income tax as interest on an "obligation" of a State, or a political subdivision thereof, under the express exemption provisions of the various Revenue Acts. Furthermore, the interest upon the award is not exempt from taxation under the implied constitutional limitation upon the power of Congress to tax interest derived from

"obligations" of a State or political subdivision thereof. It is accordingly recommended that Office Decision 591 be revoked.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 22(c).—GROSS INCOME: INVENTORIES.

ARTICLE 105: Inventories by dealers in securities.

X-33-5170
G. C. M. 9656

REVENUE ACT OF 1928.

A taxpayer who buys and sells securities for his own account exclusively for investment or speculation is not entitled to the classification of "dealer in securities," regardless of the fact that he maintains an office and office force. He is, therefore, precluded from the use of inventories in computing his net income.

The opinion of this office is requested whether A, the taxpayer, should be denied the classification of a "dealer in securities" under article 105 of Regulations 74, which permits the use of inventories by dealers in securities in computing their net income.

A devotes his entire business time to the purchase and sale of securities, maintaining an office and office force and handling all of his transactions through brokers. His books are kept on the accrual basis and at the end of each day his accountant supplies him with an inventory of securities on hand based on the closing market figures. The taxpayer states that his sole objective in the purchase of securities is the gain to be derived from their quick and profitable resale.

Section 22(c) of the Revenue Act of 1928 provides:

Inventories.—Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

Article 105 of Regulations 74, which is identical, in so far as the definition is concerned, with article 1615 of Regulations 69 under the Revenue Act of 1926, reads as follows:

Inventories by dealers in securities.—A dealer in securities, who in his books of account regularly inventories unsold securities on hand either (*a*) at cost, (*b*) at cost or market, whichever is lower, or (*c*) at market value, may make his return upon the basis upon which his accounts are kept; provided that a description of the method employed shall be included in or attached to the return, that all the securities must be inventoried by the same method, and that such method must be adhered to in subsequent years, unless another be authorized by the Commissioner. For the purpose of this rule a dealer in securities is a merchant of securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. If such business is simply a branch of the activities carried on by such person, the securities inventoried as here provided may include only those held for purposes of resale

and not for investment. Taxpayers who buy and sell or hold securities for investment or speculation and not in the course of an established business, and officers of corporations and members of partnerships who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule. * * *

The taxpayer insists that he is entitled to the classification of a "dealer in securities" chiefly because of the maintenance of a regular place of business and staff and the devotion of his entire time and business energy. These facts alone are not sufficient to sustain his contention. The method of conducting the business, the manner in which he holds himself out to the *public*, and the object of his transactions determine whether a taxpayer is a merchant or a "dealer in securities" within the meaning of the regulations.

In *In re Marston* (16 Fed. Cas. No. 9142) and *In re Woodward* (30 Fed. Cas. No. 18001) it was held that one who bought and sold securities for speculation through brokers, even though in an established business, was not a merchant or tradesman; and in *In re Moss* (17 Fed. Cas. No. 9877) a broker, who conducted his business exclusively through other brokers, was denied the classification. All three of these cases arose under the bankruptcy laws.

If a taxpayer buys and sells for his own account rather than for the account of others, he is more a "customer" than a "dealer." He occupies in the marketing of securities the same relative position as the "ultimate consumer" occupies in trade. The volume of his transactions, the fact that some of his brokers consider him a trader, or the maintenance of a place of business would not make him either a "merchant" or a "dealer."

I. T. 1818 (C. B. II–2, 39) contains a full treatment of the subject and cites abundant authorities for denying the classification to one who buys and sells for his own account only. The decisions and rulings of the courts and Board of Tax Appeals, subsequent to I. T. 1818, support rather than weaken it. The most recent decision and one which appears definitely to conclude the matter is *Adirondack Securities Corporation* v. *Commissioner* (23 B. T. A., 61), where the classification was denied solely because of the purchase and sale for the petitioner's account only.

In *Harriman National Bank* v. *Commissioner* (43 Fed. (2d), 950) the court held that there were sufficient dealings with customers to grant to the taxpayer the classification of a "dealer in securities." I. T. 2564 (C. B. X–1, 107) holds that the Harriman Bank decision is not to be taken as sufficiently broad to permit all banks to inventory securities, i. e., that the mere fact that there is a regular established place of business is not sufficient. This line of decisions and rulings appears to settle the question. As the facts in the instant case show that, regardless of the establishment of an office and office force, A bought and sold securities for his own account exclusively, either for investment or speculation, he is not entitled to the classification of a "dealer in securities." He is, therefore, precluded from the use of inventories in computing his net income.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

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

ARTICLE 121: Business expenses. X–27–5126
I. T. 2579

REVENUE ACT OF 1928.

If a safety deposit box is used primarily in connection with the safeguarding of income-producing securities the rent paid therefor would constitute a deductible business expense.

ARTICLE 121: Business expenses. X–30–5149
I. T. 2582

REVENUE ACT OF 1928.

The fees paid by the taxpayer corporation during its fiscal year to its registrar and transfer agent in connection with the transfer of its capital stock are ordinary and necessary business expenses under section 23(a) of the Revenue Act of 1928, and constitute allowable deductions from gross income.

A question is presented relative to the deductibility of fees paid by the M Company during its fiscal year ended on June 30, 1930, to its registrar and transfer agent in connection with the registration and transfer of its capital stock.

When stock issued by the taxpayer was listed on the New York Stock Exchange it was necessary to appoint a registrar and transfer agent to take care of the registration and transfer of the taxpayer's capital stock in accordance with the requirements in that respect. The expenditures in connection with the registration and transfer of the capital stock were not incurred as the result of the organization, reorganization, or recapitalization of the corporation, but were the usual recurring charges which arose from year to year in connection with the maintenance of a correct record of the company's stockholders. It is stated that, in accordance with the decision rendered by the United States Board of Tax Appeals in the case of Dome Mines, Ltd. (20 B. T. A., 377), the amounts so claimed as deductions were disallowed by the examining officer on the theory that such expenditures were not incurred in carrying on the taxpayer's business within the meaning of section 23(a) of the Revenue Act of 1928.

The above-mentioned decision pertains exclusively to the deductibility of an amount expended with respect to the listing of Dome Mines, Ltd., stock on the New York Stock Exchange at or about the time of the formation of that corporation. In that decision the Board stated as follows:

> If the expenditure does not meet the statutory requirement, it can not be deducted, even though it may not properly be classified as a "capital expenditure." It is clear that there are expenditures which are not of a capital nature and yet do not meet the test of the statute.
>
> Assuming, as does counsel for the petitioner, that the petitioner was not benefited by this expenditure and that the listing was for the benefit of the stockholders, it seems impossible to say that the payment was an ordinary and necessary expense of carrying on the business of the petitioner, which business is stated in the application for listing to be gold mining and milling. * * *
>
> If counsel is incorrect in his assumption, stated above, and the listing of its stock was made for the benefit of the petitioner, it seems clear that the rights

and benefits thereby acquired continued indefinitely and that their cost can not be deducted as an expense of the year in which payment was made.

The meaning of the above-quoted language appears to be that the expenditure does not come within the meaning of an ordinary and necessary business expense, regardless of whether or not it inured to the benefit of the corporation.

In the ruling published as I. T. 1836 (C. B. II–2, 158) such listing fee is specifically held to be a capital expenditure and not an allowable deduction as a business expense. The above-mentioned Board decision is, therefore, not materially inconsistent with the ruling of the Bureau.

Such listing fee is, of course, paid but once and is usually paid at or about the time of the organization or reorganization of the corporation. After the stock is so listed, the fees paid to the registrar and transfer agent are annual recurring charges required in maintaining an up-to-date record of the stockholders. Although the taxpayer corporation is formed primarily to engage in a particular business, the corporate organization must be maintained in order to carry on the business for which it is formed. This involves the holding of meetings of the stockholders annually or oftener in order to elect the officers through whom the corporation acts, and in order to vote on various matters in connection with the business, which require the sanction of the stockholders. For such purpose, it is obvious that the proper records showing the names and addresses of the stockholders must be maintained. While in the case of a corporation, the stock of which is not listed on an exchange, such records are ordinarily maintained by the corporation itself, there does not appear to be any reason for making a distinction in that respect where a corporation, whose stock is listed on the exchange, employes a separate registrar and transfer agent to maintain such records.

It is held, therefore, that the fees paid by the taxpayer corporation during its fiscal year to its registrar and transfer agent in connection with the transfer of its capital stock are ordinary and necessary business expenses under section 23(a) of the Revenue Act of 1928, and therefore constitute allowable deductions from gross income.

Where such expenditures have been incurred in connection with a merger or consolidation they do not constitute allowable deductions from gross income. (See Appeal of Emerson Electric Manufacturing Co., 3 B. T. A., 932.)

ARTICLE 122: Traveling expenses. X–45–5281
I. T. 2602

REVENUE ACT OF 1928.

The necessary expenses paid or incurred by a regular member of the Association of M Companies in sending a representative to the annual convention of the association, for the sole purpose of furthering the business interests of such member, constitute an allowable deduction for Federal income tax purposes. I. T. 1369 (C. B. I–1, 123) revoked.

Advice is requested whether the expenses paid or incurred by a member of the Association of M Companies in sending a representative to attend the annual convention of the association are deductible

by the member for Federal income tax purposes as necessary expenses incident to business.

Membership in the above mentioned association may be acquired by all persons, firms, and corporations engaged in the indicated business under regulatory laws. Provision is made in the constitution and by-laws of the association that all persons, firms, associations, and corporations not eligible to be regular members but subscribing to and advocating the purposes of the association shall be eligible to be associate members. The purposes of the association as outlined in its constitution "are to encourage the business of ———; to advocate the enactment of laws designed to regulate and foster such business; to assist in the enforcement of such laws; to encourage and maintain truthfulness in advertising; to bring about cooperation with State officials and obedience to their lawful rulings and regulations; to engage lawfully in the exchange and dissemination of information concerning such laws and such business." The association is comprised of approximately 1,200 members doing business in about 25 States of the Union.

Section 23(a) of the Revenue Act of 1928 provides for the allowance of a deduction in computing net income of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

It is evident that regular members of the association may derive a business advantage from sending a representative to the annual convention as well as from maintaining a membership in the association. In view of the decision of the Board of Tax Appeals in *Cecil M. Jack* v. *Commissioner* (13 B. T. A., 726, C. B. VIII–1, 22), it is held that if a regular member of the Association of M Companies sends a representative to its annual convention for the sole purpose of furthering the business interests of such member, the necessary expenses paid or incurred constitute an allowable deduction for Federal income tax purposes. I. T. 1369 (C. B. I–1, 123), holding to the contrary in the case of amounts expended by a physician in attending a medical convention, is revoked.

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

ARTICLE 151: Taxes.

X–27–5127
I. T. 2580

REVENUE ACT OF 1928.

The gasoline tax imposed by the State of Oklahoma is deductible in the Federal income tax return of the consumer who pays it and to whom it is not refunded. If, however, the 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.

An opinion is requested whether the excise tax on gasoline imposed by the State of Oklahoma is deductible in the income tax return of the individual consumer.

The gasoline tax of the State of Oklahoma is imposed in accordance with the provisions of chapter 239, Oklahoma Session Laws, 1923, as amended by chapter 198, Oklahoma Session Laws, 1925;

chapters 278, 279, and 280, Oklahoma Session Laws, 1929; and house bill No. 461, approved April 20, 1931.

Section 1, chapter 198 of the Laws of Oklahoma, 1925, as amended by chapter 278 of the Laws of Oklahoma, 1929, provides:

There is hereby levied an excise tax of four cents (4c) per gallon on each and every gallon of gasoline consumed in the State of Oklahoma, to be reported and collected as hereinafter provided. * * *

Section 1, house bill No. 461, supra, defines the term "gasoline" as used in existing laws, levying an excise tax on gasoline, as "motor fuel" and the term "motor fuel" is defined to mean and include every volatile and inflammable liquid or substance in common or commercial use, used and usable, for the purpose of generating power for the operation and propulsion of motor engines or internal combustion engines, regardless of the name by which such substance may be known or sold.

The pertinent sections of house bill No. 461 read as follows:

SEC. 2. * * *

"Distributor" shall mean and include every person, importing or causing to be imported into the State of Oklahoma, any motor fuel for use, distribution or sale and delivery in Oklahoma, after the same reaches the State of Oklahoma; and every person producing, refining, preparing, distilling, manufacturing or compounding such motor fuel in Oklahoma for use, distribution or sale and delivery in the State of Oklahoma; provided, that, in the event any person, as above defined, shall sell motor fuel for delivery in tank car lots to any purchaser who is a licensed distributor under the provisions of this act, then the seller shall not be deemed to be the distributor of the motor fuel so sold; but such purchaser thereof, in tank car lots, who shall use the same in whole or in part within this State, for the purpose of operating or propelling motor engines, or who shall resell such motor fuel for delivery within this State, in less than tank car lots, or who shall resell such motor fuel to any purchaser who is not a licensed distributor, shall be deemed the distributor of the motor fuel so used or sold; provided, further, that when any person importing motor fuel into Oklahoma, shall sell such motor fuel in tank car lots, or in its original package or container, to any purchaser for use, distribution or sale and delivery in the State of Oklahoma, then, except as hereinbefore provided, such purchaser and not the seller shall be deemed the distributor of the motor fuel contained in such tank car lots or other original package or container.

"Retailer" or "retail dealer" shall mean and include every person who sells or professes or undertakes to sell motor fuel, in the State of Oklahoma, without qualifying as a licensed distributor under the provisions of this act; and every such retailer or retail dealer doing business in Oklahoma who buys, for sale or use, motor fuel, of anyone except a distributor, licensed under the provisions of this act, shall be deemed to be a distributor and shall be subject to all the provisions of the act applicable to such distributors.

SEC. 3. The excise tax imposed by law shall be paid by the distributor, to the Oklahoma Tax Commission; provided, that every distributor paying such tax, or being liable for the payment thereof, shall be entitled to charge and collect the amount of the excise tax on motor fuel sold by him, as a part of the selling price of such fuel; and no city, town, county, township or other subdivision of the State shall levy or collect any tax upon the sale, distribution or use of motor fuel as herein defined.

SEC. 4. (a) The object of this act is to provide for the payment and collection of the excise tax accruing under the laws of the State on the sale of all motor fuel when sold, or on its use, when used in this State.

(b) Motor fuel produced, refined, manufactured or compounded in, or imported into, this State, and subsequently sold for exportation and exported, shall not be subject to the excise tax; provided, however, motor fuel produced, manufactured, refined or compounded in this State and transported out of the State, and brought back into the State and used or distributed for resale and use within the State, shall be subject to the excise tax.

* * * * * * *

SEC. 27. Whenever any distributor or any retailer or retail dealer sells motor fuel to a purchaser, under circumstances which preclude the collection of the excise tax levied by any law of the State, because of any provision of the Constitution of the United States or any law thereof, enacted pursuant to the Constitution, then any tax paid on such motor fuel, by the seller thereof, shall be refunded in all cases where such seller fails to collect the tax from the purchaser; provided, however, such refund shall be made in the way and manner hereinafter specified.

SEC. 28. (a) When any person buys motor fuel within the State of Oklahoma, to be used by him for operating farm tractors or stationary engines owned and operated by the purchaser of such motor fuel and used exclusively for agricultural purposes, he shall demand and receive of the seller of such motor fuel his motor fuel tax free, and an invoice or ticket, which shall be on a form which shall be prescribed and furnished by the Oklahoma Tax Commission, showing the number of gallons of motor fuel so bought, the purpose for which it is intended to be used and the date and place of purchase, the name of the seller and the name of the purchaser, the name of the agent or employee, if any, making the sale, and the name of the agent or employee, if any, making the purchase, the manner of delivery and the place of delivery; and said invoice or ticket shall show the deduction of the tax and the said invoice or ticket shall show such other information as may be required by the rules and regulations of the Oklahoma Tax Commission; and such invoice or ticket shall be made at the time of the sale or delivery of the motor fuel covered thereby; and it shall, under no circumstances, be made at any other time.

(b) The seller of said tax free motor fuel shall be entitled to deduct from his subsequent payments to the Oklahoma Tax Commission, the amount of tax he has paid on gasoline sold for said agricultural purposes from which sale price the tax was deducted. Provided, said deductions shall be allowed only after verified claims on forms approved and furnished by the tax commission, shall have been filed with said tax commission by said seller.

SEC. 29. (a) Whenever any person purchases motor fuel within this State, on which, by reason of his nonliability to the excise tax, a refund may be due, he shall, on or before the end of the calendar month succeeding the month wherein such motor fuel was purchased, render a statement to the Oklahoma Tax Commission showing the number of gallons of motor fuel so purchased, the amount of money paid therefor, and the amount of excise tax included in the money so paid, and showing such other facts and matters as may be required by the rules and regulations of the Oklahoma Tax Commission.

* * * * * * *

(c) Such statement, in addition to other facts and matters that the Oklahoma Tax Commission may require to be shown, shall show when, where and how the motor fuel covered thereby was used; and the Oklahoma Tax Commission shall not approve any claim for refund unless the same is made in the manner herein provided and within the time herein specified; and any such claim, if found to be correct, shall be approved by the Oklahoma Tax Commission and shall be certified to the State auditor, who shall draw his warrant therefor on the State treasury; and the same shall be paid out of the State highway construction and maintenance fund.

Section 23(c) of the Revenue Act of 1928 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, promulgated under the Revenue Act of 1928, provides that in general taxes are deductible only by the person upon whom they are imposed.

From the foregoing quoted sections it appears that the gasoline tax of the State of Oklahoma is imposed upon the consumer. It is held, therefore, in accordance with the provisions of section 23(c) of the Revenue Act of 1928 and article 151 of Regulations 74, that the gasoline tax imposed by the State of Oklahoma is deductible in the Federal income tax return of the consumer who pays it and to whom it is not refunded. If, however, the 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.

REVENUE ACT OF 1928.

The liquid fuels tax imposed by the State of Pennsylvania under the act approved May 21, 1931, known as "the liquid fuels tax act," is deductible in the income tax return of the distributor who pays it and to whom it is not refunded. If, however, such tax is added to or made a part of the business expenses of such distributor, it can not be deducted by him separately as a tax.

A ruling is requested relative to the deductibility, for Federal income tax purposes, of the liquid fuels tax imposed by the State of Pennsylvania under the act approved May 21, 1931, known as "the liquid fuels tax act."

Section (2) of the said act defines the term "distributor" to mean every natural person, association, or corporation who or which—

1. Produces, refines, prepares, blends, distills, manufactures, or compounds liquid fuels in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein.
2. Imports or causes to be imported from any other State or Territory of the United States, or from a foreign country, liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery in and after reaching the Commonwealth, other than in the original package, receptacle, or container.
3. Imports or causes to be imported from any other State or Territory of the United States liquid fuels for his own use in the Commonwealth of Pennsylvania, or for sale and delivery therein, after the same have come to rest or storage therein, whether or not in the original package, receptacle, or container.
4. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use, or for sale and delivery therein, from any person who has imported the same from a foreign country.
5. Purchases or receives liquid fuels in the original package, receptacle, or container in the Commonwealth of Pennsylvania for his own use therein, or for sale and delivery therein, from any person who has imported the same from any other State or Territory of the United States, in case such liquid fuels have not, prior to such purchase or receipt, come to rest or storage in the Commonwealth of Pennsylvania.
6. Receives and, in any manner, uses or distributes liquid fuels in the Commonwealth of Pennsylvania on which the tax provided for in this act has not been previously paid.

The term "liquid fuels" is defined by the said act as follows:

All distillates of, and condensates from, petroleum, natural gas, coal, coal tar, vegetable ferments, and other oils, including among others, gasoline, naphtha, benzol, benzine, kerosene, fuel oil, gas oil, or alcohols, which are ordinarily, practically, and commercially usable in internal combustion engines for the generation of power.

Sections 4, 5, and 17 of "the liquid fuels tax act" read in part as follows:

SEC. 4. *Imposition of tax; exemptions and deductions.*—A State tax of 3 cents a gallon, or fractional part thereof, is hereby imposed and assessed upon all liquid fuels used or sold and delivered by distributors within this Commonwealth, excepting liquid fuels delivered to the United States Government on presentation of a duly authorized United States Government exemption certificate or other evidence satisfactory to the department, and such liquid fuels used or sold and delivered as are not within the taxing power of this Commonwealth under the commerce clause of the Constitution of the United States:

Provided, That the tax herein imposed and assessed shall be collected by and paid to the Commonwealth but once in respect to any liquid fuels.

Distributors shall be liable to the Commonwealth as taxpayers for the payment of the tax imposed by this act.

SEC. 5. *By whom tax is payable.*—Every distributor using or delivering liquid fuels upon which a tax is imposed by this act shall pay the tax into the State treasury, through the department, in the manner and within the time specified in this act * * *.

SEC. 17. *Refunds.*—The board of finance and revenue may refund to distributors taxes, penalties, and interest paid by them on liquid fuels delivered to the United States Government, or paid as the result of an error of law or of fact or of both law and fact. Claims for refund shall be made under the procedure prescribed by the fiscal code.

Section 23(c) of the Revenue Act of 1918 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, promulgated under the Revenue Act of 1928, provides that in general taxes are deductible only by the person upon whom they are imposed.

From the foregoing quoted sections of the law of the State of Pennsylvania imposing a tax on liquid fuels, it appears that the tax was intended to be imposed upon the distributors of liquid fuels and not upon the consumers thereof.

It is held, therefore, in accordance with the provisions of section 23(c) of the Revenue Act of 1928 and article 151 of Regulations 74, that the tax in question is deductible in the income tax return of the distributor who pays it and to whom it is not refunded. If, however, such tax is added to or made a part of the business expenses of such distributor, it can not be deducted by him separately as a tax.

ARTICLE 151: Taxes. X–36–5194
I. T. 2588

REVENUE ACT OF 1928.

The motor vehicle fuels tax imposed by chapter 239, Laws of New Jersey, 1930, is deductible in the Federal income tax return of the consumer who pays it and to whom it is not refunded. If, however, such tax is added to or made a part of the business expenses of such consumer, it can not be deducted by him separately as a tax. As chapter 239, Laws of New Jersey, 1930, did not take effect until December 1, 1930, only such motor vehicle fuels taxes as were paid thereunder on and after December 1, 1930, may be deducted under this ruling.

A ruling is requested in regard to the deductibility of the motor vehicle fuels tax imposed by the law of the State of New Jersey.

A taxpayer states that the collector of internal revenue for the fifth district of New Jersey disallowed an amount claimed as a deduction for the total motor vehicle fuels tax paid to the State of New Jersey in 1930. The ruling of this office published as I. T. 2532 (C. B. IX–1, 106) was cited by the collector to substantiate the disallowance of the item in question. I. T. 2532 reads in part as follows:

In the statutes above referred to, the Legislature of New Jersey has not indicated a purpose or intention to impose the motor vehicle fuel tax upon the consumer either by expressly stating such intention, by providing for a refund

of the tax to the consumer who uses motor vehicle fuel for purposes other than in the operation of motor vehicles as defined in the statute, by providing that the dealer shall collect the tax from the consumer, or by indicating in any other way that the burden of the tax is placed upon the consumer * * *.

Chapter 239, Laws of New Jersey, 1930, is entitled and contains in part the following provisions:

An act to amend and supplement an act entitled "An act to impose a tax on the sale of motor vehicle fuels as herein defined; regulating the sale of such fuels; providing for the collection of said tax, for reports of sales of such motor fuels, and for the disposition of the revenue derived from such tax, and fixing penalties for the violation of the terms thereof," approved April 1, 1927.

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section 4 of said act is hereby amended to read as follows:

4. Every distributor shall, on or before the last business day of each month, render a report to the commissioner of motor vehicles, stating the number of gallons of such fuel sold or used in the State by him during the preceding calendar month on forms to be furnished by said commissioner of motor vehicles. On or before the 1st day of the calendar month succeeding the filing of said report each distributor shall pay to the commissioner of motor vehicles a tax of 3 cents per gallon upon each gallon so reported, which shall be in addition to any motor vehicle license fee now or hereafter assessed in this State.

* * * * * * *

3. Any person, firm or corporation using such fuel for the purpose of propelling motor boats or motor vessels shall be entitled to a refund of 1 cent per gallon of the tax paid under section 4 of this act, as amended, upon filing with the commissioner of motor vehicles a certification, under oath of such person, or a member of such firm, or an officer of such corporation, on forms furnished for such purpose by the commissioner of motor vehicles, showing the number of gallons of such fuel used for such purpose.

4. This act shall take effect on the 1st day of December following the general election held in November in the year 1930. * * *.

Section 23(c) of the Revenue Act of 1928 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, promulgated under the Revenue Act of 1928, provides that in general taxes are deductible only by the person upon whom they are imposed.

In I. T. 2532 it was held that the motor vehicle fuels tax then imposed by the State of New Jersey was deductible for Federal income tax purposes by the distributor who pays it and not by the consumer. It appears that the purpose of chapter 239, Laws of New Jersey, 1930, was to impose the tax in question upon the consumer on and after December 1, 1930. It is held, therefore, in accordance with the provisions of section 23(c) of the Revenue Act of 1928 and article 151 of Regulations 74, that the motor vehicle fuels tax imposed by chapter 239, Laws of New Jersey, 1930, is deductible in the Federal income tax return of the consumer who pays it and to whom it is not refunded. If, however, such tax is added to or made a part of the business expenses of such consumer, it can not be deducted by him separately as a tax. As chapter 239, Laws of New Jersey, 1930, did not take effect until December 1, 1930, only such motor vehicle fuels taxes as were paid thereunder on or after December 1, 1930, may be deducted under this ruling.

ARTICLE 151: Taxes. X–38–5210
G. C. M. 9774

REVENUE ACT OF 1928.

Where a corporation in the State of Connecticut is on the accrual basis, the deduction for State excise taxes based on net income is allowable, for Federal income tax purposes, for the taxable year in which the income is earned.

An opinion is requested relative to the proper date of accrual of a tax based on corporate income under the laws of the State of Connecticut.

The taxpayer corporation files its Federal income tax returns on the basis of fiscal years ending June 30. Its books are kept and its income tax returns are filed on the accrual basis. On the return filed for the fiscal year ended June 30, 1929, the taxpayer claimed as a deduction an amount representing the Connecticut State excise tax paid for the fiscal year ended June 30, 1928. The revenue agent disallowed the amount claimed, since it represented a tax based on income for the fiscal year ended June 30, 1928, and allowed as a deduction the amount of the State tax applicable to the fiscal year ended June 30, 1929.

The taxpayer contends that the State tax is not self-determined; that such tax for the fiscal year ended June 30, 1928, is not due and payable until the amount thereof is computed by the State tax commissioner; and that the taxpayer has no means of knowing such amount until about August 1 of each year. In support of these contentions the taxpayer relies upon General Counsel's Memorandum 1240 (C. B. VI–1, 65) and the provisions of the State taxing statute. The State statute, so far as is here material, provides as follows:

> Each such company * * * shall pay a tax annually to the State computed upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income, subject to the provisions of sections 2 and 3 of this act, such company is required to pay a tax to the United States. Each company subject to the tax * * * shall render to the tax commissioner * * * on or before the 1st day of April of each year * * * a true copy of the last return made to the collector of internal revenue, of the annual net income arising or accruing from all sources in its fiscal or the calendar year next preceding * * *. (Section 1392 of the General Statutes of Connecticut, revision of 1918, as amended by chapter 81, section 1, Public Acts of the State of Connecticut, 1923.)
>
> The tax commissioner, on or before the 1st day of July in each year, shall make a list of companies subject to the tax computed upon their net income, with the amount apportioned to this State * * * and a tax shall be laid on each such company equal to 2 per centum of such net income * * * and the tax commissioner shall enter the amount of such tax against the name of each such company * * *. Such tax shall be payable on or before the 1st day of August in such year, * * *. (Section 1395 of the General Statutes of Connecticut, revision of 1918, as amended by chapter 81, section 2, Public Acts of the State of Connecticut, 1923.)

Although the State tax is based on, or measured by, net income, the Supreme Court of Connecticut has held it to be an excise tax. (*Underwood Typewriter Co.* v. *Chamberlain*, 94 Conn., 47, 108 Atl., 154.) This decision was affirmed by the United States Supreme Court (254 U. S., 113).

General Counsel's Memorandum 1240, cited by the taxpayer, was explanatory of the holding of the Board of Tax Appeals in the

Russell Milling Co. case appearing in 1 B. T. A., 194, which held that State, county, and municipal taxes could be accrued only when they *became due*, and that no part could be accrued or deducted in ascertaining net income when the *due date* was not within the fiscal year. After the decision in the Russell Milling Co. case, an opinion was rendered by the Supreme Court of the United States in the case of *United States* v. *Anderson* (269 U. S., 422, T. D. 3839, C. B. V–1, 179), which held that a taxpayer on the accrual basis could deduct from gross income all losses and expenses applicable to the process of earning income whether immediately payable or not; that the munitions tax was such an expense; and that such a tax accrued in the year the income was earned. The court said in part:

* * * In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. * * *

General Counsel's Memorandum 1240 was revoked by General Counsel's Memorandum 6273 (C. B. VIII–1, 168), due to the decision of the Board of Tax Appeals in the case of *H. H. Brown Co.* v. *Commissioner* (8 B. T. A., 112, C. B. IX–2, 8).

Section 23 of the Revenue Act of 1928 provides:

In computing net income there shall be allowed as deductions:
(c) *Taxes generally.*—Taxes paid or accrued within the taxable year except— * * *.

The exceptions are not material to this case.

Section 43 provides:

The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period.

In General Counsel's Memorandum 8553 (C. B. IX–2, 109), the question at issue was the year of accrual of the Massachusetts corporation excise tax based on net income. That memorandum reads in part as follows:

Under the act of the Massachusetts Legislature approved April 15, 1927, a corporation filing its return for the calendar year 1928 is not required to wait until April 1, 1929, to accrue its liability for the excise tax which is payable in October, 1929. At the end of the calendar year 1928 all the events had occurred which fixed the amount of the tax and determined the liability of the taxpayer to pay it under the rule laid down in *United States* v. *Anderson*, supra. Its taxable year having closed, the corporation could compute its net income as required by the statute, as well as ascertain its corporate excess. Thus, on December 31, 1928, it could determine to a reasonable degree of certainty the amount of excise tax which would be payable to the State of Massachusetts in October, 1929, for the date for determining the corporate excess and the limitation of the tax was moved back from April 1, 1929, to the end of its taxable year. It is concluded, therefore, that a corporation, which filed its 1928 income tax return on the basis of the calendar year and has adopted the accrual method of accounting, may accrue as of December 31, 1928, the corporation excise tax payable to the State of Massachusetts in October, 1929. * * *

In the case of *H. H. Brown Co.* v. *Commissioner*, supra, involving an excise tax based on income in the State of Massachusetts, the Board said in part:

The basic idea under the accrual system of accounting is that the books shall immediately reflect obligations and expenses definitely incurred and income definitely earned without regard to whether payment has been made or whether payment is due. Expenses incurred in the operations for a particular year are properly accrued in the accounts for that year, although payment may not be due until the following year. Under the accrual system, *the word "accrued" does not signify that the item is due in the sense of being then payable.* On the contrary, the accrual system wholly disregards due dates. Neither is it necessary that the amount of an incurred liability be accurately ascertained in order to accrue it. [Italics supplied.]

General Counsel's Memorandum 6075 (C. B. VIII–1, 76) involved several questions, one of which was the date of accrual of the Wisconsin income tax. In that memorandum it was stated in part as follows:

In determining whether under the accrual method of accounting a possible future expense or outgo may be taken as a true expense or outgo (and thus be charged against possible future receipts constituting items of real income under the method of accounting), the criterion to be applied is necessarily the status of the possible future expense or outgo during the particular accounting period or taxable year. Certainly the criterion can not be the status thereof at any time later than the close of the accounting period, for it is of that time, and as of no later time, that the accounting records must speak both under sound principles of accounting and under the requirements of the Federal income tax laws. As respects a liability raised by law in the form of a tax upon the income of the accounting period (or as under the Wisconsin income tax act the average of the incomes of the accounting period and of preceding accounting periods), the criterion of a proper accrual for that accounting period is necessarily the status of the income tax liability at the close of the accounting period (or as under the Wisconsin income tax act at the close of the last of the accounting periods with respect to which the tax liability is raised). At that time all the events have occurred which fix and determine the income of the accounting period (or as under the Wisconsin income tax act the total incomes of the accounting periods in question). At that time, and as of no earlier time, has that which is the subject matter of the tax—the income of the accounting period (or as under the Wisconsin income tax act the average of the incomes of the accounting periods)—come into existence; and as of that time, and as of no earlier time, is the amount and character thereof determinable. And while the amount thereof may not actually have been determined, all that is required to fix and determine it is a mathematical calculation.

The taxpayer admits that in the case of income taxes which are self-determined the accrual date will be the last day of the tax period, but contends that since the taxes in this case are not self-determined, such taxes accrue only when they become due and payable. The taxpayer's contention is not in harmony with the view of the Board of Tax Appeals as expressed in *Brown* v. *Commissioner*, supra. The accrual system wholly disregards due dates; neither is it necessary that the amount of an incurred liability be *accurately* ascertained in order to accrue it. As stated in General Counsel's Memorandum 6075, above, the only act necessary for the taxpayer to perform, in order to fix and determine the tax for the purpose of accrual, was a mathematical calculation.

The principle underlying the decisions and rulings relating to the proper time for accrual of State income taxes or excise taxes based on income is that at the close of the taxable year a taxpayer, without any action by the taxing authorities, can ascertain, to a reasonable degree of certainty, the amount of the tax it will have to pay because all of the events which fix the amount of the tax and determine the liability of the taxpayer to pay it have occurred.

For the reasons above stated, it is the opinion of this office that where a corporation in the State of Connecticut is on the accrual basis, the deduction for State excise taxes based on net income is allowable, for Federal income tax purposes, for the taxable year in which the income is earned.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 151: Taxes. X–40–5226
G. C. M. 9822

REVENUE ACT OF 1928.

The license fee imposed by the State of Iowa on motor vehicle fuel 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 fee 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.

An opinion is requested whether the license fee on motor vehicle fuel imposed by the State of Iowa is deductible as a tax for Federal income tax purposes by the consumer or by the distributor.

The State of Iowa formerly imposed a license fee on gasoline. (See chapter 251–A1, Code of Iowa, 1927, as amended by chapters 20 and 29, session laws of Iowa, 1928–29; and see chapter 241–B1, section 4755–b38, Code of Iowa, 1927.)

The law was changed in 1931 to a license fee on "motor vehicle fuel." (See chapter 108, Laws of Iowa, 1931, amending chapter 251–A1 and section 4755–b38. Chapter 251–A1 was further amended by chapters 124 and 125, Laws of Iowa, 1931.)

Section 5093–a1 of chapter 251–A1, as so amended, provides that a "license fee of 2 cents per gallon or fraction of a gallon is hereby imposed on all motor vehicle fuel used or otherwise disposed of in this State for any purpose whatsoever."

Section 4755–b38 of chapter 241–B1, Code of Iowa, 1927, as amended, provides, in part, as follows:

There is hereby levied on all motor vehicle fuel imported and used within this State a license fee of 1 cent per gallon, which shall be in addition to the license fee levied by chapter 251–A1. All of the provisions and conditions of said chapter 251–A1 relating to the levy, collection or payment of the license fee on motor vehicle fuel shall apply with equal force to the license fee levied herein. * * *

In other sections of chapter 251–A1 the law defines the term "distributor" and requires such distributor to procure a license from the treasurer of the State permitting the transaction of business (sections 5093–a2 and 5093–a4). The license fee, above referred to, is paid by the distributor into the State treasury (section 5093–a5). The distributor, if he retails motor vehicle fuel, must keep posted "a placard showing the total sale price per gallon, including license fee, of all grades of motor vehicle fuel sold, said placard to have printed thereon the words 'State license fee included.'" (Section 5093–a3.)

Section 5093–a8 of said chapter 251–A1, as so amended, reads, in part, as follows:

Any person who shall buy or use any motor vehicle fuel for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes or aircraft, motor vehicles, trucks and tractors

owned and operated by the State of Iowa, or by a municipality for municipal purposes within the State, or who shall purchase or use any motor vehicle fuel for cleaning or dyeing, or for any other commercial use except for propelling motor vehicles operated in whole or in part upon the public highways of the State or upon the streets of any city or town in the State, shall be reimbursed and repaid *the amount of such license fee paid by him*, upon presenting to the treasurer of State a statement accompanied by the original invoices showing such purchase which statement shall set forth the total amount of motor vehicle fuel so purchased, paid for and used by such consumer other than for propelling motor vehicles operated or intended to be operated in whole or in part upon any of the public highways of this State or upon the streets of any city or town of this State and the treasurer of State shall, upon the presentation of such invoice, cause to be repaid from the funds collected hereunder, the amount of such license fee paid by such consumer on motor vehicle fuel used for purposes other than propelling motor vehicles as hereinbefore provided. * * * [Italics supplied.]

While this tax is called, in the statute, a "license fee," the Supreme Court of Iowa, in the case of *State* v. *Northern Iowa Oil Co.* (229 N. W., 214), refers to it as a "tax" on gasoline, and see *Solberg* v. *Davenport* (232 N. W., 477), where the Supreme Court of Iowa held that where the amount for license is substantially in excess and out of proportion to expense incurred by the State, it is generally regarded as a revenue measure, particularly where no provision for inspection or regulation is made. The terminology of the statute is not controlling in determining the question whether it provides for a "license fee" or a "tax."

Section 23(c) of the Revenue Act of 1928 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, promulgated under the Revenue Act of 1928, provides that in general taxes are deductible only by the person upon whom they are imposed.

It is quite clear, from the provisions of the laws of Iowa, quoted above, and especially those contained in section 5093–a8, that it is the purpose to impose the motor vehicle fuel license fee upon the individual consumer and not upon the distributor. In accordance with the provisions of section 23(c) of the Revenue Act of 1928 and article 151 of Regulations 74, it is, therefore, the opinion of this office that the license fee imposed by the State of Iowa on motor vehicle fuel 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 fee 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.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 151: Taxes.

REVENUE ACT OF 1928.

Taxes paid to Republic of Cuba under Article XV of Cuban tax law and Article III, chapter 6, emergency tax law of Cuba. (See I. T. 2596, page 184.)

ARTICLE 151: Taxes. X–43–5262
G. C. M. 9793

REVENUE ACT OF 1928.

Under the law of the State of Iowa ownership of personal or real property on January 1 is the event which determines the taxpayer's liability for taxes thereon, and taxpayers whose books of account are kept on an accrual basis may accrue Iowa taxes as of that date.

An opinion is requested relative to the proper accrual date, for income tax purposes, of real and personal property taxes in the State of Iowa.

The pertinent provisions of law will be found in the following sections of the Code of Iowa, 1927:

6956. *Listing—by whom.*—Every inhabitant of this State, of full age and sound mind, shall list for the assessor all property subject to taxation in the State, of which he is the owner, or has the control or management, in the manner herein directed: * * *.

6957. *Listing property of another.*—Any person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own, except as herein otherwise directed; but he shall list it separately from his own, giving the assessor the name of the person or estate to which it belongs.

* * * * * * *

6959. *Personal property—real estate — buildings.* — Property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the 1st day of January. Real estate shall be listed and valued in each odd-numbered year, and in each year in which real estate is not regularly assessed, the assessor shall list and assess any real property not included in the previous assessment, and also any buildings erected since the previous assessment, with a minute of the tract or lot of land whereon the same are situated, and the auditor shall thereupon enter the taxable value of such buildings on the tax list as a part of the real estate to be taxed; but if such buildings are erected by another than the owner of the real estate, they shall be listed and assessed to the owner as personal property, but buildings and fixtures erected on real estate held under a lease of longer than three years' duration shall be assessed as real estate.

Provision is also made in section 6958 for taxation of property in the hands of an agent, and provision is made in section 6960 for taxation of real property where the owner is unknown. With respect to the proper accrual date of taxes imposed by the State of Iowa on personal property, it seems clear from the wording of the statute that taxes are levied against the person who is the owner of such personal property on January 1 of each year. In the case of *Arie* v. *Burnside* (182 Iowa, 1107, 166 N. W., 376) it was held by the Supreme Court of the State of Iowa, where the owner of personalty sold it, taking a mortgage for the price, and the purchaser was in possession on the 1st day of January, that the personalty was taxable to the purchaser and not to the seller. It has also been held that where personal property is brought into the State after January 1 it can not be taxed for that year. (*Wangler Bros.* v. *Black Hawk County*, 56 Iowa, 384, 9 N. W., 314.) Likewise, cattle brought into the State for feeding purposes and kept in the State until after the 1st of January are subject to tax, although the owner is a nonresident of the State. (*Fennell* v. *Pauley*, 112 Iowa, 94, 83 N. W., 799.) In general, assessments of personal property are held to relate back to the 1st day of the preceding January. (*In re Kauffman's Estate*, 104 Iowa, 639, 74 N. W., 8; *Talley* v. *Brown*, 146 Iowa, 360, 125 N. W.,

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

* * * In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it.

In 37 Cyc., page 788, it is stated as follows:

Ordinarily and in the absence of statute to the contrary, property is taxable only to the person who is the owner thereof at the date for its listing or assessment, or the date fixed by statute as of which its ownership for purposes of taxation is to be determined; and taxes are not a lawful charge on property unless assessed in the name of its owner, and any attempt to enforce the payment of taxes assessed and charged to the wrong person will be ineffective. * * *

It has been held that the ownership of property as of the date for which the assessment of taxes is made is the "event" which determines the liability of the taxpayer to pay it within the rule laid down by the United States Supreme Court in *United States* v. *Anderson*. (See G. C. M. 6272, C. B. VIII–1, 170, relating to Texas; G. C. M. 6273, C. B. VIII–1, 168, relating to Illinois; G. C. M. 6667, C. B. VIII–2, 94, relating to Washington; G. C. M. 7190, C. B. VIII–2, 113, relating to Indiana; I. T. 2495, C. B. VIII–2, 98, relating to Kansas; G. C. M. 7235, C. B. VIII–2, 197, relating to Minnesota; and G. C. M. 8218, C. B. IX–2, 106, relating to Ohio.)

In view of the foregoing, it is the opinion of this office that under the law of the State of Iowa ownership of personal property on January 1 is the event which, in accordance with *United States* v. *Anderson*, supra, determines the taxpayer's liability for taxes thereon and fixes the amount thereof. Taxpayers in that State whose books of account are kept on the accrual basis may, therefore, accrue personal property taxes as of January 1.

With respect to the proper accrual date of taxes imposed upon real property, the law of the State does not, as in the case of personal property, specify a particular date as of which the property should be listed for assessment. Section 7202 of the Code of Iowa, 1927, provides that taxes upon real estate shall be a lien thereon against all persons except the State. No specific date as of which the lien for taxes on real property attaches is provided for in the law. Except as between vendor and purchaser such lien shall attach on and after the 31st day of December in each year. (Section 7204 of the Code of Iowa, 1927.) That date can not, however, be accepted as controlling for the purpose of accrual of real property taxes for Federal income tax purposes.

In the case of *First Congregational Church of Cedar Rapids* v. *Linn County* (70 Iowa, 396, 30 N. W., 650), the plaintiff purchased in August, 1880, a city lot for the purpose of erecting thereon a house of worship, and it was used exclusively for objects connected with the church. An assessment was made against the grantor who was the owner in January, 1880, and the question before the court was whether the lot was exempt from taxation for the year 1880. The court concluded that the lot was not exempt from taxation on the theory that on the date as of which the assessment was made the

property was not owned by the corporation which was exempt from taxation. The court in its opinion used the following language:

* * * The taxes are levied annually, and *each assessment and levy are for the year in which they are made.* The lot in question was, without doubt, in a condition to be taxed for more than seven months of the year; being, for that time, the property of the plaintiff's grantor. Within that time it had been assessed. The taxes were not levied until September. It is not necessary to inquire whether the tax was a lien from the assessment. It is sufficient to know that for seven months of the year it was subject to taxation, and that during all that time it was subject to assessment and other proceedings preliminary to the levy of the tax for the whole year, whereby it was brought within the exercise of the taxing power. The lot, being subject to taxation, certainly ought to pay taxes for that time. But there are no provisions of the law under which the tax may be apportioned. The State must lose the whole tax, or the plaintiff must pay it. In the exercise of its power to protect its revenue the State may enforce the tax for the whole year. The exemption from taxation, under code, section 797, was not intended to act retrospectively, and exempt from prior taxes, or prior liability for taxes. The provision was intended to operate prospectively, and to exempt property from future liability. * * *

In *Nunngesser* v. *Hart* (122 Iowa, 647, 98 N. W., 505) real property was sold September 26, 1900, the purchase price was paid in installments, and the deed was delivered and possession given on March 1, 1901. The Supreme Court of Iowa held that the vendor was liable for the taxes thereon. The court in its opinion stated as follows:

* * * Taxes on real estate are required to be paid by the owner, and the question at once arises, who was the owner of the property in controversy, within the meaning of the statute, on January 1, 1901? * * *

In the case of *Clinton* v. *Shugart* (126 Iowa, 179, 101 N. W., 785) the question arose between the vendor and the vendee as to who was responsible for the payment of certain taxes, where a landlord agreed to sell the tenant the premises for a specified sum to be paid on or before the day when the lease would expire. On July 3, 1901, the parties entered into a written agreement whereby the purchaser of the property was to pay $500 in cash and the balance on or before January 2, 1903. The court concluded that the landlord who sold the property was liable, as he was in possession on January 1, 1903. The following extract from the opinion rendered by the Iowa Supreme Court is of particular interest:

* * * The contract was not one by which the appellees obtained any present right to the use or possession of the property. They were in possession under a lease, and remained in possession until January 1, 1903, in their rights as tenants alone. In other words, the appellant was, in a legal sense, herself in possession by her tenants, and she was receiving the agreed rental therefor. * * * We think it an established rule of law in this State that, as between the parties to an executory contract for the sale of land, where the seller retains the possession, rents, and profits until the conveyance is due, the duty rests upon him to pay the accruing taxes, in the absence of any agreement by which the purchaser assumes that obligation. * * *

In *Mohr* v. *Joslin* (162 Iowa, 34, 142 N. W., 981) the Supreme Court of Iowa held that where the vendor of the land remained in possession after December 31 he was liable for the taxes thereon, even though he had entered into an enforceable contract for the sale of the land and had deposited a warranty deed in escrow which was to be delivered at a future date. Again, in *Iowa Wesleyan*

College v. *Knight* (224 N. W., 502), the Supreme Court of Iowa said:

* * * We surmise the seat of trouble to be in the fact that the property had been assessed as against plaintiff's grantor on January 1, 1924, and that the levy [of the tax] of September 8, 1924, was made pursuant to such assessment. * * *

While the foregoing decisions of the Supreme Court of the State of Iowa do not clearly point out the date as of which taxes are assessed on real property, it appears that such taxes are assessed to the person who is the owner on January 1, the same as in the case of taxes on personal property. It is, therefore, the opinion of this office that in Iowa ownership of real property on January 1 is the event which determines the taxpayer's liability for taxes thereon and fixes the amount. Accordingly, taxpayers whose books of account are kept on an accrual basis may accrue Iowa real property taxes as of that date.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 23(m).—DEDUCTIONS FROM GROSS INCOME: BASIS FOR DEPRECIATION AND DEPLETION.

ARTICLE 251: Charges to capital and to expenses in the case of timber. X–33–5171 T. D. 4320

INCOME TAX.

Charges to capital and to expenses in the case of timber—Article 251 of Regulations 74, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 251, Regulations 74, is hereby amended to read as follows:

ART. 251. *Charges to capital and to expenses in the case of timber.*—In the case of a timber property, all expenditures for administration, protection, and other carrying charges shall be charged to expense if paid or incurred, as the case may be, on or after August 6, 1931, regardless of whether the taxpayer has substantial income from the property or from other sources. Where the taxpayer has under applicable regulations charged to capital account carrying charges paid or incurred, as the case may be, prior to August 6, 1931, in respect of timber property held for future operation, such carrying charges will be regarded as items properly chargeable to capital account for the purpose of making proper adjustment to the cost or other basis of the property. (See article 561.) In the case of timber operations all expenditures for plants, improvements, and equipment shall be charged to capital account for purposes of depreciation.

H. F. MIRES,
Acting Commissioner of Internal Revenue.

Approved August 6, 1931.

OGDEN L. MILLS,
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 fund for relief of unemployment. (See I. T. 2603, page 161.)

PART III.—CREDITS AGAINST TAX.

SECTION 31.—EARNED INCOME CREDIT.

ARTICLE 312: Definitions and limitations. X–42–5252
G. C. M. 9825

REVENUE ACT OF 1928.

Where a husband in the State of California is a member of a partnership, but the wife is not a member, and the partnership is one in which both personal services and capital are material income-producing factors, and original separate returns are filed, and where 20 per cent of the net profits of the partnership business constitutes reasonable compensation for the personal services actually rendered by the husband, the amount thereof, within the limitation of section 31(a)3 of the Revenue Act of 1928, may be divided and one-half treated as the earned income of each spouse. The income which is derived from the partnership should be equitably apportioned so as to treat part of the profits as attributable to the use of the husband's separate capital and part attributable to his personal activity, ability, and capacity. That part of the partnership profits which is attributable to the use of the husband's separate capital should be taxed to him as his separate income and that part of the partnership profits which is attributable to his activity, ability, and capacity is community income which should be divided between the husband and wife, one-half of such community income being taxed to each.

Where husband and wife in California are members of the same partnership they are taxable in their individual capacity, the same as other members of a partnership, and no attempt should be made to apportion the partnership profits on any basis except on the basis of the percentage of interest owned by each member. The principle stated in General Counsel's Memorandum 6645 (C. B. VIII–2, 182), namely, that the spouse who actually rendered the services may treat an amount not in excess of 20 per cent of the half of his profits reported by him as earned income for the purpose of computing his earned income credit, can no longer be followed.

General Counsel's Memorandum 6645 (C. B. VIII–2, 182) revoked.

An opinion is requested relative to the proper method of reporting income from a partnership business in which both personal services and capital are material income-producing factors, and the amount of earned income which may be claimed by husband and wife where separate returns are filed. In the consideration of the questions submitted it is necessary to discuss (a) the case where the husband is a member of the partnership but the wife is not a member, and (b) the case where the husband and wife are members of the same partnership.

Section 31 of the Revenue Act of 1928, relating to earned income credit, provides in part as follows:

SEC. 31. EARNED INCOME CREDIT.

(a) *Definitions.*—For the purposes of this section—

(1) "Earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income producing factors, a reasonable allowance as compensation for the personal services actually rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

Section 185 of the Revenue Act of 1928, relating to earned income which may be claimed by members of a partnership, reads as follows:

SEC. 185. EARNED INCOME.

In the case of the members of a partnership the proper part of each share of the net income which consists of earned income shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement.

The earned income credit will be allowed to the members of a partnership with respect to the share of net income belonging to each which consists of earned income. (Article 921, Regulations 74.) No difficulty arises in computing the earned income in community property States where the husband receives compensation for services actually rendered, in view of the decision in *McLarry* v. *Commissioner* (30 Fed. (2d), 789, Ct. D. 355, C. B. X–1, 307), which has been accepted by the Bureau as a precedent. In that case the circuit court of appeals held that one-half of the amount of compensation received by the husband for personal services is properly returnable by the wife as income in a community property State and should be treated as "earned income" under section 209(a) of the Revenue Act of 1924 to the maximum amount of $10,000. (The maximum amount was increased to $20,000 under the Revenue Act of 1926, and to $30,000 under the Revenue Act of 1928.)

The Bureau in Mimeograph 3879 (C. B. X–1, 141), with reference to the decision of the circuit court of appeals in *McLarry* v. *Commissioner*, supra, held that the earned income credit of the wife in community income cases would be determined in accordance with that decision. The question presented in the instant case involves the related question whether there should be any distinction between the treatment of (a) income actually earned by the husband in a community property State, and (b) theoretical earned income based on 20 per cent of the profits of the trade or business, in cases where capital and personal services are both income-producing factors. Section 31 of the Revenue Act of 1928, quoted above, specifically provides that in the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income-producing factors "a reasonable allowance as compensation for the personal services actually rendered by the taxpayer, not in excess of 20 per centum *of his share of the net profits* of such trade or business, *shall be considered as earned income.*" Of course, under

this provision personal services must be actually rendered, but for earned income purposes a reasonable allowance as compensation for such services can not exceed 20 per cent of his share of the net profits.

Consequently, where a reasonable allowance for personal services actually rendered is equal to 20 per cent of a husband's share of the partnership net profits, no distinction should be made between earned income based on 20 per cent of the husband's share of the partnership profits and earned income derived from the partnership where capital was not an income-producing factor. The result is that in applying the rule laid down in *McLarry* v. *Commissioner* and Mimeograph 3879, supra, earned income which is received for services actually rendered, as well as earned income which consists of 20 per cent of his share of the profits of the business, may be divided equally between husband and wife in a community property State. The amount of earned income based on 20 per cent of the profits of the trade or business will not in every case, however, coincide with the amount of taxable income shown on the individual return. This office has taken the position that it is not necessary for the amount of earned income shown on the return to be the same as the amount of taxable income.

In General Counsel's Memorandum 6563 (C. B. VIII–2, 186) it was held that a loss in one business in which both personal services and capital are material income-producing factors is not a deduction in computing the net profit from another business in which both personal services and capital are material income-producing factors; neither is the loss a deduction which is properly allocable to or chargeable against earned income. While the loss in one business will operate to reduce total net income and thereby reduce the tax payable, it will not reduce the amount of the earned income. In that case it was recognized that in some instances the amount treated as earned income would exceed the amount reported as taxable income. In a more recent ruling published as I. T. 2551 (C. B. IX–2, 146) the Bureau held that a partner's share of the net gain derived by the partnership from the sale of its capital assets and the interest received by it from tax-exempt securities should be included in the total amount of a partner's profits from the partnership in computing his earned income from that source.

In California the situation is complicated by the construction placed on the community property laws by the courts of that State. It has been held that inasmuch as the income from a partnership between the husband and a third party was in part attributable to his separate capital and in part to his personal labor or effort, such part of the profit as accrues from the use of capital is separate property and such part as is due to the personal activity, ability, and capacity of the husband is community property. (*Pereira* v. *Pereira*, 156 Cal., 1, 103 Pac., 488; *McDuff* v. *McDuff*, 48 Cal. A., 175, 191 Pac., 957; *In re Gold's Estate*, 170 Cal., 621, 151 Pac., 12.) In *Pereira* v. *Pereira*, in discussing the apportionment of income between that part attributable to the use of the capital of the husband and that part attributable to the activity, ability, and capacity of the husband, the supreme court of the State used the following language:

* * * The separate property should have been credited with some amount as profit on this capital. It was not a losing business, but a very profitable one. It is true that it is very clearly shown that the principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property; but without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and, as the business was profitable, *it would amount at least to the usual interest on a long investment well secured.* * * * [Italics supplied.]

Furthermore, the Supreme Court of California in *In re Gold's Estate* stated as follows:

The plaintiffs claim that Gold's share of the partnership profits made after the marriage became Gold's separate property by reason of the fact that the partnership was formed prior to the marriage. Where a business has been carried on and capital has been invested therein before marriage, the entire profits therefrom, after marriage, are not necessarily separate property of the husband. The rules regarding the character of such property were considered in *Pereira* v. *Pereira* (156 Cal., 1, 103 Pac., 488, 23 L. R. A. (N. S.), 880, 134 Am. St. Rep., 107.) The principle there stated is that the interest of the husband in the capital of the partnership, as it was at the time of his marriage, is the husband's separate property, and that the question what part of the subsequent profits arises from the use of this capital and what part from the personal activity, ability, and capacity of the husband is to be determined by the court from the circumstances appearing in the case, that whatever accrues from the latter source is community property, and that the remaining profits must be classed as separate estate. * * *

It is necessary, therefore, in the audit of returns in the State of California, where the husband is a member of a partnership in which both personal services and capital are income-producing factors (and the wife is not a member of the partnership), that effect be given to section 31 of the Revenue Act of 1928 and to the law of the State as set forth in the court decisions referred to above. For example, assume that A formed a mercantile partnership on January 1, 1920, with X, and each paid into the partnership capital amounting to $200,000. On January 1, 1930, A married B and at that time his partnership interest was worth $300,000. The total partnership earnings for 1930 were $200,000, of which A was entitled to $100,000. Under the rule laid down by the Supreme Court of the State in *Pereira* v. *Pereira*, supra, and *In re Gold's Estate*, supra, the profits of $100,000 must be apportioned between the husband's separate estate and the community estate.

Applying the rule laid down in General Counsel's Memorandum 1030 (C. B. VI–1, 26), the income attributable to the husband's investment at the date of marriage, namely, $300,000, equal at least to the usual rate of interest (8 per cent), would amount to $24,000 for the taxable year 1930, which is a "fair return" on his investment. Assuming the husband's services were worth $36,000, i. e., they had a "fair value" of that amount, 24/60ths of $100,000 ($40,000) would represent income attributable to the husband's capital and 36/60ths of $100,000 ($60,000) would represent income attributable to personal services. The former is his separate income and the latter is community income, which may be divided between the husband and wife. The result is that if separate returns were filed the husband would be taxable on $40,000, partnership income attributable to the use of

his separate capital, and $30,000, community income attributable to his personal activity, ability, and capacity, making a total of $70,000, whereas the wife would be taxable on $30,000 as community income. This apportionment, based on the law of the State of California as interpreted by the State courts, can not be brought into harmony with section 31(a) of the Revenue Act of 1928. Under the Revenue Act the taxpayers in the instant case could claim not in excess of 20 per cent of the husband's share of the net profits of the business as earned income. As the husband's share of the partnership profits was $100,000, $20,000 could be claimed as earned income, which, under the rule set down in *McLarry* v. *Commissioner*, supra, could be divided between husband and wife, each claiming $10,000. As heretofore stated, however, it is not always possible to have the earned income coincide with the taxable income. (See G. C. M. 6563, supra, and I. T. 2551, supra.) Thus to allow the husband to treat 20 per cent of $70,000 (i. e., $14,000) as earned income, and to allow the wife to treat 20 per cent of $30,000 (i. e., $6,000) as earned income, is not permissible.

It is suggested, therefore, where this question arises in connection with the audit of original separate returns filed by husband and wife domiciled in California, that (first) where 20 per cent of the net profits of the partnership business constitute reasonable compensation for the personal services actually rendered by the husband, the amount thereof, within the limitation prescribed by section 31(a)3 of the Revenue Act of 1928, may be divided and one-half treated as earned income of each spouse; (second) the income which is derived from the partnership should be equitably apportioned so as to treat part of the profits as attributable to the use of the husband's separate capital and part attributable to his personal activity, ability, and capacity; (third) that part of the partnership profits which is attributable to the use of the husband's separate capital should be taxed to him as his separate income; and (fourth) that part of the partnership profits which is attributable to his activity, ability, and capacity is community income which should be divided between the husband and wife, one-half of such community income being taxed to each.

An apparent conflict in two published rulings of the Bureau raises the question as to the proper method to be used in the apportionment of income derived by the husband from a partnership in which capital was a material income-producing factor. In Solicitor's Memorandum 3883 (C. B. IV–2, 125) it was stated as follows:

> In the instant case it is clearly shown that the capital investment, including good will, was a material factor in producing the profits but that on account of the nature of the business—an automobile agency—the services of the husband were probably the principal factor in producing the profits.
>
> This office is of the opinion that the profits derived from the business are separable—the husband being entitled as his separate property to the usual interest upon an investment well secured. As the remaining profits are considered as being the result of the husband's services, they constitute community property.

In General Counsel's Memorandum 1030 (C. B. VI–1, 26) the following rules were laid down:

> 1. Where income from the business was produced both by separate property and the community, and both were essential factors in producing the income, the income should, if possible, be segregated between them in the proportion

which each in fact contributed to the success of the enterprise. A general method which may often be applied in such cases is the segregation of the income between the investment of the separate property and the community in the proportion which a fair return on such investment bears to the fair value of the personal services rendered by the spouses.

2. Where it appears that income is essentially attributable either to the separate property or to the community, the entire income should be taxed as separate income if essentially attributable to the separate property; otherwise as community income.

Where the profits of the business are small, due to unusual circumstances in any particular locality, "the usual interest upon an investment well secured" might result in treating the entire amount of the husband's share of the partnership profits as his separate estate, leaving no "remaining profits" which could be considered community income. On the other hand, to treat a high percentage of the partnership income as derived from personal services and the remaining profits as attributable to the use of the husband's separate estate, would result in a disproportionate amount of community income in other cases. What is an equitable apportionment can not be determined except by considering all the circumstances in each case. (*Pereira* v. *Pereira*, supra; *In re Gold's Estate*, supra.)

As stated in General Counsel's Memorandum 1030, "A general method which may often be applied in such cases is the segregation of the income between the investment of the separate property and the community in the proportion which a fair return on such investment bears to the fair value of the personal services rendered by the spouses." In view of the foregoing, Solicitor's Memorandum 3883 may be considered as amplified by General Counsel's Memorandum 1030.

With respect to those cases where the husband and wife are members of the same partnership, and both personal services and capital are material income-producing factors, it is necessary to refer to General Counsel's Memorandum 6645 (C. B. VIII-2, 182). That memorandum was based on a case where A and B, husband and wife, were domiciled in a community property State, and set forth certain principles which it was thought should govern with respect to the computation of earned income and the apportionment of the partnership profits between the two spouses who were members of the same partnership. In that memorandum it was concluded that there should be reported in the husband's separate return "one-half of each item of his share" of the partnership profits and "one-half of each item of his wife's share" of the partnership profits. The opinion also held that the "spouse who actually rendered the services may treat an amount not in excess of 20 per cent of the half of his profits reported by him as earned income for the purpose of computing his earned income credit."

The Board of Tax Appeals in *Glenn M. Harrington et al.* v. *Commissioner* (21 B. T. A., 260) held that "Whether, under California laws, a wife's partnership profits become community property, or whether they remain her own separate property, is immaterial in this instance," that is, where husband and wife are members of the same partnership. (Cf. *L. S. Cobb* v. *Commissioner*, 9 B. T. A., 547, C. B. VII-1, 7; *Charles Brown et al.* v. *Commissioner*, 13 B. T. A., 981, C. B. VIII-1, 6.) In General Counsel's Memorandum 9422

(C. B. X–1, 245) the distinction which the Board drew in the Harrington case was pointed out. In other words, where husband and wife in California are members of the same partnership they are taxable in their individual capacity, the same as other members of a partnership, and no attempt should be made to apportion the partnership profits on any basis except on the basis of the percentage of interest owned by each member. With respect to the rule stated in General Counsel's Memorandum 6645, namely, that *the spouse who actually rendered the services* may treat an amount not in excess of 20 per cent of the half of his profits reported by him as earned income for the purpose of computing his earned income credit, this principle can no longer be followed, in view of the decision of the Circuit Court of Appeals in *McLarry* v. *Commissioner*, supra, which has been accepted by the Bureau as a precedent. (See Mim. 3879.) Consequently, General Counsel's Memorandum 6645 is contrary to the rule laid down by the Board of Tax Appeals in the Harrington case as well as General Counsel's Memorandum 9422, in so far as it relates to a division of partnership profits, and is contrary to the decision in *McLarry* v. *Commissioner*, supra, and Mimeograph 3879, in so far as it relates to earned income.

In view of the foregoing, General Counsel's Memorandum 6645 is hereby revoked.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 312: Definitions and limitations. X–46–5287
G. C. M. 9939

REVENUE ACT OF 1928.

The earned income credit allowance in the case of a member of a partnership, engaged in a trade or business in which both personal services and capital are material income-producing factors, is measured by reasonable compensation for services rendered unless such reasonable compensation is in excess of 20 per cent of the partner's share of the net profits of the partnership business, in which event the earned income is limited to such 20 per cent.

Section 31(a)1 of the Revenue Act of 1928 reads in part as follows:

* * * In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income producing factors, a reasonable allowance as compensation for the personal services actually rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

It is contended that under paragraph (c) of Mimeograph 3283 (C. B. IV–1, 14) 20 per cent of each member's distributive share of the partnership profits should be considered as earned income (where services are rendered), regardless of how much salary may actually have been received.

This contention is not in accord with the views of the Bureau as stated in General Counsel's Memorandum 396 (C. B. V–2, 37) and I. T. 2286 (C. B. V–1, 52). The principles recognized therein have been sustained in so far as presented to the Board. (See *Leo Schwartz et al.* v. *Commissioner*, 7 B. T. A., 223, and *Charles E. Moser* v. *Commissioner*, 12 B. T. A., 671.)

These rulings and decisions follow the clear language of the Revenue Acts and hold that earned income (as concerns income derived from such a partnership) is measured by a reasonable allowance as compensation for personal services actually rendered by the taxpayer (irrespective of whether such compensation is called salary or distribution of profits), but if such compensation exceeds 20 per cent of his share of the net profits (computed without reduction by so-called salaries to members), then the earned income is limited to a maximum of 20 per cent of his share of such profits. That is, if reasonable compensation is an amount smaller than 20 per cent of his share of the net profits, the earned income allowance is measured by the amount of such reasonable compensation, but if reasonable compensation is more than 20 per cent of the partner's share of the net profits, then earned income is limited to 20 per cent of his share of such profits. (The rule just stated, of course, does not operate to defeat the $5,000 minimum earned income allowance to all taxpayers without regard to source of income.)

It is, therefore, the opinion of this office that the earned income credit allowance is measured by reasonable compensation for services rendered, unless such reasonable compensation is in excess of 20 per cent of the partner's share of the net profits of the partnership business, in which event the earned income is limited to 20 per cent of the partner's share of such profits.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 323: Methods of accounting. X–32–5162
G. C. M. 9571

REVENUE ACT OF 1928.

Under the plan outlined in the instant case, where a sale of an automobile is made on a credit basis, the purchaser executes a note or notes for the deferred payments, including a service charge. The notes are indorsed by the dealer and turned over to the finance company, which then remits to the dealer the unpaid portion of the selling price, not including the service charge. The finance company maintains a reserve account and upon taking over such notes credits the dealer therein with a portion of the service charge, which is to be paid to the dealer on complete payment of the notes.

The credit thus given by the finance company to the dealer is properly to be included and taken up as income on the accrual basis of accounting when the credit is made in favor of the dealer by the finance company.

The taxpayer is engaged in the business of retail dealer in automobiles and finances through a finance company the time payments on sales of the cars. No formal contract between the finance company and each dealer is entered into, but in a printed booklet there are stated the principal features of the plan, one of which is a reserve

maintained by the finance company to the credit of the dealer for payment to the dealer as an account is liquidated.

When a dealer sells a car on the installment plan the purchaser executes a note for the unpaid purchase price plus a specified service charge, payable to the dealer and bearing interest at the rate of — per cent. The note is indorsed by the purchaser and afterwards by the dealer.

The contract is then assigned by the dealer to the finance company, which remits to the dealer the amount of the face of the purchaser's note, less the service charge that has been included therein. This service charge includes the reserve which is credited by the finance company to the dealer's account. Thus the dealer, in addition to his regular profit from the sale of the automobile, receives as a reserve credit a portion of the service charge. Attached to the check remitted by the finance company to the dealer is a stub reading as follows: "Dealer, your reserve credit on this contract No. —— is $——." The name and address of the purchaser are also shown on the stub. The reserve is held to the credit of the dealer and is paid to it when the account is liquidated.

The taxpayer, upon receipt of the check from the finance company in settlement of the contract, enters the amount of the reserve credit on its books by debiting "reserve fund finance company" and crediting "reserve for contingent asset of finance company." This same method is used by most dealers, though the accounts debited and credited are sometimes captioned differently. The taxpayer contends that the amount of reserve credit has not been earned because it is not known in advance whether the purchaser will completely liquidate the liability to the finance company, which is necessary before the finance company will pay the dealer. It appears, however, that if the purchaser fails to pay, the dealer immediately becomes liable on his indorsement and is required to pay the balance due, less his reserve on the particular contract, which stands to his credit on the books of the finance company. This is in accordance with that company's method of making payment, though not specifically mentioned in the plan.

The taxpayer's books of account are kept on the accrual basis and in such cases it has been the practice of the internal revenue agent in charge to treat the reserve as an accrued item of income at the time the credit is made in favor of the dealer. The question is now presented whether this method is correct or whether the reserve credit should be treated as accrued income at the time the notes are finally liquidated, upon the theory that the income in question is contingent upon the purchaser satisfying the outstanding notes. Under the provisions of section 41 of the Revenue Act of 1928, the general rule is that net income shall be computed upon the basis of the taxpayer's annual accounting period "in accordance with the method of accounting regularly employed in keeping the books of such taxpayer." Under the provisions of section 42 of the Revenue Act of 1928, 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."

The accrual system of accounting is one of the "methods of accounting permitted under section 41," and recognized by the Bureau. (See articles 88, 322, and 341 of Regulations 74.) Under the accrual system of accounting receipts and disbursements are deemed received and disbursed when the income is accrued and the liabilities are incurred. (See *American Can Co.* v. *Bowers*, 35 Fed. (2d), 832.) In *Rouss* v. *Bowers* (30 Fed. (2d), 628) the Circuit Court of Appeals for the Second Circuit said:

> When a trader keeps books on an accrual basis, the price of a sale of goods is treated as received when the account receivable is acquired, though not yet collected, and liabilities incurred are treated as outgo, though not yet paid; the receivables and liabilities are forthwith entered on the books and the bookkeeping entries are considered for tax purposes as the equivalent of actual receipts and disbursements.

The courts have repeatedly held that where a taxpayer has adopted the accrual method of accounting all income earned and liabilities incurred must be accrued uniformly in order properly to reflect the taxpayer's income. (*Aluminum Castings Co.* v. *Routzahn*, 31 Fed. (2d), 669; *Miller & Vidor Lumber Co.* v. *Commissioner*, 39 Fed. (2d), 890, Ct. D. 235, C. B. IX–2, 314; *Pittsburgh Hotels Co.* v. *United States*, 63 Ct. Cls., 475; *United States* v. *Anderson*, 269 U. S., 422, T. D. 3839, C. B. V–1, 179; *Vang* v. *Lewellyn*, 35 Fed. (2d), 283, Ct. D. 134, C. B. VIII–2, 283.)

In the instant case the taxpayer uses the straight accrual method of reporting income and the only question involved is whether a reserve credit allowed by the finance company to the dealer should be treated as income when the notes are accepted by the finance company and the reserve is credited, or whether the accrual of the income should be postponed until the purchaser of the automobile liquidates his indebtedness. It is the opinion of this office that inasmuch as the taxpayer has adopted the accrual method of accounting, he must be consistent in the treatment of all items of income. Such treatment, under the accrual method, demands that each item of income shall be accrued when earned rather than when received. This is the basis upon which the theory of "accrual" is founded, and the possibility of an item of earned income not being received due to some unforeseen circumstances is immaterial. It is true that where an entry on the books of account is based on a remote contingency which may never happen such item could not reasonably be accrued for income tax purposes. (See G. C. M. 7514, C. B. IX–1, 111, relating to New York transfer tax on contingent remainders.) The contingency must, however, be something more than the mere possibility of the debtor not satisfying his indebtedness. There is always a possibility, where the relationship of debtor and creditor exists, that the debtor may not pay, due to financial reverses, but if the possibility of such failure to pay is accepted as a reason for not accruing an item of income the whole theory of the accrual method of accounting must fall where commercial transactions are concerned.

In the instant case there is just as much reason for accruing the reserve which is credited to the dealer by the finance company as there is for accruing the profit derived by the dealer as the result of the sale of the automobile. The facts show that the reserve credit is not a contingent credit but is paid to the dealer either at the time

the note is liquidated by the purchaser of the car or, in case the purchaser fails to meet his obligation, the dealer is given the benefit of the reserve credit through a corresponding reduction in his liability to the finance company. It follows, therefore, that the reserve credit to the dealer is an absolute credit by the finance company and is payable to the dealer without limitation, regardless of whether the obligation is liquidated by the purchaser (who is the maker of the note) or by the dealer (who is the indorser thereof).

In view of the foregoing, it is concluded that the taxpayer, which is the retail dealer, should accrue the income in question at the time the reserve is credited to its account by the finance company.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 44.—INSTALLMENT BASIS.

ARTICLE 355: Gain or loss upon disposition of installment obligations. X–36–5195 I. T. 2589

REVENUE ACT OF 1928.

The transfer of installment obligations constituting a portion of the assets of a trust estate to the remainderman upon the termination of the trust is a transaction falling within the scope of section 44(d) of the Revenue Act of 1928, and the income of the trust should be computed under the provisions of that section. The income of the trust represented by the installment obligations transferred is deductible by the trust and taxable to the beneficiary.

Advice is requested in the case of A, trustee, under the circumstances hereinafter described.

B, under the will of her father, was named the beneficiary of a testamentary trust, the income from which was distributable in the discretion of the trustee, A. The trust provided that when B reached the age of 25 years, the entire property was to be distributed to her and the trust terminated. In pursuance of the terms of the trust the entire fund, including corpus and income, was distributed to the beneficiary in 1930, at which time the beneficiary reached the required age.

During the year 1926, the trustee accomplished the sale of a business building and availed herself of the right to report the profits from the sale upon the installment basis. Annually as payments were made the profits have been reported on the installment basis. In 1930 there were distributed to the beneficiary notes having a face and fair market value of $11x$ dollars. The amount of income returnable upon these obligations and remaining unreported at the date of the distribution amounted to x dollars.

The trustee, having in mind the provisions of section 44(d) of the Revenue Act of 1928, included on a Form 1040 filed for the estate the income realized upon the disposition of the installment obligations and paid the tax thereon.

The question is raised as to whether the income realized upon the disposition of the installment obligations, together with the current income of the trust, is taxable to the beneficiary or the trustee.

Inasmuch as the trustee as such sold the business building on the installment plan and transferred the installment obligations covering the outstanding deferred payments to the beneficiary in 1930, the transfer of such obligations falls within the scope of section 44(d) of the Revenue Act of 1928, and the income of the trust should be computed in accordance with the provisions of that section. However, the income of the trust represented by the installment obligations transferred to the beneficiary (as well as current income distributed to the beneficiary) is deductible by the trust (I. T. 1621, C. B. II–1, 129) and taxable to the beneficiary.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 55.—PUBLICITY OF RETURNS.

ARTICLE 421: Inspection of returns. X–43–5263
I. T. 2598

REVENUE ACT OF 1928.

The provisions of Treasury Decision 4317 (C. B. X–1, 146), opening to inspection certain classes of Federal income tax returns by officers of a State having income tax laws, upon the written request of the governor of such State, are applicable also to the Territory of Hawaii.

SECTION 57.—EXAMINATION OF RETURN AND DETERMINATION OF TAX.

ARTICLE 451: Examination of return and determination of tax by the Commissioner. X–41–5250
T. D. 4327

INCOME TAX.

Examination of income tax returns—Article 451 of Regulations 74 amended.

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

To Collectors of Internal Revenue and Others Concerned:

It has been decided that the matters of procedure prescribed in article 451 of Regulations 74 relative to the examination of income tax returns and the determination of the correct amount of the tax by the Commissioner, such matters being subject to change from time to time, may be more appropriately prescribed in mimeographs signed by the Commissioner of Internal Revenue and published in the Internal Revenue Bulletin service than in the Income Tax Regulations. The subject matter of article 451 will, therefore, be revised and published as a mimeograph. This necessitates the amendment of article 451 of Regulations 74. Accordingly, that article is hereby amended to read as follows:

ART. 451. *Examination of return and determination of tax by the Commissioner.*—As soon as practicable after returns are filed, they will be examined and the correct amount of the tax determined under such procedure as may be

prescribed from time to time by the Commissioner. (See sections 57 and 272 and article 1171.)

DAVID BURNET,
Commissioner of Internal Revenue.

Approved October 5, 1931.

A. W. MELLON,
Secretary of the Treasury.

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.

X–47–5294
G. C. M. 9958

REVENUE ACTS OF 1924, 1926, AND 1928.

Where property is held primarily for sale in the course of a trade or business, section 101 of the Revenue Act of 1928, pertaining to capital gains and losses, and the corresponding sections of the Revenue Acts of 1926 and 1924 do not apply, regardless of whether the transaction results in a gain or a loss.

The request has been made that General Counsel's Memorandum 9656 (see page 127) be reconsidered and the subject matter elaborated on to meet certain questions hereinafter discussed.

General Counsel's Memorandum 9656 holds that one who buys and sells securities for his own account exclusively is not a "dealer in securities" and is not entitled to inventory his securities under article 105 of Regulations 74 in computing net income. That memorandum does not consider the related matter whether such a person is entitled to the benefits of section 101 of the Revenue Act of 1928, pertaining to capital gains and losses. In this connection the following question is asked: "If a man who buys and sells securities for his own account exclusively is not a 'merchant' or 'dealer' so as to allow of the use of inventories in computing net income, is such a person 'engaged in a trade or business?'"

The fact that a person who buys and sells securities for his own account exclusively is not a dealer in securities within the meaning of article 105 of Regulations 74, so as to permit the use of inventories, is not regarded by the Bureau as necessarily preventing his activities from constituting a "trade or business." In this connection attention is invited to I. T. 1818 (C. B. II–2, 39), cited in General Counsel's Memorandum 9656. In that ruling it was held that a taxpayer who bought and sold securities on his own account was engaged in a trade or business and that he could claim the benefits of section 204 of the Revenue Act of 1921 relative to net losses. In the same ruling it was held that the individual was not a dealer in securities and that he was entitled to the benefits of section 206 of the Revenue Act of 1921, relating to capital gains and losses. It should be noted, however, that the definition of a capital asset as contained in the Revenue Act of 1921 was changed in the Revenue Act of 1924 so as to add to

the exclusions from the definition of capital assets the words "or property held by the taxpayer primarily for sale in the course of his trade or business." This change has been carried into the Revenue Acts of 1926 and 1928.

In the case of *Ignaz Schwinn* v. *Commissioner* (9 B. T. A., 1304, C. B. VII–1, 28) it appears that the petitioner devoted approximately two-thirds of his business time to studying the market and buying and selling stocks, bonds, wheat, cotton, and other commodities. These activities covered the period from 1919 to 1924. The purchases and sales were made almost entirely on speculation and for no one but himself. In December, 1919, the petitioner purchased 2,300 shares of Anaconda Copper Co. stock, and sold the same in June, 1924, at a loss of $73,472. The Commissioner treated the stock as a capital asset within the meaning of section 208(a)8 of the Revenue Act of 1924, and subjected the loss to the 12½ per cent limitation prescribed by section 208(c) of that Act. The Board of Tax Appeals expressed the opinion that the petitioner was engaged in a trade or business, and that the securities and other commodities constituted property held by the petitioner primarily for sale in the course of his trade or business, and, accordingly, held for the petitioner. Clearly in that case the petitioner was not a "dealer in securities," since the purchases and sales were made for no one but himself. See also *John M. Welch, sr.*, v. *Commissioner* (19 B. T. A., 394) and Mimeograph 3883 (page 180).

On the basis of the foregoing, this office is of the opinion that a person who buys and sells securities for his own account exclusively may be engaged in a trade or business even though he can not be treated as a "merchant" or "dealer in securities," and that in a case where property is held primarily for sale in the course of a trade or business section 101 of the Revenue Act of 1928, pertaining to capital gains and losses, and the corresponding sections of the Revenue Acts of 1926 and 1924 do not apply, regardless of whether the transaction results in a gain or in a loss.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 501: Definition and illustration of capital net gain.

X–52–5332
G. C. M. 10063

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

In order to constitute "capital assets" within the meaning of the capital gain provisions of the Revenue Acts of 1921, 1924, 1926, and 1928, stock acquired by the exercise of stock rights must itself have been held for more than two years—i. e., the 2-year period during which the property must be held in order to constitute a "capital asset" begins to run from the date of the acquisition of the stock acquired through the exercise of the rights, and not from the date of the acquisition of the stock with respect to which the rights were issued.

Recommended that I. T. 1786 (C. B. II–2, 45) be revoked.

An opinion is requested whether stock acquired through the exercise of stock rights must have been held for a period of more

than two years in order to be classified as a "capital asset" under the Revenue Acts of 1921, 1924, 1926, and 1928.

In I. T. 1786 (C. B. II–2, 45) it was held that in the case of stock acquired through the exercise of stock rights, if the stock with respect to which such rights were issued was acquired and held by the taxpayer for profit or investment for more than two years, he may elect to be taxed under the capital gain provisions of the 1921 Act. This ruling has been followed under the later Acts. However, in the case of *Rodman E. Griscom* v. *Commissioner* (22 B. T. A., 979) the Board held that stock acquired by the exercise of rights must itself have been held for more than two years to constitute "capital assets."

In the Griscom case the stipulation of facts (22 B. T. A., at page 983) stated that the taxpayer's return showed a sale of 164 shares of Pennsylvania Water & Power Co. stock for $26,994.94, 130 shares of which had a March 1, 1913, value of $8,450, and 34 shares of which had cost $3,400, the return showing a total profit, therefore, of $15,144.94 from such sale. The stipulation then states in part as follows:

These profits were included in the return in the computation of a capital net loss. In the final determination of the Commissioner no adjustment was made on account of the profits reported from the sale of said stocks, but the same amounts were included in the computation of the item of capital net gain shown in the statement attached to the deficiency letter. It is agreed that in any event the correct profit from the sale of * * * 130 shares of Pennsylvania Water & Power Co. should be reflected in adjustments to capital net gain. The sale of the 164 shares of Pennsylvania Water & Power Co. was made August 7, 1925. The 34 shares thereof were acquired by petitioner through the exercise of rights to subscribe thereto, as follows:

19 shares in July, 1923, at a cost of	$1,900.00
15 shares in July, 1924, at a cost of	1,687.50
	3,587.50

If it be held as a matter of law that the 34 shares constituted "capital assets," the correct profit thereon should be reflected in an adjustment to capital net gain; but if said 34 shares were not "capital assets" within the meaning of section 208 of the Revenue Act of 1926, then the correct profit thereon should be added to net income subject to normal and sur tax rates, with a resulting adjustment to capital net gain.

The Board's opinion (at page 994) reads in part as follows:

The amount of profit realized by petitioner upon the sale of Pennsylvania Water & Power Co. stock in 1925 is the difference between the selling price of the 164 shares and the value of the 130 shares on March 1, 1913, plus the cost of the 34 shares acquired by purchase through the exercise of subscription rights in 1923 and 1924.

* * * * * * *

Capital assets are defined by section 208(a)8 of the Revenue Act of 1924 as "property held by the taxpayer for more than two years * * *." Since the 34 shares, together with the 130 shares of Pennsylvania Water & Power Co. stock were sold on August 7, 1925, it follows that the 19 shares acquired by purchase in July, 1923, constituted capital assets of the petitioner within the meaning of section 208(a)8, but the 15 shares acquired in July, 1924, are not capital assets for the reason that they were held less than two years from the date of sale.

Thus, in that case, in spite of the fact that the stock with respect to which the rights were issued appeared to have been acquired before 1913, the Board held that the stock acquired through exercise

of the rights must itself have been held for more than two years in order to constitute capital assets. In view of the Board's decision, it is the opinion of this office that under the Revenue Acts of 1921, 1924, 1926, and 1928, the 2-year period during which property must be held in order to constitute a "capital asset" should begin to run from the date of acquisition of the stock acquired through exercise of stock rights, and not from the date of acquisition of the stock with respect to which the rights were issued.

In view of the foregoing, it is recommended that I. T. 1786, supra, be revoked.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 103.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 527: Religious, charitable, scientific, literary, and educational organizations and community chests. X–46–5288 I. T. 2603

(Also Section 23(n), Article 261.)

REVENUE ACT OF 1928.

The M Corporation, organized to raise a community fund to relieve distress caused by unemployment, is a charitable organization within the meaning of section 103(6) of the Revenue Act of 1928. Contributions to it by individuals are deductible in the manner and to the extent provided in section 23(n) of the Revenue Act of 1928. Contributions by a corporation are deductible only if the contributions may be classified as ordinary and necessary expenses of the business within the meaning of section 23(a) of the Revenue Act of 1928.

An opinion is requested as to the deductibility for Federal income tax purposes of contributions to the M Corporation.

The M Corporation was incorporated in 1931. The object of the corporation is to raise a community fund sufficient to underwrite and supplement, as necessary, the normal budgets of major family relief and service agencies, and to contribute to the maintenance of essential collateral services of other agencies in an effort to conserve family life in the city of X and vicinity. The general purpose of the organization is to relieve distress caused by unemployment. The corporation is now fully organized and is in operation, and at the present time is soliciting contributions. No officer, director, or committee man of the corporation receives any salary.

In view of the foregoing, it is held that the M Corporation is a charitable organization within the meaning of section 103(6) of the Revenue Act of 1928. It will, accordingly, be relieved of the duty of filing returns of annual income so long as its purposes and activities remain unchanged. Any changes, however, in its purposes or actual activities must be immediately reported to the collector of internal revenue, in order that the effect of such changes upon the present exempt status may be determined. The exemption granted does not apply to taxes levied under other titles or provisions of the Revenue Act of 1928, except in so far as exemption is granted expressly under

those titles or provisions to corporations enumerated in section 103(6).

Contributions made to the organization by individuals are deductible for Federal income tax purposes in the manner and to the extent provided in section 23(n) of the Revenue Act of 1928.

Contributions by a corporation are deductible only if the contributions may be classified as ordinary and necessary expenses of the business within the meaning of section 23(a) of the Revenue Act of 1928. To be held deductible as business expenses, corporate contributions, charitable or otherwise, must be shown to have in a direct sense some reasonable relation to the corporation's business, or it must be shown that the contributions result in a direct benefit to the corporation. In such cases the contributions will be allowed as deductions from gross income under the classification of ordinary and necessary business expenses. Careful consideration will be given in each instance to any facts tending to show such relation or benefit, but in the absence of such a showing a deduction for corporate contributions can not be allowed.

ARTICLE 530: Social clubs. X-27-5128
G. C. M. 9470

REVENUE ACT OF 1928 AND PRIOR REVENUE ACTS.

The M club was organized for the purpose of the acquisition, development, and operation of a golf course, country clubhouse, and grounds. It acquired tracts of land in excess of its needs and in each of the years prior to 1930 sales of parcels of land were made. The club is not entitled to the exemption extended clubs organized and operated exclusively for pleasure, recreation, or social purposes, for the year 1929 and previous years.

An opinion has been requested relative to the exemption of the M Club for the year 1929 and prior years under section 103(9) of the Revenue Act of 1928 and the corresponding provisions of the earlier Revenue Acts.

The club was organized in 1916, and its purposes are the acquisition, development, and operation of a golf course, country clubhouse, and grounds. It was not feasible to acquire land suitable for a golf course without acquiring larger boundaries of land from which the site of the golf course could be taken, and several tracts of land were in fact purchased. Upon part of the tracts of land mentioned the golf course was located, leaving part of the land so purchased outside of the golf course and, therefore, available for sale to others. Parcels of the land mentioned have been sold by the club, and it has been deemed advisable by the club to purchase one or two adjoining tracts of land for the primary purpose of protecting its holdings. Sales of parcels thereof have been made with suitable restrictions.

Sales of the parcels of land mentioned above were made by the club in each year since its organization. It is contended that the sales of land adjacent to the golf course have been incidental to the purpose of the organization—that is, the acquisition, development, and operation of a golf course, country clubhouse, and grounds—such sales serving to reduce the net investment in the clubhouse, golf course, and grounds to a point where the investment could be borne

by its community. The club has capital stock; it is operated for pleasure and recreational purposes; and no part of the net earnings of the club from the sales mentioned above or from any other activities of the organization has been paid to any of the shareholders. The facilities of the club are open to members and their guests.

Article 530 of Regulations 74, dealing with the exemption of clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, provides in part that:

* * * If a club, by reason of the comprehensive powers granted in its charter, engages in traffic, in agriculture or horticulture, or in the sale of real estate, timber, etc., for profit, such club is not organized and operated exclusively for pleasure, recreation, or social purposes, and any profit realized from such activities is subject to tax.

A club may engage in incidental income-producing activities without losing its right to exemption, but such activities should be limited to those carried on for the accommodation of members and their guests. It is not believed that the regulations of the Department contemplate that an organization organized as a social or recreational club may engage in activities of the character here in question and be exempt on the theory that the club is merely using the income so derived in the furtherance of its activities.

In the case of *Trinidad* v. *Sagrada Orden de Predicadores, etc.* (263 U. S., 578; T. D. 3548, C. B. III–1, 270) the Supreme Court held that a religious, charitable, or educational organization might engage in income-producing business activities without losing its right to exemption if the income was used in the furtherance of its exempt activities. It is apparent, however, that this conclusion was reached in recognition of the benefit which the public derived from the activities of organizations of the kind there considered. It is not believed that the activities of an organization of the character of the one here in question serve such a broad public purpose as to bring it within the principle of that decision. In other words, it is not believed that the Bureau is justified in extending the principle of the Sagrada case to an organization that falls so far short of the public purpose expressly recognized by the Supreme Court in its decision in the Sagrada case. This view of the decision of the Supreme Court in the Sagrada case finds support in the opinion of the Board of Tax Appeals in the *Appeal of Hutterische Bruder Gemeinde* (1 B. T. A., 1208). In that case the Board said:

The statutory exemption of religious corporations from the payment of Federal taxes is based on the assumption that all the income of such organizations shall be used for the purposes of their foundation and that the public interests will be served by such uses. This is recognized by the court in the case above cited, which said:

"Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain."

It is difficult to discover any benefit to the public flowing from the activities of this taxpayer. It sells its commodities and services on the open market in direct competition with other producers who are of the general public. It excludes the public from all participation in the results of such sales. While it does not distribute its annual profits to its individual members for their private use, it does hold and invest such profits for their common benefit. The results of these practices are that all members of the taxpayer corporation enjoy a

greater degree of security from necessity than would be possible if the profits were distributed to them as individuals.

It is accordingly the opinion of this office that the club in question is taxable for Federal income tax purposes for 1929 and prior years.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 532: Farmers' cooperative marketing and purchasing associations, and corporations organized to finance crop operations. X–30–5150 Mim. 3886

Exemption of farmers' and other cooperative marketing and purchasing associations.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., July 9, 1931.

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

Under section 103(12) of the Revenue Act of 1928 and section 231(12) of the Revenue Act of 1926 and corresponding section of prior Revenue Acts, cooperative associations engaged in the marketing of farm products for farmers, fruit growers, livestock growers, dairymen, etc., and turning back to the producers the proceeds of the sales of their products, less the necessary operating expenses, on the basis of the products furnished by them, are exempt from income tax and are not required to file returns.

The practice of the Treasury Department, under the Revenue Acts prior to the Revenue Act of 1926, has been at all times to extend the benefits of exemption from taxation to associations which operate for the benefit of their producer patrons, and to deny exemption in the cases of associations which operate so that their profits inure to the benefit of investors or others than the producer patrons equitably entitled to the profits. For example, these statutes have been construed, in the cases of cooperative associations otherwise meeting the requirements of exemption, to include:

(1) Cooperative associations which buy, sell, and take title to, farm products in their own names and which strictly do not act as agents;

(2) Cooperative associations which deal with all producers (whether or not they technically qualify as members) on a cooperative basis, the term "members" used in the exemption sections being construed to include all producer patrons in whose behalf the associations are operated;

(3) Cooperative associations which, in connection with their marketing functions, manufacture products and change the form of the raw materials furnished by the producers, such as cooperative creameries and fruit growers' cooperative cannery organizations; and

(4) Cooperative associations which issue capital stock provided the dividend rate is limited so as not to permit more than a fair return on the capital invested, and the ownership of any stock carrying the right to participate in the surplus of the association is restricted as far as possible to producer patrons.

The construction given by the Department to the pertinent provisions of the several Revenue Acts prior to the Revenue Act of 1926 was in substance approved by Congress and enacted into law as section 231(12) of the latter Act. Speaking with respect to this section of the Revenue Act of 1926, the Senate Committee on Finance (report No. 52, page 23) said:

Section 231 (12): The existing law, strictly construed, allows exemption only to those farmers', fruit growers', or like associations which act as sales or purchasing agents for producer members and which return to such members the entire proceeds of their operations, except necessary sales or purchasing expenses. However, in order that any such association, not operated for profit, and which is a true cooperative association, shall get the benefit of this exemption, the Treasury Department in its regulations has construed the existing law with great liberality, enlarging the term "member" to mean any producer whether or not a member, if treated by such an association on the same basis as a member; exempting such an association not acting as an agent, but taking title to products or supplies; allowing such associations to have outstanding capital stock and to pay dividends on such stock (subject to certain limitations); permitting such associations to build up reserves for State requirements or other necessary purposes; and allowing such associations to manufacture their products, to change the form of raw materials, and in some cases to operate subsidiaries, so long as the operations are not conducted on an ordinary profit-making basis.

The committee amendment does not broaden the scope of nor even include all the provisions of the Treasury regulations but only incorporates certain provisions adopted by the Department as fundamental in allowing exemptions to cooperative marketing and purchasing associations. The amendment will assure associations, now exempt, that the liberal construction, by the Department, of existing law is sanctioned by Congress and if enacted will prevent a valid, but perhaps sudden or drastic, restriction upon exemptions, such as is now possible under existing law. It will also permit a considerable number of cooperative agricultural associations, organized under general corporation laws, with capital stock, and not now exempt, to attempt to obtain exemption by changing their organization and operations to meet the requirements of permanent law rather than merely of impermanent regulations. * * *

Section 103(12) of the Revenue Act of 1928 follows verbatim section 231(12) of the Revenue Act of 1926 and provides as follows:

The following organizations shall be exempt from taxation under this title—

* * * * * * *

(12) Farmers', fruit growers', or like associations organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose. Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the

value of the purchases made for persons who are neither members nor producers does not exceed 15 per centum of the value of all its purchases.

It will be observed that this section exempts farmers' and other cooperative marketing associations organized and operated "for the purpose of marketing the products of *members or other producers*, and turning back to *them* the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them." [Italics supplied.] The clear intent of this provision of the statute is that nonmember patrons, if dealt with at all, will be treated the same as members in so far as the distribution of patronage dividends is concerned. In other words, if products are marketed for nonmember producers the proceeds of the sales, less necessary operating expenses, must be returned to the patrons from the sale of whose goods such proceeds result, whether or not such patrons are members of the association. Therefore, a cooperative marketing association may not, without losing its exempt status, make a profit on the business transacted with nonmember patrons and divert the proceeds of such business from the patrons entitled thereto. However, where a cooperative marketing association has otherwise complied with the provisions of the statute respecting exemption, but defers the payment of patronage dividends to nonmembers, exemption will not be denied—

1. Where the by-laws of the association provide that patronage dividends, by whatever name known, are payable to members and nonmembers alike, and a general reserve is set up for the payment of patronage dividends to nonmembers.

2. Where the by-laws provide for the payment of patronage dividends to members but are silent as to the payment of patronage dividends to nonmembers, and a specific credit to the individual account of each nonmember is set up on the books of the association.

3. Where the by-laws are silent as to the payment of patronage dividends to either members and/or nonmembers, but the evidence submitted shows that it has been the consistent practice of the association to make payment in cash or its equivalent of patronage dividends to members and nonmembers alike within a reasonable period after the expiration of the particular year involved.

4. Where, under the circumstances stated in 1, 2, and 3, above, patronage dividends are not payable until the nonmember becomes a member of the association, either through the payment of the required amount in cash or the accumulation of dividends in an amount equal to the purchase price of a share of stock or membership.

Under the regulations of the Department prior to their amendment by Treasury Decision 3511 (C. B. II-2, 201), promulgated under the Revenue Act of 1921, and Treasury Decisions 3658 (C. B. III-2, 242) and 3709 (C. B. IV-1, 51), promulgated under the Revenue Act of 1924, a farmers' cooperative association was denied exemption if any of the stock of the association was held by nonproducers. By express provision of the Revenue Acts of 1926 and 1928 (and by the departmental construction of prior Revenue Acts), farmers' cooperative marketing associations are exempt only if "substantially all" of the capital stock "(other than nonvoting preferred stock, the owners of which are not entitled or permitted to par-

ticipate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products * * * through the association * * *."

If an association is permitted to have nonproducers as stockholders and accumulate a surplus at the same time, the principle that a producer shall have returned to him the proceeds of the sale of his products less only necessary operating expenses is violated. This follows as a result of the established principle of law that the surplus of a stock corporation inures to the benefit of its stockholders. In recognition of this principle of law, the statutes of a number of States provide that cooperative associations must be organized without capital stock. In this connection, reference is made to the Civil Code of California (1929), Title XXII, Nonprofit cooperative corporations; Acts and Resolves of Massachusetts (1923), chapter 438; and Pennsylvania Statutes (1920), section 155, Incorporation of cooperative agricultural associations. Therefore, where associations are permitted by law to organize with capital stock, it is essential to exemption that the ownership of capital stock which carries the right to participate in the surplus and reserves of the association be restricted, as far as possible, to actual producers.

It is impracticable to attempt to define the term "substantially all" as used in the statutes under discussion for the reason that what constitutes substantially all of the capital stock of a cooperative marketing association is a question of fact, which must be decided in the light of the circumstances surrounding each particular case. Any ownership of stock by other than actual producers must be explained by the association. The association will be required to show that the ownership of its capital stock has been restricted as far as possible to actual producers who market their products through the association. However, if by statutory requirement the officers of an association must be shareholders, the ownership of a share of stock by a nonproducer to qualify him as an officer will not destroy the association's exemption; or if a shareholder 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 shareholders who are no longer producers will not destroy the exemption. On the other hand, where a substantial part of the stock was voluntarily sold to nonproducers, exemption must, under the statute, be denied as long as such stock is so held.

The statute recognizes that in order to operate a farmers' marketing association additional capital is frequently required. However, if it is necessary for such associations to be financed by investors, that situation must be taken care of by the issuance of preferred stock or bonds or other evidences of indebtedness for the purpose of providing necessary working capital, or acquiring property which is required for the conduct of the association's business. The holders of such securities may not be entitled or permitted to participate directly or indirectly in the profits of the association upon dissolution or otherwise beyond the regular fixed dividends or interest pay-

ments, and voting control of the association must be retained by shareholders who are actual producers.

It is recognized in the law that cooperative associations have a need for accumulating and maintaining reserves for certain purposes, namely, "a reserve required by State law or a reasonable reserve for any necessary purpose." A reserve of the first class requires little discussion except to state that it must be a reserve *required* by a State law; a reserve permitted but not required does not meet this test of exemption. The necessity for the existence of any reserve or reserves, other than those reserves required by a State law, must be shown. The phrase, "reasonable reserve for any necessary purpose," has been construed to include reserves accumulated or maintained to meet the capital expenditures of such associations. Where such an association has investments in buildings, machinery, and other property which, due to depreciation through use in the operations of the association, eventually reach a point where their usefulness is exhausted, such depreciation in a given year is properly chargeable against the patrons of the association as a part of the "necessary marketing expenses" of that year, and a reserve for the replacement of such property set up ratably over the period of the useful life of the property will be recognized as a necessary purpose within the meaning of the statute and the departmental regulations.

Under the Revenue Acts prior to the Revenue Act of 1926, the extent of the business done by a farmers' cooperative marketing association with nonmembers is immaterial, provided nonmembers are dealt with on the same basis as members, in so far as the payment of patronage dividends is concerned. However, under the Revenue Acts of 1926 and 1928 farmers' cooperative marketing associations may market the products of nonmembers only in "an amount the value of which does not exceed the value of the products marketed for members * * *."

Membership in a cooperative association is, generally speaking, acquired in the same manner as membership in any other stock corporation—through the ownership of one or more shares of stock. However, as heretofore stated, the statutes of a number of States provide that farmers' cooperative associations must be organized without capital stock. Therefore, as the exemption statute is silent as to the qualifications of members in farmers' cooperative marketing associations, it follows that anyone who shares in the profits of such an association, and is entitled to participate in the management of the association, must be regarded as a member within the meaning of that statute.

In order to be exempt under the Revenue Act of 1921 and subsequent Revenue Acts, cooperative associations, engaged in the purchasing of supplies and equipment for farmers, fruit growers, livestock growers, dairymen, etc., and turning over such supplies and equipment to them at actual cost, plus the necessary operating expenses, must meet the foregoing conditions. An association which purchases supplies and equipment for nonmembers will not for such reason be denied exemption, provided the value of the purchases for nonmembers does not exceed the value of the supplies and equipment purchased for members, and provided the value of the purchases

made for nonmembers who are not producers does not exceed 15 per cent of the value of all its purchases.

An association engaged both in marketing farm products and in purchasing supplies and equipment is exempt if, as to each of its functions, it meets the requirements set forth herein.

Associations claiming exemption as a farmers' cooperative marketing and/or purchasing association shall submit the information required by Questionnaire, Form 1028 (copies of which may be obtained from any collector), together with a copy of the articles of incorporation and the constitution and by-laws of the association. The latest financial statement shall also be submitted, showing the assets, liabilities, receipts, and disbursements of the association. When such an association has established its right to exemption it need not thereafter make a return of income, or any further showing with respect to its status under the law, unless it changes the character of its organization or operations or the purpose for which it was originally created.

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

H. F. MIRES, *Acting Commissioner.*

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. X–33–5172 T. D. 4321

INCOME TAX.

Determination of the amount of gain or loss—Article 561 of Regulations 74, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 561, Regulations 74, is hereby amended by the elimination of the third and fourth sentences of the second paragraph thereof, and the substitution therefor of two sentences reading as follows:

In computing the amount of gain or loss, however, the cost or other basis of the property shall be properly adjusted for any expenditure, receipt, loss, or other item properly chargeable to capital account, including the cost of improvements and betterments made to the property since the basic date. Carrying charges, such as interest and taxes on unproductive property, may not be treated as items properly chargeable to capital account, except in the case of carrying charges paid or incurred, as the case may be, prior to August 6, 1931, by a taxpayer who did not elect to deduct carrying charges in computing net income and did not use such charges in determining his liability for filing returns of income.

H. F. MIRES,
Acting Commissioner of Internal Revenue.

Approved August 6, 1931.

OGDEN L. MILLS,
Acting Secretary of the Treasury.

ARTICLE 561: Determination of the amount of gain or loss. X–44–5272 I. T. 2599

REVENUE ACT OF 1928.

Pursuant to an extensive program of street opening and widening in the State of R, large sums have been paid the various property owners along each street for acquisition of land in connection with the condemnation of real estate for street purposes, as well as for severance damages to the remaining portions. The court proceedings in each case show a sum paid for acquisition of land separately from the amount paid for severance damages.

Gain or loss results from the portion of each award paid for the acquisition of land. No taxable gain is recognized with respect to that portion of the award which represents the severance damages, but the amount thereof should be deducted from the basis to be used in determining gain or loss upon the subsequent disposition of the remaining portion of the property, unless the amount of the severance damages exceeds the basis of the remaining portion of the property, in which case such excess is taxable gain. I. T. 1787 (C. B. II–2, 78) distinguished.

A ruling is requested relative to the proper treatment for income tax purposes of awards received by property owners in certain towns in the State of R for 1928 and subsequent years in connection with the condemnation of real estate for street opening and widening purposes.

Pursuant to an extensive program of street opening and widening in the State of R, large sums have been paid the various property owners along each street for acquisition of the land as well as for severance damages to the remaining portion. The court proceedings in each case invariably showed a sum paid for acquisition of land separately from the amount paid for severance damages. In most instances the compensation under condemnation proceedings exceeded the cost or fair market value as of March 1, 1913, as the case may be, of the entire lot or parcel belonging to property owners.

In the case considered in I. T. 1787 (C. B. II–2, 78) the compensation paid to the taxpayer included a sum which represented the fair market value of the portion condemned and an amount equal to the difference in value of the remaining portion before and after the completion of the improvements. In that ruling it was stated that, since the estimate of the damage resulting to the remaining property must be to a great extent conjectural and speculative, the actual damages thereto were not ascertainable until such time as the property was disposed of.

In the instant case the court proceedings in connection with each condemnation invariably show the sum paid for the acquisition of land, as well as the amount paid for severance damages. The award being separable, this office is of the opinion that gain or loss will result from that portion of each award which represents the amount paid for the acquisition of land. No taxable gain is recognized, however, with respect to that portion of the award which represents the severance damages, but the amount thereof should be deducted from the basis to be used in determining gain or loss upon the subsequent disposition of the remaining portion of the property, unless the amount of the severance damages exceeds the cost or other basis

of the remaining portion of the property, in which case such excess is taxable gain.

The case where no accurate allocation of the award can be made as between the amount covering the acquisition of land and the amount applicable to severance damages is clearly distinguishable from the instant case, where the court in making the award allocated a definite amount for the acquisition of the land condemned. as well as a definite amount for severance damages. Accordingly, I. T. 1787, supra, which deals with the case where it was impossible to make such allocation has no application to the instant case.

SECTION 113.—BASIS FOR DETERMINING GAIN OR LOSS.

ARTICLE 594: Property acquired by transfer in trust after December 31, 1920. X–31–5156 I. T. 2584

REVENUE ACT OF 1928.

Where the right of revocation is vested in the joint grantors as a unit and/or in the survivor of them, the death of one of the joint grantors does not effect any change in the title to the corpus or the property. The trust continues as a revocable trust with B, one of the joint grantors and the surviving beneficiary, retaining the right to revoke the trust at any time. The last sentence of section 113(a)5 is not applicable to a sale by the trustee from the corpus, after the death of one of the joint grantors. The basis for determining gain or loss is governed by section 113(a)3.

A ruling is requested with respect to the basis for determining gain or loss arising from the sale by a trustee in 1930 of certain securities.

A and B, his wife, jointly assigned, transferred, and paid over to a trustee certain personal property and moneys in trust with the power to invest the corpus of the trust in safe, conservative, and income-producing bonds, mortgages, stocks, and other securities. The trust instrument provides that during the joint life of A and B the trustee shall deposit monthly the net income arising from the trust estate in a checking account in the grantors' joint names established in the banking department of the M Company. Upon the death of one of the grantors, the survivor thereof shall receive all the income from the trust estate during his or her lifetime. The trustee is authorized to apply so much of the principal of the trust estate to provide properly for the maintenance, care, or comfort of the grantor or either of them.

The trust indenture contains the following revocable provisions under paragraph 13:

Provided, however, and it is hereby declared as a limitation upon all the foregoing provisions and powers, that it shall be lawful for said A and B at any time and from time to time during their joint lives by any proper instrument in writing under their hands and duly acknowledged by them before any magistrate or notary public, and from and after the decease of either of them for the survivor of them at any time and from time to time during his or her lifetime by any proper instrument in writing under his or her hand and duly acknowledged by him or her before any magistrate or notary public, to revoke the foregoing uses and trusts as to all or any part or parts of the trust estate, and to appoint the same to new, further or other uses in whole or in part, and to vest the same in the same trustee or trustees, or in any new or other trustee

or trustees, and upon and with new, further or other trusts, powers, discretions and limitations, or in themselves or either of them or in himself or herself, or in any other person or persons, freed and discharged of all trusts as they, he or she, as the case may be, shall see fit.

A, one of the joint grantors, died on November —, 1929, and up to the date of his death no revocation of any part of the trust had been executed. During the year 1930 the trustee sold from the corpus of the trust in question all of the holdings in the N Company, which holdings A had contributed to the trust. A ruling is requested whether the basis for determining gain or loss from the sale of the holdings in question should be determined in accordance with the provisions of section 113(a)3 or section 113(a)5 of the Revenue Act of 1928, which read as follows:

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(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 right of revocation of the instant trust was vested by the trust indenture in the grantors as a unit and/or in the survivor of them. The death of A, one of the joint grantors, thus effected no change in the title of the property forming the corpus of the trust. The trust continued as a revocable trust with B, one of the joint grantors and the surviving beneficiary, retaining the right to revoke the trust at any time. It is, accordingly, held that the last sentence of section 113(a)5 of the Revenue Act of 1928 is not applicable to the instant case, but that the basis for determining gain or loss is governed by the provisions of section 113(a)3 of the Revenue Act of 1928.

ARTICLE 600: Stock or securities distributed in reorganization.

REVENUE ACT OF 1928.

Rights to acquire stock of a character or preference different from stock in respect of which rights were issued. (See I. T. 2597, page 118.)

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 621: Dividends. X–34–5180
I. T. 2586

REVENUE ACT OF 1928.

Dividends in the form of rights to purchase stock of other corporations, evidenced by purchase certificates, should be valued for income tax purposes as of the date set for determining the stockholders entitled to the rights.

A ruling is requested relative to the correct date for valuing certain rights granted by the M Company to its stockholders to purchase from it the common stock of other corporations.

It appears that on January 23, 1929, the board of directors of the M Company resolved that the corporation offer to common stockholders of record at the close of business on January 26, 1929, the privilege of purchasing from the M Company shares of the common stock of the N Company at the rate of x dollars per share. A form of purchase certificate or warrant was approved, and the officers of the O Company were authorized to prepare the purchase certificates and to arrange with the P Company, agent, for their signing and mailing. On the surrender of these certificates by the holders on or before February 15, 1929, together with the proper money payments, the shares of stock of the N Company were to be delivered. The purchase certificates were mailed on or about January 31, 1929, and were received by stockholders on February 1, 1929. The stockholders had previously been notified that the rights would be issued to stockholders of record on January 26, and that the certificates would be mailed "on or about February 1, 1929."

Similar resolutions were adopted by the board of directors of the M Company on May 1, 1929, offering to common stockholders of record on May 8, 1929, the right to purchase additional stock of the N Company. The purchase certificates in this instance were mailed on or about May 11, 1929, and were received by the taxpayers on May 13, 1929.

Similar resolutions were adopted at a meeting held June 5, 1929, offering to common stockholders of record at the close of business on June 18, 1929, the right to purchase from the M Company shares of common stock of the Q Company. In this instance, the purchase certificates were mailed on or about June 22, 1929, and were received by the stockholders on June 24, 1929.

The M Company had earnings or profits accumulated after February 28, 1913, greater than the value of all purchase rights issued, and it is admitted, in accordance with *Metcalf's Estate* v. *Commissioner* (32 Fed. (2d), 192, Ct. D. 58, C. B. VIII–1, 219), that the purchase rights constituted dividends, subject to surtax, to the extent of their fair market value. The question upon which a ruling is requested is whether the rights should be valued as of the record date (that is, the date determining the stockholders "of record" of the M Company who were entitled to the rights), the date of mailing of the purchase certificates, or the date such certificates were received by the stockholders.

Sections 41 and 42 of the Revenue Act of 1928 provide in part as follows:

SEC. 41. *General rule.*
The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *.

SEC. 42. *Period in which items of gross income included.*
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.

Regulations 74 provide in part as follows:

ART. 621. *Dividends.*—

* * * * * * *

A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands. (See article 333.)

ART. 627. *Dividends paid in property.*—Dividends paid in securities or other property (other than its own stock) in which the earnings of a corporation have been invested, are income to the recipients to the amount of the market value of such property when receivable by the shareholders. (See, however, section 112(h) and article 576.) Where a corporation declares a dividend payable in stock of another corporation, setting aside the stock to be so distributed and notifying the shareholders of its action, the income arising to the recipients of such stock is its market value at the time the dividend becomes payable. (See article 333.) Scrip dividends are subject to tax in the year in which the warrants are issued.

ART. 333. *Examples of constructive receipt.*—When interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, shall be included in gross income for the year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. The interest shall be included in gross income even though the coupons are exchanged for other property instead of eventually being cashed. Defaulted coupons are income for the year in which paid. Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder. As to the distributive share of the profits of a partner in a partnership, see section 182 and article 902. Interest credited on savings bank deposits, even though the bank nominally has a rule, seldom or never enforced, that it may require so many days' notice before withdrawals are permitted, is income to the depositor when credited. An amount credited to shareholders of a building and loan association, when such credit passes without restriction to the shareholder, has a taxable status as income for the year of the credit. * * *

Section 201(e) of the Revenue Act of 1921 contained an express provision that—

* * * A taxable distribution made by a corporation to its shareholders * * * 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.

No other Revenue Act has contained a similar express provision, but the congressional committee reports show that section 201(e) of the Revenue Act of 1921 was intended merely as a clarification of the prior law rather than as a change in it, and that the omission of the express provision in the Revenue Act of 1924 and subsequent Revenue Acts was likewise not intended to change the 1921 law in this respect. See the report of the Finance Committee of the Senate on the proposed 1921 Act (Report No. 275, page 10) and the case of *Mary Miller Braxton* v. *Commissioner* (22 B. T. A., 128), setting forth

the committee reports on this question with respect to the Revenue Act of 1924, and holding that the omission of section 201(e) of the Revenue Act of 1921 from the Revenue Act of 1924 did not change the law. The Treasury Department regulations covering the Revenue Act of 1924 and later Revenue Acts adopt almost verbatim the above-quoted language from section 201(e) of the Revenue Act of 1921.

In *Commissioner* v. *Bingham* (35 Fed. (2d), 503, cert. denied 281 U. S., 729) it was held, under section 201(e) of the Revenue Act of 1921, that cash dividends declared and made payable by various corporations either on December 30 or December 31, 1922, and for which checks were issued and mailed on those dates, should be included in income for 1922 by a stockholder who had adopted the cash receipts and disbursements method of accounting and filed returns on the basis of the calendar year, even though he did not receive the checks until January 2, 1923, and regardless of the fact that "it was not convenient and was perhaps physically impossible for him to appear at the offices of the various corporations before the year closed and demand the cash * * *." In the case of Mary Miller Braxton, supra, the Board of Tax Appeals applied the rule of the Bingham case under the Revenue Act of 1926, holding, as above stated, that the omission of section 201(e) of the Revenue Act of 1921 from the later Acts did not change the law.

If this is true of cash dividends, it would seem that dividends consisting of rights to purchase stock would become unqualifiedly subject to the demands of the stockholders at a date at least as early as the mailing of the purchase certificates, and this office has concluded that in fact the proper date is earlier than that. The "dividend" in the instant case consists neither of cash nor of corporate stock. The "dividend" is the right itself—the right to purchase the stock, and is, therefore, an intangible chose in action, the purchase certificate being merely tangible evidence of the intangible dividend. Consequently, in order to show that the dividend was "received" it is not necessary to show that the purchase certificates had been received or mailed, or that the corporate stock to be purchased had been unqualifiedly set aside for the stockholders. The fact that the corporation may require the surrender of the purchase-certificate before selling the stock to the stockholder is immaterial, because the requirement of surrender pertains to the *exercise* of the right (that is, to the purchase of the stock) rather than to the *receipt* of the right. Suppose the purchase certificates had been received by the stockholders on February 1, but had contained a provision that the stock must be purchased between February 5 and February 15; it would nevertheless be true that by February 1, at the latest, the stockholders would have received *rights* to purchase. It would be only the exercise of the right (the purchase itself) that would be postponed to February 5 in such a case.

Likewise, the requirement that x dollars a share must be paid for the stock is a requirement applying to the exercise of the right, but not of its receipt. If the dividend were the stock itself, then it might well be true, in the hypothetical case just put, that such stock would not be unqualifiedly subject to the demands of the stockholders until February 5. When, however, the dividend does not consist of the stock, but of a right to purchase the stock, the "receipt" of the

right and the "exercise" of the right are separate and distinct. The stockholder may sell the right instead of exercising it, or he may let it lapse, but he nevertheless *receives* the right before February 5, in spite of the fact that he can not exercise it until then.

It is, therefore, evident that conditions precedent to the purchase of the stock (such as the surrender of the purchase certificate, the payment of x dollars a share, or the setting of a date prior to which the stock can not be purchased) do not necessarily constitute conditions precedent to the receipt of the right to purchase, and it is the right to purchase, not the stock itself, that constitutes the dividend in the instant case. Therefore, the fact that the purchase certificates must be surrendered before the stock can be purchased in no way contradicts the fact that the certificates are merely tangible evidence of the right to purchase, and do not themselves constitute the dividend in question. The purposes, moreover, for which the certificates are printed and mailed are not to mark the date the rights to purchase are received by the stockholders, but to simplify the exercise and transfer of the rights and to protect the issuing corporation.

In the case of *Bingham* v. *Commissioner*, above cited, which dealt with a cash dividend, the fact chiefly relied upon by the court to show that the dividends were unqualifiedly subject to the demands of the stockholders on December 30 and 31, respectively, was not that the checks were *mailed* on those dates but that the directors had declared the dividends *payable* on those dates. Of course, the fact that the checks were then mailed did afford additional evidence that the cash was unqualifiedly subject to the demands of the stockholders on December 30 and December 31, but if, due to some mistake, a check had been mailed to a particular stockholder on January 2, 1923, it seems clear from the opinion that the court would nevertheless have held the dividends to be income to such stockholder for the year 1922. In the instant case the resolutions of the directors clearly required the dividends (namely, the rights to purchase stock) to be credited to the stockholders of record as of January 26, May 8, and June 18, respectively.

No later date was set by the resolutions on which the dividends were to be "payable," and since the dividends were not cash or other tangible property but consisted of intangible choses in action, there was no occasion to set a "payment" date. The rights to purchase were in fact "received" by the stockholders as soon as the stockholders entitled to them were ascertained, and it was quite immaterial either that the purchase certificates—the tangible evidence of the rights—were received later or that the rights could not be exercised until later. As before stated, the purpose of the certificates was to protect the corporation and facilitate the exercise and transfer of the rights—not to mark the date the rights were "received." The rights were evidently freely bought and sold on the days the stockholders entitled to them were ascertained, for it is stated that they had definite market values on those dates of $.5x$ dollars, $.345x$ dollars, and $3.025x$ dollars, respectively. It is the opinion of this office that they were "received" by the stockholders on those dates within the meaning of the Revenue Act of 1928 and the regulations promulgated thereunder.

This view conforms with General Counsel's Memorandum 6374 (C. B. VIII–2, 75), where it is stated:

It appears the M Company issued to its stockholders of record on December 21, 1928, rights to purchase one 10-year convertible 4½ per cent gold debenture bond, par value $100, at 98 plus accrued interest, for each —— shares of stock held on that date. * * *

* * * * * * * * * Assuming that the M Company had on hand on December 21, 1928, a surplus earned since February 28, 1913, in an amount equal to or in excess of the total fair market value of all rights issued, such rights must be regarded as a dividend to the stockholders * * * to the extent of their fair market value on the day of their issuance. * * * Such dividend is subject to surtax only. The fair market value of the rights on the day of their issuance is the basis for the determination of gain or loss from their subsequent sale by A.

It is evident that the day of "issuance" contemplated by General Counsel's Memorandum 6374 is December 21, 1928, the day set for determining the stockholders of record entitled to the rights. In General Counsel's Memorandum 926 and General Counsel's Memorandum 916 (C. B. VI–1, 133 and 135) it was held that the basis for computing gain or loss from the sale of rights issued by one corporation to subscribe to the stock of another is the fair market value of the rights when "received" by the stockholders, but there is nothing in those opinions to show that the date of "receipt" was not considered to be identical with the date of issuance. The opinions speak of the receipt of the "rights," not of the receipt of the certificates evidencing the rights, and as already stated above this office is of the opinion that the intangible rights are "received" by the stockholders, within the meaning of the Revenue Act, as of the day set for determining the stockholders entitled to them.

SECTION 116.—EXCLUSIONS FROM GROSS INCOME.

ARTICLE 641: Income of foreign governments, ambassadors, and consuls. X–29–5141 I. T. 2581

REVENUE ACT OF 1928.

The phrase "members of their households" used in article 641 of Regulations 74 in designating those within the exemptions extended to ambassadors and ministers, includes the wives of clerks of foreign embassies and legations in Washington who are not citizens of the United States.

Inquiry is made whether the income of wives of clerks of foreign legations and embassies who are not citizens of the United States is subject to Federal income tax.

Article 641 of Regulations 74, promulgated under the Revenue Act of 1928, reads in part as follows:

Ambassadors and ministers accredited to the United States and the members of their households (including secretaries, attachés, and servants) who are not citizens of the United States, are exempt from the payment of Federal income tax upon their salaries, fees, or wages. The income from investments in the United States in bonds and stocks and from interest on bank balances received by ambassadors and ministers accredited to the United States, who are not citizens of the United States, is exempt from tax, but income from any business carried on by them in the United States is taxable. These provisions are also applicable to the wives and minor children of foreign ambassadors and ministers and the members of their households, including secretaries, attachés, and servants.

The above-quoted provisions of article 641 recognize and give effect to the extraterritorial privileges and immunities accorded to diplomatic representatives of foreign governments by sections 4062–4065 of the Revised Statutes of the United States (sections 251–255, U. S. Code) and by established usage and practice between nations. It will be observed that clerks of foreign legations and embassies and their wives are not included among those employees for whom exemption is provided by the regulations, unless they are " members of their households " within the meaning of that phrase as used in article 641.

An examination of the lists of employees in the embassies and legations in Washington, which are prepared by the Department of State, discloses that the names of all the employees and their wives are contained therein. It is understood that all the persons whose names appear in these lists may be deemed to be members of the households of the ambassadors and ministers and, as such, entitled to the privileges and immunities accorded by the Revised Statutes of the United States and by established usage and practice between nations.

In view of the foregoing, it is held that the phrase " members of their households," as used in the above-quoted provisions of article 641 of Regulations 74, includes the wives of clerks of foreign embassies and legations in Washington who are not citizens of the United States. They are, therefore, exempt from the payment of Federal income tax to the extent provided in that article.

SECTION 116. X–44–5273
G. C. M. 9848

REVENUE ACT OF 1928.

The phrase " a bona fide nonresident of the United States for more than six months during the taxable year " contained in section 116(a) of the Revenue Act of 1928 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. 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. It is immaterial whether the absence is caused by, or consists of, trips to one or several countries. The fact that an employee of a domestic employer does or does not maintain an established home in the United States is also immaterial in determining whether he is a bona fide nonresident of the United States within the meaning of section 116(a) of the Revenue Act of 1928.

An opinion is requested with respect to the interpretation to be placed upon the words " a bona fide nonresident of the United States for more than six months during the taxable year " as used in section 116(a) of the Revenue Act of 1928, which exempts from taxation earned income of a citizen of the United States from sources without the United States. That provision of the law reads as follows:

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

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

(a) *Earned income from sources without United States.*—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States 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.

The exemption applies to earned income received from sources without the United States by an American citizen who was a bona fide nonresident of the United States for more than six months during the taxable year. "Earned income" means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered. In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income-producing factors, a reasonable allowance as compensation for the personal services actually rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered earned income. (See section 31(a) of the Revenue Act of 1928.)

The earned income which is exempt from taxation is that which is received from sources without the United States. The term "United States" means the States, the Territories of Alaska and Hawaii, and the District of Columbia. (Section 701(a)9 of the Revenue Act of 1928.) The source of the income in the case of compensation for labor or personal services is the place where the services are performed. Consequently, compensation for labor or personal services performed without the United States shall be treated as earned income from sources without the United States. (Section 119(c)3 of the Revenue Act of 1928.)

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. It follows that it is immaterial whether the absence is caused by, or consists of, trips to one or several countries. The fact that an employee of a domestic employer does or does not maintain an established home in the United States is also immaterial in determining whether he is a bona fide nonresident of the United States within the meaning of section 116(a) of the Revenue Act of 1928. Furthermore, the purpose of the trip or trips of the employee so long as he is on business for the employer has no bearing upon the taxable status of the remuneration received while abroad. In this connection see generally I. T. 2274 (C. B. V–1, 50); I. T. 2286 (C. B. V–1, 52); S. M. 5446 (C. B. V–1, 49); and I. T. 2293 (C. B. V–2, 33).

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 117.—NET LOSSES.

ARTICLE 651: Net losses, definition and computation. X–29–5142 Mim. 3883

REVENUE ACT OF 1928.

Application of net loss provisions of section 117, Revenue Act of 1928, to taxpayers engaged in stock market transactions.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., June 26, 1931.

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

The term "net loss" as used in section 117 of the Revenue Act of 1928 applies to a net loss during the taxable year in a trade or business regularly carried on by a taxpayer. Therefore, in order to be entitled to claim an allowance for a "net loss" the taxpayer must have suffered an actual net loss in a trade or business during the taxable year. Whether or not a taxpayer's activities, and particularly his activities involving stock market transactions, constitute a "trade or business" as that term is contemplated by the statutory provisions is purely a question of fact in each case, and no general rule can be laid down which would be determinative of this issue in all cases in which the question arises. The cases hereinafter cited are briefly discussed herein with a view to providing information and guidance in properly classifying the activities of taxpayers engaged in stock market transactions.

In *Ignaz Schwinn* v. *Commissioner* (9 B. T. A., 1304, acq. C. B. VII–1, 28) a loss resulting from a sale of certain shares of stock was held to be a loss sustained in the petitioner's trade or business. The Board in its opinion enunciated certain fundamental principles which are deemed worthy of mention. The Board stated: (1) Losses from isolated transactions entered into for profit are separately considered from those incurred in trade or business; (2) when the expression "trade or business" is used in the statute in connection with losses it would seem to refer to a regular occupation or calling of the taxpayer, for the purpose of livelihood or profit; (3) this is one of the accepted definitions of the term "business" and is probably its most usual legal sense (*Flint* v. *Stone Tracy Co.* (1911), 220 U. S., 107, 171); (4) it has been recognized by the courts and by the Bureau of Internal Revenue that a person can be engaged in more than one trade or business (*Mente* v. *Eisner* (1920), 266 Fed., 161 [T. D. 3029, C. B. 2, 131], certiorari denied, 254 U. S., 635; 41 Sup. Ct., 8); (5) it is not necessary under the language of the Act (1924) that the activities in question form the taxpayer's principal trade or business; it is sufficient that they may of themselves be regarded as an occupation or business; (6) it is recognized that a single, isolated activity or transaction is not sufficient to constitute a business or vocation (*Cooper Manufacturing Co.* v. *Ferguson* (1885), 113 U. S., 727; *Woods* v. *Lewellyn* (1921), 289 Fed., 498). In this case the petitioner devoted the largest part of his business time to, and made the most money from, speculating in stocks, grain, and other commodities. He also had large sums of money involved in his marginal

dealings. The loss resulting from disposition of the stock made the subject of sale was held to be a loss sustained with respect to property held primarily for sale in the course of the petitioner's trade or business.

In the *Appeal of J. J. Harrington* (1 B. T. A., 11) the Board held that the petitioner, who was regularly employed on a salary, who made five purchases of securities during 1921 from brokers and one sale of securities at a loss which exceeded his income for 1921, was not entitled to the application of the net loss provisions since the loss sustained did not result from the operation of a business regularly carried on by the petitioner.

In *Oscar E. Rehm* v. *Commissioner* (16 B. T. A., 1045) the petitioner was president, acting manager, and principal stockholder of the Rehm, Zeiber Co., a corporation, such duties requiring at least three-fourths of his time. He was thus enabled to maintain a close watch on the stock market. He had for many years traded in the market "off and on." The Board held that his transactions were merely isolated and occasional and did not constitute a trade or business.

In *E. M. Elliott* v. *Commissioner* (15 B. T. A., 494, acq. C. B. VIII–2, 15) the Board in its decision held that the purchases and sales of cotton futures and stocks by petitioner occurred with regularity throughout the years involved in the appeal; that the purchases and sales in question were the result of petitioner's constant personal attention; that such transactions constituted a trade or business regularly carried on whether tested by the number of transactions, the amount of personal time and effort devoted to that business (in this case 75 per cent of petitioner's business hours), or the duration of the periods in which the petitioner was active; and that his dealings in cotton futures and stocks were, at least for the year 1921 when the loss was sustained, the principal activity of the petitioner.

In *Richard D. Wyckoff* v. *Commissioner* (19 B. T. A., 263, acq. C. B. IX–2, 66) the petitioner during the taxable year, and for several years before and after, was a trader in stocks and bonds on the New York market on his own account. His operations were extensive and his trading included many popular speculative stocks and some in which he was interested as a promoter. Some of his transactions were for investment purposes, but most were on margin and speculative. The Board held that petitioner was regularly engaged in and carried on the business of buying and selling stocks and bonds, mostly of a speculative nature. The net loss was held deductible.

In *Harry F. Harper* v. *Commissioner* (20 B. T. A., 143, nonacq. C. B. X–1, 81) the petitioner's vocation was that of president of a large manufacturing company at a salary of $25,300 a year. He invested his money in various corporations through stock purchases, loans, and indorsement of notes. The Board was of the opinion that the activities of the petitioner with respect to stock transactions and financial promotions were sufficient to constitute them a regular trade or business within the meaning of the statute. The Bureau took the position that the petitioner's ventures appeared to be casual over a long period of years and were not a trade or business regularly carried on by him.

In *Harvey H. Ostenberg et al.* v. *Commissioner* (17 B. T. A., 738, nonacq. C. B. IX–1, 72) it appeared from the evidence that Ostenberg was a capitalist and an investor on a large scale. He invested in stocks and bonds and in various enterprises which showed a prospect of profit. Such investing and connections with the various enterprises in which he was interested constituted the only business he had, the source of his income, and his means of livelihood. The Board held that petitioner was regularly engaged in carrying on a trade or business, and that the net loss provisions were applicable to the case. In a dissenting opinion, Mr. Smith stated: "In my opinion an investor in stocks and bonds of corporations for profit for himself is not entitled to the benefits of section 204 of the applicable taxing Act, and I do not see how this case can be differentiated from the case of the ordinary investor." This was substantially the position of the Bureau in the case.

In I. T. 1818 (C. B. II–2, 39) consideration was given the case of a taxpayer, who was not a member of a stock exchange, had no place of business, did not make purchases and sales of securities for others, but devoted the greater part of his time to keeping in touch with the stock market and in giving orders to his broker for the purchase and sale of securities. He had no other trade or business. It was held that he was engaged in the business of buying and selling securities on his own account and was entitled to the benefit of the provisions of section 204(a).

General Counsel's Memorandum 2463 (C. B. VI–2, 170) concerned a case in which the taxpayer had many times more money invested in securities than in his other business, which consisted of manufacturing. He spent more than one-half his time in attending to his transactions in securities, and during a 5-month period alone in 1919 he had more than 70 separate transactions. Securities were bought to be sold for a profit and not to be held as an investment. It was held that taxpayer's transactions in securities were sufficient to constitute a business regularly carried on, and a loss sustained therein in 1919 should be considered in applying the net loss provisions of the statute.

As heretofore stated, the determination of whether losses from the sale of securities result from the operation of a trade or business regularly carried on by the taxpayer resolves itself into a question of fact. The decision in each case, therefore, is dependent upon the particular state of facts presented.

Queries regarding this mimeograph should be directed to IT: E:RR.

H. F. Mires, *Acting Commissioner.*

SECTION 118.—LOSS ON SALE OF STOCK OR SECURITIES.

ARTICLE 661: Losses in connection with sale and repurchase of securities. X–33–5173 I. T. 2585

REVENUE ACT OF 1928.

In 1930 the taxpayer sold shares of class A stock of a corporation and within 30 days after the date of sale purchased a like number of shares of common stock of the same corporation. This

common stock has voting power while the class A stock is nonvoting.

The common stock in this instance did not constitute substantially identical property within the meaning of section 118 of the Revenue Act of 1928.

Inquiry is made whether the purchase in 1930 of certain shares of stock of a corporation constituted the acquisition of substantially identical property within the meaning of section 118 of the Revenue Act of 1928. The stock which was sold consisted of the class A stock of the corporation and the taxpayer within 30 days after the date of sale purchased a like number of shares of common stock of the same corporation.

An examination of the certificate of incorporation discloses that the authorized capital stock of the corporation consists of three classes, namely, preferred stock, class A stock, and common stock. While the preferred stock carries a preference over the other two classes in the right to receive dividends and in the right to share in the distribution of the assets in case of liquidation, there is no preference in that respect as between the class A stock and the common stock, it being specifically provided that these two classes are to share or participate equally both as to dividends and in the distribution of the assets in case of liquidation. No voting rights are carried by the preferred stock, and as between the other two classes the voting rights inhere exclusively in the common stock, it being specifically provided that the holders of the class A stock shall have no right to vote at any election or meeting of the stockholders, thus excluding them from participation in the management and control of the corporation. As the common stock was purchased within 30 days from the date of sale of the class A stock, the question involved is whether there was an acquisition of "substantially identical property" within the meaning of section 118 of the Revenue Act of 1928 within the prescribed period of time.

Section 118, so far as is here material, provides as follows:

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within 30 days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23(e)2 of this title; * * *.

While the class A stock and the common stock in question carry equal rights with respect to sharing in dividend distributions and in the distribution of the assets in case of liquidation, voting stock is generally recognized as being of a distinct class from nonvoting stock. (Cf. section 112(i) of the Revenue Act of 1928.) By reason of such distinction different certificates obviously would be issued as evidence of the ownership of the class A stock and the common stock in question. The purchase of the common stock within 30 days after the date of sale of the class A stock did not, therefore, result in the acquisition of "substantially identical property" within the meaning of section 118 of the Revenue Act of 1928.

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

ARTICLE 691: Analysis of credit for taxes. X–42–5253
(Also Section 23(c), Article 151.) I. T. 2596

REVENUE ACT OF 1928.

The tax imposed by Article XV of the Cuban tax law, approved July 9, 1928, on gross revenues derived from sources in Cuba, is not an income tax and may not be claimed as a credit under section 131 of the Revenue Act of 1928. Such tax may, however, be claimed as a deduction under section 23(c) of the Revenue Act of 1928, for the year in which paid or accrued, dependent upon whether the taxpayer's books of account are kept on the cash receipts and disbursements basis or on the accrual basis. This ruling is also applicable to taxes paid under Article III of chapter 6 of the emergency tax law of Cuba, approved January 29, 1931, with respect to taxation of foreign navigation companies.

The question is raised whether taxes paid to the Republic of Cuba by the M Company under Article XV of the Cuban tax law, approved June 9, 1928, may be taken as a credit against income tax due the United States.

Section 131(a)1 of the Revenue Act of 1928 provides that the income tax imposed by the Revenue Act of 1928 shall be credited with:

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

Article XV of the Cuban tax law, approved July 9, 1928, reads as follows:

ART. XV. Article III of Military Order 463 of 1900 shall be drawn as follows:

"ART. III. The following shall pay taxes to the State at the rate of 6 per centum of their net profits:

"(a) Railroads of general service, or namely, those destined to public exploitation for the transportation of passengers and the traffic of merchandise, either belonging to companies or to private parties conformably to legislation in force on the matter.

"(b) Domestic shipping companies and foreign shipping companies authorized to do a coastwise business.

"Foreign shipping companies engaged in handling freight and passengers between domestic and foreign ports, shall be exempt from the tax on profits, and shall pay, in lieu thereof, 3 per cent on the gross revenues received for freight and passengers taken aboard in domestic ports, continuing to be subject to the payment of taxes of other nature, in accordance with the legislation in force.

"The tax shall be paid precisely by said shipping companies or their agents, and can not be collected from shippers or passengers."

The taxpayer states that the Cuban tax law of 1928 is a reenactment of Article III of Military Order 463 of 1900, in so far as subdivisions (a) and (b) are concerned, but that the paragraph following (b) appears for the first time in the law of 1928. The taxpayer also states that it was the original intent and purpose of the law to impose an income tax of 6 per cent on net profits of all carriers by rail and water. The taxpayer further states as follows:

Immediately, controversy arose between the shipping companies and the tax authorities of the Cuban Government, on the question of what proportion of expenses should be allowed against revenues derived from Cuban sources in determining "net profits." The taxpayers and the Government were never able to reach an agreement on the apportionment of expenses. Ultimately, the Cuban Government offered to compromise the difficult question by a decrease of 50 per cent in the rate of tax, making it 3 per cent, and applicable to gross income from Cuban sources rather than on "net profits."

The taxpayer contends that it was the clear intent of Article III of Military Order No. 463 of 1900 to impose an income tax, and that the portion relating to foreign shipping companies doing business in Cuba must be considered in connection with the article as a whole.

The answer to the question submitted depends on whether the tax paid by the M Company under the provisions of Article III of Military Order 463 of 1900, as amended by the Cuban tax law of July 9, 1928, is a tax on income, or whether it is a tax on gross receipts. If the tax is imposed on the income, the amount of tax paid to the Cuban Government may be claimed as a credit against the United States income tax, subject to certain limitations contained in section 131(b) of the Revenue Act of 1928, whereas if the tax referred to is not an income tax no credit therefor may be allowed but the amount of such tax may be claimed as a deduction in computing net income subject to United States tax.

From an examination of the law it is apparent that the tax is imposed upon "gross revenues" or "gross receipts," and is not imposed on net profits. In this connection it is noted that Article XXI of the law approved July 9, 1928, amending Article X of Military Order 463 of November 13, 1900, provides that certain deductions be made in connection with the determination of net profits and when referring to the term "gross revenues" it is stated that for the purpose of the law "revenues shall be understood to be *all receipts*, whether in cash, securities, or credits, which affect the wealth of the taxpayer and of which he may avail himself without obligation to make reimbursement of the amount thereof." Thus it is evident that the words "gross revenues" in the Cuban law mean "gross receipts," or all that is received in the regular course of business. The general rule is that taxes based on gross receipts constitute a tax on business and are held to be an excise tax. (Cooley on Taxation, 4th Edition, sections 842 and 892, containing numerous citations to the effect that a tax on gross revenues or gross receipts is an excise tax. See also *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S., 217; *Security Savings & Commercial Bank* v. *District of Columbia*, 279 Fed., 185; *Ohio River & W. Ry. Co.* v. *Ditty*, 203 Fed., 537.)

In *Maine* v. *Grand Trunk Ry. Co.*, supra, the United States Supreme Court stated that a tax on gross receipts, for the collection of which the action was brought, was "an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine." In *State Tax on Railway Gross Receipts* (15 Wall., 284) it was stated that:

* * * We think it may safely be asserted that the States have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural

persons, and to the same extent. *We think also that such taxation* may be laid upon a valuation, or *may be an excise, and that in exacting an excise tax from their corporations, the States* are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they *may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise.* * * * [Italics supplied.]

The purpose of allowing domestic corporations to claim a credit for taxes paid to a foreign government was to avoid double taxation of income. Consequently, Congress provided in section 131 of the Revenue Act of 1928 that in claiming a credit for foreign taxes such credit should be limited as provided in subdivision (b), reading as follows:

(b) *Limit on credit.*—In no case shall the amount of credit taken under this section exceed the same proportion of the tax (computed on the basis of the taxpayer's net income without the deduction of any income, war-profits, or excess-profits tax any part of which may be allowed to him as a credit by this section), against which such credit is taken, which the taxpayer's net income (computed without the deduction of any such income, war-profits, or excess-profits tax) from sources without the United States bears to his entire net income (computed without such deduction) for the same taxable year.

It appears that the tax imposed by the Cuban Government on gross revenues is imposed regardless of whether the United States corporation operating in Cuba has any net income from sources therein, and it also appears that as a matter of fact in some years the company actually operated at a loss. Nevertheless, a tax on gross revenues was paid to the Cuban Government. In such cases, even if the tax were treated as an income tax the limitation on the credit imposed by section 131(b) of the Revenue Act of 1928 would prohibit any credit where the company had no net income from foreign sources. That section of the law, it will be noted, provides that in no case shall the amount of credit exceed the same proportion of the tax, against which such credit is taken, which the taxpayer's *net income* from sources without the United States bears to its entire net income for the same taxable year. But aside from this, a tax on gross receipts can not be considered an income tax within the meaning of section 131 of the Revenue Act of 1928. An income tax is a tax on income, and income has been defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. (*Eisner* v. *Macomber*, 252 U. S., 189; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179; *Stratton's Independence, Ltd.*, v. *Howbert*, 231 U. S., 399.) Clearly, where a tax is imposed by a foreign country on gross revenues and there is in fact no gain derived from capital, from labor, or from any other source, the amount of such tax can not be properly designated as an "income" tax paid to a foreign country, for the purpose of being taken as a credit against the taxpayer's income tax liability to the United States Government.

In view of the foregoing, it is concluded that the amount of tax paid under Article XV of the Cuban tax law, approved July 9, 1928, to the Cuban Government on gross revenues derived from sources in Cuba is not an income tax and may not be claimed as a credit under section 131 of the Revenue Act of 1928. The amount of such tax may, however, be claimed as a deduction under section 23(c) of the Revenue Act of 1928, for the year in which paid or accrued,

dependent upon whether the taxpayer's books of account are kept on the cash receipts and disbursements basis or on the accrual basis.

Inasmuch as the emergency tax law of Cuba, approved January 29, 1931, contains in Article III of chapter 6 practically the identical provisions with respect to the taxation of foreign navigation companies as is contained in Article XV of the Cuban tax law approved July 9, 1929, the above ruling is applicable to taxes paid under the emergency tax law.

ARTICLE 698: Domestic corporation owning a majority of the stock of foreign corporation. X–40–5234 T. D. 4323

INCOME TAX.

Amendment of article 698 of Regulations 74.

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

To Collectors of Internal Revenue and Others Concerned:

Article 698 of Regulations 74 is hereby amended to read as follows:

ART. 698. *Domestic corporation owning a majority of the stock of foreign corporation.*—In the case of a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 23(p)) in any taxable year, the credit for foreign taxes includes not only the income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States by such domestic corporation, but also a credit for income, war-profits, and excess-profits taxes deemed to have been paid determined by taking the same proportion of any income, war-profits, and excess-profits taxes paid or accrued by such controlled foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of any such dividends received bears to the amount of such accumulated profits. The credit for taxes deemed to have been paid is limited, however, to an amount which shall in no case exceed the same proportion of the taxes against which the credit for foreign taxes is taken, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. If dividends are received from more than one controlled foreign corporation, the limitation is to be computed separately for the dividends received from each controlled foreign corporation. The credit for foreign taxes (including taxes paid or accrued by the domestic corporation and the credit for taxes deemed to have been paid) may not, under any circumstances, exceed the same proportion of the tax (computed on the basis of the domestic corporation's net income without the deduction of any income, war-profits or excess-profits tax any part of which may be allowed to the corporation as a credit by section 131), against which the credit is taken, which the domestic corporation's net income (computed without the deduction of any such income, war-profits, and excess-profits tax) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. A domestic corporation which includes in the credit for foreign taxes a credit for taxes deemed to have been paid must furnish the same information with respect to the taxes deemed to have been paid as it is required to furnish with respect to the taxes actually paid or accrued by it.

Taxes paid or accrued by a controlled foreign corporation are deemed to have been paid by the domestic corporation for purposes of credit only. Where the credit for foreign taxes includes both taxes paid or accrued by a domestic corporation and a credit for taxes deemed to have been paid, and the sum of the taxes paid or accrued and the credit for taxes deemed to have been paid exceeds the limitation on the entire amount of the credit allowable, the excess shall be apportioned between the taxes paid or accrued and the credit for taxes deemed

to have been paid in proportion to their respective amounts. The portion of the excess apportioned to the taxes paid or accrued, but not that apportioned to the credit for taxes deemed to have been paid, shall be allowed as a deduction from gross income under the provisions of section 23(c).

DAVID BURNET,
Commissioner of Internal Revenue.

Approved September 28, 1931.

A. W. MELLON,
Secretary of the Treasury.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 141.—CONSOLIDATED RETURNS OF CORPORATIONS—1929 AND SUBSEQUENT TAXABLE YEARS.

ARTICLE 12, REGULATIONS 75: Filing consolidated return and other forms. X–50–5316 I. T. 2607

REVENUE ACT OF 1928.

The consolidated return filed for 1929 and each subsequent taxable year by the parent corporation on Form 1120 should be accompanied by a Form 1122 filed by its subsidiary, and the subsidiary should also file Form 1122 each taxable year in the office of the collector for the district prescribed for the filing of separate returns by the subsidiary.

Advice is requested whether a subsidiary corporation which filed Form 1122 for the year 1929 is required to file such form for subsequent years. It has been suggested that according to the instructions on Form 1122, when a subsidiary corporation authorizes the parent corporation to file a consolidated return, it not only authorizes the filing of a consolidated return for the taxable year but for each subsequent taxable year. In this connection reference has also been made to article 12(b) of Regulations 75.

Article 12(b) of Regulations 75 reads as follows:

(b) *Authorizations and consents filed by subsidiaries.*
Each subsidiary must prepare two duplicate originals of Form 1122, consenting to these regulations and authorizing the parent corporation to file a consolidated return on its behalf for the taxable year and authorizing the parent corporation (or, in the event of its failure, the Commissioner or the collector) to file a consolidated return on its behalf (as long as it remains a member of the group), for each year thereafter for which, under article 11(a), the filing of a consolidated return is required. One of such forms shall be attached to the consolidated return, as a part thereof; and the other shall be filed, at or before the time the consolidated return is filed, in the office of the collector for the district prescribed for the filing of a separate return by such subsidiary. No such consent can be withdrawn or revoked at any time after the consolidated return is filed.

Article 11(a) of Regulations 75 provides that if a consolidated return is made for 1929 or for any taxable year thereafter, a consolidated return must be made for "each subsequent taxable year," with certain exceptions not here material. Form 1122 is more than a mere consent and authorization on the part of the subsidiary corporation. It is, on the face of it, an information return which tends to expedite the audit of tax cases. Under article 12(b), supra, it serves as an annual notice to the collector of the district

in which the subsidiary corporation would normally file its separate return that the subsidiary's income will be included in a consolidated return possibly filed in the office of some other collector. If the subsidiary was only required to file Form 1122 for the year in which the original consolidated return was filed under Regulations 75, much of the information necessary to the proper administration of the taxing statute would not be readily available. Accordingly, it is held that where the parent corporation makes and files a consolidated return, Form 1120, for a particular taxable year, whether it is the first taxable year a consolidated return is made under Regulations 75 or some subsequent taxable year, the consolidated return should be accompanied by a Form 1122 filed by its subsidiary and the subsidiary should also file Form 1122 each taxable year in the office of the collector for the district prescribed for the filing of a separate return by the subsidiary.

ARTICLE 41, REGULATIONS 75: Net losses. X–50–5317
G. C. M. 10026

REVENUE ACT OF 1928.

The balance of the 1927 net loss of a subsidiary, which also sustained a net loss in 1928, remaining after offsetting the 1927 net income of a parent may be used to reduce the 1929 net income of the parent company in determining the consolidated net income for that year.

An opinion is requested whether the M Company, the parent company, may receive the benefit of a net loss of its subsidiary under the following circumstances:

The M Company and its subsidiary, the N Company, filed consolidated returns for the years 1927 to 1929, inclusive, which disclosed the following:

	1927.	1928.	1929.
	x dollars.	*x dollars.*	*x dollars.*
M Company (net income)	158.04	154.70	303.49
N Company (net loss)	222.70	147.96	94.06
Consolidated net income or loss	−64.66	+6.74	+209.43

The issue involved is the proper application of the 1927 net loss to the taxable year 1929.

The N Company, the subsidiary, sustained a net loss of $222.70x$ dollars in 1927, and after the net loss was used as an offset against the separate net income of $158.04x$ dollars of the M Company for that year, there remained a consolidated net loss of $64.66x$ dollars, all of which under the ruling laid down in *Swift & Co.* v. *United States* (38 Fed. (2d), 365) must be apportioned to the subsidiary to be used as an offset against the subsidiary's proportion, if any, of the consolidated net income for 1928. The subsidiary sustained a net loss of $147.96x$ dollars for the year 1928, and after this was applied against the parent company's net income of $154.70x$ dollars there remained a consolidated net income of $6.74x$ dollars. All of this consolidated net income for 1928 was apportioned to the parent com-

pany. As a consequence there was no net income for 1928 against which the balance of the subsidiary's 1927 net loss might be applied. But for the change, beginning with the taxable year 1929, in the rules for the application of net losses of affiliated companies, this balance of the subsidiary's 1927 net loss could not have been availed of for 1929 by this affiliated group, because the subsidiary also sustained a net loss for that year. Since the privilege of carrying forward a net loss is limited to two years immediately succeeding the taxable year in which it is sustained, the benefit of such balance of the 1927 loss would have lapsed. (G. C. M. 8132, C. B. IX–1, 287; G. C. M. 8618, C. B. IX–2, 180; and G. C. M. 8686, C. B. IX–2, 306.)

Article 41(b) of Regulations 75 provides that:

(b) *Consolidated net loss for years prior to 1929.*
A consolidated net loss sustained for either of the two taxable years immediately preceding the taxable year 1929, in the case of a parent corporation and one or more other corporations which made a consolidated return for such year, shall, if such parent is a member of an affiliated group which makes a consolidated return for the taxable year 1929 or the next succeeding taxable year, be allowed as a deduction in computing the consolidated net income of such group for 1929 or the next succeeding taxable year in the same manner, to the same extent, and upon the same conditions as if such group were a single corporation and the same taxpayer, except that no part of any such consolidated net loss which has previously been allowed, or is allowable, as a deduction in computing the net income of any such corporation which is not a member of such affiliated group during 1929 or the next succeeding taxable year, shall be allowed as a deduction in computing such consolidated net income for 1929 or the next succeeding taxable year. * * *

Under section 141 of the Revenue Act of 1928, relating to consolidated returns of corporations for 1929 and subsequent taxable years, the benefit of making consolidated returns is confined to a chain or chains of corporations connected through stock ownership with a common parent company. Under section 141(b) of that Act the Commissioner was delegated to prescribe regulations, with the approval of the Secretary, for the determination of the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation. This delegation of power has been referred to as legislative in character (Senate Report 960, Seventieth Congress, first session, page 15), and it is also laid down as a condition to the exercise by an affiliated group of the right to file a consolidated return that the group must consent to the regulations prescribed prior to the date on which the return is filed. Regulations 75 have been promulgated under this authority. These regulations deal with the parent company as the company primarily concerned with the tax liability of the affiliated group. They permit the parent company to take unto itself entirely the net losses of the group for *1929 and later years.* (Article 41(a) of Regulations 75.) If the parent company remains the same, the group as a whole is permitted to take over in 1929 any balance of net losses of the affiliated group for 1927 and 1928. (Article 41(b) of Regulations 75.) These provisions have been consented to by affiliated groups which have filed consolidated returns for the taxable year 1929, and their returns for 1929 must be audited accordingly.

The Commissioner has authority under section 141(b) of the Revenue Act of 1928 to lay down such regulations as he may deem necessary for determining the tax liability of affiliated groups of

corporations making consolidated returns for 1929 and subsequent taxable years. Regulations 75 were promulgated January 3, 1929, some 13 months before the promulgation of the opinion of the Court of Claims in *Swift & Co.* v. *United States*, supra, decided February 17, 1930.

The rulings of this office heretofore referred to, viz, General Counsel's Memorandum 8132, General Counsel's Memorandum 8618, and General Counsel's Memorandum 8686, which are based upon *Swift & Co.* v. *United States*, supra, set forth the rules applicable to the treatment of net losses of affiliated groups to and including the taxable year 1928, and article 41 of Regulations 75 sets forth the rules applicable to 1929 and subsequent years.

Under the facts stated, the balance of the 1927 net loss of the N Company, the subsidiary, which remained after offsetting the 1927 net income of the M Company, the parent company, may be used to reduce the 1929 net income of the M Company in determining the consolidated net income for that year.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 144.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 761: Withholding tax at source. X–40–5227
I. T. 2592

REVENUE ACT OF 1928.

No withholding at the source is required from interest paid to a nonresident alien individual, whether or not such individual is engaged in business in the United States, on Treasury bonds dated and bearing interest from June 15, 1931, issued under authority of the Act of Congress approved September 24, 1917, as amended.

A ruling is requested whether, for income tax purposes, any withholding of tax at the source is required from interest paid on the issue of Treasury bonds, dated and bearing interest from June 15, 1931, to a nonresident alien individual engaged in business in the United States through an agent.

The bonds referred to were issued under the authority of the Act of Congress approved September 24, 1917, as amended. Under the provisions of that Act interest on the bonds, when taxable for Federal income tax purposes, is subject only to the graduated additional income taxes commonly known as surtaxes. Article 90 of Regulations 74 provides as follows:

By virtue of section 4 of the Victory Liberty Loan Act of March 3, 1919, amending section 3 of the Fourth Liberty Bond Act of July 9, 1918, the interest received on and after March 3, 1919, on bonds, notes, and certificates of indebtedness of the United States while beneficially owned by a nonresident alien individual, or a foreign corporation, partnership, or association, not engaged in business in the United States, is exempt from income taxes.

In respect to the above-quoted provision of Regulations 74, this Bureau is of the opinion that the qualifying phrase "not engaged in business in the United States" is not applicable to nonresident alien individuals, but is applicable only to foreign corporations, partner-

ships, and associations. In this connection attention is invited to Form 1040–B, prepared for the use of nonresident alien individuals in making Federal income tax returns. Instruction 28 on that form provides in part:

The following items are exempt from Federal income tax and should not be reported, unless it is desired to establish a net loss, in which case see section 117 of the Revenue Act of 1928:

* * * * * * *

(d) Interest upon * * * (3) the obligations of the United States or its possessions. * * *

No withholding at the source is, of course, required in respect of income which is exempt from Federal income tax.

In view of the foregoing, it is held by this office that no withholding at the source is required from interest on the Treasury bonds above referred to paid to a nonresident alien individual, whether or not such individual is engaged in business in the United States.

ARTICLE 767: Form of certificate for nonresident aliens, nonresident foreign corporations, and unknown owners. X–48–5302 I. T. 2605

REVENUE ACT OF 1928.

The name of the fiduciary should be disclosed on an ownership certificate, Form 1001, as well as the name of the estate or trust.

Advice is requested whether the name of the fiduciary should be disclosed on an ownership certificate, Form 1001, as well as the name of the estate or trust.

The application of the withholding provisions of the statute to the income of a trust depends upon the status of the fiduciary and not upon the status of the creator of the trust or the beneficiaries thereof. The name of the fiduciary, therefore, must be entered on the ownership certificate in order to ascertain whether the withholding provisions of the statute requiring tax to be withheld are applicable, and, if so, the rate required to be reported.

The words "A Trust" should be added under the caption "Owner of bond" when executing ownership certificate, Form 1001, and exemption certificate, Form 1002. Failure to comply with the foregoing has in the past resulted in the disapproval of exemption certificates because the status of the bond owner could not be determined from the name appearing thereon.

SECTION 146.—PENALTIES.

ARTICLE 791: Penalties. X–50–5318 Ct. D. 424

FEDERAL TAXES—REVENUE ACTS OF 1926 AND 1928—DECISION OF SUPREME COURT.

1. WITNESS—REFUSAL TO TESTIFY—SELF-INCRIMINATION—PROSECUTION FOR FAILURE TO SUPPLY INFORMATION.

While the right of a person, summoned under the provisions of section 1104 of the Revenue Act of 1926 as amended by section 618

of the Revenue Act of 1928, to refuse to testify lest he incriminate himself, may be tested in a proceeding to compel testimony, a determination of that question is not required before prosecution for the willful failure to supply information that is made a misdemeanor by section 1114(a) of the Revenue Act of 1926 and section 146(a) of the Revenue Act of 1928.

2. WITNESS—IMMUNITY—SELF-INCRIMINATION—WAIVER.

Where in a Federal proceeding the only claim of immunity asserted by a witness is that his testimony might tend to incriminate him under a State law, he waives his right to claim immunity on the ground that his answers would incriminate him under a Federal law.

3. SAME.

Where in a Federal proceeding a witness does not claim immunity based upon fear of prosecution under a Federal law he does not bring himself under the protection of the fifth amendment of the Constitution.

4. FEDERAL CRIMINAL PROCEDURE—PLEA IN BAR.

Where after a demurrer which is not disposed of and motions for a bill of particulars and to suppress evidence which are denied, a plea of not guilty is entered, under Federal criminal procedure the case should thereupon be tried and there is no warrant for a special plea in bar to single out for determination in advance of trial matters of defense either on questions of law or fact.

SUPREME COURT OF THE UNITED STATES. No. 38.—OCTOBER TERM, 1931.

The United States of America, appellant, v. *Harry Murdock.*

Appeal from the District Court of the United States for the Southern District of Illinois.

[November 23, 1931.]

Mr. Justice BUTLER delivered the opinion of the court.

Appellee filed his individual Federal income tax returns for 1927 and 1928, and in each year deducted $12,000 which he claimed to have paid to others. An authorized revenue agent summoned appellee to appear before him and disclose the recipients. Appellee appeared but refused to give the information on the ground that to do so might incriminate and degrade him.

He was indicted for such refusal and interposed a special plea averring that he ought not to be prosecuted under the indictment because, if he had answered the questions put to him, he would have given information that would have compelled him to become a witness against himself in violation of the fifth amendment and caused him to be subjected to prosecution in the court below for violation of various laws of the United States, as shown by a transcript of the questions asked and answers given which he included in his plea. The United States demurred to the plea on the grounds that it fails to show that the information demanded would have incriminated or subjected defendant to prosecution under Federal law, and that defendant waived his privilege under the fifth amendment. The court overruled the demurrer and entered judgment discharging defendant.

The judgment necessarily determined that to require defendant to supply the information called for would be to compel him to incriminate himself and that therefore he did not unlawfully or willfully refuse to answer. Its effect, unless reversed, is to bar further prosecution for the offense charged. It follows unquestionably that, without regard to the particular designation or form of the plea or its propriety, this court has jurisdiction under the Criminal Appeals Act.[1] (*United States* v. *Barber*, 219 U. S., 72, 78; *United States* v. *Oppenheimer*, 242 U. S., 85; *United States* v. *Thompson*, 251 U. S., 407, 412;

[1] A writ of error may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: * * *

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. (18 U. S. C., section 682; 34 Stat., 1246. See also 28 U. S. C., page 345 (2).)

United States v. *Storrs*, 272 U. S., 652, 655; *United States* v. *Goldman*, 277 U. S., 229, 236.)

The offense charged is defined; "Who willfully fails to * * * supply such information [for the computation of any tax imposed by the Act] at the time or times required by law or regulations, shall * * * be guilty of a misdemeanor."[2] Other provisions authorize resort to the district courts to compel attendance, testimony and production of books.[3] While undoubtedly the right of a witness to refuse to answer lest he incriminate himself may be tested in proceedings to compel answer, there is no support for the contention that there must be such a determination of that question before prosecution for the willful failure so denounced. By the very terms of the definition the offense is complete at the time of such failure.

Immediately in advance of the examination, appellee's counsel discussed with counsel for the Internal Revenue Bureau the matter of appellee's privilege against self-incrimination and stated that he had particularly in mind incrimination under State law. And at the hearing appellee repeatedly stated that, in answering "I might incriminate or degrade myself," he had in mind "the violation of a State law and not the violation of a Federal law." The transcript included in the plea plainly shows that appellee did not rest his refusal upon apprehension of, or a claim for protection against, Federal prosecution. The validity of his justification depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made. The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked. (*Vajtauer* v. *Commissioner of Immigration*, 273 U. S., 103, 113.)

The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against State law. Nothing of State concern was involved. The investigation was under Federal law in respect of Federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for Federal purposes may not be prevented by matters depending upon State law. (Constitution, Article VI, section 2.) The English rule of evidence against compulsory self-incrimination, on which historically that contained in the fifth amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. (*King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.), 1050, 1068; *Queen* v. *Boyes*, 1 B. & S., 311, 330.) This court has held that immunity against State prosecution is not essential to the validity of Federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of State power to give witnesses protection against Federal prosecution does not defeat a State immunity statute. The principle established is that full and complete immunity against prosecution by the Government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. (*Counselman* v. *Hitchcock*, 142 U. S., 547; *Brown* v. *Walker*, 161 U. S., 591, 606; *Jack* v. *Kansas*, 199 U. S., 372, 381; *Hale* v. *Henkel*, 201 U. S., 43, 68.) As appellee at the hearing did not invoke protection against Federal prosecution, his plea is without merit and the Government's demurrer should have been sustained.

We are of opinion that leave to file the plea should have been withheld. The proceedings below are indicated by a chronological statement printed in

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[2] Any person required * * * to * * * supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to * * * supply such information, at the time or times required by law or regulations, shall * * * be guilty of a misdemeanor * * *. (26 U. S. C., section 1265; section 1114(a), Revenue Act of 1926, 44 Stat., 116; 26 U. S. C., section 2146; section 146(a), Revenue Act of 1928, 45 Stat., 835.)

[3] 26 U. S. C., sections 1257, 1258; 1122(a), (b), Revenue Act of 1926 (44 Stat., 121). Superseded by 26 U. S. C., section 2617; section 617, Revenue Act of 1928 (45 Stat., 877).

the margin.[4] After demurrer—not shown by the record to have been disposed of—and motions for a bill of particulars and to suppress evidence which were denied, a plea of not guilty was entered. The case should then have been tried without further form or ceremony. (18 U. S. C., section 564.) The matters set forth in the plea were mere matters of defense determinable under the general issue. Federal criminal procedure is governed not by State practice but by Federal statutes and decisions of the Federal courts. (*United States* v. *Reid*, 12 How., 361; *Logan* v. *United States*, 144 U. S., 263, 301; *Jones* v. *United States*, 162 Fed., 417, 419; *United States* v. *Nye*, 4 Fed., 888, 890.) Neither require such piecemeal consideration of a case. A special plea in bar is appropriate where defendant claims former acquittal, former conviction or pardon (2 Bishop New Criminal Procedure (2d ed.), sections 742, 799, 805 et seq.), but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact. That such a practice is inconsistent with prompt and effective administration of the law and is likely to result in numerous hearings, waste of courts' time and unnecessary delays is well illustrated by the record in this case. The indictment was returned January 23, 1930, the judgment before us was entered more than a year later, and it seems certain that more than two years will have elapsed after indictment before the case can be reached for trial.

Judgment reversed.

SECTION 148.—INFORMATION AT SOURCE.

ARTICLE 818: Information as to actual owner. X–37–5203
I. T. 2590

REVENUE ACT OF 1928.

It will be a satisfactory compliance with the provisions of article 818 of Regulations 74 if ownership certificate—dividends on stock (Form 1087)—disclosing actual ownership of stock and dividends thereon, or a substitute form approved by the Bureau, is filed by brokers for each customer where the individual dividend credit to the customer's account is $125 or more, disregarding credits of less than that amount.

If a broker desires he may retain the forms so prepared until the end of the calendar year and forward them to the Bureau only in those cases where the aggregate amount of the individual dividend credits as shown by the forms equals or exceeds $500.

A ruling is requested relative to the procedure to be followed by the record owner of stock in filing ownership certificate—dividends on stock (Form 1087)—disclosing actual ownership of stock and

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[4] 1930.
Jan. 23. Indictment returned.
Feb. 6. Demurrer to indictment.
Feb. 19. Additional special ground for demurrer.
Feb. 25. Motion for bill of particulars.
May 27. Motion to suppress evidence and to restrain its use at trial.
Motion for bill of particulars denied.
Arraignment and plea of not guilty.
June 10. Argument on motion to suppress.
June 21. Motion to suppress denied.
July 1. Leave granted to file special plea.
Special plea filed.
Oct. 1. Demurrer to plea filed and hearing thereon set for October 13.
Oct. 13. Second and third special pleas filed.
Oct. 17. Demurrer to second and third special pleas filed.
Hearing on demurrers.
Oct. 18. Demurrer to first special plea overruled; demurrers to second and third special pleas sustained.
Oct. 28. Opinion on demurrers.
1931.
Feb. 3. Plea of not guilty withdrawn.
Judgment for defendant on first special plea.
Mar. 4. Appeal allowed.

dividends thereon under the provisions of article 818 of Regulations 74. The following procedure has been suggested as meeting the requirement of the regulations:

1. Form 1087 (or a substitute therefor containing the necessary information) to be filed by brokers for each customer where the individual credit is $100 or more at the time it is made, disregarding the credits of less than that amount.

2. Should a broker desire, he may retain all forms until the end of the year and file only those where the total dividend credits to one individual for one year are $500 or more.

Article 818 of Regulations 74, so far as is here material, reads as follows:

When the person receiving a payment falling within the provisions of the Act for information at the source is not the actual owner of the income received, the name and address of the actual owner shall be furnished upon demand of the individual, corporation, or partnership paying the income, and in default of a compliance with such demand the payee becomes liable to the penalties provided. (See section 146.) Dividends on stock are prima facie the income of the record owner of the stock. Upon receipt of dividends by a record owner, he should immediately execute Form 1087 to disclose the name and address of the actual owner. Form 1087 should be filed with the Commissioner of Internal Revenue, Sorting Section, Washington, D. C. Unless such a disclosure is made, the record owner will be held liable for any tax based upon such dividends. (See article 831.)

It will be a satisfactory compliance with the provisions of article 818, and one which will entail the minimum amount of work upon brokers and result in the maximum amount of usefulness to the Bureau, if Form 1087, disclosing actual ownership of stock and dividends thereon, or a substitute form approved by the Bureau, is filed by brokers for each customer where the individual dividend credit to the customer's account is $125 or more, disregarding credits of less than that amount. The substitute form, if used, shall be the exact size of Form 1087 (3½ inches by 8 inches) and must contain the same information required thereby, but the preparation of the substitute form is left to the convenience of the broker, subject, of course, to the approval of the Bureau.

If a broker desires, he may retain the forms so prepared until the end of the calendar year and forward such forms to the Bureau only in those cases where the aggregate amount of the individual dividend credits as shown by the forms equals or exceeds $500.

ARTICLE 818: Information as to actual owner. X–48–5303
I. T. 2606

REVENUE ACT OF 1928.

Illustration of the method of complying with the provisions of article 818 of Regulations 74 in the execution of Form 1087, disclosing actual ownership of stock and the dividends thereon, in accordance with I. T. 2590 (see page 195).

The following illustration is given of the application of the ruling in I. T. 2590 with respect to the execution of Form 1087, disclosing actual ownership of stock and the dividends thereon.

Each dividend payment of $125 or more credited to a customer's account by a broker should be entered on Form 1087, or a substitute form. No dividend payment of less than $125 should be entered on such form. If a broker desires to forward to the Bureau each form so prepared (representing a payment of $125 or more) immediately upon its preparation, he may do so. If he desires to hold the forms so prepared (each representing a payment of $125 or more) until the end of the calendar year, such forms need be forwarded to the Bureau only in cases where the aggregate amount reported on the forms so prepared with respect to the dividends received from one dividend-paying corporation equals or exceeds $500. For example, a broker during the calendar year credits a customer's account as follows:

Name of corporation.	First quarterly dividend.	Second quarterly dividend.	Third quarterly dividend.	Fourth quarterly dividend.
A Corporation	$125	$125	$125	Passed.
B Corporation	100	100	100	$100
C Corporation	200	200	200	200

The broker should execute Form 1087 or a substitute form for the three dividend payments received from A Corporation and the four dividend payments received from C Corporation but should not execute such form for the four dividend payments received from B Corporation. If he desires to hold the forms prepared until the end of the calendar year, he would not be required to forward to the Bureau the three forms representing dividends from A Corporation but he would be required to forward to the Bureau the four forms representing the dividends from C Corporation.

SUPPLEMENT E.—ESTATES AND TRUSTS.

SECTION 161.—IMPOSITION OF TAX.

ARTICLE 861: Estates and trusts.

X–41–5238
G. C. M. 8724

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

Where a trust instrument provides for payment of income to A for life and after death to her children and the issue of any deceased child and that all payments shall be made on the 2d day of January and July, the income from July 2 to December 31, 1926, is "income which is to be distributed currently by the fiduciary to the beneficiaries" and taxable to the beneficiary.

Recommended that Appeals and Review Recommendation 3421 (C. B. II–2, 172) be revoked.

An opinion is requested whether certain income of a trust is taxable to the beneficiary or to the trust as an entity.

The third clause of the trust agreement provides as follows:

Third: During the continuance of the trust payment of income shall be made as follows: to the said A during her lifetime and after her death to the living children of said A and the issue of any deceased child or children, the issue of any deceased child to take the share of the deceased ancestor.

All payments of income hereunder shall be made on the 2d days of January and July in each and every year. All income on hand at the time of the death of said A shall be paid to the person or persons entitled to the income of the trust fund upon her death, and no beneficiary hereunder shall be entitled to any income for any half year, or any part thereof, unless living at the time fixed for such payment.

For the years 1918 to 1925, inclusive, the trustee reported the entire income as having been distributable to A, and she included the income in her returns. In reporting the distributable income of the trust for the year 1926, however, the trustee decided that its action in past years had been erroneous, and that income from July 2 to December 31, 1926 (the trust being on the calendar-year basis), was "income accumulated in trust for the benefit of * * * persons with contingent interests" within the meaning of section 219(a)1 of the Revenue Act of 1926, and hence was taxable to the fiduciary. In this connection, the trustee relies solely on Appeals and Review Recommendation 3421 (C. B. II–2, 172).

Section 219 of the Revenue Act of 1926 provides in part as follows:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *;

* * * * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

The foregoing provisions contrast income which is "accumulated" or "held for future distribution" with income "which is to be distributed currently." In the former cases, the income is taxed to the trust as an entity. In the latter it is taxed to the beneficiary. Funk & Wagnalls New Standard Dictionary defines the word "currently" as follows:

In a current manner; flowingly; commonly. * * *

In the same dictionary, the adjective "current" is defined as follows:

Current, * * * a. 1. Passing from hand to hand or from mouth to mouth, as money or as news; circulating or circulated; generally accepted as valid, authentic, or true; as *current* coins; *current* ideas.

* * * * * * *

2. In actual progress, or belonging to the time immediately passing; as, the *current* month; the *current* number of a periodical. 3. *Math.* Differing from point to point; as, *current* lines; 4. [Archaic.] Moving; running; flowing.

If it be assumed, for the sake of argument, that the word "currently" in section 219 is used in a sense similar to the second

dictionary definition quoted above for the adjective "current," namely, as "belonging to the time immediately passing," it might be argued that "to be distributed currently" means "to be distributed in the *current* year," that is, in the taxable year of the trust during which the income is earned. Of course it is clear that the phrase can not mean that distribution must actually *occur* during the taxable year, because it is expressly provided that "the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries *whether distributed to them or not.*" The most the phrase could mean, therefore, is that such income which, under the terms of the trust instrument, should be distributed during the taxable year of the trust, is taxable to the beneficiaries, whether distributed or not.

But even this meaning would largely destroy the purpose of the statute. Most trust instruments do not specify an exact day for distribution, but simply provide that the income shall be distributed annually, semiannually, or quarterly. In such cases, if the trust, for example, keeps its books on the calendar-year basis, it can not reasonably be said that the income for the year (or for the last half year or last quarter, as the case may be) is required, by the trust instrument, to be distributed on December 31. On the contrary, a logical interpretation of the instrument would give the trustee a reasonable time after the close of the year to find out what the income is and to make distribution of it. In such cases, therefore, if "to be distributed currently" means "to be required by the trust instrument to be distributed during the taxable year of the trust," the result is that all (or a half or a quarter) of the trust income would be taxed to the trust as an entity, in spite of the fact that it is regularly distributed to the beneficiaries. Obviously, such a result was never intended. It was intended that such income should be taxed to the beneficiaries, and that only such income as was in reality accumulated by the trust for future distribution should be taxed to the trust. The phrase does not mean, therefore, that income which is required by the trust instrument to be distributed during the taxable year of the trust is taxable to the beneficiaries. At most, it refers to income as to which the trust instrument requires a distribution, "belonging to the time [taxable year] immediately passing" in the sense that it should occur within a reasonable time after the close of the taxable year. The distribution would then "belong" to, and be connected with, the taxable year, even though not actually within such year. What constitutes a "reasonable time," under such an interpretation, would vary according to the individual case.

However, it is not necessary to infer that the word "currently" refers so directly to the taxable year as has been assumed, for the sake of argument, in the foregoing discussion. One dictionary definition of the term, as quoted above, is "commonly," and this may well be the sense in which the term is used in section 219. This view is strengthened by the fact that, under the Revenue Acts of 1918 and 1921, the corresponding phrase was "income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals." If the phrase in the later Acts is interpreted as meaning "income which is to be distributed commonly by the fiduciary

to the beneficiaries," the similarity in meaning to the corresponding phrase in the earlier Acts is apparent, and there is no indication in the committee reports that Congress intended the later Acts to make any change in this respect.

The mere fact that the trust instrument in the instant case requires distribution of the latter half of the year's income on the following January 2, instead of on December 31, does not mean that such portion of the income is not "to be distributed currently by the fiduciary to the beneficiaries." On the contrary, it is apparent, from the terms of the instrument, that *all* the income of the trust is to be distributed semiannually, and that distribution of the portion earned during the latter half of the year is to occur as soon after December 31 as could reasonably be required of any trustee. January 1 being a holiday, it is difficult to see how distribution could be made at an earlier date than January 2.

It is contended, however, that, in the instant case, there is not only the factor of distribution not being required within the taxable year, but also the additional factor that on December 31 it is not certain who will get the income for the latter half of the year.

The fact that there is some uncertainty as to who the beneficiaries may be, because of a possible death during the 2-day interval, does not result in transforming income which is required to be distributed currently into income which is "accumulated" or "held for future distribution." In other words, it is not sufficient to show that there is a possibility that the beneficiaries, on January 2, may be persons who, on the preceding December 31, were "unascertained," or were "persons with contingent interests," in order to permit the taxation of the income to the trust as an entity. It must be shown, in addition, that the income was "accumulated," or "*held* for future distribution," and this can not be shown in the instant case. There is no requirement, in section 219(b)2, that the exact beneficiaries be ascertained during the taxable year, any more than there is a requirement that distribution must actually occur during such year. The subdivision provides for the deduction, by the trust, of income "which is to be distributed currently by the fiduciary to the beneficiaries," and for the inclusion of such amount "in computing the net income of the beneficiaries whether distributed to them or not." The test is not who the beneficiaries are, but whether the income "is to be distributed currently," and it is entirely clear in the instant case that it was to be distributed currently, and at the earliest practicable moment after the close of the year, taking into consideration the legal holiday.

The deduction should, therefore, be taken by the trustee whether or not A is alive on January 2. If she is alive, she will include the amount in her return. If not, some other beneficiary, or beneficiaries, will include it, so far as the amount earned during the latter half of the year is concerned.

That this is the proper construction of the statute is indicated, by analogy, in the case of *Clapp* v. *Heiner* (34 Fed. (2d), 506). In that case, the grantor of a trust reserved "the right to revoke this trust after six (6) months' written notice of his intention to do so served on the party of the second part [the trustee] * * *, whereupon

the principal of the trust fund, together with any unpaid income, shall be transferred to the party of the first part [the grantor] * * *." Section 219(g) of the Revenue Act of 1924 provided that:

(g) Where the grantor of a trust has, at any time during the taxable year * * * 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.

It was argued that the income for at least the latter half of each year should not be taxable to the grantor (if he had not given notice of an intention to revoke before the beginning of such latter half), because, in such a case, it would be clear that he could not revest title in himself "during the taxable year." The court said:

* * * There is nothing to this proposition. The power of revocation rested in the plaintiff. The fact that he had to give six months' notice in order to exercise that power of revocation did not change the status of the income as taxable under this statute for the entire period. * * *

Likewise, in the instant case, it is clear that *during the entire taxable year* all the income of the trust "is to be distributed currently," and it is quite immaterial that distribution may not occur until two days after the taxable year closes. The statute provides that a deduction shall be allowed where the income is to be distributed currently, and that the beneficiaries shall include the amount of such income in computing their net income. It would be contrary, therefore, both to the letter and to the spirit of the statute to tax any portion of the distributable income to the trust as an entity.

The instant case is distinguishable from I. T. 1733 (C. B. II-2, 169). In that case the income was all distributable under the terms of the trust instrument, but litigation arose over the amounts of the respective shares of the beneficiaries and the trustee withheld distribution of the disputed amount pending the termination of the litigation. It was held that such amount constituted undistributable income, and should be taxed to the trust as an entity. In the instant case, the income is being regularly distributed. The statement in I. T. 1733 that in order to be taxable to the beneficiary the income "must be his for the mere asking" must be read in connection with the facts there involved, where the litigation might continue for years. It does not mean that the beneficiary, by the mere asking, in all cases must be able to get the income on December 31 of each year in order for such income to be taxable to him. Ordinarily he is not able to get distribution on that date because, as already pointed out, the trustee is entitled to a reasonable time after the close of the year to compute and distribute the income.

The ruling contained in Appeals and Review Recommendation 3421, supra, which is relied upon by the taxpayer, is essentially contrary to the above reasoning, and it is recommended that Appeals and Review Recommendation 3421 be revoked.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 322.—REFUNDS AND CREDITS.

ARTICLE 1257: Limitations upon the crediting and refunding of taxes paid.

REVENUE ACT OF 1928.

Effect of reopening claim under Treasury Decision 4235 (C. B. VII–2, 76) on period within which suit must be brought. (See Ct. D. 357, page 291.)

TITLE IV.—ADMINISTRATIVE PROVISIONS.

SECTION 601.—BOARD OF TAX APPEALS—PROCEDURE.

REVENUE ACT OF 1928.

Evidence beyond stipulation of facts. (See Ct. D. 359, page 342.)

SECTION 604.—SUITS TO RESTRAIN ENFORCEMENT OF LIABILITY OF TRANSFEREE OR FIDUCIARY.

REVENUE ACT OF 1928.

Constitutionality of section 604, Revenue Act of 1928. (See Ct. D. 401, page 259.)

SECTION 610.—RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

SECTION 610. X–41–5239
Ct. D. 396

INCOME TAX—REVENUE ACTS OF 1921 AND 1928—DECISION OF COURT.

1. SUIT—ERRONEOUS REFUND—CREDIT BY OPERATION OF LAW.

Where the allowance of an overpayment of tax for the year 1918 is made when the period of limitation on collection of a tax for the year 1917, under section 250(d) of the Revenue Act of 1921, has not expired, the credit of the tax for the year 1917 by the overpayment is made by operation of law under that section. The refund of the tax thus credited is made through mistake of fact of an administrative officer of the United States and is recoverable by suit for money had and received and illegally paid out of the Public Treasury.

2. SUIT—ERRONEOUS REFUND—LIMITATION.

A suit by the United States to recover an amount of tax refunded by mistake of an administrative officer is not a proceeding to collect the tax which must be brought within the statutory

period of limitation prescribed therefor and such a suit is not subject to the period of the 2-year limitation on suits for the recovery of amounts erroneously refunded where it is commenced prior to May 1, 1928, and therefore within the saving clause of section 610(b) of the Revenue Act of 1928.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF ILLINOIS NORTHERN DIVISION.

United States of America, plaintiff, v. *Woolner Distilling Co., defendant.*

[June 30, 1931.]

OPINION.

FITZHENRY, J.: This is an action by the United States against the Woolner Distilling Co., a corporation, to recover $2,457.96, plus interest thereon from February 19, 1923. This is not a suit to collect any sum as unpaid taxes but is an action for money had and received, which money was erroneously, mistakenly or illegally paid out of the Public Treasury to defendant through mistake, or error of the administrative officers of the Government.

The parties waived trial by jury and the case was submitted to the court without a jury upon a written agreed statement of facts and the documents made exhibits thereto.

On February 19, 1923, defendant as successor corporation and real party then in interest received a refund of an allowance of overpayment of the 1918 income taxes of its dissolved subsidiary—the Duquesne Distributing Co.—in the sum of $5,994.86. At that time the dissolved corporation owed 1917 income tax of $2,457.96. Its 1917 return had been filed April 1, 1918, and the 1917 tax in question was assessed September 16, 1918. The 5-year period of limitation under section 250(d) of the Revenue Act of 1921, within which that 1917 assessment could have been collected by suit, credit, distraint or otherwise, had not expired when the 1918 refund was made and did not expire until April 1, 1923.

Because of the errors made in the office of both the collector and the Commissioner of Internal Revenue, the Bureau of Internal Revenue failed to enter upon its accounts with the taxpayer the credit of the 1918 overpayment in satisfaction and discharge of the then outstanding and legally collectible 1917 tax, which credit was accomplished in law and in fact under the mandatory provisions of section 252 of the Revenue Act of 1921 when the allowance of overpayment of 1918 tax now in question was made by the Bureau. This resulted in a payment to defendant out of the United States Treasury of the sum of $2,457.96, which plaintiff claims defendant was not entitled either to receive or to retain.

The administrative officers of the Bureau failed to make the necessary bookkeeping entries which would have insured the refund being reduced to the amount of net overpayment of taxes for both years involved. That error was made in the face of a letter from the taxpayer's counsel dated January 2, 1923, in which the taxpayer expressly recognized the authority and duty of the Bureau to satisfy the 1917 tax out of the 1918 overpayment and requested it to do so in adjusting the refund for 1918.

This action was commenced to recover the excessive and illegal refund on March 15, 1927, and at a time when there was no statutory period of limitation applicable to such actions. The limitation for the commencing of such actions which was first enacted under section 610(b) of the Revenue Act of 1928, approved May 29, 1928, contains a saving clause which expressly saves this action from the bar of limitation because it was pending before May 1, 1928.

The questions presented are as follows:

1. When an officer of the United States makes a refund of taxes under a mistaken idea of the law or the facts, may the United States recover by suit the amount so paid; and is there any limitation upon the United States for the commencement of such suit, where same was instituted prior to May 1, 1928?

2. Was the payment by plaintiff to defendant in 1923 of the sum of $5,994.86 based, to the extent of $2,457.96, on such mistake of fact that the plaintiff can now recover said sum of $2,457.96 from defendant?

3. Is the recovery of said sum in this action now barred, inasmuch as proceedings to enforce said 1917 tax liability of Duquesne Distributing Co. were not commenced within five years of the filing by Duquesne Distributing Co. of its Federal income tax return for the year 1917?

The first part of the question No. 1 must be answered in the affirmative and the second part in the negative. The second question must be answered in the affirmative; and the third in the negative, for the reason that this is not a proceeding to collect the income tax of the Duquesne Distributing Co. for the year 1917.

In this case, when it had been determined there had been an overpayment of the tax for the year 1918, in the sum of $5,994.86 and the proper certificate made to the collector of internal revenue in Pennsylvania, the tax for the year 1917 became paid by operation of law and the amount due—$2,457.96—should have been deducted from the amount of the overpayment and a proper certificate made back to the Commissioner, and the refund check would then properly have been issued for the balance due the claimant.

It is a misapprehension to regard this suit as a suit now to recover the income tax for the year 1917. There was a clear mistake, in fact, made by the officers of the Government when they vouchered the refund for the full amount found to have been overpaid for the year 1918.

The law and the rules and regulations relative to the collection of income taxes require that particular line of procedure and not only the collector and Commissioner were bound by it, but also the taxpayer to whom the refund was made.

Government officers are required to act within the law, as the Supreme Court, in *Wisconsin Central R. R. Co.* v. *United States* (164 U. S., 190) said:

"As a general rule, and on grounds of public policy, the Government can not be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act, unauthorized payments were made. (*Whiteside* v. *United States*, 93 U. S., 247; *Hawkins* v. *United States*, 96 U. S., 89, and cases before cited.) The question is not presented as between the Government and its officers, or between the officer and the recipient of such payment, but as between the Government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of action not authorized by law, resulting from an erroneous conclusion by the agent of the Government as to the legal effect of the particular statutory law under or in reference to which he is proceeding."

In *Sutton* v. *United States* (256 U. S., 575) the court adhered to this doctrine.

Prior to the passage of the Revenue Act of 1928, the Government could either recover by suit upon common counts, or counterclaim where a refund of taxes was made through mistake or error of law or fact upon the part of the administrative officers of the Treasury. (*Talcott* v. *United States*, 23 Fed. (2d), 897 [T. D. 4137, C. B. VII–1, 319]; certiorari denied, 277 U. S., 604; *Kelly* v. *United States*, 30 Fed. (2d), 163; *United States* v. *Barton*, 35 Fed. (2d), 765; *United States* v. *Standard Spring Mfg. Co.*, 23 Fed. (2d), 249 [T. D. 4115, C. B. VII–1, 308]; *Champ Spring Co.* v. *United States*, 38 Fed. (2d), 998 [Ct. D. 323, C. B. X–1, 446].)

Section 610(b) of the Revenue Act of 1928 does not bar this action, it having been commenced before May 1, 1928, and it was expressly excluded. As this is not a suit to collect a tax, statutes of limitation for the collection of taxes do not apply. (*Talcott* v. *United States*, supra.)

It is clear that the controversy presented by this suit is due to the interpretation placed upon the law by the defendant in holding that this is an action to recover unpaid income tax for the year 1917, which of course, was barred if not paid or collected within five years. The money refunded to the defendant for the year 1918 was in the hands of the Government before the bar of the 5-year statute of limitation had run, and this fact operated as the payment of the taxes for the prior year 1917.

Judgment may be prepared and submitted.

SECTION 613.—LIEN FOR TAXES.

SECTION 613. X–32–5163
G. C. M. 9710

REVENUE ACT OF 1928.

The act of June 15, 1931, enacted by the Legislature of Florida, can not be regarded as coming within the purview of section 3186, Revised Statutes, as amended by section 613 of the Revenue Act of 1928, and is, therefore, not such legislation as authorizes or requires the collector of internal revenue to file notices of Federal tax liens with clerks of circuit courts in the State of Florida in order to make such liens valid as against mortgagees, purchasers, and judgment creditors.

An opinion is requested whether an act passed by the Florida Legislature, approved by the governor on June 15, 1931, relating to the registration, recording, docketing, indexing, etc., of judgments and decrees of the United States courts with clerks of circuit courts in that State, comes within the purview of section 3186, Revised Statutes, as amended by section 613 of the Revenue Act of 1928.

The act of June 15, 1931, so far as is here material, reads as follows:

SECTION 1. That whenever the laws of this State shall require a judgment or decree of a circuit court of this State to be registered, recorded, docketed, indexed or any other thing to be done, in a particular manner or in a certain office or county before a lien shall attach, judgments and decrees of the United States courts held in this State are authorized to be registered, recorded, docketed, indexed, and otherwise conformed to the rules and requirements relating to the judgments and decrees of the circuit courts of this State.

SEC. 2. That the clerk of the circuit court in each county of this State shall enter in his record of foreign judgments certified transcripts of the judgments and decrees of the United States courts held in the State of Florida which may be presented to him for the purpose, and shall do and perform any and all things authorized in section 1 of this act.

SEC. 3. That chapter 10166 of the laws of Florida entitled "An act requiring the record of all judgments and decrees rendered in the Federal courts of the State of Florida to be recorded in the several counties in the State in which property of the defendants is located before such judgments or decrees shall attach as a lien thereof," approved June 3, 1925, be, and the same is hereby, repealed.

SEC. 4. All laws and parts of laws in conflict herewith are hereby repealed.

SEC. 5. This act shall take effect immediately upon its becoming a law.

The act of June 3, 1925, chapter 10166, now to be found as section 4492, Compiled General Laws of Florida, 1927 edition, repealed by section 3 of the act of June 15, 1931, declared that judgments and decrees recovered in Federal courts in the State of Florida should not create liens against real estate of a defendant unless a certified copy of the judgment or decree was recorded in the "foreign judgment docket" of the county wherein the real estate of such defendant was situated and sought to be bound by the judgment or decree.

The primary reason for the enactment of these State statutes will be found in section 1, Act of August 1, 1888 (25 U. S. Stat. L., 357), as amended by the Act of August 17, 1912 (37 U. S. Stat. L., 311, section 812, title 28, U. S. C. A.). This legislation makes the judgment or decree of a Federal district court within any State a lien on "property throughout such State" in the same manner, and to the same extent, and under the same conditions only as if the judgment

or decree had been rendered by a State court of general jurisdiction. The statute further provides:

> Whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this section * * * shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

The language last quoted indicates very clearly that the Act of June 3, 1925, supra, did not meet the prescribed conditions of the Federal Act and hence the necessity for the amendatory legislation of June 15, 1931.

It is to be noted, however, that both of the Florida acts, as well as the Act of Congress of August 1, 1888, as amended, relate exclusively to the registration, recording, docketing, indexing, etc., of judgments and decrees of United States courts. In none of them is there any reference, either directly or by implication, to the filing with local State officers of the notice of an internal revenue tax lien—a lien which does not arise by reason of any "judgment or decree" of the court, but comes into being by virtue of Acts of Congress other than those relating to so-called judgment liens. The two classes of liens are entirely dissimilar in origin, and, to some extent, in their effect. For example, on execution to enforce a judgment, the judgment debtor might claim the exemptions provided for by State law (see *Fink* v. *O'Neil*, 106 U. S., 272, and section 916, Revised Statutes), but in a distraint proceeding to enforce an internal revenue tax lien only the personal property specified in section 3187, Revised Statutes, would be exempt from seizure and sale. (I. T. 1683, C. B. II–1, 172.)

The Florida act of June 15, 1931, when considered in connection with the Federal laws bearing upon the subject matter of the State statute, can not be regarded as coming within the purview of section 3186, Revised Statutes, as amended by section 613 of the Revenue Act of 1928, and is, therefore, not such legislation as authorizes or requires the collector of internal revenue to file notices of Federal tax liens with clerks of circuit courts in the State of Florida in order to make such liens valid as against mortgagees, purchasers, and judgment creditors.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 613. X–41–5240
I. T. 2593

REVENUE ACT OF 1928.

The act of March 14, 1927, enacted by the Legislature of the State of New Mexico, is recognized by the Bureau of Internal Revenue as coming within the purview of subsection (b)1 of section 3186, Revised Statutes, as amended, as further amended by section 613, Revenue Act of 1928, relative to the filing of notices of Federal tax liens with local or State officials.

SECTION 613. X–41–5241
I. T. 2594

REVENUE ACT OF 1928.

The purchaser of real property at a sale on execution to satisfy a judgment is entitled to the rents payable under a lease of the property from the date of the delivery of the deed, as against the right of the Government to the rents under a levy pursuant to warrants issued, where notice of the lien was not filed until subsequent to recovery of the judgment.

Advice is requested relative to the collection of delinquent income taxes assessed against A. Assessments aggregating 15.46x dollars were made by the collector on March 1, 1930, and represented taxes due for the years 1924 to 1928, inclusive. On April 1, 1929, the taxpayer, then the owner of certain property in the city of R, New Jersey, leased the property to the M Company for the term of one year at an annual rental of 4.20x dollars. The lease gave the lessee the privilege of four successive annual renewals and provided that the lessee by continuing to occupy the premises after expiration of the original 1-year term, or after expiration of any renewal period, should be deemed to have exercised its option of renewal. The lease further provided that the first two renewal periods were to be at the annual rental of 4.20x dollars, and that the last two periods were to be at the annual rental of 4.40x dollars. The lease was not recorded.

It appears that on March 9, 1929, B obtained a judgment against the taxpayer for 2.25x dollars, including costs, in the ——— County Circuit Court. On October 30, 1930, execution was issued under this judgment, a levy was made on the property, and the property was sold on December 18, 1930. A sheriff's deed for the property appears to have been delivered on December 21, 1930, to C, one of the attorneys for B, she being referred to by C as the present owner, although title now appears to be held in C's name under the deed.

On April 21, 1930, the collector issued distraint warrants and on July 16, 1930, served a notice of levy on the M Company. Pursuant to the levy, the collector demanded and received the rents from the property until the sheriff's deed was delivered. Thereafter the payments have been held in abeyance pending a decision as to who was entitled thereto. It also appears that on April 30, 1930, the collector filed with the county clerk of ——— County, a notice of lien covering the taxpayer's delinquency.

Under the provisions of section 3186, United States Revised Statutes, as amended by section 613, Revenue Act of 1928, the Government's lien is not valid as against a judgment creditor until a notice of lien has been filed as provided by the statute. By the Act of July 1, 1928, chapter 140, Laws of 1928, the State of New Jersey provided for the filing of notices of Federal tax liens either in the office of the county clerk, or in the office of the register of deeds of the county where the property subject to such lien is situated. Since it appears that the judgment in favor of B was rendered on March 9, 1929, and that the notice of lien herein was not filed with the county clerk of ——— County until April 30, 1930, it follows that in view of the provisions of section 3186, supra, the Government's lien upon the taxpayer's property in ——— County,

which property includes all of his rights under the aforesaid lease, is not valid as against the prior judgment creditor.

It is well established that except where there is a stipulation to the contrary, the transferee of the reversion under a lease for years is entitled to the rent. (Tiffany on Real Property, second edition, volume 2, page 1470.) And where leased property is sold at a sheriff's sale, on execution against the owner, the sheriff's deed conveys the reversion and the rent follows as an incident thereto. (*Butt* v. *Ellett*, 19 Wall., 544.) It also appears to be the general rule, in the absence of statutory provisions to the contrary, that a judgment creditor purchasing real property under an execution sale is entitled to the rents and profits from the date he acquires title under the sheriff's deed. (*Tate* v. *Sanders*, 245 Mo., 186, 149 S. W., 485; *Clark* v. *Missouri K. & T. Co.*, 59 Nebr., 53, 80 N. W., 257.)

It does not appear that the aforesaid legal principles have been abrogated or altered by statutes or court decisions in New Jersey, in which State a sheriff's deed pursuant to a sale on execution passes the title to the property to the same extent as would a deed of bargain and sale executed by the judgment debtor. (See *Bilder* v. *Robinson*, 73 N. J. Eq., 169, 67 Atl., 828, holding that the purchaser at a sale on execution may obtain a decree that the rents be paid to him.) (See also *Roll* v. *Rea*, 57 N. J. L., 647, 32 Atl., 214; *Brady* v. *Carteret Realty Co.*, 67 N. J. Eq., 641, 60 Atl., 938, vol. 4, Compiled Statutes of New Jersey, page 4675, section 7.)

In view of what has been stated above, it is held that the purchaser of the property at the sale on execution under the judgment obtained by B is entitled to the rents payable under the lease from the date of the delivery of the deed, as against the right of the Government to the rents under levy pursuant to the warrants issued by the collector.

SECTION 613. X–46–5289
I. T. 2604

REVENUE ACT OF 1928.

The statute enacted by the Legislature of the State of Florida, approved June 15, 1931 (chapter 14757, No. 119 of 1931), effective as of that date, is accepted by the Bureau of Internal Revenue as coming within the purview of subsection (b)1 of section 3186, Revised Statutes, as amended, as further amended by section 613 of the Revenue Act of 1928, relative to the filing of notices of Federal tax liens with certain designated county or other officials. The Florida statute here involved is a different statute from the one under consideration in General Counsel's Memorandum 9710 (page 205).

SECTION 613. X–47–5295
G. C. M. 9978

REVENUE ACT OF 1928.

List of States which have authorized filing of notices of internal revenue tax liens with local officers, pursuant to section 3186, Revised Statutes, as amended.

Under section 3186, Revised Statutes, as amended by the Act of March 4, 1913 (37 Stat., 1016), the Act of February 26, 1925 (43 Stat., 994), and section 613 of the Revenue Act of 1928 (45 Stat., 875), it is provided that an internal revenue tax lien in favor of the United States shall not be valid as against any mortgagee, purchaser, or judgment creditor, in any State or Territory in which the property subject to the lien is situated, until notice thereof has been filed in accordance with the provisions of the local law, if such State or Territory has provided proper legislation for the filing of notices of Federal tax liens with local officers.

A list of the States which have heretofore enacted legislation authorizing the filing of internal revenue tax liens in favor of the United States with local officers, together with the date of approval of the authorizing act and its effective date, is as follows:

State.	Act of—	Effective date.	State.	Act of—	Effective date.
Alabama	Feb. 10, 1923	Feb. 10, 1923	Montana	Feb. 7, 1927	Feb. 7, 1927
Arizona	Mar. 4, 1925	June 11, 1925	Nebraska	Mar. 9, 1923	Mar. 9, 1923
Arkansas	Mar. 25, 1923	Mar. 25, 1923	Nevada	Mar. 21, 1925	Mar. 21, 1925
California	June 22, 1923	Aug. 17, 1923	New Jersey	Apr. 3, 1928	July 1, 1928
Colorado	Apr. 19, 1919	Apr. 19, 1919	New Mexico	Mar. 14, 1927	Mar. 14, 1927
Connecticut	June 23, 1925	June 23, 1925	New York [1]	Apr. 18, 1925	Sept. 1, 1925
Delaware	May 4, 1927	June 1, 1927	North Carolina	Aug. 22, 1924	Aug. 22, 1924
Florida	June 15, 1931	June 15, 1931	North Dakota	Feb. 19, 1923	July 1, 1923
Georgia	Aug. 11, 1924	Aug. 11, 1924	Ohio	Apr. 18, 1923	July 18, 1923
Idaho	Feb. 10, 1925	May 4, 1925	Oklahoma	Feb. 14, 1925	Feb. 14, 1925
Illinois	June 27, 1923	July 1, 1923	Oregon	Jan. 26, 1923	May 24, 1923
Indiana	Mar. 4, 1925	Mar. 4, 1925	Pennsylvania	May 1, 1929	May 1, 1929
Iowa	Apr. 19, 1923	Apr. 24, 1923	Rhode Island	May 28, 1923	May 28, 1923
Kansas	Mar. 20, 1923	Mar. 24, 1923	South Carolina	Mar. 1, 1928	July 1, 1928
Kentucky	Mar. 26, 1930	Mar. 26, 1930	South Dakota	Mar. 8, 1923	July 1, 1923
Louisiana	June 26, 1924	June 26, 1924	Tennessee	Mar. 19, 1925	Mar. 19, 1925
Maine	Mar. 9, 1925	July 11, 1925	Texas	Jan. 30, 1923	Jan. 30, 1923
Maryland	Apr. 16, 1914	Apr. 16, 1914	Utah	Feb. 28, 1927	July 1, 1927
Massachusetts	June 14, 1928	Sept. 12, 1928	Virginia	Mar. 20, 1922	Mar. 20, 1922
Michigan	May 2, 1923	Aug. 30, 1923	Washington	Feb. 16, 1925	May 14, 1925
Minnesota	Apr. 18, 1923	Apr. 18, 1923	West Virginia	Apr. 27, 1927	Apr. 27, 1927
Mississippi	Mar. 13, 1924	Mar. 13, 1924	Wisconsin	May 11, 1925	May 12, 1925
Missouri	Apr. 2, 1923	Apr. 2, 1923	Wyoming	Feb. 26, 1925	Feb. 26, 1925

[1] Covers liens on realty only.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 614.—INTEREST ON OVERPAYMENTS.

SECTION 614.
(Also Section 615.)

X–35–5183
Ct. D. 375

FEDERAL TAXES—REVENUE ACT OF 1928—DECISION OF COURT.

INTEREST—OVERPAYMENTS—JUDGMENTS.

Neither section 614 nor section 615 of the Revenue Act of 1928 authorizes interest on judgments but they do authorize interest on overpayments and under the latter section interest is allowed as therein provided upon the amount of the overpayment, whether or not the judgment as entered provides for the payment of interest beyond its date.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Andrew W. Mellon, Secretary of the Treasury; John Raymond McCarl, Comptroller General of the United States; and David Burnet, Commissioner of Internal Revenue, appellants, v. *United States ex rel. Orono Pulp & Paper Co., appellee.*

[June 1, 1931.]

OPINION.

ROBB, Associate Judge: Appeal from a judgment in the Supreme Court of the District sustaining the demurrer of appellee to the answer of appellants to the rule to show cause and petition for mandamus to compel appellants to approve for payment and pay to appellee interest on certain judgments.

On June 15, 1929, judgments were rendered in the District Court of the United States for the Southern District of Maine in a suit for the recovery of overpayments of Federal taxes for the years 1917, 1918, and 1919. These judgments included interest to their respective dates. Thereupon appellee filed claim for refund of the aggregate amount of the judgments, together with interest thereon from the date of the judgments to a date not more than 30 days prior to the date of the refund checks. Appellants paid the amounts of the respective judgments by checks dated January 25, 1930, and February 5, 1930, but refused payment of the interest claimed.

Section 614(a) of the Revenue Act of 1928, approved May 29, 1928 (45 Stat., 791, 876), entitled "Interest on overpayments," provides in part that: "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: (1) * * *; (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."

Section 615, entitled "Interest on judgments," amending section 177 of the Judicial Code, reads in part as follows: "In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner of Internal Revenue."

It will be observed that, whether the fact of overpayment has been determined by the Commissioner of Internal Revenue or by the court, interest is allowable from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days. This is conceded by appellants. They further concede that had the court in entering the judgments in the present case added "with interest according to law," the overpayments would have borne interest to a date within 30 days of the refund checks.

Appellants insist, however, that the words in section 615, "In any judgment * * * interest shall be allowed," require the court to add to the judgment, "with interest according to law." They contrast this provision with the provision in section 614 that "interest shall be allowed and paid *upon* any overpayment." Section 615 does not provide for payment of interest on a judgment, but upon the overpayments included in the judgment; hence the use of the word "in" instead of "upon" in that section. Both section 614 and section 615 provide that interest shall be allowed on *overpayments*. In the present case, interest was computed on the overpayments from their date to the date of the judgments. Had the judgments been paid within 30 days, there would have been a literal compliance with the terms of the statute. The case, therefore, narrows down to this: May the accounting officers, by delaying the payment of a judgment that does not expressly provide for interest beyond its date, defeat the obvious intent of the statute and deprive the taxpayer of interest, not on the judgment, but on the overpayment from the date of the judgment to within 30 days of the date of payment? We think not.

The statute clearly contemplates that where there is a delay of more than 30 days in the payment of a judgment, interest shall be computed upon the overpayment from its date to within 30 days of the refund. In the present case it is a simple matter of computation to determine the interest on the overpayments from the date of the judgment to a date within 30 days of the payment of the refund.

The court below directed the payment of interest on the judgments. This was error, as neither section 614 nor section 615 authorize interest on judgments, but they do authorize interest on overpayments. Since interest has been paid up to the date of the judgments, the order of the court below should be modified so as merely to direct the payment of interest on the ascertained overpayments from the date of the respective judgments to within 30 days of January 25, 1930, and February 5, 1930, respectively, the dates of the refund checks.

As modified, the judgment is affirmed.

Affirmed, as modified.

SECTION 615.—INTEREST ON JUDGMENTS.

REVENUE ACT OF 1928.

Interest beyond judgment date not expressly provided for in judgment. (See Ct. D. 375, page 209.)

TITLE V.—GENERAL PROVISIONS.

SECTION 701.—DEFINITIONS.

ARTICLE 1312: Association. X–40–5228
Ct. D. 391

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

ASSOCIATION—INSURANCE THROUGH A COMMON ATTORNEY IN FACT.

A number of persons, acting through an attorney in fact, organized under the statutes of Texas to do a general fire, tornado, hail, and floater insurance business, who have a common name, a common office, a common set of books, a common bank account as to a portion of their funds, a common policy form, the premiums of insurance being paid into a common fund to a pro rata share of which each "underwriter" is legally entitled and out of which expenses and losses are paid, is an association within the meaning of section 701(2) of the Revenue Act of 1928 and liable for the income tax imposed by that Act. The fact that the organization restricted its business to buildings covered by several hundred loans made by a building and loan company is immaterial.

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

Fletcher W. Harris, Attorney in Fact, Lloyd's Agency at Galveston, plaintiff, v. United States of America, defendant.

[April 30, 1931.]

OPINION.

KENNERLY, J.: Articles 5013 to 5023, inclusive, of the Texas Revised Statutes of 1925, authorize individuals, partnerships, or associations of individuals, to make any insurance (except life insurance) on the "Lloyd's plan," by executing articles of agreement, expressing their purpose so to do, and complying with the provisions of said articles. On April 15, 1927, Maco Stewart, of Galveston, Tex., and 11 other individuals executed a power of attorney, claimed to be such as is provided for in such articles, to Fletcher W. Harris, of Galveston, Tex. In such power of attorney, it is set forth that the business is to be carried on under the name of "Lloyd's Agency at Galveston." Fletcher W. Harris then filed with the insurance commissioner of the State of Texas an application for a permit for Lloyd's Agency at Galveston to write insurance in accordance with the provisions of said statute, for the year ending February 28, 1928. Such

permit for such period was issued by such commissioner. A similar application was filed and a similar permit was issued for the year ending February 28, 1929. Under instructions from the internal revenue authorities, and under protest, said Harris acting under the name of "Lloyd's Agency at Galveston," filed for such agency an income tax return for the calendar year 1928, and likewise, under protest, on or prior to March 15, 1929, paid to the proper tax authorities thirty-eight dollars ($38), being the assessment of tax owing under such return. This is a suit by said Fletcher W. Harris, as attorney in fact for Lloyd's agency at Galveston, by original petition filed November 19, 1930, and amended petition filed December 9, 1930, against the United States of America, under the provisions of subdivision 20 of section 41 of Title 28 of the United States Code, to recover such tax so paid. Defendant's answer, filed February 16, 1931, interposes general demurrer, special demurrer, and general denial. Such demurrers were heard along with the case on the merits without same being waived by defendant. On account of the disposition that is made of the case on the merits, it is only necessary to notice the special demurrer which, for convenience, is quoted:

"Defendant specially demurs and excepts to plaintiff's first amended original petition and says the same is insufficient in law and does not set forth a cause of action, in that said action is instituted by Fletcher W. Harris, attorney in fact, Lloyd's Agency at Galveston, when in truth and in fact said petition, on its face, shows that the party at interest is the Lloyd's Agency at Galveston."

It is clear that this is not a suit by Fletcher W. Harris, individually, and that he does not purport to act herein individually. An examination of the amended petition, together with its exhibits, makes it clear that this is a suit by Lloyd's Agency at Galveston, which it is claimed was created by the execution of the power of attorney hereinbefore referred to, and by the happening of the matters, and the doing of the things, set forth in said amended petition. All purporting to be done under and by virtue of said articles 1513 to 1523, inclusive, of the Texas Revised Civil Statutes. The special demurrer of defendant, therefore, should be, and will be, overruled.

This brings us to the question of the liability of said Lloyd's Agency at Galveston to file the income tax return which was filed, and to pay the tax which was paid, and its right to recover same herein. The determination of these questions largely depends upon the character or organization created by plaintiff under said articles of the Texas statutes, and in determining that question what is said by the Circuit Court of Appeals for the Fifth Circuit in the recent case of *Lucas, Commissioner*, v. *Extension Oil Co.* (47 Fed. (2d), 66) is quite pertinent. In that case, there was presented for determination by the court the question of whether the Extension Oil Co. was a trust, or an association, etc. The court uses this language:

"It is at once evident that this is one of those cases where '*As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied*' (*Guy* v. *Donald*, 203 U. S., 406; 27 S. Ct., 63, 64; 51 L. Ed., 245), and that its correct decision will depend upon a complete apprehension and recognition of the *realities of the case*, through an appreciation and understanding of the facts which make it up; and that this is so both as to the question of whether the particular taxpayer is an association, or a trust, and whether it is doing business, a review of the many decisions in the Supreme and inferior courts will show."

After referring to numerous cases, and commenting upon one or more thereof, the court continues and uses this language:

"*Each of these cases grounds its result upon the controlling facts, and makes it clear that reality, and not fiction, must in each case determine whether the tax is or is not properly laid.*"

The facts in this case are, in the main, undisputed, and substantially all of them, that need be considered here, are set forth in the stipulations of fact filed herein, and need not be here, again, set forth or repeated. A consideration of these facts leads inevitably to the conclusion that plaintiff, Lloyd's Agency at Galveston, was, during 1928, an association within the meaning of, and was required under, the Revenue Act of 1928, to make the return it made, and pay the tax it paid.

Such agency was, during the year 1928, authorized, under the statutes of Texas above referred to, and by the Commissioner of Insurance of Texas, to do a general fire, tornado, hail and floater insurance business in Texas. That it voluntarily restricted its business to buildings covered by some 911 loans made by the Guaranty Building & Loan Co. is immaterial.

Plaintiff contends that under such power of attorney, etc., it does not come within the definition of an association. While the power of attorney referred to does provide that each subscriber is acting individually, and that the subscribers are not acting jointly or collectively, etc., it is doubtful if this is in compliance with the Texas statutes mentioned, and particularly article 5013. Be that as it may, it is certain that those who executed the power of attorney had a common attorney in fact (Harris), a common name (Lloyd's Agency at Galveston), a common office, a common set of books, and as to a portion of their funds, a common bank account. When a policy or insurance obligation was issued, while it is true it was signed by the attorney in fact for each "underwriter," and the obligation of each is limited, it is a common policy. The premiums of insurance were paid into a common fund, and expenses and losses paid out of such fund. Each "underwriter" is legally entitled to his pro rata share of such fund. (*Hecht* v. *Malley*, 265 U. S., 144 [T. D. 3595, C. B. III–1, 489]; *Pickering* v. *Alyea-Nichols Co.*, 21 Fed. (2d), 501 [T. D. 4096, C. B. VI–2, 314]; *Burk-Waggoner* v. *Hopkins*, 269 U. S., 110 [T. D. 3790, C. B. V–1, 147]; *Hoadley* v. *Purifoy*, 30 L. R. A., 351; *Thompson* v. *Schmidt*, 274 S. W., 554; *Lucas* v. *Extension Oil Co.*, 47 Fed. (2d), 66, and cases there cited.)

My time does not permit a review and a discussion of the authorities which I believe support this view, but the conclusion reached is that the Lloyd's Agency at Galveston in 1928 was an association within the meaning of the Revenue Act of 1928, and actively engaged in the fire, tornado, hail, and floater insurance business.

Judgment will be entered that plaintiff take nothing as against defendant, and that plaintiff pay the costs of court.

ARTICLE 1314: Association distinguished from trust. X–30–5151 I. T. 2583

REVENUE ACT OF 1928.

In the instant case the beneficiaries have no control in an associated capacity such as they had in I. T. 2572 [C. B. X–1, 200], and, in general, the quasi corporate element, and the amount of business activity, are less than in that case. The trust is a strict trust and not an association. I. T. 2572 distinguished.

A ruling is requested whether the trust agreement dated May —, 1930, signed by the M Company as depositor and the N Company as trustee created, for income tax purposes, a strict trust or an association.

Under this trust agreement the depositor with its own funds purchases units of .36*y* shares each of the common stock of *x* corporations, transfers legal title to such stock to the trustee, and deposits with each unit certain cash reserves. The trustee then issues certificates for 181.8*y* trust shares for each unit of stock so deposited, the certificates being freely assignable (some by mere delivery and others in a manner similar to that involved in the transfer of certificates of stock of a corporation), and the depositor sells such certificates to the public.

As in the case of many investment trusts, the depositor corporation retains substantially all of the managerial powers, including the right to direct the trustee in the voting of the deposited stocks. The beneficiaries to whom the trust certificates are sold by the depositor have no control, except that each beneficiary, under certain restric-

tions, may at any time recover the then value of his share of the corpus of the trust in money, or, if he has 45.45y trust shares or any multiple thereof, he may recover his proportionate part of the deposited stocks themselves.

When stocks are sold by the trustee the net proceeds instead of being reinvested are credited to currently distributable funds and distributed to the beneficiaries. There is, however, no general power of sale. Stocks on which a usual dividend is not paid may be sold, and stocks on which dividends or any other distribution have not been made for a certain prescribed period must be sold, but, aside from this, sales may take place only in connection with the dissolution, reorganization, reclassification of stock, and the like, of the corporations whose stocks have been deposited and then only under rigidly defined conditions. In other words, sales can not be made for the purpose of making a profit therefrom.

The instant case is distinguishable from I. T. 2572. The beneficiaries have no control in an associated capacity such as they had in I. T. 2572, and, in general, the quasi corporate element, and the amount of business activity, are less than in that case.

The question of whether a trust is engaged in business is primarily a question of degree, and this is likewise true of the question of whether a trust is controlled by its beneficiaries or otherwise resembles a corporation in form of organization. The entire question, therefore, of whether a trust should be classified as a strict trust or as an association is a question of degree, and while there are certain trusts which are clearly trusts and others which are clearly associations, there is a border-line zone between the two extremes within which are found many trusts of a much more doubtful nature. Consequently, while it was stated in I. T. 2572 that "there is ground for arguing that even the most rigid investment trust is engaged in business," it was not intended to imply that this office is classifying such trusts as associations. The meaning intended was that such a trust is in the border-line zone between organizations that are clearly trusts and those that are clearly associations, and that when, to such a trust, there are added such additional features of business activity, of control by the beneficiaries, and of quasi corporate form in general, as were presented in the trust considered in I. T. 2572, the trust must be classified as an association.

In the instant case, however, those additional features do not exist, and in view of the present general trend of the United States Board of Tax Appeals and court decisions on association questions, the Bureau does not feel justified in placing this trust in the association category, even though recognizing that it falls in the border-line zone.

On the above facts it is held that the trust is a strict trust and not an association.

ARTICLE 1314: Association distinguished from trust. X-31-5157 Ct. D. 366

FEDERAL TAXES—REVENUE ACT OF 1928—DECISION OF COURT.

TRUST—ASSOCIATION—DEFINITION.

An organization, operating under a declaration of trust which provides for beneficial interests therein that are transferable as personal property, and which vests in a board of managers power

like that conferred upon corporate directors, which by the joint action of the trustee and beneficiaries carries on for profit a business pursuant to the purpose for which it was created as set forth in the declaration of trust, is an association within the meaning of section 701(a) of the Revenue Act of 1928. It is immaterial whether the interests in the organization are evidenced by certificates of stock or other written evidences of ownership.

UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Trust No. 5833, Security-First National Bank of Los Angeles, Successor to Security Trust & Savings Bank, Trustee, plaintiff, v. *Galen H. Welch, Collector of Internal Revenue for the Sixth Collection District of California, defendant.*

[March 21, 1931.]

OPINION.

MCCORMICK, District Judge: This is an action to compel refund of $4,147.93, representing Federal income taxes computed at the prevailing corporate rate for the calendar year 1928. The amount sued for was paid under protest by plaintiff Security-First National Bank of Los Angeles as trustee, to the defendant collector. The sole question for decision is whether the project or enterprise denominated Trust No. 5833, as it is disclosed by the evidence, is an association within the purview of section 701(a)2 of the Revenue Act of 1928. The pertinent part of that section reads, "the term 'corporation' includes associations, joint stock companies and insurance companies." The defendant collector demanded and collected the tax from plaintiffs upon the ground that it was an association as described in the Revenue Act aforesaid. The plaintiffs contend that such ruling was erroneous and illegal and that the enterprise under consideration is shown by the evidence herein not to be an association within the aforesaid section, but that it is to be considered solely as a fiduciary for income tax purposes. It is admitted that if the enterprise is properly classified as an "association" the amount sued for can not be recovered by plaintiff herein.

The following facts have been established. In October, 1924, one Cotton, a real estate operator in Los Angeles, Calif., in association with other persons undertook to acquire by purchase a tract of approximately 90 acres of land, to improve the same by laying out streets and other ways, to install sidewalks, water, electricity, and other utilities therein, and to subdivide the tract into city lots and to sell them to the public at a substantial profit. The scheme involved an outlay of capital both for the purchase price of the acreage and also to pay for the improvements and subdivision expenses. The land was owned by the Southern California Edison Co., which agreed to sell it to Cotton and his associates for $810,000. The contemplated improvements amounted to approximately $250,000. A written contract of sale of the tract was accordingly entered into by one Farran acting as the agent of the buyers and promoters, Cotton and his associates, and the Southern California Edison Co., the seller. The agreement provided for the payment of $100,000 in cash and the balance of the purchase price within 90 days of the date of the contract. In order to finance the project, a syndicate of some 40 persons was organized. These persons were invited by Cotton and his associates to subscribe and invest various amounts of money in the undertaking, ranging from $1,000 to $15,000 each. The purpose of the syndicate as well as the invitation to join therein was to enable the participants to realize a profit upon their investments in the project. The aggregate amount realized from such subscriptions was $250,000. The contract with the Edison Co. was assigned to the Security Trust & Savings Bank, predecessor of one of the plaintiffs herein as trustee. Concurrently, the subscribers of the $250,000 paid their money to said trustee. The Security Trust & Savings Bank as such advanced the further sum of $400,000 to the project and took a first lien upon the assets of the enterprise as its security for payment of such loan with interest. An additional sum of $212,500 was advanced by Cotton and an associate Bryan and these two took a second mortgage on the assets of the enterprise as security for the payment of their

loan with interest. The moneys thus obtained in accordance with a written instrument denominated as a declaration of trust, Trust No. 5833, were applied on the purchase price of the 90-acre tract of land.

The declaration of trust under which the project was so launched and carried out is a lengthy document that has been introduced in evidence herein and that has been carefully considered by the court. I consider it unnecessary to set it forth in extenso. Suffice it to say that it conforms generally to similar instruments common in the realty subdivision activities of Los Angeles, Calif., and is what is popularly known therein as a "real estate subdivision trust." It was executed by the Security Trust & Savings Bank as trustee, Dean Farran, acting on behalf of Cotton and associates as trustor, and the subscribers or investors of the $250,000 as beneficiaries. It provided a complete and to some extent a self-executing scheme for the payment of the purchase price of the property; the payment of the two mortgage loans; the reimbursement of those who had subscribed and invested money therein; the payment of all expenses attendant upon the improvement and subdivision of the tract of land and for the sale of the entire subdivided parcel of real property. It declared that all beneficial interest in the trust is owned by the investors of the $250,000, and that such interest be divided into units of $1,000 each and that each beneficiary shall be deemed to hold one of such units for each $1,000 that he had paid into the trust or should thereafter pay into it. It provided that in all dealing with the trustee and the beneficiaries, the trustee shall be bound by the written direction of any three of the board of five beneficiaries termed the "board of syndicate managers," which board was chosen by the subscribers of the $250,000 and had power to establish the price at which the real property was to be sold by the trustee; to fix the terms of sale; the manner, method, and time of disposition of the proceeds of such sale; the person to whom all money coming into the hands of the trustee under the declaration was to be paid after certain payments rigidly fixed by the declaration of trust had been made; the amount of such payments; to fix the restrictions, covenants, conditions, and reservations under and upon which the property or any part of it shall be sold; the form of deeds and contracts to be executed by the trustee in case of any sales; to fix and determine the manner, method, cost, and improvement of the property; and in all other respects to have the power to bind each and every beneficiary in all dealings with the trustee and with other parties in connection with the subdivision and sale of the property. It provided that no lot is to be sold by the trustee for less than the minimum price thereof fixed by a schedule of minimum prices that was annexed to said declaration and made a part thereof, but as before stated, it gave to the syndicate managers the power of fixing the prices at which the property of the subdivision might be sold. A real estate firm of Los Angeles was irrevocably constituted the agent of the beneficiaries for the sale of the property for a period of two years from the date of the declaration of trust but as just adverted to, the sales agency could sell the real property only upon such price, terms, restrictions, and covenants as were fixed by the board of managers by written direction to the trustee and subject to such conditions. The sales agency could direct the trustee to convey the property with the same force and effect as if such direction had been given by the board of managers direction. At the expiration of two years, the board of managers were authorized to designate some other agency if it so desired for the sale of the trust property.

The trustee is directed to apply the proceeds of sales to the payment of taxes, costs, charges, and expenses, etc.; to the payment of its own services; to the payment of money loaned the project by the bank, by Cotton and by others and to the payment to the subscribers to the amount that they had subscribed to the project and certain additional amounts specifically mentioned and designated in the trust instrument, and in addition to pay as directed by the board of managers any further amount of money that would be received by them on account of sales of real property of the trust as directed by the board of syndicate managers.

The declaration provided that the beneficiaries agreed that they would subdivide and improve the real property as provided in the trust instrument and that such work of improvement would be installed and completely and fully paid for within two years of the date of such instrument.

It also provided that the trustee may resign and discharge itself of the trust by a written notice to the board of managers 30 days before such resignation shall take effect and successor may thereupon be appointed by an instrument in writing executed by the beneficiaries and accepted by the suc-

cessor trustee. Should the beneficiary fail to make such appointment before the expiration of such 30-day period, then the trustee may thereupon appoint a temporary successor trustee to fill such vacancy until such successor be appointed by the beneficiaries, and it further provided that any such successor should be vested with all the estates, rights, powers, and duties of its predecessor trustee. It was also stated in the declaration of trust that no sale or transfer of beneficial interests under the trust shall be valid or binding upon the trustee until the instrument making such assignment or transfer shall have been approved by and deposited with the trustee excepting only where such interest may pass or be transferred by a judgment or decree of court and then only upon proof satisfactory to the trustee of the legality and validity of the procedure in such matters being presented to the trustee. It stated that the legal and equitable title to the real property was vested in the trustee for the purposes of administering the trust, and that no person beneficially interested in the trust has any right, title, interest, or estate in the property covered by the declaration, nor has any person beneficially interested under said declaration of trust any right or power to apply for or secure a dissolution or termination of the trust or partition or division of any of the trust estate, it being further recited that the entire beneficial interest of any and all beneficiaries under the declaration of trust is personal property only consisting of the right to enforce the performance of this trust according to its terms. It was further provided in the declaration that the trust shall continue to and until the sale and disposition in fee of all the property subject to the trust and the disposition of all proceeds thereof in accordance with the terms of said declaration of trust or until the expiration of 25 years, whichever event shall happen first. There are other and further provisions in the declaration of trust, but sufficient has already been stated to designate the character of the instrument as well as the classification of the component entities and persons that are described therein. It seems clear that the structure or project created by it is a business enterprise wherein the beneficiaries exercised an ultimate effective control. They had absolute power to remove the board of managers. It is true that the trust in many respects was self-executing, and to some extent was an escrow and security device. It was however, also a functioning, operating business carried on for profit by the joint action of the trustee, beneficiaries, and sales agents.

The potent and motivating element of the trust was its control by the board of syndicate managers. Their sole power to fix prices at which the lots could be sold was the energizing and paramount principle of this business scheme. Not only did the declaration of trust vest in the board of syndicate managers such plenary power of control not unlike that conferred upon corporate directors, but they exercised such powers throughout the operation of the trust. The work of improving, subdividing, and selling the tract was carried out under its direction. It held meetings, fixed and paid a per diem to the members of it who attended the meetings; formally approved contracts for improvements; authorized the payment of commissions and escrow charges; approved expense accounts; and altered the usual terms of sales as specified in the declaration of trust. If the test as to the character of the trust under consideration is to be determined by the control of the property by those beneficially interested as investors of the $250,000, there can be little doubt that such association of persons dominated.

The weight of judicial authority however, inclines one to the opinion that the real test as to whether business trusts are "associations" within the meaning of applicable internal revenue statutes is whether the shareholder or trustees or both combined carry on business for profit and if they do they constitute a business trust—in legal effect, an "association"—with liability for taxes as a corporate entity and not as a mere fiduciary or escrow. It is immaterial as to whether the shares or interests in the project are evidenced by certificates of stock or by any other written evidences of ownership. The beneficial interest of the beneficiaries in this trust clearly existed and was assignable and transferable as other personal property. The evidence shows that the owners of beneficial interest frequently sold the same, and that a legal form was provided for the purposes of sale and transfer, and it appeared that 10 units were assigned during the calendar year 1928, and that there were other units assigned by the owners for collateral purposes. It is true that the enterprise sold only one lot during the year 1928, but during that period the sales agency was actively engaged in an effort to

dispose of the unsold lots and that in the period approximately $340,000 was collected on lot sales, interest, etc., and that the total expenses for administration for the same period amounted to approximately $30,000. It is unnecessary to review all of the evidence as to the financial operations of the enterprise. Suffice it to say that it was a very profitable venture and resulted not only in the payment in full of all obligations incurred on account of the purchase, improvement, subdivision, and sale of the tract of land, but in addition made a handsome profit to all who invested or were interested in the enterprise. It seems to me that to classify this trust as a mere liquidating trust such as those encountered in the administration of estates of deceased persons or in financially embarrassed business or projects would be an unreasonable classification. In *Hecht* v. *Malley* (265 U. S., 157 [T. D. 3595, C. B. III–1, 489]) the Supreme Court said "The word 'association' appears to be used in the Act in its ordinary meaning," and in *Little Four Oil & Gas Co.* v. *Lewellyn, etc.* (C. C. A. 6; 35 Fed. (2d), 149 [Ct. D. 118, C. B. VIII–2, 264]) the court clearly points out in so far as Federal income taxes are concerned, a distinction between two classes of trusts, one where the trustees merely collect dividends or interests, or rentals, and distribute them among the beneficiaries and the other where a trust is organized or declared for business purposes and the trustees carry on an active business for profit. In the former, tax classification as fiduciaries are authorized while in the latter a tax liability ensues at the usual corporate rate because such trusts are regarded in law for taxation purposes as plain unincorporated joint stock associations. I am of the opinion that the project under consideration here is analogous to those discussed in the cases of *Hecht* v. *Malley*, supra, and *Little Four Oil & Gas Co.* v. *Lewellyn, etc.*, supra.

All of the characteristics present in the trusts considered in those cases do not exist in the enterprise under consideration, but in my opinion the main and determinative qualities and features of the trusts discussed by the courts in each of those cases are present in the case at bar. It follows from the foregoing that the collector of internal revenue was correct in the assessment of the tax imposed upon plaintiff, and that plaintiff is not entitled to a refund of the same. The special findings of fact and conclusions of law submitted by the plaintiff are disallowed and the special findings of fact and conclusions of law proposed by the defendant with certain changes upon said document as filed in the clerk's office are ordered prepared herein and pursuant thereto judgment is ordered for the defendant with costs of suit. Counsel for defendant will accordingly prepare, serve and present the same for signing and entry herein.

INCOME TAX RULINGS.—PART II.

REVENUE ACT OF 1926.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 202.—DETERMINATION OF AMOUNT OF GAIN OR LOSS.

ARTICLE 1561: Determination of the amount of gain or loss. X–29–5143 Ct. D. 362

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. GAIN OR LOSS—SALE—UNPRODUCTIVE REAL ESTATE—TAXES AND INTEREST.

In computing, under subdivision (a) of section 202 of the Revenue Act of 1926, the amount of gain or loss from the sale of unimproved real estate purchased after February 28, 1913, subdivision (b) of that section does not authorize the addition of taxes and interest to the cost.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (17 B. T. A., 776) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT. No. 5871.

Central Real Estate Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals.

Before BRYAN and FOSTER, Circuit Judges, and DAWKINS, District Judge.

[March 18, 1931.]

OPINION.

FOSTER, Circuit Judge: This is a petition to reverse a decision of the Board of Tax Appeals affirming the ruling of the Commissioner of Internal Revenue denying to petitioner the right to capitalize and add taxes and interest on the unpaid portion of the purchase price to the cost of certain real estate in determining the profit derived from its sale. (17 B. T. A., 776.)

There is no dispute as to the material facts, which are these. Petitioner is a Texas corporation and in the year 1913 purchased unimproved real estate in the city of Dallas for speculation, paying $50,126 therefor. It produced no revenue until the beginning of the year 1918. In the calendar years 1914 to 1917, inclusive, petitioner paid $8,821.62 in interest on the unpaid portions of the purchase price and paid city, county, and State taxes on the land amounting to $2,624.15. Petitioner kept its books on the cash receipts and disbursements basis and these amounts were capitalized and added to the original cost of the property on the books. Petitioner filed income and profits taxes returns for the years 1913 to 1917, inclusive, which returns showed no taxable income, without considering said interest and taxes and no deductions were claimed for these items. In the calendar year 1924 petitioner, on the advice of its accountant, filed amended returns for the calendar years 1913 to 1917, inclusive, and claimed such interest and taxes as deductions for the respective years in which paid. As a result of this, after allowing the deductions, petitioner was

assessed taxes for the calendar year 1914 in the amount of $181.83. No change was made as to the other years. The property was sold in 1924 at a profit. In filing its returns in 1925 petitioner sought to add the amounts paid for interest and taxes as above set out to the cost of the property for the purpose of determining the net profit. This was disallowed by the Commissioner of Internal Revenue on the ground that petitioner had had the benefit of the deductions and additional taxes in the amount of $1,813.19 were assessed. On petition to the Board of Tax Appeals for a redetermination the Commissioner was affirmed, not on the theory adopted by him but on the Board's interpretation of the law.

The contention of petitioner is based on the provisions of section 202 of the Revenue Acts of 1924, 1926, and 1928, and the regulations of the Treasury Department adopted following the passage of said Acts.

Prior to the adoption of the Act of 1924, except for the short period between February, 1920, and February, 1922, the Treasury Department had uniformly denied to the taxpayer the right to add interest and taxes to cost in determining profit from the sale of property, unless paid before the incidence of the Federal tax. On the other hand, the taxpayer had always been allowed to add expenditures considered capital items although the Revenue Acts governing were silent as to this. The Board of Tax Appeals had uniformly denied the right to capitalize interest and taxes. Section 202 of the Revenue Act of 1926, which is similar to the provisions of the same numbered sections in the Revenue Acts of 1924 and 1928, is as follows:

"SEC. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

"(b) In computing the amount of gain or loss under subdivision (a)—

"(1) Proper adjustment shall be made for any expenditure or item of loss properly chargeable to capital account, * * *."

After the adoption of the Act of 1924 the Treasury Department promulgated Regulations 69, of which article 1561 is as follows:

"Treasury Department Regulations 69, article 1561:

* * * * * * *

"The amount realized from the sale or other disposition of property is the sum of any money received plus the fair market value of the property (other than money) received. In computing the amount of gain or loss, however, the cost or other basis of the property must be increased by the cost of capital improvements and betterments made to the property since the basic date, and by carrying charges, such as taxes on unproductive property. Where the taxpayer has elected to deduct carrying charges in computing net income, or used such charges in determining his liability for filing returns of income for prior years, the cost or other basis may not be increased by such items in computing the gain or loss from the subsequent sale of the property. * * *"

In presenting the bill the report of the Ways and Means Committee of the House commented on section 202, subdivision (b), as follows:

"There is no provision in the existing law which corresponds to subdivision (b), but the rule laid down therein is substantially the same as the construction placed upon existing law by the Treasury Department. It provides that in computing gain or loss from the sale or other disposition of property the cost or other basis of the property (and in the appropriate case the fair market value as of March 1, 1913) shall be increased by the amount of items properly chargeable to capital account and decreased by the depreciation and similar deductions allowed with respect to the property. Under this provision capital charges, such as improvements, betterments, and carrying charges, such as taxes on unproductive property, are to be added to the cost of the property in determining the gain or loss from its subsequent sale, and items such as depreciation and obsolescence previously allowed with respect to the property are to be subtracted from the cost of the property in determining the gain or loss from its subsequent sale."

The Senate report did not contain this language.

It is argued on behalf of petitioner that Regulation [article] 1561 is a correct interpretation of section 202. The report of the House committee presenting the bill is relied upon as showing the intention of Congress and it is further argued that the enactment of the Revenue Acts of 1926 and 1928 with prac-

tically the same provision is a ratification of the interpretation by the Treasury Department. If the statute were ambiguous the argument might be persuasive but the rule is well settled that while reports of committees accompanying the introduction of proposed laws may be looked to in determining the intent of Congress, in cases of doubtful interpretation, if the words of the statute are free from doubt, and do not lead to absurd and wholly impracticable consequences, the statute is the sole evidence of the legislative intent. (*Caminetti* v. *U. S.*, 242 U. S., 470.)

Section 202 above referred to is unambiguous and does not require extraneous aids to its interpretation. The provision permitting proper adjustment to be made for any expenditure or item of loss properly chargeable to capital account clearly means such items as add to the value of the property. It would be impracticable for Congress to enumerate in detail what those items might be but taxes and interest do not fall into that class and no difficulty presents itself in dealing with them specifically. All the Revenue Acts have specifically provided for the deduction of taxes and interest from gross income annually while dealing generally with other items of expense. If Congress had intended to give the taxpayer the privilege of adding taxes and interest to cost it would have been very easy to have said so. As the Act does not so provide the conclusion is inescapable that Congress did not so intend. The following cases tend to support this conclusion: *Westerfield* v. *Rafferty* (4 F. (2d), 590 [T. D. 3667, C. B. IV–1, 96]); *Fraser* v. *Commissioner of Internal Revenue* (25 F. (2d), 653); *Oswego & S. R. Co.* v. *Commissioner of Internal Revenue* (29 F. (2d), 487); *Hays* v. *Gauley Mt. Coal Co.* (247 U. S., 189).

It might be said that the Commissioner was rather illogical in putting his decision on the ground that he did in view of the regulations, considering that the petitioner had not benefited and the United States had lost nothing by the attempted deductions, but it is unnecessary to pass upon that question as it is immaterial. The petition is denied.

ARTICLE 1561: Determination of the amount of gain or loss.
(Also Section 214(a)9, Article 203.)

X–38–5211
G. C. M. 9798

REVENUE ACTS OF 1921, 1924, AND 1926.

On February —, 1901, the owners of certain property executed an oil and gas lease for a period of 12 years, with privilege of renewal and right of assignment. On October —, 1906, the lessee and a corporation executed an instrument transferring to the corporation all the interest, right, and title which he held. On August —, 1917, the lessee died. Royalty payments to the estate were made by the vendee pursuant to the October —, 1906, contract for the years 1923 to 1926, inclusive. The lessee's estate reported none of these payments as income in its returns for the years in question, on the theory that such amounts were returns of capital.

Held, that the taxpayers should be allowed to recover the full amount of their capital before treating any portion of the receipts from the contract as income. General Counsel's Memorandum 8650 (C. B. IX–2, 214) modified.

An opinion is requested concerning the cases of the Estate of A and the Estates of B and C. The matter involved has previously received consideration in this office and a memorandum with respect thereto was published as General Counsel's Memorandum 8650 (C. B. IX–2, 214). The facts, which are stated in detail in General Counsel's Memorandum 8650, supra, are briefly restated as follows:

In February, 1901, the owners of certain property executed an oil and gas lease for a period of 12 years, with privilege of renewal and right of assignment. In May, 1906, the lessee as vendor, and two individuals as vendees, executed an option agreement. In October, 1906, the lessee and a corporation executed an instrument trans-

ferring to the corporation all the interest, right, and title which he held. In August, 1917, the lessee died. Royalty payments to the estate were made by the vendee pursuant to the October, 1906, contract for the years 1923 to 1926, inclusive. The lessee's estate reported none of these payments as income in its returns for the years in question, on the theory that such amounts were returns of capital. It was held that the lessee's estate had no depletable interest, and with regard to the recovery of capital this office stated:

Although the taxpayer is not entitled to depletion allowances, it is entitled to recover the fair market value of the contract of October —, 1906, as of the date of the decedent's death in 1917. In *Eldredge* v. *United States* (31 Fed. (2d), 924) the Circuit Court of Appeals for the Sixth Circuit held that the fair market value upon the date of the decedent's death of a contract similar to the one in the instant case might be recovered by treating as capital a proportion of each annual payment, which proportion was the ratio of the fair market value of the contract on the date of the decedent's death to the total payments expected to be received under the contract. The remaining portion of each annual payment was held to be income. That authority is regarded as controlling in this case.

The Income Tax Unit now inquires whether the conclusion in that memorandum should be modified, in view of the decision of the Supreme Court of the United States in *Burnet* v. *Edith Andrews Logan* (283 U. S., 404, Ct. D. 351, C. B. X–1, 345).

The Logan case originated in the United States Board of Tax Appeals. The following is the syllabus of the Board's decision in the appeals of Julia Andrews Bruce and Edith Andrews Logan, executrix, estate of Louisa Andrews (5 B. T. A., 300):

Taxpayer sold stock on March 11, 1916, for more than cost and less than the March 1, 1913, value. A part of the consideration received was a contract providing for future payments as ore was mined. The contents and life of the mine and the annual production were capable of determination. *Held*, that the transaction in 1916 was a completed sale resulting in no taxable gain or loss, and the payments made under the contract in the taxable year were in part a return of capital, that is, the present worth of the future payments as of the time of the receipt of the contract, and a portion was gain.

The same question was presented to the Board in *Edith Andrews Logan et al.* v. *Commissioner* (12 B. T. A., 586). While there was some modification in the application of the principle involved, the Board adhered to its position in the prior case that only a portion of each payment made under the contract was a return of capital and that the remainder constituted income.

Edith Andrews Logan took an appeal from the Board's decision in 12 B. T. A., 586, to the Second Circuit Court of Appeals. That court in *Logan* v. *Commissioner* (42 Fed. (2d), 193) reversed the Board. Its opinion reads in part as follows:

In his calculations, the respondent, being guided by the Haskold formula, has in effect determined that the contract of March 11, 1916, by which the stockholders of the Andrews & Hitchcock Co. received these benefits constitutes a right to annual payments fixed by accepting the tonnage thought to be in the mine, the annual mining operations, the length of time necessary for exhaustion, and the price paid for the ore mined, and this amounted to $132,573.60 annually to be paid to the vendors of the stock. If all went well each year, and the mining operation was the same with the same degree of fortune as to the quantity and quality of the ore mined, there would be insured to the stockholders this annual payment. In effect it would be similar to an annuity. Therefore, when this taxpayer sold her stock, in addition to receiving cash, she would obtain what substantially amounts to an annuity for a period of 45 years. If this were a purchase of an annuity, the sums received in the years

in question could not be taxed as income. (*Warner* v. *Walsh* (C. C. A. 2, 1926), 15 F. (2d), 367.) The same principle is applicable. (*United States* v. *Bolster* (C. C. A. 1, 1928), 26 F. (2d), 760, 59 A. L. R., 491; *Allen* v. *Brandeis* (C. C. A. 8, 1928), 29 F. (2d), 363.)

There is no taxable income received until there has been a return of petitioner's capital, ascertained by finding her proportionate share of the value of her original 250 shares as of March 1, 1913, and as to those shares inherited from her mother's estate, the value of such interest at the time of her mother's death.

At the same time the court in *Bruce* v. *Commissioner* (42 Fed. (2d), 197) reversed the Board's decision in 5 B. T. A., 300.

Frank Hitchcock, who also owned a portion of the same property involved in those cases and whose case was decided by the Board simultaneously with that of Edith Andrews Logan (12 B. T. A., 586), took an appeal to the Sixth Circuit Court of Appeals. That court in *Hitchcock* v. *Commissioner* (44 Fed. (2d), 756) affirmed the Board. The following is from the court's opinion:

By the transaction of March 11, 1916, the petitioner received, as part consideration for his stock, an income-producing contract. That contract, in our opinion, is indistinguishable in its legal aspects from the contract involved in *Eldredge* v. *United States* (C. C. A.) (31 F. (2d), 924), where the taxpayer assigned an option for a lease in consideration of a promise to pay two and a half cents per ton of coal mined if the assignee elected to take the lease. This court held in that case that the contract right to the two and a half cents a ton of coal mined was property having an ascertainable market value within the meaning of the taxing statutes, and that the payments made thereon were in part return of capital and part income. We are aware, of course, of the inconsistency between that decision and the decision of the Second Circuit Court of Appeals in *Logan* v. *Commissioner* (42 F. (2d), 193), where it was held that the payments made to certain former stockholders of the Andrews company on the contract here involved were to be treated as capital payments until the entire capital value (it would seem the March 1, 1913, value of the Andrews company stock) was paid in full. The Logan case was decided, as stated by the court, upon the principle announced in the earlier decision of the same court in *Warner* v. *Walsh* (15 F. (2d), 367). We had *Warner* v. *Walsh* under consideration in the Eldredge case, and for the reasons given in the opinion in that case did not deem it controlling. Neither do we deem it applicable in the present case, for we think the fairer method of treating returns from a contract such as this is to apportion them to capital and income in the proportion that the total capital to be recovered bears to the total anticipated receipts. To follow the Logan case in this case would require an abandonment of that view and the overruling of the Eldredge case. This we would do if we thought the latter case wrong, but upon a reconsideration of it in the light of the arguments now made, we still believe that it was rightly decided and in the present circumstances is controlling. (Compare *Kosmerl* v. *Commissioner* (C. C. A.), 25 F. (2d), 87; *Ruth Iron Co.* v. *Commissioner* (C. C. A.), 26 F. (2d), 30; and *Reinecke* v. *Spalding*, 280 U. S., 227, 50 S. Ct., 96, 74 L. Ed., 385.)

Subsequently, the decisions of the Second Circuit Court in the Logan and Bruce cases were taken to the United States Supreme Court on writ of certiorari and were there affirmed in *Burnet* v. *Logan*, supra. The following is an extract from the court's opinion:

* * * As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation. When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was $2,200,000 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only

conditionally promised. Prior to 1921 all receipts from the sale of her shares amounted to less than their value on March 1, 1913. She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture.

"In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." (*Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179, 184, 185, Revenue Act 1916, section 2, 39 Stat., 757, 758; Revenue Act 1918, ch. 18, 40 Stat., 1057.) Ordinarily, at least, a taxpayer may not deduct from gross receipts a supposed loss which in fact is represented by his outstanding note. (*Eckert* v. *Commissioner of Internal Revenue*, 283 U. S., 140 [Ct. D. 325, C. B. X–1, 241].) And, conversely, a promise to pay indeterminate sums of money is not necessarily taxable income. "Generally speaking, the income tax law is concerned only with realized losses, as with realized gains." (*Lucas* v. *American Code Co.*, 280 U. S., 445, 449 [Ct. D. 168, C. B. IX–1, 314].)

On June 9, 1931, the Sixth Circuit Court of Appeals upon the authority of *Burnet* v. *Logan*, supra, granted a petition for rehearing in the Hitchcock case and reversed the decision of the Board.

It is apparent from the sequence of the above decisions and the reasoning employed by the courts that the theory of the Eldredge decision, at least in so far as it may have appeared to apply to situations similar to that presented in the Logan case, should no longer be followed. It remains necessary, therefore, only to determine whether the instant case is similar to the Logan case.

In this connection, it is considered unnecessary exhaustively to review the facts. This case is regarded as similar to the Logan case, particularly in the essential fact that in each case there are indeterminate future payments to be made dependent upon the yield of mineral products from the property involved. The taxpayers should be allowed to recover the full amount of their capital before treating any portion of the receipts from the contract as income. General Counsel's Memorandum 8650 is modified accordingly.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 204.—BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

ARTICLE 1599: Stock or securities distributed in reorganization.

REVENUE ACT OF 1926.

Rights to acquire stock of a character or preference different from stock in respect of which rights were issued. (See I. T. 2597, page 118.)

ARTICLE 1602: Basis for allowance of depletion and depreciation. X–40–5229 Ct. D. 395

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

DEDUCTION—DEPLETION—OIL AND GAS PROPERTY—INCOME FROM SALE.

"Gross income" as used in section 204(c)2 of the Revenue Act of 1926 means gross income derived from the sale or other disposition of oil and gas produced and not from the sale of oil and

gas property. Accordingly income arising from the sale of oil and gas property may not be taken into consideration in computing the allowance for depletion under that paragraph.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT.

Darby-Lynde Co., a Corporation, appellant, v. Acel C. Alexander, Collector of Internal Revenue for the District of the State of Oklahoma, appellee.

Before COTTERAL, PHILLIPS, and MCDERMOTT, Circuit Judges.

[June 20, 1931.]

OPINION.

PHILLIPS, Circuit Judge, delivered the opinion of the court.

The Darby-Lynde Co. brought this suit to recover an alleged overpayment of income taxes. The trial court sustained a demurrer to the petition. The essential facts set up in the petition follow.

Plaintiff is a Delaware corporation engaged in producing and marketing oil and gas, with its principal office and place of business in Oklahoma. At the beginning of the taxable period, January 1, 1926, plaintiff was the owner of certain oil and gas properties in Kansas, a part of which were producing and a part of which were nonproducing. Such properties were acquired by plaintiff after February 28, 1913.

On July 1, 1926, plaintiff sold such properties to the Darby-Lynde Petroleum Co. for $1,000,000. In its original return for 1926, plaintiff claimed deduction for depletion based upon the income derived from the sale of oil and gas produced from such properties. Such return duly reflected the gross income derived from such sale. On May 26, 1927, plaintiff filed with the collector an amended return in which it sought to deduct a depletion allowance under section 204(c)2, Revenue Act of 1926 (44 Stat., 16), based upon 27½ per cent of the income derived from both the sale of such properties and the sale of oil and gas produced therefrom. The collector ignored such amended return and plaintiff was compelled to pay, under threats of distraint, a tax computed upon the basis of the original return. Thereupon, plaintiff duly filed a claim for refund of $35,072.81 based upon the disallowance of its amended claim for depletion. The Commissioner rejected such claim.

Section 204, Revenue Act of 1926 (44 Stat., 14), provides in part as follows:

"(a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

"(b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property * * * or (B) the fair market value of such property as of March 1, 1913, whichever is greater. * * *

"(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that—

"(1) In the case of mines discovered by the taxpayer after February 28, 1913, the basis for depletion shall be the fair market value of the property at the date of discovery or within 30 days thereafter. * * *

"(2) In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

Section 234, Revenue Act of 1926 (44 Stat., 41), provides in part as follows:

"(a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(8) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed

by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee."

Counsel for plaintiff contend that the language "gross income from the property during the taxable year," as used in section 204(c)2, supra, includes both operating income derived from the production and sale of oil and gas, and income derived from the sale of the oil and gas properties.

In the Revenue Act of 1913 and in each of the Revenue Acts since enacted, Congress has provided for some allowance for depletion in case of operating mines and oil and gas wells. By such provisions for a depletion allowance in the case of oil and gas wells, Congress recognized that oil and gas reserves are wasting assets and become exhausted through the process of producing oil and gas. The depletion charge, permitted as a deduction from gross income in determining taxable income, represents the reduction during the taxable year through the production of oil and gas from such wells, in the total deposit or reserve of oil or gas which may be captured thereby and produced therefrom. (*United States* v. *Ludey*, 274 U. S., 295, 302–303 [T. D. 4046, C. B. VI–2, 157]; *Lynch* v. *Alworth-Stephens Co.*, 267 U. S., 364 [T. D. 3690, C. B. IV–1, 162].)

The primary rule in the construction of statutes is to ascertain and give effect to the intent of the legislative body. (*Stevens* v. *Nave-McCord Merc. Co.* (C. C. A. 8), 150 Fed., 71, 75; *Balanced Rock S. A.* v. *Manitou* (C. C. A. 10), 38 Fed. (2d), 28, 30; *Moffat Tunnel Imp. Dist.* v. *Denver & S. L. R. Co.* (C. C. A. 10), 45 Fed. (2d), 715, 723.) Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, resort must not be had, ordinarily, to rules of construction, but the statute must be given its plain and obvious meaning. (*United States* v. *Mo. Pac. R. Co.*, 278 U. S., 269, 277; *Duke Power Co.* v. *Commissioner* (C. C. A. 4), 44 Fed. (2d), 543; *Eclipse Lumber Co.* v. *Iowa Loan & T. Co.* (C. C. A. 8), 38 Fed. (2d), 608, 610.) Where, however, the language is of doubtful meaning, or where adherence to the strict letter would lead to injustice or absurdity or result in contradictory provisions, it devolves upon the court to ascertain the true meaning. (*United States* v. *Katz*, 271 U. S., 354, 357; *In re Chapman*, 166 U. S., 661, 667; *United States* v. *Kirby*, 7 Wall., 482, 486–487.) The general design and purpose of a statute should be kept in view and its provisions should be given a fair and reasonable construction with a view to effecting its purpose and object. (*Low Wah Suey* v. *Backus*, 225 U. S., 460, 475; *Takao Ozawa* v. *United States*, 260 U. S., 178, 194; *Feitler* v. *United States* (C. C. A. 3), 34 Fed. (2d), 30, 33.)

In *Stevens* v. *Mercantile Co.*, supra, the court, speaking through Judge Sanborn, said:

"Cardinal rules for the construction of a statute are that the intention of the legislative body which enacted it should be ascertained and given effect, if possible, regardless of technical rules of construction and the dry words of the enactment; that that intention must be deducted not from a part but from the entire law; that the object which the enacting body sought to attain and the evil which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention; that the statute must be given a rational, sensible construction; and that, if this be consonant with its terms, it must have an interpretation which will advance the remedy and repress the wrong."

It frequently happens that the true intention of a legislative body is not expressed by the language employed in a statute, when literally construed. In such cases, the intent of such legislative body can only be effectuated by a departure from a literal interpretation of the language employed. Where such intention is plainly discernible from the provisions of the statute when considered as a whole, the real purpose and intent of the legislative body will prevail over the literal import of the words employed. (*Holy Trinity Church* v. *United States*, 143 U. S., 457; *Hill* v. *American Surety Co.*, 200 U. S., 197, 203; *Jones* v. *Guaranty & I. Co.*, 101 U. S., 622, 626; *Barrett* v. *Van Pelt*, 268 U. S., 85, 90; *Fleischmann Const. Co.* v. *United States*, 270 U. S., 349, 360; *Baltzell* v. *Mitchell* (C. C. A. 1), 3 Fed. (2d), 428, 430 [T. D. 3668, C. B. IV–1, 191]; *London & L. I. Co.* v. *Smoot* (C. A. D. C.), 287 Fed., 952, 956.)

It is obvious that, as in prior revenue laws, Congress intended by section 204(c)2 to provide an allowance for the exhaustion of oil and gas reserves resulting through the operation of oil and gas wells and the extraction of oil and gas therefrom.

We have a right to assume that Congress intended to provide a basis for ascertaining such allowance predicated on factors bearing a reasonable relation

to the amount of depletion or exhaustion resulting from the operation of such oil and gas wells, and to adopt a rule which would lead to a rational rather than an absurd result.

Let us apply plaintiff's theory to four supposititious cases. Assume two oil and gas properties each of which, for the purpose of ascertaining profit from sale for income tax purposes, cost $4,000,000, and that each was worth $10,000,000 on January 1, 1926. Assume, in the first case, that the owner operated his property for three months, exhausted 4 per cent of the oil reserve, receiving an operating income of $400,000 and then sold the property for $9,600,000, making a profit of $5,600,000. Assume, in the second case, that the owner operated his property for six months, exhausted 8 per cent of the oil reserve, received an operating income of $800,000 and then sold the property for $9,200,000, making a profit of $5,200,000. Note that the selling price in each instance was the value on January 1, 1926, less the oil and gas produced during that year prior to the sale.

Applying plaintiff's theory to the first case, the depletion allowance would be 27½ per cent of the $400,000 operating revenue plus the $5,600,000 profit derived from the sale, or $1,650,000. Applying plaintiff's theory to the second case, the depletion allowance would be 27½ per cent of the $800,000 operating income plus the $5,200,000 from the sale, or $1,650,000.

In the first case, the taxpayer would receive a depletion allowance of $1,650,000 for a $400,000 exhaustion. In the second case, the taxpayer would receive a $1,650,000 depletion allowance for a $800,000 exhaustion. The depletion allowances in both cases would be the same, but the actual exhaustion in the second case would be double that in the first case.

Again, let us assume, as a third case, that the taxpayer operated his property for the entire year and exhausted 16 per cent of his reserve, for which he received an operating income of $1,600,000. His depletion allowance would be $440,000. His sustained depletion would be four times that of the taxpayer in the first case, while his allowed depletion would be $1,210,000 less.

Finally assume, in the first case, that the purchaser continued to operate the property during the last nine months of the year and exhausted 12 per cent of the oil reserve, and received an operating income of $1,200,000. He would be entitled to a depletion allowance of 27½ per cent of such operating income, or $330,000. In the first case, the total depletion allowance would be $1,980,000 and the third case, $440,000, while the actual depletion in both cases would be the same.

Thus, it will be seen that the construction for which plaintiff contends would lead to absurd and unreasonable results. The reason for such results is that plaintiff's theory takes into consideration income derived from an act which does not in fact deplete the oil and gas reserves, and includes in the formula for computing depletion a factor which has no reasonable relation to the depletion actually sustained.

In order to reach a reasonable and rational result, the words "gross income" as used in section 204(c)2 must be construed as meaning the gross income produced from the operation of such oil and gas wells. The language is clearly susceptible of the construction that it is income from or out of the property itself; not out of its sale.

The legislative history of the 1926 Act confirms this view. In the Revenue Acts of 1921 and 1924, in cases of oil and gas wells, Congress had provided, with certain limitations, for a depletion allowance based upon discovery value. See section 214(a)10 and section 234(a)9, Revenue Act of 1921, and section 204(c), Revenue Act of 1924. When Congress wrote the provision for depletion allowance in the case of oil and gas wells in the Revenue Act of 1926, it departed from the discovery value basis because of the difficulty of administration. The discussions before the Senate Finance Committee, where the amendment which ultimately became section 204(c)2 originated, discloses that the framers of this legislation had in mind operating income as distinguished from income derived from sales. See report of hearings before that committee, pages 153, 154, 177, and 179.

We conclude that the words "gross income," as used in section 204(c)2, supra, mean income derived from the sale or other disposition of oil and gas produced, and not from the sale of the oil and gas properties.

The judgment is affirmed.

ARTICLE 1602: Basis for allowance of depletion and depreciation.

X–52–5333
Ct. D. 432

INCOME TAX—REVENUE ACTS OF 1918, 1921, 1924, AND 1926—DECISION OF COURT.

1. PATENT APPLICATION — DEPRECIATION — PATENT APPLICATION PENDING MARCH 1, 1913.

An invention for which an application for a patent is pending March 1, 1913, is "property" as that term is used in section 202(a) of the Revenue Acts of 1918 and 1921 and section 204(a) of the Revenue Acts of 1924 and 1926 so that its fair market value may be used as a basis of computing depreciation or exhaustion under those Acts. The fact that the taxpayer paid nothing for the invention and the application for a patent, which was acquired prior to March 1, 1913, and which ripened into a patent grant subsequent to said date, does not prevent the taxpayer from securing allowances for the exhaustion of said patent, based on the March 1, 1913, value, spread over the life of the patent starting with the actual date of the issuance of the patent.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (16 B. T. A., 41) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. No. 4413.—OCTOBER TERM, 1930; APRIL SESSION, 1931.

Commissioner of Internal Revenue, petitioner, v. *Stephens-Adamson Manufacturing Co., respondent.*

Petition for review of decision of United States Board of Tax Appeals.

Before EVANS, SPARKS, Circuit Judges, and BARNES, District Judge.

[July 27, 1931.]

OPINION.

Respondent's 1920 and 1921 income and profits taxes, as well as its income taxes for 1922 to 1925, inclusive, are involved. The attack is directed to the ruling of the Board of Tax Appeals, which allowed respondent a substantial sum for each of the years in question for exhaustion of its letters patent No. 1,255,658, issued February 5, 1918. The discovery covered by the patent was made by one of respondent's stockholders in 1911, and the invention, as well as the application for a patent, was sold and transferred to respondent before March 1, 1913. Nothing of value was paid by respondent to its stockholder for said invention and assignment.

The Board of Tax Appeals, in its opinion, said:

"Issues 1 and 4, as set out above, relate to the petitioner's invested capital and involve the question of the value, on November 29, 1911 (the date of its acquisition by the petitioner), of the invention and application for patent thereon, and the further question of whether such value may be included in the petitioner's invested capital. * * * This Board has, consistently, held that intangible property paid into a corporation, without consideration, may not be included in paid-in surplus. (See *Herald Despatch Co.*, 4 B. T. A., 1096; *Shope Brick Co.*, 5 B. T. A., 1042; *Browning Co.*, 6 B. T. A., 914.) It is, accordingly, held that the petitioner may not include in its invested capital, by reason of the acquisition of this invention and the application for patent thereof, any amount in excess of its cost.

"Issues numbered 2 and 5 relate to the annual deduction, if any, to which the petitioner is entitled, by reason of the exhaustion of the patent. * * * The witnesses testified to values ranging from $600,000 to $1,000,000. * * * We have found as a fact that valuation of the invention and application for patent thereon, as of March 1, 1913, was $500,000, which valuation we arrived at after

a careful consideration of all of the facts and circumstances and the opinions of the witnesses.

"In *Individual Towel & Cabinet Service Co.* (5 B. T. A., 158), we held that the petitioner therein was entitled to an annual deduction for exhaustion of its patent, computed upon the basis of the March 1, 1913, value of the invention and application for patent thereon, and a 17-year life of such patent, starting with the actual date of the issuance of such patent. The rule there announced has been consistently adhered to. (See *Hartford Fairmont Co.*, 12 B. T. A., 98, and *A. E. Starbuck, Administrator*, 13 B. T. A., 796.) The petitioner's deduction for exhaustion of its patent should be computed in the same manner."

EVANS, C. J.: Petitioner argued that because the patent was not issued until 1918 the only basis for computing its depreciation was its cost, and, as its cost was nothing, the substantial allowances made by the Board of Tax Appeals for depreciation were unauthorized.

Article 167, Regulations 45 of the Treasury Department, reads as follows:

"ART. 167. *Depreciation of patent or copyright.*—In computing a depreciation allowance in the case of a patent or copyright, the capital sum to be replaced is the cost (not already deducted as current expense) of the patent or copyright or its fair market value as of March 1, 1913, if acquired prior thereto. * * *"

Three questions are presented, which may be stated thus:

(1) Is an invention for which an application for a patent is pending March 1, 1913, "property," as that term is used in section 202(a), Revenue Acts of 1918 and 1921, and section 204(a), Revenue Acts of 1924 and 1926, so that its fair market value may be used as a basis of computing depreciation or exhaustion for each of the years in question?

(2) Does the fact that respondent paid nothing for the invention and the application for a patent, which were acquired prior to March 1, 1913, and which ripened into a patent grant subsequent to said date, prevent respondent from securing an allowance for the exhaustion of said patent?

(3) Assuming questions (1) and (2) are answered in favor of respondent, what was the fair market value of the invention and the application for a patent, on March 1, 1931?

The first two questions will be considered together. The word "property," as used in the above referred to sections of the Revenue Acts, should not be given a narrow or technical meaning. In *Lynch* v. *Alworth-Stephens Co.* (267 U. S., 364, 369 [T. D. 3690, C. B. IV–1, 162]), the court said:

"The general provision * * * is that the deduction from gross income shall include a reasonable allowance for the 'exhaustion * * * of property.' *There is nothing to suggest that the word 'property' is used in any restricted sense.*"

The ruling of the Treasury Department, article 167, Regulations 45, confirms our impression that the rights accruing to the inventor by reason of the issuance of a patent are within the meaning of the word "property," as that term is used in the statute. As we understand petitioner, he does not dispute the soundness of this conclusion. He makes an attempted distinction between the property of one who owns a patent and the rights of one who has merely a pending application for a patent. Such a distinction, it seems to us, goes to the value of the property right rather than to its existence. That one who has secured through assignment the application for a patent, or who has himself made a discovery of a patentable article, has a property right therein, is established by the fact that he may (35 U. S. C. A., 47) sell and assign his application for a patent. (*Gayler* v. *Wilder*, 10 How., 477; *Cook* v. *Sterling Electric Co.*, 118 Fed., 45.) We think it a fair definition to say that what may be sold and assigned is property. It has likewise been held that an application for a patent passed to the trustee in bankruptcy under section 70(a) of the Bankruptcy Act. (*In re Meyers-Wolf Manufacturing Co.*, 205 Fed., 289.)

Petitioner relied largely upon *Durham* v. *Seymour* (161 U. S., 235). He points to the following language appearing in the opinion:

"Whether the alleged invention were patentable or not was the question, and that question had no relation to its value in money. If the invention were not patentable, Durham had suffered no loss; if the invention were patentable, it was not material whether it had or had not a money value. * * *

"* * * The matter in dispute must have actual value, and that can not be supplied by speculation on the possibility that, in a given case, an invention might be held patentable."

True, the court said (page 238):

"* * * But 'until the patent is issued there is no property right in it, that is, no such right as the inventor can enforce. At all events there is no power over its use, which is one of the elements of the right of property in anything capable of ownership.' (*Marsh* v. *Nichols*, 128 U. S., 605, 612; *Brown* v. *Duchesne*, 19 How., 193.)"

But the real question in controversy in the Durham case was over the jurisdictional amount in dispute. Without a showing "that the matter in dispute in the courts below was money to an amount exceeding $5,000, exclusive of costs, or some right, the value of which could be ascertained in money and exceeded that sum," the court was without jurisdiction of the appeal. We think there is a justifiable distinction between "property" as used in the Revenue Act and a matter in controversy having a value in excess of $5,000 as used in the other Act.

Likewise, the Durham case can be distinguished upon another ground. In that case, the litigation was between the applicant for a patent and the Commissioner of Patents. There was no controversy between these parties over any sum of money. The subject of the litigation was the applicant's right to a patent. The value of such patent, as between the commissioner and the applicant, was not in dispute. No judgment or decree for any sum of money could have been entered in plaintiff's favor had he prevailed. The effect of the holding, therefore, is that the naked right to a patent did not involve a sum of money exceeding $5,000.

Congress, in enacting this legislation, was dealing with a most practical problem—the problem of taxation. (*Tyler* v. *U. S.*, 281 U. S., 497 [Ct. D. 190, C. B. IX–1, 383].) In construing any Revenue Act, we, therefore, should not ignore the ordinary everyday commercial experiences which constitute its background.

It is, we think, common knowledge that an individual may have property (unpatented discoveries) which in the ordinary channels of commerce, would be readily recognized as of substantial value, even though the inventor has gone no further than to file an application for a patent to cover the invention.

We conclude that respondent's invention and its application for a patent were "property" as that term is used in the statute.

It follows, too, that if one may have a property right, within the meaning of the Revenue Act, in and to a pending application for a patent, the basis (cost or fair market value as of March 1, 1913) for determining exhaustion must be fixed as of the day he acquired such right. (Section 204 (a), (b), Revenue Act, 26 U. S. C. A., section 935.) Here, the right was acquired in 1911, and, therefore, the fair market value as of March 1, 1913, rather than its cost price, must be used as the basis for determining depreciation or exhaustion.

We conclude that the Board of Tax Appeals properly held that it was required to determine the fair market value of the invention and the pending application for a patent as of March 1, 1913, and to use such valuation as the basis for determining the respondent's deduction for exhaustion of such property for the years in question.

(3) The Board fixed the fair market value of the invention and application for a patent on March 1, 1913, at $500,000. There is some evidence to support this finding, and we, therefore, are not at liberty to disturb it. Doubtless, there is considerable danger of a fact-finding body being unduly influenced by the subsequent grant of the patent in determining the value of an invention, to cover which an application for a patent is pending in the Patent Office. We are not prepared, however, even were we permitted so to do, to say from all of the evidence, which covered a wide range of valuation, that the finding fails to correctly appraise the worth of this highly valuable property. The weakness of respondent's testimony is apparent. However, the Board of Tax Appeals discounted this testimony liberally.

The order is affirmed.

SECTION 206.—NET LOSSES.

ARTICLE 1622: Claim for allowance of net loss. X-28-5135
Ct. D. 358

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

DEDUCTION—NET LOSS—AFFILIATED CORPORATIONS.

A consolidated net loss sustained in 1924 by affiliated corporations, A and B, which, without the deduction of such net loss, have a net loss also in 1925 in which year they became affiliated with corporations C, D, and E within the meaning of section 240 of the Revenue Act of 1926, may not be deducted, under section 206 of the Revenue Act of 1926, in determining the consolidated net income of the five corporations for the year 1925.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.

Planters Oil Co., Inc., et al. v. *George C. Hopkins, Collector.*

Suit to recover payment of income taxes.

[March 2, 1931.]

OPINION.

The five plaintiffs are associations in which Homer Chapman owned and owns over 95 per cent of the stock. (Section 993, U. S. C. A., affiliated corporations.) Two of the five, the original Waxahachie and Ennis companies, were affiliated in 1924, and out of their assets, were created three new companies, two of which bear the same names as the old companies, and the third of which is known as the Farmers Gins, Incorporated. Chapman was, therefore, in reality the taxpayer. It is true the artificial persons were named as the respective units and the tax was figured for each of those units, but the result of the year's work was a benefit or a loss to Chapman, and the tax was, in reality, paid by him, because he owned the companies.

The trend of judicial pronouncement, as well as the trend of legislation, is that the taxpayer shall pay on income, and only upon income. Affiliation of artificial persons works no exception. Under the present statute affiliation is uninforced, until once enjoyed. The cycle idea in business is a recognition of the fact that one year may be helpful and another year hurtful—one year may be adverse and another prosperous—and supports the suggestion that, after all, the taxpayer's fortune was in the mind of the Congress, even as was the thought the Government should have its exact due, without being cheated out of the same by the juggling of earnings and losses, or, by bookkeeping credits and charges of corporations controlled by the same interests.

Affiliation may, therefore, be for the interest of both taxpayer and gatherer even though some of the cases indicate its use for the benefit of the gatherer only.

In re Trentor Corn Products Co. (299 F., 326); 4 F. (2), 195; 5 B. T. A., 499.

The original Waxahachie and Ennis concerns show the consolidated net loss of $206,031.03 for the fiscal year ending June 30, 1924. On August 18, 1924, two of the new concerns were incorporated, and on September 6, 1924, the third was born. Assets of the old associations were the consideration for stock in the three new ones, and for the taxable year ending June 30, 1925, the five organizations made a consolidated return. This showed a net income for that year of $69,237, made up of $147,636.25, net income by the three new members, and a net loss of $78,399.25, by the two old ones. If the 1924 losses of the two originals had been utilized this net income would have been wholly destroyed, and there would have been no tax. Upon payment of the tax claim for refund was refused and this suit followed.

The plaintiffs contend that the loss suffered by the two original affiliated associations for the year 1924, may be used for the benefit of the 1925 computation.

The question is troublesome. The use that may be made of a loss is not clear. (18 B. T. A., 537; 19 B. T. A., 81; 18 B. T. A., 919; 16 B. T. A., 945; 16 B. T. A., 1310; 19 B. T. A., 943.)

Then, too, there is the Sweets case (40 F. (2d), 436) and *Swift* N *Co.* v. *U. S.* (38 F. (2d), 363). This latter case dealt with a statute somewhat different from 206(b), article 937, Act of 1926. The statute there was the one which authorized the Commissioner to deduct a net loss for a subsequent year from the net income of a preceding year, while the statute which regulates this case authorizes the Commissioner to deduct a preceding loss from a gain of the following year. Judge Sibley in *Woolford Realty Co.* v. *Rose* (44 F. (2d), 856; Ct. D. 267, C. B. X–1, 221) wrote about the identical question at bar and supports the defendant's contention, and the Commissioner's action in refusing the refund.

It may be said that while, with one exception, the reasoning of the learned writers in the above mentioned cases, may not be upon facts exactly on all fours with those of the cause we are considering, the drift thereof is against the position of the defendant. I am not sure that optional affiliation, until once enjoyed or compelled, has any bearing upon a correct solution, but, the exact wording of the other statute can not be ignored. "If, for any taxable year, it appears from the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding year (hereinafter in this section called 'second year'), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year'); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary." (206(b), art. 937, Act 1926.)

The tax of each member of an affiliated group is complete within itself. It is calculated without reference to the figures, or the results of any other. The aggregate result of such individual calculations becomes the computing unit. Without the words, "computed without such deduction," the statute would be even less clear, but, with those words we need not write anything into the statute in order to limit the prior losses to the use and benefit of the taxable unit which actually made such losses, if and when there is no excess of a net loss over a net income for the subsequent year. If the net loss sustained in 1924 is used as a deduction in computing the taxpayer's net income for 1925, nothing could be carried forward to 1926, which would be, within the statute, the third year of the completed cycle. I think the statute means that the two associations which sustained the net loss in 1924 could not have such a net loss used as deductions in computing their net income for 1925, because such net income computed without such deduction resulted in losses and the plain wording of the statute requires that such net losses be carried forward and used as deductions in computing the net income for such taxpayers for 1926. Affiliation is of no consequence to such calculation. There must be a calculation within the terms of the law for each individual unit before a computation for the affiliated unit can be used. A different basis allows evils sometimes against the payer and sometimes against the receiver, but this reading and construction preserves both, and affords a support for the belief that there was a due consideration for both in the mind of the Congress.

The motion of the defendant for a verdict is sustained.

SECTION 208.—CAPITAL GAINS AND LOSSES.

ARTICLE 1651: Definition and illustration of capital net gain.

REVENUE ACT OF 1926.

Property held primarily for sale in the course of a trade or business. (See G. C. M. 9958, page 158.)

ARTICLE 1651: Definition and illustration of capital net gain.

REVENUE ACT OF 1926.

Stock acquired through exercise of stock rights. (See G. C. M. 10063, page 159.)

SECTION 209.—EARNED INCOME.

ARTICLE 1661: Earned income.

REVENUE ACT OF 1926.

General Counsel's Memorandum 6645 (C. B. VIII–2, 182) revoked in so far as inconsistent with General Counsel's Memorandum 9825. (See page 146.)

PART II.—INDIVIDUALS.

SECTION 210.—NORMAL TAX.

ARTICLE 4: Who is a citizen.

REVENUE ACT OF 1926.

Status, under Act of September 22, 1922, of a woman citizen of the United States who marries a subject of Great Britain and of a woman subject of Great Britain who marries a citizen of the United States. (See I. T. 2600, page 107.)

SECTION 212.—NET INCOME OF INDIVIDUALS DEFINED.

ARTICLE 23: Bases of computation. (Also Section 1208.) X–43–5264 Ct. D. 407

INCOME TAX—REVENUE ACTS OF 1918 AND 1926—DECISION OF COURT.

1. INCOME—SALE—PERSONAL PROPERTY—INSTALLMENT BASIS—ESTOPPEL.

Where taxpayers, owners of capital stock of an oil corporation, entered into two contracts in 1918 to effectuate their purpose in connection with a sale of the same to the E Company, one with the E Company by which the latter purchased stock for $500,000 in cash and the delivery of oil and gas income certificates entitling the taxpayers to 20 per cent of the gross income of the E Company as and when received, the other contract with the S Company, parent of the E Company, by which the taxpayers purported to grant to the S Company an option to purchase such certificates for the sum of $2,500,000, the certificates indorsed in blank were delivered to a designated trustee, the taxpayers were to receive the income from the oil and gas certificates until such receipts equaled $2,500,000, when the S Company became the owner of such certificates, and the S Company agreed that if in any one year the income from such certificates did not amount to the sum of $500,000 it would advance

to the taxpayers the difference and bound itself to purchase such certificates five years from the date of the agreement for a total consideration of $2,500,000, the two contracts read together manifest that the taxpayers sold their stock for $3,000,000, $500,000 in cash and $2,500,000 in deferred payments, the S Company bound itself to the extent of $500,000 a year for five years, the taxpayers could receive no more than $3,000,000 in any event and the S Company was bound to pay that amount in any event.

The transaction was not an exchange of property and within the provisions of section 202(a) of the Revenue Act of 1918, but was a deferred payment sale on the installment plan, and the sale being a "casual" one the income therefrom may be returned, as the taxpayers did report it, on the installment basis pursuant to the authority of sections 212(d) and 1208 of the Revenue Act of 1926. The taxpayers' books having been on the basis of cash receipts and disbursements and they having returned the income from the sale "in the gross income for the taxable year in which received by the taxpayers," proportioning the income from the sale on the installment basis, conceding, arguendo, that the taxpayers had the election of treating the obligations of the purchaser as the equivalent of cash, they otherwise elected, and they may not change that election, particularly since the result would be the return of all the income in a year the collection of the tax for which was barred by the statute of limitations.

2. DECISION REVERSED.

The decision of the Board of Tax Appeals (11 B. T. A., 979) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT. JANUARY TERM, 1931.

202. *Commissioner of Internal Revenue, petitioner,* v. *L. C. Moore, respondent.*

203. *Commissioner of Internal Revenue, petitioner,* v. *W. F. Kistler Estate, Florence L. Kistler and L. C. Moore, Administrator, respondent.*

205. *Commissioner of Internal Revenue, petitioner,* v. *M. C. Garber, respondent.*

206. *Commissioner of Internal Revenue, petitioner,* v. *James Tait, respondent.*

On petition to review the decisions of the United States Board of Tax Appeals.

Before PHILLIPS and MCDERMOTT, Circuit Judges, and KENNEDY, District Judge.

[March 14, 1931.]

OPINION.

MCDERMOTT, Circuit Judge, delivered the opinion of the court.

The sole question involved on these appeals is whether the profit derived from the sale of certain oil stock should be charged into the income of the taxpayers for the year 1918, when the contract of sale was made, or whether it should be charged into the years in which the payments on the purchase price were actually received. The Board of Tax Appeals held that the entire profit was taxable in the year 1918, and since the statute of limitations had run on the assessment of taxes for that year, that there was no taxable liability. The Commissioner appeals. The facts are not in dispute.

In the year 1918 the taxpayers owned 200 shares of the capital stock of the Garfield Oil Co., that being one half of its issued capital; the other half was owned by the Exchange Oil Co., a subsidiary of the Sinclair Oil & Gas Co. In 1918 the taxpayers undertook to negotiate a sale of their stock to the Exchange Oil Co. After some dickering as to price, the parties agreed upon a sale price of $3,000,000, of which $500,000 was to be paid in cash, the balance to be paid by assigning 20 per cent of the oil runs to the buyers until they had received $2,500,000, with the guarantee that such runs would equal at least $500,000 a year. Because of the greater financial responsibility of the parent Sinclair company, it was agreed that that company should guarantee the deferred payments. The terms being agreed upon, it was left to the attorneys for the Sinclair company to draw the papers. Such attorneys devised the plan of two contracts, one of them being an outright contract to purchase

between the taxpayers and the Exchange Oil Co., by which the Exchange company purchased the stock for $500,000 in cash and the delivery of oil and gas income certificates entitling the taxpayers or their assigns to 20 per cent of the gross income of the Exchange company, as and when received. The second contract was between the taxpayers and the Sinclair company, by which the taxpayers purported to grant to the Sinclair Oil & Gas Co. an option to purchase such certificates for the sum of $2,500,000. By that agreement the certificates, indorsed in blank, were delivered to a trustee named in the instrument. The taxpayers were to receive the income from the oil and gas certificates until such receipts equaled $2,500,000, when the Sinclair company became the owner of such certificates. The Sinclair company agreed that if in any one year the income from such certificates did not amount to the sum of $500,000, it would advance to the taxpayers the difference, without interest, and bound itself to purchase such certificates, five years from the date of the agreement, for a total consideration of $2,500,000. It is obvious that this is a firm contract of purchase, and not an option.

Reading these instruments together, as they must be, it is entirely clear that the taxpayers sold their stock for $3,000,000, $500,000 in cash and $2,500,000 in deferred payments, the Sinclair company binding itself to the extent of $500,000 a year for five years. The taxpayers could receive no more than $3,000,000 for their property in any event, and the Sinclair company was firmly bound to pay that amount in any event. This is not only the clear purport of the writings when read together, but is also the understanding of the taxpayers. One of them testified that $3,000,000 "was the fixed price. There was no question about that. * * * There was not any other view entertained by us but what we were receiving $3,000,000 as the purchase price for that property. * * * That was determined before we completed the sale." The understanding of the taxpayers is further evidenced by the fact that notwithstanding the fact that their income tax returns were on a cash basis, they did not account for the entire profit on the sale in their 1918 returns, but accounted only for the $500,000 received that year, and in each of the five succeeding years accounted for so much of the profit as was represented by the amounts received by them during the year in question.

Disagreement arose between the taxpayers and the Commissioner as to certain questions of depletion and other matters not here pertinent. During these negotiations with the Commissioner, the taxpayers maintained their original position that profits on the sale should be distributed over the five years. The negotiations with the Commissioner were so prolonged that the statute of limitations ran upon any additional assessment for the year 1918. The taxpayers then contended that the sale was complete in 1918; that in fact no part of the purchase price of the stock sold was received in the years 1919 to 1923, inclusive, despite their returns to the contrary; that the transaction with the Exchange Oil Co. was separate and distinct from the transaction with the Sinclair company; that what they had in fact done was to exchange their stock in the Garfield Oil Co. for $500,000 in cash and oil and gas income certificates which had a ready market value; that under section 202(b) of the Revenue Act of 1918, the sale should be treated as an exchange of property; the contemporaneous transaction with the Sinclair company should be disregarded, and no part of the sale price should be charged to them for the years 1919 to 1923, inclusive. The statute having run on the 1918 assessment, the result of their contention, if sound, is that four-fifths of the profit from this sale escapes any taxation.

The Board of Tax Appeals sustained the contention of the taxpayers and held that the transaction with the Exchange Oil Co. was "complete in itself. * * * There were two transactions each separate and distinct from the other and each giving rise to income." With this holding we can not agree. The first contract, considered separately, does not express the agreement of the parties. If the Board of Tax Appeals is correct, the sale price of the stock was an unascertained and unascertainable amount, with $500,000 as a minimum and that sum plus 20 per cent of all the oil recovered under the leases as a maximum. But all the evidence is that the sale was bottomed on a fixed price of $3,000,000, of which $500,000 was to be paid in cash and the balance in deferred payments. This was the original agreement which the attorneys for the Sinclair company were instructed to, and which they did, reduce to writing. That two contracts were drawn to effectuate that purpose can not change the substance of the transaction. See *O'Meara* v. *Commissioner* (34 F. (2d), 390), where this court construed two writings as reflecting but one

transaction. Taxation is a practical matter, and the courts uniformly penetrate the form to get at the substance. (*Tyler* v. *United States*, 281 U. S., 497 [Ct. D. 190, C. B. IX–1, 383]; *Chicago, M. & St. P. Ry.* v. *Minn. Civic Assn.*, 247 U. S. 490; *Scheonheit* v. *Lucas* (C. C. A. 4), 44 F. (2d), 476; *Tsivoglou* v. *United States* (C. C. A. 1), 31 F. (2d), 706; *Phillips* v. *Gnitchel* (C. C. A. 3), 27 F. (2d), 662.)

That leaves for determination the legal question of whether the entire profit on the sale should be charged to the year 1918, or whether it should be distributed through the years in which the purchase price was paid. The property involved is personal property; the sale was not one made by one regularly engaged in the sale of personal property on the installment basis, but was a casual sale; the buyer was responsible financially.

Section 213(a) of the Revenue Act of 1918 defines gross income as including profits arising from sales of personal property, and provides:

"The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period."

Article 42, Treasury Department Regulations 45, promulgated under this Act, provides:

"The rule prescribed is that in the sale or contract for sale of personal property on the installment plan, whether or not title remains in the vendor until the property is fully paid for, the income to be returned by the vendor will be that proportion of each installment payment which the gross profit to be realized when the property is paid for bears to the gross contract price. * * * If the vendor chooses as a matter of consistent practice to treat the obligations of purchasers as the equivalent of cash, such a course is permissible."

The taxpayers were on a cash basis of accounting, and in line with the statute above quoted, they did return the profits from this sale "in the gross income for the taxable year in which received by the taxpayer," proportioning the profit in accordance with the quoted regulation. Conceding, for the argument, that the statute and regulation afforded the taxpayers the election of treating the obligations of the purchaser as the equivalent of cash, the taxpayers otherwise elected; they may not now change that election, particularly since the result would be to throw all of the profit into a year where collection is barred by limitations. (*Lucas* v. *St. Louis National Baseball Club* (C. C. A. 8), 42 F. (2d), 984 [Ct. D. 243, C. B. IX–2, 293]; *Rose* v. *Grant* (C. C. A. 5), 39 F. (2d), 340; *Alameda Investment Co.* v. *McLaughlin* (C. C. A. 9), 33 F. (2d), 120 [Ct. D. 101, C. B. VIII–2, 326]; Holmes on Federal Income Tax. (6th Ed.), 1278.)

Another point is worthy of notice. Section 212(d) of the Revenue Act of 1926 (26 U. S. C., 953) is made retroactive by section 1208 of the same Act (26 U. S. C., 953–a). That section, and the regulation promulgated thereunder (Regulations 69, article 42) permits the distribution of profits on a sale on deferred payments in the case of "casual sale * * * for a price exceeding $1,000 * * * if the initial payments do not exceed one-fourth of the purchase price." The section defines "initial payments" as cash or property other than evidences of indebtedness of the purchaser. The case at bar falls within the four corners of this retroactive statute.

The taxpayers argue that the transaction is governed by section 202(a) of the Revenue Act of 1918, which provides that where property is exchanged for other property, the property received in exchange shall "for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any." It is argued that they received in exchange for their stock certain oil and gas income certificates, which, coupled with the agreement of the Sinclair company to purchase, had a ready market value. But we do not regard the transaction as an exchange of their stock for the income certificates, but rather as a sale on deferred payments. The taxpayers never had any dominion over such certificates—they did not "receive them"—for by the very transaction of their issuance they passed to the Sinclair company by a contract of sale. Reliance is had upon *Fesler* v. *Commissioners* (C. C. A. 7) (38 F. (2d), 155) and similar cases, which hold that where property is exchanged for negotiable bonds or other property which may be readily liquidated, that the profit is realized and taxable, under section 202(a). The facts do not bring this case within the doctrines there announced, for this is not an exchange of property but a sale on deferred payments. On the other

hand, it was held by the second circuit in *Bedell* v. *Commissioner* (30 F. (2d), 622) that—

"But if land or chattel is sold, and title passes merely upon a promise to pay money at some future date, to speak of the promise as property exchanged for the title appears to us a strained use of language, when calculating profits under the income tax. Section 202(b) of the Act of 1918 provided for an exchange of property and made the profit depend upon 'the amount of its (the property received) fair market value, if any'—a phrase which was amended in the law of 1921 (42 Stat., 227) to 'readily realizable market value.' There is a difference between the two, but it is absurd to speak of a promise to pay a sum in the future as having a 'market value,' fair or unfair. Such rights are sold, if at all, only by seeking out a purchaser and higgling with him on the basis of the particular transaction. Even if we could treat the case as an exchange of property, the profit would be realized only when the promise was performed."

See, also, Foulke on Taxation, chapter 18, "Installment sales," and cases there cited; *Davis* v. *United States* (Court of Claims), decided January 12, 1931; *O'Meara* v. *Commissioner* (C. C. A. 10) (34 F. (2d), 390).

In *Eisner* v. *Macomber* (252 U. S., 189 [T. D. 3010, C. B. 3, 25]), the Government urged that the recipient of a stock dividend had received taxable income, because the stockholder may sell the shares acquired by the stock dividend. The Supreme Court said that he might, if he could find a buyer, but if and when he did sell, the profit realized was taxable income. The Supreme Court then said, at page 213:

"Yet, without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show that to tax a stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax."

It is so in this case. In 1918 the taxpayers had not realized all the profit from this sale. The profit was realized as they received the deferred payments. Aside from the $500,000, they received nothing in 1918 but a share in oil produced in later years and an agreement of the Sinclair company. While the Sinclair company was then, and now is, a solvent corporation, the fact still remains that the taxpayers did not realize the profit from the sale in 1918, but realized the profit during the ensuing years; and it is the general contemplation of the statutes that a tax shall be levied on profits which are realized and not deferred. If the contention of the taxpayers is sound, one who sells his farm to a responsible buyer on payments deferred over 20 years must account for the entire profit during the year of the sale. He has not actually received that profit; he has received no income out of which to pay the tax; the statute and the regulations give him the right to spread the tax; to deny him the right would, in our opinion, result in a hardship to taxpayers generally.

The causes are, therefore, reversed and remanded for further proceedings in accordance with this opinion.

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1926.

Reinvestment of income from tax-exempt restricted allotted lands of Five Civilized Tribes. (See G. C. M. 9621, page 111.)

ARTICLE 39: Sale of stock and rights.

REVENUE ACT OF 1926.

Rights to acquire stock of a character or preference different from stock in respect of which rights were issued. (See I. T. 2597, page 118.)

SECTION 213(b).—GROSS INCOME DEFINED: EXCLUSIONS.

ARTICLE 74: Interest upon State obligations.

REVENUE ACT OF 1926.

Interest upon an award for property condemned for public purposes. (See G. C. M. 10043, page 124.)

SECTION 214(a)1.—DEDUCTIONS ALLOWED INDIVIDUALS: BUSINESS EXPENSES.

ARTICLE 110: Rentals. X–44–5274
Ct. D. 410

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. DEDUCTION—RENTALS—BUSINESS EXPENSES—BONUS OR ADVANCED PAYMENT OF RENTAL—WHEN DEDUCTIBLE.

Where a taxpayer acquires in 1926 a lease of certain coal property to run from November 1, 1926, until all the coal has been mined and removed, the lease providing for payment of rental of a specified amount upon its execution and delivery and a further specified amount in May, 1927, these specified amounts paid in accordance with the terms of the lease do not constitute rental payments for these respective years but together represent the payment of a bonus or rental in advance for the entire term of the lease and are not deductible as a business expense for the years in which they were paid but must be apportioned as an expense over the whole estimated term.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (19 B. T. A., 169) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT. No. 4535.—MARCH TERM, 1931.

Baton Coal Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

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

Before WOOLLEY, DAVIS, and THOMPSON, Circuit Judges.

[July 29, 1931.]

THOMPSON, Circuit Judge: This case comes up upon petition for review of a decision of the Board of Tax Appeals finding deficiencies in the petitioner's income taxes for the years 1926 and 1927.

On November 2, 1925, petitioner leased certain coal properties from the Shenango Furnace Co. for a term of one year at a rental consisting of $40,000 in quarterly payments of $10,000, a royalty upon the coal mined of 25 cents per ton, with a minimum royalty of $50,000, and payment of the taxes on the property. All payments made under the lease were deducted as expenses on the petitioner's income tax return for 1926 and were approved and allowed by the Commissioner. On November 14, 1926, the petitioner entered into a new lease for the same properties to run from November 1, 1926, until all of the Pittsburgh vein of coal had been mined and removed. The new lease provided for payment of rental of $50,000 upon the execution and delivery of the lease and $51,250 on May 1, 1927, for the payment of a royalty of 13 cents per ton, with a minimum royalty of $26,000 per annum, for payment by the lessee of all taxes, and for payment to the lessor of one-half of the net profits of operation. The payments were made in accordance with the lease for each of the years 1926 and 1927.

In its income tax returns, the petitioner deducted the sum of $50,000 as an expense of carrying on the business during the year 1926 and deducted $51,250 as a similar expense for the year 1927. The Commissioner disallowed each of the deductions as an expense of the taxpayer's business for the years 1926 and 1927, and apportioned the entire sum throughout the life of the lease ascertained by taking the petitioner's estimate of the total tonnage of coal in the ground and dividing that by the average tonnage of coal taken out per year. He gave as his reason therefor that those amounts represented a bonus "paid in connection with the attaining of the lease and should be capitalized and the cost recovered over the life of the asset."

The Board of Tax Appeals held that, whether the sums paid in each of the years 1926 and 1927 were considered a bonus or advance payment of rental, the payments should not be deducted in their entirety in those taxable years but should be spread over the years during which the lease would continue.

The pertinent section of the Revenue Act of 1926 is as follows:

"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:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity.

* * * * * * *

"(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

"(8) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee."

The pertinent part of the Treasury Department regulation prescribed in accordance with the authority granted by that Act is as follows:

"ART. 110. *Rentals.*—Where a leasehold is acquired for business purposes for a specified sum, the purchaser may take as a deduction in his return an aliquot part of such sum each year, based on the number of years the lease has to run."

We perceive no ground for differing from the conclusions and rulings of the Commissioner and the Board of Tax Appeals. It is clear that the payments of $50,000 in 1926 and $51,250 in 1927 did not constitute rental payments for these respective years but together represented the payment of a bonus or rental in advance for the entire term of the lease, the length of which was determinable by the quantity of coal in the ground divided by the annual average output. The lease was to run until exhaustion of the coal. It is clearly evident, therefore, that those sums, together with the other payments specified in the lease constituted the consideration for a lease during the entire period and that under the law and the regulations, those sums must be apportioned as an expense over the whole term of the lease and are not deductible as a business expense of the years in which they were paid. (*Duffy* v. *Central R. R.*, 268 U. S., 55 [T. D. 3704, C. B. IV-1, 143]; *Galatoire Bros.* v. *Lines*, 23 F. (2d), 676 [T. D. 4138, C. B. VII-1, 229].)

The petition is dismissed and the order and decision of the Board of Tax Appeals affirmed.

SECTION 214(a)9.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPLETION.

ARTICLE 203: Amount returnable through depletion and depreciation deductions in the case of lessee.

REVENUE ACT OF 1926.

Assignment of lessee's interest. (See G. C. M. 9798, page 221.)

SECTION 219.—ESTATES AND TRUSTS.

ARTICLE 341: Estates and trusts.

REVENUE ACT OF 1926.

Income payable on 2d days of January and July. (See G. C. M. 8724, page 197.)

ARTICLE 341: Estates and trusts. X–44–5275
Ct. D. 412

INCOME TAX—REVENUE ACTS OF 1916, 1918, 1921, 1924, AND 1926—DECISION OF COURT.

1. CONSTRUCTION OF A WILL—RES JUDICATA.

Where a commissioner appointed by a State court makes a report to the court as to the proper construction of a will and on the day the report is submitted the trustee under the will and the three interested beneficiaries move the court to confirm the report, the judgment of the court entered the same day confirming the report and adopting the commissioner's construction of the will is an agreed judgment which is not binding upon the Federal court and the United States is not concluded thereby, where the United States is not a party nor represented in the proceeding in the State court, although the trustee and the beneficiaries each knew that the United States was contending for an entirely different construction of the will and on the strength of that contention had already assessed taxes against the trustee and had enforced payment thereof and knew also that the trustee was demanding a refund of these taxes based upon the construction of the will which they were asking the State court to adopt.

2. CONSTRUCTION OF A WILL.

A will is construed as creating a single trust to maintain and educate the testator's children and upon each attaining 21 to pay not in excess of specified sums to each child until his eldest surviving child reached 30, on that event the entire trust estate to be divided in equal shares among the surviving children, the share of the daughter to be held in trust for her life, one-half of each of the shares of the two sons to be held in further trust upon each arriving at the age of 30 and the balance of the corpus of their shares then to be paid to them. The income of the trust is "income held for future distribution under the terms of the will or trust" under section 2(b) of the Revenue Act of 1916, section 219(a)3 of the Revenue Acts of 1918 and 1921, and section 219(a)1 of the Revenue Acts of 1924 and 1926, and is taxable to the trustee pursuant to the provisions of those sections.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

Fidelity & Columbia Trust Co., Trustee of the Estate of L. P. Ewald, Deceased, etc., plaintiff, v. *Robert H. Lucas, Collector, etc., defendant.*

[July 11, 1931.]

OPINION.

DAWSON: D. J.: The plaintiff in this case is seeking a refund of income taxes for the years 1917 to 1926, both inclusive. The material facts are as follows:

L. P. Ewald, a wealthy citizen of Louisville, died testate in 1909. The provisions of his will material to this controversy are the first, second and fourth clauses thereof, which are as follows:

"First: I bequeath to the Fidelity Trust Co. of Louisville, Ky., the sum of three hundred thousand dollars ($300,000) in trust, for my three children,

Philip Louis, Helen Josephine and Sterling Donald, share and share alike, to hold the same on the trusts hereinafter declared.

"Second: I also devise and bequeath to the Fidelity Trust Co. of Louisville my house and lot situate on the east side of Third Street, between York and Breckinridge Streets, in the city of Louisville, together with all the furniture and appurtenances, for the use and benefit of my three children above named, on the trusts hereinafter declared.

"It is my will that the bequests and devises made in the first two clauses of my will, for the benefit of my children above named, shall constitute a first charge on my estate, and shall take precedence over all devises and bequests hereinafter made.

"Fourth: The rest and residue of my estate I devise and bequeath to the Fidelity Trust Co. of Louisville, to hold the same, as well as the $300,000 mentioned in the first clause of this will, for the use and benefit of my three children above named, upon the following trusts, viz:

"To apply so much of the income thereof as said executor and trustee may deem proper to the liberal maintenance and education of my said three children, until they severally arrive at the age of 21 years. To pay to each of them thereafter, and until they arrive at the age of 25 years, out of the income of my estate or their respective shares thereof, a sum not exceeding $10,000 per annum, and to pay to each of them thereafter, and in like manner, until they arrive at the age of 30 years, a sum not exceeding $15,000 per annum.

"I direct that when my eldest surviving child arrives at the age of 30 years, the entire estate then held in trust, shall be by said trustee divided into equal shares amongst my surviving children, and the lawful issue of any deceased child, *per stirpes*.

"The share allotted to my daughter, Helen Josephine, shall be held in trust for her during her natural life, and at her death shall pass to her descendants, if any, otherwise to her surviving brother or brothers, or his or their descendants, *per stirpes*.

"If my sons, Philip Louis, and Sterling Donald, or either, shall attain the age of 30 years, said trustee shall, as they severally attain said age, turn over to them one half of the corpus of their several shares of my estate, and hold the other half in trust for them during their several lives, with remainder to their descendants, if any, otherwise, to their surviving brothers or sister or their descendants *per stirpes*.

"Any part of my estate received by either of my children because and by right of survivorship shall be held subject to the same trusts as the other estate devised to such child or children under this will.

"If any infant descendant of either of my children shall take any portion of my estate under my will, the said trustee shall continue to hold the same for such infant until it becomes 21 years of age."

By a codicil the Columbia Trust Co. was substituted for the Fidelity Trust Co. as executor, trustee and guardian, and the plaintiff, Fidelity & Columbia Trust Co., is the corporate successor, by merger, of the Columbia Trust Co. and the Fidelity Trust Co. Plaintiff's corporate predecessor was appointed and qualified as executor and trustee under the will on August 3, 1909. Philip Louis Ewald became 21 years of age on March 5, 1917; Helen Josephine became 21 in 1919 (the record does not show the month of her birth), and Sterling Donald became 21 on July 9, 1922.

With the exception of the $300,000 referred to in clause 1 of the will, no actual separation of the trust estate, or the income therefrom, into three parts was made until 1926, when the eldest son, Philip Louis, became 30 years of age. The plaintiff as trustee, however, for each of the calendar years 1917 to 1926, both inclusive, made four separate income tax returns, one as trustee of the estate of L. P. Ewald, deceased, and one for each of the three children, Philip Louis, Helen Josephine, and Sterling Donald. It is fairly inferable from the petition that the plaintiff reported no taxable income as trustee of the estate of L. P. Ewald, deceased. As trustee for each of the children for each of the years involved, plaintiff reported one-third of the net income of the entire trust estate, although for each of the years each of the children had actually received a much smaller sum.

Upon an audit and review of these returns by the Commissioner of Internal Revenue, it was determined that only the amount actually paid to or for the account of the children in each of the years involved was taxable income to them, and that the balance of the net income derived from the trust estate for

each of the years involved should have been reported as income of the estate of L. P. Ewald and taxed as such. The tax on this basis was accordingly assessed against the plaintiff, as trustee of the estate of L. P. Ewald, for each of the years involved, and the amounts thus arrived at for the years 1917, 1918, 1919, and 1920 were paid during the years 1923 and 1924. The tax assessed against the estate for the year 1921 was paid in 1926; the taxes for the years 1922, 1923, and 1924 were paid on January 21, 1927; and the taxes for the years 1925 and 1926 were paid in October, 1928. Claims for refund were regularly made and rejected. Consistently with this view of the case, the Commissioner ruled that for each of the years involved each child was entitled to a refund of the difference between the tax actually paid by such child and the amount payable had such child reported only the income actually received each year.

In the latter part of January, 1927, in an action then pending in the Circuit Court of Jefferson County, Ky., the trustee moved the court to refer the case to a commissioner, for the purpose of settling its accounts and for a construction of the will. The matter was so referred, and the commissioner made his report on June 11, 1927. That part of the report dealing with a construction of the will is as follows:

"Being of the opinion that under a proper construction of the testator's will he intended his children to share equally in his estate, your commissioner holds that beginning with the year 1917 the net income from the estate of L. P. Ewald should have been divided into three equal parts, one for each of the testator's children, and then each child's interest charged with what that child actually received, and the balance carried to that child's separate trust account."

On the same day Philip Louis Ewald, Helen Josephine Ewald and Sterling Donald Ewald, all of whom were more than 21 years of age, and also the plaintiff, as trustee of the estate of L. P. Ewald, entered written motions to confirm the commissioner's report, and on the same date a judgment was entered by the court, confirming the report and adopting the commissioner's construction of the will.

The applicable Revenue Acts are those of 1916, as amended by the Act of 1917; 1918, 1921, 1924, and 1926. By each of these Acts trust estates are made taxable entities, and the trustee is charged with the duty of making the return and paying the tax. Each of these Acts imposes a tax on trust estates on "income held for future distribution under the terms of the will or trust." (Section 2(b), Revenue Act of 1916; section 219(a)3, Revenue Acts of 1918 and 1921; section 219(a)1, Revenue Acts of 1924 and 1926.) Under each of the Acts referred to the fiduciary was allowed as a deduction the amount of any income from the trust estate properly paid or credited to the beneficiary during the taxable year.

In view of the provisions of the Acts referred to, it is apparent that a solution of this case involves a construction of the Ewald will. If, under this will, the testator intended that for the years prior to the time the eldest child became 30 years of age all of the income of the trust estate remaining at the end of each year, after making provision for the children according to the fourth clause of the will, was to be held as a part of one trust estate until a division of that estate upon the eldest surviving child becoming 30 years of age, then it was the duty of the plaintiff to report this surplus income each year as income of the general trust estate, and pay the taxes thereon, as the trustee was required to do by the Commissioner. If, on the other hand, such was not the intention of the testator, but he intended—as contended by the plaintiff and as decided by the Jefferson Circuit Court—that the income each year was to be divided into three separate trusts, one for each child, respectively, and the income expended for each child during such year charged against the child's estate and the balance carried forward into such child's individual trust account, then the plaintiff is entitled to recover.

Therefore, we may disregard the manner in which the trustee handled this yearly surplus income. The vital question is, How did L. P. Ewald by his will intend it to be handled? This intention must be gathered from the will itself.

At the very threshold of this inquiry, however, I am met with the contention of the plaintiff that this court is not free to exercise its independent judgment in construing the will, but that I am conclusively bound by the construction thereof made by the Jefferson Circuit Court in its judgment of June 11, 1927.

While I recognize that as a general rule the decree of a State court, as to the meaning and effect of a will of one of that State's residents, is binding upon the Federal court, I do not think that rule has any application under the facts disclosed by this record. I am satisfied that the judgment relied upon must be regarded as nothing more than an agreed judgment. No other construction of the will than that contended for by the plaintiff was suggested to the commissioner in that case, and when the commissioner's report was filed, the plaintiff, as trustee, and the three children, each of whom was then of age, asked the court to adopt the commissioner's report, including his construction of the will. This the court did, by its judgment entered on the same day. The court in this judgment was careful to point out that the trustee and the three children had each entered a motion that the report be approved, and that they were the only parties interested in the estate. The obvious deduction is that the circuit court did the very natural thing of adopting the commissioner's report, when all the interested parties were present and asking that it be adopted. The Government was not represented in the proceeding, although the trustee and the three children each knew that the Government was contending for an entirely different construction of the will, and, on the strength of that contention, had already assessed taxes against the trustee of the L. P. Ewald estate in large amounts for each of the years from 1917 to 1924, both inclusive, and had enforced payment thereof; and they knew that the trustee was demanding a refund of these taxes based upon the construction of the will which they were asking the circuit court to adopt. They likewise knew that a similar assessment would be made by the Government for the years 1925 and 1926. So far as this record shows, the controversy between the Government and the trustee as to the construction of the will was in no way brought to the attention of the circuit court.

Under these circumstances it would shock one's sense of justice to hold that the Government is concluded by the State court judgment. Furthermore, it is well settled that a decision of a State court, establishing a local rule of property, construing a State statute or a contract made after the rights of a litigant in a Federal court suit had accrued, and in a case to which he was not a party, is not binding upon the Federal court. I know of no reason why this rule should not apply to the construction of wills. See *Kuhn* v. *Fairmont Coal Co.* (250 U. S., 349), and authorities there cited.

I therefore conclude that I am not only free, but it is my duty, to make my own construction of the will in this case.

The third clause of the will enumerates nine specific bequests of $15,000 each to persons other than the three children of the testator. All the residue of the estate was left in trust to the three children under the terms of the first, second and fourth clauses of the will. It is apparent that the thing uppermost in the mind of the testator was to make provision for his three children. Therefore, in the first clause he provided a trust fund of $300,000 for his three children, "share and share alike, to hold the same on the trusts hereinafter declared." The "trusts hereinafter declared" are set out in the fourth clause of the will. In the second clause he devised the residence on Third Street and the household furniture therein, in trust "for the use and benefit of my three children above named on the trusts hereinafter declared"; and to make certain that the provisions for his children made in the first and second clauses of the will should not be diminished by the bequests contained in the third clause, the testator specifically declared "that the bequests and devises made in the first two clauses of my will for the benefit of my children above named shall constitute a first charge on my estate and shall take precedence over all other devises and bequests hereinafter made." Therefore, the bequests in the third clause in no event could be effective unless at the testator's death the net estate was in excess of the property disposed of in the first and second clauses. The first paragraph in the fourth clause disposes of any residue of the estate left after satisfying the first, second and third clauses of the will, and the succeeding paragraphs of the fourth clause set out the trusts governing the $300,000 disposed of in clause 1 and the residue of the estate disposed of in clause 4.

It seems quite clear to me that it was not the intention of the testator that the $300,000 disposed of in the first clause of the will should constitute a separate and distinct trust fund from the residue of the estate disposed of in the fourth clause. He intended that the $300,000 and any residuary estate should constitute one trust fund, under the terms and conditions set out in the

fourth clause. The testator specifically provided that not only the residuary estate, but the $300,000 as well, should be held under the trusts set out in the fourth clause Having required that these two funds should be held under exactly the same trusts, he certainly did not intend that they should be handled separately. They were treated separately in the will for the simple reason that the testator wanted to be sure that at least $300,000 would be available for the use of the children before any of the other bequests made in the will to his other kinsmen should be paid. After making provision for the liberal maintenance and education of each of the three children during their minority, the fourth clause of the will next directs the trustee " * * * to pay to each of them thereafter, and until they arrive at the age of 25 years, out of the income of my estate, or their respective shares thereof, a sum not exceeding $10,000 per annum, and to pay to each of them thereafter, and in like manner, until they arrive at the age of 30 years, a sum not exceeding $15,000 per annum."

I see nothing in the will evidencing any intention on the part of the testator to charge his children with the sums expended for their benefit during their minority, nor with the sums directed to be paid to them from their twenty-first birthday to the date when the estate was to be divided into three parts, which was the date when the eldest living child became 30. On the contrary, the silence of the will on this subject, considered in connection with the fact that the only specific provision for a division of the trust estate is the one directing the division to be made when the eldest living child became 30 years of age, would indicate that the testator intended that all expenditures directed to be made in behalf of his children prior to the date of division should be treated as a general charge against the entire trust estate. Of course, this construction of the will is to the advantage of the eldest child, for the reason that all payments made to him up to the date of the division of the estate on his thirtieth birthday would be charged against the entire trust estate, whereas the payments made to the other two children between the time the estate was divided on the thirtieth birthday of the eldest child and their thirtieth birthday would be charged against their individual parts of the estate, but inequality between children affords no reason for the court disregarding the plain provisions of a will.

The plaintiff makes much of the phrase "or their respective shares thereof" in the paragraph of the will last above quoted. It is argued that this language clearly indicates that it was the intention of the testator that from the time the eldest child arrived at the age of 21 years until he became 30 years of age, the income from the trust estate should each year be divided into three equal parts and the amount paid to each child under the provisions of the will should be charged to his part. It is suggested that unless such a construction is given the will, the phrase referred to is meaningless. I fully realize that it is the duty of the court to give some meaning to every word used in an instrument, if such can be done consistently with its other provisions; but if the will is construed according to plaintiff's contention, then the phrase "out of the income of my estate," appearing in the quoted paragraph and in immediate connection with the phrase relied upon by the plaintiff, would be entirely meaningless. The will should be construed, if possible, so as to give meaning to both phrases, and I think the construction here suggested accomplishes this result.

Philip Louis Ewald became 30 years of age on March 5, 1926. On that date it became the duty of the trustee to divide the entire estate into three equal parts. Up to that time the sums directed by the will to be paid to each of the children were paid out of the income of the entire trust estate. Payments under clause 4 of the will were to cease when the children arrived at 30 years of age. Helen did not become 30 years of age until 1928, two years after the division of the estate, and Sterling did not become 30 years of age until more than five years after the division of the estate. Therefore, literally, the sums paid to the two younger children under the last quoted paragraph of clause 4 of the will were paid from the income of the entire trust estate, or from the income of their respective shares. The sums paid prior to the division of the estate on March 5, 1926, were paid from the income of the entire trust estate. The sums paid to them after that date until they became 30 years of age were paid out of the income of their respective shares of the estate. Inasmuch as Sterling's twenty-fifth birthday was July 9, 1926, any sum paid to him during his twenty-fourth year prior to the division of the estate on March 5, 1926, was chargeable to the income of the entire trust estate, and any sum paid to him

under the will for the remainder of his twenty-fourth year was chargeable against the income of his one-third of the estate.

From these facts it will be seen that the construction of the will here suggested gives effect to both of the phrases referred to, and I think this construction is in accord with the intention of the testator.

I am therefore of the opinion that the $300,000 and the residuary estate, together with all income therefrom, were intended by the testator to be treated as one trust estate, to be held as one such estate until the eldest living child arrived at the age of 30 years, and that until that time the payments directed by the fourth clause of the will to be made to and in behalf of each of the children were intended by the testator to be treated as general charges against the income of the entire trust estate. Such being the case, it was the duty of the plaintiff, as trustee of the estate of L. P. Ewald, for each of the years 1917 to 1925, both inclusive, to report and pay taxes on all of the income of such estate, except such sums as were paid to or in behalf of the three children of the testator under the terms of the will. The amounts thus actually paid to each of the children under the terms of the will should have been reported by the trustee as income received by it as trustee of the child to whom it was paid. A similar report should have been made by the plaintiff as trustee of the estate for income received for the calendar year 1926, from January 1 to March 5, when the entire estate was divided under the terms of the will.

A finding of facts and judgment in conformity to the views herein expressed may be prepared and presented for entry.

ARTICLE 346: Stock bonus, pension, or profit-sharing trust. X–35–5189 Ct. D. 376

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

STOCK BONUS TRUST—ADDITIONAL COMPENSATION TO EMPLOYEE.

Where a trust is created by a corporation as a part of a "stock subscription plan" for the benefit of employees, which is operative for a period of five years, under the terms of which employees and the employer make contributions to a fund which is to be used in purchasing stock of the corporation to be delivered to the participating employees upon the termination of the plan or under certain circumstances to be delivered to the employees before that time at the option of the trustees, the employee's right to anything but his own contribution being conditional on his continuance in the corporation's service for five years and the carrying on of the plan to its termination by the corporation, which reserved the right to cancel the plan as provided in the State law, as to the shares bought by the employer's contribution and distributed at the end of the 5-year period to an employee, taxable income is realized by the employee, in accordance with section 219 of the Revenue Act of 1926, in the year the stock is received to the extent of the fair market value of the stock at that time.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Walter Schaefer, appellee, v. *Frank K. Bowers, Collector of United States Internal Revenue for the Second District of the State of New York, appellant.*

[June 27, 1931.]

OPINION.

Appeal by the defendant from a judgment for the plaintiff of the District Court for the Southern District of New York, in an action to recover for taxes erroneously collected.

L. HAND, Circuit Judge: Schaefer, the plaintiff, was an employee of the Standard Oil Co. of New Jersey, and became a party to a stock subscription plan, inaugurated by his employer on December 30, 1920, for a period of five

years. The plan provided that any employee might contribute to a fund so much of his pay as he chose up to 20 per cent, to which the employer would add one-half. Trustees, appointed by the employer, were to receive the joint contribution, and from time to time invest it in shares of the employer's stock, at a price fixed on January 1 of each year, no greater than the average price for the preceding three months, and not less than 10 per cent below it. The title to the shares was to be in the trustees, but they were to be credited upon the trustees' books to the employees in proportion to the joint contribution. Their rights in the shares were to be "only as hereinafter declared."

(1) An employee might remain in the service of the company and withdraw from the fund. In that case he got back only his own deposits with interest, or if the trustees so decided, an "equivalent thereof" in shares at their average cost. (2) He might leave the employer's services voluntarily, or be "discharged for good cause (of which the trustees shall be the sole judges)." In either event he should also have only his money back with interest, or "at the option of the trustees," an equivalent in shares. (3) He might be retired or quit "on account of total disability or for other satisfactory cause (of which the trustees shall be the sole judges)," or he might be discharged through "no fault of his own." In either of these cases he was to receive the full amount of the shares to his credit at the time. If he died, his successors had the same rights.

Any shares or money accruing through withdrawals swelled the fund as a whole, and at its "termination the fund shall forthwith be liquidated by the distribution of all the stock and cash therein to and amongst the then participants." The employer reserved the right to recall, abolish or amend the plan, as provided in the New Jersey law (chapter 175 of the Laws of 1920), which gave such a power to an employer, provided he restored their contributions to the employees.

Schaefer made his contributions regularly to the end of the 5-year period, and received certain shares of stock as his distribution. He had already paid an income tax upon what he contributed in the years when it was credited to his account with the trustees, and the question is whether the shares which he received at the conclusion of the plan are taxable as income at their value at that time, or at their purchase price. If the last, he was taxable in 1925 only upon the amount contributed by the employer, upon the accrued dividends and upon the surplus accruing from withdrawals. If the first, he was taxable upon the value at the time of distribution of all that he then received, less his contributions. The relevant section is 219(f) of the Revenue Act of 1926.

The plaintiff's argument is that when the trustees bought shares of stock by means of the joint contribution of employer and employee, they became his in equity. Their distribution at the end of the period was not income; his property had merely appreciated, and under well-settled law appreciation can not be taxed until he sells. When he does, he will be chargeable with the profit then received, to be determined by the difference between the cost, that is, the joint contribution, and the price he receives on their sale. While it might theoretically have been more proper to tax the employer's contribution when made, the statute has postponed it. But that contribution, together with the dividends and surplus due to withdrawals, are all that are meant by the phrase "amount actually distributed or made available."

The defendant's argument is that no part of the fund was ever unconditionally the employee's property except his own contributions and interest upon them, these alone being all that he was ever certainly entitled to receive. Everything else—the shares, the dividends and the surplus from withdrawals—he might or might not get, depending upon his continuance in the company's employ till the period was completed, and upon the company's carrying on the plan to its termination. Hence it was right to tax him originally upon his contributions when they were received and invested; but upon the shares, etc., at distribution, when they first became his. The fact that he received them in kind, not in cash, is irrelevant. The issue so drawn obviously turns upon the character of the employee's interest in the fund before distribution. Each side is right upon its own interpretation of the plan, and we have to choose which one to accept; so far as concerns any general principles of the income tax, there is no difference to resolve.

When shares were unconditionally allocated to an employee under a kindred scheme, we held that they were taxable when credited to him (*Rodriguez* v. *Edwards*, 40 Fed. (2d), 408), but here the employee's right to anything but his own contribution was conditional until the period expired. We do not ques-

tion the existence of conditional equitable interest in the shares when purchased; or that an employee might file a bill against the trustees, if they abused their powers. Nor do we rest upon the fact that the legal title was in the trustees; an equitable interest is often, perhaps usually, now treated as more than a right in personam. (*Brown* v. *Fletcher*, 235 U. S., 589.) Moreover, even a right in personam is property whose appreciation we can assume to be as little taxable as any other.

We rely upon the fact that the right, whatever it was, was conditional on the employee's continuance in the company's service for five years. The plaintiff answers that this was a condition depending wholly upon his own volition, and can not properly be regarded as a condition at all. We can not agree. He might be discharged, and the trustees were to be the "sole judges" whether or not it was for "good cause." It is idle to say that a man subject to discharge for reasons resting in the decision of a third person, voluntarily abandons the service, because his discharge presumably depends upon his own conduct. He may prove incompetent, or arouse the displeasure of his employer for reasons of which he could not anticipate such a result. Even though the decision of the trustees were subject to eventual review in cases of plain abuse, the occasions for its lawful exercise might be such as he could not control or foresee.

Moreover, even if it can be thought that any discharge is voluntary, still his rights changed upon distribution. Until then, his interest was charged with the obligation to remain; that is as true a condition as though his employment did not rest in his pleasure. Practically it might prove onerous; he might find it much to his advantage to go elsewhere, but his decision to do so was clogged by the fact that he would lose his shares. Certainly he had not that untrammelled dominion over property so limited which he has over property in general. An executory limitation is none the less a condition because performance rests with the grantee. The release from such a condition changed the character of the interest as much as in a number of cases where the new property was treated as income. (*U. S.* v. *Phellis*, 257 U. S., 156 [T. D. 3270, C. B. 5, 37]; *Rockefeller* v. *U. S.*, 257 U. S., 176 [T. D. 3271, C. B. 5, 34]; *Cullinan* v. *Walker*, 262 U. S., 134 [T. D. 3508, C. B. II–2, 55]; *Marr* v. *U. S.*, 268 U. S., 536 [T. D. 3755, C. B. IV–2, 116]; *Allen* v. *Commissioner*, 49 Fed. (2d), 716 (C. C. A. 2).)

Second, the right to cancel the plan was reserved in the widest terms allowed by the New Jersey statute; that is, at the pleasure of two-thirds of the shareholders. If it was canceled, the company need return only the contributions of the employees. Section 3 of the act provides that any cancellation of such a plan shall be subject "to the restoration by the corporation of any moneys contributed by employees * * * for which no stock or other equivalent has been issued." The plaintiff argues that, once the trustees bought shares and credited them to an employee, the company had no power under the statute to deprive him of them. We do not so read it. Shares are not "issued," whose title remains in the trustees, merely because they are provisionally credited to the employees upon the books. They may never be "issued" at all; it was precisely the purpose of the plan at bar to hold them back until it appeared whether the employee was entitled to receive them at the close of the period. The meaning of the section is different. It is in limitation of the obligation to "restore." The company need repay only those contributions for which the employees have not already received an "equivalent," in "stock" or otherwise. The employer is to be allowed at any time to abandon the venture, if it turns out impracticable, either because the shares fall in value, or for other reasons. The only limitation is that he must always insure his employees against loss. The bonus is viewed as a favor which he may withdraw, so long as they come out whole. Nor can we accept the interpretation placed by the plaintiff on that clause in the plan which is headed "Time of delivery of stock." This refers only to a "termination" by lapse of time and in due course, as the heading shows. A rescission of the plan as a whole would not be such a termination; the power to rescind was reserved in other language, borrowed from the statute; it was not circumscribed by the clause quoted.

The plaintiff further argues that, if so, then section 219(g) of the Act applies, and the company is taxable upon the income of all the trust except the employees' contributions. But the situation covered by section 219(g) is quite different from that at bar; it refers to settlements of the common kind, in which the settlor either alone or with some third person, is vested with powers of revocation. Assuming—what is not altogether clear as matter of language—

that the company may be called the "grantor of a trust," the general section is not to be read as in limitation of the specific provision of section 219(f), which affects to deal generally with all such arrangements, and is the exclusive measure of the taxes imposed in their execution.

Therefore, we think that when the shares were distributed at the close of the 5-year period, the plaintiff got for the first time the income which had theretofore been accumulating, conditionally upon his continued service and the company's continued purpose to complete. (*Appeal of Lister*, 3 B. T. A., 475.) Until then it was uncertain whether he would ever receive the shares; they had become his only provisionally. To be sure section 219(f) uses only the word "amount"; but the purpose was to cover all sorts of plans, cash or stock, and the word used was apt to include both. Moreover, if it be thought that the defendant must do some violence to the language, certainly the plaintiff does much more. He must say that the tax is levied on the theory that the employee receives upon distribution, not the shares themselves, which is all that in fact he gets, but only so much as the employer has contributed from time to time in the past, a quite different "amount." Why it should be supposed that Congress had in mind so artificial a use of words we can not conceive. Had it been the purpose to tax that "amount" on the theory that the employee became the owner of the contributions when they were credited to him, that was the time to tax them. A tax at that time would have disclosed a purpose to treat him as owner of the shares when they were purchased, and it could with some cogency have been argued that any subsequent appreciation must be treated as appreciation elsewhere. But this was not the method; nothing was to be taxed till distribution, and then the amount distributed. The change effected by section 165 of the Act of 1928 did expressly accomplish just this, but it can not be used as interpretative of the Act of 1926. Indeed, if it chanced that the shares purchased had fallen in value, the employees would have had to pay a tax upon income to which they had never access, and over which they had never had control. Although this is a possibility under the Act of 1928, it appears to us an unreasonable interpretation without express warrant.

Our reasoning would indeed include all the shares purchased, as well the two-thirds bought with the employee's money, as the third bought with the employer's. However, we have not that question to decide because the defendant's attorney has withdrawn any claim to more than the third. The Commissioner of Internal Revenue has indeed filed a brief in which, as we gather, though this is not altogether clear, he asserts that all the shares are to be treated alike. But we can not look upon the Commissioner as other than an amicus in this action, which is against the collector's representative, for whom the district attorney appears. So far as he is content to admit any part of the plaintiff's claim, no dispute arises, and we can dispose of only what remains. Therefore, we hold only that in so far as the tax levied upon that third of the shares bought by the employer's contribution, it was valid. By virtue of the defendant's concession a judgment may be rendered for the remainder.

Judgment reversed.

PART III.—CORPORATIONS.

SECTION 231.—CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

ARTICLE 520: Social clubs.

REVENUE ACT OF 1926.

Receipt of revenue from sale of surplus land by golf club. (See G. C. M. 9470, page 162.)

ARTICLE 523: Farmers' cooperative marketing and purchasing associations.

REVENUE ACT OF 1926.

Farmers' and other cooperative marketing and purchasing associations. (See Mim. 3886, page 164.)

SECTION 233.—GROSS INCOME OF CORPORATIONS DEFINED.

ARTICLE 541: Gross income. X–46–5290
Ct. D. 415

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. INCOME—PART OF DEBT COLLECTED IN YEAR SUBSEQUENT TO DEDUCTION.

Where a debt is ascertained to be worthless in part in 1921 and the worthless part is charged off in that year, when it was allowed as a deduction under section 234(a)5 of the Revenue Act of 1921, the amount of such worthless part received in 1925 is taxable income for the latter year under section 233(a) of the Revenue Act of 1926.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (20 B. T. A., 45) is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT. No. 6173.

Putnam National Bank, 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, SIBLEY, and HUTCHESON, Circuit Judges.

[May 27, 1931.]

OPINION.

HUTCHESON, Circuit Judge: Petitioner, having in 1921 made a partial charge off and had allowed as a bad debt a deduction of $18,000 on account of bonds held by it, was required by the Commissioner, when that amount was collected on the bonds in 1925, to return it as taxable income for that year. On appeal to the Board of Tax Appeals the action of the Commissioner was sustained, and the case comes here for review of the Board's decision.

The facts as stipulated and found by the Board are that petitioner, a national bank, in 1921 accepted in lieu of notes due it 39 bonds of the face value of $1,000. That after controversy and protest petitioner was ordered by the bank examiner to write off 60 per cent of their face. "On December 23, 1921, petitioner's directors voted to charge off 60 per cent of the face value of the bonds pursuant to the instructions of the chief national bank examiner and on December 31, 1921, the amount of $23,400 was charged to profit and loss. The amount so charged off was claimed as a deduction by petitioner in its return for 1921 and allowed by the respondent. The face value of the bonds was subsequently paid * * * in 1925, $30,000. Sixty per cent of this amount was on petitioner's books credited to profit and loss, and reported as taxable income in its return."

As the Board noted in its opinion, "though the petitioner does contend that the charge off and deduction was not a proper one, because no loss was actually sustained in 1921 in respect of the bonds nothing was offered to show whether

or not petitioner was warranted in making the charge off. The stipulated facts do not cover the matter of partial worthlessness in 1921" * * *. They "fall far short of establishing that the charge off as made in 1921 was improper."

It seems to be taken for granted, as indeed it must be that if the 1921 deduction was properly claimed and allowed, that is, if in law and in fact the bonds were in that year ascertained to be to that extent worthless, any later collection of such debt must be returned as income. (*Carr* v. *Comr.*, 28 Fed. (2d), 551; *Davidson* v. *Lucas Co.*, 37 Fed. (2d), 808; *Sanford & Brooks Co.* v. *Comr.*, 35 Fed. (2d), 314; *Burnet* v. *Sanford & Brooks Co.*, 282 U. S., 359 [Ct. D. 277, C. B. X–1, 363]; Treasury Department Regulations 62, article 151; Treasury Department Regulations 69, article 50; *Brewster* v. *Gage*, 280 U. S., 327 [Ct. D. 148, C. B. IX–1, 274]; *Famous Machine Co.* v. *U. S.*, 282 U. S., 375.)

Petitioner pitches its case against the action of the Board upon the proposition that the debt was not in fact determined to be worthless, that no loss in fact actually occurred in 1921; that therefore the moneys received in 1925 were not income, but merely payment of the principal due on the debt.

To this contention respondent opposes two propositions; (1) that the record presents nothing from which it could be found that the taxpayer did not ascertain and declare a partial loss on account of the bonds; on the contrary, it affirmatively establishes that it did, and that what would be petitioner's rights if the record were otherwise, presents for decision not an issue having real substance, but a mere hypostasis; (2) if petitioner could show that there was no loss it would, because in 1921 it claimed and received a deduction as for a loss, be now estopped from doing so.

Respondent's first proposition is correct, and disposes of petitioner's appeal.

"The power of taxation is a fundamental and imperious necessity of all Governments." (*Tyler* v. *U. S.*, 281 U. S., 503 [Ct. D. 190, C. B. IX–1, 383].)

"The sixteenth amendment was adopted to enable the Government to raise revenue by taxation; it is the essence of any system of taxation that it should produce revenue ascertained and payable to the Government at regular intervals. Only by such a system is it practicable to produce a regular flow of income and to apply methods of accounting, assessment and collection capable of practical operation." (*Burnet* v. *Sanford & Brooks Co.*, 282 U. S., 359.)

"Taxation, as it many times has been said is eminently practical." (*Tyler* v. *U. S.*, 281 U. S., 503.) "Because of these considerations it is necessary for a taxpayer to show the illegality of the exactions which he opposes." (*Reinecke* v. *Spalding*, 280 U. S., 232 [Ct. D. 154, C. B. IX–1, 305].) "The burden in each case to establish the facts which entitle it to the deduction or relief claimed is upon the taxpayer and the real point in each case is whether that burden has been established by adequate evidence." (*Reinecke* v. *Spalding*, supra.)

Here the Commissioner, as a basis for his determination found that the bonds, to the extent which he required the collections for 1925 to be returned as income had been ascertained by the taxpayer to be worthless in 1921, and a deduction on that score claimed by the taxpayer had been allowed it. Before the Board the taxpayer not only presented no evidence to the contrary, but by stipulation it agreed that the facts were just as the Commissioner first, and the Board later, found them.

The decision of the Board is affirmed.

SECTION 234.—DEDUCTIONS ALLOWED CORPORATIONS.

ARTICLE 561: Allowable deductions. X–44–5276
Ct. D. 411

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

1. DEDUCTION—DEPRECIATION—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.

A taxpayer engaged in the ownership, development, and rental of real estate is not entitled to a deduction under section 234(a)7 of the Revenue Acts of 1924 and 1926 for depreciation of paving,

curbing, and sidewalk improvements on public property adjacent to the real estate, to meet the cost of which it paid special assessments of taxes.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (19 B. T. A., 612) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT. No. 9064.—MAY TERM, A. D. 1931.

F. M. Hubbell Son & Co., Inc., petitioner, v. *David Burnet, Commissioner of Internal Revenue, respondent.*

On petition to review decision of the United States Board of Tax Appeals.

Before KENYON and BOOTH, Circuit Judges, and OTIS, District Judge.

OTIS, District Judge, delivered the opinion of the court.

This is a petition to review a decision of the Board of Tax Appeals approving deficiencies in the income and profits tax of the appellant for the years 1924, 1925, and 1926 in the respective amounts of $913.88, $1,351.74 and $1,685.68.

The appellant is an Iowa corporation with its principal place of business in Des Moines, where it is engaged in the ownership, development and rental of real estate. In the years 1924, 1925, and 1926 it was required by special assessments to make expenditures on account of paving, curbing and sidewalk improvements in connection with property owned by it in Des Moines and used in its business. The estimated average life of paving in the districts in which appellant's property is located is 10 years and that of curbing, sewers and sidewalks 20 years. Upon such basis of estimated average life of paving, curbing, sidewalks and sewers the appellant charged as expenses on account of depreciation for the years 1924, 1925, and 1926, respectively, the amounts of $7,262.25; $7,245.70 and $6,912.88. The Commissioner of Internal Revenue ruled that appellant was not entitled to these deductions. If in computing its net income for the years in question, it was entitled to deductions by reason of the depreciation referred to, then the decision of the Board of Tax Appeals sustaining the Commissioner must be reversed.

Section 234 of the Revenue Act of 1924 provides that—

"In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: * * * (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

1. Under this section (and it is upon this section appellant relies), before an allowance for exhaustion, wear and tear, that is, for depreciation, is allowable it must be shown that the property in connection with which depreciation is claimed is "used in the trade or business" of the taxpayer. So much is clear from the very words of the statute. Whether it is also essential that either an absolute or qualified ownership of the property shall be in the taxpayer or that the depreciation shall result from the use of the property in the taxpayer's trade or business are matters of interpretation. Obviously the first question here is this: Are the pavements, curbs, sidewalks and sewers in the streets abutting on appellant's properties "used in the trade or business" of appellant?

Appellant's argument, supporting an affirmative answer to the question put, is this: Appellant's business is the rental of properties; street improvements of the nature of those here increase rental incomes just as would improvements erected on the lands of appellants; in the same sense as the latter would be property used in appellant's business, the former are property used in its business.

It must be conceded that the laying of a pavement in front of a business or residence property does increase its rental value. That rental value is increased also by pavement other than that immediately abutting the property, without which other pavement the pavement in front of the particular property would be useless. And the rental value is increased without regard to who pays for the pavement, whether it is constructed from special assessments or the general revenue. It is increased also by the building of churches and schools and street railways in the immediate vicinity. In the face of these

instances it can hardly be said that any improvement, not located on the taxpayer's property, which increases rental value is on that account property used in the business of renting property.

Why is a street railway running in front of a business property, a street railway that undoubtedly increases that property's rental value, not "used in the trade or business" of renting that property? Because it is something independent of and separate from that business; because it is not exclusively devoted to that business, only incidentally serving it and others; because it is not subject to the control of the owner of that business. It benefits the business but it is not "in" the business, not a part of it. To secure its benefit the owner may have joined with a hundred others in constructing it but it is still separate from and independent of the business of renting the particular business property. All of this is likewise true of pavements, curbings, sidewalks and sewers. Incidentally they benefit properties and businesses conducted thereon but primarily they are used in the business and for the service of the public.

2. While the statute does not in so many words declare that before a deduction from net income may be made on account of "the exhaustion, wear and tear of property used in the trade or business" it must appear that the property depreciated is property in which the taxpayer has an absolute or qualified ownership and that the "exhaustion, wear and tear" has resulted from the use of the property in the taxpayer's business, those are necessary implications.

Unless the taxpayer has some sort of ownership in the property which has depreciated its depreciation directly causes him no loss and has therefore no proximate relation to his income. He must have some special proprietary interest in the property (*Weiss* v. *Wiener*, 279 U. S., 333, 337 [Ct. D. 60, C. B. VIII–1, 257]) although, of course, the whole title need not be in him. A taxpayer upon whom a special assessment is levied for the construction of a pavement has no peculiar financial interest in that pavement. It is as much the property of the public and wholly so as is any public building. Certainly that is true as to a pavement in Iowa under Iowa law. It is not the theory of special assessments that the taxpayer acquires in compensation for what he has paid a special interest in that which is constructed. The theory is that he is compensated by a value added to what he already had. The increased value of his property will diminish as the value of the pavement decreases from exhaustion, wear and tear but the increase in value which the taxpayer has received, while it diminishes, does not diminish by reason of *its* exhaustion, wear and tear, but by reason of the exhaustion, wear and tear of property in which the taxpayer has no special pecuniary interest and on account of whose exhaustion, wear and tear the taxpayer is entitled to no deduction.

3. If the "exhaustion, wear and tear" is from other uses than that of the taxpayer's trade or business then the property, to that extent, is not "used" in such trade or business and is not the property described in the statute. Suppose, for example, a motor truck owned by one business but jointly used by it and by another. Obviously the owner would be entitled only to the depreciation resulting from its use of that truck and would have the burden of showing what part of the total depreciation resulted from its use. Similarly, even if it is conceded that in the sense of the statute a street pavement is used in a trade or business conducted on abutting property, it is likewise used by every other trade or business on that street and by the public generally. No method could be devised for allocating its depreciation to its various users.

There are then three things, among others, which must be shown before a deduction on account of depreciation may be allowed: (1) That the property is used in the taxpayer's trade or business and not merely that it is of incidental benefit thereto; (2) that the taxpayer has either absolute or qualified ownership of the property; and (3) that the depreciation has resulted from use of the property in the trade or business of the taxpayer. The appellant's case does not satisfy any of these requirements.

The decision of the Board of Tax Appeals is affirmed.

KENYON, Circuit Judge, concurs in the result.

BOOTH, Circuit Judge: I concur in the result, but prefer to place my concurrence upon the ground that there has been no showing by the taxpayer of the extent to which the exhaustion, wear and tear of the paving, curbing, sidewalk, and sewer were due to use in the taxpayer's trade or business.

ARTICLE 561: Allowable deductions. X–47–5296
G. C. M. 9954

REVENUE ACT OF 1926.

Where a taxpayer has both exempt and taxable income, only that portion of the deductions which is attributable (on a basis of pro rata allocation) to the taxable income should be allowed in the computation of net taxable income. Proration of deductions should be resorted to only where the taxpayer does not show or it does not otherwise appear what portion of its deductions is actually applicable to the earning, derivation, or collection of exempt income and what portion to taxable income. General Counsel's Memorandum 7668 (C. B. IX–1, 221) revoked.

An opinion is requested whether, in view of the case of *Lewis* v. *Commissioner* (47 Fed. (2d), 32, Ct. D. 359, page 342), affirming the decision of the Board of Tax Appeals in the case of *Victor G. Marquissee et al* v. *Commissioner* (11 B. T. A., 334), the ruling in General Counsel's Memorandum 7668 should be modified or revoked.

In General Counsel's Memorandum 7668, which related to the case where a bank received during the taxable year both exempt and taxable income, the conclusion was reached that the bank's unsegregated expenses were deductible in their entirety from the taxable income, and were not allocable on a pro rata basis to each type of income.

Subsequent to the ruling in General Counsel's Memorandum 7668, *Lewis* v. *Commissioner*, supra (affirming the Marquissee decision), was decided. In that case a public reporter, who derived exempt salary from the State as well as taxable income, deducted from his taxable income his unsegregated expenses connected with both taxable income and exempt income. The Board of Tax Appeals and the Circuit Court of Appeals for the Third Circuit held that only the expenses attributable (on a basis of pro rata allocation) to the taxable income should be deducted in the computation of net taxable income. (Compare Treasury Decision 2137.)

Since the rule and logic of the Lewis case appear broad enough to cover all situations, no distinction should be made between the case of an individual taxpayer and the case of a corporate taxpayer (the wording of the statute permitting deductions being the same as to each). Nor should any distinction be made as to the nature of the taxpayer, whether acting in a personal or fiduciary capacity, or whether the case is one of a bank, trust company, partnership, association, estate, trust, investment trust, or other entity (including cases of trustees and beneficiaries), or as to whether the deduction is in connection with exempt salary, or the collection of exempt interest, or is a trustee's commissions, or otherwise. The rule should be applied generally.

However, if a taxpayer can show or if it otherwise appears that no appreciable part of the amounts which it is otherwise entitled to claim as deductions from gross income in computing net income was applicable to the earning, derivation, or collection of exempt income, then all of such amounts will be deductible from taxable income and there will be no proration of such amounts on the basis of the ratio of exempt income and taxable income to total income. If a taxpayer can show or if it otherwise appears what portion of

its deductions was actually applicable to taxable income and exempt income, then such deductions will be allocated or apportioned on that basis and not prorated. Proration of deductions between exempt income and taxable income should be resorted to only where the taxpayer does not show or it does not otherwise appear what portion of its deductions is actually applicable to the earning, derivation, or collection of exempt income and what portion to taxable income.

In view of the foregoing, General Counsel's Memorandum 7668 is hereby revoked and the rule of the Lewis and Marquissee cases is adopted.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 561: Allowable deductions. X–52–5334
G. C. M. 10123

REVENUE ACT OF 1926.

General Counsel's Memorandum 9954 (see page 253), holding that where a taxpayer has both exempt and taxable income, only that portion of the deductions which is attributable (on a basis of pro rata allocation) to the taxable income should be allowed in the computation of net taxable income, is modified so that it does not apply to situations involving expenses incurred in the collection of interest on bonds or other obligations of the United States or its possessions, or interest on bonds or other obligations of a State, Territory, or political subdivision thereof, or to other situations not within the scope of the facts involved in *Lewis* v. *Commissioner* (47 Fed. (2d), 32, Ct. D. 359, page 342.)

This office has been requested to reconsider General Counsel's Memorandum 9954.

In General Counsel's Memorandum 9954 this office relied upon the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Lewis* v. *Commissioner*, supra, to support the conclusion that where a taxpayer has both exempt and taxable income, only that portion of the deductions which is attributable (on a basis of pro rata allocation) to the taxable income should be allowed in the computation of net taxable income. It was further held in that memorandum that proration of deductions between exempt income and taxable income should be resorted to only where the taxpayer does not show or it does not otherwise appear what portion of its deductions is actually applicable to the earning, derivation, or collection of exempt income and what portion to taxable income.

In the hearings and briefs leading up to a reconsideration of General Counsel's Memorandum 9954, supra, it has been pointed out that the Lewis case involved only the question of whether an individual whose income consists of taxable income derived from one source and exempt income derived from another source (the exempt income representing compensation for personal services rendered to a State or political subdivision thereof when engaged in the exercise of an essential governmental function), was entitled to deduct from gross taxable income the expenses incurred in earning exempt income. The court held that the deduction was not warranted under the statute. That case involved the reduction of income

(otherwise unquestionably taxable) claimed on the ground of immunity because of the implied constitutional limitation upon the power of the Federal Government to interfere, through the medium of taxation, with a State when engaged in the exercise of an essential governmental function. It is contended that the court in that case was dealing not with a claim that the income was expressly exempt from tax under the language of a statute, but with a claim for implied exemption which the courts have not shown a tendency to extend. In this connection see *Flint* v. *Stone Tracy Co.* (220 U. S., 107) and *Metcalf & Eddy* v. *Mitchell* (269 U. S., 514, T. D. 3824, C. B. V–1, 218).

From the foregoing premise it is conceded that the conclusion reached in the Lewis case may be justified when limited to its specific facts, and when the nature of the issue there involved is considered. It is argued, however, that there is no authority for extending the decision, as was done in General Counsel's Memorandum 9954, supra, to apply to situations involving expenses incurred in the collection of interest on bonds or other obligations of the United States or its possessions, or interest on bonds or other obligations of a State or political subdivision thereof, which latter interest in addition to being within the implied constitutional immunity is now and has been expressly exempt from taxation under all of the Revenue Acts beginning with the Revenue Act of 1913.

Furthermore, it has been contended that the position taken by this office in General Counsel's Memorandum 9954 has been expressly disapproved by the Supreme Court in *Missouri ex rel. Missouri Insurance Co.* v. *Gehner* (281 U. S., 313), where the United States Supreme Court held unconstitutional a State statute which, under the construction given it by the Missouri Supreme Court, required an insurance company in returning its property for purposes of State taxation to reduce the amounts which it was entitled to deduct from the gross value of its property by the proportion that the value of the United States bonds owned by it bore to the value of its total assets. The United States Supreme Court based its decision upon the principle that the effect of the State statute, as construed by the State court, was to impose a burden upon the power of Congress to borrow money and that a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt securities. In its decision the court relied upon the *National Life Insurance Co.* v. *U. S.* (277 U. S., 508, T. D. 4206, C. B. VII–2, 296).

In General Counsel's Memorandum 9954, supra, the following language appears:

> Since the rule and logic of the Lewis case appear broad enough to cover all situations, no distinction should be made between the case of an individual taxpayer and the case of a corporate taxpayer (the wording of the statute permitting deductions being the same as to each). Nor should any distinction be made as to the nature of the taxpayer, whether acting in a personal or fiduciary capacity, or whether the case is one of a bank, trust company, partnership, association, estate, trust, investment trust, or other entity (including cases of trustees and beneficiaries), or as to whether the deduction is in connection with exempt salary, or the collection of exempt interest, or is a trustee's commissions, or otherwise. The rule should be applied generally.

After reconsidering General Counsel's Memorandum 9954 in the light of all the arguments made and authorities cited, this office is of the opinion that the rule and logic of the Lewis case are not broad

enough to cover all situations and, specifically, that the Lewis case does not cover all types of income exempt from Federal and State tax, especially interest on bonds or other obligations of the United States or its possessions, or interest on bonds or other obligations of a State, Territory, or political subdivision thereof, but that the Lewis case should be limited to those cases where employees of a State or political subdivision thereof seek to reduce their taxable income by deductions for expenses incurred in earning such tax exempt income. General Counsel's Memorandum 9954, supra, is hereby modified accordingly.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTION 238.—CREDIT FOR TAXES IN CASE OF CORPORATIONS.

ARTICLE 612: Domestic corporation owning a majority of the stock of foreign corporation. X–40–5235 T. D. 4324

INCOME TAX.

Amendment of article 612 of Regulations 65 and article 612 of Regulations 69.

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

To Collectors of Internal Revenue and Others Concerned:

Article 612 of Regulations 65 and article 612 of Regulations 69 are hereby amended to read as follows:

ART. 612. *Domestic corporation owning a majority of the stock of foreign corporation.*—In the case of a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234) in any taxable year, the credit for foreign taxes includes not only the income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States by such domestic corporation, but also a credit for income, war-profits, and excess-profits taxes deemed to have been paid determined by taking the same proportion of any income, war-profits, and excess-profits taxes paid or accrued by such controlled foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of any such dividends received bears to the amount of such accumulated profits. The credit for taxes deemed to have been paid is limited, however, to an amount which shall in no case exceed the same proportion of the taxes against which the credit for foreign taxes is taken, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. If dividends are received from more than one controlled foreign corporation, the limitation is to be computed separately for the dividends received from each controlled foreign corporation. The credit for foreign taxes (including taxes paid or accrued by the domestic corporation and the credit for taxes deemed to have been paid) may not, under any circumstances, exceed the same proportion of the tax (computed on the basis of the domestic corporation's net income without the deduction of any income, war-profits or excess-profits taxes imposed by any foreign country or possession of the United States), against which the credit is taken, which the domestic corporation's net income (computed without

the deduction of any such income, war-profits, or excess-profits tax) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. A domestic corporation which includes in the credit for foreign taxes a credit for taxes deemed to have been paid must furnish the same information with respect to the taxes deemed to have been paid as it is required to furnish with respect to the taxes actually paid or accrued by it.

Taxes paid or accrued by a controlled foreign corporation are deemed to have been paid by the domestic corporation for purposes of credit only. Where the credit for foreign taxes includes both taxes paid or accrued by a domestic corporation and a credit for taxes deemed to have been paid, and the sum of the taxes paid or accrued and the credit for taxes deemed to have been paid exceeds the limitation on the entire amount of the credit allowable, the excess shall be apportioned between the taxes paid or accrued and the credit for taxes deemed to have been paid in proportion to their respective amounts. The portion of the excess apportioned to the taxes paid or accrued, but not that apportioned to the credit for taxes deemed to have been paid, shall be allowed as a deduction from gross income under the provisions of section 234(a)3.

For the purpose of section 238 a corporation entitled to the benefits of section 262 or 263 is treated as a foreign corporation.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved September 28, 1931.

A. W. MELLON,
Secretary of the Treasury.

PART V.—PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES.

SECTIONS 273 AND 274.—DEFICIENCY IN TAX.

ARTICLE 1231: Deficiency defined. X–45–5282
(Also Section 284, Article 1305.) Ct. D. 413

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

SUIT—JURISDICTION—DEFICIENCY—AMOUNT COLLECTED WITHOUT ASSESSMENT.

Where the taxpayer after paying the tax assessed against it pays under threat of distraint an additional amount, which is not assessed, as part of the tax for the same year, and thereafter the Commissioner notifies the taxpayer of a deficiency for the same year, from which determination the taxpayer, after the enactment of the Revenue Act of 1926, appeals to the Board of Tax Appeals, the additional amount paid comes within the definition of a "deficiency" as defined by section 273(1) of the Revenue Act of 1926, and a suit to recover the same commenced while the taxpayer's appeal to the Board is pending is barred by section 284(d) of that Act.

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS.

American Woolen Co. v. *Thomas W. White, Collector.*

[August 10, 1931.]

OPINION.

LOWELL, J.: The declaration in this case sets forth the following facts:

The plaintiff paid the tax assessed against it for the year 1922. After that, on April 12, 1928, the collector made demand upon the plaintiff for the pay-

ment of a further sum as an unpaid portion of the taxes for the year 1922. This sum was paid in order to prevent a threatened distraint upon the plaintiff's property. On April 11, 1930, the plaintiff filed with the Commissioner of Internal Revenue a claim for the refund of this sum, which the Commissioner has not decided.

It appears by stipulation as to agreed facts that on December 17, 1930, the Commissioner of Internal Revenue notified the plaintiff of a deficiency for the year 1922, stating in this notice that the amount of tax for that year was the sum originally paid by the plaintiff. On January 12, 1931, the plaintiff took this matter to the Board of Tax Appeals. It is agreed that the appeal does not specifically raise the question involved in the present suit.

The defendant filed a plea in abatement relying on the provision of the statute, which declares that no suit shall be brought to recover any tax while a deficiency is being considered by the Board of Tax Appeals.

The plaintiff contends that the present suit does not relate to any tax, because none was assessed, but to the entirely unauthorized action of the collector in recovering an additional sum from it by threat of distraint. It also says that the Board of Tax Appeals may not have jurisdiction to consider this matter, because under the statute it can not consider the amount of the tax unless it first decides that there was no deficiency, which it may not do.

The pertinent provisions of the statutes are as follows:

"If the Board finds that there is no deficiency, and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final be credited or refunded to the taxpayer as provided in subdivision (a)."

"Deficiency" is defined as:

"The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment as a deficiency) and decreased by the amounts previously abated, credited, refunded or otherwise repaid in respect of such tax."

The extra amount was paid for the year 1922, whether technically it was for a tax duly laid or was covered by an unauthorized proceeding by the collector.

In my opinion the amount alleged to have been illegally taken from the plaintiff comes within the definition of "deficiency," which refers to amounts previously assessed or collected without assessment. The Board of Tax Appeals therefore has jurisdiction over the matter in controversy, and this suit was illegally begun.

Plea in abatement sustained. Suit dismissed.

SECTIONS 277 AND 278.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

ARTICLE 1272: Period of limitation upon collection of tax. X–34–5181 Ct. D. 372

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

LIMITATION—COLLECTION.

Where a tax due for the year 1921 is assessed within the statutory period therefor and the statutory period for collection as provided by section 250(e) of the Revenue Act of 1921 has not expired previous to the passage of the Revenue Act of 1926, section 278(d) of the Revenue Act of 1926 is applicable and the United States has six years from the date of assessment within which to collect the tax.

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Welch Insurance Agency, a Corporation, plaintiff, v. *Edwin A. Brast, Collector of Internal Revenue, defendant.*

[June 24, 1931.]

OPINION.

This action was submitted to the court upon an agreed stipulation of facts. This makes it unnecessary to state any findings of fact, and I will speak of facts so far to show the conclusions of law.

This action is for the recovery of a sum of $3,371.30 income taxes paid under duress on the 21st day of July, 1928, for the calendar year of 1921. Return of income taxes for the year 1921 was filed on the 15th day of March, 1922, and showed a tax due of $3.293, and the sum of $823.20 was paid on that date. On the 14th day of June, 1922, a claim for refund of the amount paid and another claim for the abatement of the balance of $2,469.89 was filed with the Commissioner. It was claimed that the plaintiff had made a mistake in filing the return and that it was not liable for the claim at all. The amount on the 21st of July, 1921, was the above sum of $2,469.89 and interest thereon to that date.

The contention of the plaintiff is that the collection of this amount was barred by the statute of limitations on the date of its collection. Plaintiff claims that no assessment of this tax was ever made. The defendant claims that an assessment was made on the 9th day of September, 1922. If no assessment was made then, the plaintiff should recover the amount claimed herein.

However, there is filed as a part of the statement of facts a paper purporting to be an assessment certificate dated on the 9th day of September, 1922. It is true that the Commissioner did not pass upon the correctness of the return and the claims for refund of the amount paid and abatement of the balance as shown by the return for more than four years after the filing of the return, and the collector did not ask for payment of the balance claimed to be due until the 1st day of November, 1927, and did not initiate any proceeding to enforce payment thereof until the 21st day of July, 1928, when the payment thereof was made under protest.

Without going into the details of the case or of the various statutes, I reach the conclusion that the paper dated September the 9th, 1929, and signed by the Commissioner, is an assessment under the law.

Having reached this conclusion, the next question is, What statute then governs? Under the authority of the case of *Northwestern Barb Wire Co.* v. *United States*, decided by the Court of Claims on the 2d day of June, 1930, and the cases therein referred to, I hold that the 6-year statute of the Act of 1926 is controlling, and this requires a judgment for the defendant.

SECTION 280.—CLAIMS AGAINST TRANSFERRED ASSETS.

ARTICLE 1291: Claims in cases of transferred assets.

REVENUE ACT OF 1926.

Constitutionality of section 280(1) of the Revenue Act of 1926. (See Ct. D. 392, page 318.)

ARTICLE 1291: Claims in cases of transferred assets. X–42–5254 Ct. D. 401

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

1. TRANSFEREE—LIABILITY—CONSTITUTIONALITY.

Section 280(1) of the Revenue Act of 1926, which provides a summary procedure for collection of the tax imposed upon a taxpayer from a transferee of his property, is constitutional.

2. SUIT—INJUNCTION—VALIDITY.

Section 604 of the Revenue Act of 1928, which prohibits a suit to restrain the assessment or collection of the amount of the liability, at law or in equity, of a transferee of property of a taxpayer, is valid.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT. No. 143.—APRIL TERM, 1931.

A. C. Alexander, and A. C. Alexander, as Collector of Internal Revenue for the District of Oklahoma, appellant, v. *Mid-Continent Petroleum Corporation, a Corporation, appellee.*

Appeal from the District Court of the United States for the Western District of Oklahoma.

Before LEWIS, PHILLIPS, and MCDERMOTT, Circuit Judges.

[July 3, 1931.]

OPINION.

PHILLIPS, Circuit Judge, delivered the opinion of the court.

The Mid-Continent Petroleum Corporation brought this suit against A. C. Alexander, individually and as a collector of internal revenue, to enjoin the summary collection from it as transferee pursuant to section 280(a)1, Revenue Act of 1926 (section 2311(a)1, Title 26, U. S. C. A.), of certain income taxes assessed against the Burbank Oil Co.

The bill challenged the constitutionality of section 280(a)1, supra, and section 604, Revenue Act of 1928 (section 2604, Title 26, U. S. C. A.).

From an order granting a temporary injunction against the collection of such taxes from the Mid-Continent Corporation, Alexander, individually and as collector, has appealed.

The Supreme Court, in *Phillips* v. *Commissioner* (283 U. S., 589 [Ct. D. 350, C. B. X–1, 264]), sustained the constitutionality of section 280(a)1, supra, section 311(a)1, Revenue Act of 1928, section 2311(a)1, Title 26, U. S. C. A., and section 604, supra. The court held that the procedure provided for in section 280(a)1 does not violate the requirements of due process because of the two eventual methods of judicial review provided—one by an appeal from the decision of the Board of Tax Appeals and the other by a suit by the transferee against the collector to recover the tax after payment and administrative denial of a claim for refund.

The court also sustained the validity of section 604, supra, prohibiting injunctive relief in the case of summary proceedings against a transferee.

It follows that the Mid-Continent Corporation is not entitled to any relief in this suit. Therefore, notwithstanding this is an appeal from an interlocutory order, this court has the power to dispose of the case on the merits. (*Consolidated Cement Corporation* v. *Pratt* (C. C. A. 10), 47 Fed. (2d), 90, 93.)

The order granting the temporary injunction is reversed with instructions to vacate such order and to dismiss the bill at the cost of the Mid-Continent Corporation.

ARTICLE 1291: Claims in cases of transferred assets. X–43–5265 Ct. D. 406

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. TRANSFEREE — DEFICIENCY NOTICE — SUFFICIENCY — APPEAL TO BOARD OF TAX APPEALS—JURISDICTION—ESTOPPEL.

Where a notice of a deficiency for the year 1920 was addressed to the San Joaquin Fruit & Investment Co. and a notice of a deficiency for the year 1921 was addressed to the San Joaquin Fruit Co. in care of San Joaquin Fruit & Investment Co. and the Fruit & Investment Co. appealed to the Board of Tax Appeals in respect of each determination, held itself out in its own pleadings as the "taxpayer," which it was in law and in fact, set forth the theory under which it regarded itself as a "taxpayer," namely,

that it was "formerly the San Joaquin Fruit Co." and "successor to San Joaquin Fruit Co. through change of name only," upon which theory the case was tried in part before the Board, and raised no question as to the sufficiency of the notice until after the time had expired within which a determination could be made against the Fruit company, the San Joaquin Fruit & Investment Co. is estopped to change its position and deny its liability as transferee. The omission of the designation transferee on the part of the Fruit & Investment Co. as well as on the part of the Commissioner is a procedural and administrative omission which does not deprive the Board of Tax Appeals of jurisdiction. the notices of deficiencies fulfilling all the requirements of a notice under section 280 of the Revenue Act of 1926.

2. DECISION REVERSED.

The decision of the Board of Tax Appeals (16 B. T. A., 1290) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT. No. 6346.

David Burnet, Commissioner of Internal Revenue, petitioner, v. *San Joaquin Fruit & Investment Co. (a Corporation), respondent.*

Upon petition to review an order of the United States Board of Tax Appeals.

Before RUDKIN, WILBUR, and SAWTELLE, Circuit Judges.

SAWTELLE, Circuit Judge: This is a petition for review of a decision of the United States Board of Tax Appeals. The facts, as stated in the opinion and findings of the Board, are as follows:

"Under date of July 21, 1925, the Commissioner of Internal Revenue sent a deficiency notice to the San Joaquin Fruit & Investment Co. of Tustin, Calif., the petitioner herein, in which he stated:

"'The determination of your income tax liability for the years 1918 and 1919 has resulted in a deficiency in tax aggregating $111,281.07, as set forth in Bureau letters dated March 9, 1925, and April 22, 1925.'

"In a statement attached to this letter this total deficiency was divided into a deficiency of $66,147.93 for 1918 and a deficiency of $45,133.14 for 1919. Within the proper time after receipt of this letter, the petitioner filed its petition with the Board at Docket No. 6988 in which it alleged four errors: One relating to invested capital, two relating to depreciation and one relating to the use of improper comparatives in special assessment. Thereafter, the respondent filed his answer and the case came on for hearing in Los Angeles, Calif., at the conclusion of which hearing, upon the petitioner's motion, the case was continued and placed upon the reserve calendar. Following this, the petitioner moved to amend its original petition in order to allege that the petitioner was not in existence during the taxable years and that inasmuch as the Commissioner is not trying to tax it as a transferee, it is not liable as a taxpayer for any alleged deficiency. This motion was granted, and thereafter the respondent filed his answer to the amended petition and the case came on for further hearing. In the original petition the caption was as follows: 'San Joaquin Fruit & Investment Co. (formerly San Joaquin Fruit Co.), Tustin, Calif.' The petition was verified by the president of the San Joaquin Fruit & Investment Co. and in the verification it was stated that the San Joaquin Fruit & Investment Co. was the successor to the San Joaquin Fruit Co. The verification of the amended position was substantially the same.

"Under date of July 27, 1925, the Commissioner mailed a deficiency notice addressed to San Joaquin Fruit & Investment Co., Tustin, Calif., the petitioner herein, in which he stated:

"'An audit of your income and profits tax return for the year ended December 31, 1920, has resulted in the determination of a deficiency in tax of $22,872.09, as shown in Bureau letter dated June 16, 1925.'

"Thereafter, in due time, the petitioner filed its petition at Docket No. 6989 in substantially the same form as it filed its petition at Docket No. 6988. The Commissioner answered, the case was heard at the hearing in Los Angeles, Calif., above mentioned, after which it was continued and placed on the re-

serve calendar, an amended answer was filed raising the question of the identity of the taxpayer just as in the other case, the respondent answered and the case came on for further hearing.

"It appears that in neither of these proceedings is the Commissioner attempting to determine, assess or collect the liability, if any, of the petitioner as a transferee of the San Joaquin Fruit Co., in respect of the tax of that company for the taxable years. Moreover, the alleged taxes in controversy, if they be taxes at all, must be taxes of the San Joaquin Fruit Co., which seems to have been in business during the taxable years. The record shows that the San Joaquin Fruit Co. was incorporated in October, 1906, under the laws of the State of California for certain purposes for term of 25 years with a capital stock of $100,000 divided into 1,000 shares of the par value of $100 each; on November 6, 1922, at a regular meeting of its board of directors they decided to call a meeting of the stockholders on November 18, 1922, for the purpose of considering and acting upon the proposition to dissolve the corporation, wind up its affairs and dispose of its assets according to law; this meeting of the stockholders was duly held on the 18th day of November, 1922, and from the minutes of that meeting it appears that the San Joaquin Fruit & Investment Co. held 807 shares of the stock of the San Joaquin Fruit Co.; at this meeting the resolution was adopted to dissolve the corporation, wind up its affairs and distribute the assets according to law; thereafter on the 26th day of December, 1922, a court of competent jurisdiction decreed that the directors of the San Joaquin Fruit Co. be made trustees for the dissolution of its assets and the winding up of its affairs and ordered them to distribute the real and personal property to the San Joaquin Fruit & Investment Co. and further ordered, adjudged and decreed that the San Joaquin Fruit Co. was thereby dissolved; the last paragraph of the decree was as follows:

"'IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the respective interests of the stockholders of said San Joaquin Fruit Co., have hereinbefore been fixed, namely, there were four stockholders as herein named, three of whom have assigned their whole interest herein unto the said San Joaquin Fruit & Investment Co., and that now the San Joaquin Fruit & Investment Co. is the only stockholder, and the only person to whom said property and assets of said San Joaquin Fruit Co. shall be distributed and conveyed.'

"The record further shows that thereafter a copy of the decree was filed in the office of the department of state of the State of California; the San Joaquin Fruit Co. on June 19, 1919, filed its income and profits tax return for the year 1918; on March 15, 1920, filed its return for 1919; on March 15, 1921, filed its return for 1920; and on May 12, 1922, filed its return for 1921; the San Joaquin Fruit & Investment Co. was incorporated in July, 1922, under the laws of the State of California, for a period of 50 years, with a capitalization of $1,500,000 divided into 15,000 shares of the par value of $100 each, for certain purposes set forth in its articles of incorporation, which purposes were similar to, but broader and not the same as the purposes set forth in the articles of incorporation of the San Joaquin Fruit Co.; under date of December 29, 1927, the Commissioner sent a notice of liability under section 280 of the Revenue Act of 1926, to the San Joaquin Fruit & Investment Co. as a transferee of the San Joaquin Fruit Co. liable for additional taxes of the latter company for the year 1921, following the receipt of which the San Joaquin Fruit & Investment Co. filed a petition with this Board at Docket No. 35835, which proceeding has not been consolidated with the present proceedings and is not being decided in the present proceedings.

"After carefully considering the facts before us we are satisfied that the petitioner has made out a *prima facie* case, which has not been overcome by the respondent, which *prima facie* case shows that the petitioner was not in existence during the taxable years and that the tax liability which the Commissioner is trying to establish against the petition is not its tax liability. Therefore, for the years 1918, 1919, and 1920 an order of no deficiency will be entered.

"The situation in regard to the year 1921 is somewhat different. For that year, under date of September 1, 1926, the Commissioner sent a deficiency notice addressed to the 'San Joaquin Fruit Co. c/o San Joaquin Fruit & Investment Co., Tustin, Calif.,' in which he stated:

"'An audit of your income and profits tax return for the calendar year 1920 has resulted in the determination of a deficiency in tax of $21,867.40 as shown in Bureau letter dated July 20, 1926.'

"The letter of July 20, 1926, was addressed in the same way. On October 25, 1926, at Docket No. 20801, a petition was filed under the title of 'San Joaquin Fruit & Investment Co. (formerly San Joaquin Fruit Co.).' The petition was verified by the president of the San Joaquin Fruit & Investment Co., which verification stated that the San Joaquin Fruit & Investment Co. was the successor to the San Joaquin Fruit Co. Errors were set forth in this petition which were similar to the errors set forth in the above-mentioned two petitions. The respondent filed his answer. The hearing at Los Angeles, Calif., covered this case also, at the conclusion of which hearing this case was continued and placed on the reserve calendar and came on for further hearing with the other three cases, all three of which cases were consolidated for hearing and decision by an order of the Board. At the last hearing the petitioner moved to amend its petition in this case as he had theretofore done in the other two cases and for the same purposes. On this motion, which was objected to by counsel for the respondent, we have taken no action.

"Upon consideration of the circumstances in connection with this proceeding at Docket No. 20801, we are of the opinion that the deficiency notice in question was sent to the San Joaquin Fruit Co. in connection with its tax liability for the year 1921 and that the deficiency notice was not a notice to the San Joaquin Fruit & Investment Co. corporation, which filed the petition herein and was not a notice of the determination of its tax liability for any year, and that neither the San Joaquin Fruit & Investment Co., its president, who verified the petition, nor counsel, who prepared and signed the petition, had proper authority or purported to act for the San Joaquin Fruit Co. The petitioner herein not being the taxpayer within the meaning of the section of the Revenue Act giving the Board jurisdiction to hear and decide proceedings, we have no jurisdiction in this proceeding and therefore dismiss the same. (*Bisso Ferry Co.*, 8 B. T. A., 1104; *Bond, Inc.*, 12 B. T. A., 339; *American Arch Co.*, 13 B. T. A., 552; *Weis & Lesh Manufacturing Co.*, 13 B. T. A., 144; *Sanborn Bros.*, 14 B. T. A., 1059; *Carnation Milk Products Co.*, 15 B. T. A., 556.)

"For the years 1918, 1919, and 1920 judgment will be entered for the petitioner. The proceeding in so far as it relates to the year 1920 is dismissed for lack of jurisdiction."

There are six assignments of error as follows: First and second, that the Board erred as a matter of law in deciding that there were no deficiencies for the years 1918, 1919, and 1920, and in not deciding that there were deficiencies for said years and for the year 1921; third, that the Board erred as a matter of law in dismissing for lack of jurisdiction the proceeding in so far as it relates to the year 1921; fourth and fifth, that the Board erred as a matter of law in failing to vacate the decision referred to in assignments 1, 2 and 3; sixth, that the Board committed other plain errors manifest in the record.

It is contended by counsel for respondent that assignments 1 to 5, inclusive, are too general and are directed solely to the decision, that they do not point to any special ruling or to the insufficiency of the evidence to support the decision and that consequently such assignments present nothing for the consideration of the appellate court and that the sixth assignment is unworthy of discussion.

It is true that the assignments are general in character and if we were to follow the strict rules applicable to appeals from the district courts we might decline to consider them, but in view of sections 1003 (a) and (b) of the Revenue Act of 1926 (26 U. S. C. A., 1226), it is thought that the assignments are sufficient to warrant us in reviewing the decision of the Board. Those sections are as follows:

"(a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

"(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

Counsel for petitioner in their brief state that the petitioner raises no question concerning the taxes for the years 1918–19, because, as stated in the brief:

"While the Commissioner appears to have had waivers covering taxes for the years 1918 and 1919, such waivers were not introduced in evidence and therefore, so far as the record is concerned, it appearing that the statute of limitations had run against the assessment of taxes for those years at the time the 60-day letters were issued, the Commissioner raises no question concerning taxes for those years."

We shall, therefore, confine our discussion to the question of the legality of the taxes imposed for the years 1920 and 1921.

Section 274(a) of the Revenue Act of 1924 (ch. 234, 43 Stat., 253, 26 U. S. C. A., 1048) provides that:

"If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900."

Section 2(a)1 of said Act of 1924 provides that, when used in that Act:

"The term 'person' means an individual, a trust or estate, a partnership, or a corporation."

Section 2(a)9 states that, in that Act:

"The term 'taxpayer' means any person subject to a tax imposed by this Act."

Section 283(b) of the Act of 1926 contains the following provisions:

"If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 * * * and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases, the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section * * *."

As shown in the above-quoted findings of the Board, the deficiency notice for the year 1920 was addressed to the Investment company, respondent herein. The deficiency notice for the year 1921 was sent to the Fruit company in care of the Investment company. For the year 1920 judgment was entered for the respondent and proceedings, in so far as they related to the year 1921, were dismissed for lack of jurisdiction.

It is contended that inasmuch as the record of the proceedings before the Board discloses that after said notices had been sent out directed as hereinbefore stated the respondent, San Joaquin Fruit & Investment Co., appeared as petitioner and described itself as the "taxpayer," "formerly the San Joaquin Fruit Co." and "successor to San Joaquin Fruit Co. through change of name only," and for some time participated in the hearings before said Board and raised no question as to the sufficiency of the 60-day letters sent to it until after the time had expired within which determination could be made against the Fruit company, and the case having been tried in part upon the theory that respondent was liable for the taxes in question, it was estopped to change its position and deny its liability.

We believe that this position is well taken. The San Joaquin Fruit & Investment Co. was in law and in fact the "taxpayer" in the instant case, and so held itself out in its own pleadings, further setting forth the theory under which it regarded itself as the "taxpayer"; namely, that it was "formerly the San Joaquin Fruit Co." and "successor to San Joaquin Fruit Co. through change of name only." These statements accurately described what had actually occurred, and the respondent can not now be heard to deny them.

In this connection, illumination may be derived from the following statement by Mr. Justice Swayne, in *Casey* v. *Galli* (94 U. S., 673, 680):

"Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have

made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it."

In the instant case, the liability of the respondent as "taxpayer" was not only "apparent," but "real"; for section 280 of the Revenue Act of 1926 plainly provides:

"The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refund):

"(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act."

In this case, therefore, the San Joaquin Fruit & Investment Co. was stating a "real" as well as an "apparent" situation when it described itself as the "taxpayer"; for, being the transferee of the San Joaquin Fruit Co., it was indeed charged with "the liability, at law or in equity," of the "taxpayer" that it has succeeded.

It may be argued that any mistake of law or fact would not estop the respondent from interposing a meritorious defense to the claim. This objection would be valid if applicable. But here we have a mistake neither of fact nor of law. The respondent, as far as its liability for the tax was concerned, was in truth the "taxpayer," as it described itself.

The omission of the designation "transferee" on the part of the respondent, as well as on the part of the petitioner, when referring to the San Joaquin Fruit & Investment Co. can not be called a mutual mistake of law, as far as the Commissioner is concerned, the failure so to label the admitted taxpayer is a procedural and administrative omission. The statutes do not require such a designation of the transferee. It does not seem to us to be indispensable, so far as the Government's right to collect taxes lawfully due to it is concerned.

In *Nauts* v. *Clymer* (36 F. (2d), 207, 208), a deficiency assessment was made against "George H. Marsh, deceased, L. C. Morgan, executor." Deciding the case on other grounds, the Sixth Circuit Court "assumed" that "notice 'to the taxpayer' * * * might reasonably be construed to include notice to an acting executor holding assets of the estate."

Regarding section 280 as merely remedial, and not declaratory of any new tax-collecting right possessed by the Government, the Supreme Court of the United States, in the recent case of *Annie G. Phillips et al.* v. *Commissioner of Internal Revenue*, decided May 25, 1931 [Ct. D. 350, C. B. X–1, 264], has shown a disposition to construe this statute liberally in favor of the Government's "need promptly to secure its revenues." While in that case, according to the findings of the United States Board of Tax Appeals (15 B. T. A., 1218, 1219), the taxpayer sought to be held was indeed designated as transferee, the court decided the suit on other grounds.

In reaching its decision, however, the Supreme Court used language strongly indicative of its general attitude toward the construction of a statute of this remedial character. Mr. Justice Brandeis, who delivered the opinion, said:

"Section 280(a)1 (of the Revenue Act of 1926, 26 U. S. C. A., 1069) provides the United States with a new remedy for enforcing the existing 'liability at law or in equity.' The quoted words are employed in the statute to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability. The obligation to be enforced is the liability for the tax. (*Russell* v. *United States*, 278 U. S., 181, 186 [T. D. 4260, C. B. VIII–1, 206]; *United States* v. *Updike*, 281 U. S., 489, 493–494 [Ct. D. 192, C. B. IX–1, 228].) The proceeding is one to collect the revenue. That Congress deemed the action necessary in order to make the tax-collecting system more effective is established not only by the fact of enactment but also by the reports of the committees."

The Supreme Court then paints in the background for this particular statute, in the following footnote:

"Conference report to accompany H. R. 1 (H. Rept. 356, Sixty-ninth Congress, first session, February 22, 1926, page 44) states that the section 'makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes * * * *for procedural purposes the transferee is treated as a taxpayer would be treated.*' [Italics our own.] (Compare H. Rept. No. 2, Seventieth Congress, first session, December 7, 1927, pages 31-32.) 'Section 280 of the 1926 Act has proved a very effective and necessary method of stopping tax evasion through the various favorite methods recognized by everyone prior to the 1926 Revenue Act. The enforcement of the liability through court process had been ineffective and the amount of revenue lost through mala fide transfers or through corporate distribution of assets was admittedly large."

In the instant case the transferee, the taxpayer in fact and in law, received the notice of deficiency in the tax of the transferee's predecessor. The transferee's own pleadings clearly show that such notice conveyed the necessary information, namely, a deficiency in the tax, for which the transferee was sought to be held liable, and was in fact and in law liable. The mere failure so to designate the transferee is not fatal, nor does it deprive the Board of Tax Appeals of its jurisdiction over the proceedings and to determine the issues there involved.

In view of the Supreme Court's liberal attitude toward this statute as a remedial measure, we do not feel inclined to deny the Government its right to collect its taxes merely because it failed to label the transferee as such.

To apply to such a statute the strict rules of construction of common-law pleading would scarcely be appropriate. Particularly is this true when we remember that not even the statute itself requires that the transferee shall be so designated in the notice of deficiency. It is only by strained inference that this requirement can be read into the law.

The decision of the Board of Tax Appeals is reversed.

WILBUR, Circuit Judge, concurs.

SECTION 283.—TAXES UNDER PRIOR ACTS.

SECTION 283. X–48–5304
Ct. D. 419

INCOME AND EXCESS PROFITS TAXES—REVENUE ACTS OF 1921 AND 1926—DECISION OF COURT.

1. ASSESSMENT—DEFICIENCY—ASSESSMENT BEFORE EXPIRATION OF 60-DAY PERIOD—CONSENT TO ASSESSMENT—NECESSITY OF COMMISSIONER'S SIGNATURE.

Where within 60 days before the enactment of the Revenue Act of 1926 the Commissioner has mailed to a taxpayer a notice under subdivision (a) of section 274 of the Revenue Act of 1924 in respect of income and excess profits taxes imposed by the Revenue Act of 1918 and the taxpayer waives the right to appeal under that subdivision and consents to the immediate assessment of the proposed deficiency, section 283(c) of the Revenue Act of 1926 is not applicable and an assessment of the deficiency is not invalid because made before the expiration of 60 days from the enactment of the Revenue Act of 1926, even though the agreement consenting to the assessment was not signed by the Commissioner.

2. ASSESSMENT—LIMITATION—COMMENCEMENT OF PERIOD—TENTATIVE RETURN.

A completed return and not the so-called tentative return for the taxable year 1919 is the return required to be filed by the provisions of section 239 of the Revenue Act of 1918, and the filing of the tentative return does not start the running of the 5-year period within which the amount of tax due must be assessed under section 250(d) of the Revenue Act of 1921.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

E. E. Atkinson & Co., a Corporation, appellant, v. *L. M. Willcuts, Individually and as Collector of Internal Revenue, District of Minnesota, appellee.*

Appeal from the District Court of the United States for the District of Minnesota.

[August 27, 1931.]

OPINION.

DEWEY, District Judge, delivered the opinion of the court.

This was a suit for recovery on a deficiency assessment and payment of income and profits taxes alleged to have been illegally exacted from appellant for the taxing years ending January 31, 1919, and January 31, 1920. On March 26, 1919, E. E. Atkinson & Co., a corporation, made to the collector of internal revenue of the district of Minnesota a tentative return and on July 19, 1919, a completed return for the income and profits taxes of the corporation for the period ending January 31, 1919. There was also a tax return filed with said collector of internal revenue by the corporation for the fiscal year ending January 31, 1920, but the record does not disclose the date when this return was made or filed.

The Commissioner of Internal Revenue asserted deficiencies for these years in a registered letter under section 274 of the Revenue Act of 1924, dated February 10, 1926, as follows:

Fiscal year ended—	Deficiency.
January 31, 1919	$21,505.70
January 31, 1920	1,420.01
Total	22,925.71

The deficiencies were assessed against the plaintiff on April 26, 1926, and were collected and paid as follows:

Fiscal year ended January 31, 1919.

Date of collection or credit—	Amount.
Collection—February 24, 1926	$8,314.54
Credit—April 27, 1926	10,414.07
Collection—September 3, 1926	2,992.15
Total tax and interest	21,720.76

Fiscal year ended January 31, 1920.

Collection—February 24, 1926	$1,434.21

On December 10, 1928, the corporation filed a claim for a refund of the assessment and payment covering the income and profits taxes paid for the fiscal year ending January 31, 1919, and this claim for refund was denied by the Commissioner of Internal Revenue about February 8, 1929. A similar claim was filed for the refund of the deficiency assessment and payment for the fiscal year ending January 31, 1920, on or about February 27, 1929, and this claim for refund was denied by the Commissioner on or about May 6, 1929. These claims for refund were based on the ground that the statute of limitations against the assessment and the collection of the amount claimed as refundable had expired when it was assessed and collected and on the further ground that such amounts were assessed during a period within which an assessment was prohibited by law.

On May 20, 1924, the taxpayer and Commissioner signed an income and profits tax waiver extending the period for the determination of the assessment and collection of the income and excess-profits, or war-profits taxes for the fiscal year ending January 31, 1919, to be effective from May 20, 1924, for a period of one year after the expiration of the statutory period of limitations. On January 29, 1925, a similar income and profits tax waiver was executed by the taxpayer and Commissioner extending the statutory period of limitations for an additional year.

A judgment was entered against the appellant, plaintiff below, and in favor of the Government after an order had been made overruling the demurrer of the plaintiff to the answer of the appellee, the facts appearing in the pleadings.

There are two questions raised on appeal: First, whether the assessment which was made April 26, 1926, was barred by the statute of limitations, and, second, whether the assessment was made within a period which was prohibited by the Revenue Act of 1926. We will discuss these questions raised in their order.

The statute of limitations governing the question is found in the 1921 Revenue Act, section 250(d), and reads, so far as here material, as follows:

"* * * 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; * * *."

The appellant contends that this statute of limitations commences to run from the date of the filing of the tentative return, which in this case was March 26, 1919, and that said period of limitations, as provided by the statute, of five years, together with the two periods of extensions by the waivers of one year each, would extend the time within which an assessment could be made only to March 26, 1926, and as the assessment was made April 26, 1926, it was beyond the period of the statute as extended by the waivers. The statute, however, commences to run from the date of the completed return, which in this case was July 19, 1919. This is determined by the case of *Florsheim Bros. Co.* v. *United States* (280 U. S., 453 [Ct. D. 167, C. B. IX-1, 260]). And the taxpayer relies upon this theory as to assessments which were made for both the fiscal years ending January 31, 1919, and January 31, 1920. The Supreme Court has definitely determined contrary to appellant's contention in this regard.

The Government relies upon the two waivers above referred to. The one dated May 20, 1924, extends the period for one year after the expiration of the statutory period of limitations; the other waiver dated January 29, 1925, extends the period for one year after the expiration of the statutory period of limitations or the statutory period of limitations as extended by section 277(d) of the Revenue Act of 1924, or by any waivers already on file. The waivers therefore extended the period for assessment and collection two years beyond that allowed by the statute, which would carry it beyond April 26, 1926, the date when the assessment complained of was made. The appellant questions the validity of the waivers in that there is no allegation in the pleadings, from which the facts were considered as admitted, that the waivers were signed before the expiration of the statute of limitations. However, the full provisions of the waivers are set out and they purport to be signed as of the date thereof.

As to the other contention of the appellant, the relevant provisions of the statute are section 274(a) and section 283(c), both of the Revenue Act of 1926, reading, so far as here material, as follows:

"SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the

provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

"SEC. 283. (c) If before the enactment of this Act the Commissioner has mailed to any person a notice under subdivision (a) of section 274 of the Revenue Act of 1924 (whether in respect of a tax imposed by Title II of such Act or in respect of so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and if the 60-day period referred to in such subdivision has not expired before the enactment of this Act and no appeal has been filed before the enactment of this Act, such person may file a petition with the Board in the same manner as if a notice of deficiency had been mailed after the enactment of this Act in respect of a deficiency in a tax imposed by this title. In such cases the 60-day period referred to in subdivision (a) of section 274 of this Act shall begin on the date of the enactment of this Act, and the powers, duties, rights, and privileges of the Commissioner and of the person entitled to file the petition, and the jurisdiction of the Board and of the courts, shall, whether or not the petition is filed, be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section."

The Revenue Act of 1926 went into effect on April 26, 1926, the same date that the assessment was made and complained of herein.

It is the claim of the appellant, if we understand it, that the above sections apply to his case in this, that before the enactment of the 1926 Act the Commissioner had mailed a notice of a proposed deficiency; that the assessment was not made until after the Act took effect; and that under the provisions of section 283(c) and this situation, he was given a new and additional right, to wit, an additional period of 60 days to file an appeal and within which time no assessment could be made. That, as he had never waived this additional right, the deficiency assessment made within that prohibited period was void. However, on February 13, 1926, and prior to the taking effect of the Revenue Act of 1926, the appellant herein filed with the collector of internal revenue for the district of Minnesota an instrument designated as an "Agreement consenting to assessment of a deficiency," as follows:

The undersigned taxpayer hereby waives the right of appeal under section 274(a) of the Revenue Act of 1924 with respect to the items listed below[1] and consents to the immediate assessment of the deficiency in tax resulting therefrom. These items are included in a deficiency in tax aggregating $22,925.71 as indicated by letter from the Commissioner of Internal Revenue, Washington, D. C., dated February 10, 1926, bearing the symbols IT:CA: 2555-8-60D or as indicated in the report of the revenue agent in charge at ——— dated ———.

(Attach additional sheets if necessary.)

(Corporate seal to be affixed.)

E. E. ATKINSON & Co.,
(Name.)
701 Nicollet Ave., Mnpls., Minn.
(Address.)
By ALFRED M. ATKINSON,
Vice Pres. & Treas.
H. E. ATKINSON,
Vice Pres. & Secy.

Dated February 13, 1926.

NOTE.—This agreement is subject to the approval of the Commissioner and is not an agreement provided under section 1006, Revenue Act of 1924.

The waiver was not only as to a right to appeal under section 274(a) of the Revenue Act of 1924, but with respect to this particular proposed assessment. The taxpayer also consented to an immediate assessment. There was only one right of appeal. This was waived. And the consent to an immediate assessment rendered the extension of any period within which such a deficiency assessment might be made immaterial so far as this taxpayer is concerned.

[1] Where the taxpayer consents to the assessment of the entire amount of the deficiency shown by the letter from the Commissioner or as indicated in the report of the revenue agent in charge, the items need not be listed; reference may be made to the letter or report.

The comments by Judge Wilbur in the case of *Mutual Lumber Co.* v. *Burns Poe* (44 Fed. (2d), 922), on the requirements to effect a waiver of the restrictions provided by section 274(a) of the Revenue Act of 1924, have no application to the facts here, as the fact situation is not at all similar. In that case no notice of a determination by the Commissioner of a deficiency assessment had been given and the written waiver there under discussion did not contain an assent to an immediate assessment.

It is also the contention of the taxpayer that the written consent as above was invalid because it is not shown to have had the approval of the Commissioner. We are of the opinion that the contention by appellant that consent thereto was not given by the Commissioner is captious. There is no requirement in the law that any such consent should be in writing, and, if such provision were present, it would be an administrative requirement only. (*Florsheim Bros. Co.* v. *United States*, supra.) It can be assumed that where a taxpayer consents to the full assessment proposed by the Commissioner and promptly pays the same, or a large portion thereof, that the consent to such a procedure was approved by the Commissioner.

We have given full consideration to the several technical reasons raised by appellant why the waivers and consent given by him are invalid, but find no merit in any of them. The action of the trial court in sustaining defendant's motion to dismiss and entering judgment in favor of the defendant is affirmed.

SECTION 284.—CREDITS AND REFUNDS.

ARTICLE 1301: Authority for abatement, credit, and refund of tax. X–27–5129 Ct. D. 356

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

CREDITS AND REFUNDS—ADJUSTMENT—AUTHORITY OF COMMISSIONER.

Where after the Board of Tax Appeals has sustained a proposed deficiency for the year 1918 and before overpayments for the years 1917 and 1919, which are in excess of the amount of the deficiency, are scheduled by the Commissioner, the taxpayer pays the deficiency, the payment is properly refunded as an overpayment for the year 1918, there being a tax "then due" for the year 1918 from the taxpayer within the meaning of section 284(a) of the Revenue Act of 1926, which requires the Commissioner to credit the overpayments determined by him against the deficiency and to refund the balance to the taxpayer.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Robert H. Lucas, Commissioner of Internal Revenue, appellant, v. *United States ex rel. Blackstone Manufacturing Co.*

Appeal from the Supreme Court of the District of Columbia.

Before MARTIN, Chief Justice, ROBB, Associate Justice, and WHEAT, Chief Justice of the Supreme Court of the District of Columbia.

[November 3, 1930.]

OPINION.

This case relates to certain income and profits taxes assessed by the Commissioner of Internal Revenue against the Blackstone Manufacturing Co., and challenges the action of the Commissioner in offsetting certain overpayments for the years 1917 and 1919 against a deficiency for the year 1918.

The case was commenced in the lower court by a petition for mandamus filed by the taxpayer against the Commissioner for a refund. An answer was filed which was demurred to, and the demurrer was sustained. The Commissioner elected to stand upon his answer, and judgment was entered against him. This appeal followed.

The answer of the Commissioner sets out in substance the following facts: On June 15, 1918, the collector of internal revenue erroneously and illegally collected from the taxpayer excessive income taxes amounting to $10,761.04 for the year 1917. The Commissioner however did not schedule this sum as an overpayment until November 26, 1927. When the taxpayer made its return for the year 1918, a deficiency in the sum of $11.708.28 was asserted by the Commissioner in reference thereto. The taxpayer appealed from this decision to the United States Board of Tax Appeals, and the appeal was not decided until October 5, 1927, when the decision of the Commissioner was affirmed. (8 B. T. A., 537.) On October 18, 1927, the taxpayer paid the amount of the deficiency to the collector of internal revenue, but this was not accepted by the Commissioner as a settlement of the deficiency, inasmuch as the overpayment of $10,761.04 for 1917, and also an overpayment of $3,953.52 for 1919, were not yet disposed of, and the Commissioner held that the deficiency and overpayments should be set off pro tanto against one another in an adjustment of the respective claims. Whereupon the sum thus paid by the taxpayer upon the deficiency was refunded and paid to it, as an overpayment for the year 1918. The Commissioner accordingly credited the taxpayer with the amounts of the overpayments less the amount of the deficiency, and refunded and paid to the taxpayer the net credit balance together with interest as provided by the statute. The Commissioner alleged that the entire account for taxes between the taxpayer and the United States for the years 1917, 1918, and 1919 was thereby fully settled and closed.

In our opinion this answer sets out a complete defense to the taxpayer's petition, and the demurrer thereto should have been overruled.

Section 284(a) of the Revenue Act of February 26, 1926 (44 Stat., 9, 66), provides in part as follows: "Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such payment shall * * * be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

The sole contention made in the brief of the taxpayer is that when the overpayments for the years 1917 and 1918 were scheduled by the Commissioner on November 26, 1927, there was no tax deficiency due from the taxpayer for 1918, for the reason that such deficiency had been fully settled by the payment made by the taxpayer on October 8, 1927. We think however that the Commissioner was right in refusing to accept that payment as a settlement of the deficiency, and in returning the same to the taxpayer, inasmuch as otherwise the Government would have been paying interest to the taxpayer upon the overpayments from the dafe of payment, whereas it would have collected interest upon the deficiency only from February 26, 1926. We have already held that such a result would contravene the plain intent of Congress. See *McCarl* v. *Leland* (42 Fed. (2d), 346). Also compare *Riverside & Dan River Cotton Mills* v. *United States* (37 Fed. (2d), 965 [Ct. D. 215, C. B. IX-2, 269]); *York Safe & Lock Co.* v. *United States* (30 Fed. (2d), 148). In each of these cases certiorari was denied by the Supreme Court, October term, 1930.

The judgment of the lower court is therefore reversed and the cause is remanded for further proceedings not inconsistent herewith.

ARTICLE 1301: Authority for abatement, credit, and refund of tax.

X-43-5266
G. C. M. 9800

REVENUE ACT OF 1926.

In determining whether there has been an overpayment which may be refunded or credited, the correct tax should be calculated on the basis upon which the taxpayer filed his return, taking into consideration all items increasing and decreasing net income, regardless of the statute of limitations. The tax actually paid may be refunded or credited to the extent of the overpayment represented by the allowable items covered by timely claims when claims are necessary.

An opinion is requested as to the method of calculating the tax which may be refunded or credited where a claim therefor was filed based on an item which decreased net income, but where upon redetermination of the tax liability there are discovered additional items (with respect to which the statute of limitations has run), some decreasing and others increasing net income.

The items in question are as follows:

1923.

	x dollars.	x dollars.
Net income as previously adjusted		83.60
Add: (1) Decrease in allowance of deduction for British taxes		27.01
		110.61
Deduct:		
(2) Head office expenses allowed	72.48	
(3) Additional depreciation allowed	.92	
(4) Increase in reserve for unearned premiums	42.50	
		115.90
Revised net income [loss]		5.29

Item (2) is covered by a claim for refund, but items (3) and (4) are not covered by a claim and the statutory period for filing further claims has expired.

1925.

	x dollars.	x dollars.
Net income as previously adjusted		128.30
Add:		
(1) Decrease in reserve for unearned premiums		27.47
(2) Furniture and fixtures disallowed as an expense		9.26
(3) Decrease in allowance of deduction for British taxes		4.17
		169.20
Deduct:		
(4) Head office expenses allowed	74.73	
(5) Additional depreciation allowed	.69	
		75.42
Revised net income		93.78

Item (4) is covered by a claim for refund, but item (5) is not covered by a claim and the statutory period for filing further claims has expired.

The question involved is stated as follows:

> May the deductions referred to above which are not covered by a claim be allowed legally as deductions from income (even though the statute of limitations for filing further claims has run) to the extent of the additions made to income, thus being allowed as offsets against the additions, although the statute of limitations for levying additional assessments has run?
>
> * * * * * * *
>
> Some doubt has arisen as to the legality of offsetting additional deductions (which are entirely proper and allowable except for the fact that they are not covered by a claim for refund or credit and for that reason could not be allowed if considered separately) against additions to income to the extent that such additions will permit an offset. * * *

The matter appears to be controlled by the express language of the statute. Section 284(a) of the Revenue Act of 1926, so far as material, directs that "Where there has been an overpayment of any income * * * tax * * * the amount of such overpayment shall

* * * be credited against any income * * * tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer." Subdivision (b) 1 and 2 of section 284 provides:

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

These provisions require no complicated calculations. Plainly the purpose is to permit the refund or credit of overpaid tax where a claim is required, to the extent of the allowable items covered by the claim. The statute does not make the adjustment of overpaid tax a matter of setting off one income-adjusting item or class of items against another. The statute looks simply to (1) the correct tax ascertained by inclusion of all proper items, regardless of time limitations, and (2) the tax actually paid no matter how calculated, and contemplates that the excess of (2) over (1) shall be refunded or credited to the extent of the tax overpaid represented by the allowable items covered by timely claims when claims are necessary.

It is accordingly consistent and appropriate in the instant case to determine the correct income regardless of the statute of limitations. As the tax was paid upon the "net income as previously adjusted," there should be subtracted therefrom the "revised net income" to obtain the excess amount on which the tax was paid. Credit or refund may be made of the tax paid on so much of such excess amount as is covered by a timely claim. Therefore, on the basis of the figures for 1923, the credit or refund may be calculated as follows:

	x dollars.
Net income as previously adjusted	83.60
Revised net income	0.00
Income on which excess tax was paid	83.60
Income, the tax on which is covered by a claim	72.48
Income, the tax on which is not covered by a claim	11.12

Since the amount of income on which excess tax was paid, $83.60x$ dollars, exceeds the amount of income the tax on which is covered by the claim, $72.48x$ dollars, the tax paid on the latter amount may be credited or refunded. The tax paid on $11.12x$ dollars, not covered by a timely claim, may not be refunded or credited.

The calculation on the basis of the figures shown for 1925 is as follows:

	x dollars.
Net income as previously adjusted	128.30
Revised net income	93.78
Income on which excess tax was paid	34.52
Income, the tax on which is covered by a claim	74.73

Since the amount covered by a claim, $74.73x$ dollars, exceeds the amount on which excess tax was paid, $34.52x$ dollars, the tax on the latter amount may be credited or refunded.

Lewis et al. v. *Reynolds* (48 Fed. (2d), 515, Ct. D. 347, C. B. X-1, 180), decided by the United States Circuit Court of Appeals, Tenth Circuit, is not contrary to this conclusion. The court, after quoting section 284(a) of the Revenue Act of 1926, supra, and section 322 (a) and (b) of the Revenue Act of 1928, stated:

> The above-quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.

The inference of the court's statement that the taxpayer is not entitled to a refund unless he has overpaid his tax seems plainly to be that if he has overpaid his tax he is entitled to a refund. The court recognized that in order to ascertain whether there has in fact been an overpayment of tax, items of income which increase the tax must be considered as well as items of deductions which decrease the tax. The court's opinion affords no basis for assuming that the tax and overpayment may be computed to the detriment of the taxpayer by including one class of items and excluding the other class.

It is, therefore, concluded that in determining whether there has been an overpayment which may be refunded or credited, the correct tax should be calculated on the basis upon which the taxpayer filed his return, taking into consideration all items increasing and decreasing net income, regardless of the statute of limitations. The tax actually paid may be refunded or credited to the extent of the overpayment represented by the allowable items covered by timely claims when claims are necessary.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 1305: Limitations upon the crediting and refunding of taxes paid. (Also Section 1113, Article 1351.) X-38-5212 Ct. D. 384

INCOME AND EXCESS PROFITS TAXES—REVENUE ACT OF 1926—DECISION OF COURT.

1. CLAIM FOR REFUND—SUFFICIENCY.

A letter written by a taxpayer to a revenue agent stating that it had received the report of an audit of its taxes and requesting a special assessment of excess profits tax, but which makes no mention of a claim for refund and contains nothing that can be said to refer to a claim for refund directly or indirectly, may not be regarded as an informal or a formal claim for refund under section 284(g) of the Revenue Act of 1926.

2. SUIT—CLAIM FOR REFUND—SUFFICIENCY OF CLAIM.

An informal claim for a refund filed within the statutory period therefor does not constitute a claim for a refund under section 3226 of the Revised Statutes as amended which will support a suit to recover a tax based upon a ground, other than that stated in the informal claim, which is stated in a formal claim filed after the period of limitation expired.

8. REFUND—LIMITATION—AMENDED CLAIM.

Where an informal claim for a refund is filed and is disallowed by the Commissioner, it is not susceptible to amendment by a second claim filed after the expiration of the statutory period for filing the same so as to give the taxpayer the right to bring suit, within the time provided in section 3226 of the Revised Statutes as amended, upon another and different ground from any stated in the first claim.

COURT OF CLAIMS OF THE UNITED STATES. NO. J–618.

Wausau Sulphate Fibre Co. v. *The United States.*

[May 4, 1931.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

The plaintiff overpaid its income and profits taxes for the year 1920 in the sum of $22,753.40, and now brings this suit to recover that amount. The defense is that the claim for refund was not filed until after the period of limitations had expired.

It appears that plaintiff had filed a waiver on October 10, 1925, effective until December 31, 1926, which, under section 284(g) of the Revenue Act of 1926, served to extend the time for the filing of a claim for refund to April 1, 1927. But this was the latest date at which it could be filed, and there is no question but that what the plaintiff calls its "formal claim for refund" was not filed within the period of limitations. This so-called "formal claim" stated that it was "amendatory of an informal claim for refund filed by claimant on July 20, 1926," and also stated that the "informal claim for refund" was contained in a letter written to the supervising internal revenue agent at Milwaukee, Wis., on July 20, 1926, the material parts of which are set out in the findings. This letter not only made no mention of a claim for refund, but contained nothing that could even be said to refer to a claim for refund, directly or indirectly.

It appears from the evidence that this letter was written after plaintiff had received the report of an audit of its taxes for the year in question, and showed that this report had been examined. Beyond this, it merely requested that its excess-profits taxes be computed under certain sections of the statute which refer to what are commonly called "special assessments." On October 15, 1926, the Commissioner answered this communication denying the application for the assessment of plaintiff's profits tax in the manner requested in the letter, and set out in detail the audit with the result thereof, which showed an overassessment for 1920 in the sum of $27,226.51. We do not think the letter upon which plaintiff relies could in any event be considered as a claim for refund. As above stated, it made no mention of a claim for refund, and contained nothing that could even be said to refer to a claim for refund directly or indirectly. It did not state that if a special assessment was granted it would show an overassessment of plaintiff's taxes, or other facts entitling it to a refund. The letter appears to have been written merely in the hope or expectation that if a special assessment was granted it *might* show that plaintiff was entitled to a refund, in which event a claim for refund would thereafter be filed. But the letter, even when considered in connection with all of the circumstances of the case, completely fails to satisfy the requirements of a claim for refund. (See *Stauffer, Eshleman & Co.* v. *United States*, 66 C. Cls., 277 [Ct. D. 47, C. B. VIII–1, 291].)

There are other reasons why plaintiff's claim can not be held to be sufficient. In *United States* v. *Felt & Tarrant Mfg. Co.* (283 U. S., 269 [Ct. D. 336, C. B. X–1, 431]), decided by the Supreme Court April 13, 1931, the taxpayer filed what was designated as a claim "for refund of taxes illegally collected." The sole ground stated for the reduction of tax demanded therein was that petitioner had filed with the Commissioner an application for special relief from the amount of its excess profits tax similar to the request made in the letter above referred to, but the suit was brought to recover what was alleged to be an overpayment of income and excess profits taxes by reason of failure to allow the taxpayer a deduction on account of exhaustion or obsolescence of

patents. The Supreme Court held that this claim was not a compliance with the statute in that it did not set out the grounds on which suit was brought. Conceding *arguendo* that the letter might constitute an informal claim for refund, the grounds upon which suit is brought are altogether different from those stated in the letter, and the letter by itself and alone must be held insufficient upon the authority of *United States* v. *Felt & Tarrant Mfg. Co.*, supra. Counsel for plaintiff contend that this defect is remedied by the claim for refund filed on October 25, 1927, which was sufficient in form, and that thereby plaintiff's claim was saved from the bar of the statute of limitations which expired on April 1 of that year. We are unable to agree with this contention. The opinion of the Supreme Court in the case above cited shows that the essence of a claim for refund is the statement of the grounds upon which it is based, and a mere general statement that the taxpayer claims a refund of a certain amount is not sufficient, although it is more than the plaintiff set out or claimed in the instant case. In one sense the second claim (if it may be called such) may be considered as amending any claim which was contained in the letter because the second claim so states, but in determining whether it operates to prevent the application of the statute of limitations we think a rule of pleading should be followed, especially as this rule is based on logic and reason. It is well settled that where a cause of action is defectively pleaded, an amendment not changing the cause of action but curing these defects does not make the cause of action subject to the statute of limitations, even though the amendment be filed after the expiration of the period thereof. On the other hand, if an amendment is filed after the expiration of the period of limitations setting up an entirely new cause of action it is barred by the statute, notwithstanding the original plea was filed in time. So in the instant case, even if we consider the letter as an informal claim for refund, the grounds constituted an altogether different cause of action from the one set out in the claim filed on October 25, 1927. As the filing of the later claim was after the period of limitations had expired and set up a totally different claim from that expressed in the letter, it does not help plaintiff's case.

The fact that a second claim was filed after the expiration of the period of limitations makes the bar of the statute of limitations apply for another reason. The Commissioner had considered and rejected the so-called informal claim which made an application for special assessment and it was no longer susceptible of amendment after the statute of limitations had expired, so as to give plaintiff the right to bring suit on another and different ground. (*Sugar Land Ry. Co.* v. *United States*, No. H–394 [Ct. D. 382, page 309], decided by this court April 6, 1931; *Mutual Life Ins. Co. of N. Y.* v. *United States*, No. K–377 [Ct. D. 363, page 292], decided this date.)

It should be observed that the instant case differs from that of *Bonwit Teller & Co.* v. *United States* [Ct. D. 334, C. B. X–1, 328], decided by the Supreme Court April 13, 1931 (283 U. S., 258). In that case the claim first presented was allowed as an informal claim for refund; in the instant case the claim first filed was rejected and never treated by the Commissioner as a claim for a refund, either formal or informal. With reference to this point the Supreme Court said in the Bonwit Teller & Co. case, supra:

"The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim."

It follows that plaintiff's petition must be dismissed, and it is so ordered.

ARTICLE 1305: Limitations upon the crediting and refunding of taxes paid. X–42–5255 Ct. D. 402

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

CREDIT OR REFUND—REDUCTION OF INVESTED CAPITAL—AMOUNT OF DEDUCTION ALLOWED IN DETERMINING OVERPAYMENT.

Where the invested capital of a taxpayer is decreased by the Commissioner and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, in

determining the amount of overpayment for any such previous year, which must be credited or refunded pursuant to section 284(c) of the Revenue Act of 1926 without the filing of a claim therefor, notwithstanding the period of limitation has expired, the taxpayer is entitled to a deduction no greater in amount than that by which the Commissioner decreased the invested capital of the taxpayer because of the failure to take an adequate deduction for such year.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

A. Schrader's Son, Inc., appellee, v. *The United States of America, appellant.*

Appeal by the defendant from a judgment for the plaintiff of the District Court for the Eastern District of New York in an action to recover taxes erroneously paid.

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

[July 7, 1931.]

OPINION.

L. HAND, Circuit Judge: The plaintiff, a New York corporation, was the owner of a number of patents, some acquired before March 1, 1913, which alone are involved here. In its tax returns for 1913 to 1919, inclusive, it did not deduct anything from its gross income for the depreciation of these, but on March 13, 1925, recognizing its error, it filed a claim for a refund upon its tax for 1919. The Commissioner recalculated the whole tax for that year, income, war and excess profits, and made a refund. In so doing he found both the original cost of the patents and their value on March 1, 1913, and in assessing the income tax deducted from the gross income an amount calculated as the depreciation for the year 1919, based upon value. In assessing the war and excess profits tax, he was obliged to fix the invested capital in which he included the cost of the patents, deducting, however, a total depreciation from that cost, by aggregating the depreciations, also based on cost, for each of the preceding years. This resulted in increasing the plaintiff's war and excess profits tax for 1919. But by virtue of section 384(c) of the Act of 1926[1] (of which section 252 of the Act of 1921 and section 281(c) of the Act of 1924 were the precursors), he was also obliged to make a refund upon the plaintiff's taxes in the earlier years for that depreciation by which he had reduced its invested capital. This he did, recomputing the income tax for each of the years 1913 to 1918, inclusive, by deducting from gross income the same yearly depreciation upon the patents, which went into the aggregate he had used in determining the invested capital for 1919. That is to say, he allowed a yearly deduction based upon their cost. Similarly for the years 1917 to 1918 he recomputed the invested capital by using the cost of the patents, as he had done for the year 1919. As a result the plaintiff has received a refund of its income tax for the year 1919, on the depreciation, occurring in that year, of the patents, based upon their value on March 1, 1913; but for the preceding years upon their cost. Its position is that it was entitled to deductions in those years, based upon the value of the patents on March 1, 1913; that is, to a consistent application of the rule which the Commissioner recognized for 1919, and which, we may assume, the law required. The judge took this view of the statute, and gave judgment for the plaintiff.

The section in question does no more than lift the bar of the statute of limitations; how far it does so must be determined by its language and its obvious purpose. It provided against a situation in which the taxpayer might find himself concluded by the lapse of time from taking those very deductions from his gross income, which the Treasury was using against him in a later year. This could arise only because in fixing the war and excess profits tax,

[1] SEC. 284. (c) If the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that there has been an overpayment of income, war-profits, or excess-profits taxes in any previous year or years, then the amount of such overpayment shall be credited or refunded, without the filing of a claim therefor, notwithstanding the period of limitation provided for in subdivision (b) or (g) has expired.

the statute used the taxpayer's invested capital, which in turn could not be determined without going back into earlier years and ascertaining what in those years should have been subtracted from income. The Commissioner might decrease the invested capital for 1919, by charging to income in the year 1918 the sum which the taxpayer had credited to capital in that year, and the taxpayer have no means of using that deduction in his favor. If so, he was at once obliged to pay a larger war and excess profits tax for 1919, because of a smaller invested capital; and he was held to the larger taxes which he had erroneously paid in 1918, because he could not use the same deduction against his gross income in that year. The Treasury in this indirect way could reopen past years and charge him because of his omissions, while he had no corresponding privilege because the statute had run against him. Against that injustice and that alone, Congress meant to relieve him.

The limit of his privilege is entirely clear. It is confined to those deductions which the Commissioner in fact uses to decrease his invested capital and thus raise his war and excess profits tax in the later year. Once he has got the benefit in his earlier taxes of those same deductions, he has not suffered from the action of the Treasury; as to all else he stands charged with his laches, like any other taxpayer. In the case at bar the plaintiff has received a refund for the earlier years, measured by precisely those deductions which the Commissioner took against it in 1919. Its claim to more, if the language of the sections compels its recognition, will result in an unfair discrimination in its favor against other taxpayers who may have made similar mistakes, but whose invested capital has not been reassessed. As to them the statute has barred any reconsideration; section 284(c) gives them no relief, nor should it give any to those whose invested capital has been corrected, except in so far as consistency requires. While the situation was somewhat different in *Southwestern Oil & Gas Co.* v. *U. S.* (29 Fed. (2d), 404 [Ct. D. 36, C. B. VIII–1, 211], affirmed 34 Fed. (2d), 446 (C. C. A. 3)), much of the ratio decidendi was the same, as the discussion discloses.

The argument based upon the language of the section leads to no different result. It is true that the decrease in invested capital is presupposed to arise from the taxpayer's failure to take "adequate deductions," and "adequate" must mean such as the law required. The Commissioner in fixing what he deemed adequate must tax all that the law demanded. To be sure, it does not inevitably follow that what may be adequate in fixing invested capital is adequate for other purposes; but, be that as it may, whatever he does take in order to fix the invested capital of the later year is determined for that purpose between the parties, unless it is reviewed. Right or wrong it becomes adequate for invested capital in that year; indeed in the case at bar there is no effort to challenge the tax for 1919. But the overpayment as to which the bar is lifted is the result of taking those deductions which are in this sense "adequate"; nothing more is intended. Thus the adequacy of the deductions can not be challenged except by challenging the propriety of the reassessment of the invested capital; that once settled, the overpayments are automatically fixed; they are the deductions actually taken, "adequate" because unimpeached.

The second argument is that to take deductions from invested capital in a later year can not "result" in an overpayment in earlier years. Results must follow causes; not precede them. Surely this is the extremity of verbalism. It is of course true that "taking" the deductions does not create the overpayment; but it is equally true that they demonstrate that there has been an overpayment; and the meaning is apparent, whether or not the diction is perfect. The section ties the overpayments as to which the bar is lifted to the deductions themselves; the decrease in capital depends upon the deductions, and these in turn make the overpayments. The sequence is logical, not causal. Besides, the statute does not in any case impose a tax, but is akin to an exemption; it grants a privilege to certain classes of taxpayers. We are not therefore charged with the duty of finding its warrant straitly within its four corners; intendments are to be taken in favor of the Treasury.

We hold that the section merely requires the Commissioner in reassessing the taxes in the earlier years, to allow as overpayments the same figures which he takes as deductions for those years in fixing invested capital. If further deductions are sought, they are subject to the statutes of limitation properly applicable; as to them the taxpayer can have no recourse to section 283(c). Hence it becomes unnecessary to decide what was the proper basis at which to

take deductions from gross income in the earlier years. Even though the plaintiff may have suffered by this, it is no more than any other taxpayer must endure, who, having made a mistake does not discover it and seek redress within the prescribed periods.

Judgment reversed; cause remanded with instructions to dismiss the petition.

ARTICLE 1305: Limitations upon the crediting and refunding of taxes paid.

REVENUE ACT OF 1926.

Suit to recover deficiency commenced while taxpayer's appeal to the Board is pending. (See Ct. D. 413, page 257.)

ARTICLE 1305: Limitations upon the crediting and refunding of taxes paid. X–48–5305 G. C. M. 9841

REVENUE ACT OF 1926.

The taxpayer withdrew its protest against the inclusion in taxable net income for 1926 of a refund of Federal estate tax received in that year, at a time when a final determination of the tax liability for the year 1923, in which the excess tax was deducted, had not been made and the statutory period, as extended, for assessment or issuance of a deficiency notice had not expired. It did not file a claim for refund of income taxes paid for 1926, reasserting its protest, namely, that the Federal estate tax refund represented not income in 1926 but an improper deduction in 1923, until after such statutory period had expired and its Federal income tax liability for 1923 had been finally determined, pursuant to a closing agreement, submitted by it, under the provisions of section 606 of the Revenue Act of 1928, in which final determination the excess Federal estate tax was allowed as a deduction.

Held, that the taxpayer is estopped from asserting its present claim for refund.

The taxpayer in 1922 filed a tentative Federal estate tax return and paid the tax indicated thereon of $14.24x$ dollars, and in 1923 it paid the balance, $41.48x$ dollars, of the total Federal estate tax of $55.72x$ dollars, shown on its final and completed return then filed. Its Federal estate tax was determined by the Bureau to be $42.53x$ dollars with a resultant overpayment of $13.19x$ dollars, which was refunded to it in 1926.

The taxpayer kept its books and made its Federal income tax returns upon the cash receipts and disbursements basis. Accordingly, in its Federal income tax return for 1922 it deducted the Federal estate tax of $14.24x$ dollars paid in 1922 and in its Federal income tax return for 1923 it deducted the Federal estate tax of $41.48x$ dollars paid in 1923. It appears, however, that, upon the determination that the taxpayer had overpaid its Federal estate tax in the amount of $13.19x$ dollars and the refunding to it of such amount in 1926, it failed to file an amended Federal income tax return for 1923 to correct the overstatement of the deduction for Federal estate tax which it had taken in that year or to report the refund as taxable income in its Federal income tax return for 1926.

Upon an examination in March, 1928, by a revenue agent of the taxpayer's Federal income tax return and its books of account for 1926, the revenue agent, among various adjustments, recommended adding to the taxable net income reported the Federal estate tax refund of 13.19x dollars received in that year and an amount of 1.96x dollars, executors' commissions paid and taken as a deduction. The internal revenue agent in charge so notified the taxpayer under date of April 19, 1928, and granted it a period of 30 days within which it might file a protest and present additional information. A protest objecting to the above-mentioned adjustments was filed and a hearing was granted on July 18, 1928, to A, duly authorized representative of the taxpayer. At this hearing it was proposed that the revenue agent's action in disallowing the deduction for executors' commissions of 1.96x dollars be reversed, whereupon, according to the hearing report, "The taxpayer's representative at the conference voluntarily advanced the statement that the agent's action in the inclusion of the sum of 13.19x dollars, being a refund of Federal estate tax as income, was correct and that no objection would be argued at the conference." Accordingly, it was proposed that such action be sustained.

Under date of July 30, 1928, the taxpayer's representatives submitted to the internal revenue agent in charge a letter confirming the proposals made at such hearing and expressly consenting to the assessment of the resulting deficiency, the letter reading as follows:

> As one of the attorneys for the executors of the above estate I have been authorized to advise you that it has been decided to withdraw the protest made against the inclusion of the refund of Federal estate taxes in the sum of 13.19x dollars received in 1926 in the gross income of the estate for that year.
>
> I understand that the deduction for executors' commissions paid on income in the sum of 1.96x dollars will be allowed and with this adjustment I consent to the assessment of an additional tax based upon the revenue agent's report.

The revenue agent's report for 1926 was revised pursuant to such agreement. After a review of the entire file by the Bureau in Washington, the deficiency in income tax for the year 1926 in the sum of 2.33x dollars and interest in the sum of .20x dollars was assessed on May 25, 1929, and was paid in full on June 12, 1929.

The taxpayer's income tax returns for 1922 and 1923 were filed on time and the statutory period for assessment of the tax for the two years was duly extended by waivers and consents to December 31, 1928. A deficiency notice for 1922, 1923, 1924, and 1925 was mailed to the taxpayer on December 31, 1928, upon the basis of a final determination of the taxable net incomes, in which the Federal estate tax in the amounts of 14.24x dollars and 41.48x dollars deducted on the returns for 1922 and 1923, respectively, was allowed. A petition was filed with the United States Board of Tax Appeals from said deficiency notice, but no allegations of error or fact were made in such petition in respect of the years 1922 and 1923, and, accordingly, upon motion by the Government, the Board dismissed the proceedings for the years 1922 and 1923 and further ordered and decided that there were deficiencies therefor as stated in the deficiency notice.

The taxpayer's representatives submitted a final closing agreement, executed by the taxpayer, for the years 1922 and 1923 under the

provisions of section 606 of the Revenue Act of 1928, stating the tax liabilities as shown in the deficiency notice and as approved by the Board. Such closing agreement was signed by the Commissioner and approved by the Secretary of the Treasury on July 6, 1929.

Thereafter, on July 15, 1929, the taxpayer filed with the collector a claim for refund of 2.64x dollars Federal income tax for 1926, namely, the tax assessed on the return and paid of .11x dollars, the deficiency of 2.33x dollars, and interest of .20x dollars. The basis of this claim is the contention that the refund received in that year of 13.19x dollars Federal estate tax did not constitute taxable income, under the decision in the case of *Mary W. Leach* v. *Commissioner* (16 B. T. A., 781, C. B. IX–1, 31), the syllabus of which is as follows:

Petitioner, the residuary legatee of an estate of a decedent who died in 1918 and upon which the estate tax was due in 1919, paid in 1922 a deficiency in estate tax finally determined in that year. Subsequently, as a result of suit and judgment the greater part of the sum paid was refunded, with interest, by the Government, this refund being subsequent to 1922, but prior to the hearing on the appeal. Upon the facts, *held* that petitioner was on a cash basis and is entitled to credit in the year 1922 for any deduction due on account of the payment made, and that the credit taken for the total of the payment made in 1922 should be adjusted by deduction of any portion of such payment refunded to petitioner in a succeeding year but prior to the final adjustment of her tax liability for the year in question.

The principle annunciated in such Board decision, however, is not essentially different from the conclusions reached in Office Decision 741 (C. B. 3 (December, 1920), 115), that the excess taxes paid during 1915, 1916, and 1917 had been erroneously deducted in those years rather than that they represented income in 1919 when the excess paid was refunded and "accordingly that *amended returns* for the respective years *should be filed*," and in *Inland Products Co.* v. *Commissioner* (10 B. T. A., 235, affirmed 31 Fed. (2d), 867), that beverage taxes paid in 1919 and 1920 by error of law and refunded in 1924 are *not deductible* in the years paid.

But, it should be noted, in all three decisions the rule, that excess taxes subsequently refunded are to be disallowed in the year paid and/or deducted rather than be considered taxable income in the year refunded, is conditioned or predicated upon the premise that the adjustment be made *prior to the final adjustment of the taxpayer's tax liability for the year in which the excessive deduction was taken.* In the *Appeal of Mary W. Leach*, supra, the Board said:

In *Inland Products Co.* (10 B. T. A., 235) we held that amounts paid by a taxpayer as beverage taxes in 1919 and 1920 and deducted from gross income in returns for such years were not subject to deduction where it is shown that subsequent to the taxable years in question but prior to the final determination of the tax liability for those years through the proceeding before the Board, the sums so paid had been refunded as collected in error. The United States Circuit Court of Appeals for the Fourth Circuit on April 9, 1929, in affirming this decision, said:

"* * * It is elementary that one who seeks to have a mistake corrected must surrender what he has received by reason thereof; and likewise one who accepts the correction of a mistake is estopped to claim a benefit to which he would be entitled if it were not corrected. In this case, the taxpayer as the result of the payment under mistake received the deduction from its gross income of the amount so paid. When the mistake was rectified and it

accepted the return of the amount paid with interest, it ought not to be heard to claim the benefit of the deduction on account of the payment."

The Board's decision in the Leach case was affirmed by the Circuit Court of Appeals, Second Circuit (50 Fed. (2d), 371).

In the instant case, the taxpayer *withdrew its protest* against the inclusion in taxable net income for 1926 of the refund of Federal estate tax received in that year, at a time when a final determination of the tax liability for the year 1923, in which the excess tax was deducted, had not been made and the statutory period, as extended, for assessment or issuance of a deficiency notice had not expired. It did not file its present claim for 1926 reasserting its protest, namely, that the Federal estate tax refund represented not income in 1926 but an improper deduction in 1923, until after such statutory period had expired and its Federal income tax liability for 1923 had been finally determined, pursuant to a closing agreement, submitted by it, under the provisions of section 606 of the Revenue Act of 1928, in which final determination the excess Federal estate tax was allowed as a deduction.

Although there was no misrepresentation by the taxpayer or reliance thereon by the Government, or any intended deception in the conduct or declarations of the taxpayer or such gross negligence on its part so as to give rise to ordinary estoppel, nevertheless it would appear that the taxpayer is now estopped from asserting its present claim for refund of the taxes paid by it for the year 1926. The principle relied upon is that broad equitable principle which is recognized by courts of law, namely, where by acquiescence, waiver, or quasi estoppel, a party with full knowledge of the facts has once assumed a position, he will not be permitted to act later in a manner inconsistent with his former position or conduct to the injury of another, especially where in connection with his former position the party has accepted a benefit. If the instant taxpayer's taxable net income for 1923 had been increased by the excess Federal estate tax deducted in that year of 13.19x dollars, instead of including the refund thereof in 1926 in its taxable net income for 1926, the resulting Federal income tax deficiency for 1923 would have been, because of the higher normal and sur tax rates prevailing in that year, approximately twice that which resulted by including it in 1926, *as acquiesced in by the taxpayer; hence, it thereby accepted a very substantial benefit.*

In *Hector* v. *Mann* (225 Mo., 228, 124 S. W., 1109) it is stated:

* * * There are estoppels and estoppels, and some forms of them are so defined by law writers and jurists as to make one element in the estoppel the knowledge and reliance of one party upon the acts and conduct of the other; for instance, estoppel in pais, arising from misrepresentation by word, act, conduct, or silence. *But there are other forms of estoppel in which knowledge of the fact upon the part of the person invoking the estoppel, and reliance upon the fact and a change of situation based upon that reliance, is not an element.* It may be that "estoppel," speaking with precision, is the wrong designation, and that in attempting to classify and give names the doctrine we are about to invoke is improperly classified as "estoppel," and that it does not come under that head, but springs from *election, ratification, affirmance, acquiescence, acceptance of benefits*, or what not. It is classed, however, by law writers under the head of "*quasi estoppel.*" (Bigelow on Estoppel (5th ed.), p. 697; 16 Cyc., 787, et seq.) [Italics supplied.]

In *Humes Construction Co.* v. *Philadelphia Casualty Co.* (32 R. I., 246, 79 Atl., 1) it is said:

* * * Whether the action of the defendant be termed a "waiver," "estoppel," "quasi estoppel," or "an election ripening into an equitable estoppel," its liability is based upon the broad equitable principle, *which courts of law will recognize*, that a person, *with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.* * * *

The defendant's counsel has argued that the doctrine of estoppel can not be applied in this case, because there does not appear * * * to have been any misrepresentation or concealment of material facts on the part of the defendant, nor does it appear that the facts were not equally as well within the knowledge of the plaintiff as of the defendant. *These objections overlook the distinction between quasi estoppel and estoppel by misrepresentation.* "The term 'quasi estoppel' * * * includes the doctrine of election, the principle which precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver." (16 Cyc., 784.) [Italics supplied.]

In 10 Ruling Case Law, on page 694, the following appears:

The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be *unconscionable* to permit a person to maintain a position inconsistent with one in which *he has acquiesced* or of which *he has accepted any benefit.* * * * [Italics supplied.]

On page 30 of Bigelow on Estoppel, sixth edition, it is stated:

This completes estoppel proper, in substantive law, and brings us to what may be called "quasi estoppel." A party will not be permitted to assume inconsistent positions, and where *one has an election between inconsistent courses of action he will be confined to that course which he first adopts.* [Italics supplied.]

In 21 Corpus Juris, 1206, the following appears:

Where one *having the right to accept or reject a transaction takes and retains benefits thereunder*, he ratifies the transaction, is bound by it, and can not avoid its obligation or effect by taking a position inconsistent therewith. * * * [Italics supplied.]

On page 1202 of this reference will be found the following:

Where a person has, *with knowledge of the facts*, acted or conducted himself in a particular manner, or *asserted a particular claim*, title, or right, he can not afterwards assume a position inconsistent with such act, claim, or conduct *to the prejudice of another* * * *. [Italics supplied.]

In 21 Corpus Juris, 1240, it is stated:

While waiver is not in the proper sense of the term a species of estoppel, yet *where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled.* The doctrine of estoppel by waiver, it has been said, applies in any case to determine the rights of the parties from the time when a *mistake of law* or of fact becomes known to the party whose rights are affected. [Italics supplied.]

In *Railway Co.* v. *McCarthy* (96 U. S., 258) the United States Supreme Court held that where a corporation, *having enjoyed the fruits* of a contract fairly made, denies, when called to account, the existence of the corporate power to make it, the corporation *is estopped* from making such a defense.

The syllabus of *Philadelphia R. R. Co.* v. *United States* (103 U. S., 703) is as follows:

"A," a railroad company, in the execution of its contract with the Government, carried the mails from P to F, the route being partly over its own road

and partly over a portion of the road of company B, which also had a contract for carrying the mails over its entire line. After passage of the Act of March 8, 1873 (ch. 231), the Post Office Department *made* frequent *adjustments* of the *amount due* to the respective companies, *which was* from time to time *received without protest or objection.* B having received the amount due for conveying all the mails over its road, although over a part of it a portion of them had been carried by A, under its contract, the latter brought suit against the United States to recover compensation for the portion so carried. Held, that A's *acquiescence in the adjustments precluded the maintenance of the suit.* [Italics supplied.]

Scholey v. *Rew* (23 Wall., 331, 350–352) was an action by an alien to recover a Federal succession tax payment made in respect of certain real estate alleged to have passed to him by the will of his wife. One of the defenses (page 346) was, "That the plaintiff being an alien the devise to him is absolutely void," under the laws of the State of New York, in which the land was situated. The Supreme Court in its opinion used the following language:

> Except for the purpose of avoiding the tax or duty due to the United States he has always claimed the benefit of the devise and still claims it for every other purpose. Had he disclaimed the right to take the interest devised to him the actual devolution of the estate would have given the right of possession to the heirs, either by the will or by the law of descent, and in that event the United States would not have met with any embarrassment in levying and collecting the succession tax or duty. By the terms of the will the devise was to the plaintiff, and inasmuch as he claimed the benefit of it without opposition, and has continued to enjoy its use, as before explained, to the present time, it followed that the heirs could not be subjected to such an exaction.
>
> Tested by these suggestions it is clear that the claim of the plaintiff to recover back the amount of the tax or duty is inequitable, and in that regard the court here concurs in the proposition submitted by the United States, that the plaintiff is estopped to set up alienage as a ground of recovery under the circumstances of this case.
>
> Having accepted the beneficial interest under the will, and being in the undisturbed enjoyment of the same, he must bear the burden which legally attaches to the interest.

In *United States Trust Co. of New York* v. *Commissioner* (13 B. T. A., 1074), franchise taxes deducted in 1920 were disallowed by the Commissioner on the ground that the taxes did not accrue until the due date thereof in 1921. The taxpayer thereupon deducted the tax in 1921, but under the decision in *United States* v. *Anderson* (269 U. S., 422), decided in 1926 after the taxpayer's taxable year 1920 had been closed, it was ruled that the tax was a proper accrual and deduction for 1920, and the Commissioner disallowed the deduction made therefor by the taxpayer in 1921. The taxpayer sought to invoke equitable estoppel, but the Board held that the taxpayer *was not damaged* because it had been improperly allowed a portion of the 1919 franchise taxes as a deduction in 1920.

In the decision in *W. H. Hill Co.* v. *Commissioner* (22 B. T. A., 1351), subsequently referred to the Board for review and promulgated on June 5, 1931 (23 B. T. A., 605), it was held that "Where the Commissioner *has given credit* to a taxpayer for payments of tax for the calendar years 1918 and 1919 against tax due for the fiscal year ended March 31, 1919, the Board will not hold that any part of such credit should have been applied against the tax liability for the fiscal year ended March 31, 1920," although the Board in *Paso Robles Mercantile Co.* v. *Commissioner* (12 B. T. A., 750, non-

acquiescence C. B. VIII–1, 59, and 18 B. T. A., 415, nonacquiescence C. B. IX–2, 81), on similar facts, reached a contrary conclusion. In *Mrs. H. C. Walker, jr., et al.* v. *Commissioner* (23 B. T. A., 1), the Board said in part:

The petitioners reported the income in question upon the installment basis. The Commissioner's regulations, article 42, Regulations 45, 62, and 65, provided for reporting income in this manner and the Commissioner accepted the returns filed by the petitioners as a basis for computing their tax liabilities. Presumably the petitioners *thus acquired a benefit by distributing* their income over a period of several years and avoiding the high taxes that would have resulted from reporting a larger amount in any single year. The *petitioners now seek to report their income upon another basis which would throw the greater part of it back into a year which is barred by the statute of limitations.* In *Commissioner of Internal Revenue* v. *Moore* (January, 1931), the Circuit Court of Appeals, Tenth Circuit, confronted with a similar situation, said:

"The sole question involved on these appeals is whether the profit derived from the sale of certain oil stock should be charged into the income of the taxpayers for the year 1918, when the contract of sale was made, or whether it should be charged into the years in which the payments on the purchase price were actually received. The Board of Tax Appeals held that the entire profit was taxable in the year 1918, and since the statute of limitations had run on the assessment of taxes for that year, that there was no taxable liability. * * *

* * * * * * *

"The taxpayers were on a cash basis of accounting, and in line with the statute above quoted, they did return the profits from this sale 'in the gross income for the taxable year in which received by the taxpayer,' proportioning the profit in accordance with the quoted regulation. Conceding, for the argument, that the statute and regulation afforded the taxpayers the election of treating the obligations of the purchaser as the equivalent of cash, *the taxpayers otherwise elected; they may not now change that election, particularly since the result would be to throw all of the profit into a year where collection is barred by limitations.* (*Lucas* v. *St. Louis National Baseball Club* (C. C. A. 8), 42 F. (2d), 984; *Rose* v. *Grant* (C. C. A. 5), 39 F. (2d), 340; *Alameda Investment Co.* v. *McLaughlin* (C. C. A. 9), 33 F. (2d), 120; Holmes on Federal Income Tax. (6th Ed.), 1278.)"

See also General Counsel's Memorandum 9333 (C. B. X–1, 253), containing numerous citations in support of estoppel by acceptance of benefits, where the following language was used:

* * * In the case of such insurance companies the cost of furniture and fixtures, including the cost of furniture and fixtures previously charged off as an expense, should be capitalized as of the date of acquisition and depreciation allowed thereon on the basis of such cost and the period of the useful life of the asset from the date of acquisition, subject to this limitation, that no depreciation is allowable upon any item, the cost of which has previously been deducted as an expense, when any additional taxes resulting from the subsequent capitalization of such cost are barred by the statute of limitations. This latter limitation is based upon the principle of estoppel arising from acceptance of benefits * * *.

There is an equitable maxim, which is so well established as to need no citation for support, that "he who seeks equity must do equity." In *Inland Products Co.*, supra, the United States Circuit Court of Appeals for the Fourth Circuit said in part: "It is elementary that one who seeks to have a mistake corrected must surrender what he has received by reason thereof." It is true that if the taxpayer brought suit in this case it would not be a suit in equity, but one at law in assumpsit. But, any assumpsit of this kind is of an equitable nature. (*New York Life Insurance Co.* v. *Anderson* (C. C. A.), 263 Fed., 527, and citations therein.) Being in the nature of a bill in equity, it is subject to the rule of moral

obligation which binds the conscience. (2 R. C. L., 745.) The defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience, is not entitled to recover in whole or in part. *Meyers* v. *Hurley Motor Co.* (273 U. S., 18), and also the following excerpt from section 274(b) of the Judicial Code (section 398, U. S. C. A.):

> In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea.

It is, therefore, the opinion of this office that the claim for refund should be rejected.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

TITLE XI.—GENERAL ADMINISTRATIVE PROVISIONS.

SECTION 1106.—FINAL DETERMINATIONS AND ASSESSMENTS.

ARTICLE 1341: Final determination and assessment of tax or penalty. X–37–5204 Ct. D. 381

FEDERAL TAXES—REVENUE ACT OF 1926—DECISION OF COURT.

SUIT—JURISDICTION—CLOSING AGREEMENT.

Where a taxpayer and the Commissioner have executed a "closing agreement" pursuant to section 1106(b) of the Revenue Act of 1926, subdivision 2 of that subsection bars a suit to recover a tax covered by the agreement (except upon a showing of fraud, or malfeasance or misrepresentation of fact materially affecting the determination or assessment made), even though the tax was assessed after the expiration of the period of limitation therefor.

UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

Jack Dubinsky, plaintiff, v. *Louis J. Becker, Collector of Internal Revenue for the First District of Missouri, defendant.*

[February 25, 1931.]

OPINION.

CHAS. B. DAVIS, Judge: The plaintiff has instituted this action wherein he seeks to recover from the defendant $13,644.26, with interest, the same being the amount of certain additional taxes and interest paid by plaintiff covering the year of 1922. It is asserted that plaintiff was not liable for the payment of these taxes because they were barred by the statute of limitations and were collected without authority, and by means of threat of distraint and under duress.

The answer admits the payment of the taxes and alleges that on November 7, 1927, plaintiff by executing a waiver extended the time for the assessment of taxes for the year 1922 (and 1923) to December 31, 1928, and on March 12, 1928, after payment of the taxes, signed an agreement as to final determina-

tion and assessment of taxes in accordance with section 1106(b) of the Revenue Act of 1926.

The parties waived a jury and the cause was tried before the court.

FINDINGS OF FACT.

1. On March 15, 1923, plaintiff, Jack Dubinsky, a resident of the city of St. Louis, Mo., filed his income tax return for the calendar year 1922, disclosing thereon a net income of $11,645.92 and a tax liability of $588.59, which tax was duly paid by the plaintiff.

2. Subsequent thereto and during the month of September, 1924, the Commissioner of Internal Revenue caused to be assessed against the plaintiff an additional tax of $30, which additional tax was paid by the plaintiff together with interest of $2.10, and the legality of neither the assessment nor the collection of the tax and interest as aforesaid is herein disputed.

3. Subsequently, during the months of October and November, 1927, the Commissioner of Internal Revenue caused an examination to be made of the plaintiff's books of account and records for the calendar years 1922 to 1926, inclusive, in connection with the income tax returns filed by the plaintiff for said years, and as a result thereof the said Commissioner determined the plaintiff's total tax liability including interest for the said years 1922 to 1926, inclusive, to be $25,262.45. Of the said amount of $25,262.45, the said Commissioner determined that the sums of $10,819.19 and $2,825.07 represented additional tax and interest, respectively, owing by the plaintiff on account of the returns filed by him for the calendar year 1922; that the balance of said amount, $11,618.19, represented in part original taxes previously assessed against and paid by the plaintiff and in part additional taxes and interest then unassessed but owing by the plaintiff on account of the years 1923 to 1926, inclusive; and no part of the last mentioned amount of $11,618.19 is in controversy in plaintiff's suit; that the sums of $10,819.19 and $2,825.07 representing additional tax and interest determined by the Commissioner of Internal Revenue to be due from the plaintiff for the year 1922 as aforesaid were assessed by the Commissioner against the plaintiff on January 14, 1928, as was also the balance of the total tax liability, including interest, in the amount of $11,618.19, representing additional taxes and interest as determined by the said Commissioner with respect to plaintiff's tax liability for the years 1923 to 1926, inclusive.

4. The asserted additional tax for the year of 1922 arose by reason of the following facts: Prior to the year 1922 plaintiff and his brother had organized a corporation to engage in the real estate business. This corporation had acquired a number of pieces of real estate located in the city of St. Louis, Mo. In the year 1922 plaintiff and his brother decided to abandon the real estate business, dissolve the corporation, and distribute its assets in kind. Each stockholder took one-half of the real estate. The income, if any, arising from this transaction was not reported by plaintiff in his tax return for the year 1922, because plaintiff thought that the division of the property of the corporation between the two stockholders constituted no taxable income.

5. Upon the discovery of these facts the revenue agent stated to the bookkeeper of plaintiff that his failure to report this income constituted fraud on the part of plaintiff, and not only subjected plaintiff to the payment of the fraud penalties of 50 per cent, but, in addition thereto, subjected him to the possibility of an indictment by the Federal grand jury. This statement was thereafter repeated to plaintiff by the revenue agent in the presence of the bookkeeper.

6. Plaintiff, on November 7, 1927, signed a waiver extending the time for assessment of any additional taxes for years of 1922 and 1923 to December 31, 1928.

7. On February 10, 1928, the plaintiff paid to the defendant the sums of $10.819.19 and $2,825.07, representing the additional tax and interest assessed against the plaintiff on account of the return filed by the plaintiff for the calendar year 1922.

8. On February 10, 1928, the plaintiff likewise paid the defendant the balance of $11,618.19 as additional taxes and interest determined due from 1923 to 1926, inclusive.

9. On February 9, 1928, the plaintiff made a written application to the Commissioner of Internal Revenue for the execution of an agreement pursuant to which the determination and assessment of the taxes and interest for the

years 1922 to 1926, inclusive, should be final and conclusive as provided by section 1106(b) of the Revenue Act of 1926.

10. Subsequent to the payment of the tax on the 12th day of March, 1928, pursuant to the provisions of section 1106(b) of the Revenue Act of 1926, an agreement as to assessment and final determination of the tax was entered into between the taxpayer and the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, under which it was mutually agreed that the determination and assessment by the Commissioner of Internal Revenue should be final and conclusive.

11. Thereafter, a claim for refund in the sum of $10,819.19 was filed by the plaintiff on February 19, 1929. Said claim for refund was rejected by letter dated March 25, 1929.

12.

Form 866—Revised June, 1927.

IT:C:P:2-EW

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE.

AGREEMENT AS TO FINAL DETERMINATION AND ASSESSMENT OF TAX.

THIS AGREEMENT, made in duplicate and in pursuance of section 1106(b) of the Revenue Act of 1926, by and between Jack Dubinsky, a taxpayer residing at, or having its principal office or place of business at 327 Wainwright Building, St. Louis, Mo., and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury:

Whereas, there has been a determination and assessment of twenty-five thousand two hundred sixty-two dollars and forty-five cents ($25,262.45), as the amount of tax or tax, interest and penalty due the United States of America from said taxpayer on account of income for the calendar years 1922, 1923, 1924, 1925, and 1926;

Whereas, said taxpayer has paid the amount of tax or tax, interest and penalty so determined and assessed, together with all accrued interest or penalty demanded without assessment; and

Whereas, said taxpayer has accepted any abatement, credit, or refund based on such determination and assessment, and has accepted the adjustment made with respect to any and all claims filed in connection herewith;

Now, this agreement witnesseth, that said taxpayer and said Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, hereby mutually agree that such determination and assessment shall be final and conclusive.

In witness whereof, the above parties have subscribed their names to these presents in duplicate.

Signed this 27th day of February, 1928.

JACK DUBINSKY, *Taxpayer.*

Signed this 9th day of March, 1928.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved this 12th day of March, 1928.

HENRY HERRICK BOND,
Acting Secretary of the Treasury.

THE STATUTES.

Section 1106(b) of the Revenue Act of 1926 (44 Stat., 113):

"If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States."

Section 606, Revenue Act 1928 (45 Stat., 874):

"(*a*) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period ending prior to the date of the agreement.

"(*b*) *Finality of agreements.*—If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

"(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

"(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded."

Section 1106(b) of the Revenue Act of 1926 is repealed, effective on the expiration of 30 days after the enactment of this Act, but such repeal shall not affect any agreement made before such repeal takes effect.

"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 limitations 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."

The facts out of which the additional assessment for the year 1922 arose constituted a taxable transaction. (*Hellmich, Collector*, v. *Hellman*, 276 U. S., 233 [T. D. 4217, C. B. VII–2, 238].) But in fairness to the taxpayer it should be stated that this had not definitely been determined in November, 1927, because the district court had ruled to the contrary and this decision was affirmed by the court of appeals in March, 1927, in *Hellmich, Collector*, v. *Hellman* (18F. (2d), 239). This decision was reversed by the Supreme Court in the above-mentioned case in February, 1928. Consequently, the tax was properly assessable and justly owing except for the fact that the period during which it might be assessed may have expired.

The effect of the agreement of November, 1927, extending the time for making the assessment seems to be immaterial to the issue here presented. The plaintiff asserts that it is without legal effect, and the defendant makes no effort to support it. It is conceived to be not involved.

The plaintiff bases his right to recover upon section 607 of the Revenue Act of 1928, above quoted. This Act provides in substance that a tax paid or assessed after the expiration of the period of limitation shall be refunded, whether the payment was made before or after the enactment of the statute. The tax in question was paid before the passage of the Act.

The closing agreement executed in March, 1928, was entered into under the authority of section 1106(b) of the Revenue Act of 1926 (44 Stat., 113). It provided in substance that when taxes have been paid the taxpayer and the Commissioner may agree in writing, subject to approval, that the determination and assessment shall be final and conclusive; that when such an agreement has been entered into the matter shall not be reopened, and no action shall be brought to annul, modify or set aside such determination, except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment.

At the time the Act of 1928, above referred to, was passed, the statute under which the closing agreement was executed was repealed and the substance thereof was reincorporated in a new enactment, section 606, Revenue Act 1928 (45 Stat., 874). This statute provided, paragraph (c), that the repeal should not affect any agreement made under the former Act.

This is regarded as important because at the time the statute upon which plaintiff relies was passed, Congress had directly before it the statute providing for the execution of closing agreements. The statute permitting the recovery

of taxes paid after the period of limitation has expired, follows the statute providing for the making of final agreements. It is thus apparent that the two statutes should be read together if possible. While this is the rule of construction to be followed in any case, the circumstances here present more clearly indicate the duty.

The statute clearly points out the instances in which the agreement may be questioned. They are for fraud, malfeasance and misrepresentation. It does not say that such an agreement may be overturned upon a showing that a part, or all, of the taxes paid were assessed after they were barred by limitation. If it had been so intended the legislature would have said it. It didn't. So there can be no recovery unless the agreement is vulnerable for one or more of the above reasons.

It is said that it was fraud, malfeasance and misrepresentation for the collector to inform the taxpayer that the Government had available in the event of tax evasion certain civil and criminal remedies. It does have, and while every person is presumed to understand that, yet, it is difficult to see wherein it is any sort of species of wrongdoing for a public officer to call the taxpayer's attention to the situation. It would seem that it was his duty so to do. Moreover, at the time of the conversation of which complaint is made, November, 1927, the tax item for the year of 1922 was not the only matter under consideration. There were also the additional taxes determined for the years of 1923, 1924, 1925, and 1926. While it may be that the remedies of the Government with reference to the first item were not the same as they were in the items accruing in the later years, yet, fraud or misrepresentation is hardly to be imputed because a deputy collector failed to clearly state the remedy as to each particular item.

The effect of the statute of limitations was not so clear at the time of these negotiations as it was after the passage of the Act of 1928. There was also an open question as to what period of limitation should be applied in a given case. The four years' statute was not universally applicable. In the event of a willful attempt to evade tax liability, as well as in other cases, the assessment might be made at any time. These considerations must be kept in mind in an effort to characterize the conversation or conduct of the revenue officers.

This agreement was for the mutual benefit of both parties. It closed the plaintiff's accounts for the period of 1922–1926 from further examination by the defendant, thereby shortening the time that they were otherwise subject to scrutiny. These records that had been gone over three times by the Government were now finally closed. It can not be said that there was no consideration for the payment of the taxes justly owing, but assessed out of time, for, notwithstanding the statute, there is a moral obligation to pay honest debts. (*Shepherd* v. *Thompson*, 122 U. S., 231.) The fact that a subsequent law made one item embodied in the settlement otherwise recoverable, does not set aside the agreement. The very purpose of the Act was to close controversies, and end negotiations, regardless of subsequent legislation, court decisions, Department rulings or other situations, which might occasion the reopening of the matter. (*Aetna Life Insurance Co.* v. *Eaton*, 43 F. (2d) (C. C. A.), 711 [Ct. D. 225, C. B. IX–2, 263], *Wisconsin National Life Insurance Co.* v. *United States*, 42 F. (2d) (Ct. Cl.), 316 [Ct. D. 213, C. B. IX–2, 260], *Great Southern Life Insurance Co.* v. *United States*, 42 F. (2d) (Ct. Cl.), 319, *Ely & Walker Dry Goods Co.* v. *United States*, 34 F. (2d) (C. C. A. 8), 429 [Ct. D. 102, C. B. VIII–2, 343].)

CONCLUSIONS OF LAW.

1. The closing agreement of March, 1928, was executed voluntarily by the parties in accordance with the statute.
2. The evidence does not disclose fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment made.
3. The agreement is binding on both parties.
4. The plaintiff is not, under the evidence and the law, entitled to recover.
5. The defendant is entitled to the judgment.

It may be so entered.

SECTION 1113.—LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. X-27-5130 Ct. D. 357

FEDERAL TAXES—REVENUE ACT OF 1926—DECISION OF COURT.

SUIT—LIMITATION—DISALLOWANCE OF CLAIM FOR REFUND—REOPENING OF CLAIM.

Treasury Decision 4235 [C. B. VII-2, 76] is a valid regulation in so far as it provides that "no reopening or application for reopening" of a claim for refund which has been disallowed "will extend the period within which suit must be brought, nor will a reconsideration of a claim be considered as a reopening." That Treasury decision having been effective when the taxpayer requested a reopening of his claim, the reopening or reconsideration of the claim, if any, does not effect an extension of the period of two years after the disallowance of the claim within which a suit must be brought as provided in section 1113(a) of the Revenue Act of 1926.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

E. L. Heebner, plaintiff, v. *United States of America, defendant.*

[March 26, 1931.]

OPINION.

PATTERSON, D. J.: The action is to recover excess-profits tax paid by the plaintiff on June 12, 1923. It was commenced on April 18, 1930. The defendant moves to dismiss the complaint on the ground that the action is barred by limitation. Under section 1113 of the Revenue Act of 1926 (U. S. C. A., Title 26, section 156), no suit may be brought to recover any internal revenue tax more than five years after payment, unless the claim has been disallowed and suit is brought within two years after disallowance of the plaintiff's claim for refund.

The plaintiff filed claim for refund on June 9, 1927. By letter dated February 25, 1928, the Commissioner of Internal Revenue notified him that the claim would be rejected and that the rejection would officially appear on the next schedule to be approved by the Commissioner. The rejection was accordingly listed on the schedule approved March 9, 1928. The plaintiff on October 29, 1928, filed a brief requesting a reopening of the matter. The Commissioner declined to change his rulings, and so notified the plaintiff in a letter dated April 9, 1929. This letter, setting forth briefly the view of the facts taken by the Commissioner, and stating that the tax had been correctly computed, concluded: "The conclusions expressed in Bureau letter dated February 12, 1923, are therefore affirmed." The plaintiff then filed a second claim for refund covering the same tax, and on February 28, 1930, the Commissioner informed him by letter of the forthcoming rejection of this claim.

The significant date here is March 9, 1928, when the original claim for refund was formally disallowed. The 2-year period then began to run and no further notice to the plaintiff was necessary. (*United States* v. *Michel,* decided by the Supreme Court on February 24, 1931 [Ct. D. 310, C. B. X-1, 297].) The time to commence suit therefore expired on March 9, 1930, and an action brought on April 18, 1930, was too late.

The plaintiff does not urge that a new lease of life was won by the second claim for refund and its rejection. He does contend, however, that the first claim for refund was reopened and was not finally rejected until April 9, 1929. Support for this contention may come by analogy from the rule that a motion for a new trial or a petition for rehearing, if seasonably made, extends the time for application for appeal until the motion or petition is disposed of. (*Aspen Co.* v. *Billings,* 150 U. S., 31; *Kingman* v. *Western Mfg. Co.,* 170 U. S., 675.) But it seems to me that the result here is different. A regulation of the Treasury Department which took effect six days before the plaintiff filed

his brief for reconsideration of the claim for refund provides that no application for reopening will extend the period within which suit must be brought, and that reconsideration of a claim by the Commissioner will not be deemed a reopening. Article 1257, effective October 23, 1928. It will be noted that this regulation is applicable only to cases where claims have already been definitely disallowed by the Commissioner. It is not repugnant to any statute, so far as appears, and in my opinion it is a valid and proper regulation, serving the useful purpose of removing uncertainty as to the effect of an application for reconsideration of a rejected claim. The plaintiff argues that the words used in the Commissioner's letter of April 9, 1929, indicate that the claim for refund was reopened and reconsidered on the merits. It is not necessary to pass upon this point, because under the controlling regulation this communication to the plaintiff could not have the effect claimed for it by the plaintiff. It follows that the plaintiff, when he filed his application for reconsideration, was put on notice that the period of limitations two years from March 9, 1928, continued to run without interruption.

The complaint will therefore be dismissed.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. X–30–5152 Ct. D. 363

INCOME TAX—REVENUE ACT OF 1926—DECISION OF COURT.

1. SUIT—LIMITATION—CLAIM FOR REFUND—SUFFICIENCY.

A claim by a life insurance company for a refund of an overpayment of tax made on the specific ground that the reserve funds at the beginning and the end of the taxable year were greatly in excess of the amounts reported by the company and determined by the Commissioner and that therefore the 4 per cent of the mean of these reserve funds should be increased by a certain amount which would increase the deduction provided by section 245(a)2 of the Revenue Act of 1921 and result in an overpayment of a specified sum does not constitute a claim for refund under section 3226 of the Revised Statutes, as amended, which will support a suit to recover a tax based on the ground that the deduction of 4 per cent of the mean of the reserve funds therein allowed should not be abated by the amount of interest received from tax exempt securities. The claim for refund which that section makes prerequisite to a suit relates to the claim which may be asserted by the suit.

2. SAME—SUFFICIENCY OF AMENDED CLAIM FOR REFUND.

A claim for a refund of an overpayment of tax filed within the prescribed period of limitation may not after its disallowance be amended or enlarged after the prescribed period has expired so as to include an entirely different ground from that asserted in the original claim, and thus effect a postponement of the time within which a suit must be brought as provided in section 3226 of the Revised Statutes, as amended.

COURT OF CLAIMS OF THE UNITED STATES. No. K–377.

The Mutual Life Insurance Co. of New York v. *The United States.*

[May 4, 1931.]

OPINION.

LITTLETON, Judge, delivered the opinion of the court.

Plaintiff instituted this suit August 29, 1929, to recover $372,814.97 with interest on $185,908.05 from September 14, 1923, $185,908.04 from December 14, 1923, and on $998.88 from December 21, 1926, representing an overpayment of income tax for 1922.

Defendant demurs to the petition on the ground, first, that it fails to state facts which constitute a cause of action against the United States, and secondly, that the facts stated do not constitute a cause of action within the jurisdiction of this court.

The question is the sufficiency of a claim for refund filed August 2, 1927.

Plaintiff is a New York corporation engaged in the business of life insurance. In March, 1923, it filed an income tax return as a life insurance company for the calendar year 1922, under the Revenue Act of 1921, showing a total tax liability of $743,632.21, which was paid in four installments of $185,908.06 on March 15 and June 15, 1923, $185,908.05 on September 14, 1923, and $185,908.04 on December 14, 1923. On September 21, 1926, plaintiff paid to the collector an additional assessment for 1922 of $5,473.31, together with interest thereon in the amount of $998.88. During 1922 plaintiff received interest from tax-exempt securities amounting to $4,798,178.66. In its return for that year, in computing the deduction claimed under section 245(a)2 of the Revenue Act of 1921, it followed the provisions of that section and the instructions of the Commissioner of Internal Revenue and subtracted from 4 per centum of the mean of its reserve fund required by law and held at the beginning and at the end of the taxable year said amount of tax-exempt interest, as shown on the return.

August 2, 1927, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of $5,799.58, or such greater amount as might be legally refundable, of income tax paid for 1922. This claim is attached to the petition as Exhibit B and is made a part of this finding by reference. The basis of the claim was that for 1922 plaintiff had understated the 4 per cent of the mean of the reserve funds by $46,396.64 resulting in an overpayment of tax in the amount of $5,799.58. In this claim it was stated in part that "Under section 245(a) (1) and (2) of the Revenue Act of 1921, in arriving at its net income, taxpayer is entitled under said subdivision (a) (1) to deduct from its gross income the amount of interest received by it during the taxable year on tax-exempt securities, and under said subdivision (a) (2) to deduct 'an amount equal to the excess, if any, over the deductions specified in paragraph (1) of this subdivision, of 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year,' * * *." And, further, as the statement of facts relied upon by plaintiff in support of the claim it alleged an understatement of its reserves held at the beginning and the end of the taxable year 1922 "making 4 per cent of the mean of the reserve funds held at the beginning and end of the year 1922, $23,142,642.35, as reported by taxpayer in said return, instead of $23,189,038.99, 4 per cent of the mean of said reserves as actually held by taxpayer at the beginning and end of said taxable year, making a difference in the deduction under section 245(a)2 of the Revenue Act of 1921 of $46,396.64, and an overpayment by taxpayer of income tax for said taxable year 1922 of $5,799.58." This claim for refund was considered and wholly disallowed and rejected by the Commissioner of Internal Revenue on September 3, 1927.

On June 4, 1928, the Supreme Court of the United States in *National Life Insurance Co.* v. *United States* (277 U. S., 508 [T. D. 4206, C. B. VII-2, 296]) decided that the provisions of section 245(a)2 of the Revenue Act of 1921 that only the excess of the 4 per cent of the mean of the reserve funds over the amount of tax-exempt interest might be deducted was unconstitutional. By reason of this decision the Commissioner of Internal Revenue shortly thereafter voluntarily refunded to the plaintiff the amount of $5,473.31, being the additional assessment paid on September 21, 1926, together with interest of $682.89. Checks for these amounts were received by plaintiff November 17, 1928.

Shortly after the commencement of this suit, the Commissioner refunded to plaintiff the further sum of $998.88, being the amount of interest collected on September 21, 1926, upon the additional assessment aforesaid.

On December 27, 1928, plaintiff filed with the Commissioner of Internal Revenue a statement concerning its claim for refund filed August 2, 1927, which statement was based upon the decision in *National Life Insurance Co.* v. *United States*, supra, and requesting reconsideration of the refund claim and a further allowance to the extent of $371,816.09 in addition to the amount of $5,473.31 previously refunded. This statement is attached to the petition as Exhibit C and is made a part of this finding by reference. The additional amount which plaintiff requested the Commissioner to allow in view of the decision in the *National Life Insurance Co.* case represented the tax paid within four years prior to the date of the filing of the claim on August 2, 1927, over the amount which the Commissioner already had refunded. The Commissioner did not reopen the claim of August 2 or reconsider his action denying it.

As a result of the reduction of the 4 per centum of the mean of plaintiff's reserve funds for 1922 by $4,798,178.66, the amount of tax-exempt interest, in

computing the deduction allowed to it under section 245(a)2 of the Revenue Act of 1921, the plaintiff overpaid its income tax for 1922 in the amount of $599,772.33.

From the foregoing facts it appears without dispute that plaintiff overpaid its tax for 1922 in an amount in excess of that which it now seeks to recover. Plaintiff insists that, since its claim for refund of August 2, 1927, related to the computation of its reserve funds required by law and set forth facts specifically or by reference to the returns for 1921 and 1922 then in possession of the Commissioner showing the amount of said reserve funds, the amount of tax-exempt interest and, also, the 4 per cent of the mean of the reserve funds, it was a sufficient claim under the statute and the regulations to entitle the plaintiff to the refund of the overpayments made within four years prior to the filing thereof because of the decision in the *National Life Insurance Co.* case; that, if there was any insufficiency in the claim, it was a matter of form which was corrected by the statement of December 27, 1928, and that the Commissioner was authorized and required to make the refund under said claim and since he refused to do so this suit may be maintained to recover the full overpayment made within four years prior to August 2, 1927.

The claim of August 2, 1927, was made on the specific ground that the reserve funds at the beginning and the end of the taxable year were greatly in excess of the amounts reported by the taxpayer and determined by the Commissioner and that, therefore, the 4 per cent of the mean of these reserve funds should be increased by $46,396.64, which would increase the deduction provided in section 245(a)2 of the 1921 Act and result in an overpayment of $5,799.58, refund of which was demanded. That claim can not, therefore, be construed as a claim for refund on the basis of deduction of the full 4 per cent of the mean of the reserve funds amounting to $4,798,178.66. In *United States* v. *Felt & Tarrant Mfg. Co.* (283 U. S., 269, decided April 13, 1931 [Ct. D. 336, C. B. X–1, 431]) the Supreme Court held that one object of the requirements with reference to filing a claim for refund is to advise the appropriate officers of the demands or claims intended to be asserted so as to insure an orderly administration of the revenue; that the claim which the statute makes prerequisite to a suit obviously relates to a claim which may be asserted by suit and that quite apart from the provisions of the regulations the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which suit is brought. Although the claim of August 2 stated certain facts with reference to the reserve funds at the beginning and end of the taxable year from which the 4 per cent of the mean of these reserve funds could be determined, they were stated, considered, and acted upon by the Commissioner for an entirely different purpose than that upon which the plaintiff now relies. No claim for refund of the nature asserted in this suit was ever made to the Commissioner until the application for reconsideration long after he had rejected the claim and after the statute of limitation for filing a claim had expired. The Commissioner declined to reconsider his action rejecting the claim. A claim that has been rejected may not be amended after the statute of limitation has expired. (*Sugar Land Railway Co.* v. *United States*, decided April 6, 1931, by this court.) To hold that a claim for refund made on a specific ground may, after it has been considered and rejected, be amended or enlarged so as to include an entirely different ground, and to claim a much larger refund than that asserted in the original claim, would be to permit an indefinite postponement of the limitation for bringing suit and would nullify the provisions of the statute as to the time within which claims may be filed and the time within which suit may be brought. (*Jonesboro Grocer Co.* v. *United States*, 66 C. Cls., 320–327 [Ct. D. 84, C. B. VIII–2, 258].) The claim of August 2, 1927, did not fulfill the requirements of the statute. The question here involved was not brought to the attention of the Commissioner by a timely claim, and he took no action upon it. "Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.' (*Rock Island R. R. Co.* v. *United States*, 254 U. S., 141, 143 [Ct. D. 2, C. B. 4, 342].)" (*United States* v. *Felt & Tarrant Mfg. Co.*, supra.)

The demurrer is sustained, and the petition is dismissed. It is so ordered.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. X–36–5196 Ct. D. 379

FEDERAL TAXES—REVISED STATUTES—DECISION OF COURT.

SUIT—CLAIM FOR REFUND—SUFFICIENCY OF CLAIM.

A claim for a refund of a tax based on a claim for additional depreciation on buildings and machinery does not constitute a claim for refund under section 3226 of the Revised Statutes as amended which will support a suit to recover a tax based on the ground, set forth in a claim for refund filed after the expiration of the period of limitation for filing the same, that the taxpayer is entitled to depreciation of a contract for purchase of bleached sulphite.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Bryant Paper Co., a Michigan Corporation, plaintiff, v. *Marie Sprague Holden, Executrix of the Estate of Charles Holden, Deceased, formerly United States Collector of Internal Revenue for the Fourth Collection District of Michigan, defendant.*

[April 21, 1931.]

OPINION.

RAYMOND, J.: This action is brought for the recovery by plaintiff of certain income taxes paid by it for the year 1922. The alleged overpayment results from the allowance in 1930 by the Commissioner of additional depreciation for the years 1921 and 1922 upon completion of his audit for those years. The important facts have been stipulated by the parties. The precise question presented is whether within the time provided by law plaintiff filed a claim for refund which was sufficient to be the required preliminary to the maintenance of suit. It is stipulated that if such claim were filed then plaintiff is entitled to judgment in the amount of $7,386.36 with interest. Defendant insists that no claim for refund upon the ground now set forth in this action was filed by plaintiff until April 30, 1929, which was more than four years after the payment of the last installment of taxes for the year 1922, this payment being made on December 13, 1923. On the other hand, plaintiff contends that a claim for refund stating the ground upon which this action is based was filed within the statutory period of four years and, alternatively, that if the claim for refund as originally filed was not sufficient it became so upon amendment by claim filed on April 30, 1929, and within the time and manner then provided therefor by the regulations.

The difference between the amount of taxes paid and the amount claimed by plaintiff to be correct arises out of additional depreciation allowed by the Commissioner in his final audit for the years 1921 and 1922 on the so-called Nashwaak contract. It is important to consider the precise terms of the several claims filed.

In the claim for refund filed March 14, 1927, plaintiff stated that its application should be allowed for the following reasons:

"Adjustment of depreciation for prior years *now being considered* by the unit may, when carried forward, result in additional deductions for 1921 and 1922, and loss on Home Life Publishing Co. may be determined to be allowable in 1921 or in 1922 rather than in an earlier year as claimed. This claim is filed for protection under the statute of limitations."

The claim for refund filed October 13, 1927, alleges the following reasons for a refund:

"The details supporting this claim are contained in a protest submitted herewith dated October 26, 1927. The points involved are:

Additional depreciation—1921	$44,038.32
Additional depreciation—1922	21,733.14
Loss on Home Life Publishing Co.—1921	44,553.87
Loss on F. B. Mills Co.—1921	314.42
Loss on F. B. Mills Co.—1922	220.09
Total	110,859.84

"The foregoing items arise from giving effect to the contemplated treatment of these items as indicated by the Bureau of Internal Revenue in considering the years 1917–1920, inclusive."

Attached to said claim is a statement duly sworn to which reads:

"Reference is made to your letter dated October 12, 1927, bearing the above symbols, in which we are advised that the data presented in our claim for refund for the year 1922 filed on March 14, 1927, and the subsequent protest filed under date of June 8, 1927, were not sufficiently specific to form the basis of a redetermination of the tax liability for the year 1922. The following specific facts are submitted which we believe will enable you to make a proper adjustment.

"The points in question are three, namely:

"(a) A claim for additional depreciation.

"(b) A claim that the loss on the Home Life Publishing Co. charged off on the books in 1918 in the amount of $44,553.87 and disallowed as a deduction in that year by the Bureau, should be allowed as a deduction in the year 1921, in accordance with the attitude taken by the Bureau that it was not a definitely determined loss until a later year.

"(c) Allocation to the years 1921 and 1922 of a portion of the loss on the F. B. Mills Co. account, this allocation being approved by the Bureau in connection with the loss claimed on this account for the year 1918.

"The claim for additional depreciation arises from following the procedure, rates and depreciable cost determined by the Bureau with respect to buildings and machinery for the years 1917 to 1920, inclusive. The effect of applying the basis adopted by the Bureau is indicated in the attached schedule, in which it is shown that additional depreciation is allowable in the amounts of $44,038.32 and $21,733.14 for the years 1921 and 1922, respectively.

"In connection with the loss on the Home Life Publishing Co., the taxpayer has not acquiesced in the Bureau's treatment of this item as not being a proper deduction in the year 1918. The claim, therefore, with respect to this item is for the purpose of protecting the interests of the taxpayer should the present attitude of the Bureau be finally sustained.

"A revised claim to cover the refund which will result from the specific corrections cited herein is attached."

It is recognized that suit for recovery of income taxes must be based upon a ground asserted in the claim for refund. No indication appears in either of the claims for refund above referred to that plaintiff was basing his demand upon any allowance which might be made upon the contract for purchase of bleached sulphite from Nashwaak Pulp & Paper Co., Ltd. It is the contention of plaintiff however that the rule applicable to such cases requires only that the suit for recovery must be based upon a ground asserted in the claim for refund and that the claims above clearly set forth a demand for allowance upon the basis of additional depreciation for the years 1921 and 1923. Plaintiff therefore contends that additional depreciation having been set forth as the ground upon which the present suit is based that both the refund claims of March 14, 1927, and October 31, 1927, sufficiently set forth that ground, viz., additional depreciation. Examination of the stipulation and exhibits attached thereto convince the court that the only depreciation referred to therein related to that on buildings and machinery of plaintiff. Nowhere in the record is there any indication of claim made within the 4-year period for depreciation of the Nashwaak contract. While there is a trend toward more liberal interpretation in recent cases decided in the lower Federal courts (see Klein Federal Income Taxation, page 1647), no cases are found which seem to this court to abrogate the principles set forth in *Nichols* v. *United States* (7 Wallace, 122); *Maryland Casualty Co.* v. *United States* (251 U. S., 342); *Rock Island A. & L. R. Co.* v. *United States* (254 U. S., 141 [Ct. D. 2, C. B. 4, 342]); *Red Wing Malting Co.* v. *Willcuts* (15 F. (2d), 626 [T. D. 3980, C. B. VI–1, 225]); *Tucker* v. *Alexander* (15 F (2d), 356 [T. D. 3973, C. B. VI–1, 287]); and *Aladdin Co.* v. *Woodworth* (43 F (2d), 150). (See also *U. S.* v. *Felt & Tarrant Mfg. Co.*, U. S. Sup. April 13, 1931 [Ct. D. 336, C. B. X–1, 431].) It is possible that under the more liberal rules some courts may hold that a general claim based upon prospective additional allowance for depreciation may be sufficient. Where however as here the additional depreciation relied upon is specified it would appear to be

directly contrary to principles established in the foregoing cases to hold that a suit for recovery may be based upon an entirely different allowance for depreciation. The obvious purpose of the statute and of the regulations was to bring clearly before the Commissioner the precise ground upon which a claim for refund is based. It seems obvious that where, as here, plaintiff has in its claims for refund erroneously stated the precise nature of the depreciation allowance upon which it relies it can not be said that it has afforded the Commissioner an opportunity to correct errors. Such a claim affords less opportunity for consideration and correction than a statement in general terms because of its misleading nature. It is clear to the court that the present suit is not based upon the specific grounds stated in the claim for refund.

It is equally clear that the claim for refund filed April 30, 1929, which does set forth the Nashwaak contract as the element for additional depreciation for which claim for refund is made, can not be considered for the reason that it was filed after the expiration of the statute of limitations and that the ground then claimed was claimed for the first time. Treasury Decision 4265 [C. B. VIII–1, 110], upon which plaintiff relies, provides:

"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."

It follows that plaintiff may not recover in this case. Findings of fact and conclusions of law in conformity with the stipulation on file and this opinion may be presented for signature, after which judgment will be entered in favor of defendant.

ARTICLE 1351: Suits for recovery of taxes erroneously collected.

REVENUE ACT OF 1926.

Ground stated in formal claim filed after limitation period not stated in informal claim filed within limitation period. (See Ct. D. 384, page 274.)

ARTICLE 1351: Suits for recovery of taxes erroneously collected. X–52–5335 Ct. D. 433

INCOME AND EXCESS PROFITS TAXES—REVISED STATUTES—DECISION OF COURT.

SUIT — CLAIM FOR REFUND — SUFFICIENCY OF CLAIM — TOLLING STATUTE.

A claim for refund of a tax stating solely that the excess profits tax should be assessed under the provisions of sections 327 and 328 of the Revenue Act of 1918 does not constitute a claim for refund under section 3226 of the Revised Statutes as amended which will support a suit based on the ground, set forth in claim for refund filed after the expiration of the period of limitation for filing the same, that the value of certain material long on hand should have been added to invested capital. This conclusion is not affected by the fact that an examination and audit of the taxpayer's books would have shown the fact of the existence of the material and that it would have been the duty of the Commissioner to add this item in computing invested capital. Nor can the conclusion of the Commissioner that had the value of the material been added to invested capital the taxpayer's taxes would be decreased by the amount sued for operate to tall the statute of limitations.

DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

Bemis Bros. Bag Co., plaintiff, v. *United States of America, defendant.*

[September 23, 1931.]

OPINION.

FARIS, J.: This is an action brought by plaintiff to recover from the defendant a certain sum of money alleged to have been overpaid on taxes. The collector involved being out of office, the suit was brought directly against the United States of America.

The case was submitted on an agreed statement of facts, wherein the single question up for judgment was agreed to be whether plaintiff, in its application for a refund (or ever before the statute of limitations ran) stated the *facts* or *grounds* upon which it bottomed its right to a refund. Much controversy is waged over whether the facts or the grounds are to be stated. The statute relied on seems to use the word *facts* as the things which must be stated in such an application; while the courts (perhaps deeming the words, in a way, synonymous) rather uniformly use the word *grounds*, as the things which must be set up as a condition precedent to relief.

Plaintiff first specifically asked for a special assessment as the ground for a reduction of the taxes for the years of 1918 and 1919. This was finally refused. After the statute of limitations ran against plaintiff, it contended, and now contends, that the value of certain materials in its printing plant, long on hand and used by it, should have been added to capital, and which value when added would have reduced its taxes for the years 1918 and 1919 by something like $23,000, for which, in this action, it prays judgment.

Plaintiff further contends that, even if the genus special assessment does not include the species addition to capital on account of printing material, yet, the Commissioner of Internal Revenue waived the point by an examination of the facts in 1926.

True it seems to be, that the Commissioner about the time stated reached the conclusion that had this printing material been added to invested capital it would so far have increased the latter as that the taxes exacted for 1918 and 1919 would have been decreased by the amount set out in the stipulation, namely, $23,000. Having reached this conclusion, however, the Commissioner then denied the claim on the ground that the statute of limitations had run prior to the time at which the present claim was made, as now made.

I take leave to doubt if any ordinary officer of the Government may waive the statute of limitations so as to render the Government liable (*Finn* v. *United States*, 123 U. S., 227; *Tucker* v. *Alexander*, 275 U. S., 228 [T. D. 3973, C. B. VI–1, 287]) or bring about by action or inaction a state of facts which would toll the statute of limitations. The case of *Tucker* v. *Alexander*, supra, was a case wherein the waiver enforced by the court was made before the statute ran, not afterwards, as here. I think there was no waiver here. What in effect the Commissioner did was to ascertain how much plaintiff would be entitled to if it did sue. The information has its use here in this action, at any rate.

The *facts* or *grounds* stated by plaintiff in its application for a refund, are that, "The excess profits tax and the war profits tax against this company for the year 1918 should be assessed under the provisions of sections 327 and 328 of the Revenue Act of 1918."

It is contended, however, that an examination and audit of plaintiff's books would have shown the fact of the existence of the printing materials, and thereupon, under the law, it would have been the duty of the Commissioner to add this item to invested capital. Obviously, the facts or grounds above recited give no hint of this present contention. Whether the statute means facts, as it says, or grounds, as the courts say, I think it clear that it means more than to say, as the contention of plaintiff in effect is, that "facts should be stated in such wise that other facts being deduced, or found on investigation, relief may be accorded." Especially would this seem so in the light of the fact that it has been said that "meticulous compliance by

the taxpayer with the prescribed conditions must appear before he may recover" (*Maas & Waldstein Co.* v. *United States*, 283 U. S., 583 [Ct. D. 353, C. B. X–1, 433!]; *Lucas* v. *Pilliod Lumber Co.*, 281 U. S., 249 [Ct. D. 266, C. B. IX–2, 396]).

It would have been easy to say that the ground of relief was that invested capital should have been, but was not, increased by the addition of the value or worth of printing material on hand and owned.

I do not think the facts set out in the application fairly embrace the facts now relied on; hence, the judgment will be for defendant, that it go hence and recover its costs.

SECTION 1114.—PENALTIES.

ARTICLE 1361: Penalties.

REVENUE ACT OF 1926.

Determination of rights of person summoned under section 1104, Revenue Act of 1926 as amended by section 618, Revenue Act of 1928, to refuse to testify before prosecution for willful failure to supply information. (See Ct. D. 424, page 192.)

TITLE XII.—GENERAL PROVISIONS.

SECTION 1208.—INSTALLMENT SALES.

REVENUE ACT OF 1926.

Sale by contract with subsidiary and separate contract with parent granting option to purchase oil and gas income certificates of subsidiary. (See Ct. D. 407, page 233.)

INCOME TAX RULINGS.—PART III.

REVENUE ACT OF 1924.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 201.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 1541: Dividends. X–39–5217
Ct. D. 387

INCOME TAX—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

1. DIVIDENDS—DISTRIBUTION—PROFITS ACCUMULATED SINCE FEBRUARY 28, 1913—PAID-IN SURPLUS.

Where a corporation at the time distributions to its stockholders are made has on hand earnings or profits accumulated since February 28, 1913, the distributions made by it are made out of such earnings or profits to the extent thereof and are dividends to such extent within the meaning of section 201(a) of the Revenue Acts of 1921 and 1924. Such distributions are not distributions in liquidation under subdivision (c) of those sections, although the directors intend or understand that they are distributing a part of the paid-in surplus of the corporation pursuant to resolutions of the directors.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (18 B. T. A., 795) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT. OCTOBER TERM, 1930.—No. 2550.

William H. Leland et al., petitioners for review, v. *Commissioner of Internal Revenue.*

Appeal from Board of Tax Appeals.

Before BINGHAM, ANDERSON, and WILSON, JJ.

[June 10, 1931.]

OPINION.

BINGHAM, J.: This is a petition to review decisions or orders of the Board of Tax Appeals in three different matters which were consolidated and brought here as a single case, as each involved the same question. The petition questions the determination of the Board of Tax Appeals of the income taxes of William H. Leland for the years 1922 and 1924, and of Albert G. Gifford for the latter year. The sums upon which the income taxes for these years were assessed were distributions made in the respective years by the Leland-Gifford Co. to Leland and Gifford, of which they and one Nikoloff were the sole stockholders, Gifford and Leland each owning a 5/12 interest and Nikoloff a 2/12 interest in the outstanding shares of the corporation.

The statutes involved are section 201 (a), (b), and (c) of the Revenue Act of 1921 (42 Stat., ch. 136, p. 227) and section 201 (a), (b), and (c) of the Revenue Act of 1924 (43 Stat., ch. 234, p. 253).

It appears that, for a number of years prior to January 1, 1921, the two petitioners and Nikoloff conducted a business at Worcester, Mass., as partners, in which Gifford and Leland each owned a 5/12 interest and Nikoloff 2/12; that the partnership was successful and accumulated a large capital surplus; that during the years of the partnership each partner reported his distributive share of the profits in his tax return and paid the tax thereon, whether such profits were distributed or not; that on January 1, 1921, the three partners organized a Massachusetts corporation under the name of Leland-Gifford Co. with an authorized capital stock of $500,000, represented by 5,000 shares of a par value of $100 each; that only 4,800 shares were issued to subscribers; that Gifford and Leland subscribed for 2,000 shares each, or 10/12 of the stock issued, and Nikoloff subscribed for 800 shares, or 2/12 of the stock issued; that the stock was paid for by the partners transferring to the corporation certain real estate, which included two mill buildings and about 2¼ acres of land, for 1,750 shares, and machinery and equipment for 3,050 shares; that the partnership had other quick assets such as merchandise, cash, accounts receivable, securities and the like, of the value of $861,875.48; that these assets were turned over to the corporation and were entered on its books as paid-in surplus, which was used in the business during the periods involved; that there was no formal bill of sale or conveyance of these liquid assets as there was of the land, buildings, machinery and equipment, and no note or notes were given by the corporation evidencing the transaction.

During the year 1921 the corporation made a loss amounting to $61,360.21; in 1922 it made a profit of $266,606.97; in 1923 a profit of $210,287.37; and 1924 a profit of $19,785.86.

On December 28, 1922, the directors of the corporation passed the following resolution:

"It was voted to distribute the sum of $120,000 as a partial distribution of the paid-in surplus belonging to the company, which surplus was paid in by the original stockholders to the corporation immediately after said corporation was formed; said sum to be distributed among the stockholders in proportion to the number of shares held by them."

And on January 31, 1924, the directors passed a like resolution reading:

"It was voted to withdraw the sum of $480,000 as a partial distribution of paid-in surplus belonging to the company, which surplus was paid in by the original stockholders to the corporation immediately after said corporation was formed, said sum to be distributed among the stockholders in proportion to the number of shares held by them."

On the books of the corporation these distributions were credited to the surplus account and charged to the stockholders' accounts. Neither petitioner, in making his individual income tax returns for 1922 and 1924, returned any part of such payments. But the Commissioner, after auditing their income tax returns, held that the amounts distributed in the respective years to each petitioner were dividends, and, to the extent that the corporation had current earnings, these distributions were paid out of the current earnings and were taxable to the respective petitioners for the year in which they were received.

On December 31, 1922, when the $120,000 was distributed, the earnings of the corporation then available for distribution were $205,256.76, and on December 31, 1924, when the distribution of the $480,000 was made, the earnings of the corporation available for distribution were $315,329.99.

The by-laws of the company provided that the directors could declare dividends only from the surplus profits of the corporation, that is, not from paid-in surplus, which can only be regarded as an addition to capital; and the directors, in making the distribution of $120,000 in 1922 and of the $480,000 in 1924, did not intend or understand that they were distributing dividends but were distributing a part of the paid-in surplus or capital represented by the $861,875.48 of quick assets turned over by the stockholders in January, 1921; and the question is whether, notwithstanding what the directors intended and understood they were doing, the distributions were dividends out of the net earnings or profits of the corporation on hand at the time, by force of the provisions of section 201 (a) and (b) of the Revenue Acts of 1921 and 1924.

Section 201 (a) and (b) of the Revenue Act of 1921 provides:

"SEC. 201. (a) That the term 'dividend' when used in this title * * * means any distribution made by a corporation to its shareholders or members, whether in cash or in other property out of its earnings or profits accumulated since February 28, 1913. * * *

"(b) For the purpose of this Act every distribution is made out of earnings or profits, and from the most recently accumulated earnings or profits, to the extent of such earnings or profits accumulated since February 28, 1913; * * *."

In the Revenue Act of 1924 section 201 (a), (b) provides:

"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.

"(b) For the purpose of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits * * *."

While the language employed in these sections of the two Acts is not exactly the same, its meaning is the same, and that is that, so long as a corporation has on hand earnings or profits accumulated since February 28, 1913, and available for distribution, every distribution made by the corporation to its stockholders is made from the most recently accumulated earnings or profits, and in effect creates a conclusive presumption that the distribution was so made.

Such was the holding in *Douglas* v. *Edwards* (298 Fed., 229, 237 (2d Cir.), construing a similar provision in the Revenue Act of 1916, as amended in 1917. It was there said:

"We think it was the purpose of the statute that any distribution made to shareholders should be conclusively presumed to have been made from the most recently accumulated undivided profits or surplus, and that it was intended that the corporation should not be permitted to determine to what year or period or to what fund it would allocate such distribution."

This case was taken to the Supreme Court and is reported in 269 U. S., 204. In that court the decision of the circuit court of appeals, as to its holding that the distribution was a dividend from earnings or profits, was not questioned. The question reviewed was whether the dividends paid in 1917 should be deemed to have been paid out of earnings of that year or out of an accumulated surplus built up in 1916 and earlier years. The Court of Appeals for the Second Circuit had held that the dividends should have been treated as paid out of the 1916 surplus earnings, at the 1916 rate. As to this the Supreme Court held that the court of appeals erred; that the statute required the distribution to be made out of the most recently accumulated earnings, which were the earnings of 1917, and at the 1917 rate, which was much larger than the 1916 rate, the year 1917 being the year in which the distributions were made.

It thus appears that in that case the Court of Appeals for the Second Circuit held that it was conclusively presumed that a distribution made by a corporation to its shareholders, at a time when it had on hand earnings or profits accumulated since 1913, were made out of such earnings and that the distributions were dividends; and that the Supreme Court held that if, at the time the distributions were made, the corporation had on hand earnings or profits that had accumulated in the year in which the distributions were made (1917), as well as earnings and profits that had accumulated in 1916 and prior years, it was to be conclusively presumed that the distributions were from the earnings or profits of 1917, the year in which the distributions were made.

Then, again, as the Leland-Gifford Co. had on hand, at the time the distributions were made, earnings or profits that had accumulated since 1913, we do not think that the provisions of section 201(c) of the Revenue Acts of 1921 and 1924 are applicable.

Nor do we think that Congress exceeded its constitutional power by providing that, so long as a corporation has on hand earnings and profits accumulated since 1913, any distribution to its stockholders should be conclusively presumed to be a dividend out of such earnings or profits. It is evident that Congress intended that a stockholder, to whom distributions were made while a corporation had earnings or profits on hand, should not escape the burdens of the income tax law through the directors of the corporation undertaking to make

distributions from some other source. The statute does not convert what is not income into income. It simply requires that, while there are earnings or profits, the distributions to the stockholders shall be made from such earnings or profits, and any distributions made while such earnings or profits exist shall be deemed to have been so made.

The Board of Tax Appeals found that the paid-in surplus was not a loan to the corporation. The evidence warranted such finding. The distributions, therefore, were not payments upon a loan.

The decisions or orders of the Board of Tax Appeals are affirmed.

SECTION 202.—DETERMINATION OF AMOUNT OF GAIN OR LOSS.

ARTICLE 1561: Determination of the amount of gain or loss.

REVENUE ACT OF 1924.

Royalty payments made to a lessee under an assignment of his interest. (See G. C. M. 9798, page 221.)

SECTION 204.—BASIS FOR DETERMINING GAIN OR LOSS, DEPLETION, AND DEPRECIATION.

ARTICLE 1599: Dividend stock.

REVENUE ACT OF 1924.

Rights to acquire stock of a character or preference different from stock in respect of which rights were issued. (See I. T. 2597, page 118.)

ARTICLE 1602: Basis for allowance of depletion and depreciation.

REVENUE ACT OF 1924.

Allowance for exhaustion where invention and application for patent, acquired prior to March 1, 1913, ripened into patent grant subsequent to that date. (See Ct. D. 432, page 228.)

SECTION 208.—CAPITAL GAINS AND LOSSES.

ARTICLE 1651: Definition and illustration of capital net gain.

REVENUE ACT OF 1924.

Property held primarily for sale in the course of a trade of business. (See G. C. M. 9958, page 158.)

ARTICLE 1651: Definition and illustration of capital net gain.

REVENUE ACT OF 1924.

Stock acquired through exercise of stock rights. (See G. C. M. 10063, page 159.)

SECTION 209.—EARNED INCOME.

ARTICLE 1661: Earned income. X–32–5164
G. C. M. 9716

REVENUE ACT OF 1924.

In view of Mimeograph 3802 (C. B. IX–1, 121) and the decision of the Board of Tax Appeals in the case of Percy A. Yalden (20 B. T. A., 372, acquiescence C. B. X–1, 72), Solicitor's Memorandum 4088 (C. B. IV–2, 26), holding that the profits resulting from the labors of assistants in an accounting partnership are not to be regarded as compensation received for personal services actually rendered by the partners, and hence do not constitute earned income within the meaning of section 209 of the Revenue Act of 1924, where it appears that the work of the assistants is subject only to perfunctory approval by the partners, is revoked in so far as it is in conflict with Mimeograph 3802.

An opinion is requested whether Solicitor's Memorandum 4088 should be revoked or modified, in view of Mimeograph 3802 and the decision of the Board of Tax Appeals in the case of Percy A. Yalden.

In Solicitor's Memorandum 4088 the position was taken that profits resulting from the labors of assistants in an accounting partnership were not to be regarded as compensation received for personal services actually rendered by the partners, and hence did not constitute earned income within the meaning of section 209 of the Revenue Act of 1924, where it appeared that the work of the assistants was subject only to a perfunctory approval by the partners. The same position was taken in Mimeograph 3471 (C. B. V–2, 16).

In Mimeograph 3802 the following language appears:

> It was not intended to deny the taxpayer the right to consider the entire amount received as professional fees as earned income if the taxpayer is engaged in a professional occupation, such as a doctor or a lawyer, even though the taxpayer employs assistants who perform part or all of the services, provided the clients or patients are those of the taxpayer and look to the taxpayer as the responsible person in connection with the services performed.
>
> This mimeograph will also apply to income received as professional fees from a professional partnership, even though the partnership employs assistants who work on a salary basis, provided the clients or patients are those of some active member of the partnership and look to some active member of the partnership as responsible for the services performed.
>
> * * * * * * *
>
> Mimeograph 3471 is amended in so far as it is inconsistent with this mimeograph.

In the Yalden case the Board of Tax Appeals had for consideration the question whether for 1925 the earned income credit of an accountant who employed assistants should be computed on an amount up to $20,000, or whether it should be limited to the income attributable solely and entirely to his personal efforts without the assistance of others, subject to the statutory minimum of $5,000. In deciding that the accountant was entitled to have his earned income credit computed on an amount up to $20,000, the Board cited both Solicitor's Memorandum 4088 and Mimeograph 3802. After indicating that Mimeograph 3802 was apparently promulgated to correct the practice of the Bureau with respect to the determination of

earned income on professional fees, the Board quoted the mimeograph in its entirety. This decision of the Board was acquiesced in by the Commissioner.

It is evident that the provisions of Mimeograph 3802 are much broader than the provisions of Solicitor's Memorandum 4088. It is also evident that the Board of Tax Appeals considered Mimeograph 3802 as tantamount to a revocation or modification of Solicitor's Memorandum 4088, and that the Commissioner has acquiesced in the Board's decision upon the same theory. Under these circumstances it is the opinion of this office that the provisions of Solicitor's Memorandum 4088, in so far as they are in conflict with Mimeograph 3802, should no longer be followed. Accordingly, Solicitor's Memorandum 4088 is revoked in so far as it is in conflict with Mimeograph 3802.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

PART II.—INDIVIDUALS.

SECTION 210.—NORMAL TAX.

ARTICLE 4: Who is a citizen.

REVENUE ACT OF 1924.

Status, under Act of September 22, 1922, of a woman citizen of the United States who marries a subject of Great Britain and of a woman subject of Great Britain who marries a citizen of the United States. (See I. T. 2600, page 107.)

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1924.

Reinvestment of income from tax-exempt restricted allotted lands of Five Civilized Tribes. (See G. C. M. 9621, page 111.)

ARTICLE 39: Sale of stock and rights.

REVENUE ACT OF 1924.

Rights to acquire stock of a character or preference different from stock in respect of which rights were issued. (See I. T. 2597, page 118.)

SECTION 213(b).—GROSS INCOME DEFINED: EXCLUSIONS.

ARTICLE 74: Interest upon State obligations.

REVENUE ACT OF 1924.

Interest upon an award for property condemned for public purposes. (See G. C. M. 10043, page 124.)

SECTION 214(a)9.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPLETION.

ARTICLE 203: Amount returnable through depletion and depreciation deductions in the case of lessee.

REVENUE ACT OF 1924.

Assignment of lessee's interest. (See G. C. M. 9798, page 221.)

SECTION 219.—ESTATES AND TRUSTS.

ARTICLE 341: Estates and trusts.

REVENUE ACT OF 1924.

Income payable on 2d days of January and July. (See G. C. M. 8724, page 197.)

ARTICLE 341: Estates and trusts.

REVENUE ACT OF 1924.

Will construed as establishing a single trust although a State court in an agreed decision construed it as establishing three trusts. (See Ct. D. 412, page 240.)

PART III.—CORPORATIONS.

SECTION 231.—CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

ARTICLE 520: Social clubs.

REVENUE ACT OF 1924.

Receipt of revenue from sale of surplus land by golf club. (See G. C. M. 9470, page 162.)

ARTICLE 522: Cooperative associations.

REVENUE ACT OF 1924.

Farmers' and other cooperative marketing and purchasing associations. (See Mim. 3886, page 164.)

SECTION 234.—DEDUCTIONS ALLOWED CORPORATIONS.

ARTICLE 561: Allowable deductions.

REVENUE ACT OF 1924.

Depreciation of paving, curbing, and sidewalk improvements. (See Ct. D. 411, page 250.)

SECTION 238.—CREDIT FOR TAXES IN CASE OF CORPORATIONS.

ARTICLE 612: Domestic corporation owning a majority of the stock of foreign corporation.

REVENUE ACT OF 1924.

Amendment of article 612, Regulations 65. (See T. D. 4324, page 256.)

PART V.—PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES.

SECTIONS 277 AND 278.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

ARTICLE 1272: Period of limitation upon collection of tax. X-36-5197 Ct. D. 378

FEDERAL TAXES—REVENUE ACT OF 1924—DECISION OF COURT.

COLLECTION—LIMITATION—JUDGMENT—TRUST FUND DOCTRINE.

A suit against the transferees of the assets of a corporation to enforce their liability under the trust fund doctrine commenced after the expiration of the period of limitation upon collection against the corporation prescribed by section 277(a)2 of the Revenue Act of 1924 is not an action to collect a tax which is barred by that paragraph, where a judgment for the tax is obtained against the corporation prior to its dissolution, the execution of which is returned unsatisfied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

United States of America, complainant-appellant, v. *Oscar Frommel & Bro., Frommel Realty & Investment Co., Harry Ferguson, Louis Ferguson, Eugene A. Sullivan, Harry E. Young, William B. Russlend, Jane Helen Williams, George Davis Frommel, Helen Elizabeth Frommel, Oscar Rue Frommel, Harry Ferguson, and Louis Ferguson, as Executors of the Last Will and Testament of Oscar Frommel, Deceased, and Harry Ferguson and Louis Ferguson, as Trustees under the Trusts set up under Paragraph "Thirteenth" of the Last Will and Testament of Oscar Frommel, Deceased, defendant-appellees.*

Appeal from the District Court for the Southern District of New York.

[May 18, 1931.]

OPINION.

MANTON, Circuit Judge: On March 26, 1918, Oscar Frommel & Bro., a corporation, filed with the collector of internal revenue, its corporation income and profits tax return for the year 1917 showing a tax due of $21,847.41. On June 27, 1919, an amended return was filed for that year showing a tax due in

the sum of $104,428.42. It had no taxable earnings for part of the year subsequent to June 21, 1917. An assessment was made on the original return (June 15, 1918) of $21,847.41 and on the amended return (July 29, 1919) of $82,581.01; the total tax assessed for the calendar year was $104,428.42. After demand for payment by the United States, an action was brought, June 6, 1922, to recover the taxes assessed; issue was joined, by the service of an answer, the action was reached for trial and on April 3, 1925, judgment was entered by default against Oscar Frommel & Bro. for $146,760.34. Execution of this judgment was returned unsatisfied. On December 1, 1925, a suit was begun to recover from the appellees the amount of the judgment. The answers were filed and a motion was made to strike out the answers and the appellees moved to dismiss the bill for failure to state a cause of action. The latter motion was granted and the bill dismissed. The court below held that the action was one to collect the tax and was barred by the 5-year period of limitations described in section 277(a)2 of the Revenue Act of 1924 (43 Stat., 253). The fact that a judgment was obtained for the arrears of taxes was regarded below as not altering or changing the applicability of the statute.

Section 277(a)2 of the Revenue Act provides:

"The amount of income, excess-profits and war-profits taxes imposed by 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, * * * the Revenue Act of 1917, * * * and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

The judgment obtained against the corporation, Oscar Frommel & Bro., on April 3, 1925, was for the arrears of taxes—a debt. It was binding on the corporation only. The present suit is against the stockholders to recover the amount of the judgment because they have received by transfer the assets of the corporation and made it impossible to collect on the judgment obtained against the corporation. The Oscar Frommel & Bro. Co. was a New York corporation. Section 105, subdivision 8, of the New York stock corporation law (Consol. Laws, ch. 59) provides that a "corporation shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets and doing all other acts required to adjust and wind up its business and affairs, and may sue and be sued in its corporate name." The bill alleges that the stockholders received, without giving consideration, the assets of the corporation. The corporation was not dissolved by any action authoritative in law. Under these circumstances, the assets received are regarded as a trust fund in the hands of transferees for the payment of all debts and demands against the corporation, and under proper proceedings, such funds are applicable to the payment of outstanding indebtedness against the corporation. (*Pierce* v. *United States*, 255 U. S., 398; *Swan Land & Cattle Co.* v. *Frank*, 148 U. S., 603.) In the Pierce case, the court said:

"It is true that the bill to reach and apply the assets distributed among the stockholders can not, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and execution thereon has been returned unsatisfied (*Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S., 371); but, as a matter of substantive law, the right to follow the distributed assets * * * applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims. A corporation can not by divesting itself of all property leave remediless the holder of a contingent claim, or the obligee of an executory contract * * *; and there is no good reason why the United States with a claim for penalties should be in a worse plight."

It is no answer to say that there had been a substantial liquidation of the firm of Oscar Frommel & Bro. in July, 1917, and that there were sufficient assets left to enable it to pay the income tax which under the internal revenue laws then in existence would be payable. (*United States* v. *Armstrong*, 26 Fed. (2d), 227 (C. C. A. 8); *United States* v. *Klausner*, 25 Fed. (2d), 608 (C. C. A. 2); *United States* v. *McHatton*, 266 Fed., 602 (Dist. Mont.) [T. D. 3043, C. B. 3, 283].) And the allegations of the complaint must be accepted as true in testing the result below.

It has been held that, where judgment has not been first obtained and the action is one to collect a tax, and the resort to a judgment would be idle and useless equity will interpose to prevent such useless circuity. (*United States* v. *Updike*, 281 U. S., 489 [Ct. D. 192, C. B. IX–1, 228]; *United States* v. *Fairall*,

16 Fed. (2d), 328 (S. D. N. Y.) [T. D. 4008, C. B. VI-1, 267]; *United States* v. *Penn*, 23 Fed. (2d), 714 (S. D. Cal.) [T. D. 4216, C. B. VII-2, 228].) In the Updike case, the income tax was for 11 months ending June 30, 1917. In August, 1917, the corporation dissolved and distributed its assets. It filed no tax return until October, 1918, when a return was filed by a revenue agent after examination of the books, and the United States, in 1927, instituted an action to recover from the stockholders a sum of money sufficient to pay the tax. The court held that a suit in equity against the distributees of the assets might lie, but that it must be brought within six years after the assessment under section 278(d) and section 280 of the Revenue Act of 1926. Moreover, that section 278 of the Act of 1926, providing that where the assessment had been made within the statutory period of limitation properly applicable thereto, the tax might be collected by a proceeding in court, but only if begun within six years after the assessment of the tax, applied to an assessment in 1920 of 1917 taxes, notwithstanding that in 1920, when the assessment was made, there was and had been no provision of law which in any form limited the time for assessing and collecting the tax.

But the result below deprives the United States of the right to proceed on its judgment which is valid and stands unchallenged. Section 280 of the Revenue Act of 1926 authorizes the collector to assess a tax against a transferee of the property of a taxpayer. The appellant does not rely upon section 280 for assistance. It proceeds as if on a creditor's bill on a judgment to collect a tax liability which was liquidated by judicial action prior to the dissolution of the corporation. By section 280 Congress imposed a new liability upon the transferee of the property of a taxpayer who has failed to pay the tax. Section 280 was not intended to limit the appellant in pursuing the assets of the corporation which had been transferred, without first having paid the taxes due to it, a judgment therefor having been obtained.

Decree reversed.

SECTION 281.—CREDITS AND REFUNDS.

ARTICLE 1307: Limitations upon the crediting and refunding of taxes paid. X-37-5205 Ct. D. 382

INCOME AND EXCESS PROFITS TAXES—REVENUE ACT OF 1924—DECISION OF COURT.

REFUND—LIMITATION—SUPPLEMENTAL CLAIM.

Where a claim for refund, which states no ground for the same, is filed within the statutory period therefor and is disallowed by the Commissioner after the expiration of that period, a second claim for refund subsequently filed on June 6, 1924, which sets forth a specific ground for recovery, can not be regarded as enlarging the first claim or as supplemental to it and is an original claim governed by the provisions of section 281(b) of the Revenue Act of 1924 and section 3228 of the Revised Statutes as amended.

COURT OF CLAIMS OF THE UNITED STATES. No. H-394.

Sugar Land Railway Co. v. *The United States.*

[April 6, 1931.]

OPINION.

LITTLETON, Judge, delivered the opinion of the court.

Plaintiff's return for the calendar year 1918 was due under the statute March 15, 1919. Its return was filed June 15, 1919. The original return showed a tax of $9,740.19, which was paid in four installments throughout 1919. Later an additional assessment of $1,798.77 was paid July 8, 1921, and an additional tax of $368 shown on the amended return filed by plaintiff was paid February 9, 1922.

March 8 plaintiff filed a claim for refund which stated no basis or grounds for the alleged overpayment but contained the statement that it was filed to protect plaintiff against the statute of limitations. This claim was considered by the Commissioner and denied and rejected April 16, 1924. This claim was filed within five years after the return for 1918 was due, as permitted by section 252 of the Revenue Act of 1921. It was rejected by the Commissioner after the time for filing a claim for refund had expired. Thereafter, on June 6, 1924, plaintiff filed the claim for refund referred to in finding 4 for the same amount which had been specified in the earlier rejected claim. This claim gave as the ground and reason for the allowance thereof that plaintiff was entitled to have its profits tax computed under the provisions of section 328, special assessment provision, of the Revenue Act of 1918. Subsequent to the filing of this claim plaintiff duly filed an application for assessment of its profits tax under the special assessment provisions. The application for special assessment was allowed by the Commissioner, as a result of which, on October 7, 1925, he determined that there had been an overpayment of $4,492.56 for 1918. The Comptroller General directed that payments of the overpayment allowed by the Commissioner be withheld, and when he subsequently certified to the Commissioner, in August, 1928, that there was no longer any reason to withhold payment, the Commissioner of Internal Revenue decided that since the claim for refund filed March 8, 1924, stated no grounds and had been considered and rejected upon the record before him, the claim filed by the plaintiff June 6, 1924, was governed by the provisions of section 281(b) of the Revenue Act of 1924 and of section 1012 of that Act amending section 3228 of the Revised Statutes, and such claim having been filed more than four years after a portion of the tax going to make up the total overpayment determined had been paid, only a portion of the overpayment could be refunded. Accordingly, the Commissioner issued a new certificate of overassessment and refunded to the plaintiff only $2,166.77 of the total overpayment representing the amount of the last two payments above mentioned on July 8, 1921, and February 9, 1922, these two payments falling within a period of four years prior to the filing of the claim of June 6, 1924. The Commissioner refused to refund the balance of the overpayment, amounting to $2,417.79 with interest.

This suit is to recover the above-mentioned amount with interest on $2,189.31 from September 19, 1919, and on $228.48 from December 18, 1919, and the question is whether the plaintiff made and maintains this suit upon the claim for refund filed.

Plaintiff contends that the original claim of March 8, 1924, was filed within five years after the return was due and, therefore, in time, and that it was enlarged by a "supplemental" claim for refund filed June 6, 1924, based upon special assessment, and under the provisions of section 281(a) of the Revenue Act of 1924 the Commissioner allowed the claim on the ground of special assessment and determined an overpayment of $4,492.56.

On the other hand, the defendant contends that since the refund claim filed March 8, 1924, was rejected on April 16, 1924, which was prior to the enactment of the Revenue Act of 1924, the saving clause of section 281(b)(f) of that Act is not applicable; that the claim of June 6, 1924, must be considered an original claim subject to the 4-year period of limitation provided by the Revenue Act of 1924.

Unless the refund claim filed June 6, 1924, can be treated as a part of and an amendment of the first claim filed March 8, 1924, the plaintiff can not maintain this suit, for the last-mentioned claim was filed after the expiration of the period for the filing of claims in respect of the overpayment in controversy. We are of opinion from the facts that the claim of June 6, 1924, was not an amendment or supplement to the claim of March 8, 1924. Although counsel in the stipulation of facts stipulate that "On June 6, 1924, the claimant filed a supplemental claim for refund of income and profits taxes paid for the year 1918 in the sum of $11,906.96, as follows," the fact is that the claim of March 8, 1924, was not in existence and could not be amended nor supplemented. It had been considered and rejected by the Commissioner of Internal Revenue, and it could not subsequently, after the statute of limitations had expired, be enlarged or supplemented so as to give the taxpayer any greater right than existed under an original claim filed at such time. The facts definitely establish that the claim of March 8, 1924, had been duly considered and rejected by the Commissioner of Internal Revenue before the claim of June 6, 1924, was filed. We, therefore, decline to follow the stipulation and

to find as a fact that the last-mentioned claim was supplemental to the first. (See Finding 4.) The claim for refund of June 6, 1924, was therefore an original claim and subject to the limitation provisions of the Revenue Act of 1924, approved June 2, 1924. (Cf. *Altman & Co.* v. *United States*, 69 C. Cls., 721 [Ct. D. 204, C. B. IX–1, 286].)

We need not here consider whether the Commissioner of Internal Revenue, having considered a timely claim for refund and duly rejected it after the expiration of the statute of limitation for filing a claim, might legally reconsider his action and vacate his decision rejecting the claim so as legally to permit an amendment or supplement to such claim. There are no facts in the record to show that the Commissioner ever reconsidered or vacated his decision of April 16, 1924, denying and rejecting the claim for refund theretofore filed by the plaintiff March 8, 1924. The claim of June 6, 1924, was governed by the provisions of section 281(b) of the Revenue Act of 1926. The Commissioner correctly declined to make a refund to the plaintiff of that portion of the overpayment of tax which had been paid more than four years prior to the filing of the refund claim of June 6, 1924.

The petition must be dismissed, and it is so ordered.

TITLE X.—GENERAL ADMINISTRATIVE PROVISIONS.

SECTIONS 1014 AND 1015.—LIMITATIONS UPON SUITS AND PROCEEDINGS BY THE TAXPAYER.

ARTICLE 1351: Suits for recovery of taxes erroneously collected. X–41–5242 Ct. D. 397

INCOME TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. SUIT—LIMITATION—CLAIM FOR REFUND—AMENDMENT.

Where an informal claim for a refund of an overpayment of tax is filed within the statutory period therefor and is disallowed by the Commissioner, it may not be amended by a claim filed after the statutory period for filing a claim has expired so as to give the taxpayer any greater right than existed under the informal claim and effect the postponement of the time within which a suit must be brought as provided in section 3226 of the Revised Statutes as amended.

2. CREDIT—OVERPAYMENT—ERROR IN CERTIFICATE OF OVERASSESSMENT.

Where a tax for the year 1917 is actually due, the Commissioner may apply against it an overpayment for the year 1918, although the amount of the overassessment was erroneously understated in the certificate of overassessment first issued, the amount due for the year 1918, however, being correctly determined and correctly stated in the certificate.

COURT OF CLAIMS OF THE UNITED STATES. No. K–180.

Edward Maxson, Receiver for the International High Speed Steel Co., v. *The United States.*

[June 1, 1931.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

Plaintiff, who is receiver of the International High Speed Steel Co., a corporation, brings this suit to recover $32,945.60 alleged to have been illegally collected as income and profits taxes for the year 1918 from said company.

The parties have stipulated as to the facts. On a casual reading, the findings of fact made pursuant to this stipulation seem like a maze of returns, amended returns, computations made with reference to the taxes involved, and overassessments, together with recomputations thereof. In reality the facts essential to a determination of the legal questions involved in the case are not only few and comparatively simple, but undisputed, and the only difficulty presented is in determining their legal effect. Nor are the issues complicated.

If we were to again set out in the opinion all of the facts recited in the stipulation of the parties and set forth in the findings, it would only serve to obscure the real points in the case. We think all the facts necessary to be considered can be stated in much simpler form as follows:

The corporation which plaintiff represents as receiver filed in 1919 a tentative return of its income and profits taxes and paid thereon a total of $32,916.80. On March 20, 1919, the corporation filed with the collector a claim for abatement in the sum of $55,000, but as this claim for abatement was based on ordinary depreciation it need not be considered. On September 17, 1919, the corporation filed a completed return for 1918 and claimed therein a deduction for amortization of war facilities in the amount of $11,219.24, and on August 4, 1920, the corporation made "an amended return" for 1918 under which its taxes were computed at $9,045.96. The same deduction was claimed for amortization and also a deduction "for loss of year 1919." On December 26, 1922, a certificate of overassessment for $29,075.38 was issued. In this certificate the correct tax liability of the corporation for 1918 was stated to be $3,812.62, and in determining this amount the entire deduction claimed for amortization was disallowed. The amount stated for the overassessment was erroneous, as it should have been stated at a larger sum, but the tax was correctly determined if no allowance was made for amortization. The said amount of overassessment was on March 31, 1923, applied on an outstanding additional assessment for 1917, made in January, 1920. On November 24, 1924, another certificate of overassessment was issued as a supplement to the previous certificate in which the amount of overassessment was fixed at $36,149.45, the correct tax liability after certain abatements had been made stated the same as before, and the balance due the corporation according to the Commissioner's books was refunded. On February 17, 1925, the corporation filed a brief protesting the disallowance of the amount claimed on its returns for amortization and claiming a total deduction therefor in the amount of $35,186.68.

Upon the facts above stated the plaintiff seeks to recover—

First, the sum of $3,812.62 collected on the taxes of 1918.

Second, $29,132.98 which was applied on the taxes of 1917.

These claims will be taken up in their order.

The stipulation shows that if a proper allowance had been made to the corporation for amortization of war facilities, a deduction would have been made of $35,186.68 on account of amortization, which would have eliminated the entire taxable income for 1918 and resulted in an overpayment of $3,812.62 for said year. Defendant concedes that plaintiff is entitled to recover this sum if a proper and timely claim for refund has been filed. On behalf of plaintiff it is conceded that no formal claim for refund was filed, but it is insisted that the claim for allowance of amortization made by the corporation in its returns constituted an informal claim for refund, and that this claim was supplemented by its brief. The argument is in effect that thereby the statute requiring a claim for refund to be filed was substantially complied with.

It will be observed that the evidence fails to show that a refund was claimed or requested either in the returns made by the corporation or in the brief filed by it, although it was claimed therein that a deduction for amortization should be made as stated above. It may well be doubted whether a claim for a deduction from income which contains no direct reference to a refund can, when disallowed, be treated as a claim for refund, which the statute requires to be filed. In this connection it should be observed that by reason of the claim for amortization having been denied, this case differs from the cases of *Lasher* v. *United States* (65 C. Cls., 295) and *Bonwit Teller* v. *United States*, decided by the Supreme Court April 13, 1931 (283 U. S., 258 [Ct. D. 334, C. B. X–1, 328]), for in both of these cases the informal claim had been considered and held sufficient by the Commissioner. In such event the question of waiver of the requirements of the statute may arise, as well as other matters which under such circumstances may make a statement sufficient

which does not expressly claim or request a refund. See *Wausau Sulphate Fibre Co.* v. *United States*, No. J.–618 [Ct. D. 384, page 274] decided by this court May 4, 1931. But it is not necessary to decide the question of whether the statements made in the returns constituted a claim for refund.

The stipulation shows that in making up the first certificate, which showed the correct tax liability for 1918 to be $3,812.62, the entire deduction for amortization which had been claimed in two previous returns was disallowed. This certificate was issued on December 26, 1922. Even if it be conceded that the claim for amortization made in the returns constituted an informal claim for refund, it appears that it was rejected on the last-named date. Having thus been rejected, it could not be amended by a claim filed after the statute of limitations had expired. In *Sugar Land Ry. Co.* v. *United States*, No. H–394 [Ct. D. 382, page 309], decided by this court April 6, 1931, it was said with reference to the claim therein filed:

"It had been considered and rejected by the Commissioner of Internal Revenue, and it could not subsequently, after the statute of limitations had expired, be enlarged or supplemented so as to give the taxpayer any greater right than existed under an original claim filed at such time."

This court accordingly, in the case last cited, refused to consider the claim filed after the statute of limitations as supplemental to what was alleged to be an informal claim, but said that the claim filed after the expiration of the statutory period must be treated as an original claim and therefore "subject to the limitation provisions of the Revenue Act of 1924." So, also, in this case, without considering any of the other objections made to the brief filed by the corporation in the Commissioner's office after the expiration of the statute of limitations, we are constrained to hold that it must be considered separately and by itself, and if so considered the claim stated therein is barred by the statute of limitations. See also *Mutual Life Ins. Co. of N. Y.* v. *United States*, No. K–377 [Ct. D. 363, page 292], decided by this court May 4, 1931.

If we are correct in the foregoing conclusions, it follows that the claim for amortization made in the returns must also be considered by itself and alone. Conceding again for the purposes of the argument that it constituted an informal claim for a refund, it was rejected on December 26, 1922, as before stated, and this suit was not begun until May 7, 1929, more than six years afterwards. The period within which suit could be brought had expired, and, even if it be conceded that an informal claim was thus made, it also is barred by the statute. It follows that plaintiff can not recover the $3,812.62 paid on the 1918 taxes.

In addition to the foregoing it should be pointed out that the amended return for 1918 relied upon by the plaintiff to constitute an informal claim for refund is not in evidence and we do not know what statements were made therein, nor is the brief of February 17, 1925, in evidence and we do not know what statements it may have contained. Furthermore, it appears that the deduction for amortization mentioned in the amended return had been claimed in the original completed return and, to that extent, was merely a restatement of the items in the original return, the main purpose of the filing of the amended return apparently being to claim the benefit of a net loss for 1919 against the tax due for 1918. The Commissioner appears to have allowed the net loss and, as a result, determined an overpayment which was refunded. At the time the amended return was filed on August 4, 1920, the Commissioner had not audited the original return for 1918 and had made no disallowance of the deduction claimed for amortization. A restatement therefore in an amended return of the deductions claimed in an original return before the Commissioner has taken any action thereon can not be held to constitute a claim for refund merely because the Commissioner subsequently disallowed the deduction.

Plaintiff's right to recover on the second item for which it brings suit depends upon whether the Commissioner lawfully applied an overassessment of $29,075.38 against an outstanding additional assessment for 1917 made in January, 1920, this overassessment having been determined on December 26, 1922, and a certificate of overassessment issued accordingly.

Plaintiff contends that the allowance of an overassessment in this amount still left outstanding a large amount of the original assessment of $80,000 for the year 1918, and that therefore the Commissioner had no right to apply any of this amount on the taxes of 1917. We are unable to agree with this conclusion. It will be conceded that the Commissioner could not take money paid on 1918

taxes and apply it on those of 1917 while there was anything left unpaid or anything due on the 1918 taxes. But there was nothing due. It is true that the amount of overassessment was erroneously understated in the certificate of overassessment first issued, but the amount remaining due, which was stated in the certificate as the "tax liability corrected," had been correctly determined and was correctly stated in the certificate. A second certificate of overassessment was issued on November 24, 1924, which stated the tax liability the same as in the first certificate and fixed the overassessment at $36,149.45. This increase in the overassessment did not make the credit of a smaller sum upon the 1917 taxes erroneous. We have no occasion to determine whether the Commissioner could have credited more than he did, but at least he could credit that much, provided this amount was due on the 1917 taxes, and in the absence of evidence to the contrary we must assume it was. It is clear that the error in the overassessment in no way prejudiced plaintiff. The fact that no certificate of overassessment had been issued against part of the original assessment did not make the corporation liable for anything beyond the correct amount of the tax, as determined by the Commissioner. When such a determination was made and the amount thereof satisfied, it was the end of the corporation's liability for the year 1918, and any excess in the hands of the Commissioner could be applied on taxes due for another year. It is true that in September, 1924, there was credited from an overpayment for the year 1917 the sum of $13,279.28 against the assessment still outstanding of $36,149.45 for the year 1918, which left a balance of $22,870.17. But subsequently the Bureau corrected and balanced its books by a second certificate of overassessment in which the correct tax liability was stated the same as before, and the $13,279.28 which had been credited out of the overpayment for 1917 was refunded. There was nothing in any of these transactions or the other facts in the case which deprived the Commissioner of the right to credit the overassessment of $29,075.38 upon the taxes of 1917 at the time when the credit was made.

It seems to be suggested rather than argued that the 1917 taxes were outlawed at the time when the credit was applied thereon, which was March 31, 1923. But the corporation had filed an unlimited waiver for 1917 on February 25, 1921, which did not expire until April 1, 1924.

From what has been said above, it follows that plaintiff can not recover on either of the items for which suit has been brought and that its petition must be dismissed. It is accordingly so ordered.

INCOME TAX RULINGS.—PART IV.

REVENUE ACT OF 1921 OR PRIOR REVENUE ACTS.

TITLE I.—GENERAL DEFINITIONS.

SECTION 2.—GENERAL DEFINITIONS.

ARTICLE 1504: Association distinguished from trust. X–47–5297 Ct. D. 417

(Also Section 213(a), Article 31.)

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. TRUST—ASSOCIATION.

Where a trustee does not conduct any business but merely holds assets as security for a period of years, after which he is to liquidate them and distribute the residue among the holders of "beneficial certificates" issued to beneficiaries of the trust which are transferable at will, the organization is not an "association" within the meaning of section 2(a)2 of the Revenue Act of 1921, but the trustee and cestuis que trust are to be treated as fiduciary and beneficiaries taxable pursuant to section 219 of the Revenue Act of 1921.

2. GAIN—TRUST CERTIFICATES—DISTRIBUTIONS IN KIND BY TRUSTEE—CHANGE IN BENEFICIAL INTEREST.

Where two banks merge, transferring their assets to a third, and the latter receives a part of the assets of the merging banks in trust to liquidate the same and to distribute the residue among the holders of transferable "beneficial certificates" issued to the beneficiaries of the trust, and the trustee makes a series of cash distributions under section 219(a)4 of the Revenue Act of 1921 equal to the cost or March 1, 1913, value of the certificates, as the case may be, and also delivers ratably among the beneficiaries securities in kind having a readily realizable market value, these distributions in kind effect a substantial change in the interest of each beneficiary and the fair market value of the securities is taxable gain under section 213(a) of the Revenue Act of 1921.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Benjamin L. Allen, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Appeal by a taxpayer from an order of the Board of Tax Appeals fixing a deficiency in his income tax for 1922.

Before MANTON, L. HAND, and CHASE, Circuit Judges.

[May 11, 1931.]

OPINION.

L. HAND, Circuit Judge: On June 6, 1912, the Knickerbocker Trust Co. of New York merged with another bank and the two became a third. Its assets were divided into three parts, "Schedules A, B, and C," the first two of which the new bank took outright, and the third, "Schedule C," in trust to secure it against any unknown debts of the Knickerbocker, and any shrinkage in the assets in "Schedule B" below their appraised value. The trust was to last two years, during which interest was to be paid at 4 per cent, so far as earned, and after which the trustee was to liquidate the assets, and distribute the residue among the holders of "beneficial certificates," issued to the Knickerbocker shareholders, and transferable at will.

Allen, the appellant, who had been a shareholder in the Knickerbocker bank, received apparently 100 of these certificates upon his original holdings; he bought others from time to time, until in 1922 he held over 1,000. Meanwhile the trustee had made a series of cash distributions, leaving among the undistributed assets certain shares of stock in the "Brunswick Site" company, and a large mortgage upon the Hotel Gotham. Believing these incapable of sale at their proper value, the trustee distributed them ratably during 1922, and Allen received as his allotment 1,000 shares in the "Brunswick Site" company, and 1,100 "mortgage participation certificates" in the mortgage upon the Hotel Gotham. These he did not sell during the year 1922, and for this reason did not enter any profit upon them in his return for that year. The Commissioner treated them as gain at the value at which Allen entered them on his books and assessed him accordingly. This was because the earlier cash distributions had already redeemed the cost of the purchased certificates, so that as to them the distribution of 1922 was all profit. The same is not so clear in the case of those certificates which Allen had received upon his original holdings, but as no distinction is taken, we shall assume that the value of these too had been redeemed. The Board affirmed the Commissioner and the taxpayer appealed.

We agree with the appellant that the trust did not create an "association" under section 2(a) of the Act of 1921, and that section 201(c) did not in terms apply. This was not a trust like those before the court in *Hecht* v. *Malley* (265 U. S., 144 [T. D. 3595, C. B. III–1, 489]), where the trustee was conducting a business. The only purpose was to hold the assets as security for a season, and then to distribute them. Little of the assets proved necessary to make whole the trustee, and the delay arose only because of difficulties in liquidation. We therefore assimilate the trust to those considered in *Crocker* v. *Malley* (249 U. S., 223) and *White* v. *Hornblower* (27 Fed. (2d), 777 (C. C. A. 1)), and we accept section 219 as the controlling section. If so, section 219(c) imposed the tax primarily upon the trustee, and this covered profits arising from the sale of the trust property. (*Merchants, etc., Co.* v. *Smietanka*, 255 U. S., 509 [T. D. 3173, C. B. 4, 34].) However, in the case at bar the trustee paid over the principal together with any profits as the liquidation proceeded, as well as any interest that was available. Hence the trust was for the "periodic," though irregular, payment of any income that arose, and fell within section 219(a)4. If so, the certificate holders were subject to the tax under section 219(d), and so we understand everyone agrees in the case of property sold by the trustee and distributed in cash.

The securities in question were not, however, sold, but delivered in kind, and there was no gain or profit under section 213(a), unless the distribution effected a substantial change in the beneficiaries' interest. If that change was enough to justify saying that they received new property for their former rights, there was a taxable profit, even though strictly the transaction were not an exchange under section 202(c). It seems to us that there was enough such change, due to the particular character of the trust. It does not follow that the same would be true generally, as for example in the ordinary case of a trust of land, of one or of several parcels, for the benefit of a single cestui que trust or of more, or of voting trusts of corporate shares, where the res is a mass of fungibles to be returned in kind upon dissolution, or of similar transactions. The result may well vary with the relation of the beneficiaries to the fund while the trust is being administered. In any event we have to decide no more than the case before us.

Originally, a cestui que trust—as in archaic times a bailor—had only a right in personam, and the question is still debated among scholars, whether even now he has more. (17 Col. L. Rev., 269; 1 Harv. L. Rev., 1, 9; 17 Col. L. Rev., 467.) But *Brown* v. *Fletcher* (235 U. S., 580) decided that he has a present "equitable interest" in the res, and so perhaps did *Maguire* v. *Trefry* (253 U. S., 12), so far as it has not been overruled by *Safe Dep. & T. Co.* v. *Virginia* (280 U. S., 83). We shall therefore assume that he has such an interest, and, when the res is a congeries of securities of different kinds, in the separate funds of which the res is in that case composed. We can also assume that even so in most cases the mere change from equitable to legal title may be disregarded in computing profits or losses. (*Brewster* v. *Gage*, 280 U. S., 327 [Ct. D. 148, C. B. IX–1, 274].)

The application of such a theory here would, however, result in an extremely complicated and onerous method of computing the tax. Each certificate holder would be regarded as an "equitable coowner" of each fund

in the res from the time of his purchase. Not only in case the trustee distributed a security in kind, but if he sold and paid out the cash, it would be necessary to appraise the value of the fund in question when the particular holder bought his certificate in order to ascertain the "basis" for calculating his profit or loss. All the earlier distributions in the case at bar were erroneously computed on this theory. Unless such a method is necessary in law, it is to be avoided, and the simpler one adopted which the Commissioner used; treating the certificate as an interest in the res in gross, and all distributions, whether in cash or in kind, as first redeeming the original cost, and thereafter creating a profit.

It appears to us that no principle compels us to declare invalid the Commissioner's method. The res, as we have said, was composed of a miscellany of funds, each made up of fungibles, in each of which by hypothesis a certificate holder was an "equitable coowner" in the proportion of his holdings. If we disregard all but the two funds distributed in kind, it is plausible to say that the interest of each holder after distribution was but formally different from what he had had before; like the distribution of grain in a bin. Moreover, it was at least theoretically possible for a holder to transfer his interest in one fund separately. But this was clearly not intended, for while the certificates were bought and sold, there is no reason to suppose that the trustee would have recognized any attempt to split their ownership among the constituent funds, except so far as it could have been compelled in law to do so. Practically, at any rate, it was impossible for a holder to deal with the funds separately, and there was much difference between his control over his allotment out of any particular fund, after it was distributed in kind, and over what he had theretofore possessed. He could not have dealt with it independently, nor have realized any profit or loss upon it, except as it reduced or raised the general value of the whole res, which the sale value of his certificate reflected. Again, even if we were to disregard this practical limitation, the holders had no power to withdraw their shares in any of the funds without the trustee's consent, which it was not obliged to give. The trust was to sell, and the other holders might have objected to the partition of any fund; they might have had good reason for believing that the trustee's powers of sale might be better exercised if it was kept whole, rather than split up among disorganized holders. The trustee's decision to the contrary as to the two securities here in question did not affect the status of the property before they had so decided.

Thus it appears to us that there are very real reasons for refusing to identify the prior "equitable interest" of a certificate holder in these securities with what he got upon distribution. It may be that the transaction was not an "exchange" under section 202(c), though it was certainly not very different; but the question whether a profit ensues depends not so much upon whether one chattel is exchanged for another as upon what are the rights of the taxpayer before and after the transaction under consideration. If these be so far changed as to constitute substantially a new means of command over money, there may be a taxable transaction, in spite of the fact that appreciation in value in the same property never alone results in profit. It seems to us that the change in rights here was enough, certainly since the securities when delivered were not shown to have lacked "a readily realizable market," an issue on which, if it be material at all, the taxpayer has the burden.

The transaction was analogous to those dealt with in *U. S.* v. *Phellis* (257 U. S., 156 [T. D. 3270, C. B. 5, 37]) and *Rockefeller* v. *U. S.* (257 U. S., 176 [T. D. 3271, C. B. 5, 34]). In those cases a corporation wished to segregate some of its assets in a subsidiary to be formed. This it did, and allotted the new shares pari passu to the old shareholders. They insisted that the new shares were a stock dividend under *Eisner* v. *Macomber* (252 U. S., 189 [T. D. 3010, C. B. 3, 25]), and that no profit emerged. But the court said no; that the new shares were property of another kind, though the shareholders got no title to the segregated assets, but remained shareholders as before. The doctrine was carried still further in *Cullinan* v. *Walker* (262 U. S., 134 [T. D. 3508, C. B. II–2, 55]) and *Marr* v. *U. S.* (268 U. S., 536 [T. D. 3755, C. B. IV–2, 116]), its limit being marked in *Weiss* v. *Stern* (265 U. S., 242 [T. D. 3609, C. B. III–2, 51]).

The change in interest accomplished by those transactions appears to us no greater than that arising from the distribution in kind of the securities here before us. It is true that the shareholders of the new company had no direct

control over the segregated assets any more than they had had before; but it is also true that the transaction gave them a power, though only as shareholders, to deal with the segregated assets, which they lacked before. In the same way here, the certificate holders got power to deal with the distributed securities separately, which before they could in practice only dispose of along with their interest in the whole res. True, they had never been shareholders; their rights by hypothesis were more direct than that both before and after; but it is the change that counts and the change was as great here as in the decisions cited.

There are no absolutes applicable to such issues; we have to apply colloquial and vague notions, "gain" and "profit," to varying situations, and the lines drawn will often appear arbitrary. But no problem more constantly confronts a court than how far to preserve principles inviolate at the expense of actuality; when to introduce variants in propositions theretofore treated as valid without limitation. We need not here decide that the termination of a dry trust is material in assessing taxes, or even of an active trust for a single cestui que trust who enjoys no more than the income, or of a trust where there are several beneficiaries and several pieces of property. But when the res is heterogeneous, when the purpose is to liquidate the property and when any transfer to be practically available must be of the cestui que trusts's interest in the whole res, it seems to us that distribution in cash or in kind should be regarded as the redemption of a single right.

Schoenheit v. *Lucas* (44 Fed. (2d), 476 (C. C. A. 4)) does not stand in our path. It held that when the owner of property transferred it to a company which had nothing else, and all of whose shares he got in exchange, no gain resulted. Whether or not we should have so held ourselves, the situations are plainly different. The owner retained substantially the same control as before; as much as though he had put the assets in a trust for himself. Nor are we met by *Brewster* v. *Gage* (280 U. S., 327), which turned upon the meaning of the words, "acquired," in the Act of 1918, and "time of such acquisition," in section 202(a)3 of the Act of 1921, and decided that the "basis" for computing the gain upon a residuary legacy was its value at the death of the testator. It is true that an executor is a "fiduciary" (section 200(2)), but quite apart from the limited scope of the decision, the legatee's relation to the estate was unlike that of the certificate holders here for the reasons we have given.

Order affirmed.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 200.—DEFINITIONS.

ARTICLE 1528: Activities of stockholders of personal service corporation: conduct of affairs. X–40–5230 Ct. D. 392

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. PERSONAL SERVICE CORPORATION—CLASSIFICATION—ACTIVITIES OF STOCKHOLDERS.

Where all the stockholders of a corporation, whose business is the selling of tobacco for the raisers thereof on a commission basis, solicit business for the company from their neighbors, but even during the tobacco seasons carry on their regular business as farmers or farmers and merchants combined, 8 of the 19 stockholders holding four-fifths of the shares, none of whom devotes his whole time to the corporate business, and the corporation employs a large force of men, including 25 expert graders, auctioneers, from 10 to 20 warehouse laborers, 3 calculators, and 2 bookkeepers,

the income of the corporation is not "to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of the affairs of the corporation," and the corporation, therefore, is not entitled to classification as a "personal service corporation" under section 200 of the Revenue Act of 1918.

2. TRANSFEREE—LIABILITY—CONSTITUTIONALITY.

Section 280(1) of the Revenue Act of 1926, which provides a summary procedure for collection of the tax imposed upon a taxpayer from a transferee of his property, is constitutional.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT. No. 5684.

David T. Long, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review an order of the United States Board of Tax Appeals.

Before MOORMAN, HICKS, and HICKENLOOPER, Circuit Judges.

[June 10, 1931.]

MOORMAN, Circuit Judge: This case involves income and profit taxes of the Star Warehouse Co., a dissolved corporation, which were asserted against the petitioner, a former stockholder and a distributee of corporate assets. The questions presented on the record are: (1) Whether section 280 of the Revenue Act of 1926, under which the liability was asserted, is constitutional; and (2) whether for the taxable period, November 7, 1919, to October 30, 1920, the corporation was entitled to classification as a personal service corporation within the meaning of section 200 of the Revenue Act of 1918. The first of these questions has been settled adversely to petitioner's contentions by the decision of the Supreme Court in *Phillips* v. *Commissioner* (283 U. S. 589 [Ct. D. 350, C. B. X–1, 264]); the other requires a consideration of the proofs.

The Star Warehouse Co. was incorporated in November, 1919, with a capital stock of $60,000, divided into 600 shares of the par value of $100 each. This entire capital was paid in and was used to purchase and equip a warehouse in Shelby County, Ky. The business of the company was selling tobacco for the raisers thereof on a commission basis. The stockholders were farmers and merchants residing in Shelby and adjoining counties. The selling season began in December and concluded about the middle of March. Sales were conducted in season as often as they were justified by the quantity of tobacco on the warehouse floors, usually twice a week. After the tobacco was brought to the warehouse and unloaded by the owner, it was sorted, separated into grades and sold at auction by the company. In order to do this the company was required to employ a large force of men, including expert graders and auctioneers. Buyers were required to make settlement and remove their tobacco by the end of the day, but upon completion of a sale the company, without waiting for the buyer to pay, issued its check to the seller for the sales price, deducting therefrom its commission of 80 cents per hundred pounds. This practice of paying the seller before the buyer paid, with pay rolls and other expenses, required considerable capital and necessitated the borrowing by the company of $30,000 from banks during the period here involved. Sales for that period were approximately $1,500,000, and commissions which the company earned amounted to $30,378.54. The fair rental value of the warehouse was $8,000 a year.

From the foregoing facts the Board of Tax Appeals concluded that capital was a material income-producing factor in the business of the company.[1] We do not deem it necessary to determine whether it was or was not, but pass the question and examine the case from the standpoint of the activities of the stockholders with respect to income. On this latter question other relevant facts are: There were 19 original stockholders. Of this number, 8 held 480 shares of stock, each holding about 60 shares. Four of the eight were officers

[1] In support of this ruling the Commissioner cites, among other cases, *Business College* v. *Blair* (24 Fed. (2d), 176), *Prey Bros. Live Stock Commission Co.* v. *Commissioner* (36 Fed. (2d), 326), *Medaris Co.* v. *Commissioner* (38 Fed. (2d), 812 (6 C. C. A.)), and *Franciscus Realty Co.* v. *Commissioner* (39 Fed. (2d) 583). In opposing it petitioner relies, among other authorities, upon *Strayer's Business College* v. *Commissioner* (35 Fed. (2d), 426).

of the company; none of them devoted his whole time to its business. Petitioner was secretary and treasurer in charge of the books with an assistant. His principal business, however, was farming. Other stockholders having a smaller number of shares of the stock were farmers or farmers and merchants combined. All the stockholders solicited business for the company from their neighbors. What time they spent in doing so does not appear, but it is admitted that even during the tobacco seasons each of them carried on his regular business. It further appears that the company employed from 10 to 20 warehouse laborers, depending on the volume of business; an office force consisting of 3 calculators, a bookkeeper, and the petitioner; that the tobacco was graded by expert graders, 25 in number, who were employed by the company; and that the auctioneers were also employed by the company.

The term "personal service corporation" means, among other things, according to the statute, a corporation whose income is to be ascribed primarily to the activities of the principal owners or stockholders who are themselves regularly engaged in the active conduct of its affairs. It is, of course, not necessary that the principal owners devote their entire time to the business of the company, but the income must nevertheless "be ascribed primarily" to their activities. In insisting that this test is met by the proofs in the present case, the petitioner asserts that the only services which the company rendered its patrons, besides those rendered by the stockholders, were such as are ordinarily rendered by laborers and nonexpert clerical employees. No evidence was offered to support this contention and we can not accept it as established. Nor can we agree that the skill of the graders was not a material factor in producing income, for naturally the farmer who had tobacco to sell would select the warehouse where it could be sold at the highest prices, and quite as naturally, too, a buyer who knew that the tobacco had been carefully inspected and graded would bid without making allowance for errors or mistakes as he would not do if the graders were not competent. It is probably true that to begin with sellers brought their tobacco to the warehouse through the solicitation of stockholders, but it is unreasonable to suppose that they would have continued to do so unless the grading and selling were satisfactory.

Counsel for petitioners rely upon *Shipley School* v. *McCaughn* (34 Fed. (2d), 281 [Ct. D. 38, C. B. VIII–1, 216]) and *New Orleans Shipwright Co., Ltd.*, v. *Commissioner* (27 Fed. (2d), 214). We think these cases inapplicable. In the first the two principals owned the entire capital stock and gave their entire time to the school, and in the other the business was procured by virtue of the relationship of the owners to the ship lines, the employees being clerks or manual laborers requiring no expert skill. To be "regularly engaged in the active conduct of its (the company's) affairs" means something more, it seems to us, than merely asking one's neighbors, as occasion arises or as one's regular business permits, to patronize the company, leaving it to others to perform the services upon which the success of the business must ultimately depend. Skillful grading and selling were the most important work done in connection with the warehouse company's business, and in our opinion the services of the graders and auctioneers, expert in character, were a material factor in obtaining business for the company and producing its income. In this particular the case is similar to the Blair case, where it was held that the teachers employed by the business college were such a necessary factor in the institution as to preclude the ascription of the income primarily to the activities of the owners. (See also *Hubbard-Ragsdale Co.* v. *Dean*, 15 Fed. (2d), 410 (D. C., 15 Fed. (2d), 1013) (6 C. C. A.) [T. D. 3904, C. B. V–2, 134]; *Prey* v. *Commissioner*, supra.)

The order is affirmed.

SECTION 201.—DIVIDENDS.

ARTICLE 1541: Dividends.

REVENUE ACT OF 1921.

Distributions made to stockholders where corporation has on hand earnings or profits accumulated since February 28, 1913. (See Ct. D. 387, page 300.)

ARTICLE 1548: Sale of stock received as dividend.

REVENUE ACTS OF 1918 AND 1921.

Rights to acquire stock of a character or preference different from stock in respect of which rights were issued. (See I. T. 2597, page 118.)

SECTION 202.—BASIS FOR DETERMINING GAIN OR LOSS.

ARTICLE 1561: Basis for determining gain or loss from sale.

REVENUE ACT OF 1921.

Royalty payments made to a lessee under an assignment of his interest. (See G. C. M. 9798, page 221.)

ARTICLE 1561: Basis for determining gain or loss from sale.

REVENUE ACTS OF 1918 AND 1921.

Allowance for exhaustion where invention and application for patent, acquired prior to March 1, 1913, ripened into patent grant subsequent to that date. (See Ct. D. 432, page 228.)

ARTICLE 1564: Exchange of property.

REVENUE ACT OF 1918.

Sale by contract with subsidiary and separate contract with parent granting option to purchase oil and gas income certificates of subsidiary. (See Ct. D. 407, page 233.)

ARTICLE 1564: Exchange of property. X–51–5325
Ct. D. 430

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

INCOME—GAIN—EXCHANGE OF STOCK—STOCK DIVIDEND—MERGER.

Where the A Bank, the B Bank, and the C Bank unite their business and assets, transferring them, pursuant to an agreement of consolidation, to the D Bank, the D Bank being a new name for the A Bank, and the business of the banks is continued under the charter of the A Bank, the excess of the par value of the stock of the D Bank received in 1919 by a stockholder of the A Bank over the par value of the stock of the A Bank exchanged is not a stock dividend but is taxable gain to the extent provided in section 202(b) of the Revenue Act of 1918.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

United States of America, appellant, v. *Anna L. Siegel and St. Louis Union Trust Co., Executors of the Estate of Alfred J. Siegel, Deceased, appellees.*

Before STONE and GARDNER, Circuit Judges, and MARTINEAU, District Judge.

[July 30, 1931.]

OPINION.

GARDNER, Circuit Judge, delivered the opinion of the court.

In 1919 Alfred J. Siegel, appellees' testate, was the owner of 255 shares of the capital stock of the Third National Bank of St. Louis, Mo. During that year the Third National Bank, the Mechanics-American National Bank, and the St. Louis Union National Bank, all located in St. Louis, Mo., entered into an agreement of consolidation or merger. This agreement provided that consolidation was to be effected under the charter of the Third National Bank, and that the capital of the consolidated bank should be $10,000,000, represented by 100,000 shares of a par value of $100 each, with a surplus of $5,000,000, and undivided profits of $500,000.

At the time of the execution of the consolidation agreement, the capital stock of the Third National Bank was $2,000,000, its surplus $2,000,000, and its undivided profits $350,000, or a total assets of $4,350,000. To enable it to contribute net assets of $5,250,000 to the consolidated bank, its capital stock was increased by $1,000,000, and $500,000 of additional shares of stock were sold to its then stockholders at a price of $200 per share. The capital and surplus of the Mechanics-American National Bank was similarly increased, and thereafter, pursuant to the agreement of consolidation, the name of the Third National Bank of St. Louis was changed to "First National Bank in St. Louis." The business and assets of the three consolidating banks were transferred to the First National Bank in St. Louis, and the business continued under the charter of the Third National Bank. Thirty-three thousand, three hundred and thirty-three and one-third shares of the stock of the consolidated bank were allotted to the stockholders of each of the consolidating banks, upon the delivery by the stockholders of their certificates of stock in the consolidating banks duly indorsed for cancellation. The banks concerned each turned over to the First National Bank in St. Louis (the consolidated bank) net assets of an agreed value of $5,250,000, making a total assets of $15,750,000, and in addition thereto, assets in an amount sufficient to cover all State and city taxes assessed to March 31, 1919, and all assessed and estimated Federal taxes to that date. The capital, surplus and undivided profits of the consolidated bank were fixed, however, at only $15,500,000, and the excess of $250,000, contributed ratably by each of the consolidating banks, was set aside in a special trust fund for the old stockholders of the Third National Bank, as representing the agreed excess value of the business of that bank over the business of each of the other consolidating banks. Each stockholder of the three consolidating banks received 1½ shares of stock in the consolidated bank for each share formerly owned by him in his consolidating bank.

Alfred J. Siegel, appellees' testate, as one of the stockholders of the Third National Bank, received 340 shares of stock in the First National Bank in St. Louis, in lieu of 255 shares which he had theretofore held in the Third National Bank. He did not report any gain or loss accruing to him because of this transaction, and the Commissioner of Internal Revenue determined his gain therefrom to be the sum of $8,500, being the difference between the aggregate par value of his 255 shares in the Third National Bank of St. Louis, surrendered by him, and the aggregate par value of his 340 shares in the First National Bank in St. Louis, and assessed a tax deficiency for the calendar year 1919 in the sum of $2,509.84. On appeal to the Board of Tax Appeals, the ruling of the Commissioner was affirmed, and the taxpayer thereupon paid the deficiency assessment under protest, and this action was brought to recover the payment so made. The appellees had judgment in the lower court, and the Government has appealed.

It is contended by the appellees on this appeal, as it was in the lower court, that the interest of the taxpayer after consolidation or merger, was precisely the same interest held by him in the Third National Bank of St. Louis before consolidation, and hence, there was no taxable gain arising from the transaction,

and that the excess in the par value of the stock received by the taxpayer over the par value of the stock exchanged, was in the nature of a stock dividend. The Government, on the other hand, contends that the 255 shares of stock of the Third National Bank which were exchanged for 340 shares of stock of the First National Bank in St. Louis, represented interests fundamentally and materially different, and that the transaction was therefore not a stock dividend, but gave rise to a realizable taxable income within the meaning of the sixteenth amendment to the Constitution, and of section 202(b), Revenue Act of 1918.

By the sixteenth amendment to the Constitution, Congress was empowered to lay and collect taxes on income from whatever source derived. Section 202 of the Revenue Act of 1918 provides, among other things, that:

"When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged.

"When in the case of any such reorganization, merger, or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost (or if acquired prior to March 1, 1913, the fair market value as of that date) of the stock or securities exchanged."

If, as contended by appellees, the transaction in question resulted in effect in the issuance of a stock dividend to the taxpayer, then under the doctrine announced in *Eisner* v. *Macomber* (252 U. S., 189 [T. D. 3010, C. B. 3, 25]), no taxable income resulted Income is a gain derived from capital, from labor, or from both combined (*Stratton's Independence* v. *Howbert*, 231 U. S., 399), and includes profits gained through the sale or conversion of capital assets. (*Eisner* v. *Macomber*, 252 U. S., 189.) Income is, therefore, not confined to cash. As said by Mr. Justice Brandeis in *Marr* v. *United States* (268 U. S., 536 [T. D. 3755, C. B. IV-2, 116]):

"The Government insists that identity of the business enterprise is not conclusive; that gain in value resulting from profits is taxable as income, not only when it is represented by an interest in a different business enterprise or property, but also when it is represented by an essentially different interest in the same business enterprise or property; that, in the case at bar, the gain actually made is represented by securities with essentially different characteristics in an essentially different corporation; and that, consequently, the additional value of the new securities, although they are still held by the Marrs, is income under the rule applied in *United States* v. *Phellis* (257 U. S., 156 [T. D. 3270, C. B. 5, 37]), *Rockefeller* v. *United States* (257 U. S., 176 [T. D. 3271, C. B. 5, 34]), and *Cullinan* v. *Walker* (262 U. S., 134 [T. D. 3508, C. B. II-2, 55]). In our opinion the Government is right."

If the interest of the taxpayer after the merger or consolidation was fundamentally and materially different from his interest prior thereto, then a taxable income resulted from the transaction. While the First National Bank in St. Louis continued under the charter issued to the Third National Bank, it was, in our opinion, a substantially and fundamentally different institution after the merger of these banks than it had theretofore been. The consolidating banks, other than the Third National Bank, were left without property and without liabilities, both the property and the liabilities of these institutions having passed to the consolidated bank. Hence, the assets and liabilities of the First National Bank in St. Louis were vastly different from those of the Third National Bank. Its stockholders were a different body, and the taxpayer held a different proportional interest in the consolidated bank than he had held in the Third National. The liabilities of the stockholders were different; the volume of the business was different; the customers were different. This difference was not such as results from a stock dividend. Where a stock divi-

dend issues, the enterprise remains the same. The interests of the stockholders remain the same and in the same proportions. A stock dividend is a conversion of surplus or undivided profits into capital stock, which is distributed to stockholders in lieu of a cash dividend. It implies a continuance of the corporation with the same assets and the same liabilities. But in the instant case, prior to the consolidation, the taxpayer's interest in the Third National Bank was 255/25,000ths of the stock, but after consolidation his interest was 85/25,000ths of the stock, so that his relative interest was reduced from approximately 1 per cent in the Third National Bank to approximately ⅓ of 1 per cent in the First National Bank in St. Louis. Here, the distribution of stock resulted from the taking over by the First National Bank in St. Louis of all of the assets and liabilities of the three consolidating banks, including the one under whose charter it continued to exist.

In this process of consolidation, the First National Bank in St. Louis took from the consolidating banks all their assets, including their accumulated surplus, and gave in exchange therefor its stock. But not only did the taxpayer, as a result of the merger or consolidation, receive 340 shares of stock in the consolidated bank, but there was set apart $250,000 in a special trust fund for the stockholders of the Third National Bank, representing the agreed excess of the value of the business of that bank over the business of each of the other consolidating banks, and he was entitled to his interest in this special fund. While it is not claimed that any part of the tax assessed was on any sum received by the taxpayer out of this fund, yet he had such interest as a result of the consolidation, and his interest in the consolidated bank was not therefore the same as that formerly held by him. Confessedly, his interest in the $250,000 represented an interest which he had had in the Third National Bank, but which he did not have in the First National Bank in St. Louis. In other words, after the consolidation his interest represented a different interest than that held by him prior thereto. We are of the view that the exchange in the instant case was not in the nature of a stock dividend.

It was held by the Supreme Court in *Weiss* v. *Stearn* (265 U. S., 242 [T. D. 3609, C. B. III-2, 51]) that the mere identity of an institution was not controlling, for in that case there was an entire difference in corporate entity between the new and the old companies, but because the new company was merely a reorganization of the old company, it was held there was no realization of a taxable income by the exchange of shares.

Under the doctrine announced in *Marr* v. *United States* (268 U. S., 536), *United States* v. *Phellis* (257 U. S., 156), *Rockefeller* v. *United States* (257 U. S., 176), and *Cullinan* v. *Walker* (262 U. S., 134), the gain realized by the taxpayer is taxable not only when it is represented by an interest in a different business enterprise or property, but also when it is represented by an essentially different interest in the same business enterprise or property, and the mere fact that the corporate existence of the Third National Bank was continued is not controlling. The gain here sought to be taxed was represented by shares with essentially different characteristics in an essentially different corporation, and hence, the added value, although still held by the taxpayer, is taxable income.

In determining that there resulted from this transaction and exchange of property a taxable gain to the taxpayer, the Commissioner followed the rule prescribed by section 202 of the Revenue Act of 1918, supra, and, under the facts here disclosed, was warranted in so doing.

It follows that the decision of the lower court should be and is reversed and the cause is remanded for further proceedings consistent herewith.

Article 1564: Exchange of property.

X–51–5326
Ct. D. 428

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. Income—Stock Dividend—Exchange of Stock for Cash and Stock—Year Gain is Taxable—Stock Received Held in Trust.

Where, pursuant to an agreement of sale, the sellers of all the common stock of the A Corporation in 1920 put them in the name

of the B Company, indorsed in blank, and deposit them in trust for five years for the benefit and security of the sellers, and the buyer pays for the stock cash and an amount of preferred stock of the B Corporation, having an ascertainable fair market value, which is distributed ratably among the sellers, the cash being used in part for the purchase of certain guaranteed and preferred stock of the A Corporation, bought pursuant to the agreement, and the remainder distributed to the sellers in payment at par for the original shares of guaranteed and preferred stock of the A Corporation held by them and for their common stock at a specified rate per share, the transaction is a sale and not a stock dividend, and the gain derived therefrom by the common stockholders is taxable in 1920 under the Revenue Act of 1918, in which year it was ascertainable, notwithstanding that it was to be held in trust until 1925 and was not redeemed until 1924.

2. FINDING OF FACT—REVIEW OF BOARD'S FINDING.

Where there is substantial evidence to support a finding of fact by the Board of Tax Appeals, its finding of that fact will not be reviewed on appeal to the Circuit Court of Appeals.

3. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (19 B. T. A., 541) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT. No. 3139.

George M. Wright and William A. Moorehead, petitioners, v. *Commissioner of Internal Revenue, respondent.*

On petition to review the decisions of the United States Board of Tax Appeals.

Before PARKER, NORTHCOTT, and SOPER, Circuit Judges.

[June 17, 1931.]

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 19 B. T. A., 541. The Banna Manufacturing Co. was a corporation organized under the laws of South Carolina engaged in operating a cotton mill at Goldville in that State. In the years 1919 and 1920 its outstanding capital stock was $248,300 divided into 2,483 shares of the par value of $100 each, and consisted of three classes of stock as follows: 1,000 shares of common stock ($100,000); 967 shares of guaranteed stock ($96,700); and 516 shares of preferred stock ($51,600). In the latter part of the year 1919 a written contract was executed by and between all the holders of the common stock of the Banna Manufacturing Co. as sellers, and one, S. H. McGhee, as buyer, for the sale of the common stock. The agreement provided, among other things, that the sellers agreed to sell and the buyer agreed to buy on January 2, 1920, all of the stock of the Banna Manufacturing Co. at a certain fixed price for each spindle of the said Banna Manufacturing Co., and in addition, the buyer agreed to buy and pay for certain quick assets of the Manufacturing company. The agreement further provided that all the stock of the Banna Manufacturing Co. was to be put in the name of Banna Mills and indorsed in blank and deposited with a trust company for the benefit and security of the sellers, qualifying shares of directors excepted. The buyer agreed to pay, and did pay, for the stock $234,116 in cash, and $250,000 par value of the preferred stock of the Banna Mills. Part of the cash received was used to pay the expenses of the sale, and for the purchase of certain guaranteed and preferred stock of the Banna Manufacturing Co., which the holders of the common stock had purchased in accordance with the agreement of sale, and the remainder was distributed to the common stockholders of the Banna Manufacturing Co. in payment at par for the shares of guaranteed and preferred stock held by them, and for their common stock at the rate of $70 per share. The preferred stock of the Banna Mills, which was delivered according to the agreement, was all distributed among the common stockholders of the Banna Manufacturing Co. in proportion to the number of shares owned by them.

The petitioner George M. Wright received on account of the 225 shares of the common stock of the Banna Manufacturing Co. owned by him the sum of $15,750 in cash and 563 shares of the preferred stock of Banna Mills. The petitioner William A. Moorehead received on account of the 100 shares of common stock of the Banna Manufacturing Co. owned by him the sum of $7,000 in cash and 250 shares of the preferred stock of Banna Mills. Concurrently with the delivery of the capital stock of the Banna Manufacturing Co. said stock was placed in trust by the buyers for the benefit and security of the $250,000 of preferred stock of the Banna Mills in accord with the agreement.

The $250,000 of the preferred stock of the Banna Mills was to pay 8 per cent cumulative dividends, and this was promptly paid until the year 1924, when the stock was redeemed at $95 per share. The trust agreement had provided that it was to run for a period of five years.

At and after January 2, 1920, the preferred stock of the Banna Mills was closely held and was not listed or dealt in on any exchange. In January or February, 1920, the petitioner George M. Wright, sold 50 shares of said preferred stock to one J. B. Wharton, who purchased the stock as an investment at $100 per share. There were no other sales or offers for sale of said preferred stock in the year 1920. There were some other small sales of the stock in the years 1922 and 1923, at $95 per share, and a sale of 55 shares in February, 1922, at $80 per share. The contract price of the stock of the Banna Manufacturing Co., on a basis of $34 per spindle, amounted to $483,616, and the Board of Tax Appeals found that the value of the assets of the Banna Manufacturing Co. in 1920 was greater than the $415,000 for which they were sold in 1924.

It is contended on behalf of the petitioners that by the transaction of January, 1920, they did not receive any gain or profit that was taxable, and that the transaction amounted, in effect, to a stock dividend, and that the preferred stock of the Banna Mills, received by them, represented an appreciation in value of the common stock of the Banna Manufacturing Co. of the nature of a stock dividend of that company. It is also claimed on behalf of the petitioners that there was no ascertainable fair market value of the Banna Mills; that there was no substantial evidence to support the findings of the Board of Tax Appeals, and that the admitted presumption in favor of the correctness of the final determination of deficiencies by the Commissioner was overcome by the evidence.

We can not agree with the contention that the transaction was of the nature of a stock dividend, but are of the opinion that it was more in the nature of a sale with part payment in cash, and a lien for the remainder of the purchase price. A large portion, nearly or about one-half of the agreed price, was paid by the purchaser in cash; the contract refers to the transaction as a sale, and to the purchaser as the buyer, and holders of the common stock as sellers; the entire common stock of the Banna Manufacturing Co., which represented all that was transferred by the contract in question, was deposited in trust as security for the redemption of the preferred stock in the Banna Mills, which constituted, together with the cash payment, the consideration for the transfer of the common stock in the Banna Manufacturing Co.; the common stock in the Banna Manufacturing Co. passed entirely out of control of its holders, and the preferred stock in the Banna Mills was issued to the Banna Manufacturing Co. stockholders by the purchasers, and not to the company itself.

(*Peabody* v. *Eisner*, 247 U. S., 347; *Marr* v. *United States*, 268 U. S., 536 [Ct. D. 3755, C. B. IV–2, 116]; *Cullinan* v. *Walker*, 262 U. S., 134 [Ct. D. 3508, C. B. II–2, 55]; *Rockefeller* v. *United States*, 257 U. S., 176 [Ct. D. 3271, C. B. 5, 34]; see *Eisner* v. *Macomber*, 252 U. S., 189 [Ct. D. 3010, C. B. 3, 25].)

On this point counsel for petitioners rely on the case of *Weiss* v. *Stearn* (265 U. S., 242 [Ct. D. 3609, C. B. III–2, 51]), and the decision of this court in *Schoenheit* v. *Lucas* (44 Fed. (2d), 476), but these cases are easily distinguished from the instant case. In the *Weiss* v. *Stearn* case, the court said a new corporation had, in fact, been organized to take over the assets and business of the old. Technically there was a new entity; but the corporate identity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State, with presumably the same powers as the old. There was also no change in the characters of securities issued. By reason of these facts, the proportional interest of the stockholder after the distribution of the new securities was deemed to be exactly the same as if the par value of the stock in the old corporation had been reduced, and

5 shares of reduced par value stock had been issued in place of every 2 shares of the old stock.

In the Schoenheit case, this court held that the transaction was not taxable because the change was one of form rather than of substance, and the stockholder got nothing which he did not already have. Here there was not only technically, but in fact, a new entity. There was a change in the character of securities issued. The proportional interest of the stockholders, after the distribution of the new securities, was different from that which it was before the distribution. We can not escape the conclusion that the transaction was, in effect, a sale, and that the petitioner received something taxable from it in the year 1920.

This court has repeatedly held, and it is not necessary to quote authorities to that effect, that the determination of the Commissioner is *prima facie* correct, nor will the courts review the finding of the Board of Tax Appeals on questions of fact where there is substantial evidence to support such finding. *Anchor Co.* v. *Commissioner* (42 Fed. (2d), 99) and authorities there quoted.

As to the contention that there was no ascertainable fair market value, we again can not agree. In *Anchor Co.* v. *Commissioner*, supra, Judge Parker of this court said:

"The fair market value of the property as of March 1, 1913, was peculiarly a question of fact for the determination of the Board. It had before it, not only the opinion evidence relied upon by the taxpayer, but also the facts as to the cost of the property, the cost of improvements placed thereon, the rate of depreciation, and the valuation fixed by the Commissioner of Internal Revenue, the last of which was prima facie correct. (*Brooks* v. *Commissioner* (C. C. A. 4), 35 Fed. (2d), 178; *Wickwire* v. *Reinecke*, 275 U. S., 101, 105, 48 S. Ct., 43, 72 L. Ed., 184 [Ct. D. 4126, C. B. VII–1, 316].) What weight was to be given to these various matters in determining the value as of March 1, 1913, was for the Board to decide; and there is nothing to show that it abused its discretion or proceeded upon any erroneous view of the law."

Again in the case of *Penney & Long, Inc.*, v. *Commissioner of Internal Revenue* (39 Fed. (2d), 849), this court said:

"The very language of the statute itself, to the amount of its fair market value, presupposes the making of some estimate and the exercise of some judgment on the part of the Commissioner in finding, from all the circumstances, what a fair market value may have been."

In the instant case sales were made, it is true, of a small quantity of the preferred stock in the Banna Mills at the same or a greater price than that fixed as the value of the stock by the Commissioner. Certainly the intrinsic value of the security behind the stock justified the value fixed by the Commissioner. The 8 per cent dividend, which was promptly paid, would tend to prove at least the value fixed by the Commissioner, and finally, the price, at which the stock was redeemed in 1929, was the same price as that fixed by him and found by the Board of Tax Appeals as the fair market value. Certainly there was substantial evidence to support the finding of the Board of Tax Appeals, and as above shown, in such case, we will not review that finding.

The contention on behalf of the petitioners that the taxable profit accruing to them could not be ascertained until the end of the period fixed in the trust agreement of five years is not sound. Were such an agreement held to fix the date of the taxation of profits in a transaction of this kind the Government would be at the mercy of the purchaser and seller in each contract of sale, and if the taxing date could be postponed for 5 years by such a contract between purchaser and seller, it could be postponed for 20 years. As pointed out by Mr. Justice Stone in the case of *Burnet* v. *Sanford & Brooks Co.* (282 U. S., 359 [Ct. D. 277, C. B. X–1, 363]), "It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the Government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. It is not suggested that there has ever been any general scheme for taxing income on any other basis." And the Government can not, of necessity, in the collection of its taxes, be left to the mercy of agreements between individuals.

There was nothing in the action of the Board subject to review by this court, and its order is accordingly affirmed.

ARTICLE 1565: Determination of gain or loss from exchange of property. X-40-5231 Ct. D. 393

INCOME TAX—EVIDENCE OF VALUE—DECISION OF COURT.

VALUE—EVIDENCE.

Where it is necessary to determine the value of the assets of a corporation received for its stock in ascertaining the amount of taxable gain derived, the trial court is bound neither by the balance sheet of the corporation nor the opinion evidence introduced by the taxpayer, and the latter has no more probative force than the former. There being competent substantial evidence to support the trial court's findings of fact as to the value of the assets, which justify the court's conclusion of law, the judgment of the court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Pauline F. Wessel et al., as Executors, etc., appellants, v. *United States of America, appellee.*

Appeal from the District Court of the United States for the District of Nebraska.

[April 9, 1931.]

OPINION.

KENYON, Circuit Judge, delivered the opinion of the court.

This suit was brought by Sam Wessel (now deceased) in the District Court of the United States for the District of Nebraska, Lincoln Division, to recover certain income taxes in the sum of $9,500, alleged to have been erroneously collected from him.

The trial court made findings of fact and announced conclusions of law denying Wessel (whom we will hereinafter term the taxpayer) the relief demanded. From the judgment of the trial court in favor of the United States this appeal is taken. Since this appeal was perfected Wessel has died, and his executors substituted as appellants.

The action was brought under section 41, Title 28, U. S. C. A., which provides for original jurisdiction in the district court concurrent with the Court of Claims in certain cases in suits against the United States, and under subdivision 20 of said section such suits are tried by the court without a jury. It is not a case under section 773, Title 28, U. S. C. A., which provides for waiver of jury in civil cases by written stipulation.

Section 226 of Title 28 provides for a review, in suits of this nature, in the Circuit Court of Appeals, of judgments of the district court the same as other judgments therein, and section 764 provides that it is the duty of the trial court to cause a written opinion to be filed "setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon."

The findings of fact show that taxpayer on March 31, 1920, was the owner of all the common stock of the Western Furniture & Manufacturing Co. (hereinafter called the Manufacturing company). At that time he surrendered his stock in exchange for the assets of the corporation, and assumed the corporation's liabilities. The common stock was canceled, and the corporation dissolved. There was no cash payment involved in the liquidation of the business. There was no balance sheet to determine the surplus of the corporations as of March 31, 1920, the date of the liquidation. March 15, 1921, taxpayer filed his income tax return showing the amount of income and surtaxes which he claimed to be due from him to the Government for the calendar year 1920, in the sum of $5,043.23, which was paid. February 17, 1923, the Commissioner of Internal Revenue notified taxpayer of a proposed assessment of additional income and surtaxes for the year 1920, in the sum of $13,958.56. Over taxpayer's protest, on October 12, 1923, an assessment of an additional tax in the sum of $13,938.20 was made. February 26, 1924, taxpayer paid said additional assessment under protest, and in July, 1924, filed claim for refund, which was denied.

Finding of fact No. 8 of the court was as follows:

"That the Commissioner of Internal Revenue based his computation of plaintiff's income and excess profits tax for the year 1920 upon figures furnished by the plaintiff and which were contained in the books of account regularly kept by the Western Furniture & Manufacturing Co., a corporation, and this plaintiff during the years of 1919 and 1920."

The amount of gain or profit in the transaction was arrived at by the Treasury Department as follows: There was a balance sheet of the Manufacturing company as of December 31, 1919 (introduced in evidence by taxpayer), which was computed on the basis of cost of the various items contained therein, and showed a surplus as of December 31, 1919, of $49,917.58. The investigating officer of the Treasury Department determined the net income of the corporation for the period from January 1, 1920, to March 31, 1920, to be $6,342.76, arriving at a gross surplus as of March 31, 1920, of $56,260.34. From this he deducted accrued and unpaid corporation taxes in the sum of $9,852.75, leaving the alleged net surplus of the corporation March 31, 1920, as $46,407.59. To this was added the par value of the common stock in the sum of $30,000, making a total of $76,407.59, from which he deducted the cost to taxpayer of his stock in the corporation, to wit, $32,500, which left a net profit to taxpayer out of the liquidation of the Manufacturing company of $43,907.59.

It was stipulated in the case that the balance sheet of December 31, 1919, introduced in evidence, was correctly made by an internal revenue agent from figures contained in the books of the Manufacturing company.

The trial court found that the computations made by the Commissioner of Internal Revenue of taxpayer's income and excess profits taxes for 1920 were based upon figures furnished by taxpayer and were contained in the books of account regularly kept by the Manufacturing company, and were mathematically correct; that the accuracy of the books of account kept by the taxpayer during the years 1919 and 1920 have not been questioned. The court in its conclusions of law held that the taxpayer's income and excess profits tax for the year 1920 was correctly computed, and according to law; that the evidence of the values offered on behalf of the taxpayer was not sufficient to entitle him to recover even if the theory should be adopted that the value of the stock should not have been based upon the value of the assets as shown by the books and trial balance of the Manufacturing company.

Appellee introduced no evidence.

Findings of fact and conclusions of law sustaining his theories were asked by the taxpayer.

The taxpayer originally made two contentions: First, that there was no gain realized by the liquidation of the corporation and the transfer to him of its assets; that it was not a purchase and sale of stock. This contention, in view of the decision of the Supreme Court in *Hellmich* v. *Hellman* (276 U. S., 233 [T. D. 4217, C. B. VII-2, 238]), has been abandoned. The other contention urged on this appeal is that the trial court considered itself bound as to the fair market value of the assets by the statement of such value in the books of the corporation. The taxpayer urges that he was entitled to show and did show that the fair market value of the assets was much less than the figure at which they were carried on the books of the corporation.

The Government contends that the sole province of this court is to determine as a matter of law whether the facts found by the trial court support the judgment, and that the question as to any competent evidence to support the conclusions of fact is not here, there being no proper assignment of error covering that point. Further, the Government claims that no motion was made by the taxpayer for judgment, and that this court can not reverse a special finding of fact by the court below or reverse the judgment thereon for any error of fact. The special findings of fact by the trial court have the same effect as the verdict of a jury. (*Cramp* v. *United States*, 239 U. S., 221; *Crocker* v. *United States*, 240 U. S., 74; *Brothers* v. *United States*, 250 U. S., 88; *Stone* v. *United States*, 164 U. S., 380.)

If the question of whether or not there is any substantial evidence to support the findings of fact was properly raised at the trial and preserved for review by this court we are satisfied that it is our duty to pass on that question as one of law, all the evidence being before us. (*Collier* v. *United States*, 173 U. S., 79; *United States* v. *Buffalo Pitts Co.*, 234 U. S., 228.)

There is some doubt whether the assignments of error sufficiently cover this point. However, we have concluded notwithstanding that doubt to consider the same.

As to the Government's contention that no motion was made by the taxpayer for judgment and no declaration of law was requested on the subject of whether there was any competent evidence to warrant the findings of fact, we may say that the question was, we think, sufficiently raised by the requests made for conclusions of law on the part of the taxpayer.

In the case of *Federal Intermediate Credit Bank of Omaha* v. *L'Herisson* (33 F. (2d), 841), cited by the Government, it was held by this court: "If a party seeks to have reviewed the question whether the record contains any substantial evidence to support the findings and judgment against him, it is incumbent upon him to make a motion for judgment in his favor on that ground, or to request a declaration of law to that effect, or to take some other equivalent step, and secure a ruling by the trial court, and to take exception to such ruling." Such equivalent steps were here taken.

It will not be necessary for us to enter the field of inquiry further in this case than to determine whether there was any substantial testimony to support the findings of fact of the trial court, for there can be no doubt that the findings of fact justify the court's conclusions of law.

It was the duty of the taxpayer to establish his claim by proof satisfactory to the court. It was the province of the court under the statute to determine the profit or gain in the transaction in question. That was measured by the fair value of the property received, less the cost of the stock. It was not bound by the statements of the corporation books. The corporation was an entity, separate and distinct from the stockholders. While the statements on the books of the value of the assets were not conclusive, they were of evidential value, and of course it was proper for the court to consider them in arriving at its ultimate conclusion as to the facts. Speaking of books of account as showing values, the Supreme Court said in *Doyle* v. *Mitchell Bros. Co.* (247 U. S., 179, 187): "Nor is the result altered by the mere fact that the increment of value had not been entered upon plaintiff's books of account. Such books are no more than evidential, being neither indispensable nor conclusive. The decision must rest upon the actual facts, which in the present case are not in dispute." That would seem a clear statement of the law. See also *Robert P. Hyams Coal Co.* v. *United States* (26 F. (2d), 805).

The only point really urged here is that the court should not have accepted as correct the value of the assets as appeared on the books in view of the opinion evidence offered by taxpayer that the market value was less, but the court was bound, neither by the opinion evidence, nor the balance sheet, both of which the taxpayer introduced. The opinion evidence had no more probative force than did the books.

The court found in determining the net profit or gain derived by taxpayer from the exchange of the assets of the Manufacturing company for his stock that the figures of the Commissioner of Internal Revenue as to net profit, namely, $43,907.59, were correct, and found as a fact just how this net profit of $43,907.59 had been reached by the Treasury Department. Certainly there was evidence in the balance sheet from the books of account of the Manufacturing company, of which taxpayer owned all the stock, to justify the court's findings as to the value of the assets and the net profit, and this court is not concerned with the mental processes of the trial court in arriving at its conclusion.

Counsel for appellant in his brief states "the trial court could not properly say that there was no evidence upon which to base a finding, even if the stipulation had been the only evidence introduced in the case." The court did not say in its conclusion of law there was no evidence upon which to base a finding different from the one it did. It said "the evidence of values offered on behalf of the plaintiff is not sufficient to entitle the plaintiff to recover." That was a conclusion of law based on the evidence. We are satisfied there was competent substantial evidence to support the findings of fact and that such findings warrant the conclusions of law. The judgment is affirmed.

SECTION 203.—INVENTORIES.

ARTICLE 1581: Need of inventories. X–47–5298
Ct. D. 418

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. INVENTORIES—NEED OF.

Where a taxpayer, engaged in financing transactions of a general character and not engaged in buying and selling merchandise, takes a security title to certain merchandise under an express contract with a corporation, the use of inventories is not necessary in the determination of the income of the taxpayer.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (19 B. T. A., 1313) is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT. No. 3144.

Finance & Guaranty Co., 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.

[June 17, 1931.]

NORTHCOTT, Circuit Judge: This is a petition to review a decision of the United States Board of Tax Appeals (reported in 19 B. T. A., 1313), and involves income and profits taxes for the year 1920 in the amount of $10,833.73.

The taxpayer, a Delaware corporation, with its principal office at Baltimore, Md., is a finance company given broad powers under its charter, enabling it, in addition to its financing business, to "buy, sell, exchange, hold and own * * * personal property of any kind whatsoever." A subsidiary of the petitioner, known as the Finance Trust, was organized, and through this subsidiary, it operated in New York. In the fall of 1919, the Finance Trust company entered into a contract with the Morcott company of New York, under the terms of which contract the Trust purchased in Japan and imported into the United States certain silk, paying in addition to the purchase price and shipping charges, custom duties, warehouse charges, etc. The silk was purchased to meet sales which the Morcott company had made or was to make, was warehoused in the name of the Trust, and when sold was shipped out on orders of the Morcott company, being paid for by that company as shipped. The silk was carried on the books of the Trust as an account receivable from the Morcott company. Some time in 1920, the Morcott company failed. The petitioner and its subsidiary, the Finance Trust, filed a consolidated return for 1920, for the purpose of taxation, in which return a deduction of $37,384.66 was claimed as a loss, arising from the business relations between the Trust and the Morcott company. The amount of the deduction claimed represents the difference between the cost of the silk, as carried in the Morcott company account, and the market value at the close of the taxable year, as determined by an inventory of the silk on hand.

The Commissioner of Internal Revenue disallowed the deduction claimed upon the theory that the silk was held by the Trust as security for advances on credits given the Morcott company. The petitioner appealed to the Board of Tax Appeals from this finding of the Commissioner, and the Board affirmed the finding.

On hearing before the Board, it was stipulated by counsel representing petitioner that if it were found that the petitioner was not engaged in buying and selling silk, but on the contrary, was engaged in financing sales of silk, that the action of the Commissioner should be sustained.

The statute involved is section 203 of the Revenue Act of 1918 (ch. 18, 40 Stat., 1057), and reads as follows:

"That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the

approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

Under the stipulation entered into at the hearing before the Board, the only question presented is whether the Board erred in finding that the action of the Commissioner could not be set aside, and no question is here presented as to whether the amount claimed as a deduction could have been properly claimed as a deduction for a bad debt. As will be seen from the Act, Congress plainly placed the question of the proper use of inventories within the opinion of the Commissioner, and that question was left by Congress to the discretion of the Commissioner. In such a case a heavy burden of proving that the Commissioner's action was plainly arbitrary rests upon the taxpayer. (*Lucas, Commissioner of Internal Revenue* v. *Kansas City Structural Steel Co.*, 281 U. S., 264 [Ct. D. 223, C. B. IX–2, 299].)

Where a statute commits to an executive department of the Government a duty requiring the exercise of administrative discretion, the decision of the executive department, as to such questions, is final and conclusive, unless it is clearly proven arbitrary or capricious, or fraudulent, or involving a mistake of law. (*Work* v. *Rives*, 267 U. S., 175; *Silberschein* v. *United States*, 266 U. S., 221, 225; *United States* v. *Atchison, T. & S. F. Ry. Co.*, 249 U. S., 451; *Ross* v. *Day*, 232 U. S., 110. See, also, *Williamsport Wire Rope Co.* v. *United States*, 277 U. S., 551 [T. D. 4172, C. B. VII–2, 323].)

A study of the record leads us to the conclusion that the action of the Commissioner was not only not arbitrary or capricious, but was correct. So far as the record shows, this was the only purchase of silk made by the Trust company, and the purchase was made under an express contract with the Morcott company, and while made in the name of the Trust company, all sums expended were charged to the Morcott company on the books of the Trust company. The account was increased or diminished as money was paid out for the silk, and as the Morcott company paid for the silk withdrawn. Had the Morcott company not failed it could have been made to carry out the contract with the Trust company. The principal business of the Trust company was not the silk business, but was the financing of transactions of general character, and the Board of Tax Appeals so found. Findings of the Board on questions of fact will not be disturbed by the courts where there is substantial evidence to support them. (*Van Smith Building Material Co.* v. *Commissioner of Internal Revenue*, 44 Fed. (2d), 54, and authorities there cited.)

It is contended on behalf of the petitioner that because the Board said in its opinion that "* * * the silk was purchased in Japan by the Trust for its own account * * *" it found as a fact that the Trust company was engaged in the business of buying and selling silk. We do not think so. The Board was evidently referring to the fact that the purchase was made in the name of the Trust company.

Under the stipulation above referred to, the question as to whether the amount would be properly allowable as a bad debt was not before the Board, and is not before us to review. There is nothing in the record to show whether Morcott company gave any security to the finance company for the performance of the contract, or whether the Morcott company paid anything to its creditors upon its failure.

The decision of the Board of Tax Appeals is accordingly affirmed.

SECTION 204.—NET LOSSES.

ARTICLE 1601: Net losses, definition and computation. X–52–5336 Ct. D. 434

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

DEDUCTION—NET LOSS—IDENTITY OF TWO CORPORATIONS.

Where the assets of an old corporation are transferred to and its liabilities assumed by a new corporation bearing the same name and organized under the same laws but with vastly increased powers and an outstanding bond issue larger than that of the old and at a

higher rate of interest, the new corporation is not identical with or substantially the same as the old and it is not "any taxpayer" within the purview of section 204(b) of the Revenue Act of 1921. Accordingly, a net loss of the old corporation may not be deducted under that subdivision from the net income of the new corporation.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

William Volker and Page Golson, Trustees in Liquidation of the Great Western Portland Cement Co., a Dissolved Corporation, plaintiffs, v. *Noah Crooks, Collector of Internal Revenue for the Sixth District of Missouri, defendant.*

[September 4, 1931.]

OPINION.

REEVES, District Judge: This is an action to recover income and profits taxes in the total sum of $22,894.84. Said gross sum was heretofore paid under protest.

Plaintiffs are trustees in liquidation of the Great Western Portland Cement Co., a dissolved corporation. The plaintiffs base their right of recovery upon the provisions of section 204(b) of the Revenue Act of 1921. It is there provided that—

"If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

At the end of the year 1922 a former corporation of the same name and incorporated under the same law took steps to dissolve apparently because of its losses. It had sustained a loss of $153,154.18 for the year 1921 and $65,747.26 for the year 1922. Said former corporation had been incorporated for the purpose of buying, manufacturing and selling cement "and all articles and products in the composition and manufacture of which cement is used."

It had an outstanding bond issue of $308,500 at 6 per cent. Moreover, it had become heavily indebted to the principal stockholder.

In December, 1922, a new corporation was formed bearing the same name and incorporated under the same laws but with vastly increased powers. The new corporation was not limited in its charter to the manufacture, buying and selling of cement. It was empowered to "deal in all kinds of lime, limestone, plaster, natural and artificial stone." In addition to this, it was authorized to build or purchase manufacturing plants, tools, warehouses "and all other equipment and structures necessary, appropriate or convenient for the exercise of the powers herein granted." It was empowered to construct or acquire and sell residence properties. This power, however, was limited to nearby residences for its employees. In like manner it was granted the authority to operate stores for the purpose of furnishing merchandise to its employees. It was given power to acquire other corporations or the business of individuals or partnerships in furtherance of the objects and promotion of the business of "this company."

It was permitted to enter into all kinds of contracts with any person, firm, association or corporation whatsoever. It was granted unlimited power for the issuance of "bonds and debentures and other negotiable and transferable instruments and evidence of indebtedness whether secured by mortgage or otherwise."

It was permitted to transact its business wherever it desired.

The new corporation took over the assets and assumed the liabilities of the old. It had a net income of $123,864.69 for the year 1923, and its net income for the year 1924 was $120,981.22.

The contention is now made that the losses of the preceding two years should have been deducted from its profits for said years 1923 and 1924 and

that by such deduction plaintiffs' trust would have been saved the amount herein sued for. Plaintiffs proceed upon the theory that the two corporations were identical and that "any taxpayer" referred to in said section 204(b) of the Revenue Act of 1921 was the same corporation so far as said tax is concerned. It should be here stated that the new corporation authorized an issue of $750,000 in bonds at 8 per cent. Of this amount $650,000 were actually issued to one of the principal stockholders who was also the principal stockholder and owner of bonds of the former corporation. If the corporations were identical, or substantially the same, then plaintiffs are entitled to recover. Otherwise they are not.

1. As a preliminary to the discussion of plaintiffs' right of recovery, attention should be called to the uniform ruling of the courts to the effect that—

"Tax laws are essentially practical in their purposes and application and the Federal income tax laws are no exception. * * * It is also a basic principle in the application of such laws that substance and not mere form be regarded as governing." (*Central Life Assurance Society Mutual* v. *Commissioner of Internal Revenue*, No. 9134, Eighth Circuit Court of Appeals, filed July 13, 1931; *United States* v. *Phellis*, 257 U. S., 156 [T. D. 3270, C. B. 5, 37]; *Bowers* v. *N. Y. & Albany Lighterage Co.*, 273 U. S., 346 [T. D. 4009, C. B. VI-1, 268].)

If, therefore, the incorporation of the new company was a mere continuation of the old, plaintiffs' trust and the first corporation would have been "any taxpayer" within the purview of said section 204(b).

2. Counsel have favored the court with a collation of authorities on both sides of the question here presented. However, the case of *Marr* v. *United States* (268 U. S., 536 [T. D. 3755, C. B. IV-2, 116]) appears to be decisive. While in the Marr case the new corporation was formed under the laws of a State other than that of the old corporation, yet this was treated as an unimportant circumstance and the decision of the court rested mainly upon the fact that there was a difference in the charter powers as well as a difference in the rate of interest provided for in the bond issues of the two companies.

In the instant case the new corporation not only had vastly increased powers so as to destroy a practical identity, but in addition its bonded indebtedness was not only larger but provided a greater per cent in interest. It is true that this could have been accomplished by amendment but the same thing could have been said in respect of the corporations in the Marr case.

In view of the above, recovery will be denied. It is so ordered.

SECTION 205.—FISCAL YEARS 1920-21 AND 1921-22.

ARTICLE 1621: Fiscal years 1920-21 and 1921-22. X-43-5267
(Also Section 214(a)3, Article 132.) Ct. D. 408

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. TAXATION OF PARTNERS—FISCAL YEAR OF PARTNERSHIP—CALENDAR YEAR OF PARTNER—COMPUTATION—SURTAX.

Where a member of a partnership, who makes his return for the year 1922 on a calendar year basis, reports as his income, pursuant to section 218(a) of the Revenue Act of 1921, his distributive share of the net income of the partnership, which computes its net income on the basis of a fiscal year, sections 210 and 211 of that Act impose a single tax on his entire net income for the calendar year 1922. Section 205(c) of the Revenue Act of 1921 requires that the rates of tax for the calendar year 1921 apply to the amount of his distributive share of the net income of the partnership for its fiscal year 1922 attributable to the calendar year 1921, and the rates for the calendar year 1922 to the amount of his distributive share of the income of the partnership attributable to the calendar year 1922. In determining the rates of tax appli-

cable to the amount of the distributive share of the partner attributable to the calendar years 1921 and 1922, respectively, the amounts subject to the rates for the calendar year 1921 should be placed in the lower brackets of the rates schedule provided for the year 1921 and the amounts attributable to the calendar year 1922 in the next higher brackets of the rates schedule applicable to that year.

2. DEDUCTION—TAX ON AUTOMOBILE.

Section 900 of the Revenue Act of 1921 levies an excise on the manufacturer of an automobile and not on the purchaser and the purchaser is not entitled to a deduction of the tax under section 214(a)3 of the Revenue Act of 1921 as a tax paid by him even though the manufacturer charged him the amount of the excise by entering it as an item separate from the purchase price of the automobile.

3. DETERMINATION OF THE BOARD OF TAX APPEALS AFFIRMED IN PART AND MODIFIED IN PART.

The determination of the Board of Tax Appeals (18 B. T. A., 465) is affirmed in part and modified in part.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT. No. 27044.

George L. Shearer, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Appeal from a decision of the Board of Tax Appeals fixing a deficiency in the appellant's income taxes for the year 1922.

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

[April 6, 1931.]

OPINION.

L. HAND, Circuit Judge: The taxpayer was one of a firm of attorneys in New York which kept its books upon a fiscal year other than the calendar year. His distributive share from the firm for the firm year ending in 1922 was large, and he included it in his return for that year as required by section 218(a) of the Revenue Act of 1921. In calculating his tax he split the share into two parts; that is to say, he calculated one tax upon the proportion allocable to 1921 as though it stood alone, and another upon the remainder allocable to 1922, on the same assumption. The Commissioner computed the tax upon the part allocated to 1922 at the rates for that year, including a surtax as though that part were alone included. To this he added a second tax calculated upon the part allocated to 1921 at the rates for that year, including a surtax as though that part were in addition to the part allocated to 1922. The surtax was therefore made up by putting the 1922 part in the lower "brackets" and the 1921 in the higher, and applying the rates accordingly. The Board affirmed the Commissioner and the taxpayer appealed.

During 1922 the taxpayer bought a motor car, for which the dealer charged him by entering the excise tax under section 900 of the Act of 1921, as an item separate from the purchase price, as provided in article 3 of Regulations 47; the dealer in this way avoiding a tax upon any part of the separate item. This tax the taxpayer claimed the right to deduct from his income under section 214(a)3, and the Commissioner disallowed it. The appeal is also from the decision of the Board affirming this rule.

As to the first point, the difficulty arises from the omission from the Act of 1921 of section 206 of the Act of 1918, a confessed inadvertence corrected in the Act of 1924. That section had provided, and section 207 of the Act of 1924 later did provide, that when a partner's distributive share from his firm fell in separate years, the surtax should be computed as the Commissioner proceeded in the case at bar. By article 335 of Regulations 62 he continued this method for the year 1922, and relies upon his power to do so here. Section 205(c), which remained in all three Acts, provided that the rates for each year should "apply" to that part of the partner's share allocable to that year, and that the share should be allocated proportionately to the fraction of each calendar year included in the firm year. We have first to consider what is the

result of the Act of 1921, disregarding the repeal of section 206, and then how far that repeal changes the result.

In express terms section 218(a) required the whole share to be included in the return for the later year, thus precluding the addition of the earlier part to the other income of the earlier year. The taxpayer's method not only treats the earlier part as though it had accrued in the earlier year, but as though it were the only income of that year, since he does not, and of course could not, include it in his 1921 return. This is in effect to tax it as the whole income of another person received or accrued in 1921, though returned in 1922. It seems to us apparent that this result could not have been intended; section 218(a) by requiring the whole share to be returned in one year, must have meant that the surtax should be computed upon it as though it were received in a single year. Section 205(c) does not meet this inference; it does indeed distribute the rates of 1921 and 1922 among the allocated parts, but it does not suggest that the share shall lose its character as an entirety. The rates for each year may equally "apply" to the part allocated to that year, though the second part, whichever be chosen as second, be taken as part of a whole, that is, though it be placed in the higher "brackets." Thus, regarding alone the relevant sections of the Act of 1921, the taxpayer's pretension to treat the part allocated to 1921 as though it were a separate income for that year seems without warrant.

Nor do we think that the repeal of section 206 justifies an opposite inference. That section was designed to establish a special order in which the rates should be applied; the earlier rates to the later parts, the later to the earlier. The repeal can at most be understood as no more than to abrogate that method, which was indeed contrary to what would naturally have been selected. So far indeed we hold that it went, whether or no it was inadvertent. While at times the subsequent action of Congress has been held to throw light upon what had gone before, we know of no case where a repeal has been held to be brutum fulmen, because the repealed provision was later reinstated.

We are thus brought to the question whether the Commissioner had power to preserve the old method, despite the repeal. On the whole it seems to us that he had not. Had section 206 not been repealed, it would perhaps have been possible to say that the order in which the parts should be taken was within the compass of the Commissioner's legislative powers, though even that is doubtful. Section 205(c) in applying the rates of each year to the part allocable to that year, if taken by itself, can scarcely be supposed to have meant to invert the actual sequence in the accumulation of the income. True, the allocation is arbitrary, since it will seldom be that an income accrues proportionately with the lapse of time. Nevertheless, the effort was to avoid perplexing inquiries by establishing a rule which in the long run would conform with the facts; not to disregard the fact that an income is accretive, and that the first part, whether or not it be arbitrarily computed, must accrue in the earlier period.

But whatever may be thought of the propriety of that interpretation, when the Commissioner has otherwise provided, it appears to us conclusive when coupled with the repeal itself. Section 206 having prescribed the inverted method, its repeal, unless we permit ourselves to disregard it because it was not deliberate, can only be understood as relieving the computation from this prescription, and to require the part allocated to the earlier year to be treated as the first part to accrue. It appears to us therefore that between 1918 and 1924, the law required the part allocable to the earlier year to be placed in the "lower brackets," and that allocable to the later year to be placed in the higher. While this makes only a trifling difference to the taxpayer at bar, we think him entitled to so much relief.

As to the second point, the motor tax is imposed upon the dealer, not the purchaser. Section 900 levies an excise upon "the following articles sold * * * by the manufacturer," and if it had been theoretically open to argument whether the dealer or the buyer was the subject of the tax, the question was set at rest by *Lash's Products Co.* v. *United States* (278 U. S., 175 [T. D. 4259, C. B. VIII–1, 303]). In that case a similar tax under section 628 of the Act of 1918 was held to be imposed upon the dealer, and to be part of the purchase price upon which the percentage should be computed, though this results in taxing the tax itself when it has been "passed on" to the customer. Indeed, except that the regulation of the Commissioner to that effect had been confirmed by subsequent statute, it was intimated that no difference would arise, when the dealer separately "bills" the customer for

the tax. We follow the language of the opinion in holding that, however set up in the sale, the tax is a part of the purchase price and that the dealer, and he alone, pays it.

It is true that, so looked at, the sum when collected by the dealer is treated as part of his gross taxable income from which he makes the deduction, though this income by hypothesis comes to him only because he must pay it out to the Government as a tax. If the final incidence of the burden be traced, no doubt the only income, properly speaking, which has borne the tax is the customer's, for it is a fiction to treat as income a sum received by the dealer, which, except for the tax, would never have come to him at all. In substance, therefore, we must agree that the only person who has suffered any diminution of what would otherwise have been an income, is the customer, and that a nicer accommodation of the tax to economic burdens would have distinguished between cases in which the tax could be shown to have been added, and those where the dealer had to bear it. But the final incidence of taxation is not a measure of the person on whom the tax is levied, and it seems to us that the form of the statute must control. The fact that the Act of 1928 excluded those dealers who had succeeded in throwing the loss upon their customers, indicates no more than that Congress did not wish to make them a gratuity; it does not determine the original character of the tax.

Decree modified in acordance with the foregoing.

SECTION 206.—CAPITAL GAIN.

ARTICLE 1651: Definition and illustration of capital net gain. X–45–5283 Ct. D. 414

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. "CAPITAL GAIN"—SALE CONSUMMATED AFTER DECEMBER 31, 1921.

Where stock was delivered before January 1, 1922, by the owner to brokers in accordance with an agreement by the owner with the brokers for the sale of the stock and the owner could not by suit recover the stock if default should be made in the payment of any installment but had merely the right to recover the unpaid installments of the purchase price as they became due, the title to the stock passed from the owner before January 1, 1922, and the sale of the stock was accordingly not "consummated after December 31, 1921." The gain from the sale of the stock, therefore, is not a "capital gain" as defined by section 206(a)1 of the Revenue Act of 1921.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (20 B. T. A., 176) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT. No. 4558.—MARCH TERM, 1931.

Charles W. Dahlinger, petitioner, v. *Commissioner of Internal Revenue, respondent.*

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

Before WOOLLEY, DAVIS, and THOMPSON, Circuit Judges.

[July 29, 1931.]

THOMPSON, Circuit Judge: This case comes up upon petition for review of an order and decision of the Board of Tax Appeals sustaining the Commissioner of Internal Revenue in his construction of section 206(a)1 of the Revenue Act of 1921 and section 208(a)1 of the Revenue Act of 1924, as applied to a sale by the petitioner of certain stock under a contract made in 1920.

In January, 1920, the petitioner and other stockholders of the Columbia Plate Glass Co. entered into an agreement with Frazier & Co., brokers, for the sale of their stock constituting a majority of the stock of the glass company. The stock indorsed in blank for transfer was deposited with a bank in trust, and held for the selling stockholders and the brokers, to be delivered to the brokers upon compliance by them with the terms of the agreement. The brokers deposited $50,000 in cash with the trustee to be held by it until the sale should be consummated and, in case of consummation, that sum was to be credited on account of the purchase price.

The agreement provided that certain notes and securities were to be delivered to the trustee as security for the payments. The delivery of the notes and other securities to the trustee, it was agreed, should release and discharge the brokers from all liability to the selling stockholders. The trustee was to make the payments for the stock to Dahlinger and the other stockholders semiannually, beginning December 30, 1920, and ending December 30, 1925. On February 11, 1920, the brokers notified the trustee that they desired to obtain delivery of the stock in accordance with the agreement of January 27, 1920, and deposited securities and cash with the trustee whereupon the stock was delivered to Frazier & Co. Certain exchanges and substitutions of securities deposited with the trustee were made from time to time, the details of which are immaterial. The brokers paid the several installments when each became due, in accordance with the agreement of January 27, 1920.

The petitioner had owned his Columbia Plate Glass Co. stock for more than two years prior to 1920. In his income tax returns, he reported a profit of $13,362 for each of the years 1923, 1924, and 1925 from the proceeds of the sale of the stock, and computed his tax at the rate of 12½ per cent upon the theory that the rate for sales consummated after December 31, 1921, was applicable.

The Commissioner included the item of $13,362 with other income for each year and computed the tax on the income at normal and sur tax rates and thereby determined a deficiency. The case turns upon the interpretation of section 206(a)1 of the Revenue Act of 1921 or section 208(a)1 of the Revenue Act of 1924, which are identical in their terms and are as follows:

"The term 'capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921."

Congress has defined what "capital gain" means. The question then is, What is the meaning of the word "consummated" as applied to a sale? The dictionary meaning of "consummate," as adopted by the Commissioner and the Board of Tax Appeals, is as follows:

"To bring to completion; to raise, bring or carry to the highest or utmost point or degree; to complete; to finish; to perfect; to achieve; to fulfill."

The Board of Tax Appeals also applied the statements in Williston on Sales, showing the distinction between a contract to sell and a sale as follows:

"A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

"A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." (Williston on Sales, volume 1, section 1.)

Williston proceeds as follows:

"The distinction is often expressed by the terms 'executory' and 'executed' sales. Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is transferred. If it is transferred, there is a sale, an executed sale, even though the price be not paid." (Williston on Sales, volume 1, section 2.)

The stock was delivered to the brokers in accordance with the agreement, prior to the effective date, December 31, 1921, of sections 206 and 208 of the Revenue Acts of 1921 and 1924, although at that time only installments had been paid upon the agreed price. If default had been made in the payment of any installment, the taxpayer could not by suit have recovered the stock, but had merely the right to recover the unpaid installments of the purchase price as they became due. The title to the stock had passed from the petitioner. As a sale, therefore, the transaction was complete. It was an executed sale and, therefore, was a sale "consummated" before and not after December 31, 1921. (12 Corpus Juris, 1310; *Ormsby* v. *Graham*, 123 Iowa, 202, 214; *Micks* v. *Stevenson*, 22 Ind. App., 475.)

While the purpose of Congress in passing the bill is indicated in the reports of the committees and the debates before the committees to be remedial, and, therefore, the taxpayer is entitled to have it liberally construed, the construction which the petitioner attempts to put upon it is directly contrary to its terms. What the plaintiff is asking for is not consistent with the law of sales. He desires the court to construe the term "consummated sale" as meaning a sale not consummated or completed until the price is paid although title to the property has passed.

Our view is that, while the intention of Congress was to relieve sellers of capital assets from the heavy taxes levied upon the profit made, as income, it did not intend to afford that relief except as to sales "consummated" after December 31, 1921. If it were to be construed as the petitioner contends, it would mean that any sale of capital assets, in which the title to the property had passed, on or at any time before December 31, 1921, where installments of the purchase price, great or small, remained unpaid, would have to be construed as an unconsummated sale. As we construe the section in controversy, the clear intent of Congress was to exempt from the income tax provisions only those sales where the title to the thing sold had not passed prior to the date fixed in the Act.

The petition is dismissed and the decision of the Board affirmed.

ARTICLE 1651: Definition and illustration of capital net gain.

REVENUE ACT OF 1921.

Stock acquired through exercise of stock rights. (See G. C. M. 10063, page 159.)

ARTICLE 1651: Definition and illustration of capital net gain. X–52–5337 I. T. 2609

REVENUE ACT OF 1921.

I. T. 1786 (C. B. II–2, 45), holding that in the case of stock acquired through the exercise of stock rights, if the stock with respect to which such rights were issued was acquired and held by the taxpayer for profit or investment for more than two years, he may elect to be taxed upon the gain from the sale of such stock under the provisions of section 206 of the Revenue Act of 1921. is revoked, in view of General Counsel's Memorandum 10063 (page 159).

PART II.—INDIVIDUALS.

SECTION 210.—NORMAL TAX.

ARTICLE 4: Who is a citizen.

REVENUE ACT OF 1921.

Status, under Act of September 22, 1922, of a woman citizen of the United States who marries a subject of Great Britain and of a woman subject of Great Britain who marries a citizen of the United States. (See I. T. 2600, page 107.)

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1921.

Reinvestment of income from tax-exempt restricted allotted lands of Five Civilized Tribes. (See G. C. M. 9621, page 111.)

ARTICLE 31: What included in gross income. (Also Section 213(b), Article 73.) X–40–5232 Ct. D. 394

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

INCOME—TRUST—ESTATE FOR TERM OF YEARS.

Where the income of a trust estate created by will is payable to a designated beneficiary until his death and thereafter to his estate until the expiration of a certain period, the amounts of such income received by the estate of the designated beneficiary are taxable under the Revenue Act of 1918 as income of his estate. This conclusion is not affected by the fact that for the purpose of the estate tax the value of the right to receive this income from the time of the death of the deceased beneficiary to the end of the period for which it is to be received is included in determining the value of the gross estate of the deceased beneficiary.

COURT OF CLAIMS OF THE UNITED STATES. No. K–502.

Ernest P. Waud and the Northern Trust Co., Executors of the Estate of George F. Griffin, Deceased, v. *The United States.*

[April 6, 1931.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

Plaintiffs bring this suit as executors of the estate of George F. Griffin, deceased, to recover the sum of $5,242.28, with interest, paid as Federal income tax for the period of May 4, 1920, to December 31, 1920. The facts have been stipulated, and the issue in the case is whether certain sums paid to the executors as income from a trust created by the decedent's father were taxable as income against decedent's estate.

The findings of fact show that the decedent, in his lifetime, under the will of his father and an agreement with other heirs, received one-half of the net income of the trust estate created under his father's will, until his death, and thereafter his estate received this income until the expiration of a certain period. The Commissioner determined the value of the right to receive this income from the time of the death of the decedent, George F. Griffin, to the end of the period for which it was to be received, included this value as a part of the gross estate of the decedent, and assessed the estate tax accordingly. When the plaintiffs filed a Federal income tax return, as executors, for the period of May 4, 1920, to December 31, 1920, they did not include this income from the trust as a part of the income of the estate, but the Commissioner, upon an audit of the return, did so include it and assessed a deficiency by reason thereof. The plaintiffs paid this additional assessment with interest and duly filed an application for refund on the ground that the income so received was not taxable as income to the estate of which they were executors. The application for refund having been rejected by the Commissioner, this suit was brought.

The contention of the plaintiffs is in brief that the property which was so taxed by the Commissioner of Internal Revenue became by virtue of the be-

quest of his father, and was a part of the corpus of the estate of George F. Griffin, deceased; that it had been taxed as such under the estate tax provision; that being a part of the corpus or principal of the estate it was not income within the meaning of the Revenue Act of 1918; and that the action of the Commissioner resulted in double taxation, which Congress did not intend.

We are unable to agree that the property taxed became a part of the corpus of the estate by virtue of the bequest except in the sense that all receipts by an estate eventually become a part thereof. Nor do we think there was any double taxation. In this case, the estate tax and the income tax were levied upon two different things and under two different principles. The estate tax was levied as a transfer tax and in this case is measured by the value of the right to receive certain property, while the income tax was levied and assessed upon the gain derived from other property. The Federal estate tax is an indirect tax and not a direct tax upon property. It is merely a tax upon the privilege of transferring property. Whether the same transaction may give rise to the levy and assessment of another tax is not at all material and does not at all affect the question of whether an income tax may be collected under the circumstances of the case at bar.

It is quite true that a gift or bequest of capital assets, even if payable in installments, or consisting of interest due at a future date, or other items of that nature, does not constitute income. The cases cited by counsel for plaintiffs are mostly of this nature and are therefore not applicable herein. In the instant case, the bequest was of the right to receive this income, and when the income was paid it still remained income. The precise question involved in this case was determined in *Irwin* v. *Gavit* (268 U. S., 161 [T. D. 3710, C. B. IV-1, 123]), wherein it is held in effect that the beneficiary for life, or for a term of years, of the income of a trust estate created by will is taxable on that income as such. Practically the same objections were raised therein to the taxation of the income from the trust as income to the estate as are made in the case now being considered and these objections were held to be unfounded.

The Board of Tax Appeals in the case of *Ernest P. Waud et al., Executors* (6 B. T. A., 871), has held that the income here involved was subject to income tax upon the authority of *Irwin* v. *Gavit*, supra; and also held in the case of *Bull, Executor*, v. *Commissioner of Internal Revenue* (7 B. T. A., 993) that a tax in one form may be imposed on the present value of the right of expectancy and a tax in another form imposed upon the income when derived. In the case of *Widener* v. *Commissioner of Internal Revenue* (8 B. T. A., 651) the Board of Tax Appeals sustained the position taken by the Government in the case now before the court. We concur in the reasoning of the Board of Tax Appeals in the cases cited above.

We have examined with care the other cases cited by plaintiffs in support of their position but find that they are based on facts so much different from those of the case at bar that, in our opinion, they have no bearing thereon.

It follows that the petition of plaintiffs must be dismissed. It is so ordered.

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1921.

Distributions to beneficiaries under a trust of securities effecting a substantial change in their interest. (See Ct. D. 417, page 315.)

ARTICLE 39: Sale of stock and rights.

REVENUE ACT OF 1921.

Rights to acquire stock of a character or preference different from stock in respect of which rights were issued. (See I. T. 2597, page 118.)

ARTICLE 51: When included in gross income.

REVENUE ACT OF 1916.

Income derived from sales made in 1916, impounded until paid to taxpayer in 1917, ownership being determined by Supreme Court in 1922. (See Ct. D. 429, page 367.)

SECTION 213(b).—GROSS INCOME DEFINED: EXCLUSIONS.

ARTICLE 73: Gifts and bequests.

REVENUE ACT OF 1918.

Income of trust payable to designated beneficiary until his death and thereafter for certain period to his estate where value of right to receive income after death included in determining value of his gross estate for estate tax purposes. (See Ct. D. 394, page 340.)

ARTICLE 74: Interest upon State obligations.

REVENUE ACT OF 1921 AND PRIOR REVENUE ACTS.

Interest upon an award for property condemned for public purposes. (See G. C. M. 10043, page 124.)

ARTICLE 74: Interest upon State obligations. X–51–5327
I. T. 2608

REVENUE ACT OF 1918.

Office Decision 591 (C. B. 3, 113), holding that the interest on an award for property condemned for public purposes by a municipality is exempt from income tax, is revoked, in view of General Counsel's Memorandum 10043 (page 124).

ARTICLE 88: Compensation of State officers and employees. X–28–5136
Ct. D. 359
(Also Section 214(a)1, Article 101.)

INCOME TAX—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. EXEMPTION—STATE OFFICER OR EMPLOYEE.

Members of a firm engaged to act as official stenographers for the Public Service Commission of Pennsylvania and the Board of Viewers of Philadelphia County, both public bodies with power to pay for such services from public funds, are not officers or employees of a State or a political subdivision thereof and compensation received from such bodies for such services is not exempt from tax.

2. DEDUCTION—EXPENSES—EXEMPT INCOME—NONEXEMPT INCOME.

Where income of a taxpayer from personal services is in part exempt from tax and in part nonexempt, he is not entitled under section 214(a)1 of the Revenue Acts of 1918 and 1921 to deduct from his gross income, which does not include the tax exempt income, the expenses incurred in earning his exempt income.

3. PROCEDURE—BOARD OF TAX APPEALS—EVIDENCE BEYOND STIPULATION OF FACTS—INVASION OF TAXPAYER'S RIGHT.

Where in the case of an appeal to the Board of Tax Appeals the taxpayer and the Commissioner agree (without stating the facts) that partnership income from a State is exempt from tax and the Board, regarding this as a stipulation not of facts but of a legal conclusion based on facts not disclosed to the Board, orders the cause upon the calendar for the taking of evidence, the production of testimony beyond that disclosed by the stipulation, the taxpayer not objecting, does not result in an invasion or loss of any right of the taxpayer.

4. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (11 B. T. A., 334) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT. No. 4071.—OCTOBER TERM, 1929.

Walter H. Lewis, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review from the United States Board of Tax Appeals.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and THOMPSON, District Judge.

[Filed February 16, 1931.]

WOOLLEY, Circuit Judge: While on its face this petition for review of an order of the United States Board of Tax Appeals, redetermining tax deficiencies, appears to concern only the petitioner, the proceeding is a test case affecting like deficiency determinations with respect to all five members of a partnership, arising from their manner of conducting the business of public shorthand reporting and their method of making returns for income tax purposes.

Guilbert & Lewis, which we shall call "the firm," was under contract to report cases in the United States district court and was employed from time to time in reporting sundry legal, quasi legal and nonlegal proceedings. Admittedly its income from these sources was "taxable income."

The firm was also engaged to act as official stenographer for the Public Service Commission of Pennsylvania and the Board of Viewers of Philadelphia County, both public bodies with power to pay, as they did pay, for such services from public funds. It was claimed that the partnership income from these two sources, being income of an employee of governmental instrumentalities, is exempt from Federal taxation, hereafter referred to as "exempt income."

In the conduct of its business the firm maintained offices and an office force involving expenses normally incident to such a business. These expenses (which were substantial) were incurred in earning both its taxable income and exempt income but the several items of expense were not allocated on the books to the respective sources of income.

The firm filed annually a partnership income tax return in which it computed net taxable income by omitting altogether the exempt income (which was large) and deducting from gross taxable income (which was small) all the ordinary and necessary expenses of the partnership incurred in carrying on its entire business, that is, in earning both taxable income and exempt income, with the result that an annual net loss was disclosed and distributed to each partner in proportion to his interest in the partnership.

Coming to the partners, it appears that the petitioner at one time and two of his partners at other times were appointed official stenographers of the Court of Common Pleas, Number Four, of Philadelphia County. For this service they received fixed salaries paid from public funds which they did not turn over to the firm but retained as their own. They were also entitled to certain money received from the sale of copies of testimony to litigants which was handed to the firm and returned by it as taxable income. The partners regarded these State salaries as exempt income and therefore left them out of the computations in their 1919, 1920, 1921, and 1922 returns. But they included in their returns the expenses of earning this claimed exempt income, not by deducting them from the (omitted) exempt income to which they were related but by deducting

them from taxable income derived from other sources. And in addition, each partner in his tax returns, under the heading "income from partnerships," set up the amount of his distributive share of the partnership's net loss and thus reduced his tax.

In this situation the Board of Tax Appeals, by its order of redetermination, found certain deficiencies in the returns of all partners for certain years based on a finding of fact, and on at least one conclusion of law, that the firm in its capacity of stenographer for the Public Service Commission and the Board of Viewers for Philadelphia County was not an officer or employee of a government, State or county, and that accordingly the compensation it received for services rendered those two bodies was not exempt income but was taxable income. This finding did two things: It transmuted the firm's reported net loss into a taxable net profit and necessarily withdrew from the partners the right to deduct in their personal returns the proportions of the partnership net loss which had been improperly determined and distributed to them.

With respect to the partners the Board found that their employment by the court of common pleas was within the general law exempting from income tax their compensation for services rendered as officers or employees of a State or a political subdivision of a State. But the Board held as matter of law that the petitioner and his two partners could not, in determining net taxable income, deduct from their gross taxable income the expenses incurred in earning the exempt income but that the expenses incident to earning income of each kind should be allocated to and deducted from them respectively, which the Commissioner did in determining the deficiencies by making deductions for expenses from both taxable income and exempt income in the proportions they bore to the whole income.

No one complains of the Board's finding that the petitioner and certain of his partners were Government officers or employees when acting as official court stenographers and that, speaking generally, their salaries so earned were exempt from income tax. That is the first fixed fact in a valid computation of the tax. The next essential fact, disputed yet found by the Board and now to be established on this review, is the character of the employment of the firm by the Public Service Commission and the Board of Viewers of Philadelphia County and, accordingly, the character of the firm's income from these sources, for on this depends the partnership loss or profit distributable to the partners. Although the decision of the Board, that the firm was not in either instance a governmental employee rendering its income exempt, was made before the decision in *Lucas* v. *Reed* (281 U. S., 699), it was made after *Metcalf & Eddy* v. *Mitchell* (269 U. S., 514; T. D. 3824, C. B. V–1, 218) on which the Supreme Court grounded the Lucas-Reed decision. We hold that *Metcalf & Eddy* v. *Mitchell* rules this case on its facts and that the finding of the Board in this regard must be sustained.

With these facts established and the claimed factor of exempt income out of the way, the return of the firm can easily be adjusted as the Commissioner did it. Thus we arrive at what is the main question in the case affecting the petitioner, a partner, with respect to whom there are now three fixed factors in the tax computation—taxable income derived from one source, exempt income derived from another, and disallowance of his proportion of the firm's reported net loss. The question is: Was the petitioning taxpayer, in ascertaining net taxable income, entitled to deduct from his gross taxable income the expenses incurred in earning his exempt income?

The petitioner says that he was so entitled, and relies upon the now familiar provision of several Revenue Acts (in this case, section 214(a)1 of the Acts of 1918 and 1921) to the effect—

"That in computing net income there shall be allowed as deductions (from gross income):

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

Oddly enough neither party has been able to find and cite decisions, authoritative or persuasive, in support of his position; due perhaps to the fact that never before was such a deduction made and litigated. The petitioner, standing squarely on the statute, makes his main argument by emphasizing the words "all" and "any"—"all" the necessary expenses incurred in carrying on "any" business may be deducted, and insisting that his official shorthand "business" and "expenses" are embraced within these terms. The respondent's main argument is directed to illustrations of the evil effect of a rule

other than that for which he contends. And so the Board was left to decide the question.

We affirm the Board's ruling against the petitioner on what seems to us the common sense meaning of the words of the statute when read not alone but in connection with the law of tax exempt State salaries, for it must be assumed that when the Congress enacted the statutory tax law it had in mind the general law exempting State salaries which it could not disturb, and, indeed, did not attempt to disturb.

Section 1211 of the Revenue Act of 1926, providing for the refund of State salaries, was the first statutory recognition by the Congress of the law decided long before that the Federal government is without power to levy and collect a tax upon the compensation of officers of a State. (*Collector* v. *Day*, 11 Wall., 113.) In so recognizing the general law it is evident from the wording of section 1211 that the Congress did not intend to refund, as exempt from taxation, the income of any trade or business derived from serving a State but that it intended, as its words declare, to refund (because exempt) "amounts received by (any individual) as compensation for personal services as an officer or employee of any State or political subdivision thereof," which in plain words means exemption only of salaries paid for personal services.

Ordinarily personal service is not a trade or business involving expenses, yet in this case the petitioner's service as court stenographer did involve expenses in rendering it and in earning the salary. What is exempt? Income. What income? That which the petitioner earned. What did he earn? The difference between his official salary and his official expenses. That is the way income is figured for taxation purposes; why not for exemption purposes? But for the exemption accorded by general law, the statute would have taxed the petitioner's salary; yet, even so, it would have taxed only the difference between what he received for the personal service and what it cost him to render it. Therefore it would seem that this difference between salary income and expense outgo, being the thing which otherwise the Act would tax, must be the thing which the general law exempts.

Although "gross income" includes "gains, profits and income derived from salaries, wages or compensation for personal services * * * of whatever kind" (section 213(a)), it does not, at least according to departmental practice, include exempt income from salaries of State employees and officials; and so, in calculating taxable net income, the deduction of ordinary and necessary expenses incurred in carrying on any trade or business (section 214(a)1) incident to earning such gross taxable income must not include expenses incident to earning income exempted from taxation by general law. If this were not so and if the petitioner should prevail in his contention that expenses of earning tax exempt income may be deducted from gross taxable income, the law exempting State salaries from taxation must be construed as exempting not only the whole salary (omitted from the return) but also a part of other income (convertible into taxable net) equal to the expenses incurred in earning the salary. Thus there would be the paradox of an exemption of taxable net income.

And, finally, the petitioner complains of error in the Board's procedure resulting in what he conceives to be the loss of a substantive right. The facts are these:

The Commissioner disallowed the deduction of that part of the petitioner's ordinary and necessary expenses which were allocated to exempt income. To try out this one question the petitioner appealed to the United States Board of Tax Appeals on a stipulation of facts wherein the parties agreed (without stating the facts) that the firm's income from the State of Pennsylvania and its instrumentalities was exempt income. The Board, regarding this as a stipulation not of facts but of a legal conclusion based on facts which, though known to the Commissioner, were not disclosed to the Board, ordered the cause upon the calendar for the taking of evidence. The petitioner, without objection, produced testimony that disclosed a situation—beyond that disclosed by the stipulation—whose involved relations we have attempted to describe and out of which were set free the several new questions calling for decisions which in the Board's mind were essential to a lawful determination of the original question. Of course, if all parties had stood on the stipulation, the decision of the Board would have been different—and it would have been wrong. So far as the Board's departure from the stipulation was mere matter or procedure, certainly this court will have nothing to say in view of the character of that tribunal and particularly in view of the fact that this court

has no supervisory jurisdiction over it. We would touch the matter only if by its departure from the stipulation a right of the petitioner has been invaded or lost. We can not say that such was the case under the circumstance that the petitioner, by not objecting, acquiesced. Nor are we certain that, even if objecting, he could have avoided producing testimony so obviously necessary to a decision according to the very right of the matter.

The order is affirmed.

SECTION 214(a)1.—DEDUCTIONS ALLOWED: BUSINESS EXPENSES.

ARTICLE 101: Business expenses.

REVENUE ACTS OF 1918 AND 1921.

Expenses incurred in earning exempt income. (See Ct. D. 359, page 342.)

ARTICLE 101: Business expenses. X–32–5165
Ct. D. 367

INCOME TAX—REVENUE ACT OF 1916—DECISION OF COURT.

DEDUCTION—ADDITIONAL COMPENSATION PAID TO TRUSTEES BY BENEFICIARY.

Additional compensation for services in carrying on the business of a testamentary trust estate paid to the trustees by the sole beneficiary of the trust is not paid in carrying on any business or trade of the beneficiary, but is her personal expense, and it is, therefore, not deductible as a necessary expense actually paid in carrying on any business or trade under section 5(a) of the Revenue Act of 1916.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

William R. Kenan, jr., and Lawrence C. Haines, as Executors and Trustees of the Estate of Mary L. (Flagler) Bingham, Deceased, appellants, v. *Frank C. Bowers, as Executor of the Estate of Frank K. Bowers, late Collector of Internal Revenue, Second New York District, appellee.*

[June 3, 1931.]

OPINION.

CHASE, Circuit Judge: The plaintiffs, as executors and trustees of the estate of Mary L. (Flagler) Bingham, deceased, brought this suit to recover income taxes paid on income for 1917 which they now claim was deductible from the gross income of the taxpayer.

Mrs. Bingham's former husband, Henry M. Flagler, died in 1913. Under his will, which was duly proved and allowed in Florida, a trust was created for five years, and for five additional years, if in the opinion of the trustees the trust should be continued for the second 5-year period. His widow was the principal cestui que trust. Her interest as such so far transcended that of all other beneficiaries that they may be disregarded for the purposes of this case and the subject matter dealt with as though Mrs. Bingham had been the sole beneficiary.

Mr. Flagler's will provided for three trustees and fixed their annual compensation at $5,000 each. The trustees accepted the trust, qualified under their appointment and acted as such from May 24, 1913, until one of them died October 13, 1913. The appointment of a successor was, of course, of concern to Mrs. Bingham. The corpus of the trust had a valuation in excess of $26,000,000 and consisted in part of a chain of hotels and a railroad to be operated. She recognized that the yearly compensation of $5,000 to each of the trustees was insufficient in view of the labor and responsibility involved and might make it difficult to secure a competent man to act as the new

trustee although the two remaining original trustees were willing to continue to act. Accordingly, she agreed to pay the trustees from her own funds, in addition to the $5,000 allowed to each trustee annually in accordance with the terms of Mr. Flagler's will, the sum of $400,000 at the expiration of five years from May 24, 1913, to be in full compensation for their services whether the trust was continued for the second 5-year period or not. A new trustee was then appointed to fill the vacancy. He qualified and acted with the other two.

On July 11, 1917, Mrs. Bingham desired to, and did, pay to the trustees the sum of $308,860.69 which was the part of the $400,000 she had agreed to pay May 24, 1918, that had been earned to the time of payment. The payment so made was not deducted from her gross income for 1917 and the taxes paid as a result of the failure to deduct it are those involved in this suit. Mrs. Bingham died July 27, 1917, and the return filed in her behalf was on a cash basis and covered the period from January 1, 1917, to the date of her death.

The appellants base their claim of right to deduct the $308,860.69 on section 5(a)1 of the Revenue Act of 1916 which provided for the deduction in computing the net income of a citizen or resident of the United States of "The necessary expenses actually paid in carrying on any business or trade, not including personal, living, or family expenses."

It is undisputed that the taxes this suit was brought to recover were paid on income. If the deduction claimed is not allowable the suit must fail. Income is taxable and taxed and it is only by way of legislative favor that any taxpayer has the benefit of any deductions. Consequently, we need not first find these taxes laid in the law but rather need look only to determine whether they come within what amounts to an exception to the law which lays them. This depends wholly upon whether the payment by Mrs. Bingham falls fairly within the meaning of "necessary expenses actually paid in carrying on any business or trade" as distinguished from purely personal expenses for which no deduction may be taken.

No one denies that business was carried on by the trust. No one can maintain that the carrying on of that business was not one of the reasons for the appointment of trustees. But no one can accord to Mrs. Bingham any right to interfere in the conduct of that business so long as the trustees performed their duty. They were officers of the court who appointed them, responsible to the court and removal for cause shown. In the absence of any indication whatever that the court would not have appointed a competent trustee to fill the vacancy, had Mrs. Bingham not promised additional compensation, and in the face of the known fact that the two remaining trustees would have continued to serve anyway it would be going far to assume that the payment of the sum for which deduction is claimed was more than to satisfy her sense of the fitness of things.

The business carried on by the trust was separate and distinct from other business. The legal title to the property was in the trustees who were accountable for its preservation and management. The duty to conduct the business of the trust was theirs. While it may be true that the amount of compensation may well have been a factor in determining whether or not to accept the trust, it is hardly fair to believe that, having once accepted, the manner of performance of the duty was dependent upon the compensation received. Until the contrary is indicated, it is rather to be believed that the trustees would have performed their duty to the best of their ability as long as they remained trustees. Quite aside from that, however, Mrs. Bingham, as cestui que trust, had no right to conduct the business of the trust. Her only right in respect to it was to have competent trustees do their duty according to law. It is axiomatic that a court will not let a trust fail for want of trustees and there is nothing whatever to show that this trust was ever in any such danger.

If then, Mrs. Bingham was carrying on a business or trade, in taking upon herself the obligation to pay additional compensation to the trustees either to make it easier for the court to fill the vacancy or to assure herself that the trustees would do their duty, the claimed deduction should be allowed, otherwise not. But to hold that Mrs. Bingham made this payment as a necessary expense in carrying on the business of the trust, would require us to ignore the status of the trustees appointed by the court, charged with the duty and clothed with the power to carry on that business themselves and treat Mrs. Bingham as having the same power to control the property she would have had if the legal title to

it had been given to her and the trustees were merely her servants and agents for business purposes. It had been suggested that this case is governed by *Merle-Smith* v. *Commissioner* (42 Fed. (2d), 837). That case, however, had to do with deductions for depletion of mining properties and with income derived from working such property rather than with expenses.

The proper concern of Mrs. Bingham was to have the trustees administer the trust in such way that she would receive her just share and this would follow if they performed their duties to the best of their judgment and ability. Whatever expense she saw fit to incur to satisfy herself that they would do so was a personal expense for which no deduction is allowed. In this respect, this case is like that of *Commissioner of Internal Revenue* v. *Field* (42 Fed. (2d), 820). There the expense of litigation to construe the will under which the trust was created was claimed deductible as a business expense. It was held to be "within those general costs of protecting one's property for which the statute makes no allowance." The quoted words apply as aptly to this case. The additional compensation paid by Mrs. Bingham falls within the same category, and as Congress did not see fit to make such expenses deductible from gross income, the taxes paid can not be recovered.

Judgment affirmed.

Judge L. HAND dissents in part with opinion.

ARTICLE 109: Rentals.

REVENUE ACT OF 1921.

Taxes paid by lessee for and on behalf of lessor. (See Ct. D. 398, page 397.)

SECTION 214(a)2.—DEDUCTIONS ALLOWED: INTEREST.

ARTICLE 121: Interest. X–31–5158
Ct. D. 365

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

DEDUCTION—INTEREST—EXCEPTION—CONSTITUTIONALITY.

The provision in section 214(a)2 of the Revenue Act of 1921 making an exception to the allowance of interest as a deduction in the case of interest on indebtedness incurred or continued to purchase or carry obligations the interest upon which is wholly exempt from taxation, is not unconstitutional by reason of its being made effective as of January 1, 1921.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

John S. Phipps, appellant, v. *Frank C. Bowers, as Executor of the Estate of Frank K. Bowers, Deceased, appellee.*

Henry C. Phipps, appellant, v. *Frank C. Bowers, as Executor of the Estate of Frank K. Bowers, Deceased, appellee.*

Howard Phipps, appellant, v. *Frank C. Bowers, as Executor of the Estate of Frank K. Bowers, Deceased, appellee.*

Helen Martin, appellant, v. *Frank C. Bowers, as Executor of the Estate of Frank K. Bowers, Deceased, appellee.*

Appeal from the District Court for the Southern District of New York.

[May 18, 1931.]

OPINION.

MANTON, Circuit Judge: These cases were heard together. They involve the same questions and one opinion, it is agreed, will suffice for their disposition.

The considered appeal is taken by the taxpayer, John S. Phipps, who purchased, not as an original subscriber 3¾ per cent United States Victory notes

issued by the United States Government under the Victory Liberty Loan Act of March 3, 1919. This purchase was made in 1919, and a further purchase was made in 1920. At the time of purchase, the appellant borrowed money to buy the notes and paid interest on the loan while he held the notes. He sold some of these notes in 1921, but at the end of that year had a very large investment in them. He paid interest during the calendar year 1921 of $162,146.72, of which $157,420.45 was paid prior to November 23, 1921, at which date Congress passed the Revenue Act of 1921 (42 Stat. L., 227). The Commissioner declined to allow appellant to deduct from his income for 1921 the interest thus paid for that year. In 1923, appellant filed a claim for a refund, based upon the claim that deduction of this interest should be allowed. This suit is for an alleged excess of the amount of tax for that year resulting from the refusal to allow the deduction.

The Revenue Act of 1918, section 214, provides:

"(a) That in computing net income there shall be allowed as deductions: (2) All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917), the interest upon which is wholly exempt from taxation under this title * * *."

The Victory notes provide on their face:

"Exempt, both as to principal and interest, from all taxation (except estate or inheritance taxes) now or hereafter imposed by the United States, or any State, or any of the possessions of the United States, or by any local taxing authority."

The deduction would be allowable but for the change Congress made in enacting the Revenue Act of November 23, 1921, which reads (section 214(a)2):

"(a) That in computing net income there shall be allowed as deductions:

"(2) All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title."

The Revenue Act of November 23, 1921 (42 Stat., 227), was considered and held to be constitutional; within the power of Congress to enact, and not in violation of rights of the taxpayer similarly situated to this appellant. (*Denman* v. *Slayton*, 75 L. Ed., 356 [Ct. D. 318, C. B. X–1, 380].) In view of that authoritative pronouncement, the appellant has withdrawn its attack upon the constitutionality of the Act.

The appellant argues, however, that if the Act is retroactive, it is unconstitutional and that it should not be applied as to this taxpayer's 1921 interest payments. It is clear that Congress intended the statute to apply to all income of 1921 or income received during that year. The statute takes effect January 1, 1921, for the calendar year 1921, and in determining income, the class named in the statute was permitted to deduct interest on indebtedness incurred in the purchase of securities of the United States. Other holders were not given this deduction. This is not a retroactive operation. But retroactive legislation is not void. It is objectionable where an attempt is made to attach further consequences to events that were completed in the past and by which a radical change of such events take place. (*Nichols* v. *Coolidge*, 274 U. S., 531 [T. D. 4072, C. B. VI–2, 351].) But where there is no offense against fair play as the term is used in the field of congressional power of taxation, there is no constitutional impediment. The 1918 Act passed in February, 1919, after the taxing period of 1918 had passed, and which imposed a higher rate of taxation over the 1917 Act, and which affected transactions in 1918, was not considered unconstitutional. (*Brushaber* v. *Union Pacific Ry. Co.*, 240 U. S., 1.) In *Taft* v. *Bowers* (278 U. S., 470 [Ct. D. 49, C. B. VIII–1, 226]) the court considered the tax on a donee's income, and it was held that Congress had the power to tax as part thereof, the difference between what the gift cost the donor and the price received when sold. (Revenue Act of 1921, section 202(a)2.) The gift was made after December 31, 1920, and the statute was passed November 23, 1921, effective January 1, 1921. Where a gift of property was made November 1, 1921, and a sale November 7, 1921, by the donee, the statute was held applicable. (*Cooper* v. *United States*, 280 U. S., 409 [Ct. D. 163, C. B. IX–1, 272].) The court said in the Cooper case: "We can find

nothing unusual, arbitrary, or capricious in the provisions of the taxing Act here involved" (at p. 412).

The statute deals with income in the year 1921. It defines what is income and what may be deducted from gross income. It might have declined to all taxpayers the privilege of deducting interest upon indebtedness in determining net income. (*Anderson* v. *Forty-two Broadway Co.*, 239 U. S., 69; *Flint* v. *Stone Tracy*, 220 U. S., 107.) But it provides that for 1921 only a class of owners, for reasons sufficient to Congress, are granted this right of deduction of interest. The statute was valid and applicable to an earlier purchase and sale, as it was good prospectively. It but defines income for 1921 and taxes the income for that year. If it changed the rate and tax from what the taxpayer expected it to be in view of the earlier statute, it did no more than is always done when a taxing statute is changed (*Corliss* v. *Bowers*, 281 U. S., 376 [Ct. D. 188, C. B. IX–1, 254]). The assurance on the face of the note that the income would be tax exempt continues (*Willcuts* v. *Bunn*, 282 U. S., 216 [Ct. D. 280, C. B. X–1, 309]). The notes make no representation about indebtedness incurred in connection with their purchase. The interest upon such an indebtedness is referred to for the first time in the 1918 Act; a limitation followed in 1921, which may be a subject of rescission or modification later.

Nor is appellant entitled to an exemption. Income tax is imposed on all and one claiming an exemption from it in its entirety or some special application, must base it upon some phrase of the statute granting the exemption. (*Heiner* v. *Colonial Trust Co.*, 275 U. S., 232 [T. D. 4112, C. B. VII–1, 207].) We find no warrant for such claim in this statute.

Judgments affirmed.

SECTION 214(a)3.—DEDUCTIONS ALLOWED: TAXES.

Article 132: Federal duties and excise taxes.

REVENUE ACT OF 1921.

Excise on manufacturer of automobile under section 900, Revenue Act of 1921. (See Ct. D. 408, page 334.)

SECTION 214(a)4, 5, AND 6.—DEDUCTIONS ALLOWED: LOSSES.

ARTICLE 147: Losses from the sale and repurchase of securities. X–49–5310 Ct. D. 422

(Also Section 250, Article 1012.)

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. DEDUCTION—LOSS—SALE—BONA FIDE TRANSACTION.

Where an owner of shares of stock of a corporation sells them for the purpose of establishing a loss deductible from gross income and at the same time finances the purchase by his secretary and by a relative of the same number of the same shares at the same price, and immediately takes them into his possession, this sale is not bona fide and no loss on account thereof is deductible under the Revenue Act of 1921.

2. ASSESSMENT—LIMITATION—INCOME OF DECEDENT—WRITTEN REQUEST BY FIDUCIARY.

Where a representative of the executrix of an estate, by letter, requests the Commissioner to make an immediate audit of the amounts due for income taxes and there is nothing in his letter to indicate either that he had authority to make the request on behalf of the estate or that his request for information was intended to be the written request required by the first proviso in section 250(d) of the Revenue Act of 1921, the letter is not sufficient to start the running of the 1-year period of limitation contained in that proviso on the assessment of the tax on the income received during the lifetime of the decedent. The Commissioner's reply to the letter, stating that immediate consideration of the request would be given "under provisions of section 250(d) of the Revenue Act of 1921, and the determination of the tax liability will be made as soon as possible," does not estop the Government to insist upon the required written request.

3. DECISIONS AFFIRMED.

The decisions of the Board of Tax Appeals (13 B. T. A., 596 and 616) are affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 5746. *Mrs. Niels (Mellie) Esperson, Executrix of the Estate of Niels Esperson, Deceased, petitioner,* v. *Commissioner of Internal Revenue, respondent.*

No. 5747. *Mrs. Niels (Mellie) Esperson, petitioner,* v. *Commissioner of Internal Revenue, respondent.*

No. 5748. *Mrs. Niels (Mellie) Esperson, Executrix of the Estate of Niels Esperson, Deceased, petitioner,* v. *Commissioner of Internal Revenue, respondent.*

Petitions for review of decisions of United States Board of Tax Appeals (District of Texas).

Before BRYAN, SIBLEY, and HUTCHESON, Circuit Judges,

[April 25, 1931.]

OPINION.

BRYAN, Circuit Judge: These petitions for review present the question whether Niels Esperson in October, 1921, made bona fide sales of 8,100 shares of stock which in October, 1921, formed part of the community property of himself and his wife.

Esperson died in 1922 and his widow, now Mrs. Stewart, was appointed executrix of his estate. The Board of Tax Appeals held that the stock had not been actually sold, and consistently with that conclusion refused to allow deductions for losses sustained on account of purported sales thereof from the income for 1921 of petitioner individually and as executrix of Esperson's estate, and included half of the value of that stock in arriving at the taxes upon Esperson's estate. It also held that the collection of the estate tax was not barred by the statute of limitations. (11 B. T. A., 1283; 13 B. T. A., 596; 13 B. T. A., 616.)

In October, 1921, Esperson, for the admitted purpose of taking a loss, simultaneously sold and bought through a broker on the New York Stock Exchange 8,100 shares of stock of the Invincible Oil Corporation. The purchases were made in the names of Esperson's private secretary and brother-in-law, but were financed by Esperson, who immediately took the new stock into his possession. The evidence is set out at length in the above-cited opinions of the Board, and abundantly sustains its conclusion that throughout it was Esperson's intention to keep the same number of shares of stock after the sales were completed that he had before any sales were made. Each share of the stock was of equal value; one was as good as another. It may be assumed that an owner of stock would sustain a deductible loss by selling it and later buying back an equal amount, but no real sale is made where by one and the same transaction the same number of shares are both bought and sold at the same time and at the same price.

After Esperson's death, George B. Newton, who represented the executrix of the estate, by letter requested the Commissioner to make immediate audit of the amounts due for income taxes in order that the estate tax could be definitely determined. The Commissioner replied in a letter which stated that immediate consideration of the request would be given "under provisions of section 250(d) of the Revenue Act of 1921, and the determination of the tax liability will be made as soon as possible." Section 250(d) referred to provides "that in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent." There was nothing in Newton's letter to indicate either that he was a "fiduciary representing the estate," or that his request for information was intended to be such a written request as would start the running of the 1-year statute of limitations.

Nor was the Commissioner put on notice that the request was being preferred by one who had authority to make it on behalf of the estate. It was therefore not a sufficient compliance with the statute. (*Lucas* v. *Pilliod Lumber Co.*, 261 U. S., 245 [Ct. D. 266, C. B. IX–2, 396].) The Government is not estopped by the reply letter of the Commissioner to insist upon the written request required by the statute. (*Lee Wilson & Co.* v. *United States*, 245 U. S., 24.)

The petitions for review, and each of them is, denied.

SECTION 214(a)10.—DEDUCTIONS ALLOWED: DEPLETION.

ARTICLE 203: Amount returnable through depletion and depreciation deductions in the case of lessee.

REVENUE ACT OF 1921.

Assignment of lessee's interest. (See G. C. M. 9798, page 221.)

SECTION 215.—ITEMS NOT DEDUCTIBLE.

ARTICLE 293: Capital expenditures.

REVENUE ACT OF 1918.

Alteration of factory building. (See Ct. D. 360, page 357.)

SECTION 219.—ESTATES AND TRUSTS.

ARTICLE 341: Estates and trusts.

REVENUE ACTS OF 1918 AND 1921.

Income payable on 2d days of January and July. (See G. C. M. 8724, page 197.)

ARTICLE 341: Estates and trusts.

REVENUE ACTS OF 1916, 1918, AND 1921.

Will construed as establishing a single trust although a State court in an agreed decision construed it as establishing three trusts. (See Ct. D. 412, page 240.)

ARTICLE 347: Estates and trusts with income which is distributed periodically, and other income. X–36–5198 G. C. M. 9804

REVENUE ACT OF 1918.

In view of the decision of the United States Circuit Court of Appeals, Second Circuit, in *Merle-Smith* v. *Commissioner* (42 Fed. (2d), 837, certiorari denied 282 U. S., 897), in which the court held that a reasonable allowance for depletion should be made in computing the income of beneficiaries from royalties on mining property held in trust, General Counsel's Memorandum 1673 (C. B. VI–1, 252) is revoked in so far as it is inconsistent with that court decision.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 347: Estates and trusts with income which is distributed periodically, and other income. X–41–5243 I. T. 2595

REVENUE ACT OF 1918.

Committee on Appeals and Review Recommendation 3421 (C. B. II–2, 172), which holds that where income was payable to several beneficiaries periodically on June 15 and December 15, the will providing that the payments be made to such beneficiaries only "as may be living at the time of payment," the income of the trust from December 16 to December 31, inclusive, of each year, was accumulated for persons with contingent interests and should be reported in the calendar-year returns of the trustee and the tax thereon paid by him, is revoked, in view of General Counsel's Memodandum 8724 (page 197).

PART III.—CORPORATIONS.

SECTION 231.—CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

ARTICLE 520: Social clubs.

REVENUE ACT OF 1921 AND PRIOR REVENUE ACTS.

Receipt of revenue from sale of surplus land by golf club. (See G. C. M. 9470, page 162.)

ARTICLE 522: Cooperative associations.

REVENUE ACT OF 1921 AND PRIOR ACTS.

Farmers' and other cooperative marketing and purchasing associations. (See Mim. 3886, page 164.)

SECTION 233.—GROSS INCOME OF CORPORATIONS DEFINED.

ARTICLE 545: Sale and retirement of corporate bonds. X–34–5182 G. C. M. 9674

REVENUE ACT OF 1921.

Upon conversion of a corporation's bonds into its capital stock, no deduction is allowable on account of bond discount then remaining unamortized. Any original bond expense then unamortized is to be treated as a capital cost in connection with the issuance of the stock.

An opinion is requested relative to the allowance as deductions from gross income of the taxpayer for the years 1922 and 1923 of the amount of unamortized bond discount and bond expense upon the conversion of taxpayer's outstanding bonds into its capital stock.

In 1918 the taxpayer authorized the issuance of 7-year gold bonds. These bonds were first offered to the stockholders at 94, and contained a conversion privilege under which the owners were given the option to convert the bonds into common stock of the company at any time after a certain date and until the date of maturity in 1925, at par, plus $—— for each share of stock of $100 par value. The total amount of discount, commission, and miscellaneous expense was charged against surplus prior to 1921, and a prorated amount thereof, based upon the life of the bonds, was taken as a deduction for years prior to 1921.

During the years 1922 and 1923 certain of the bondholders converted their bonds into common stock of the taxpayer, pursuant to the above-described conversion privilege contained in the bonds. As a result of the conversion, the taxpayer claimed that it was entitled to deductions on account of unamortized bond discount and bond expense.

The taxpayer contends that it is entitled to deductions for both the unamortized bond discount and bond expense, but if wrong in its contention with respect to unamortized bond discount it is nevertheless entitled to deductions on account of the unamortized bond expense.

With respect to the unamortized bond discount, it is the opinion of this office that the taxpayer's contention should be denied. See I. T. 2347 (C. B. VI–1, 86) and *Chicago, Rock Island & Pacific Railway Co.* v. *Commissioner* (13 B. T. A., 988, affirmed 47 Fed. (2d), 990). In treating the ninth issue involved in that case the Board said:

Issue 9: The facts with reference to this issue are that on July 15, 1912, petitioner sold $20,000,000 par value of its debenture bonds for the sum of $18,800,000, or at a discount of $1,200,000. On July 2, 1917, it exchanged for those debentures its second preferred stock of the same par value. On this latter date the unamortized discount on the debentures amounted to $871,921.26. Petitioner asserts that by this transaction it lost the latter amount and should be permitted to deduct it from its gross income for 1917.

We are aware of the fact that, in accounting, unamortized discount appears on the asset side of the balance sheet as a deferred expense, but it does not follow that such treatment can give value to what in fact is a liability. Without value there can be no deductible loss. Unamortized discount repre-

sents that part of the total discount for which no provision has been made in the way of reduction of surplus or otherwise. It represents not value but liability, the extinction of which, under the facts of the transaction, did not result in deductible loss. Petitioner did not sell its bonds for cash, and with this or money from any other source, pay off the bonds. It exchanged its stock for its bonded liability. This was a purely capital transaction, which did not result in deductible loss or taxable gain. (Cf. *Simmons & Hammond Manufacturing Co.*, 1 B. T. A., 803; *Emerson Electric Manufacturing Co.*, supra; *H. S. Crocker Co.*, 5 B. T. A., 538; and *Corning Glass Works*, 9 B. T. A., 771.) Petitioner is entitled to no deduction by reason of this exchange.

With respect to the unamortized bond expense, it is urged by the taxpayer that such expense was paid, not for taking or disposing of stock but for the marketing of bonds; that an entirely different type of expense would have been incurred had stock been issued in the first instance instead of bonds; that the conversion privilege was merely incidental to the sale of the bonds and not destructive of their character as such; and that when the bond expense was paid that ended the matter in so far as the taxpayer was concerned.

It is well settled that expenses paid in connection with the issuance of stock in a corporation are not deductible as ordinary or necessary expenses of carrying on a business, such expenses being regarded as capital expenditures. (*Emerson Electric Manufacturing Co.*, 3 B. T. A., 932; *Simmons Co.* v. *Commissioner*, 8 B. T. A., 631, C. B. VII-2, 37.) A corporation realizes no gain or suffers no loss in dealing in its own stock. (*Simmons & Hammond Manufacturing Co.*, 1 B. T. A., 803.)

The taxpayer argues that the issuance of the bonds was an entirely separate and distinct transaction from the subsequent conversion of the bonds into stock. Each convertible bond was a potential share of stock. The expense in question was incurred in connection with the issuance of the bonds. Upon the conversion of each bond into stock, there was clearly no loss suffered by the taxpayer as a result of the transaction. From the taxpayer's standpoint, this was purely a capital transaction. The taxpayer's obligation to convert the bonds into stock was incurred when the bonds with respect to which the expense in question was incurred were issued. Under such circumstances, it is the opinion of this office that for amortization purposes the issuance of the bonds should not be treated as an entirely separate and distinct transaction from their subsequent conversion into stock.

The correct method of treatment would seem to be that so long as the convertible bond retains its character as a bond—that is, so long as the privilege of conversion is not exercised—the Bureau, for amortization purposes, should treat it as it treats ordinary corporate bonds, but as soon as the bond is converted into the form of stock, the Bureau should from that time on treat any expense incurred in connection with the issuance of the original obligations as it treats an expense in connection with the issuance of stock of a corporation. Briefly stated, the effect of the conversion of the bonds into stock was to cause what had theretofore been treated as bond expense to assume the character of a capital expenditure.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 545: Sale and retirement of corporate bonds. X-48-5306 Ct. D. 420

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. INCOME—SALE AND RETIREMENT OF CORPORATE BONDS.

Where bonds are issued by a corporation which thereafter in the same taxable year purchases and retires some of them at a price less than the issuing price, the excess of the issuing price over the purchase price is gain or income for the taxable year under section 233(a) of the Revenue Act of 1921.

2. DECISION DISTINGUISHED.

The decision in *Bowers* v. *Kerbaugh-Empire Co.* (271 U. S., 170) distinguished.

SUPREME COURT OF THE UNITED STATES. No. 26.—OCTOBER TERM, 1931.

The United States, petitioner, v. *Kirby Lumber Co.*

On writ of certiorari to the Court of Claims.

[November 2, 1931.]

Mr. Justice HOLMES delivered the opinion of the court.

In July, 1923, the plaintiff, the Kirby Lumber Co., issued its own bonds for $12,126,800 for which it received their par value. Later in the same year it purchased in the open market some of the same bonds at less than par, the difference of price being $137,521.30. The question is whether this difference is a taxable gain or income of the plaintiff for the year 1923. By the Revenue Act of (November 23) 1921 (ch. 136, section 213(a)) gross income includes "gains or profits and income derived from any source whatever," and by the Treasury regulations authorized by section 1303, that have been in force through repeated reenactments, "If the corporation purchases and retires any of such bonds at a price less than the issuing price or face value, the excess of the issuing price or face value over the purchase price is gain or income for the taxable year." Article 545(1)(c) of Regulations 62, under Revenue Act of 1921. See article 544(1)(c) of Regulations 45, under Revenue Act of 1918; article 545(1)(c) of Regulations 65, under Revenue Act of 1924; article 545(1)(c) of Regulations 69, under Revenue Act of 1926; article 68(1)(c) of Regulations 74, under Revenue Act of 1928. We see no reason why the regulations should not be accepted as a correct statement of the law.

In *Bowers* v. *Kerbaugh-Empire Co.* (271 U. S., 170 [T. D. 3881, C. B. V-1, 199]), the defendant in error owned the stock of another company that had borrowed money repayable in marks or their equivalent for an enterprise that failed. At the time of payment the marks had fallen in value, which so far as it went was a gain for the defendant in error, and it was contended by the plaintiff in error that the gain was taxable income. But the transaction as a whole was a loss, and the contention was denied. Here there was no shrinkage of assets and the taxpayer made a clear gain. As a result of its dealings it made available $137,521.30 assets previously offset by the obligation of bonds now extinct. We see nothing to be gained by the discussion of judicial definitions. The defendant in error has realized within the year an accession to income, if we take words in their plain popular meaning, as they should be taken here. (*Burnet* v. *Sanford & Brook's Co.*, 282 U. S., 359, 364 [Ct. D. 277, C. B. X-1, 363]).

Judgment reversed.

SECTION 234.—DEDUCTIONS ALLOWED CORPORATIONS.

ARTICLE 561: Allowable deductions. (Also Section 215, Article 293.)

X-29-5144
Ct. D. 360

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. DEDUCTION—BUSINESS EXPENSE—CAPITAL EXPENDITURE.

Where two floors of a factory are torn out, its general structure strengthened by the introduction of steel beams, a skylight placed in the roof, new concrete foundations constructed for machinery, a new concrete floor laid and the line shafting rearranged, all such alterations and changes having been continued in use throughout all of the taxable years, the expenses for such changes and alterations are not ordinary expenses deductible under section 234(a)1 of the Revenue Act of 1918 but are expenses for permanent improvements in respect of which section 215(b) of the Revenue Act of 1918 provides that no deduction shall be allowed. This conclusion is not affected by the fact that the expenditures did not increase the productive capacity of the building or the value of the property.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (17 B. T. A., 74) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT. No. 3073.

Parkersburg Iron & Steel Co., petitioner, v. *David Burnet, Commissioner of Internal Revenue, respondent.*

On petition to review the decision of the United States Board of Tax Appeals.

Before PARKER and NORTHCOTT, Circuit Judges, and COLEMAN, District Judge.

[March 13, 1931.]

OPINION.

COLEMAN, District Judge: The present appeal arises upon a petition to review the action of the Board of Tax Appeals in disallowing, as a deduction from gross income for the year 1918, the sum of $11,210.88 claimed by the petitioner to be deductible as an ordinary and necessary expense of carrying on its business during that year. The Commissioner of Internal Revenue determined a total deficiency of $38,396.06 against the petitioner for the same year. The Board of Tax Appeals redetermined the deficiency to be $26,426.21, but the other items which form the basis of this total deficiency are not involved here. In short, the only question here presented is whether the above contention of petitioner is correct with respect to the item of $11,210.88, or whether as the Board of Tax Appeals found, that item represented an expenditure on account of permanent improvements or betterments, for which deduction is not allowable.

The controlling provisions of the Revenue Act of 1918 (40 Stat., 1057) are the following:

"SEC. 215. That in computing net income no deduction shall in any case be allowed in respect of—

* * * * * * *

"(b) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate.

"SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity."

In a proceeding of this kind this court is confined to the facts as found by the Board of Tax Appeals. The latter's decision on such facts may not be upset unless "not in accordance with law." (Revenue Act of 1926, 26 U. S. C. A., section 1226(b); *Lucas, Commissioner*, v. *Livezey*, decided by this court this term; *House & Herrmann* v. *Lucas*, 36 F. (2d), 51; *Bishoff* v. *Commissioner*, 27 F. (2d), 91.) The burden of proof is upon the petitioner. (*Botany Mills* v. *U. S.*, 278 U. S., 282 [Ct. D. 39, C. B. VIII–1, 279]; *Ox Fibre Brush Co.* v. *Blair*, 32 F. (2d), 42, affirmed in *Lucas, Commissioner*, v. *Ox Fibre Brush Co.*, 281 U. S., 115 [Ct. D. 265, C. B. IX–2, 384].)

The following facts, material to the present issue, were found by the Board: The petitioner, a corporation with its principal office in Parkersburg, W. Va., is engaged in carrying on a sheet mill business, manufacturing black, blue, and galvanized sheets. During 1918 petitioner manufactured corrugated sheets, stovepipes and stovepipe elbows under Government war contracts. Approximately two-thirds of the work done in petitioner's plant, during that year, was in the production of articles under such contracts. At the time of acceptance of these contracts in 1918, petitioner was carrying on its manufacturing operations in a three-story building. The greater part of the operating machinery was located on the first floor. The second and third story lofts were used principally for storage purposes, but a few machines were operated on the second floor. The building, in general, was satisfactory and adequate to the needs of petitioner's business.

Early in 1918, engineers of the United States Army, following an inspection of the plant, requested that, in order to improve the lighting conditions, certain changes in the building construction, and rearranging of factory rooms, be made, and this request was complied with. All of the machinery on the two upper floors was removed to the first floor, necessitating a general rearrangement of machinery there. This rearrangement of machinery necessitated the abandonment of certain machine foundations and the laying of new ones, with the result that the first floor was so cut up the petitioner found it necessary to lay an entirely new floor. The second and third floors were torn out, skylights were installed, and the electric lighting system was rearranged. The tearing out of the two upper floors also necessitated a rearrangement of all line shafting for the machines. The productivity of the plant was not increased by reason of these alterations.

In affirming the Commissioner's disallowance of these expenditures as an ordinary and necessary expense in carrying on petitioner's business in the year 1918, the Board stated its conclusion as follows:

"Upon the record before us we entertain no doubt that the expenditures incident to making such alterations and changes are of a capital nature, and that the respondent correctly disallowed the item in question as a deduction from gross income. Various reasons are suggested by the petitioner as the basis for the allowance of the disputed item, none of which appeal to us as proper grounds for the action sought to be taken. It is contended that the making of the alterations was an involuntary act, done upon orders of engineers of the Army; that neither the efficiency, productivity, nor the value of the plant has been increased by virtue of the alterations; and that the petitioner has been placed at a decided disadvantage in making the alterations by reason of having to provide additional storage space, and of the cramped and congested operating conditions existing in the building because of the removal of all of the machinery to one floor. Assuming all such conditions and circumstances to be true, and we do not decide that they are, we still adhere to the conclusion already announced. It is undenied in the record that the general purpose for which alterations and changes were made, the general improvement of lighting conditions in the building, has been accomplished, although, perhaps, not to the degree expected or hoped for. Furthermore, all such alterations and changes have been continued in use throughout all of the taxable years on appeal, and the record contains no hint of any subsequent abandonment. We find no error in the action of the respondent in disallowing the cost of the alterations and changes as a deduction from gross income for 1918."

We find no error in this conclusion of the Board. The evidence compels a finding that the alterations constitute a capital expenditure, the deduction of which is not permitted by the statute.

With respect to petitioner's contention that, since the expenditures in question did not increase the productivity capacity of the factory building—a fact

which must, on the evidence, be taken as true—such expenditures are properly deductible as ordinary and necessary expenses of the business, it is sufficient to say that whether or not a given outlay actually results in ultimate advantage to the taxpayer does not determine whether such outlay is to be treated as representing permanent improvement—that is, a capital expenditure, or merely current upkeep, that is, repairs. The true test is rather the nature of the expenditure in and of itself, for, as the Government rightly contends, an alteration may be made expressly for the purpose of increasing the value of a given property; and though it may fail to accomplish that purpose, it nevertheless may remain a capital expenditure. The extent and permanency of the given alteration are indicative of its true character. Here, two floors of the building were torn out. Its general structure was strengthened by the introduction of steel beams; a skylight was placed in the roof; new concrete foundations were constructed for machinery, a new concrete floor was laid, and the line shafting rearranged, all of which alterations have been retained. These facts indubitably stamp the expenditure for such alterations as being a capital investment, to be treated as a whole because interrelated and of substantially equal permanency, and the amount so capitalized may not, as petitioner contends, be limited to the expenditure that actually produced the only tangible benefit to the structure as a factory building, namely, the increased natural lighting, because, as we have already seen ultimate advantage or disadvantage to the taxpayer is not the criterion.

The words "ordinary and necessary expenses" as used in section 234(a)1 of the statute, and also the words "permanent improvements or betterments made to increase the value of any property or estate," as used in section 215(b), must be given their rational, practical meaning, according to which the alterations were unquestionably "necessary," because compelled by the exigencies of the war. However, they were not "ordinary" but in fact extraordinary for this very reason, and they resulted in "permanent improvements" to the property, when that phrase is interpreted in the sense that it must be assumed to be used in the statute, that is, alterations which, both by their very nature and use, are relatively permanent—although they may never in fact enhance the actual value of the property as an investment—as opposed to alterations of which both the nature and the use are relatively temporary. (See *Duffy* v. *Central* R. R., 268 U. S., 55 [T. D. 3704, C. B. IV–1, 143].) In *Hubinger* v. *Commissioner* (36 F. (2d), 724, 726) "ordinary expenses" under this statute were defined as "those due to wear and tear and trifling accidental causes."

Whether, although denied a reduction of the tax under section 234(a)1 of the Revenue Act of 1918, the present petitioner might have successfully invoked section 234(a)8 of the same Act, which provides for the allowance of a reasonable deduction for amortization of the cost of buildings and other facilities constructed, etc., for the production of articles contributing to the prosecution of the war, is a question which is not presented for decision by the present appeal.

For the aforegoing reasons, we find no error in the decision of the Board of Tax Appeals and the same is accordingly affirmed.

ARTICLE 561: Allowable deductions. X–29–5145
Ct. D. 361

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. DEDUCTION—ADDITIONAL COMPENSATION PAID AFTER YEAR WHEN SERVICES WERE PERFORMED—LEGAL OBLIGATION.

Where at informal conferences in 1918 three directors of a corporation, who controlled the corporation by virtue of stock ownership, decided that beginning with that year bonuses would be given to deserving employees and decided upon the men to whom bonuses would be paid and the amount to be paid to each for that year, and thereafter, if a man to whom a bonus was to be paid complained to one of the three directors, he would be told that bonuses would be paid to deserving men and that he would receive a

bonus, but no employee was told the amount he was to receive and no book entry or written memorandum relating to bonuses was made during 1918, a reasonable amount of additional compensation, fixed arbitrarily and with no definite relationship to existing salaries, paid by the corporation in 1919 to such deserving employees for services performed in 1918, pursuant to a formal vote of the directors in 1919, did not accrue in 1918 and a legal obligation to pay such additional compensation was not incurred by the corporation in 1918, either on the basis of express or implied contract, *quantum meruit*, upon the theory of estoppel or upon the theory that the resolution of the directors was a ratification of something done in 1918. No deduction, therefore, in respect of such additional compensation is allowable for the year 1918 under section 234(a)1 of the Revenue Act of 1918.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (9 B. T. A., 392) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT. No. 5270.

The Bauer Bros. Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition to review an order of the United States Board of Tax Appeals.

Before MOORMAN and HICKS, Circuit Judges, and SIMONS, District Judge.

[February 9, 1931.]

OPINION.

SIMONS, District Judge: The petition is filed to review a decision of the United States Board of Tax Appeals redetermining a deficiency in income and excess profits taxes for the year 1918 against the petitioner. The petitioner kept its books, and its income was reported upon an accrual basis. In its return for 1918 it deducted as an expense for that year bonuses allowed to certain officers and employees which were paid in 1919, pursuant to a resolution passed at a meeting of its board of directors in the latter year. This deduction was disallowed by the Commissioner of Internal Revenue as an expense for 1918, and upon appeal to the United States Board of Tax Appeals the Commissioner's finding was upheld. Since the errors complained of in the decision of the Board of Tax Appeals are with a single exception, which is not deemed material, errors of law and not erroneous findings of fact, we accept the facts as found by the Board of Tax Appeals.

The petitioner is a close corporation controlled by three Bauer brothers, who own all of the preferred stock, and all but 30 shares of the common stock, the 30 shares of common stock being owned by three employees, who, with the Bauer brothers, make up the board of directors. The only reference to additional compensation for 1918 which appears in the petitioner's minutes is a resolution passed March 3, 1919, in part as follows:

"It was moved by Carl Caskey and seconded by W. E. Copenhaver that a bonus salary for the year 1918 be given to such officers of the company and heads of departments as have been instrumental in procuring the successful year's result for 1918, the amount of this bonus and the division of the same to be left to the discretion of the president."

It was customary for the directors of the petitioner to have but one meeting each year. This was usually held in the latter part of February or the early part of March. Officers and directors were elected at this meeting, after which the meeting was usually adjourned. The three brothers met frequently in informal conferences for the purpose of planning, directing, managing, and supervising the conduct of the business. In these conferences the three brothers decided during the summer of 1918 that beginning with that year bonuses, rather than salary increases, would be given to deserving employees. Before the end of the year they decided upon the men to whom bonuses would be paid and the amount to be paid each for that year. No book entry or written memorandum relating to bonuses was made during the year. The policy of bonus

payments was adopted after the brothers realized that other concerns were increasing the amount of compensation paid employees, that some of their own men were demanding increases and could get better salaries elsewhere, and that it would be advisable to satisfy them in this way. Thereafter if a man to whom a bonus was to be paid complained to one of the brothers he would be told that bonuses were to be paid to deserving men and that he would receive a bonus. Salaries were not usually discussed at the annual meeting of the board of directors, but it does not appear how salaries had been decided upon previously. Caskey, who kept the books of the petitioner, was not informed of the amounts of the bonuses or of the men who were to receive bonuses until several days after the meeting of March 3, 1919. As soon as he received a list from the president he made the necessary book entries to distribute the bonuses through credit accounts before closing the books for 1918. It was usual for the books to be kept open until inventories had been completed and dividends decided upon. The taking of the inventory usually required about six weeks and was begun immediately after the close of the year.

The issue before the Board of Tax Appeals, and now before the court, is whether the additional compensation paid to officers and employees of the petitioner for services rendered during 1918 was an allowable deduction incurred during the year 1918 under the provisions of section 234(a)1, and section 200 of the Revenue Act of 1918. The applicable language of section 234 is as follows:

"SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, * * *."

It being conceded by the Commissioner that the amount of the bonuses was a reasonable allowance for salaries or other compensation for personal services actually rendered, and the bonuses not being *paid* in 1918, the only question presented is whether they were *incurred* in 1918 within the meaning of the statute. Our first concern is with the sense in which the term "incurred" is used in section 234. It seems not to be disputed here that expenses are incurred only when there is an agreement or a legal obligation to pay them within the taxable year. Indeed, that seems to be the view taken of the very language of this section by the Supreme Court of the United States in *Lucas, Commissioner of Internal Revenue*, v. *Ox Fibre Brush Co.* (281 U. S., 115 [Ct. D. 265, C. B. IX-2, 384]).

In section 200 of the Revenue Act of 1918 the following definitions are given:

"The term 'paid,' for the purposes of the deductions and credits under this title, means 'paid or accrued' or 'paid or incurred,' and the terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under section 212."

In *United States* v. *Anderson* (269 U. S., 422; T. D. 3839, C. B. V-1, 179) the Supreme Court had before it an issue as to the interpretation of the word "accrue" in various sections of the Revenue Act of 1916. It held:

"In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect for purposes of accounting and of ascertaining true income for a given accounting period the munitions tax here in question does not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decisions were concerned, the taxes had accrued."

It will therefore be observed that whether the term "incurred" as used in the Revenue Act of 1918 is used in a technical legal sense or in an economic or bookkeeping sense, the expenses are not incurred unless there has arisen a legal obligation to pay them, and they do not accrue within a given taxable year unless all of the events which fix the amount and determine the liability of the taxpayer to pay occur within that year. Applying either or both of these tests to the facts as found by the Board of Tax Appeals in the instant case, we find that the three Bauer brothers decided during 1918 that beginning with that year bonuses would be given to deserving employees. They decided

upon the men to whom bonuses would be paid, and the amount to be paid to each for that year. Thereafter, if a man to whom a bonus was to be paid complained to one of the brothers he would be told that bonuses were to be paid to deserving men, and that he would receive a bonus, but no employee was told the amount he was to receive. No book entry or written memorandum relating to bonuses was made during the year. It seems to us to be clear from these facts that whatever the promises were that were made, there did not result from them a legal obligation which could be enforced, either on the basis of express or implied contract. We are not here concerned with the authority of the brothers Bauer to bind the corporation. It may be assumed, without deciding, upon the facts disclosed by the record that through a course of conduct on the part of the corporation they had such authority, for whether they had or did not have such authority is not determinative of the issue here involved. There was lacking that definiteness which under familiar principles of the law of contract fixed the legal liability of the corporation, at least in any such amount as was afterwards allowed.

Nor can the corporation's liability be sustained during the year 1918 upon the basis of a *quantum meruit* even were we to assume that there is room for the application of this principle, while in fact a definite contract already existed for the payment of salaries, nor were there circumstances present from which the value of the additional services in the amount later fixed could be ascertained upon the basis of their fair reasonable value, since it appears from the schedule that the bonuses afterwards determined during the year 1919, at least in so far as all employees are concerned other than the three Bauer brothers, were fixed arbitrarily and with no definite relationship to existing salaries. It must be remembered that what is sought to be deducted for 1918 is the amount actually allowed and paid in 1919, and not some other sum which might have been otherwise determined. What is said in connection with the theory of *quantum meruit* is equally applicable to the contention based upon the theory of estoppel. Assuming that the corporation was estopped to deny that it had promised bonuses, what bonuses had it promised and how could they be ascertained in advance of the determination that was afterwards made? The same thing may be said of the claim that the resolution of the board of directors in 1919 was a ratification of something previously done. We have already assumed that the brothers had authority to do what they did in so far as they did it. The theory of ratification adds nothing to that. If an unauthorized promise is so vague and indefinite as to be incapable of legal enforcement it adds nothing to its enforceability at the time it was made that the lack of authority is afterwards cured by ratification, and if, as contended, an agreement originally too vague for enforcement becomes definite by subsequent performance, it can hardly be said that it was enforceable at any time before it became definite.

We conclude that the Board of Tax Appeals arrived at correct findings of fact and conclusions of law, and its decision is therefore affirmed.

ARTICLE 561: Allowable deductions. X-39-5218
Ct. D. 390

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. DEDUCTION—BAD DEBTS—LOSS—COLLATERAL SECURITY—DEBT WORTHLESS IN PART.

Where a bank makes advances for the purchase of cotton with cotton as security and the bank and the cotton buyer intend that the cotton shall also be collateral for advances made to him for business and living expenses, there being only one account kept, which is charged with all checks drawn by him and credited with any profits from sales of cotton, amounts advanced for these business and living expenses may not be deducted as a loss under section 234(a)4 of the Revenue Act of 1918, the cotton being unsold at the end of the taxable year, and they may not be segregated from the advances for cotton purchases and deducted under paragraph 5 of that subsection as debts ascertained to be worthless and charged off within the taxable year.

2. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (14 B. T. A., 1256) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT. No. 5816.

Collin County National Bank, petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of the United States Board of Tax Appeals (District of Texas).

Before BRYAN and FOSTER, Circuit Judges, and HUTCHESON, District Judge.

[March 31, 1931.]

OPINION.

BRYAN, Circuit Judge: This is a petition to review a decision of the Board of Tax Appeals which disallowed deductions claimed by the petitioning bank from its income tax return for the calendar year 1920. The facts are fully stated in the Board's opinion (14 B. T. A., 1256), and need not be repeated here at any length. The bank charged off as losses or bad debts two items; one of $30,000 on October 5, and the other of $56,000 at the end of the year, or in all $86,000 in round numbers. The bank complains in its assignments of error that it was not allowed a deduction of $65,000, made up of $54,000 advanced for the business expenses and $11,000 advanced for the living expenses of its customer Dowell. The Board held that these advances for business and living expenses were intended by Dowell and the bank to be secured by the cotton which was held as collateral. And the evidence amply sustains this finding of fact. There was but a single account kept, which was charged with all checks drawn by Dowell, and credited with any profits from sales of cotton. The amounts charged off by the bank in October and December were lump sums which in the aggregate were in excess of the so-called unsecured items.

We accept these findings of fact by the Board as being correct, and as showing that it was the intention of Dowell and the bank that all advances should be made on the faith of the security held by the bank. Their intention governs, since the rights of third parties are not involved. (*Armstrong* v. *Chemical National Bank*, 41 F. (2d), 234; *Knight* v. *Seney*, 211 Ill. App., 324; 3 R. C. L., 517.) We have then only one account for the payment of all of which the bank held collateral security. Appellant claims the right to make a deduction from its income under section 234(a), (4) and (5) of the Revenue Act of 1918 (40 Stat., 1077, 1078). That section provides:

"(a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * * *

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;

"(5) Debts ascertained to be worthless and charged off within the taxable year."

The bank had on hand 1,300 bales of cotton which had not been sold during the taxable year. No loss could be sustained until a sale of the cotton was made and so the amount in dispute can not be treated as a loss. (*United States* v. *White Dental Co.*, 274 U. S., 398 [T. D. 4059, C. B. VI-2, 198]; *Lewellyn* v. *Electric Reduction Co.*, 275 U. S., 243.) The debt was not worthless. It was secured by the cotton and was worth at least as much as the cotton was worth. The bank arbitrarily charged off $86,000, and hence it is clear that it was attempting to claim credit as a deduction for more than Dowell's business and personal expenses. Therefore it would seem that no definite part of the debt had been ascertained to be worthless. The Revenue Act of 1918, unlike later Revenue Acts, does not in terms authorize the deduction as worthless of a part of a debt, and it has been held that no deduction is permissible under it unless the whole debt has been ascertained to be worthless. (*Minnehaha National Bank* v. *Commissioner*, 28 F. (2d), 703.) We think that decision finds some

support in *United States* v. *White Dental Co.* and *Lewellyn* v. *Electric Reduction Co.*, supra. The bank relies on *Sherman & Bryan* v. *Blair* (35 F. (2d), 713) and *Davidson Grocery Co.* v. *Lucas* (37 F. (2d), 806), as decisions holding the contrary view; but the first of these two cases left the point undecided, though it is relied on as authority in the second case. Under the evidence in the instant case each and every part of the debt was equally secured by 1,300 bales of cotton of considerable value; and so it was not ascertained, and could not have been, that any particular part of the debt was worthless.

The petition is denied.

ARTICLE 564: Interest. X-43-5268
Ct. D. 409

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

DEDUCTIONS—INTEREST—DISCOUNT—BORROWED MONEY—DEBENTURE STOCK.

Where the entire capital stock of a corporate taxpayer is represented by property of corporations sold to it, so-called debenture stock being first used in discharge by the taxpayer of indebtedness of the vendors pursuant to the specific requirement of the articles of incorporation which specifically lists the debenture stock as a part of the capital structure in conformity to the requirements of the statutes of the State of incorporation, the debenture stock which is placed upon the market by selling one share of it and one share of the common stock as a single unit, which provides that the stipulated dividend should be paid only out of surplus profits or assets of the corporation, the amount from the sale of which is reported by the taxpayer in previous years as invested capital and treated as invested capital in determining its war profits and excess profits credits for such years, and is reported also in its capital stock returns for previous years as a part of its capital stock, is not borrowed capital but a part of the invested capital of the taxpayer, and the dividends paid on such debenture stock as well as the discount on the same are not deductible as interest paid under section 234(a)2 of the Revenue Act of 1921. The unconditional undertaking on the part of the corporation to redeem these securities at par at the expiration of 10 years from the date of their issue and the further undertaking on the part of the corporation to incur no indebtedness in excess of a specified amount while any of the debenture stock is outstanding do not give to these debenture shares the characteristics of a debt and take from them the true characteristics of capital stock.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE.

Kentucky River Coal Corporation, plaintiff, v. *Robert H. Lucas, Former Collector, etc., defendant.*

[July 9, 1931.]

OPINION.

DAWSON, D. J.: This is a suit for a refund of income taxes for the year 1923. The whole case hinges on whether or not the so-called debenture stock issued and sold by the plaintiff was, in fact, capital stock, or represented borrowed money. These securities were sold at 50 per cent discount. The plaintiff contends that the so-called 6 per cent dividends on this stock should be treated as interest paid on borrowed money and allowed as a deduction, under section 234 of the Revenue Act of 1921, and that it was likewise entitled to amortize, over a period of 10 years, the discount at which this stock was sold, and to deduct the proper amount of this discount for this purpose for the year 1923.

I am unable to agree with the plaintiff's contention that the amount represented by this debenture stock must be treated as borrowed money. The plain-

tiff is a Virginia corporation. Under the law of that State every corporation organized thereunder is given the power to create two or more kinds of stock, of such classes, with such designations, preferences and voting powers, or restrictions or qualifications, as shall be expressed in the charter or articles of incorporation. Its articles of incorporation were drawn in conformity to the statutes of Virginia, and, as therein required, the articles of incorporation set out the authorized amount of capital stock and the character thereof. The so-called debenture stock is specifically listed in the articles of incorporation as a part of the capital stock structure. The articles of incorporation specifically provide that the $500,000 of debenture stock and $500,000 of the common stock were to remain in the treasury and to be disposed of as treasury stock, for the benefit of the corporation as its necessities might require, with the specific requirement that the proceeds of the $500,000 debenture stock was to be used exclusively in the discharge of indebtedness owing by the five corporations whose property was to be acquired by the plaintiff, the payment of which indebtedness was to be assumed by the plaintiff, or for betterments, prospecting or acquiring additional property.

It is quite clear from the record that the consideration paid to the five corporations whose property was acquired was $2,000,000 of preferred stock, $2,000,000 of the common stock of the plaintiff corporation, and the assumption and the discharge by the plaintiff of not exceeding $300,000 of indebtedness owing by the selling corporations, and for this latter purpose the $500,000 of debenture stock was to be first used.

The entire capital of the plaintiff corporation was represented by the property transferred to it by the five selling corporations, and the debenture stock is just as much reflected in this property as is the common and preferred stock.

The debenture stock, when issued, was specifically styled "debenture stock," and provided that the stipulated dividend of 6 per cent should only be paid out of the surplus profits, earnings or assets of the corporation—a typical provision as to preferred stock, as distinguished from ordinary indebtedness.

When the corporation came to comply with the Virginia law, which required to be filed with the corporation commission of that State a statement of its financial organization plan, the debenture stock was listed as a part of the capital stock structure. The debenture stock was placed upon the market by selling one share of it and one share of the common stock as a single unit, which is a common corporate practice in the disposition of preferred stock. In its income tax reports for the years 1918 to 1921, both inclusive, the plaintiff reported the amount received from the sale of its debenture stock as invested capital, and this amount was treated as invested capital in determining the war profits credit, under the Revenue Act of 1918, and the excess profits credit, under the Revenue Acts of 1918 and 1921, to which plaintiff was entitled for each of the years mentioned. In its capital stock returns to the United States Government for the years 1916 to 1922, both inclusive, the plaintiff reported as a part of its capital stock the amount of the debenture stock which was outstanding for each of the respective years.

On the facts so far related it may well be doubted if plaintiff would undertake to claim that these debenture shares were evidences of indebtedness instead of part of the capital stock structure. Plaintiff insists, however, that the unconditional undertaking on the part of the corporation to redeem these securities at par at the expiration of 10 years from the date of their issual, and the further undertaking on the part of the corporation to incur no indebtedness in excess of $25,000 while any of the debenture stock was outstanding, give to these debenture shares the characteristics of a debt, and take from them the true characteristics of capital stock. I do not think that the obligation not to incur any indebtedness in excess of $25,000 while this stock is outstanding is inconsistent with the Government's theory that these debenture shares were really capital stock. A very common practice in the issual of the ordinary form of preferred stock is to provide that the corporation's indebtedness shall not exceed a specified amount, so long as any of the stock is outstanding. Nor do I think the unconditional undertaking to redeem the stock at par at the end of 10 years destroys its nature as capital stock. The stockholders among themselves undoubtedly had the right to make such an agreement. If its enforcement rendered the corporation incapable of meeting its obligations to those general creditors whose claims were within the $25,000 debt limitation, I have no doubt the courts would hold that the rights of the holders of these debenture shares were subordinate to the rights of these general creditors.

I am constrained therefore to agree with the Board of Tax Appeals in its decision involving exactly this same question with the same taxpayer, and reported in 3 B. T. A., 644.

The stipulation of facts filed in this case will be treated as my finding of facts for the purpose of appeal.

SECTION 238.—CREDIT FOR TAXES IN CASE OF CORPORATIONS.

ARTICLE 612: Domestic corporation owning a majority of the stock of foreign corporation. X–40–5236 T. D. 4325

INCOME TAX.

Amendment of article 612 of Regulations 62.

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

To Collectors of Internal Revenue and Others Concerned:

Article 612 of Regulations 62 is hereby amended to read as follows:

ART. 612. *Domestic corporation owning a majority of the stock of foreign corporation.*—In the case of a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234) in any taxable year, the credit for foreign taxes includes not only the income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States by such domestic corporation, but also a credit for income, war-profits, and excess-profits taxes deemed to have been paid determined by taking the same proportion of any income, war-profits, and excess-profits taxes paid or accrued by such controlled foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of any such dividends received bears to the amount of such accumulated profits. The credit for taxes deemed to have been paid is limited, however, to an amount which shall in no case exceed the same proportion of the taxes against which the credit for foreign taxes is taken, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. If dividends are received from more than one controlled foreign corporation, the limitation is to be computed separately for the dividends received from each controlled foreign corporation. The credit for foreign taxes (including taxes paid or accrued by the domestic corporation and the credit for taxes deemed to have been paid) may not, under any circumstances, exceed the same proportion of the taxes, against which the credit is taken, which the domestic corporation's net income (computed without deduction for any income, war-profits, and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. A domestic corporation which includes in the credit for foreign taxes a credit for taxes deemed to have been paid must furnish the same information with respect to the taxes deemed to have been paid as it is required to furnish with respect to the taxes actually paid or accrued by it.

Taxes paid or accrued by a controlled foreign corporation are deemed to have been paid by the domestic corporation for purposes of credit only. Where the credit for foreign taxes includes both taxes paid or accrued by a domestic corporation and a credit for taxes deemed to have been paid, and the sum of the taxes paid or accrued and the credit for taxes deemed to have been paid exceeds the limitation on the entire amount of the credit allowable, the excess shall be apportioned between the taxes paid or accrued and the credit for taxes deemed to have been paid in proportion to their respective amounts. The portion of the excess apportioned to the taxes paid or accrued, but not that apportioned

to the credit for taxes deemed to have been paid, shall be allowed as a deduction from gross income under the provisions of section 234(a)3.

For the purpose of section 238 a corporation entitled to the benefits of section 262 or 264 is treated as a foreign corporation.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved September 28, 1931.

A. W. MELLON,
Secretary of the Treasury.

SECTION 239.—CORPORATION RETURNS.

ARTICLE 622: Returns by receivers. X–51–5328
(Also Section 213(a), Article 51.) Ct. D. 429

INCOME TAX—REVENUE ACT OF 1916—DECISION OF COURT.

1. RETURNS—RECEIVER.

Section 13(c) of the Revenue Act of 1916, providing that receivers make returns of net income as and for corporations the property or business of which they are operating, is inapplicable to a receiver holding only a part of the property of a corporation, who is neither required nor permitted to make such return.

2. INCOME—WHEN TAXABLE—INCOME IMPOUNDED DURING LITIGATION.

Income, derived from the sale of oil produced during the year 1916, which is impounded in the hands of a receiver appointed by the Federal court for that purpose and retained by him until 1917, when, under order of court, it was turned over to the taxpayer, the right to which is litigated until the final decision of the Supreme Court in 1922 and the return of which the taxpayer and not the receiver is required to make, is taxable in the year 1917, even if the taxpayer's returns were made on the accrual basis.

3. DECISION REVERSED.

The decision of the Board of Tax Appeals (12 B. T. A., 68) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT. No. 6315.

David Burnet, Commissioner of Internal Revenue, petitioner, v. *North American Oil Consolidated, a Corporation, respondent.*

Upon petition to review an order of the United States Board of Tax Appeals.

Before WILBUR and SAWTELLE, Circuit Judges, and NETERER, District Judge.

AMENDED OPINION.

WILBUR, Circuit Judge: Petitioner seeks to review a decision of the Board of Tax Appeals with relation to a deficiency tax of respondent for income and profit taxes for the year 1917. The sole question involved is whether or not the sum of $171,972.20 derived from the sale of oil produced on section 2 during the year 1916 impounded in the hands of a receiver appointed by the Federal court for that purpose and retained by him until 1917, when, under order of court it was turned over to the respondent, was taxable as income for the year 1917. The land which produced this oil was Government land which had been in the possession of the respondent under placer mining claims. The Government contended that as the land had been withdrawn from location by an order of President Taft the respondent was not entitled to a patent. An action was brought to terminate the respondent's right and in that action the receiver was appointed. The respondent was a large operating company holding many pieces of property and this litigation affected only the property in section 2. The trial court determined the matter in favor of the respondent. (*U. S.* v.

No. Am. Oil Co., 242 Fed., 723.) This decision was affirmed by the Circuit Court of Appeals of this circuit. (264 Fed., 336.) The case was finally disposed of by the Supreme Court on March 21, 1922, when it issued its mandate dismissing the appeal thereto in pursuance of a stipulation of counsel. The money thus impounded had been paid over to the respondent after the decision of the district court in 1917.

The Board of Tax Appeals held, in accordance with the contention of the respondent, that the income impounded by the receiver should have been returned by him as his income for the year 1916. In that regard we quote from the opinion of the Board of Tax Appeals as follows:

"The respondent affirmatively alleges that the amount impounded in the hands of the receiver in 1916 and released to petitioner in 1917 was income to the petitioner in the latter year. The respondent's principal argument in support of his claim herein is that petitioner was on the cash receipts and disbursements basis in the years 1916 to 1919, inclusive, and, as the amount here involved was not actually received by the petitioner until 1917, it must be taxable income in that year. We think it immaterial whether petitioner's accounts were kept on the receipts and disbursements basis or some other basis as permitted by section 13(d) of the Revenue Act of 1916. The fact is that the income was actually produced in 1916. The sole reason that it did not reach the petitioner in that year was because of the suit by the United States. By reason of that suit a receiver was appointed, who actually received the income, and who should have reported it for taxation. (Section 13(c) of the Revenue Act of 1916; *United States* v. *Chicago & E. I. Ry. Co.*, 298 Fed., 779 [T. D. 3591, C. B. III-1, 322]; *Forstmann* v. *Ferguson*, 17 Fed. (2d), 659, affirmed 25 F. (2d), 47.) If the receiver did not report it, that is no sufficient reason for taxing the petitioner on it in a later year. Accordingly, the amount of $171,979.22 received by petitioner in 1917 is not an item of income in that year."

The petitioner contends that section 13(c) of the Revenue Act of 1916 (39 Stat., 756) does not apply, for the reason that it is inapplicable to a receiver holding only a part of the property of the taxpayer corporation. This section provides for returns by receivers where they are operating "the property or business of corporations," etc. It is provided that they "shall make returns of net income as and for such corporation, * * * in the same manner and form as such organizations are hereinbefore required to make returns." It provides that the tax should be assessed in the same manner as if assessed directly against the organizations of whose businesses or properties they have custody or control. It will be observed that as applied to the receiver having possession of the entire property of the corporation, etc., as in the case of receiver in bankruptcy, the statutory provisions with reference to such taxation are readily applicable but where only a portion of the property of the corporation is in the hands of a receiver it would follow that only a portion of the income of the corporation was in the possession of the receiver and the tax could not be assessed and collected in the same manner as if assessed directly against the taxpayer, unless for purposes of assessment and collection it was in some fashion combined with the income, if any, received directly by the corporation or in case of loss by the corporation and corresponding deduction was made therefrom. While this consideration does not necessarily determine the proper interpretation of the statute (section 13(c), supra), it clearly points to the conclusion that section 13(c) applies only to receivers who are operating the entire property or business of a corporation, etc. The Secretary of the Treasury, soon after the enactment of the statute in 1916 adopted regulations based upon that view of the statute (article 26, paragraph 181, article 209). We quote therefrom as follows:

"* * * such receiver, trustee, or assignee stands in the place of the corporate officers and is required for the purpose of this title to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. The income which he receives on account of the business transacted is the income of the corporation and, no matter how such income is applied, it is subject to the tax imposed by this title in so far as it exceeds the deductions or allowances authorized by law."

Later additional regulations were promulgated pursuant to 40 Stat., 1057, 1058:

"A receiver who stands in the stead of an individual or corporation must render a return of income and pay the tax for his trust, but a receiver of only

part of the property of an individual or corporation need not. * * * A receiver of the rents and profits appointed to hold and operate a mortgaged parcel of real estate, but not in control of all the property or business of the mortgagor, and a receiver in partition proceedings, are not required to render returns of income. In general, statutory receivers and common-law receivers of all the property or business of an individual or corporation must make returns."

Article 622, after providing for returns of income by receivers, concludes as follows:

"A receiver in charge of only part of the property of a corporation, however, as a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income. See articles 424 and 547."

Similar provisions were incorporated in the regulations promulgated under later statutes. If in any case it is proper for a receiver to withhold a return of income on the ground that the property in his custody does not constitute all of the property of the taxpayer, it is clear that where the receiver is appointed because of a controversy over the title to the property which he holds which is only a part of that owned by the taxpayer, it is preeminently a case in which the return should not be made by the receiver who has been appointed for the very purpose of impounding the income to await the determination of the court as to its ownership. If it is to be treated as a part of the income of the owner of the property the amount of tax thereon would depend upon which one of the two litigants was subsequently determined to be the owner, and this difficulty is particularly marked in the situation presented by the case at bar where if the income belonged to the Government it was not subject to tax, whereas, if it belonged to the respondent the amount of tax thereon would depend upon the income derived by the respondent taxpayer.

We are informed by the brief filed on behalf of the Government that the uniform practice of the Treasury Department with relation to returns from receivership has been in accordance with the rules of the Treasury Department as above interpreted and that under that practice the receiver of a part only of respondent's property as in the case at bar was neither required nor permitted to make such return.

In view of the departmental construction placed upon the statute, which seems to be in accordance with the intent of Congress, the receiver was not required to make return of this income, but the respondent corporation was required to do so.

It remains to consider whether or not the respondent, who was entitled to the income derived from its property which was impounded by the receiver, was liable for income tax thereon as a part of its income for the year 1917. The petitioner asserts in his brief that respondent made its return upon a cash rather than upon an accrual basis. The returns would indicate this to be true for it is expressly stated therein that the returns are based upon receipts and disbursements. Respondent, however, takes issue with the petitioner's statement and points out that the Board of Tax Appeals failed to determine whether or not respondent's returns were made upon a cash or accrual basis. In either view we think that the amount of this income was properly taxed as income for the year when it was received by the respondent. If the returns were made upon a cash basis it is clearly taxable in the year in which the money was actually received. If, on the other hand, the respondent made its returns upon the accrual basis, as it seems now to contend, it is properly taxable in the year 1917, for it has been held that where tax returns are made upon the accrual basis obligations whose validity is a subject of litigation, is not taxable as accrued income. (*Dodge* v. *United States*, 64 Ct. Cls., 178 [T. D. 4077, C. B. VI-2, 146]; *Kales* v. *Woodworth*, 20 F. (2d), 395 [T. D. 4080, C. B. VI-2, 149]; *Lucas* v. *North Texas Co.*, 281 U. S., 11; *Lucas* v. *Am. Code Co.*, 280 U. S., 445 [Ct. D. 168, C. B. IX-1, 314].) The respondent, apparently conceding this rule, takes the position that notwithstanding the fact that it actually received the income in 1917, its right thereto was in litigation until the final decision of the Supreme Court of the United States in 1922, and that therefore the money was not taxable as income until such final determination.

It is said that the *Consolidated Tea Co.* v. *Bowers* (19 F. (2d), 382 [T. D. 4020, C. B. VI-1, 214]) is directly in point on the proposition that the impounded funds can not constitute income in 1917, but were reportable as income either in 1916 or 1922. We do not think that this case is in point for it deals with the

question as to whether or not the taxpayer is entitled to deduct as a loss a judgment for $10,000 rendered against it by the lower court in 1919, and affirmed by the appellate court and paid in 1921. The taxpayer in that case claimed the right to deduct the loss in 1919 because at that time it set up a reserve against the amount of the judgment. In that connection the district court stated:

"From a tax income standpoint, both logical and practical reasons seems to me to support the conclusion that a loss should be deductible not in the year when the judgment was rendered but in the year when the claim was adjudicated to be final and definite, or possibly, under certain circumstances, in the year when the claim originated."

We do not think this case is authority for the proposition that money paid to a corporation as a part of its income is not taxable because its right to receive such income is being litigated in the court.

The decision of *Burnet* v. *Sanford & Brooks* (282 U. S., 359 [Ct. D. 277, C. B. X–1, 363]) supports the view that we have advanced. In that case Sanford & Brooks were engaged in dredging for the Government. In 1915 they declined to proceed with the work and brought suit against the Government for the amount expended in performance of the contract on the ground that the Government had failed to make proper disclosure of the character of the dredging to be done. The Court of Claims awarded a judgment against the Government in 1918. This judgment was affirmed by the Supreme Court in 1920 (*U. S.* v. *Atlantic Dredging Co.*, 253 U. S., 1), and the judgment was paid by the Government in 1920. It was contended by the taxpayer that it was entitled to make return of this amount as income for the years 1913–14–15–16, during which the work was done and money expended, with the result that such expenditures made during those years would offset the income. The Supreme Court held that the income was properly taxable as income for the year 1920, there being no evidence that the taxpayer took advantage of the regulation providing for reporting income on long-term contract basis under Treasury regulations, or upon an accrual basis under section 212(b).

Income is ordinarily taxable only when it is received. See also decision in *Herold* v. *Mutual Benefit Life Ins. Co.* (201 Fed., 918); *Maryland Casualty Co.* v. *U. S.* (251 U. S., 342); *Eisner* v. *Macomber* (252 U. S., 189, 207 [T. D. 3010, C. B. 3, 25]); *Eckert* v. *Burnet*, decided April 13, 1931 [Ct. D. 325, C. B. X–1, 241]; *Lucas, Commissioner*, v. *No. Texas Oil Co.* (281 U. S., 11 [Ct. D. 169, C. B. IX–1, 294]); *Commissioner* v. *Garber*, No. 6219 (C. C. A. 9), decided June 8, 1931.

Order reversed.

SECTION 240.—CONSOLIDATED RETURNS OF CORPORATIONS.

ARTICLE 633: When corporations are affiliated. X–50–5319
Ct. D. 425

INCOME TAX—REVENUE ACT OF 1918—DECISION OF SUPREME COURT.

1. CONSOLIDATED RETURN—AFFILIATION—OWNERSHIP OR CONTROL OF STOCK.

Where A borrows from a bank money necessary to purchase stock in the Y Corporation, giving his notes therefor indorsed by B, and executes an irrevocable stock power assigning his stock in the Y Corporation to C, who in turn executes a similar instrument assigning the stock to B, who deposited it as collateral security for the notes and to protect B as indorser, B does not own or control the stock, within the meaning of section 240(b)2 of the Revenue Act of 1918, before he pays the notes and takes over the stock.

2. SAME.

Ownership by the same persons of 93.71 per cent of the shares of stock of one corporation and 75 per cent of the shares of another corporation is not sufficient to authorize affiliation under section

240(b)2 of the Revenue Act of 1918 even though the two corporations are operated as a business unit. Control resting solely on acquiescence, the exigencies of business or other considerations having no binding force is not sufficient to satisfy the requirements of that subdivision.

SUPREME COURT OF THE UNITED STATES. No. 14.—OCTOBER TERM, 1931.

Handy & Harman, petitioner, v. *David Burnet, Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 23, 1931.]

MR. Justice BUTLER delivered the opinion of the court.

Petitioner claims that it and Hamilton & De Loss, Inc., were affiliated corporations as defined by section 240 of the Revenue Act of 1918 and that it is entitled to have its net income and invested capital for 1918 and the first month of 1919 determined on the basis of consolidated returns. The Commissioner of Internal Revenue held them not affiliated, rejected petitioner's claim for abatement for 1918 and asserted a deficiency for 1919. The Board of Tax Appeals approved the Commissioner's determination (17 B. T. A., 980) and upon petition for review the Circuit Court of Appeals affirmed. (47 F. (2d), 184.) That decision being in conflict with decisions in other Circuit Courts of Appeals,[1] this court granted certiorari. (283 U. S., 813.)

The pertinent provisions of the section follow (40 Stat., 1081):

"SEC. 240. (a) That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title (Title II) and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return: * * *.

"(b) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated * * * (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

Petitioner carried on the business of dealing in gold and silver bullion and specie and furnishing to silversmiths silver rolled into sheets or coils. In 1916 its officers caused Hamilton & DeLoss, Inc., to be organized, to erect a factory and to take over the work of its stamping department. During the taxable periods six men owned 93.71 per cent of the stock of petitioner. The same men owned over 75 per cent of the stock of Hamilton & DeLoss, Inc. Hamilton did not own or control any of the stock of petitioner. Twenty per cent of the stock of the new company was issued to him and he became its president. He gave to a bank his notes indorsed by DeLoss to obtain money to pay for the stock. Before the beginning of 1918 he executed an irrevocable stock power to one Higgins, and the latter, by like instrument assigned the stock to DeLoss, who deposited it with the bank as collateral security for the payment of Hamilton's notes. Hamilton failed to pay and, February 1, 1919, after the expiration of the tax periods, DeLoss paid the notes and took over the stock.

Prior to that time Hamilton attended all the stockholders' meetings but never voted in opposition to the owners of the majority stock of both corporations. Hamilton & DeLoss, Inc., paid him a salary at the rate of $10,000 per year but the other officers of that corporation, being officers, directors or employees of the petitioner, received their compensation from the latter although a large part of their time was devoted to the business of the former. During the taxable periods the corporations were operated as a business unit, and Hamilton & DeLoss, Inc., sustained a net loss.

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[1] *Ice Service Co.* v. *Commissioner* (30 F. (2d), 230) and *Commissioner* v. *Adolph Hirsch & Co.* (30 F. (2d), 645 (C. C. A. 2) [Ct. D. 66, C. B. VIII–1, 267]); *United States* v. *Cleveland, P. & E. R. Co.* (42 F. (2d), 413 (Ct. D. 252, C. B. IX–2, 387] (C. C. A. 6)); *American Auto Trimming Co.* v. *Lucas* (37 F. (2d), 801 (App. D. C.)); *J. Rogers Flannery & Co.* v. *Commissioner* (42 F. (2d), 11 (C. C. A. 3)); *Pelican Ice Co.* v. *Commissioner* (37 F. (2d), 285 (C. C. A. 5)); *Great Lakes Hotel Co.* v. *Commissioner* (30 F. (2d), 1 (C. C. A. 7)); *Burnet* v. *Wilshire Oil Co.* (46 F. (2d), 975 (C. C. A. 9)).

It may be assumed that the pledge as collateral was also to protect DeLoss as indorser. But it does not appear that as between him and Hamilton he was entitled to control voting power or to have the stock transferred to him of record or to have any use or benefit therefrom unless and until required to pay the notes. It was not held by or for him. The losses sustained by Hamilton & DeLoss, Inc., did not, in respect of that stock, directly or indirectly result to his disadvantage. The section requires control of substantially all of the stock; control of the corporations is not enough.[2] The carrying on of a business unit by two or more corporations does not in itself constitute affiliation. The shares of Hamilton & DeLoss, Inc., owned by the six shareholders did not constitute substantially all of its stock.[3] We assume in favor of petitioner that they, through their power over Hamilton's official position and salary, their ability to dominate both corporations or by other means, were in position effectually to influence him in respect of the voting, use or disposition of the stock issued to him, and thus as a practical matter to exert a kind of control called by counsel "actual" to distinguish it from a legally enforceable control.

The purpose of section 240 was, by means of consolidated returns, to require taxes to be levied according to the true net income and invested capital resulting from and employed in a single business enterprise even though it was conducted by means of more than one corporation. Subsection (b) clearly reflects the intention, by means of such returns, to secure substantial equality as between shareholders who ultimately bear the burden. That intention is shown by the legislative history and was given effect by the regulations contemporaneously promulgated.[4] It requires no discussion to show that such returns will not make against inequality or evasion unless the same interests are the beneficial owners in like proportions of substantially all of the stock of each of such corporations. (*Alameda Investment Co.* v. *McLaughlin*, 28 F. (2d), 81 [Ct. D. 101, C. B. VIII–2, 326]; *Montana Mercantile Co.* v. *Rasmussen*, 28 F. (2d), 916; *Commissioner* v. *Adolph Hirsch & Co.*, 30 F. (2d), 645, 646 [Ct. D. 66, C. B. VIII–1, 267]; *Commissioner of Internal Revenue* v. *City Button Works*, 49 F. (2d), 705.) Affiliation on any other basis would not make against inequality or evasion. It would require very plain language to show that Congress intended to permit consolidated returns to depend on a basis so indefinite and uncertain as control of stock without title, beneficial ownership or legal means to enforce it. Control resting solely on acquiescence, the exigencies of business or other considerations having no binding force is not sufficient to satisfy the statute.

Judgment affirmed.

ARTICLE 636: Consolidated net income of affiliated corporations.

X–28–5137
G. C. M. 9584

REVENUE ACTS OF 1917 AND 1918.

Solicitor's Memorandum 1530 (C. B. III–1, 307), in which the conclusion was reached that profits resulting from intercompany transactions during the year 1917, which were reflected in the opening inventories of the taxpayer's subsidiary corporations for 1918, should not be eliminated in determining consolidated net income for the year 1918, is revoked in view of the decision of the Court of Claims in *Packard Motor Car Co.* v. *United States* (39 Fed. (2d), 991; certiorari denied October 13, 1930, 51 Sup. Ct., 27).

The decision of the Court of Claims has no application to Law Opinion 1108 (C. B. III–1, 412) and Solicitor's Memorandum 3384 (C. B. IV–1, 277).

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[2] It was so held in *Ice Service Co.* v. *Commissioner* (30 F. (2d), 230, 231); *Commissioner* v. *Adolph Hirsch & Co.* (30 F. (2d), 645, 646); *American Auto Trimming Co.* v. *Lucas* (37 F. (2d), 801, 803); *United States* v. *Cleveland, P. & E. R. Co.* (42 F. (2d), 413, 419); *Commissioner* v. *Gong Bell Mfg. Co.* (48 F (2d), 205, 206); *Onondaga Co.* v. *Commissioner* (50 F. (2d), 397, 399).

[3] *United States* v. *Cleveland, P. & E. R. Co.* (42 F. (2d), 413, 419); *Burnet* v. *Bank of Italy* (46 F. (2d), 629, 630); *Jos. Denunzio Fruit Co.* v. *Commissioner* (49 F. (2d), 41); *Wadhams & Co.* v. *United States* (67 Ct. Cl., 235 [Ct. D. 121, C. B. VIII–2, 332]).

[4] Treasury Regulations 41, article 77; section 1331(a), Revenue Act of 1921 (42 Stat., 319); section 336, House bill 12863; section 240(b), same bill; Senate Report No. 617 (Senate Documents, volume 4, Document 310, Sixty-fifth Congress, third session); H. R. Conference Report No. 1037, page 15, same session; Regulations 45 (1920 ed.), articles 631, 633.

An opinion is requested whether Law Opinion 1108 and Solicitor's Memorandum 1530 should be changed in view of the decision of the Court of Claims in *Packard Motor Car Co.* v. *United States*, supra.

Under the Revenue Act of 1917 affiliated corporations were taxed on the basis of a consolidated return for profits tax purposes only, and were taxed upon an individual basis for normal tax purposes. (See articles 77 and 78 of Regulations 41 and section 1331 of the Revenue Act of 1921.) This resulted as of the close of 1917 in setting up an inventory valuation for goods on hand which had been acquired through intercompany transactions (1) at the original price to the first company in the group for consolidated purposes, and (2) at the sales price of the last preceding intercompany transaction in the separate inventory of each individual company. Under the Revenue Act of 1918 affiliated corporations were taxed upon a consolidated return basis for both normal and profits tax purposes (section 240), and in section 320 of the Act it was required that the net income subject to profits tax should be determined upon the same basis and in the same manner as the determination for normal tax purposes. While intercompany profits reflected by intercompany transactions in 1917 were taxed at the normal rates for 1917, the Court of Claims in *Packard Motor Car Co.* v. *United States*, supra, ruled that in computing the income of an affiliated group in 1918 from the sale in that year of goods on hand at the close of 1917, the inventory basis of such goods should be the cost to the first company in the group, thereby eliminating the effect of intercompany sales in 1917.

The reasoning of the Court of Claims appears to be that the consolidated return basis initiated in 1917, though for profits tax purposes only, was broadened under the Revenue Act of 1918 and extended to the determination of consolidated net income for normal tax purposes as well. Under the circumstances and to conform with its view of the requirements of sections 240 and 320 of the Revenue Act of 1918, the court was of the opinion that inventory valuations on the consolidated basis should be carried over from the year 1917 into the year 1918 on the same basis, notwithstanding that intercompany profits on 1917 transactions were taxed for normal tax purposes to the individual company. In the course of its opinion the Court of Claims expressly refused to express any opinion as to the effect of intercompany transactions in 1916 on the opening 1917 inventories of an affiliated group, and said that:

> * * * What the correct answer might have been had the first transaction [intercompany transaction] occurred in 1916 when the corporations occupied the same stock relationship or affiliated status, but when affiliated returns were not recognized or required for any purpose, would be only academic to discuss, and we express no opinion as to the correctness of the method pursued by the Commissioner in not eliminating intercompany transactions in determining the opening inventory for 1917. Here, however, we have a situation where the transaction occurs within a year when affiliated returns were recognized for excess profits tax purposes, but not for income tax purposes, and we see no reason why the same test should not apply as if the transfer from the plaintiff to one of its affiliated corporations had taken place during the year 1918. * * *

In Solicitor's Memorandum 1530, the conclusion was reached that profits resulting from intercompany transactions during the year

1917 which were reflected in the opening inventories of the taxpayer's subsidiary corporations for 1918, should not be eliminated in determining consolidated net income for the year 1918. It was stated that the subsidiary corporations, having for the year 1917 filed returns as separate and distinct entities and having paid taxes upon the net earnings derived from intercompany transactions, should not be affected by the provisions of the Revenue Act of 1918 in determining net income subject to income taxes for that year; that their net incomes for 1917, having been reflected by their inventories, should not be changed; and that to reduce these inventories and apply the 1918 tax rates would in effect be taxing income realized in 1917, which had already borne its tax burden. It was thought that there was nothing in the Revenue Act of 1918 which required that intercompany profits for 1917 be eliminated from the opening inventories of the vendee corporations for 1918 in determining consolidated net income subject to income tax under the Revenue Act of 1918. The effect of the decision of the Court of Claims in the Packard Motor Car Co. case is to reverse the ruling thus made in Solicitor's Memorandum 1530. Solicitor's Memorandum 1530 is accordingly revoked.

The decision in the Packard Motor Car Co. case is limited to the question of the proper determination of the consolidated taxable net income for 1918, and to the effect of the situation under the Revenue Act of 1917. With respect to Law Opinion 1108 and Solicitor's Memorandum 3384, that decision has no application. As has been indicated heretofore the Court of Claims expressly stated that it was not passing upon the effect of intercompany transactions between affiliated companies at a time when consolidated returns were not required or permitted. These latter rulings have to do with the acquisition of capital assets or stock in trade in intercompany transactions which occurred in 1916 or prior years.

Where subsequent to the taxable year 1921, affiliated corporations have filed separate returns and have paid taxes on intercompany transactions for any year and have in the following year elected to file a consolidated return, the principle of Solicitor's Memorandum 3384 should be followed, and, in computing the consolidated net income for the subsequent year, no elimination of intercompany transactions which have been taxed in the prior year, should be made.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

ARTICLE 636: Consolidated net income of affiliated corporations.

X–31–5159
G. C. M. 9537

REVENUE ACT OF 1918.

(1) There may be no deduction under section 23, Merchant Marine Act, unless the amount claimed as a deduction is represented in taxable net income as computed under the Revenue Act of 1918. (2) Where transportation is but one of a series of transactions with goods, a proper part of the gain realized or loss sustained during the taxable year 1920 from the entire series of transactions may be attributed to the transportation—in every case, however, as respects the transported goods, the income realized or the loss sustained is only that properly brought into the

tax account (taxable net income under the Revenue Act of 1918) for the taxable year 1920 (whether the amount thereof results from an inventory loss involving transported goods, gain or loss upon the disposition of the goods transported, or otherwise). General Counsel's Memorandum 6223 (C. B. VIII-2, 334) modified.

This office is requested to reconsider General Counsel's Memorandum 6223, relative to the proper computation of such deductions under section 23, Act of June 5, 1920 (ch. 250, 41 Stat., 997) (herein called the Merchant Marine Act), as may be allowable for the purpose of computing net income subject to the profits tax levied by the Revenue Act of 1918.

The facts may be stated as follows:

For the entire taxable year 1920, the O Company (the parent corporation) owned all the shares of the capital stock of the M Company (the subsidiary corporation). The parent and the subsidiary were affiliated within the meaning of section 240 of the Revenue Act of 1918, and articles 631–637, inclusive, Regulations 45, and filed a consolidated return. The accrual method of accounting was regularly employed by both corporations in keeping their books.

The subsidiary during the taxable year 1920 owned vessels documented under the laws of the United States and operated in foreign trade within the meaning of section 23, Merchant Marine Act, and the regulations prescribed thereunder. The business of the subsidiary, being for all substantial purposes exclusively a transportation business, its corporate books necessarily reflected its dealings not only with outsiders but also with the parent. Both the parent and the subsidiary allege that on the corporate accounting records of the subsidiary the freight rates prevailing in the market were treated as freights earned by the subsidiary corporation.

The subsidiary, as respects its vessels, "invested (or otherwise set aside) * * *" sufficient sums to satisfy, in part at least, the claimed deductions under section 23, Merchant Marine Act, and the regulations prescribed thereunder.

The issue presented is what, if any, deduction under section 23, Merchant Marine Act, is available by reason of the transportation by the subsidiary for the parent.

I.

RELEVANT STATUTES AND REGULATIONS.

Section 23, Merchant Marine Act:

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 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: *Provided further*, That at least two-thirds of the cost of any vessel constructed under this paragraph shall be paid for out of the ordinary funds or capital of the person having such vessel constructed.

Article 1, paragraph 7, rules and regulations relating to section 23, Merchant Marine Act, adopted by United States Shipping Board, June 13, 1922:

For the purposes of this section and until other rules and regulations are promulgated by the United States Shipping Board, the "net earnings" of vessels for the taxable year involved, shall be determined in accordance with rules and regulations of the Bureau of Internal Revenue for the determination of net income, for income-tax purposes generally.

Section 240(a) of the Revenue Act of 1918:

In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit * * *.

Article 631 of Regulations 45:

The provision of the statute requiring affiliated corporations to file consolidated returns is based upon the principle of levying the tax according to the true net income and invested capital of a single business enterprise, even though the business is operated through more than one corporation. Where one corporation owns the capital stock of another corporation or other corporations, or where the stock of two or more corporations is owned by the same interests, a situation results which is closely analogous to that of a business maintaining one or more branch establishments. In the latter case, because of the direct ownership of the property, the invested capital and net income of the branch form a part of the invested capital and net income of the entire organization. * * *

Article 637 of Regulations 45:

* * * subject * * * to the elimination of intercompany transactions, the consolidated taxable net income shall be the combined net income of the several corporations consolidated * * *.

II.

Are the amounts accrued as earnings on the books of account of the subsidiary, as respects goods transported by the subsidiary for the parent, "net earnings of such vessel[s]" within the meaning of section 23, Merchant Marine Act?

The answer must be found in the statute. The natural meaning of the statutory phrases "net earnings of such vessel" and "net earnings of * * * vessel[s]" is the "net earnings of the owner of such vessels derived from the operation of such vessels for profit;" and, of course, the normal meaning of "net earnings" is "net profits" or "net income." Further, where the reference is specifically to the Revenue Act of 1918, the connotation of "net earnings" is presumptively, at least, the concept of taxable net income for the purposes of that Act.

When section 23, Merchant Marine Act, is read in its entirety, the inference becomes quite compelling that the basic purpose of the provision is to exempt from profits tax that part of the taxpayer's taxable net income which was, during the taxable year 1920, derived from the operation of the vessels in the trade and modes more particularly specified in section 23, Merchant Marine Act. Whatever ambiguity and doubt might remain after an inspection of the words

of the statute are dispelled by an examination of its legislative history. The reports of the committee on conference of the two Houses (59 Congressional Record, 8408, 8573, 8598) and the statements of the chairman and officers in charge of the bill in the two Houses (59 Congressional Record, 8500, 8574, 8605) make it quite clear that the only purpose of section 23, Merchant Marine Act, is to exempt that part of the taxpayer's taxable (but for section 23) net income derived from certain vessels in certain trade under certain conditions, granted certain specified conditions are satisfied. The regulations prescribed pursuant to the statute could scarcely more unequivocably so interpret the statute (rules and regulations relative to the Merchant Marine Act, art. 1, par. 7, supra). As General Counsel's Memorandum 6223 said: "The conclusion necessarily follows that if there are no earnings which would be subjected to tax but for the deduction allowed by section 23, there can be no deduction under section 23;" and this office adheres to that conclusion. Only portions of that which is, under the Revenue Act of 1918, taxable net income may by any possibility be deducted under section 23, Merchant Marine Act.

As respects the goods transported by the affiliated subsidiary for the parent, there can be no accounting for gain or loss, nor any gross or net income under the Revenue Act of 1918, nor any sum brought into the computation of net earnings under section 23, Merchant Marine Act, until, as respects the particular transported goods, income has been realized or loss sustained "in accordance with the rules and regulations of the Bureau of Internal Revenue for the determination of net income for income tax purposes generally." "In determining consolidated net income, it is * * * necessary to eliminate from the combined net incomes of the several corporations determined separately the unrealized profits and losses in intercompany transactions." (G. C. M. 8618, C. B. IX–2, 180.) (See arts. 631, 637 of Regs. 45.) It results that there is no realized income to the affiliated group, nor to any member thereof (either for the purposes of the Revenue Act of 1918 or for the purposes of section 23, Merchant Marine Act, and the regulations promulgated thereunder), from the transportation until there is realized income to the affiliated group from the transported goods. (*Tootal Broadhurst Lee Co., Ltd.*, v. *Commissioner*, 30 Fed. (2d), 239, cert. denied 279 U. S., 861.)

Only when the affiliated group has realized income or sustained a loss in respect of the transported goods is there income or earnings to be brought into the computation of "net earnings" within the meaning of section 23, Merchant Marine Act. There is no realized income either to the affiliated group or to the subsidiary from the transportation until there is realized income from the transported goods. There is no realized income either to the affiliated group or to the subsidiary until the goods transported are sold or disposed of to an interest outside the affiliated group. There is no sustained loss from the transportation, either to the affiliated group or to the subsidiary, until there is a sustained loss from the transported goods. There is no sustained loss from the transported goods until: (1) The transported goods are disposed of; (2) a loss has occurred within the meaning of section 234(a)4, Revenue Act of 1918, and

related provisions of law; or (3) a loss in the income tax sense has been sustained through the manner of taking inventory, as, for example, occurs invariably if, upon the basis of cost or market whichever is lower, market is lower than cost, and at these times there is a sustained loss.

III.

The further question remains: Grant that a closed transaction (i. e., a transaction with an interest outside the affiliated group) has occurred in respect of particular transported goods, so that an accounting for gain or loss is made and reflected in consolidated taxable net income under the Revenue Act of 1918, is a ratable part thereof to be treated as transportation earnings of the subsidiary, or must the dealings by the members of the affiliated group in respect of the goods be regarded as so inextricably unitary and bound together that they can not be segregated, or, at least, so inextricably bound together that nothing can be attributed to any phase of the dealings other than the more important and decisive phase of sale (or other event which, under the income tax laws, results in gain or loss being cast in respect of the goods)? In other words, is the proper share belonging to the subsidiary of the realized gain or sustained loss of the affiliated group (when realized or sustained) respecting the transported goods lost by reason of the circumstance that the affiliated group realizes income or sustains loss only from the disposition of the goods in a transaction with an interest outside the affiliated group?

"The consolidated group as such is * * * a tax-computing unit and the corporations which are members of the affiliated group for the year * * * lose their separate identity while so affiliated only for the purpose of the computation of the tax upon one income." (*Swift & Co.* v. *U. S.*, 38 Fed. (2d), 365.) The intercompany transaction by which the subsidiary transported goods for the parent resulted in neither gain nor loss to the affiliated group, nor, for tax purposes, to any of the members thereof, but when the affiliated group in a dealing in respect of the transported goods by one of its members with an interest outside the affiliated group (or by other action for income tax purposes resulting in a closed transaction to the affiliated group) realizes income or sustains loss, a proper regard for the separate tax status of the members of the affiliated group and a proper recognition of the role of the subsidiary in transporting the goods require that the subsidiary be regarded as having its proper share in the realized gain, when realized, and in the sustained loss, when sustained, of the affiliated group in respect of the transported goods. (See G. C. M. 8618, supra; section 23, Merchant Marine Act, article 1, paragraph 7.) Any other construction would appear to preclude all industrial carriers from the benefits of section 23, Merchant Marine Act, a result hardly within any discoverable intent of Congress. (See section 1, Merchant Marine Act.)

In conclusion, it is the opinion of this office: (1) That there may be no deduction under section 23, Merchant Marine Act, unless the amount claimed as a deduction is represented in taxable net income as computed under the Revenue Act of 1918; (2) where transportation is but one of a series of transactions with goods, a proper part

of the gain realized or loss sustained during the taxable year 1920 from the entire series of transactions may be attributed to the transportation—in every case, however, as respects the transported goods, the income realized or the loss sustained is only that properly brought into the tax account (taxable net income under the Revenue Act of 1918) for the taxable year 1920 (whether the amount thereof results from an inventory loss involving transported goods, gain or loss upon the disposition of the goods transported, or otherwise).

General Counsel's Memorandum 6223 is hereby modified to conform with this opinion.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

SECTIONS 246 AND 247.—INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL COMPANIES.

ARTICLE 691: Tax on insurance companies. X–30–5153
Ct. D. 364

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

INSURANCE COMPANY — CLASSIFICATION — TRUST DEPARTMENT—ESCROW DEPARTMENT.

A corporation engaged in the insurance business but which in addition thereto maintains a trust department, from which it derives a substantial income, and an escrow department, is not an insurance company within the meaning and intent of section 246 of the Revenue Act of 1921.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION. NO. 3269—LAW.

Title Guarantee & Trust Co., a Corporation, plaintiff, v. *United States of America, defendant.*

[April 29, 1931.]

OPINION.

JAMES, District Judge: This suit is brought to recover the sum of $30,598.69, with interest, alleged as constituting an overpayment of income taxes for the calendar year 1922. Plaintiff made its return to the revenue collector for the year in question and paid a tax amount of $74,112.15. After audit by the Revenue Department, an additional tax of $5,696.25 was assessed, which plaintiff paid. A claim for refund was duly presented, in which it was asserted that the plaintiff was an insurance company and that certain amounts not subject to tax had been included in its return, with the result that where the net income on the return was shown as $592,897.22, the correct amount of net income should have been stated as $348,107.68, with a reduced tax amount of $43,513.46. The specific items of income claimed to have been erroneously included in plaintiff's return were set forth as follows:

Escrow fees		$107,215.60
Reconveyances		8,277.33
Trustee fees		93,642.82
Recording and advances	$431,361.16	
Less recording and advances	$291,327.82	
Revenue stamps	105,379.52	
	396,707.34	
		34,563.82
		244,789.57

It is admitted that under whatever classification the plaintiff is brought, the item for recording and advances would not constitute income. The amount under that heading, however, is agreed to be the sum of $34,653.82 instead of $35,653.82. Defendant admits the right of the plaintiff to recover $4,331.71, which is 12½ per cent of $34,653.72. As to the latter, interest should be added dating from March 15, 1923.

A determination of the controversy depends wholly upon the answer to be made to the question: Was the plaintiff, during the calendar year 1922, doing the business of an insurance company within the meaning of the Revenue Act? If, for the purpose of taxation, it should be classed as a general commercial corporation, then there can be no recovery on the main claim. It would not, in that case, be entitled to deduct items of income specified as "escrow fees," "reconveyances," "trustee fees." Section 246 of the Revenue Act of 1921 (42 Stat., 362) contains the following provision:

"(a) That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid for the calendar year 1922, and for each taxable year thereafter, upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

"(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230."

In other subdivisions of the section referred to, the gross income of an insurance company is limited and defined to be that income only which is derived from "investment income and from underwriting income * * * computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners." Investment income is then defined to be "interest, dividends and rents." Underwriting income is defined to be "premiums earned on insurance contracts during the taxable year, less losses incurred and expenses incurred."

Without going into further detail, it will be sufficient to note that insurance companies were not required in 1922 to account for items of income other than those particularly specified and were and are favored by the law as against corporations doing other classes of commercial business. While they paid the same per cent on the net income as did other corporations, the net income did not include all items of income or profit and did not include a special excise tax for the carrying on of business levied upon the capital stock as is provided by section 1000 of the Revenue Act (see vol. 40, Stat. 1917–1919, 1126).

Plaintiff corporation was organized in the year 1895. Its articles declare the purposes for which it was formed to be as follows:

"To lease or acquire abstract plants, to prepare abstract books, to examine public records, to prepare statements of any matter of record, including abstracts and certificates of title, which may guarantee and assure the record title; issue policies of insurance, and other contracts and reports affecting title to real estate; to do a general trust business, act as agent, trustee, administrator, executor, guardian and fiduciary servant; to invest its funds and assets in secured loans, mortgages, bonds or other good properties; to acquire stock of other corporations; to hold and dispose of the same; to receive money and issue notes of indebtedness. All of said business shall be conducted for profit."

It has regularly complied with the requirements of the statutes of the State of California affecting corporations doing an insurance business. It has also maintained a trust department and has acted as trustee to hold title to property for various purposes, including trustee relationship under trust deeds made in lieu of mortgages, as executor under wills, etc. In its trust department it has been under the inspection of the Banking Commissioner of the State of California, and in the handling of that business has complied with the banking laws of the State. Its income from the latter source has been substantial, and that business has apparently been considered by it as inseparable and necessary to the carrying out of the general purposes for which it was organized.

The two items in its claim for refund, as representing nontaxable income, to wit: "reconveyances $8,277.33" and "trustee fees $9,364.82" were derived wholly from the trust department. "Escrow fees" shown in the amount of $107,215.60, also charged as deductible, represents compensation for services in the escrow department. That is, where persons are arranging to purchase property, negotiate a mortgage or consummate any transaction wherein documents are to be delivered or money passed upon title being shown as required, they submit their several instructions, with an order for certificate and the company acts as depositary while making the title examination to comply with

instructions given. The company acts as a searcher of records in its title department. It issues its certificate showing the condition of title, which carries with it the company's assurance that the search has been made with reasonable care. It issues what it calls its guarantee certificate, wherein a maximum amount of liability is fixed. In the latter it makes no assurance that the records examined are free from fraud of any sort. It issues a third form of certificate, which it denominated "policy of title insurance." The contract contained in such certificate form does answer strictly to that of "insurance." This contract indemnifies the insured in an amount which is fixed against loss caused by "failure of title, or by reason of any defects in, or liens, or incumbrances on * * * real property," with such exceptions as are specified.

The argument on behalf of the plaintiff is that the main and principal business of the corporation is that of title insurance and that the trust department and the escrow department are merely incidental and contributing agencies. It is said that the trust department receives transfers of tracts of land to be subdivided and that it is part of the business of the trustee to furnish a certificate of title on the land and certificates to purchasers, all of which it is argued constitutes title insurance business. It is said that the escrow business is a necessary and natural feeder to such insurance business.

It can not be doubted that Congress, in making an exceptional class of insurance corporations, intended that the corporations which were so favored in the payment of income tax, should belong strictly to the class assigned to them. The corporation here had the option of limiting its business operations and functions to those which are the well-known attributes of insurance writing, but it can not combine with insurance work a variety of other classes of profitable business and claim the exempt status which will result in its being relieved of a considerable tax which it would have to pay were the business other than insurance conducted separately. It would seem to be just as reasonable to argue that this company might engage in real estate brokerage and maintain the claim that that business was merely an incidental adjunct operating as a "feeder" to its title insurance business, as to say that its trust department and also its escrow department were merely incidental to the insurance business. To so expand the business permitted of an insurance concern would result in a situation that certainly was not contemplated when the statute was passed. In *Louisville Title Co.* v. *Lucas* (27 Fed. (2d), 413) the district judge there denied the contention of the plaintiff that it was entitled to be classified, for income tax purposes, as an insurance company. In the case of *Home Title Insurance Co.* v. *United States* (41 Fed. (2d), 793 (E. D. N. Y.) [Ct. D. 203, C. B. IX–2, 437]) District Judge Galston reached a similar conclusion with respect to the plaintiff there suing. A search does not disclose that either of these cases has been passed upon by a court of appeals, but the logic of the decisions seems sound and in accordance with common sense reasoning.

The request for findings and judgment as made on behalf of the plaintiff is denied, except as to the amount which is agreed was erroneously assessed on the item which did not constitute income of any sort. An exception will be noted in favor of the plaintiff. Findings and judgment otherwise are ordered to be entered for the defendant.

PART IV.—ADMINISTRATIVE PROVISIONS.

SECTION 250.—PAYMENT OF TAXES.

ARTICLE 1003: Nonpayment of tax—Interest and penalty. X–33–5174 Ct. D. 371

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. INTEREST—CLAIM FOR ABATEMENT.

Where a tax remains unpaid after the date when it is due and for 10 days after notice and demand by the collector, as to any amount of such tax which is the subject of a bona fide claim for abatement, the interest upon the tax covered by the claim, charge-

able under section 250(e) of the Revenue Act of 1918, is at the rate of one-half of 1 per cent a month from the time such tax was due until the claim in abatement was decided and 1 per cent a month of the tax due from the date of the rejection of the claim to the date when the tax was paid.

2. PENALTY—CLAIM FOR ABATEMENT.

Where a tax remains unpaid after the date when it is due and for 10 days after notice and demand by the collector, as to any amount of such tax which is the subject of a bona fide claim for abatement the 5 per cent penalty under section 250(e) of the Revenue Act of 1918 may not be collected even though the tax was not paid within 10 days from the time the claim was rejected.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

United States of America, appellant, v. *Maryland Casualty Co., a Corporation, appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

[May 2, 1931.]

OPINION.

SPARKS, Circuit Judge: This suit was instituted by appellant upon a bond executed by Boss Nut Co., a corporation, as principal, referred to hereinafter as the company, and appellee, as surety, which bond was delivered to the collector of revenue for the first district of Illinois to secure the payment of part, namely, $3,246.64, of an assessment of income and profits taxes for 1920 against the company, as to which amount of tax the company had filed a bona fide claim for abatement.

The following facts are uncontroverted: Appellant assessed income against the company in the sum of $46,426.78. Three quarterly payments, each for the sum of $11,606.70, were made by the company to appellant; and thereafter, on December 15, 1921, the company made a payment to appellant of $8,360.04, leaving a balance unpaid of $3,246.64, and at the same time filed a bona fide claim for the abatement of the unpaid portion, which claim was based on certain honestly alleged credits. On February 20, 1922, the company, as principal, and appellee, as surety, executed the bond in suit. The Commissioner of Internal Revenue, on June 13, 1925, rejected the claim for abatement, and the collector of internal revenue notified the company of that fact. On August 8, 1925, the collector made demand upon the company for the unpaid assessment, and on February 16, 1927, he notified appellee of the rejection of the company's claim and demanded payment of appellee, which was refused. Thereupon appellant filed its declaration claiming (1) the unpaid portion of the assessment; (2) interest thereon at the rate of one-half of 1 per cent a month from the due date of the deficiency, December 15, 1921, to June 13, 1925, the date of the denial of the claim; (3) a penalty of 5 per cent on the deficiency; and (4) interest at the rate of 1 per cent a month for the time intervening between the date of the denial of the claim in abatement and the date of payment of the deficiency. Appellee did not deny its liability for the unpaid assessment, with 6 per cent interest thereon from December 15, 1921, to date of payment; and accordingly on March 15, 1930, judgment was entered against appellee, by its consent, for those amounts in the sum of $4,853.72, which was thereupon paid by appellee in open court. The suit then proceeded for the purpose of presenting the undisposed of claims of appellant, which upon final hearing were denied.

The statute which gives rise to the contentions presented is section 250(e) of the Revenue Act of 1918 (40 Stat., 1083 and 1084), and reads as follows:

"If any tax remains unpaid after the date when it is due, and for 10 days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from

the time the amount was due until the claim is decided shall be at the rate of one-half of 1 per centum per month."

The language of the statute is quite clear, and from it we conclude that it was the manifest intention of Congress that no tax remaining unpaid after due, and after 10 days' notice and demand by the collector, should escape the penalty described, except in the case of estates of (1) insane persons, (2) deceased persons, (3) insolvent persons, and except (4) any tax which is the subject of a bona fide claim for abatement. With relation to the fourth exception it is affirmatively stated that upon all such tax the penalty of 5 per cent shall not be added, and that the monthly interest from the due date until the controversy of abatement is decided shall be one-half of 1 per cent instead of 1 per cent from the time the amount was due until the claim is decided.

It is appellant's contention, however, that such statute should be construed to mean that in case of rejection of the claim of abatement, or any part thereof, the amount of tax held to be due shall, after 10 days' notice, be subject to the 5 per cent penalty and also to 1 per cent of said amount a month from the time of rejection of the claim of abatement until the amount is paid.

In arriving at this conclusion appellant relies upon the well accepted principles of law that courts will construe a statute so as to effectuate the intention of Congress so far as that intention is expressed or implied in the language used; and that a proviso should be construed with the matter preceding it, and it should be construed strictly, so as not to except from the enacting provision anything more than Congress intended to except. There is no disposition to abate the general effect of these principles, but it must be remembered that in construing taxing Acts other well accepted principles must not be ignored. Such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. (*United States* v. *Merriam*, 263 U. S., 179 [T. D. 3535, C. B. II–2, 87].) Such Acts, including provisions of limitation embodied therein, are to be construed liberally in favor of the taxpayer. (*United States* v. *Updike*, 281 U. S., 489 [Ct. D. 192, C. B. IX–1, 228]; *Bowers* v. *N. Y. & Albany Lighterage Co.*, 273 U. S., 346 [T. D. 4009, C. B. VI–1, 268].) There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer. (*Treat* v. *White*, 181 U. S., 264.)

Governed by these principles we can not approve appellant's construction of the statute with relation to the 5 per cent penalty. It is explicitly stated therein that such penalty shall not be added to any amount of tax which is the subject of a bona fide claim for abatement, and that the interest to be added thereto shall be at the rate of one-half of 1 per cent a month from the time the amount was due until the claim is decided. There is no provision in the statute that the 5 per cent penalty shall again become effective in case the tax is not promptly paid after the claim of abatement is adjudicated, and we are convinced that Congress expressed no intention in this statute to accomplish such result.

It is quite clear however that the company was liable for interest on its deficiency tax at the rate of one-half of 1 per cent a month from the time such tax was due until the claim for abatement was decided; and at the rate of 1 per cent per month from the date of such decision until paid. The rate of 1 per cent per month is definitely fixed in the first part of the statute, and the proviso merely reduces it to one-half of 1 per cent for the time consumed by the litigation relative to the abatement.

While the construction of a taxing statute by the officials of the Bureau of Internal Revenue is entitled to great weight and is always to be seriously considered, yet such construction is not binding on the courts. Taxing officials are governed by the same rules of construction as are the courts, and where the language of the statute is plain neither the taxing officials nor the courts can extend it by implication; and where doubt exists as to the legislative intent it must be resolved in favor of the taxpayer. Where a conflict arises between the finding of the taxing officials and what we regard as the plain meaning of the statute, we have no right to follow the finding of the taxing officials, but are governed entirely by the statute. This position is supported in *United States* v. *Field* (255 U. S., 257); *United States* v. *Mo. Pac. R. R. Co.* (278 U. S., 269).

It is suggested by appellant that its position is supported by the fact that after the Department's construction of section 250(e) of the Revenue Act of

1918, the same statute was reenacted by Congress as a part of the Revenue Act of 1921. The rule that reenactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction, applies only when the construction is not plainly erroneous. (*United States* v. *Mo. Pac. R. R. Co.*, 278 U. S., 269.)

We think the district court erred in not holding, as a matter of law, that under the facts stated in the stipulation the United States was entitled to recover from the appellee interest upon the tax involved at the rate of 1 per centum a month from June 13, 1925, the date of the rejection of the claim for abatement, to March 15, 1930, when the tax was paid. In this respect the decree is reversed, with instruction to modify the decree in conformity to this opinion. It is ordered that each party pay its own costs. In all other respects the decree is affirmed.

ARTICLE 1008: Collection of tax by suit. X–42–5256. Ct. D. 405

FEDERAL TAXES—TRUST FUND DOCTRINE—DECISION OF COURT.

1. TRANSFEREE—TRUST FUND DOCTRINE—DISSOLVED CORPORATION—PRIOR JUDGMENT AGAINST THE CORPORATION.

Where stockholders receive the assets of a dissolved corporation they are under an obligation to discharge the unpaid taxes of the corporation and a bill in equity to enforce their liability for such taxes under the trust fund doctrine is an appropriate proceeding, the measure of their liability being limited to the value of the assets received. In such a case a judgment against the corporation and return of execution unsatisfied are not required and a State statute to the effect that "no action shall be brought against a stockholder for any debt of the corporation" until judgment has been recovered against the corporation and an execution thereon returned unsatisfied is inapplicable.

2. ASSESSMENT—LIMITATION—SUIT—PRESUMPTION—PLEADING.

An averment in a bill in equity to enforce the liability of transferees under the trust fund doctrine that the tax "was duly assessed" is sufficient to entitle the complainant to the presumption as a matter of pleading that the steps necessary to a proper assessment were carried out.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

United States of America, complainant, v. *Aaron Garfunkel, Louis Lubetkin, Abraham Moses, Cecil T. Moses, and Sarah Buhlaner, defendants.*

[July 28, 1931.]

OPINION.

PATTERSON, D. J.: The United States filed a bill in equity to collect from the stockholders of a dissolved corporation income taxes owed by the corporation for the years 1919 and 1920. The present motion challenges the sufficiency of the bill as an entirety and in the alternative the sufficiency of that part of it which seeks to recover the 1920 tax.

The bill alleges that on February 1, 1926, the Broadway Bargain House, a New York corporation, was dissolved and its assets distributed among the defendants as stockholders, nothing being left with which to pay taxes due to the United States. Concerning the 1919 tax, it is stated that on May 15, 1920, the corporation filed a return for the year 1919, which return understated the income for that year, wherefore an additional tax of $941.11 was assessed against the corporation on January 15, 1925, this additional tax remaining unpaid. As for the 1920 tax, the bill charges that a return was filed by the corporation on March 15, 1921, which understated income, that on May 19, 1926, an additional tax of $1,828.76 was duly assessed against the corporation,

and that this sum remains unpaid. The relief demanded is that the defendant stockholders be held liable for the taxes, to the extent of the corporate property received by them.

I am of opinion that a good cause of action is stated as to both the 1919 and the 1920 taxes.

1. Stockholders who receive the assets of a dissolved corporation are under duty to discharge unpaid corporate taxes, the measure of their liability being of course limited to the value of the assets received. A bill in equity is an appropriate and recognized proceeding to enforce the performance of this duty. These propositions of law can not be doubted. (*Phillips* v. *Commissioner of Internal Revenue*, decided by the Supreme Court May 25, 1931 [Ct. D. 350, C. B. X–1, 264]; *United States* v. *Updike*, 25 Fed. (2d), 746, affirmed 32 Fed. (2d), 1, 281 U. S., 489 [Ct. D. 192, C. B. IX–1, 228]: *United States* v. *McHatton*, 266 Fed., 602 [T. D. 3043, C. B. 3, 283]; *Capps Mfg. Co.* v. *United States*, 15 Fed. (2d), 528 [T. D. 3972, C. B. VI–1, 264].) Many other authorities might be cited. The remedy of proceeding against the stockholders by way of assessment and distraint, made available by section 280 of the Revenue Act of 1926, is an additional remedy. (*Phillips* v. *Commissioner of Internal Revenue*, supra.)

The defendants maintain, however, that prior to the maintenance of a suit against them as receiving stockholders, judgment for the unpaid taxes must have been recovered against the corporation and execution returned unsatisfied, and that the bill is insufficient for failure to allege the performance of this condition precedent. It is a fact that despite the dissolution of the corporation it may still be sued and judgment recovered against it, by virtue of section 105 of the New York stock corporation law. But it is settled that in a case like the present one judgment against the corporation and return of execution unsatisfied are not required. (*United States* v. *Fairall*, 16 Fed. (2d), 328 [T. D. 4008, C. B. VI–1, 267]; *United States* v. *Pann*, 23 Fed. (2d), 714 [T. D. 4216, C. B. VII–2, 228]; see also *Updike* v. *United States*, 8 Fed. (2d), 913, at page 918.) As pointed out by Judge Learned Hand in the Fairall case, supra, the requirement of prior judgment and execution against the corporation is not absolute. Impossibility dispenses with the requirement, as does also manifest futility. Here it is alleged that the corporation was stripped of assets and dissolved, so that a judgment against it, while doubtless obtainable, would be utterly worthless.

The defendants also rely upon the New York statute to the effect that "no action shall be brought against a stockholder for any debt of the corporation" until judgment has been recovered against the corporation and execution thereon returned unsatisfied. Stock corporation law, section 73. But the New York courts recognize that in exceptional cases these requirements will be dispensed with (*United Glass Co.* v. *Very*, 152 N. Y., 121); moreover, it is clear that income tax is more than a "debt," which renders the statute inapplicable.

As for the argument that the bill shows on its face that the corporation upon dissolution was left with $28,000 to pay creditors, I am of opinion that this is a misconstruction of the bill. In any event, the bill goes on to allege in a later paragraph that the corporation now has no assets wherewith to pay the taxes and is dissolved. The motion to dismiss the bill as an entirety is without merit.

2. The other branch of the motion is to dismiss the cause of action based upon the 1920 tax. The bill shows on its face, it is said, that the assessment was made too late. A period of 5 years and 64 days seems to have elapsed between the filing of the return on March 15, 1921, and the making of the assessment on May 19, 1926. The present Revenue Act, like the 1926 Act, fixes five years as the period for assessments of taxes under the 1918 Act. (26 U. S. C. A., section 1057(a)3.) But it also provides in the same section that the running of the statute shall be suspended for the time when the Commissioner is prohibited from making the assessment (which is for 60 days after mailing notice of deficiency) and for 60 days thereafter. This furnishes the United States with 120 additional days. While the bill does not recite that the Commissioner sent out the required notice of deficiency and waited for 60 days prior to making the assessment on May 19, 1926, it does state that the tax was "duly assessed," and the complainant is entitled to the presumption as matter of pleading that the steps necessary to a proper assessment were carried out. On the face of the bill, therefore, it seems that the assessment was a timely one.

The further point is made that since the dissolution and transfer of assets to the defendants took place several months prior to the assessment of the 1920 tax, there was no debt for the tax at the time of the transfer. The error is in the assumption that the tax liability did not arise until the making of the assessment. There is no need that the assessment against the corporation must precede the dissolution and distribution of assets, or that the stockholders must have had notice of the unpaid tax before winding up. The United States need not plead or prove any conscious evasion of tax. The defendants' liability comes from the fact that corporate taxes and debts are prior to the claims of stockholders.

The bill states a good cause of action as to both taxes, and the motion to dismiss will be denied.

ARTICLE 1008: Collection of tax by suit.

REVENUE ACT OF 1921.

Tax refunded by mistake of administrative officer. (See Ct. D. 396, page 202.)

ARTICLE 1011: Compromise of tax cases. X–41–5244
Ct. D. 400

FEDERAL TAXES—BANKRUPT'S COMPROMISE OF TAX LIABILITY—DECISION OF COURT.

1. CLAIM FOR REFUND—PURCHASER UNDER A SALE IN BANKRUPTCY—VALIDITY OF TITLE.

Where a claim for a refund is not scheduled as an asset of a bankrupt and is not inventoried or appraised in the bankruptcy proceedings, as required by the Bankruptcy Act and general orders, no title to the claim passes to a person asserting that he purchased it from the trustee in bankruptcy.

2. SUIT—COMPROMISE OF TAX LIABILITY—COLLECTION OF TAX BARRED BY STATUTE OF LIMITATIONS.

Where there is a voluntary submission of an offer in compromise of tax liability to the United States, followed by its acceptance, there is no right of recovery of the amount paid in compromise, though the compromise was made after the expiration of the period of limitation upon collection of the tax.

3. SUIT—COLLECTOR—AMOUNT PAID IN COMPROMISE.

A suit to recover money paid under an offer in compromise does not lie against a collector.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Floyd C. Snyder, plaintiff, v. *C. F. Routzahn, Collector of Internal Revenue, defendant.*

[June 23, 1931.]

OPINION.

JONES, J.: By written stipulation, trial by jury was waived and the case tried and submitted to the court upon the oral testimony and stipulated facts.

Upon the evidence, with which the parties are familiar, my conclusion is that the plaintiff, who was the president of the bankrupt company, did not acquire the title to the asserted claim for refund of money paid in compromise of tax liability, and is not entitled to maintain this action.

The purpose of the applicable provision of the Bankruptcy Act relating to the filing of schedules (section 7) is to fully advise the creditors and the court as to all of the property of the bankrupt of whatever kind and wherever situated. The alleged claim for refund was a chose in action with a specific character, which distinguished it from the other scheduled assets of the bankrupt. Schedule B(3) of the approved form of bankruptcy schedules, filed under oath by the plaintiff as president, in pursuance to a resolution of the bankrupt company's board of directors, is captioned "Choses in action" and item "D" thereon calls for the listing of "Unliquidated cla ms of every nature with their estimated value." Such claim was not scheduled, inventoried or appraised, as required by the Bankruptcy Act and general orders, and there is no evidence of probative value to justify a finding or conclusion that the trustee sold such claim in the bankruptcy proceedings.

While, generally speaking, irregularities, such as failure to appraise, may not be fatal, nor irregularities in the bankruptcy proceedings be open to collateral attack, yet the failure to schedule and the failure to include the claim in the proceedings to sell leave the plaintiff without any title to the claim. The assertion that such a claim was not scheduled and not specified in the proceedings to sell, because it was then thought to be of no value, is not persuasive in the light of the dexterity and dispatch with which presentation of the claim thereafter was made.

This is not a case where barred taxes were collected by distraint, or otherwise, or paid under protest. The supposed tax liability of the bankrupt company was compromised by the Government as the result of a voluntary offer. In May, 1927, the Rubber company paid $5,500 on account of taxes due for the year 1918, and in November of the same year the offer in compromise, shortly thereafter accepted, was made. The question of whether a compromise of tax liability is void or may be avoided, where made after the running of the statute of limitations, can not turn upon the sections of the Revenue Acts relied upon by the plaintiff. They relate, for the most part, to limitation upon the *collection* of taxes, and we are dealing here with a compromise or a voluntary liquidation of tax liability.

With reference to section 1106(a) of the Revenue Act of 1926, it will be observed that the United States Supreme Court has declared that section repealed, as of its effective date, by the Revenue Act of 1928. (*United States* v. *Barth*, 279 U. S., 370, 375, 376 [Ct. D. 65, C. B. VIII–1, 189]; *Mascot Oil Co.* v. *United States*, 282 U. S., 434, 436, 437 [Ct. D. 286, C. B. X–1, 190].)

There is no contention here that the additional taxes assessed by the Commissioner were not legally due, the sole contention being that the collection of the taxes was barred by the statute. The additional taxes, which were partly paid and the balance compromised, were assessed by the Commissioner in February, 1924. In March, 1924, the collector of internal revenue filed notices of tax lien in the District and State courts. It is assumed that the lien of the United States would become unenforcible if the collection of the tax was barred by statute. While it may be recognized that it is in the nature of mortals to avoid the payment of taxes, if there is any escape, the court can not assume as a matter of law that the taxpayer would not have compromised the tax liability had it occurred to the officers that the collection of the taxes was barred by the statute. The compromise was not a collection of the taxes admittedly due, but a voluntary settlement of a tax liability to the Government. In such case the collector was merely a medium for receiving the amount tendered in compromise and for transmitting it to the Commissioner, who had the power to compromise. The taxes were abated by the compromise and the right of recovery, if any, is against the United States as for money had and received.

For another reason it seems to me the plaintiff must fail, if he had the right to press this claim. There is always a moral obligation to pay taxes, which is sufficient to support the consideration for their voluntary discharge after the tolling of the statute. In any event, under my previous conclusion respecting the incapacity of the plaintiff, any right to set aside the compromise, or to recover money mistakenly or wrongly paid, belongs to the trustee in bankruptcy.

Judgment may be entered for the United States, and findings and conclusions may be submitted for approval.

ARTICLE 1012: Assessment of tax. X–41–5245
(Also Section 303, Article 741; Section 325, Article 815.) Ct. D. 399

INCOME AND EXCESS PROFITS TAXES—REVENUE ACT OF 1918—DECISION OF COURT.

1. WAIVER—VALIDITY—COMMISSIONER'S SIGNATURE.

A consent by the taxpayer to waive the statute of limitations on the assessment and collection of a tax is not invalid because it is not shown that it was signed by the Commissioner.

2. ASSESSMENT—DEFICIENCY—AGREEMENT WITH REVENUE AGENT.

Although the taxpayer signs an agreement pursuant to the request of a revenue agent consenting to the assessment of a deficiency shown on a report of the revenue agent and pays the amount so shown, the agreement providing that it is made subject to the approval of the Commissioner, the agreement, which is not approved by the Commissioner, is not binding upon him and does not preclude the determination of an additional tax.

3. ASSESSMENT—DEFICIENCY—PRIMA FACIE CORRECTNESS—PARTLY PERSONAL SERVICE CORPORATION—BURDEN OF PROOF—ESTOPPEL.

The fact that the Commissioner's predecessor in office decided that the taxpayer was entitled in a previous year to have its tax determined under section 303 of the Revenue Act of 1918 as a partly personal service corporation does not estop the Commissioner to determine the corporation's tax for the taxable year under section 301 of that Act. The determination of a corporation tax under the latter section is prima facie correct and where it does not sustain the burden of proving that not less than 30 per cent of its total net income is derived from a separate trade or business or a distinctly separate branch of the trade or business, it is not entitled to have its tax determined under the provisions of section 303 of the Revenue Act of 1918.

4. INADMISSIBLE ASSET—PROOF.

In arriving at the percentage of inadmissible assets to be deducted from invested capital under section 326(c) of the Revenue Act of 1918, a share of stock is properly included as an inadmissible asset as determined by the Commissioner in the absence of proof by the taxpayer that the share is not an inadmissible asset as defined by section 325(a) of the Revenue Act of 1918.

5. DECISION AFFIRMED.

The decision of the Board of Tax Appeals (11 B. T. A., 1236) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT. No. 5916.

John M. Parker Co., petitioner, v. *Commissioner of Internal Revenue, respondent.*

Petition for review of decision of United States Board of Tax Appeals (District of Louisiana).

Before BRYAN, SIBLEY, and HUTCHESON, Circuit Judges.

[April 23, 1931.]

OPINION.

BRYAN, Circuit Judge: This is a petition by a taxpayer, the John M. Parker Co., to review a decision of the Board of Tax Appeals sustaining a deficiency assessment upon income and profits taxes for the fiscal year ending July 31, 1920. In arriving at that decision the Board rejected contentions of petitioner (1) that the assessment was barred by the statute of limitations; (2) that it was entitled under sections 200 and 303 of the Revenue Act of 1918 to classification as a partial personal-service corporation; and (3) that the value of a share

of stock which it owned in the New Orleans Cotton Exchange should have been included in invested capital. (11 B. T. A., 1236.) The adverse ruling upon each of those contentions is assigned here as error.

The tax return was due on October 15, 1920, under section 227(a) of the Revenue Act of 1918; and presumably it was filed within that time. The statutory period of limitations for assessing and collecting the taxes was five years, section 250(d); and therefore would have expired October 15, 1925; but on July 22, 1925, petitioner signed and furnished to the Commissioner a statutory waiver which by its terms extended the statutory period until December 31, 1926. In August, 1925, petitioner signed a Treasury form of agreement consenting to the assessment of a deficiency tax amounting to $584.65 as shown on a report of the revenue agent in charge at New Orleans, and paid the amount so shown. That agreement provided that it was made subject to the approval of the Commissioner. He never approved it, but on the contrary in December, 1925, made the deficiency assessment in dispute.

During the taxable year in question petitioner had a capital stock of $500,000, half of which was common stock, the other half was nonvoting preferred stock. Seven owners had 3,500 shares and were all actively engaged in the management of its business. That business consisted of advancing funds to planters to enable them to grow cotton; making advances on cotton which had been shipped and accepting cotton as collateral; selling cotton "to arrive," which means that when petitioner sold cotton for interior shipment it guaranteed to the buyer that it would measure up to samples, and to the seller that it would be paid for on delivery; and selling cotton on commission where no advances were made. Petitioner maintained a separate office for the handling of cotton "to arrive" pursuant to a rule of the New Orleans Cotton Exchange, and another office in which it conducted the rest of its business. It kept only one set of books. A revenue agent examined its books and divided its business into two classes; one, that in which capital was required, and the other, that which was attributed to the personal activities of the principal stockholders.

He computed the gross income at $346,000, of which he attributed $135,000 to capital and $211,000 to personal services. The total expenses were found to be $184,000, of which he attributed $76,000 to capital expenses and $108,000 to personal-service expenses. This left a net income of approximately $162,000. Of the gross income attributed by the revenue agent to personal services, $207,000 was represented as commissions, of which, it was admitted by petitioner's president and found by the Board, $102,000 was attributable to capital and $105,000 to personal services. Without an adjustment of the expenses only $1,811 of the net income appeared to be attributable to personal services. The Board recognized that more than that amount had been earned as commissions, but held that there was no evidence to show how much more was so earned. A former Commissioner in a previous year classified petitioner as a partial personal-service corporation.

The record before us shows that a copy of the rules of the New Orleans Cotton Exchange was received in evidence, apparently for the purpose of proving rule 6 as to the responsibility of petitioner under contracts covering cotton to arrive; and those rules were to be copied in the record or sent up in the original, but it does not show that the charter or constitution of the exchange was introduced. There was testimony for petitioner given by its president that it owned a share of stock in the New Orleans Cotton Exchange; and that this stock had no dividend or earning power, its only value being to give the privileges of membership in the exchange.

It is contended that the waiver of the statutory period was invalid because it was not shown that it was signed by the Commissioner. But that contention is without merit. (*Florsheim Bros. Co.* v. *United States*, 280 U. S., 453, 464 [Ct. D. 167, C. B. IX–1, 260]; *Stange* v. *United States*, 282 U. S., 270, 276 [Ct. D. 274, C. B. X–1, 414].) The form of agreement signed pursuant to the request of the revenue agent was made subject to the approval of the Commissioner, and in the absence of such approval was not binding upon him. (*Botany Mills* v. *United States*, 278 U. S., 282 [Ct. D. 39, C. B. VIII–1, 279].) The bar of the statute was therefore effectively waived by the petitioner.

The Revenue Act of 1918 by section 200 defines a personal-service corporation to be one whose income is to be ascribed primarily to the activities of the principal stockholders who are themselves regularly engaged in the active conduct of its affairs, and in which capital is not a material income-producing factor; and provides in section 303 that if not less than 30 per cent of a corporation's total net income is derived from a separate trade or business, or a distinctly

separate branch of its trade or business, which, standing alone, would bring it within the classification of a personal-service corporation, then the tax upon such part of the net income so derived shall be separately computed, as though the stockholders were partners. The assessment made by the Commissioner was prima facie correct. In order to overcome it, petitioner had the burden of proving that the net income derived from personal-service activities amounted to as much as 30 per cent of the total income. This burden could not be met by showing only the gross income. The calculations of the revenue agent ceased to be of evidential value upon it being admitted that his calculation was wrong as to gross income derived from commissions, for then it became necessary to readjust the expenses, which was not done. The segregation of expenses was rendered more difficult by the circumstance that only one set of books was kept. Besides, it is not clear that petitioner's large capital and financial standing was without influence upon its commission business. (*J. H. Lane & Co.* v. *United States*, 62 Ct. Cls., 721 [T. D. 3979, C. B. VI-1, 154].) It is now settled that the Board's findings of fact will not be set aside unless they are clearly contrary to the evidence. The fact that a former Commissioner classified petitioner as a partial personal-service corporation during a previous year did not estop the respondent Commissioner to determine in his own way the tax liability for the year in question. (*Sweets Co.* v. *Commissioner*, 40 F. (2d), 436.)

The value of a share of corporate stock is to be excluded from or included in invested capital in computing net income according as such share has or has not dividend-earning power. Revenue Act of 1918, section 325. To which of these two types of corporations the New Orleans Cotton Exchange belongs is not shown by the record, as its charter is not included therein or properly before us. The oral testimony that it belonged to one or the other type of corporation amounted to no more than the opinion or conclusion of the witness.

The petition for review is denied.

ARTICLE 1012: Assessment of tax.

REVENUE ACT OF 1921.

Limitation period on assessment where tentative return filed. (See Ct. D. 419, page 266.)

ARTICLE 1012: Assessment of tax.

REVENUE ACT OF 1921.

Request of representative of executrix, by letter, to make immediate audit. (See Ct. D. 422, page 350.)

SECTION 252.—REFUNDS.

ARTICLE 1035: Action on claims for credit.

REVENUE ACT OF 1921.

Overpayment for 1918 applied against 1917 tax actually due. (See Ct. D. 397, page 311.)

ARTICLE 1036: Claims for refund of taxes erroneously collected.

REVENUE ACT OF 1921.

Grounds relied upon in suit not set forth in refund claim. (See Ct. D. 373, page 392.)

TITLE III.—WAR-PROFITS AND EXCESS-PROFITS TAX FOR 1921.

PART II.—IMPOSITION OF TAX.

SECTION 301.—IMPOSITION OF TAX.

ARTICLE 713: Computation of tax on income from Government contracts. X–51–5329 Ct. D. 431

EXCESS PROFITS TAXES—REVENUE ACT OF 1918—DECISION OF COURT.

GOVERNMENT CONTRACT—CANCELLATION—AMOUNT RECEIVED UNDER SUBSEQUENT AGREEMENT.

Where a taxpayer and the United States enter into a contract for Army coats between April 6, 1917, and November 11, 1918, which is not completely performed on the latter date and in 1919 cancel it and agree upon a settlement contract by which the taxpayer received in 1919 a specified amount "which sum together with payment for the finished articles of work heretofore delivered to the United States and not yet paid for shall constitute full and final compensation for articles of work delivered, services rendered and expenditures incurred by the contractor under the original contract," the payment received by the taxpayer in 1919 under the agreement is income attributable to a Government contract within the meaning of section 301(c) of the Revenue Act of 1918.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

A. B. Kirschbaum Co., appellant, v. *United States of America, appellee.*

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

[September 22, 1931.]

OPINION.

BUFFINGTON, J.: This case turns on the question whether the income here in question met the statutory requirement of being "derived from" or "attributable to" a certain war contract dated April 18, 1918, between the United States Government and A. B. Kirschbaum Co., which contract provided for the latter making for the former 300,000 soldiers' woolen coats. On February 5, 1919, the Government and the contractor canceled the contract. At that time a large number of coats had been made and delivered and a large number had not been made but were either in process of making or material had been bought from which it was expected they would be made. In pursuance of this settlement a written agreement was made by which the United States agreed and subsequently paid, as provided in such agreement, "to the contractor the sum of one hundred nine thousand, six hundred fifteen dollars and sixty cents ($109,615.60), which sum, together with payment for the finished articles of work heretofore delivered to the United States and not yet paid for, shall constitute full and final compensation for articles of work delivered, services rendered, and expenditures incurred by the contractor under the original contract."

The case narrows down to the question whether the $109,615.60 received by the taxpayer fell within the noted statutory requirement, in that it was "derived from" or is "attributable to" the original war contract, or is to be regarded as income "derived from" or "attributable to" an independent contract, namely, the award heretofore referred to. In that regard the court below held:

"The laws to be here construed impose a tax on incomes and a taxable income implies gains. These gains must have a source and the source which Congress had in mind was a war contract. Congress chose the phrases 'derived from' and 'attributable to' war contracts. Were the gains which came to the plaintiff 'derived from' or 'attributable to' the war contract into which it had entered? The taxing officials and the Board of Tax Appeals held that they were, and we think they rightly so held. Clearly if there had been no such contract there would have been no gains. The truth, to which we agree, that the legal remedy of the plaintiff, if it had been compelled to enforce its contractual rights through and by an action at law, would have been upon the second contract, does not change the other truth that the source of the gains recovered would have been the earlier war contract."

We agree with that view and therefore affirm the judgment.

SECTION 303.—TAX WHEN PARTLY PERSONAL SERVICE BUSINESS.

ARTICLE 741: Apportionment of invested capital and net income.

REVENUE ACT OF 1921.

Effect on taxable year of determination in previous year by Commissioner's predecessor; burden of proof. (See Ct. D. 399, page 388.)

PART V.—INVESTED CAPITAL.

SECTION 325.—TERMS RELATING TO INVESTED CAPITAL.

ARTICLE 815: Inadmissible assets.

REVENUE ACT OF 1921.

Determination by Commissioner with respect to share of stock in absence of proof by taxpayer. (See Ct. D. 399, page 388.)

SECTION 326.—INVESTED CAPITAL.

ARTICLE 851: Intangible property paid in. X–34–5183
(Also Section 252, Article 1036; Sections 1318, 1319, and 1320, Article 1050.) Ct. D. 373

EXCESS PROFITS TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. INVESTED CAPITAL—GOOD WILL.

Where all the assets of a predecessor corporation, including good will, were acquired for the capital stock of the taxpayer prior to March 3, 1917, the good will not having been bona fide paid in "specifically as such" for stock or shares, no amount in respect of the good will may be included in invested capital under section 326(a)4 of the Revenue Act of 1918. A paid-in surplus may not be allowed under the Revenue Act of 1918 in respect of good will.

2. SUIT—JURISDICTION—CLAIM FOR REFUND.

Where neither of the claims for refund filed by the taxpayer states as a ground for the refund its right to an increase in its invested capital by an inclusion of an amount for good will, a suit

to recover a tax based on that ground can not be maintained by reason of section 3226 of the Revised Statutes as amended.

COURT OF CLAIMS OF THE UNITED STATES. No. J–580.

Lewis A. Crossett Co. v. *The United States.*

[June 1, 1931.]

OPINION.

WILLIAMS, Judge, delivered the opinion of the court.

The plaintiff sues to recover the sum of $100,000, with interest thereon, an alleged overpayment of its income and excess-profits taxes for the fiscal year ended March 31, 1920.

The basis of the suit is that the Commissioner of Internal Revenue, in computing plaintiff's invested capital for the year in question, erroneously failed to include therein certain sums representing good will.

The plaintiff corporation upon its organization in 1912 acquired all the assets of every name, kind, and character, including good will, trade-marks, trade names, both tangible and intangible personal property and assets of its predecessor corporation, Lewis A. Crossett, Inc., for which it issued and paid therefor $749,000 par value of its stock.

The said transfer was made upon an agreed balance sheet which showed assets amounting to $1,294,650.20, and liabilities amounting to $525,389.09. There was no issue of stock for good will, and no good will appeared on the books of the predecessor corporation, no good will was listed on the balance sheet showing the assets of such corporation, which was the basis of the transfer, and so far as shown no good will was set up on the books of the plaintiff corporation. The expenditures for advertising trade-marks, etc., which had been made by the predecessor corporation, were by that corporation charged to current expense of doing business and were not capitalized.

Section 326(a)4 of the Revenue Act of 1918, which specifies the conditions under which intangible property may be included in invested capital, reads:

"Intangible property *bona fide* paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest; * * *."

The findings disclose that of the property transferred, sufficient was to be taken at book value to pay at par for the stock issued, and the balance was to constitute paid-in surplus. The net worth of the tangibles transferred, at their book value as shown by the balance sheet, was $769,261.11, for which stock in the plaintiff corporation at the par value of $749,000 was issued and paid, which makes a paid-in surplus of $20,261.11, as of the date of the transfer.

The good will which the statute authorizes to be included in invested capital is that for which payment has been made *bona fide*, "specifically as such," or good will *bona fide* purchased prior to named dates. (*Stewart Electric Co.* v. *United States*, 65 C. Cls., 21.)

Intangible property *bona fide* was not paid in for stock or shares on the transfer of the assets of the predecessor corporation to the plaintiff, and there can be no inclusion of good will in plaintiff's invested capital. A paid-in surplus may not be allowed in respect of an intangible asset. (*Colorado Continental Lumber Co.* v. *The United States*, 70 C. Cls., 413; *Daily Pantagraph, Inc.*, v. *United States*, 68 C. Cls., 251.)

The plaintiff, however, if otherwise entitled to recover is barred from bringing this suit because of a failure to file a sufficient claim for refund of the taxes involved. The claim for refund filed March 24, 1925, stated the following grounds:

"In view of the fact that there appear to be adjustments of capital and income and tax, including the redetermination of the tax under special relief sections of the law, which will affect the tax liability of this corporation for the above period and in view of the approaching effective date of the statute of limitations, this claim is filed so that when the matters referred to are finally passed upon, if the result is an overassessment such overassessment can be refunded. Such data as has not already been filed in support of this claim

for refund will be filed at a later date, including possible data covering grounds not mentioned herein but which it may be necessary to rely upon, in connection with which it is requested that we be granted an oral conference prior to final action upon this claim. The enumeration of the specific grounds upon which this claim is made shall not be construed to prevent the subsequent assertion of additional grounds as it is specifically stated that additional data in support of this claim and additional grounds for the claim will be filed at a subsequent date."

The second claim for refund filed June 13, 1925, stated as grounds for the allowance of such claim:

"Based upon the following data submitted in its brief to the Commissioner of Internal Revenue:

"(1) Accrual of State taxes fiscal year ending March 31, 1920.

"(2) Minor adjustments to invested capital.

"(3) Consideration of assessment under sections 327 and 328."

In neither claim did the plaintiff set out as a ground for the refund its right to an increase of its invested capital for the year by an inclusion of an amount for good will. The second claim stated three specific grounds: (1) Deduction for accrued State taxes; (2) minor adjustments to invested capital; and (3) special assessment.

The first ground, deduction for accrued State taxes, is not being urged in this suit, and whether or not it was allowed by the Commissioner is immaterial. The second ground, minor adjustments to invested capital, was allowed by the Commissioner. The third ground was based on the right of plaintiff to have special assessment. The plaintiff neither in this, nor the former claim for refund filed March 24, 1925, makes any mention of its right for a refund on the ground urged in this suit, that it is entitled to have included in invested capital an amount for good will. (*Colorado Continental Lumber Co.* v. *United States*, supra.)

Section 3226 of the Revised Statutes (section 1318 of the Revenue Act of 1921) provides that "no suit * * * shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been * * * illegally * * * collected * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury * * *." Article 1036, Treasury Regulations 62, provides that claim for refund shall be made on Form 843 and that "all facts relied upon in support of the claim shall be clearly set forth * * *."

The precise grounds upon which refund is demanded must be stated in the application to the Commissioner, and a taxpayer can not base a recovery in court on an entirely different and distinct ground from that presented to the Commissioner. (*Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2d), 626 [T. D. 3980, C. B. VI–1, 225]; *Feather River Lumber Co.* v. *United States*, 66 C. Cls., 54 [T. D. 4211, C. B. VII–2, 182]; *United States* v. *Felt & Tarrant Mfg. Co.*, decided by the Supreme Court, April 13, 1931 [Ct. D. 336, C. B. X–1, 431].)

The plaintiff not having filed with the Commissioner of Internal Revenue within the time provided by law, a claim for refund setting forth the grounds relied upon in this action, can not maintain suit in this court.

The petition will be dismissed. It is so ordered.

TITLE XIII.—GENERAL ADMINISTRATIVE PROVISIONS.

SECTIONS 1318, 1319, AND 1320.—LIMITATIONS UPON SUITS AND PROSECUTIONS.

ARTICLE 1050: Suits for recovery of taxes erroneously collected.

REVENUE ACT OF 1921.

Grounds relied upon in suit not set forth in refund claim. (See Ct. D. 373, page 392.)

ARTICLE 1050: Suits for recovery of taxes erroneously collected. X–36–5199 Ct. D. 380

FEDERAL TAXES—BOND AS A DEFENSE—DECISION OF COURT.

1. SUIT—DEFENSE—BOND.

Where an assessment is made within the statutory period therefor and after the expiration of the statutory period for collection the taxpayer executes a bond running to the collector and conditioned "that if the plaintiff shall pay such portion of the tax as may be found due and payable then this obligation shall be void; otherwise to remain in full force and effect," the bond is an independent valid contract to pay such portion of the tax as might be found due and payable and is a waiver of the period of limitation on collection and a defense to a suit by the taxpayer based upon the ground that the collection of the amount determined to be due and paid by the taxpayer upon demand was barred by the statute of limitations.

2. DURESS.

Where, there being no determination that the right to collect a tax is barred, the collector believes that it is not barred and issues a distraint warrant after demand for payment and refrains from seizing the taxpayer's property upon its promise to furnish a bond, the bond executed as promised by the taxpayer after the statutory period for collection is not secured by duress and therefore invalid.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

The Simmons Manufacturing Co., plaintiff, v. *Carl F. Routzahn, Collector of Internal Revenue, defendant.*

[May 18, 1931.]

OPINION.

WEST, District Judge: In this action a jury was waived and the facts stipulated. The petition contains two causes of action, the first relating to income taxes for 1918 and the second to 1919 taxes. Only the first is to be decided, as the parties appear to have adjusted their differences involved in the second cause. On March 15, 1919, plaintiff filed its tentative return and a few days later paid a portion of the taxes disclosed. On June 15, 1919, it filed a completed return showing no tax liability whatever, and on March 19, 1924, the Commissioner assessed additional taxes of $10,196.58, but later credited plaintiff with $503.05, the sum previously paid. On April 2, 1924, claim for abatement of the entire additional assessment was filed, the collection thereof delayed accordingly, and on November 19, 1924, the claim was rejected. A demand for payment to be made not later than December 29, 1924, being ignored, the collector on February 18, 1925, issued distraint warrant. In April, 1925, deputy collectors went to plaintiff's office to collect the tax, liability for which plaintiff denied, and upon its promise to furnish a bond, refrained from seizing its property. On April 20, 1925, a bond in the sum of $12,500 was executed by plaintiff and a surety, running to the collector reciting the filing of the claim for abatement of the taxes amounting to $10,196.58, and conditioned "that if the plaintiff shall pay such portion of the tax as may be found due and payable, then this obligation shall be void; otherwise to remain in full force and effect." April 26, 1928, collection of $452.27 was made by crediting overassessments for other years, and plaintiff makes no claim for this sum, which is not included in the amount for which it sues.

On April 1, 1929, notice of tax lien was duly filed and copy served on the plaintiff, and on October 19, 1929, a distraint warrant issued for $9,241.26 tax and $3,092.13 interest, a total of $12,333.39, and on October 21, 1929, this warrant with notice of levy was served on plaintiff's bank and its deposits subjected to payment of the tax and interest. Later on the same day plaintiff paid the collector $12,333.39 by its check on the bank, and the levy was released.

Plaintiff duly filed refund claim for the 1918 additional tax and interest, which was disallowed, and the parties agree that if entitled to recover, the amount recovered shall be $12,333.39 with interest.

The plaintiff bases its claim upon the fact that when the taxes were paid on October 21, 1929, forcible collection was barred by the statutes of limitation and the whole sum then secured was an overpayment under section 607, Revenue Act 1928, as to which liability had been extinguished by section 1106(a), Revenue Act 1926.

The pleadings show that rejection of the claim for refund was based on section 611, Revenue Act 1928. The answer pleads this section as a defense to the $452.27 collected by credit on April 26, 1928, but does not rely on 611 as to the balance of plaintiff's claim. As to this, being the sum paid October 21, 1929, the answer pleads the giving of the bond on April 20, 1925. It avers that on this date the additional assessment remained unpaid and unabated in the amount $9,633.53 (the sum remaining after payment of the $503.05 on March 21, 1924); that plaintiff then acknowledged this debt and executed the bond to secure payment of such portion thereof as might be found due and payable; and that the payment of October 21, 1929, was made in satisfaction of liability thereunder.

Plaintiff by reply denies acknowledging or promising to pay the debt and challenges the validity of the bond as given under duress and threat of seizure of its property, and without consideration. And further alleges in substance that payment was not under the bond, but of the taxes, and was extorted by threats of distraint.

On April 20, 1925, when the bond was given, collection of the taxes by suit or distraint was barred. (Section 250(d), Revenue Act 1921; section 277(a)2, Revenue Act 1924; *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S., 346 [T. D. 4009, C. B. VI–1, 268]; Revenue Act 1924, section 1100(b); *Russell* v. *U. S.*, 278 U. S., 181 [T. D. 4260, C. B. VIII–1, 206].)

I do not think section 1108(a), Revenue Act 1926, enters into the matter, for when the bond was given it had not yet been passed, and it was repealed before the collection was made.

Did the bond constitute an independent contract enforcible against the plaintiff; or if not, did it amount to a waiver of the statute limiting collection of the taxes? There may be a question whether the moral obligation to pay the outlawed claim was sufficient to raise an implied promise to pay the tax in the absence of some recognition by plaintiff of a subsisting liability. However that may be, the bond averted an immediate seizure of its property, and this was sufficient consideration. (*U. S.* v. *John Barth Co.*, 279 U. S., 370 [Ct. D. 65, C. B. VIII–1, 189]; *Bryant-Link Co.* v. *Hopkins* (C. C. A. 5), unreported [Ct. D. 329, C. B. X–1, 430]; *Mascot Oil Co.* v. *U. S.*, 42 F. (2d), 309 [Ct. D. 286, C. B. X–1, 190].)

In the Barth case the bond was provided for by law and was given before the statute had run. In the others the security seems to have been given after the expiration of the statutory period and in connection with a claim for abatement. In Holmes Federal Taxes, 1923 edition, at page 1101, it is said that as to abatements there is no provision of law expressly authorizing the collector to require a bond as a condition of suspending the collection of the tax; and "It is within his discretion to protect himself by requiring the taxpayer to execute a bond in the amount of the tax, collection of which is postponed." While plaintiff's bond was not given in connection with a claim for abatement, no reason is apparent why the collector could not take it if he desired.

The bond was not breached, for plaintiff finally paid the taxes by its check. It contends that the condition of defeasance expressed never could arise, because under the circumstances, no portion of this outlawed tax could, after the bond was given, "be found due and payable"; and plaintiff's conclusion is that the bond was therefore void. The requirement is not that the tax or some part of it be found due and payable by the Commissioner, or within any particular time. The law was subject to change, and was so changed in 1928 that payments made in 1925 and recoverable under the Bowers decision were, by section 611, taken out of the class of overpayments, and recovery thereof denied. Other changes more fundamental might be made, even to the extent of striking down the defense of the statute of limitations. (*Graham and Foster* v. *Goodcell*, 282 U. S., 409 [Ct. D. 287, C. B. X–1, 191].) Conceding that in 1925, after rejection of claim for abatement, and as the law then stood, it would not be possible for any tribunal to find the barred taxes due and payable, i. e., col-

lectible, yet in view of the unlimited time the bond was to run, and the changes which might be made in the law, the bond was not void.

It was not given in substitution for the asserted tax liability, for in 1928, while it was outstanding, the Commissioner collected $452.27 by crediting overassessments of other years. The purpose of the bond was evidently to postpone a general seizure of property. In the Barth case "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." Here time had already run. In the Bryant-Link case, supra, the Commissioner acted and reduced the assessment some months after the lapse of the statutory period as extended by a written waiver. No action on the bond was necessary, but that was said not to affect the question, and the bond was held to have the same effect upon the statute of limitations, whether sued on or set up as a defense in an action by the taxpayer to recover back the tax. While there is a difference between this and the Bryant-Link Co. case, in that here nothing was done after the bond was executed, to find the amount of tax due and payable, and under existing law nothing further could be done in that direction, while there the assessment was examined and reduced, I do not see that that destroys that case as an authority. In both the bond was given after time had run against the Government, and resulted in securing to the taxpayer what was then believed to be an advantageous delay of collection.

Further, the court regards this bond as a waiver, and as such effective even though executed after the statute had barred collection. (See *Stange* v. *U. S.*, 282 U. S., 270 [Ct. D. 274, C. B. X–1, 414].) "An effective and not a futile act was intended." (Id., 277.) And it is not shown to have been procured by duress. The stipulation is that when a few days prior to April 20, 1925, the deputies called to collect the tax, the plaintiff's general manager promised to furnish a bond as soon as possible, whereupon they refrained from seizing the plaintiff's property, and the bond was given as promised, the plaintiff contending that no tax was due. My attention is directed to an unreported decision of the District Court for the Northern District of Texas in *Cline* v. *Hopkins*, holding in a case where bond was given after the statute had run, and at a time when the taxpayer could not realize on his property, either at optional or forced sale, that this constituted duress, and the Bryant-Link case would not control.

In *Burnet* v. *Chicago Railway Equipment Co.* (282 U. S., 295, 303 [Ct. D. 276, C. B. X–1, 323]) it is said that in the absence of a determination that a deficiency was barred, it was the Commissioner's duty to proceed to insure the assessment and collection of the tax, and that a waiver which enabled the Board to consider the matter was not invalid, even though enforced collection of the taxes would have been illegal because of the statute of limitations.

When the bond in this case was given, it was the general belief that collection by distraint was not barred, for the Bowers case had not been decided. And if it was then the collector's duty to insure collection, and he had the right to take the security, and did so upon no greater show of force and under circumstances no more onerous to the taxpayer than appear here, I do not think it should be held that he illegally extorted the bond. The plaintiff could have paid the tax, and as is now understood, could have recovered back. Instead it chose to give the bond, and must abide the consequences.

Judgment for defendant.

SECTION 1331.—CONSOLIDATED RETURNS FOR YEAR 1917.

ARTICLE 1735: Consolidated returns for year 1917. X–41–5246
(Also Section 214(a)1, Article 109.) Ct. D. 398

INCOME TAX—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. CONSOLIDATED RETURN—AFFILIATION—STOCK OWNERSHIP—ECONOMIC CONTROL—LONG-TERM LEASES.

Ownership of stock and not actual economic control is determinative of affiliation within the meaning of section 240(b) of the Revenue Act of 1918 and section 1331(b) of the Revenue Act of

1921, and where there is not that degree of ownership or control by one corporation of substantially all of the stock of the other or community of ownership by the same interests of substantially all of the stock of both corporations, the two corporations are not affiliated within the meaning of those subdivisions. A fortiori, such corporations are not affiliated where the relations between the two corporations are governed by a long-term lease from one of them to the other, a railroad company, the lessor not operating the railroad or engaged in any business except receiving the agreed rentals, paying some corporate maintenance charges and disbursing the remainder as dividends.

2. INCOME—TAXES PAID BY LESSEE FOR LESSOR BY MISTAKE.

Where income and excess profits taxes paid by a lessee for and on behalf of the lessor were not paid under a legal obligation because paid under a mistaken interpretation of the contract existing between them, the taxes constitute additional income to the lessor and not a gift.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

No. 5765. *United States, appellant*, v. *The Mahoning Coal Railroad Co. et al., appellees.*

No. 5766. *United States, appellant*, v. *The Mahoning Coal Railroad Co., appellee.*

No. 5767. *C. F. Routzahn, as Collector, etc., appellant*, v. *The Mahoning Coal Railroad Co., appellee.*

No. 5768. *United States, appellant*, v. *The Mahoning Coal Railroad Co., appellee.*

Appeals from the United States District Court for the Northern District of Ohio.

[June 30, 1931.]

OPINION.

DENISON, Circuit Judge: These four cases involve the liability of the Mahoning company for income taxes during the years 1917, 1918, 1919, and 1920, the most substantial question being whether the Mahoning company and the New York Central Railroad, or its subsidiary, the Lake Shore, were affiliated corporations within the meaning of section 240(b) of the Revenue Act of 1918 and section 1331 of the Act of 1921.

In case 5765, it appears that the Mahoning company, having paid this tax for the calendar year 1918, thereafter and on March 7, 1924, filed its claim for refund. This claim was disallowed by the Commissioner, at a date which is in controversy. The suit to recover the claimed refund was brought February 7, 1927, more than five years after payment of the tax. The 5-year statute of limitations allowed two years after a claim for refund was disallowed. (Section 1113(a) of the Revenue Act of 1926.)

We think the statute had not run. The petition shows that on February 2, 1927, the local collector notified the plaintiffs "that said claim for refund had been disallowed on January 27, 1925." A demurrer presenting the defense of limitation was overruled, upon the expressed understanding by the district judge that notice to the taxpayer of the disallowance was necessary to start the 2-year period running. We think the demurrer was properly overruled, although the reason stated has since been held to be insufficient. (*United States* v. *Michel*, 282 U. S., 656 [Ct. D. 310, C. B. X–1, 297].) It is true that this action was not brought within five years after the payment, and hence the burden was upon the petitioner to allege that it was brought within two years after the disallowance of the claim for refund. The petitioner evidently intended to allege a denial, effective as of February 2, 1927. If it had alleged a disallowance on January 27, 1925, that would have been fatal; but that was not the allegation—it was only that the collector said that the claim had been disallowed on that date by the Commissioner. The fact as to the date of the disallowance was not expressly stated; and upon demurrer the petition was therefore good by virtue of its intent to allege disallowance as of February 2, 1927.

Thereupon answer was filed, which admitted "that on January 27, 1925, the Commissioner of Internal Revenue disallowed such claim for refund," and denied everything else. The petition not having made the allegation which the answer purported to admit, the formal reply therefore made an issue as to the date of the disallowance. Upon the proofs, the alleged letter of February 2, 1927, from the collector did not appear. The only proof as to the rejection is found in a letter of February 7, 1925, from the Commissioner, which makes reference to the claim for refund and the reasons which make it not proper to be allowed and concludes: "These claims will therefore be rejected. The rejection of these claims will officially appear on the next schedule to be approved by the Commissioner." It therefore sufficiently appears that the disallowance was not earlier than February 7, 1925; and so the suit was in time.

We think it unnecessary to recite all the facts as to the supposed affiliation. They are fully covered by the stipulation of facts. We think it clear that under our decision in the Painesville case (42 Fed. (2d), 413), there is not that degree of ownership or control by one corporation of substantially all the stock of the other, or community of ownership by the same interest of substantially all the stock of both corporations, necessary to give the statutory affiliated character. Indeed, the decision of the district court that they were affiliated was based upon the previous decision of the same court in the Painesville case to the same effect; and it is now conceded that our reversal of the Painesville case necessitates also a reversal in these cases—excepting for the additional feature present here and not there. During all the period in question, the relations between the two companies were governed by a long-term lease from the Mahoning company to the Lake Shore company, the Mahoning company was not operating the railroad or engaged in any business excepting receiving the agreed rentals, paying some corporate maintenance charges and disbursing the remainder as dividends. The lease is urged as distinguishing from the Painesville case, and said to disclose such a complete control by one company as to constitute affiliation. On the contrary, we think this makes the case stronger against the affiliation theory. That rests upon the idea that by unity of stock ownership or control the profits could be shifted back and forth between the two corporations in such a way as to affect the total amount of taxes, and hence that, in those cases, affiliation should either be permitted (as in some years) or required (as in some years). Here, there could be no such shifting of profits, and the fundamental reason for affiliation does not exist. The division of operating profits between the two companies is fixed by contract; and we see no reason why the share apportioned to each by the contract should not constitute the separately taxable income of each.

The remaining question arises thus: The lease from the Mahoning to the Lake Shore provided that the lessee should pay the lessor's taxes. In supposed pursuance of this contract, the Lake Shore, and later the New York Central, paid the Federal income taxes which were assessed against the Mahoning for all the years, to and including the first quarter of 1921. Upon the theory that the amount so paid constituted an additional taxable income to the Mahoning, the Commissioner levied an additional tax against it. The question is whether the case is controlled, in this respect, by *Old Colony Trust Co.* v. *Commissioner* (279 U. S., 716 [Ct. D. 80, C. B. VIII-2, 222]) and *United States* v. *Boston & Maine Railroad* (279 U. S., 732 [Ct. D. 73, C. B. VIII-2, 315]). The difference is that in those cases, the income taxes were paid for the benefit of the lessor, pursuant to valid contract obligations; but in this case it was decided in February, 1926, by the Court of Appeals of New York, that this lease did not require such taxes to be paid by the lessee. (*Brainard* v. *N. Y. C. R. R.*, 242 N. Y., 125.) Should this (legally) voluntary payment to the Mahoning therefore be considered in the nature of a gift and not taxable, or rather be treated as income in the ordinary course of business, taxable as such for the current year, leaving the taxpayer to be recouped, if at all, only by claiming a loss in a later year, when it may be finally decided by litigation, or otherwise, that the receipt of the payment created a duty to repay, and where that duty is met by actual repayment? If there had been at the time such a conscious and admitted duty to repay, or perhaps if the duty to repay were so clear that it would be carried back by relation, there would be a different question; but here that duty was, to say the least, not clear; nor has it even yet been established in litigation between the parties.

A payment which, though legally voluntary, yet has been made in the regular course of business and pursuant to contract obligations as understood at the time by both parties, is not necessarily and in all cases repayable when it is later ascertained both parties are mistaken and that the legal obligation to pay did not exist. Nor can we think that such a payment is so far in the nature of a gift as not to be taxable income. Paid and received under claim of right, it becomes income for that period, and we think should be so treated; and subsequent developments affecting its character must be met, as of the time when they occur. This case falls within the principle of *Burnet* v. *Sanford Co.* (282 U. S., 359 [Ct. D. 277, C. B. X–1, 363]), and as developed and applied by us in *Board* v. *Commissioner*, decided June 11, and *Ford* v. *Commissioner*, this day decided.

The judgments in these cases should be reversed and the cases remanded for further proceedings in accordance with this opinion. If counsel desire to file a petition for rehearing, we will hold it until the decision of the Supreme Court in a pending certiorari, which involves the rightfulness of our conclusion in the Painesville case, and which decision might require another result in three of these cases.

SALES TAX RULINGS.

TITLE II.—MISCELLANEOUS TAXES. (1928)

PART II.—TAX ON ADMISSIONS AND DUES.

REGULATIONS 43 (1928), ARTICLE 36: Social clubs. X–49–5311 Ct. D. 421

TAX ON ADMISSIONS AND DUES—REVENUE ACTS OF 1924, 1926, AND 1928—DECISION OF COURT.

SOCIAL CLUB.

The Army and Navy Club of America, the social features of which become an essential element of its activities for the purpose of increasing its members, aiding in its financial support, and thus helping to carry out its purposes, is a social club within the meaning of section 501 of the Revenue Acts of 1924 and 1926 and section 413 of the Revenue Act of 1928, notwithstanding that the predominant purpose of the club is to further the interests of the Army and Navy and to advocate and create a public sentiment in "preparedness."

COURT OF CLAIMS OF THE UNITED STATES. No. L–495.

Army and Navy Club of America v. *The United States.*

[November 2, 1931.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

The plaintiff in this case seeks to recover $22,591.24 and interest thereon alleged to have been wrongfully collected from it as taxes on club dues and initiation fees in the period from June 29, 1925, up to and including May 31, 1929.

The evidence shows that the plaintiff is a club organization composed largely of Army and Navy officers, or those who have served in such capacity. The objects of the club, as stated in its original charter, have been "to encourage military and naval science and for the mutual benefit of its members by social intercourse with those who have served in the military and naval affairs of the United States or foreign governments."

The issue is largely one of fact, and the case is one which, under the ruling of the Supreme Court, the ultimate fact which controls the decision must be determined by this court. The plaintiff claims that it is not a social club and therefore is not subject to the tax assessed against it. The Commissioner ruled otherwise, and the only question in the case is whether his ruling is correct under the facts shown by the evidence.

The evidence shows that the club has about 2,400 members and occupies a 12-story and basement clubhouse building in the city of New York of the value of approximately $550,000. It would take too much space to set out in the opinion the manner in which this building is equipped, which is described in Finding 7, and also in Finding 9. It is sufficient to say that it is the practice of the club to give numerous and varied entertainments. Besides this, lectures on military and patriotic topics have been given under the auspices of the club. The club was operated at a loss in the years 1925 to 1929, and a deficit

would have occurred had not funds been received from life and founder members. It has no other revenue than that obtained from dues and initiation fees, payments made by organizations for using the rooms, and serving meals to its members.

The purpose of the club and what it accomplishes are set out in Finding 14, from which it appears that it serves to enable military and naval men and men interested in military and naval matters to make social contacts and thereby promote and aid the activities of the Army and Navy service and stimulate interest on the part of civilians in the welfare and development of the Army and Navy. Also, the club, through its members, encourages military training and "preparedness," which is evidently one of its main purposes. Preparedness is generally understood to mean the possession on the part of this country of a larger and better Army and Navy.

It is contended on behalf of the plaintiff that the predominant purpose of the club is patriotic and professional and not social. This may be conceded, but this fact is not necessarily controlling. We think it quite clear that the numerous and varied social features of the club show that they are a material part of its activities and not merely incidental to the patriotic work of the club, which could be carried on without them. The evidence shows that they are made an inducement to bring additional members into an organization that needs their financial aid in order to continue its existence, and in this way have become an essential part of those elements which go to determine whether or not a club is a social organization within the meaning of the law.

It has been requested in the argument for the defendant that the court define the meaning of the term "social club," but it ought to be obvious that no exact definition thereof can be given. If it had been possible to do so, the Treasury regulations would have defined it long before this time. The word "social" itself has no exact definition. A faint and shadowy line separates activities which are social from those which are not. Another feature that adds difficulty in these cases is that the mere fact that a club has some social activities does not necessarily make it a social club within the meaning of the law, for no club can exist without having something social in its nature and this must have been well understood by Congress. The only rule that can be laid down, as we think, is that if the predominant purpose of the organization is not social and its social activities are merely incidental to the furtherance of this different and predominant purpose, then the club is not a social one within the meaning of the law. But both of these matters must exist in order to create an exemption from the tax.

This case presents more than the usual difficulties in the way of its decision. It appears that the predominant purpose of the club was to further the interests of the Army and Navy and to advocate and create a public sentiment in favor of "preparedness." Had the social element been merely incidental to this purpose, the club would have been exempt from the tax. But as we have already shown the social features became an essential element of its activities for the purpose of increasing its membership, aiding in its financial support, and thus helping to carry out its purposes. When the social features are numerous and so used, we think they are not merely incidental and the club is subject to the tax.

It follows that the petition must be dismissed, and it is so ordered.

REGULATIONS 43 (1928), ARTICLE 36: Social clubs. X–39–5221
Ct. D. 389

TAX ON DUES—REVENUE ACTS OF 1921, 1924, 1926, AND 1928—DECISION OF COURT.

SOCIAL CLUB—CHARACTER OF ORGANIZATION.

A club which occupies as a clubhouse a 9-story building in the city of New York, fully equipped for that purpose, which gives weekly teas, when a speaker on some academic subject of interest to college-bred women is present, teas to college graduates, when they are introduced to the club members, "mothers" and "daughters" teas when members and their daughters of college age are special guests, and teas for reception of new members, which pro-

vides bridge tables and a piano to members on request, which holds occasional dances, gives infrequent bridge parties, has a monthly club dinner, monthly art exhibits, which extends the use of its facilities each year to a lecturer on psychology, which devotes one evening a month to poetry, and which acts as hostess to out-of-town college graduates and receives in answer numerous inquiries from girls contemplating a college education, is a club, the social activities of which form a material part of the life of the organization and is, therefore, a social club within the meaning of section 801 of the Revenue Act of 1921, section 501 of the Revenue Acts of 1924 and 1926, and section 413 of the Revenue Act of 1928, the dues to which are taxable under those sections.

COURT OF CLAIMS OF THE UNITED STATES. No. L–224.

Women's University Club v. *The United States.*

[June 1, 1931.]

OPINION.

This suit is brought to recover taxes paid on dues of the plaintiff's members for the years 1923, 1924, 1925, 1926, 1927, and 1928, in the sum of $17,414.25. This claim is based upon the contention that the taxes were improperly assessed and collected, and that the plaintiff club was not a social, sporting, or athletic club within the meaning of section 801, Revenue Act of 1921, section 501, Revenue Acts of 1924 and 1926, and section 413, Revenue Act of 1928.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of the commissioner, makes the following

SPECIAL FINDINGS OF FACT.

1. The plaintiff, a New York corporation, was incorporated October 14, 1891. The articles of incorporation set forth the plaintiff's particular object and business as follows: "The business and object of the club is the promotion of literature and art, and the social welfare of college-bred women by the establishment and maintenance of a clubhouse in the city of New York, and by such other means as shall be suitable and expedient for such purposes."

2. The plaintiff paid to the collector of internal revenue located at New York, N. Y., a total of $12,896.75 for the period September 30, 1924, to July 31, 1928, inclusive, representing taxes imposed on dues and fees of members of social, athletic, or sporting clubs, under the provisions of section 801 of the Revenue Act of 1921, 501 of the Revenue Acts of 1924 and 1926, and 413 of the Revenue Act of 1928.

Claims for the refund of these taxes were duly filed, and the claims were rejected by the Commissioner of Internal Revenue December 5, 1928, holding that plaintiff was a social club within the meaning of the statutes. The difference between $17,414.25, the amount sued for, and $12,896.75 is barred by the statute of limitations.

3. During the taxable period involved herein the constitution and by-laws of the club provided the qualifications of members, as follows:

"1. *Qualifications.*—Any woman is eligible to membership in the club who has received from any one of the universities or colleges accepted by the board of managers a degree, to obtain which in regular course at least four years' residence and study are required.

"The managers shall also determine what foreign, higher, or honorary degree or certificate shall qualify the holder for membership in the club."

The accepted list of colleges and universities was a restricted one. Four classes of membership were provided—resident, nonresident, honorary, and life. The first two classes paid an initiation fee of $25 and annual dues of $30 and $20, respectively, prior to 1925.

These latter amounts were increased to $40 and $25 during 1925. Honorary members did not pay either initiation fees or dues and life members paid $500 but no annual dues. As an inducement to young college graduates to join, a reduction in dues was offered them for the first time in 1925. Approximately 65 of the total membership of 1,000 were young college graduates.

The following list shows the number of members during the years 1924 to 1928:

	Resident, honorary, and life.	Nonresident.	Total.		Resident, honorary, and life.	Nonresident.	Total.
1924	707	378	1,085	1927	647	343	995
1925	707	378	1,085	1928	655	358	1,013
1926	640	363	1,003				

4. The plaintiff, as lessee, occupied a 9-story building situated upon a lot 38 by 100 feet, located at 106 East Fifty-second Street, in New York City. The basement contained kitchen rooms, pantries, storerooms, heating plant, manservants' rooms, and maids' rooms. On the first floor were located the office, drawing-rooms, one dining room seating 72 persons, and a smaller room, seating 20 persons. The second floor comprised the assembly hall, which contained a small balcony, lounging room, and foyer. The third floor consisted of the library, two reading rooms, and administrative offices. The fourth, fifth, sixth, seventh, and eigth floors were composed of bedrooms. The seventh floor also contained a locker and rest room for guests and members not living in the clubhouse, and, in addition to the bedrooms, there was a lounging room on the eighth floor. The ninth floor comprised a reading room and two small roof gardens.

5. Members and their accredited guests were permitted to use the bedrooms, at rates ranging from $1.75 for a single room to $5 per day for a double room with bath. The club rules provided a limit of one month for the occupancy of rooms, but this was not often enforced, and members might remain there any length of time, at the discretion of the house committee. Guests paid an excess charge of 25 per cent, and during their stay might enjoy all of the privileges of the club. From August, 1924, to June, 1928, there was a daily average of 46 persons occupying sleeping rooms. By special arrangements rooms might be leased for a period of nine months, covering the winter season, and during the period mentioned there were approximately 8 or 10 members who occupied rooms under leases. These leases might be renewed so that it was possible for members to make the club their winter home from year to year.

6. The dining rooms of the club were open from 7.30 a. m. until 9 p. m., for breakfast, luncheon, afternoon tea, and dinner. Their use was restricted to members of the club and their guests. A special fee had to be paid for the use of the smaller private dining room. During the period August, 1924, to June, 1928, inclusive, the daily average of meals served was: Breakfast, 36; luncheon, 31; tea, 8; dinner, 46.

7. The club maintained a staff of approximately 46 employees, of which 12 were men and the balance women. The men employees included three housemen, two pages, one night man, an engineer, an assistant engineer, one pantryman, one dishwasher, one vegetable washer, and one other man whose duties were not described. Four women employees were assigned to administration, the remaining number being divided between the restaurant and the house department, which latter had charge of the bedrooms and of the public rooms. No valet or laundry service was provided by the club, but the club offered telephone service, maid service for the maintenance of bedrooms, and room service. Pages were available for duties similar to those of bell boys.

8. The club had a library of approximately 1,800 volumes, including biography, history, travel, foreign literature, poetry, drama, and reference books. An average of about 90 volumes of current fiction were kept in the library each year. There were also available leading American and foreign periodical publications, and New York daily newspapers. Additions to the library were made annually, both by purchase and gifts.

9. The principal activities of the club were determined by the "Interest committee," according to the demands of the majority of the club members.

On every Friday afternoon the club held a tea, 40 to 60 persons being present. It was usual on such occasions to have a speaker on some academic subject of interest to college-bred women, the speech followed by an open discussion between speaker and audience. The purpose was to enable members to come in contact with each other and to receive the intellectual stimulus afforded when

a speaker was provided. Teas were also given to college graduates at which time they were introduced to the club members. There were also "mothers' and daughters'" teas, when members and their daughters of high school or college age were special guests. Receptions for new members were also provided at teas.

The club held very few dances, not more than four a year. The attendance was usually small.

Bridge parties were held infrequently, at which occasionally small prizes were offered. The attendance was not great and they were not a financial success.

Once a month the club had a dinner, the date depending upon the availability of one or more to make addresses. The dinners were well attended, about 120 persons could be accommodated, and they were concluded by an open forum for discussion of the speaker's subject.

Art exhibits were held in the club almost monthly during the winter season, consisting of works of prominent artists, or sometimes young artists whom it was desired to encourage. Exhibitions of old French books and fine editions published during the year were held annually.

Once a month during the season the club held a poetry evening, when poets read and discussed their poems.

Each year the club extended the use of its facilities to a lecturer on psychology. Members of the club might attend the lectures if they subscribed to the course.

With the exception of the psychology course the club did not sponsor any lecture programs, as the members showed no interest. An attempt was made but only a handful attended. Speakers, poets, or lecturers who appeared did so either at one of the weekly teas or one of the monthly dinners.

The "Interest committee" expended from $400 to $600 a year for teas, which were gratis to the members, for stationery, printing the bulletin, and dinners for poets and other guests of honor. It was the committee's policy not to pay any of the artists, lecturers, or speakers, and this rule was quite rigidly adhered to.

10. The club devoted considerable effort toward improving the social welfare of college-bred women, both among its members and among college women who were not members. The work was local in New York, national and international.

The Women's University Glee Club of New York, composed of graduates of women's colleges, an organization, not a part of plaintiff club, had its headquarters at plaintiff's address, and, upon the payment of a nominal fee, conducted its weekly meetings there. Many of its members were also members of the Women's University Club, and invitations to join, as well as the announcements of the Glee Club's activities, were printed in the club's bulletin.

The club acted as hostess to out-of-town college graduates who came to New York to study at the School of Philanthropy. Undergraduates of colleges and universities located outside of New York City were permitted to stay at the club when visiting in New York, where they were properly sponsored and cared for. An official list of sponsors comprising club members was registered in the club offices, and these members were always available for this work. The club received and answered a great many requests from young girls contemplating a college education, asking for information concerning the selection of a college or university most adequate to their needs. The parents of girls seeking this information wrote to the club for advice as to what college or university they should permit their daughter to attend. College graduates, upon their request, were advised as to the possibility of jobs and living conditions in New York City. Many university or college organizations located in New York City received cooperation from the plaintiff club by being permitted to hold their meetings, dinners, teas, dances, etc., in the plaintiff's clubhouse, a small charge being made in each instance for the use of the club facilities.

The American Association of University Women also had their permanent headquarters and held their meetings in the club building. The same is true of the Headmistresses Association, an organization of the principals of girls' schools, and the National Federation of University Women, an organization of university women of 34 countries. The club made a charge for all meetings held by these organizations. The plaintiff club offered its facilities for entertaining to university women from foreign countries who visited this country for the purpose of initiating or continuing their educational work while here.

The exchange students who came to this country from foreign countries, particularly those from France, England, Austria, and Germany, who entered

at New York City were offered the hospitality of the club while they stayed in New York. The American Exchange students going abroad were also extended the privileges of the club while they were in New York preparatory to their departure. This work was performed by the members of the club serving on the international committee. The club made no appropriation for this work.

11. The facilities of the club were always available to the club members for impromptu entertainment. Bridge tables were available upon request. A grand piano was available in the assembly hall, although seldom if ever used by the members. There was no provision against ordinary proper entertainment or games so long as they did not annoy the other members of the club. Committee rooms were available free to the members for the purpose of entertaining, provided refreshments were served by the club.

12. The club did not have any facilities for athletic or sporting events, nor did it foster or sponsor them. No theatrical performances were engaged in by the club. The club maintained no scholarships, charities, or beneficences.

13. The club derived its income chiefly from membership dues, room rent, and food sales in its restaurant.

The receipts for the fiscal year ending March 31, 1925, were:

Dues	$34,037.05
Miscellaneous (including telephone income and interest on securities, and bank balance)	2,020.25
Room rents	39,052.57
Restaurant	42,255.63

And the disbursements were:

Administration expenses (including $321.42 expended on the library and $488.66 expended by the interests committee)	$37,523.84
House department (maintenance of rooms, etc.)	37,485.19
Restaurant (food costs, restaurant pay roll, etc.)	55,262.18

The receipts and disbursements for the fiscal year ending March 31, 1925, are typical of the succeeding years, except that the receipts from room rent gradually increased from $39,052.57 in 1925 to $44,377.79 in 1928, the net profit from rooms in 1925 being $2,020.48 as against $4,676.09 in 1928.

14. The social activities of the club are extensive and form a material part of the furtherance of the life of the organization. These social activities are not merely "incidental" to the artistic work of the club, but are so essentially a part of its activities as to constitute them the moving force in its maintenance.

CONCLUSION OF LAW.

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him.

MEMORANDUM.

This case is controlled by the decisions of this court in *William M. Abbott* v. *The United States* (66 C. Cls., 603 [Ct. D. 87, C. B. VIII–2, 359]); *John Fisler* v. *The United States* (66 C. Cls., 220 [Ct. D. 45, C. B. VIII–1, 301]); *Faculty Club of the University of California* v. *The United States* (65 C. Cls., 754 [T. D. 4228, C. B. VII–2, 335]).

REGULATIONS 43(1928), ARTICLE 36: Social clubs.

X–37–5206
Ct. D. 383

TAX ON ADMISSIONS AND DUES—REVENUE ACTS OF 1924, 1926, AND 1928—DECISION OF COURT.

SOCIAL CLUB—CHARACTER OF ORGANIZATION.

The Women's University Club of Seattle, which is incorporated "to secure a closer union and cooperation of college and university women in maintaining a club for the purpose of broadening the acquaintance of college women of Seattle, renewing and stimulat-

ing the ideals of undergraduate days, cultivating interest in the sciences and liberal arts, advancing the cause of general education, and for social enjoyment," whose by-laws provide for the usual standing committees, including one on literature and art, a lecture committee, and an entertainment committee, which "shall provide and have charge of all social entertainments of the club" and which pursues both purposes, is a cultural and social club. The social activities of the club constitute a material purpose of the organization, and it is, therefore, a social club within the meaning of section 501 of the Revenue Acts of 1924 and 1926 and section 413 of the Revenue Act of 1928.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Women's University Club of Seattle, a Corporation, plaintiff, v. *Burns Poe, Collector of Internal Revenue, defendant.*

[May 29, 1931.]

OPINION.

BOURQUIN, District Judge: Defendant imposed and collected Federal income taxes in respect to plaintiff's initiation fees and dues from May, 1925, to July, 1929, on the theory that it was a "social" club within section 872, Title 26, U. S. C. A., and plaintiff contending otherwise, sues to recover them. The statute imposes taxes upon "any social, athletic or sporting club" and exempts any "fraternal society, order or association operating under the lodge system," and any "local fraternal organization among students of a college or university." The Commissioner construed the term "social" club to include "any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity for social intercourse, * * * unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose. In evidence are all of plaintiff's records, which disclose its origin, activities, and history. It was organized and incorporated in 1914 "to secure a closer union and cooperation of college and university women in maintaining a club for the purpose of broadening the acquaintance of college women of Seattle, renewing and stimulating the ideals of undergraduate days, cultivating interest in the sciences and liberal arts, advancing the cause of general education, and for social enjoyment.

"Second, to acquire a clubhouse and such other real and personal property as may be desirable in order to carry into effect the purposes of this association, to sell, lease or mortgage the same, and in general to do any and all things convenient or desirable for the purposes of the club." (Article III, section 1, articles of incorporation.)

Its membership is restricted to those who have been resident undergraduates "In good standing for at least two years in any university or college accepted by the board of trustees and earned junior standing." (Article II, section 1, by-laws.)

"Any woman who is widely known because of service to the cause of education, or because of distinguished work in science, literature, art or philanthropy, may be elected as an honorary member." (Article II, section 3, by-laws.)

The by-laws provide for usual standing committees, including one on literature and art, a lecture committee, and an entertainment committee which "shall provide and have charge of all social entertainments of the club." (Article VII, sections 1 to 4, by-laws.)

Of dual purpose, cultural and social, it suffices to say the evidence is both thereof have been zealously pursued with equal if alternating enthusiasm, to the very substantial credit and benefit of the club, its members and their families and of the city of Seattle. But the torch of culture by these superior women carried aloft in a somewhat jazz-darkened age has been less abstract than applied to the improvement of social relationship, the ultimate object of all genuine culture, and their success is notable and enduring.

Finding no fault with the Commissioner's construction of the statute, as aforesaid, plaintiff urges it comes within his exception, in that its social activities are not material but merely incidental and to further its cultural purposes; that is to say, that even "college brains" must be bribed with the sugar of games, dances, parties, etc., to induce them to imbibe continued dosages of culture.

But, as before stated, the evidence seems otherwise, plaintiff is a social club within the statute, though also cultural. Its situation is akin to that of him who follows two vocations, and in consequence must pay taxes or license for both or for whichever is subject thereto. In its brief plaintiff asserts that its dues were $25 per year, and after June 29, 1928, no tax was imposed, but that prior thereto having received amounts for dues payable subsequent to the date aforesaid, and upon the tax was collected in amount alleged, $571.40. If so, it was an illegal exaction and recoverable herein, but evidence thereof, if present, escapes observation, has not been pointed out.

Judgment for defendant.

PART III.—EXCISE TAXES. (1928)

REFUND OF AUTOMOBILE ACCESSORIES TAX.

REGULATIONS 47(1928), ARTICLE 15: Credits and refunds. X-33-5175 Ct. D. 370

EXCISE TAXES—REVENUE ACT OF 1928—DECISION OF COURT.

REFUND—AUTOMOBILE ACCESSORIES TAX.

Section 424(a) of the Revenue Act of 1928 bars a refund of a tax imposed by subdivision 3 of section 600 of the Revenue Act of 1924 or subdivision 3 of section 900 of the Revenue Act of 1921 or the Revenue Act of 1918, except in accordance with the provisions of subdivision 1, 2, or 3 of that subsection.

DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION. NO. 4250.—LAW.

Twentieth Century Manufacturing Co., Inc., v. *Geo. G. Hopkins, Collector of Internal Revenue.*

[June 20, 1931.]

OPINION.

The COURT: At the conclusion of the testimony and argument, the defendant moves for a judgment.

The first impulse of the court was that this was a general suit under the statute which gives the citizen the right to recover from his Government that which has been illegally taken. But, the United States attorney contends that taxes collected under this automobile accessory schedule, and which was a short time after its enactment repealed, is available for the taxpayer upon an application for a refund, which application should be made within the terms prescribed by the Congress. That such refund could flow along one of three routes. First, by a suit in court brought prior to April the 30th, 1928; second, when the taxing officer himself should be satisfied that the tax should be refunded; and, third, upon the giving of a bond by the taxpayer that what was refunded to him by the Government, should by him in turn be refunded to his customers within six months.

The general rule, of course, that special statutes are controlling, rather than general statutes in the same field, must be recognized.

The suit was brought after April the 30th, 1928. The application to the Commissioner was satisfactory to the extent of $694, and unsatisfactory to the extent of $727.28. There was no effort made by the taxpayer to give the bond for the return of this amount to his customers, because, as a matter of fact, and which fact the court now finds, the taxpayer had not collected such amounts from his customers. He had in his possession a tax stamp—a stamp

which might have been circumstantial evidence that he had so collected and so figured, but, the testimony is that such collections were not made.

The fact that the amounts paid and the amounts figured were one-forty-first of the net sales, rather than one-fortieth, is also pointed to by the Government officers as circumstantial evidence that the taxpayer had made use of this method, but, it seems to the court that that method was used rather in confusion, and the court so finds, rather than as a basis for an additional charge to the customer.

The general rule with reference to taxation is that the sovereignty gathers the same and then redistributes it in such manner as its law-making body may prescribe. In other words, the Government must run regardless of everything and everybody, and if it collects that which it wishes to return such return will be made in the way it fixes, if it does fix a way. If there is a general way and a special way, both of which are applicable, then I believe the law is that the special way will rule; and, manifestly, this is a suit to recover that which was protestingly paid, and that which was erroneously paid, and that which was perhaps illegally paid. But, it was paid to the officer who had power to collect it, and the Government, recognizing that it had been collected erroneously or illegally, then provided how it could be returned, or repaid, and it provided three methods, and neither of those methods has been followed. I do not know why, and it should not interest the court, the suit was not brought before April the 30th, 1928.

I am reluctantly forced to the conclusion that the motion of the defendant must be granted.

I believe what I have said will serve as such findings as the parties may wish. If there is any further finding that either of you wish I will be glad, at this moment, to make it, if you will suggest it.

Mr. JOHNSON: Merely to incorporate in there the amount of net sales, and the amount of tax paid, as stated in the petition, are correct.

The COURT: Yes, I think the amounts stated in the petition are correct, and that the amounts of the payments are correct, and that the gross amount, to wit, $727.28, is correct. I have already stated that fact.

There may be a decree for the defendant with such exception as the plaintiff wishes.

TITLE V.—TAX ON ADMISSIONS AND DUES. (1926)

REGULATIONS 43 (1928), ARTICLE 42: Life membership. X–46–5291 Ct. D. 416

TAX ON DUES—REVENUE ACTS OF 1926 AND 1928—DECISION OF COURT.

LIFE MEMBERSHIP ACQUIRED PRIOR TO THE ADVENT OF DUES TAX.

The tax on dues in the case of a life membership in a social, athletic, or sporting club imposed by section 501 of the Revenue Act of 1926 as amended by section 413 of the Revenue Act of 1928 is an excise on the exercise of the privileges of membership and is imposed in the case of a life membership acquired before the passage of any Revenue Act that imposed such a tax.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

J. S. MacLaughlin, Collector of Internal Revenue, defendant-appellant, v. *Ira Jewell Williams, plaintiff-appellee.*

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before BUFFINGTON, WOOLLEY, and THOMPSON, Circuit Judges.

[September 24, 1931.]

OPINION.

In the court below, Ira Jewell Williams, Esq., brought suit and recovered a verdict against the collector of internal revenue for the amount of an alleged unlawful surcharge of income tax. On entry of judgment, the collector took

this appeal and the question involved is whether the taxpayer, who became a life member of the Philadelphia Cricket Club in 1906 without liability thereafter for annual dues, was by the provisions of section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928, liable to pay the tax the law imposed: "In the case of life membership, a life member shall pay annually at the time for payment of dues by active resident annual members, a tax equivalent to the tax upon the amount paid by such a member, but shall pay no tax upon the amount paid for life membership." The facts in the present case are substantially the same as in *McCaughn* v. *Williams* (23 Fed. (2d), 840 [T. D. 4154, C. B. VII–1, 291], certiorari denied), save that here the taxpayer was a life member before the Revenue Act of 1918 was passed, while in the former case he became a life member after that Act was passed. In that case we said: "The decisive question is whether the present tax is one on property, as Mr. Williams contends, or an excise tax, as the Government avers," and, sustaining the latter contention, we said: "We are of opinion that membership of a club can not be regarded for taxing purposes as property but as a right to share in the social features afforded by the club in the use of its property and facilities. It is the exercise of this personal privilege of the member, annual by virtue of maintained continuity of annual dues, and anticipation and prepayment of all dues at once by a life member, which the Federal statute, and rightly we hold, taxes." Seeing then that the present yearly enjoyment of the privileges of the club is what the statute taxes, the fact that Mr. Williams' membership antedated the passage of the taxing law in no wise excepts him from the payment of taxes imposed on the enjoyment of the privileges of the club after its passage, for in either case the tax is levied, not upon membership, whether annual or life, but upon the exercise of the rights and privileges of both as they are annually enjoyed. Such being the case, no question of retroactivity is here involved. It follows, therefore, judgment below is reversed and the record remanded for procedure in due course in accordance herewith.

TITLE V.—TAX ON ADMISSIONS AND DUES. (1924)

TAX ON DUES.

REGULATIONS 43–II, ARTICLE 5: Social clubs. X–33–5176
Ct. D. 369

TAX ON DUES—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

SOCIAL CLUB—CHARACTER OF ORGANIZATION.

The Traffic Club of Chicago, whose purpose as stated in its charter and constitution is "to cultivate friendly and social relations and promote better personal acquaintance among its members," which maintains club rooms, having a complete service of a kind that goes with a fully equipped social club where members spend their time, and whose activities embrace card playing, checkers, golf, outings, dances, dinner and luncheon parties, and other social features, is a social club within the meaning of section 801 of the Revenue Act of 1921 and section 501 of the Revenue Act of 1924, the dues to which are taxable under those sections.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Edmund K. Fleming, appellant, v. *Mabel G. Reinecke, United States Collector of Internal Revenue for the First District of Illinois, appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

[June 27, 1931.]

OPINION.

EVANS, C. J.: Was the Traffic Club of Chicago, of which appellant was a member, a "social club" within the meaning of the governing section of the

Revenue Act (section 801 of Revenue Act of 1921; section 501 of Revenue Act of 1924), which reads:

"That from and after * * *, there shall be levied, assessed, collected, and paid, * * *, a tax equivalent to 10 per centum of any amount paid on or after such date * * * (a) as dues or membership fees * * * to any *social, athletic,* or *sporting* club or organization; * * *." [Italics supplied.]

Appellant has made this a test case for himself and other members of the club. He challenges the soundness of the holding of the Treasury Department to the effect that the Traffic Club of Chicago was a social club.

Upon the trial, the district court filed a memorandum wherein it was stated:

"I am of the opinion that the Traffic Club of Chicago is a social club or organization within the meaning of the Act; that its social features were not subordinate or merely incidental to the active furtherance of a different and predominant purpose, but were a material purpose of the organization."

Appellant contended that the facts are undisputed and that the sole question is one of law; that the evidence showed the activities and purpose of this club were not predominantly social. Appellee, on the other hand, contended that the issue was one of fact; that the district court as well as the Commissioner of Internal Revenue found in favor of appellee, and its finding is supported by substantial evidence; that irrespective of such finding the evidence affirmatively established the Traffic Club to be a social club of business men; that the decisions sustain this position.

The Traffic Club was organized in 1907 as a corporation under the laws of Illinois, not for pecuniary profit. Its asserted objects were "to cultivate friendly and social relations and to promote better personal acquaintance among its members; to discuss all topics relating to transportation of all kinds, and to use its influence to obtain the best transportation possible. To build, own or lease or purchase and furnish a club house or club rooms for the use of its members."

The charter and the constitution of the club were subsequently modified so as to avoid the Department's holding that it was a social club. Its activities, however, remain unchanged, and it is agreed that its activities, rather than its professions, govern the question before us. The club maintained rooms on the eighteenth floor of the Hotel La Salle. Therein was a main dining room, a lounge, three committee rooms, and a ladies' room. It equipped the dining room. In the lounge, there were lounges and armchairs, a library table, piano, Victrola, radio, bookcases, and books. The club maintained a general library, included in which were Interstate Commerce Reports, as well as newspapers and magazines. There were shower baths provided for members. Regular luncheons were served at noontime from 12 o'clock until 2 o'clock, and dinner was served between the hours of 5.30 and 8 o'clock. Wives of members and other ladies in the families of members were given the privilege of using the club rooms excepting between the hours of 1 and 5 p. m.

A considerable number of persons attended the luncheons every day. For the 4-year period in question, the average number served was about 116. From 12 to 18 persons attended dinner each day during the said four years. Members played cards and checkers. Entertainments were held on different occasions, including dinner dances. Christmas and Thanksgiving luncheons formed part of these entertainments. Golf outings and occasional dinners and talks or lectures were given.

A detailed study of these activities lends support to the court's conclusion that the club was a social rather than a business organization. It must be admitted that it is not always easy to distinguish between a social and a business engagement. Business men in large cities not infrequently make business contacts through social engagements. Membership in clubs is often avowedly for the legitimate purpose of increasing business through social engagements. If this Traffic Club can be justifiably described as a business, rather than a social club, it must be upon the hypothesis that its social features were incidents of, as well as promotive of, the business enterprises of its members.

We have a somewhat narrower question, however, than that propounded by the abstract queries—When may an organization of business men be called a social body, and when a business club? We are here construing a revenue statute. Our task is to ascertain what Congress included in its language, "a social, athletic, or sporting club or organization."

It would seem to be more consistent with the purpose of this legislation to say that an organization is a social club if its activities are largely social even though the actuating motive of the members in joining was to secure business contacts, than to call such an organization a business club because its members are engaged in business, or they joined the club to secure through its social activities, business contacts.

Numerous cases have been cited. Clubs held to be nonsocial: *Chemists Club* v. *U. S.* (64 Ct. Cl., 156); *Aldine Club* v. *U. S.* (65 Ct. Cl., 315); *Los Angeles City Club* v. *Welch* (44 F. (2d), 239); *Washington Club* v. *U. S.* (38 F. (2d), 130 (Ct. Cl.)); *Bankers' Club of America* v. *U. S.* (37 F. (2d), 982 (Ct. Cl.)); *City Club of St. Louis* v. *U. S.* (24 F. (2d), 743 (D. C. Mo.)); *The Cordon Club* v. *U. S.* (decided by the Court of Claims, February 9, 1931); *Cosmos Club* v. *U. S.* (42 F. (2d), 321 (Ct. Cl.)). Clubs held to be social clubs: *Faculty Club of University of California* v. *U. S.* (65 Ct. Cl., 754 [T. D. 4228, C. B. VII-2, 335]); *Abbott* v. *U. S.* (66 Ct. Cl., 603 [Ct. D. 87, C. B. VIII-2, 359]); *Fisher* v. *U. S.* (66 Ct. Cl., 220); *Women's University Club* v. *United States* (decided by the Court of Claims on June 1, 1931); *Women's University Club of Seattle* v. *Poe, Collector* (decided May 28, 1931, by the United States District Court for the Western District of Washington). They need no review. Both parties to the litigation seemed to find comfort in the cases they cite. But each case turns on its own peculiar facts. It seems to us that the instant case is one where the conclusions of the trial judge are supported by the evidence.

The decree is affirmed.

TITLE VI.—EXCISE TAXES. (1924)

JEWELRY.

REGULATIONS 48, ARTICLE 4: When tax attaches. X-35-5191 Ct. D. 377

EXCISE TAX—REVENUE ACT OF 1924—DECISION OF COURT.

1. TAX ON JEWELRY—LEASE.

An agreement purporting to be a lease and designated such, which by its terms may be held to be a lease, is properly construed to be a lease, where no sound reason is advanced for taking it out of that category, although the contract may have some of the characteristics of a conditional sale agreement. In the case of a lease of jewelry, the tax imposed by section 604(a) of the Revenue Act of 1924 attaches upon the execution of the lease and delivery of the property upon the total amount payable thereunder.

2. ESTOPPEL—ERRONEOUS ADVICE BY DEPUTY COLLECTOR.

The United States is not estopped from assessing and collecting a tax by reason of a mistaken view of the law communicated to the taxpayer by a deputy collector.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Klivans, Inc., plaintiff, v. *C. F. Routzahn, Collector of Internal Revenue, defendant.*

[June 24, 1931.]

OPINION.

JONES, J.: A jury was waived by written stipulation of the parties and the case tried and submitted to the court. Upon due consideration, the defendant's motion for judgment will be sustained. Upon request, findings of fact and conclusions of law have been entered.

The plaintiff had the right to sell its merchandise under any form of valid agreement. It chose to call its contract a lease, and no sound reason is advanced for taking it out of that category. Ohio being a State where conditional sales contracts, rather than leases, are the customary instruments employed for such purposes, it is reasonable to infer and conclude that plaintiff for some reason preferred the lease. The fact that the contract may have some of the characteristics of a conditional sale agreement does not require that it be construed to be one, if by its terms it may be held to be a lease. Klivans knew the difference, and also understood when the tax attached under a conditional sales agreement. (Transcript of Testimony, pages 5 and 6.) Why he chose to adopt a lease, in view of such knowledge, is not clearly understood, even if it could be concluded that the deputy collector expressed a favorable opinion.

The agreement clearly purports to be a lease, and under article 4 of Regulations 48, promulgated by the Commissioner under authority of the Revenue Act of 1924, the articles of merchandise sold under such agreement were taxable upon execution of the contract and delivery of the articles to the purchaser. Under the statute, the tax was to be imposed and paid upon the specified articles, when sold or leased. The fact is that it may be said, with cogent reason, that the tax attaches upon execution of the instrument and delivery of the property in any kind of sale or lease.

The statement of the Senate Finance Committee with reference to the purpose of inserting the word "lease" in the 1924 Revenue Act lends support to the decision in *Carter* v. *Starick Jewelry Co.*, that the tax attaches upon a conditional sale when entered into (26 Fed. (2d), 571 [T. D. 4198, C. B. VII–2, 345]); *Lippman's, Inc.*, v. *Heiner* (41 Fed. (2d), 556, and 46 Fed. (2d), 1016 [Ct. D. 281, C. B. X–1, 442]).

Assuming, but not concluding, that the revenue officer expressed a favorable opinion of the contract, the chief field deputy collector was not authorized to determine what form of contract would avoid the payment of the whole excise tax upon execution and delivery of the articles. And even if it might be thought that he had such authority, in a suppositious instance, his mistake of law would be subject to correction. The deputy collector would have no more authority to determine the propriety of a submitted contract as fulfilling or avoiding the requirements of the law than would the Attorney General, for instance, have the authority to determine in advance, by opinion to private parties, what conduct or agreements would or would not offend the laws of the United States. The United States can not be bound by a mistaken view of the law by its agents.

TITLE IX.—EXCISE TAXES. (1918 AND 1921)

SALES BY THE DEALER.

REGULATIONS 48(1921), ARTICLE 5: Giving of premiums. X–39–5220 Ct. D. 388

EXCISE TAXES—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

SALES TAX—JEWELRY—PREMIUMS—REDEMPTION OF COUPONS—CONSTITUTIONALITY.

Where a corporation engaged in selling, at retail, cigars, cigarettes, tobacco, and other merchandise, transfers an article of jewelry, in redemption of coupons issued by it to a customer purchasing articles of merchandise from it, the transaction is a sale within the meaning of section 905 of the Revenue Acts of 1918 and 1921. In such a case the tax is to be computed on the fair market value of the premium at the time title to the premium passes to the customer receiving it in exchange for the coupons. As so construed those sections are constitutional.

COURT OF CLAIMS OF THE UNITED STATES. No. F-102.

United Cigar Stores Co. of America v. *The United States.*

[June 1, 1931.]

OPINION—ON DEMURRER.

BOOTH, Chief Justice, delivered the opinion of the court.

This case is before the court upon defendant's demurrer to plaintiff's petition. Plaintiff is a New Jersey corporation engaged in selling, at retail, cigars, cigarettes, tobacco, and other merchandise through stores and agencies located in the principal cities of the United States. Between October 1, 1920, and June 30, 1924, in its regular course of business, the plaintiff delivered to each of its customers purchasing articles of merchandise from it premium coupons or tokens which entitled the holder or holders thereof to secure certain premium articles listed in a premium catalogue issued by the plaintiff. The method pursued is alleged in the petition as follows:

Upon the making of all sales of cigars, cigarettes, tobacco, and other merchandise sold by plaintiff at retail and receipt of the price therefor by plaintiff, coupons and certificates in various denominations having an approximate relation to the amounts of such sales are offered by plaintiff to its customers, without charge, as an inducement to the purchase of its merchandise.

Upon presentation of, and in exchange for said coupons and certificates accepted by its customers, plaintiff, during the period hereinbefore mentioned, delivered various articles of merchandise, in accordance with the terms of its catalogue. A portion of such premium articles, approximating 25 per cent thereof, consisted of articles commonly or commercially known as jewelry. None of such articles listed in said premium catalogue were sold or offered for sale by plaintiff, and they were and could only be obtained from plaintiff by its customers in exchange for its premium tokens, as hereinbefore stated.

The petition then continues to set forth in detail the imposition, collection, and payment under protest of excise taxes exacted by the Commissioner of Internal Revenue under section 905 of the Revenue Act of 1918 and section 905 of the Revenue Act of 1921, both Acts containing substantially similar terms. Section 905 of the Revenue Act of 1921 (42 Stat., 227, 293) provides as follows:

"SEC. 905. (a) That on and after January 1, 1922, there shall be levied, assessed, collected, and paid (in lieu of the tax imposed by section 905 of the Revenue Act of 1918) upon all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted, or fitted with, precious metals or imitations thereof or ivory (not including surgical instruments, eyeglasses, and spectacles); watches; clocks; opera glasses; lorgnettes; marine glasses; field glasses; and binoculars; upon any of the above when sold by or for a dealer or his estate for consumption or use, a tax equivalent to 5 per centum of the price for which so sold."

The adopted and promulgated regulations of the Commissioner of May 5, 1919, approved by the Secretary of the Treasury, are set forth as follows:

"ART. 5. *Giving of premiums.*—The giving of so-called 'premiums' in return for wrappers, labels, coupons, trading stamps, or other scrip delivered or sold in connection with the sale of a commodity is a sale within the meaning of section 902 and section 905 if the premium is within the class of articles enumerated in those sections. In such cases the tax attaches at the time title in the premium passes to the person receiving it in exchange for such scrip, and is to be computed on the fair market value of the premium at such time."

On or about July 17, 1919, said article 5 was amended by adding at the end thereof the following:

"No tax attaches to the gift of an article which if sold would be taxable. Premiums given in return for wrappers, labels, coupons, trading stamps, or other scrip are not considered as gifts."

Said regulation as amended was in force and effect until July 3, 1924, and during the period hereinbefore referred to.

Under the taxing acts and the regulations plaintiff paid on the dates stated a total excise tax of $135,384.83. Claims for refund of the taxes collected, accompanied by arguments therefor, were seasonably made and denied. No jurisdictional issue is involved. The remaining allegations of the petition set forth a contention that said taxes were illegally and erroneously collected by the Commissioner without warrant or authority in law, and in violation of section 1 of Article I and clause 1 of section 8 of Article I of the Constitution of the United States, for the following reasons:

(a) In that the power of taxation being lodged solely in Congress by Article I of the Constitution, the Commissioner of Internal Revenue had no power to supply by regulation the failure of Congress to provide or indicate, in section 905 or elsewhere, any manner or method of levying, assessing, or collecting the tax where jewelry articles are issued as premiums for coupons.

(b) In that said section of said Acts imposed a tax upon said articles commonly or commercially known as jewelry, when sold by or for a dealer or his estate for consumption or use; and in that plaintiff was and is not a dealer, or the estate thereof, in said so-called jewelry articles, within the true intent and meaning of said Acts.

(c) In that plaintiff's issuance of said premium articles in exchange or return for said premium tokens, in pursuance of contracts previously entered into by plaintiff on its sales of tobacco products and other merchandise, frequently at intervals of a number of years prior to the presentation of said premium tokens for redemption, when plaintiff was compelled to pay said taxes thereon as aforesaid, were not sales by plaintiff of so-called jewelry articles for consumption or use, within the true intent and meaning of said Acts.

(d) In that when said jewelry or other premium articles were issued by plaintiff in exchange or return for said premium tokens, plaintiff was performing an obligation undertaken by it in connection with such contracts of sale previously entered into by it, on which all taxes required to be paid under said Acts, had already been paid by it in full.

(e) In that said section of said Acts did not fix or state the amount of the tax to be paid on transactions where said so-called jewelry articles are not sold for any price in money or otherwise but are delivered or issued in exchange or return for tokens only.

(f) In that the Commissioner of Internal Revenue, in promulgating the said regulation, pursuant to which plaintiff was compelled to pay said taxes as aforesaid, was not acting within the authority conferred by either section 1309 of said Act of 1918, or section 1303 of said Act of 1921, to make all needful rules and regulations for the enforcement of the respective provisions thereof.

The conclusion prays for a judgment for $135,384.83 and interest thereon as provided for by law.

The plaintiff apparently concedes that, with the exception of noted differences, this case is similar to *Colgate & Co.* v. *United States* (66 C. Cls., 510 [T. D. 4160, C. B. VII–1, 302]) and *United Profit Sharing Corporation* case, No. F–93, dismissed by this court on June 16, 1930 (70 C. Cls., 788), petition for writ of certiorari denied by the Supreme Court October 27, 1930. The differences relied upon from the standpoint of facts are said by the plaintiff to reside in the fact that in the United Profit Sharing Corporation case (supra) the coupons were issued for *manufacturers* to which the corporation had contracted to furnish a premium service, and in the Colgate case the plaintiff was likewise a manufacturer issuing coupons to ultimate consumers of the plaintiff's merchandise sold by retailers to whom the plaintiff, a wholesaler, sold the merchandise. We can not discover any vital distinction, in so far as the tax liability of the plaintiff is concerned, between this case and the Colgate and United Profit Sharing cases. The new issue alleged to appear in the present case finds expression in a contention that Congress did not in the Revenue Acts involved provide a tax with respect to jewelry issued for coupons; that the tax levied by section 905 of the Revenue Acts of 1918 and 1921 was fixed at the equivalent of 5 per centum of the price for which said articles were sold, and that no such price is existent when jewelry is issued in return for coupons issued to customers of the plaintiff as alleged in the petition, and that the Commissioner, in adopting and promulgating regula-

tions by which the plaintiff's tax liability in the premises is to be fixed in accord with the market value of the articles sold, invaded the domain and jurisdiction of Congress, which alone possesses power and authority to legislate and to lay and collect taxes. Section 1 of Article I and clause 1, section 8, of Article I of the Constitution.

One argument to sustain the above contention is predicated upon an allegation in the petition that the plaintiff's coupons are offered to its customers "without charge" as an inducement to purchase its merchandise, and inasmuch as the demurrer admits the allegations of the petition as true this is alone sufficient to warrant the court in overruling it. The gravamen of the case is, and the contentions advanced by the plaintiffs in all similar cases have been, that the issue and exchange of coupons for articles of jewelry did not comprise a sale. The allegation "without charge" is a conclusion, one vital factor to be determined from the facts alleged, and we need but state the rule that the demurrer admits only such facts as are well pleaded. The plaintiff's case is dependent upon a solution of the question as to whether the alleged transactions are sales for a price and the price is ascertainable and fixed, and seemingly no serious controversy may obtain that if they are, the taxing Acts apply, and if they are not, the transaction does not fall within the Acts. If the Commissioner's regulations as to the ascertainment of the plaintiff's tax liability impose a tax contrary to the revenue laws the plaintiff is entitled to relief. The defendant does not challenge the plaintiff's contention in this respect, and it could not be challenged in any event. (*Morrill* v. *Jones*, 106 U. S., 466.) As we view it, the sole issue present and for determination in this case is precisely similar to the issues presented upon a similar state of facts in both the Colgate and United Profit Sharing cases (supra). In reference to the ascertainment of price by the Commissioner, upon the basis of market value of the articles we found to be sold by a dealer in jewelry, this court said:

"A final impediment to the collection of the tax is said by the plaintiff to reside in the fact that the *price* for which the articles of jewelry are exchanged for coupons is not ascertainable, and hence the regulations for the collection of the tax are contrary to the wording and intent of the law. To so contend is the equivalent of asserting that if a dealer in jewelry establishes a method of selling his merchandise, which method obscures the ready ascertainment of the selling price of the article sold, he may escape the revenue laws and carry on free from this burden. In other words, he may indirectly accomplish a result which he may not directly do. The statute uses the words 'a tax equivalent to 5 per centum of the price for which so sold.' Manifestly, the Commissioner in the administration of the revenue laws is not bound to accept the return of the dealer as to price. Investigations and audit may be made of the dealer's transactions to ascertain the verity of the returns, or reasonable regulations, lawful, of course, and conducive to the correct administration of the law, may be promulgated. Tested by the Commissioner's authority and the extent of his power under the statute, we are unable to find the difficulties which the plaintiff so vigorously protests as present. The plaintiff, in fixing the value of jewelry premiums, predicates their acquisition upon a sufficient number of redeemed coupons to cover not only the market value of the article transferred, but adds thereto the proportionate cost of overhead incurred in the conduct of the business, and thereby really obtains an estimated price somewhat in excess of the market value of the jewelry. The price thus fixed by the plaintiff embraces within its computation elements of uncertainty and estimates, and may or may not reflect stable and precise return for the articles sold. The Commissioner, on the other hand, resorts to a basis easily ascertainable and obviously to the advantage of the taxpayer in that estimates and *pro rata* apportionments of overhead, etc., are absent." (66 C. Cls., 510, 524.)

We think the demurrer should be sustained and the petition dismissed. It is so ordered.

TITLE IX.—EXCISE TAXES. (1918)

SALES BY THE MANUFACTURER.

REGULATIONS 47, ARTICLE 18: Automatic slot-device machines. X–34–5184 Ct. D. 374

EXCISE TAXES—REVENUE ACT OF 1918—DECISION OF COURT.

GAMES—GAMBLING DEVICES—COIN-OPERATED MACHINES.

Machines which are gambling devices operated by placing a coin in a slot and designed that the operator thereby obtain a chance as against the owner of the machine of winning or losing through the operation are "games" within the meaning of section 900(5) of the Revenue Act of 1918 and subject to the tax imposed thereby.

COURT OF CLAIMS OF THE UNITED STATES. No. J–599.

Mills Novelty Co., a Corporation, v. *The United States.*

[June 1, 1931.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

Plaintiff brings this suit to recover $92,423.36 alleged to have been wrongfully assessed against it by reason of the manufacture and sale of certain coin-operated machines.

It appears that the Commissioner of Internal Revenue held that the machines were taxable as "games" within the meaning of section 900, subdivision (5), of the Revenue Act of 1918,[1] and the case turns upon the construction of this provision, which, in enumerating the article taxable, includes a long list of articles used in sports and games, and separately as part of the taxable articles, "games and parts of games."

The machines involved in the case were operated by placing a coin in a slot, and were so designed that the operators thereby obtained a chance as against the owner of the machine of winning or losing through the operation. The details of how this was accomplished are not material in deciding the case, and we have not considered it necessary to set them out very fully in the findings. These machines did not vend any merchandise and were sold to persons who placed them in stores, restaurants, and other public places to be used by the public. They were not sold to stores and establishments which specialized in the sale of sporting goods, and were not commonly or commercially regarded as sporting goods.

It is contended on behalf of plaintiff that the machines in question were not "games or parts of games." and are not made taxable by the statute. This renders it necessary to determine the meaning and construction of these words as used in the law.

At the outset it may be said that these words being preceded by a long list of articles used in various sports and games, the connection shows that the tax was intended to be levied not upon the act of playing the game, but upon the articles used in playing it. The word "games" in its commercial sense means the

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[1] SEC. 900. That 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—

* * * * * * *

(5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basket-ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum.

article, articles, or apparatus used in playing games. Thus stores often advertise for sale "games of all kinds," referring to such articles. The connection also shows very plainly that Congress used the words "games and parts of games" as a sort of "catch-all" or "basket clause," that is, it was intended to catch and bring within the revenue net all kinds of articles used in playing games whether they were included in the list that preceded or not. With this in mind, we will next consider whether the word "games" was intended to apply to the particular kind of machines which were in this case subjected to the tax.

At the outset it should be observed that these machines were a gambling device, and we do not understand that this is controverted by the plaintiff. The results obtained by the operators of the machine depended entirely upon chance, the operator being unable to influence or determine the outcome. The question therefore is ultimately whether a person that uses a gambling device of this kind in which he stakes the coin which he places in the machine against what chance may determine he will receive in return, if anything, is playing a game. It is obvious that the results are the same as they would be if the owner set in motion the machine upon receiving the coin. If, instead of this automatic machine, the owner had had one of those gambling devices in which a wheel is used which revolves when set in motion by the owner, and by chance stops at a certain point, we think no one would contend that a game was not being played. We do not think it makes any difference under the law whether the one that takes the other side of the wager constructs a machine that will operate in his absence or operates it personally. Clearly the effect is the same.

In *Desgain* v. *Wessner* (Ind.) (67 N. E., 991) a wrestling match was held to be a game, and the court quoted with approval from *People* v. *Weithoff* (51 Mich., 203) a definition of the word "game" as follows:

"The word 'game' is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid upon the chances of the game, and we have gaming."

So a horse race has been also held to be a game, and colloquially we have the expression in relation thereto of "playing the races." In the case last named pool tickets were sold on baseball games, and this was held to be gaming, as money was put at stake on the chances of the games, although neither the buyers of pool tickets nor those who sold them took any part in the ball games. In the instant case the operator staked money on the result of the operation of the machine. The machine was supplied with money by the owner, and if the operator was fortunate enough to have its revolutions result in his favor, money of the owner was released and dropped into a receptacle where the party playing the machine could take it; otherwise the operator lost the coin which he had put in the machine. In operating the machine the user simply put up his money at long odds against the money of the owner of the machine. If we consider the shorter definition of the word "game" given in Webster—namely, a sport or diversion—we think it quite clear that those who operated the machines did so merely as a diversion. It is common knowledge that an element of chance has an attraction for many people who find a diversion in taking chances.

Counsel for plaintiff cite many cases with reference to the construction of the statute, none of which seem to us to be applicable. Courts have always held that where some apparatus is used for gambling purposes so that one party may stake his money against that of another, a game is played and gaming carried on, and the fact that the owner of the machine was not present to lay down his wager in person seems to us to be immaterial. We have already shown that the word "games," as used in the statutes, referred not to the contests but to the articles used in carrying them on.

Counsel for plaintiff base part of their argument on the fact that section 900, subdivision (16), imposes a tax upon "automatic slot-device vending machines * * * and weighing machines." Obviously plaintiff's machines belong to neither class, and it is contended that as two types of automatic slot-device machines are specified in subdivision (16) as subject to taxation that all other types of such machines are excluded. We do not think this follows where the machines under consideration, as in this case, are constructed for an altogether different purpose and upon an altogether different plan, and, if taxed, are taxed upon an altogether different theory. Subdivision (16) imposes a tax upon the sale of a machine constructed for the purpose of automatically vending merchandise or ascertaining weight, and to the operation of which the element of chance does not enter. The machines under

consideration in the case at bar are so completely different as to belong, as we think, to an entirely different classification although also operated by a coin in a slot.

It is also argued on behalf of plaintiff that the fact that the machines in question were not commonly or commercially regarded as sporting goods shows that the statute does not apply, but the provision in the statute with reference to sporting goods is in addition to the list preceding it, which included games and parts of games, and which obviously was inserted not for the purpose of defining the meaning of the list that had preceded, but to make subject to the tax articles which might not be included in the language previously used, such as some kinds of fishing tackle, boxing gloves, etc. It is immaterial that stores that specialize in sporting goods do not advertise or carry such machines as are involved in this suit. Naturally the owners thereof who desired to carry on a strictly legitimate business would have nothing to do with a machine constructed solely for gambling purposes.

In our opinion, the gambling machines involved in the case were articles or apparatus used in playing a game as the word is used in the statute, and, if we are correct in this, it follows that the plaintiff was subject to the tax in controversy. It is accordingly ordered that plaintiff's petition be dismissed.

ESTATE TAX RULINGS.

TITLE III.—ESTATE TAX. (1926)

REGULATIONS 70 (1929), ARTICLE 36: Claims against the estate. X–39–5224 T. D. 4322

ESTATE TAX—PLEDGES.

Article 36 of Regulations 70 (1929 edition) amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 36 of Regulations 70 (1929 edition) is hereby amended by striking from the last sentence thereof the words "received therefor by the decedent."

DAVID BURNET,
Commissioner of Internal Revenue.

Approved September 18, 1931.

A. W. MELLON,
Secretary of the Treasury.

TITLE III. PART I.—ESTATE TAX. (1924)

PROPERTY HELD JOINTLY; RETROACTIVE PROVISIONS.

REGULATIONS 70, ARTICLE 22: Property held jointly or as tenants by the entirety. X–50–5320 Ct. D. 426

ESTATE TAX—REVENUE ACT OF 1924—DECISION OF SUPREME COURT.

1. GROSS ESTATE—ESTATE BY THE ENTIRETY—BANK DEPOSITS—CONSTITUTIONALITY.

Subdivisions (e) and (h) of section 302 of the Revenue Act of 1924 are constitutional in so far as they require, as therein provided, that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of property to the extent of the interest therein held upon a tenancy by the entirety by the decedent and spouse created after the enactment of the Revenue Act of 1916 and before the enactment of the Revenue Act of 1924 or deposited in a bank in their joint names after the enactment of the Revenue Act of 1916 and before the enactment of the Revenue Act of 1924.

2. BURDEN OF PROOF.

There can be no recovery of an estate tax resulting from the inclusion, in determining the value of the gross estate, of credit balances at the time of a decedent's death in bank accounts opened before the enactment of the Revenue Act of 1916 in the joint names of the decedent and his wife, where the record does not disclose whether the deposits which were the sources of such credit balances were made before or after the enactment of the Revenue Act of 1916 and the taxpayer fails to sustain the burden of proving the facts which establish its illegality.

SUPREME COURT OF THE UNITED STATES. No. 18.—OCTOBER TERM, 1931.

David W. Phillips, Collector of Internal Revenue, Twelfth District, v. *Dime Trust & Safe Deposit Co., Executor of the Last Will and Testament of William B. Lewis, etc.*

On certificate from the United States Circuit Court of Appeals for the Third Circuit.

[November 23, 1931.]

Mr. Justice STONE delivered the opinion of the court.

This suit was brought in the District Court for the Middle District of Pennsylvania, by the executor, to recover Federal estate taxes alleged to have been illegally exacted. A jury having been waived, the court found the facts as stipulated and gave judgment against the collector. (30 F. (2d), 395.) Upon appeal, the Court of Appeals for the Third Circuit, without deciding the case, certified here the questions involved, and, on joint motion of the parties, this court ordered up the entire record. (Judicial Code, 239.)

The only controversy presented relates to taxes levied and collected with respect to 13 items of property, real and personal, concededly held by decedent and his wife as tenants by the entirety at his death in 1925. The applicable taxing statute is section 302 of the Revenue Act of 1924 (43 Stat., 253, 304), which provides that the gross value of the decedent's estate subject to tax shall include all property:

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: * * *."

This provision, without any variation of present significance, appeared in the 1916 and successive Revenue Acts. (Section 202, Revenue Act of 1916, 39 Stat., 756, 777–778; section 300, Revenue Act of March 3, 1917, 39 Stat., 1000, 1002; section 402, Revenue Act of 1918, 40 Stat., 1057, 1097; section 402, Revenue Act of 1921, 42 Stat., 227, 278.)

The 13 items of property with respect to which the tax was imposed may be classified in three groups, (1) property held upon tenancies by the entirety created after the effective date of the Revenue Act of 1924, (2) property held upon tenancies by the entirety created after the Revenue Act of 1916 and before the effective date of the Revenue Act of 1924, and (3) bank accounts opened in 1910 in the joint names of decedent and his wife, in which there were deposit balances at the date of his death.

The district court accepted the contention of the taxpayer that the nature of the estate by the entirety, and particularly the interest in it of a surviving tenant, are such as to preclude the imposition of death or transfer taxes measured by the value of the interest which ceases at the death of either tenant, and that the tax, if deemed to be upon property, is a direct tax not apportioned, forbidden by Article I, section 2, clause 3, and section 9, clause 4, of the Constitution. After the decision of the district court, this contention was considered and rejected by this court in *Tyler* v. *United States* (281 U. S., 497 [Ct. D. 190, C. B. IX–1, 383]), holding that a like tax imposed under section 202(c), Revenue Act of 1916, was a valid indirect tax, measured by the value of the property, right in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety.

The controlling force of that decision is acknowledged as to the items of property in group (1), acquired after the passage of the taxing Act, and as to them it is conceded that the tax was rightly levied.

But it is urged that the tax imposed with respect to groups (2) and (3) is invalid. As the creation of the tenancies by the entirety antedated the taxing Act, and the earlier corresponding sections had been repealed, it is insisted that the statute is given a retroactive operation, such as that condemned by this court in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI–2, 351]); *Untermyer* v. *Anderson* (276 U. S., 440 [T. D. 4157, C. B. VII–1, 326]); *Coolidge* v. *Long* (282 U. S., 582). As section 302(h) of the Act of 1924 specifically makes the quoted provision of subdivision (e) applicable to estates created or existing before the passage of the statute, the question presented is not one of its construction or applicability, but of the power of Congress to impose the tax. The Government argues that the tax was laid on the devolution of rights upon the wife at the death of her husband after the passage of the Act, and that therefore the statute was not applied retroactively, even though the estate was created before its enactment. Without foreclosing consideration of this contention at another time, we find it unnecessary now, in view of the facts of the present case, to pass upon it.

Group 2: The tenancies in all of the items of the second group were created after the passage of the 1916 Revenue Act. Congress had by that Act adopted a system of death taxes, embracing, as it lawfully might, estates by the entirety. As was pointed out in *Tyler* v. *United States*, supra, pages 503, 505, such estates are appropriate subjects of death taxes and the taxation of them is a suitable measure to prevent evasion of a system of taxation levied on estates passing at death by will or inheritance. In both respects they resemble gifts made in contemplation of death, likewise taxed by the estate tax provisions of the 1916 and later Revenue Acts. The consideration which led us, in *Milliken* v. *United States* (283 U. S., 15 [Ct. D. 320, C. B. X–1, 472]), to uphold taxation of gifts in contemplation of death, made after the 1916 Act and before that of 1918, at the higher rate of the latter Act, are equally applicable here. The knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as decedents' estates, was an essential part of the system to prevent evasions, relieves the present tax of the objection that it is arbitrarily retroactive.

Group 3: Although the bank accounts were opened before the passage of the Revenue Act of 1916, the record does not disclose whether the deposits, which were the sources of the credit balances at the time of the decedent's death, were made before or after 1916. If after, the tax was rightly laid, for reasons already stated, which support the tax with respect to the items in group 2. As the suit is brought to recover taxes already paid, the presumption is that they were lawfully assessed and the burden rests on the taxpayer to prove the facts which establish their illegality. (*Niles Bement Pond Co.* v. *United States*, 281 U. S., 357, 361 [Ct. D. 185, C. B. IX–1, 295]; *Reinecke* v. *Spalding*, 280 U. S., 227, 232 [Ct. D. 154, C. B. IX–1, 305].) As the taxpayer has failed to sustain the burden in this respect or to show that the wife had originally owned or paid for any of the items or to present any facts to support a recovery other than those stated, the judgment is reversed.

TITLE IV.—ESTATE TAX. (1921)

GROSS ESTATE—GENERAL.

REGULATIONS 68, ARTICLE 11: Interests to be included. X–42–5257 Ct. D. 403

ESTATE TAX—REVENUE ACT OF 1921—DECISION OF COURT.

GROSS ESTATE—REAL ESTATE LOCATED IN NEBRASKA AND IOWA.

The interest of a decedent in real estate located in Nebraska and his interest in real estate located in Iowa, being subject, under the

respective laws of those States, to the charges against his estate and the expenses of its administration and subject to distribution as part of his estate, the value thereof should be included in determining the value of the gross estate under section 402(a) of the Revenue Act of 1921.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION.

First Trust Co. of Omaha, William W. Hoagland, Frank P. Doolittle, Executors of the Estate of George A. Hoagland, Deceased, plaintiffs, v. *A. B. Allen, Collector of Internal Revenue for the District of Nebraska, defendant.*

[July 16, 1931.]

OPINION.

WOODROUGH, District Judge: George A. Hoagland died seized of lands in Missouri, Nebraska, and Iowa, and his executors were required to pay estate taxes in respect to the value thereof. The taxes were laid under section 402(a) of the Revenue Act of 1921, and were paid under protest. This suit is to recover the money back on the ground that no lawful tax could be laid against the plaintiffs under that section. Its relevant language is:

"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—

"(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."

The district court in Missouri, the circuit court of appeals in this circuit and the Supreme Court held in the case of Harrelson that the section does not authorize any tax in respect to lands of decedents located in the State of Missouri. (28 F. (2d), 510; 35 F. (2d), 416; 282 U. S., 55 [Ct. D. 271, C. B. X–1, 469].) This court is clearly bound by those decisions to award judgment to the plaintiffs here for the part of their payment attributable to the lands in Missouri and it will be so ordered. I am not persuaded however that the decisions conclude this court from expressing its opinion as to the Nebraska and Iowa lands. The ground of decision in the Harrelson case was that in Missouri the lands of a decedent are not subject to the payment of the expenses of the administration of the estate and for that reason their value should not be included to make up the gross valuation for estate taxes. Though the decision is binding on this court and must be followed here in so far as the same facts are involved, considerations concerning the purport and intent of the statute are presented here which the opinions of the three courts and the brief of the Government in the Harrelson case disclose were not called to the attention of those courts. In such situation it is the duty of this court to assert its own judgment thereon. (*Webster* v. *Fall*, 266 U. S., 507; *U. S.* v. *Mitchell*, 271 U. S., 9 [T. D. 3865, C. B. V–1, 233].)

Notwithstanding certain discussions of the statute found in the opinions of the courts in the Harrelson case following what was said about the same statute in the case of *U. S.* v. *Field* (255 U. S., 257), it appears to me that section 402 of the Revenue Act of 1921 with its subdivisions taken together with section 403 should be interpreted so as to justify and compel the taxes laid in respect to Mr. Hoagland's Nebraska and Iowa lands. The estate tax sections as I read them express the intent of Congress to impose a tax on the net estate of decedents, by determining the value of the gross in a very broad inclusive way adding many items that are not within the ordinary concept of decedents' estates and then later on specifying particularly the deductions to arrive at the taxable net. To accomplish the obvious purpose, section 401 starts out and imposes the tax "upon the transfer of the net estate of every decedent." Section 402 then opens with the declaration that to value the gross estate there shall be included "the value at the time of death of all property real or personal, tangible or intangible, wherever situated"—these are inclusive words but

not inclusive enough to answer the purpose of Congress. That purpose as stated was to carry this tax far beyond the ordinary concept of decedents' estates. Congress was determined to include in this gross valuation interests of surviving spouses and gifts causa mortis and properties which decedent had transferred in trust during his lifetime and properties held in entirety with other persons and even insurance money—things that are in no lawyer's sense any part of a decedent's estate. To accomplish this purpose and draw these unrelated things together under the general tax imposition contained in the opening paragraph of section 402 Congress follows up the general declaration that the gross valuation for tax shall include all property with a phrase very apt for its object, namely, "to the extent." It says in substance that the gross value of decedent's estate shall be determined by including the value of all property "to the extent" of property given away by him and to the extent of the proceeds of life insurance policies and to the extent of the interest of a surviving spouse. The phrase admits of no ambiguity and lends itself perfectly to the broadening out of the opening sentence of the section as was intended.

Congress uses the same phrase to introduce subdivision "a." It says all the property "to the extent" of the interest 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. Here it is noted that the conjunctive "and" is used between "charges against his estate" "and" "expenses of its administration." Observing how the phrase "to the extent" is used throughout to expand and broaden and bring in the extraneous, it seems patent to me that the real function of the conjunctive "and" in the clause is to amplify the phrase "to the extent" and increase "the extent." It all means as I view it the value of the gross estate shall be determined by including the value of all the property of the decedent "to the extent of the interest of the decedent * * * which * * * is subject to the payment of charges * * * and (to the extent that it) is subject to the expenses of administration and (to the extent that it) is subject to distribution as part of his estate." Such an interpretation effectuates the intention of Congress to lay a uniform tax nationally and does not offend against the context.

The alternative reading has apparently appealed to the jurists who have studied the section. That alternative is to read the conjunctive "and" as the equivalent of a proviso. They read the whole "the value of the gross estate shall be determined by including the value of all the property to the extent of the interest of the decedent—which * * * is subject to charges against his estate" ("and" "provided") it is subject to the expenses of administration * * * ("and" provided) it is subject to distribution. It is not to be argued that the conjunctive "and" never approximates a proviso. But certainly not always and it does not appear to me to be according to the intent of Congress in this instance.

Inasmuch as this consideration of the real meaning of the statute has been urged upon this court and apparently was not presented to the other courts when the matter was studied, I have felt called upon to state my conclusion.

I do not however decide the case upon it.

It appears clear to me that under the Nebraska and the Iowa statutes lands belonging to a decedent at the time of his death are subject to the expenses of its administration and are also subject to distribution as part of his estate. It is true that in the matter of procedure and as concerning only the order in which the different kinds of assets shall be applied in the course of administration personal property must be used first and then realty. But both are to be resorted to if necessary. That being so both are "subject" within the meaning of the statute.

It is argued that in particular estates like this one, where there is plenty of personalty, the lands are not "subject" to the charges against the estate or expenses of administration because all such disbursements will be made out of the personalty and the lands will not be so applied. The argument appears to me to be without merit.

Judgment should be awarded the plaintiffs for the amount paid in respect of Missouri lands only, and judgment for defendant as to the other claims.

REGULATIONS 70, ARTICLES 10, 29, 31, 36: Gross estate; community property; deductions; claims; funeral expenses.

X–49–5312
Ct. D. 423

ESTATE TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. DEDUCTION—LOAN BY WIFE—COMMUNITY PROPERTY IN TEXAS.

Under the laws of Texas a husband and wife can not convert community property into separate property except by a contract which in law has the effect of an actual conveyance. Where, therefore, an agreement to secure any loss to his wife's separate property, that might result from a loan to the decedent by her, out of his share of the community property, does not amount to a conveyance of any property, no loss on account of the loan may be deducted under section 403 of the Revenue Act of 1921, from the decedent's share of the community estate in Texas, in determining the value of the net estate.

2. DEDUCTION—FUNERAL EXPENSES—COMMUNITY PROPERTY IN TEXAS.

Funeral expenses are allowed by the laws of Texas as claims against the estate and the entire amount of such expenses is deductible under section 403 of the Revenue Act of 1921 from the decedent's share of community property in Texas in determining the value of the net estate.

3. DECISION AFFIRMED IN PART AND REVERSED IN PART.

The decision of the Board of Tax Appeals (11 B. T. A., 1283) is affirmed in part and reversed in part.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT. No. 5745.

David H. Blair, Commissioner of Internal Revenue, petitioner, v. *Mrs. Niels (Mellie) Esperson Stewart, Executrix of Estate of Niels Esperson, Deceased, respondent.*

Petition for review of decision of United States Board of Tax Appeals (District of Texas).

Before BRYAN, SIBLEY, and HUTCHESON, Circuit Judges.

[April 25, 1931.]

OPINION.

BRYAN, Circuit Judge: Niels Esperson and Mellie Esperson were husband and wife. During their married life, while citizens of Texas, they accumulated considerable property which under the laws of that State became community property. They had no children, and each made a will leaving to the other the entire property of which he or she should die possessed. In 1919 they sold 999 shares of oil stock to the Invincible Oil Corporation for $5,000,000. Niels Esperson died in 1922. His widow, now Mrs. Stewart, qualified as executrix. She testified that half of the just-mentioned stock was given to her by her husband, but that after the sale he borrowed from time to time for investment various sums, which in the aggregate amounted to more than a million dollars; that she thought some of the investments he was making were hazardous, but that he did not think so; and that he promised that he would repay to her, but without interest, any loans she made to him. The following questions and answers were asked and given on her direct examination:

"Q. Did he state anything about what part of the estate this repayment would be made from?

"A. Mr. Esperson did not anticipate death.

"Q. That is not the question, Mrs. Stewart. I want to know whether Mr. Esperson agreed with you and stated anything to you as to what source the repayment of the funds loaned to him by you would come from.

"A. That they would come from the investments that he would make.

"Q. Was there anything stated by him as to whether it would come from his part of the community estate or as to whether they would come from the entire community estate?

"A. Yes, sir.

"Q. What was the agreement with reference to that as to where it would come from?

"A. That he would repay me the moneys loaned to him from his—from his——

"Q. (Interrupting.) From his part of the estate or from the entire estate?

"A. Well, from his part of the estate. As I say, Mr. Esperson did not anticipate death."

Upon this testimony of the executrix the Board found that "it was understood and agreed by and between Esperson and his wife that the money borrowed by him would be paid to her from his part of the community estate." The evidence does not disclose whether the borrowed money, or any part of it, was lost, or whether it formed in whole or in part, a portion of the community estate as it existed at the time of Esperson's death.

The Board of Tax Appeals held that the aggregate amount of the loans should be deducted from Esperson's half of the community estate. It also held that Esperson's funeral expenses, including the cost of a monument over his grave, should be deducted from his part of the community estate. (11 B. T. A., 1283.) These rulings are brought here for review by the petitioner, the Commissioner of Internal Revenue.

Esperson had no property which he had owned before marriage, or which he had acquired during marriage by gift, devise, or descent. He therefore had no separate property, but only a half interest in the community estate. (Revised Civil Statutes of Texas, articles 4613, 4619.) If we accept the Board's finding of fact that he agreed to repay out of his half of the community estate the loans which he received from his wife, the only reasonable interpretation, as it seems to us, that can be placed upon his agreement is that he promised to secure his wife against any loss that might result on account of the loans out of his share of the community estate. The object of the agreement, even according to respondent's testimony, was to protect her separate property against loss. It was not contemplated by the agreement that her separate property should thereby be increased in value, even to the extent of interest on the loans. It would be an unreasonable and unfair interpretation of the agreement to hold, in the event there was not any loss, that Esperson bound himself to charge his share of the community estate with the aggregate amount of the loans; for in such event the result would be that his share of that estate would, without receiving any benefit, contribute half of the borrowed money to his wife's separate estate. If only part of the borrowed money had been lost, the contribution would be less, but it would be in the same proportion; and whatever amount he returned to the wife's separate estate would be in fulfillment of a promise to make a gift to her, and would be unenforceable and void because of a total lack of consideration. The burden was on the respondent to prove a loss by Esperson of the whole or some part of the borrowed money, and this burden she failed to meet. For all that appears there was no loss and the borrowed money was represented in the amount which was left in the community estate at the time of Esperson's death. It follows that in our view the deduction which the Board made from Esperson's share of the community estate was erroneous. But we are further of the opinion that there should be no deduction from Esperson's estate even though there had been satisfactory proof of the loss of some or all of the borrowed money.

Under the Texas decisions a husband and wife can not convert community property into separate property, or vice versa, except by a contract which in law has the effect of an actual conveyance. (*Cox* v. *Miller*, 54 Tex., 16; *Green* v. *Ferguson*, 62 Tex., 525; *Kellett* v. *Trice*, 95 Tex., 160; McKay's Community Property No. 936. See also *Justice* v. *McRuffin*, 224 S. W., 204.) The conveyance whether absolute or as security ought to be proved by clear and convincing evidence where as here the proof of it depends not upon the interpretation of a written instrument but upon the oral testimony of the grantee, as to what was agreed to by the grantor whose lips have been sealed by death. In the absence of such evidence, the policy of the law places in the community the property acquired during marriage otherwise than by gift, devise, or descent. The testimony of the respondent is too vague and uncertain to support the inference that Esperson conveyed to her, as security,

any part of his share of the community estate. That testimony indicated at first that the loans were to be paid out of Esperson's investments; and respondent's final statement, that payment was to be made out of her husband's part of the community estate, was made in response to a leading question which suggested the answer that was given. And so it was not satisfactorily shown whether the loans were to be paid back out of the investments or out of Esperson's part of the community property. Respondent would have been as well off without the alleged agreement, since she would have received all Esperson's property at his death both under his will and, there being no children, under the laws of descent. (R. C. S., article 2578.) The fact that such an agreement was unnecessary renders it highly improbable that it was made. Besides no definite or identifiable property then in existence was pledged, nor was property to be afterwards acquired definitely pledged, assuming that it could be; but the pledge of any property existing or to be acquired was made dependent upon the contingency that a loss might be sustained by Esperson in the making of future investments. The agreement which it is claimed Esperson made did not amount to a conveyance of any property, and was nothing more than a promise to make a conveyance if that should be found necessary in order to protect his wife's property against a possible future loss. The conclusion is that the alleged agreement did not amount to an actual conveyance.

We are of opinion that the Board was correct in holding that Esperson's funeral expenses were deductible from his half of the community property. Funeral expenses are deductible from an estate when they are "allowed by the laws of the jurisdiction." (26 U. S. C. A., No. 1095a(1).) Such expenses are by the law of Texas recognized as claims against an estate and are given preference over all other claims. (Article 3531, Revised Civil Statutes.) The executor of an estate has no authority to administer any estate except that of the decedent, and therefore can not administer on the half of the community property that belongs to the surviving spouse. An estate liable for funeral expenses at all is, of course, liable for the whole of such expenses. *Gilroy* v. *Richard* (63 S. W., 664) and *Goldberg* v. *Zellner* (235 S. W., 870) hold that community property rather than separate property is primarily bound for funeral expenses. In the first cited case it is not clear whether the court meant to hold that funeral expenses were chargeable against the entire community estate or only against the decedent's interest therein. But we think any doubt on that question was set at rest by the decision of the Supreme Court in *Richardson* v. *McCloskey* (276 S. W., 680), where it was held that funeral expenses were chargeable against "the estate." The only estate there being administered was the interest of the decedent in community property; for in that case, as in this, the decedent had no separate property.

For the reason that in our opinion the Board erred in deducting from Esperson's share of the community estate the amounts claimed as loans made to him by respondent, the petition for review is granted, and the cause remanded for further proceedings not inconsistent with this opinion.

TRANSFERS BY DECEDENT IN HIS LIFETIME.

REGULATIONS 70, ARTICLE 16(1): Transfers made in contemplation of death. X–50–5321 Ct. D. 427

ESTATE TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. RENUNCIATION OF GIFT BY WILL.

Where a decedent elects to accept the provisions of his wife's will which gives him a life estate in a residence and one-third of her real and personal property which the testatrix intends to pass and be enjoyed in connection with the residence, the gift is entire and his acceptance of the life estate and his enjoyment of the income from the other property for several years after the probate of the will constitute an acceptance of a part of the gift which binds the decedent to accept the rest in the absence of any language in the will manifesting a sufficient intention of the testatrix to the contrary, and thereafter there can be no renunciation of a part of

the gift. Nor has the probate court under the laws of Ohio power to determine that the decedent renounced his gift or that it had become a part of the residuary estate or that the trustees of the residuary estate, rather than the decedent, were entitled to it.

2. TRANSFER—CONVEYANCE TO TESTAMENTARY TRUSTEES.

Where, following an order of distribution in kind by the probate court, the decedent joins with his coexecutor in transferring the securities given him by will to the trustees of the residuary estate, to which transfer he had in his individual capacity executed a consent, and subsequently he joins with the other trustees of the residuary estate in receipting to the executors for the securities, the transaction results in a transfer of the securities by the decedent within the meaning of section 402(c) of the Revenue Act of 1921.

3. TRANSFER IN CONTEMPLATION OF DEATH.

Held, that the evidence proves that the thought of his death was the controlling motive of the decedent in effecting transfers of his property and that in the circumstances shown they were made in contemplation of death within the meaning of section 402(c) of the Revenue Act of 1921.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Fayette Brown, as Executor of the Estate of Harvey H. Brown, Deceased, plaintiff, v. *C. F. Routzahn, Collector of Internal Revenue, defendant.*

[September 9, 1931.]

OPINION.

WEST, District Judge: Action by the executor of Harvey H. Brown to recover estate taxes, in which a jury was waived. Elizabeth Brown died in 1912, and by item 2 of her will left the decedent, her husband, one-third of all her property in fee, and a life estate in a valuable residence. Subject to this bequest, item 3 gave the residue of the estate in trust to the decedent, his son Fayette Brown, and a trust company, as testamentary trustees. It required the net income of the trust estate to be paid over to Harvey H. Brown during his life and thereafter to his five children until they reached the age of 30, when they were to have the principal. Harvey H. Brown and his son Fayette were made executors of Mrs. Brown's will. On December 28, 1912, the decedent duly elected in writing to take under the will. The estate was not settled until in 1920. The executors then made application to the probate court for authority to distribute the assets in kind to the three testamentary trustees to be by them held and administered under the terms of the will. The application stated that Harvey H. Brown had renounced his rights under the will, except his life estate in the above and another residence, and to have the income paid to him by the testamentary trustees, and that the property renounced had become a part of the residue. And a written statement from Mr. Brown to the effect that he had so renounced, accompanied the application. Upon the court's order Mrs. Brown's executors turned over the personal estate, consisting of securities and cash, to the three testamentary trustees, took their receipts, and on June 7, 1920, were discharged from their trust.

The plaintiff's contention is that the gift, having been renounced by the decedent, never became a part of his estate, while defendant claims that Mr. Brown's election to take under the will constituted a definite acceptance of its benefits. The court's view is that the effect of the election was merely to bar the widow from thereafter claiming except under the will. Notwithstanding the election, he still had the right to say what if any of its separate gifts he would accept and what decline. (See G. C. 10572 and *Carder* v. *Comm'rs*, 16 O. S., 353.)

The general rule is that a beneficiary may refuse to accept property given him by will, but he can not accept such parts of an entire gift as he wishes and reject the rest. (See Page on Wills, section 1233.)

"A gift of property by will is supposed prima facie to be beneficial to the devisee or legatee, and consequently it is also supposed, until the contrary is proved, that the gift is accepted by him. But he is at liberty to refuse or disclaim it, for the law will not compel a man to take property against his will. Disclaimer may be express or implied, but there can be no effectual disclaimer after a party has once elected to accept the gift. An election, like disclaimer, may be inferred from the conduct of the party. Thus, if a devisee retains possession for some years of property subject to charges which exceed its value, he may be deemed to have elected to accept the devise.

"Where by the same will two properties are given to the same person, one beneficial and the other burdensome, he is generally at liberty to accept the former and reject the latter, although by so doing he throws a burden on the testator's general estate, which, if he had accepted both, must be borne by himself. * * *

"The cases are not easy to reconcile, but the test seems to be whether or not the gifts are separate and distinct. If onerous property and beneficial property are included in the same gift as an aggregate, then, unless a contrary intention appears by the will, the donee can not disclaim the onerous property and accept that which is beneficial; he must take the whole gift or nothing. But if two distinct gifts are made by the same will, one of them being onerous and the other beneficial, the donee may reject the former and take the latter." (Jarman on Wills, seventh edition, page 530.)

The author cites, among other cases, *Guthrie* v. *Walrond* (22 Ch. Div., 573), where it is held:

"When by a will two distinct legacies are bequeathed to the same person, one of them being onerous and the other beneficial, prima facie the legatee is entitled to disclaim the onerous legacy and to take the other. If, however, onerous property and beneficial property are included in the same gift, prima facie the legatee can not disclaim the onerous and accept the beneficial; he must take the whole gift or none of it. But this prima facie rule may be rebutted if the will manifests a sufficient intention of the testator to the contrary."

Also *Parnell* v. *Boyd* (2 Ir. Rep., 571). In this case a testator in 1890 devised all his property to the defendant, who entered into possession of all but a certain house, and in 1895 made a deed disclaiming this house. It was held not competent to disclaim one portion of the property while accepting the rest. Of the contention that the disclaimer was good, Lord Ashbourn in deciding the appeal said:

"I do not think it necessary to discuss the second question arising in the will, which I regard as entirely untenable. It was clearly not competent for the devisee here to pick and choose. He can not reject one part and accept the rest. The matter is really closed by authority."

Green v. *Britten* (42 L. J., ch. 187). Here there was a bequest of six leasehold villas for life with any other house testator might build on an adjoining space of ground "together with the ornamental park I am now forming opposite that cottage and villas." It was held the legatee could not take the villas without the park, of which the tenure was onerous.

Speaking of the villas and park, Bacon, V. C., stated that the testator "Couples them together and treats them as one entire thing; and by election speaks of the six villas which were built and those that might be hereafter built, but which he never did build, 'together with the ornamental park I am now forming opposite that cottage and villas.' I can not entertain the least doubt that it is a gift of one entire thing and that it is not competent to the legatee of that entire thing to say 'I will pick out of it the bit I like and leave the rest, no matter what may be the consequences.' * * * All you have to do is to ascertain what the intention of the testator was; and the facts once ascertained, the conclusion is irresistible that his intention was that the park, no less than the six villas, should go to his friend."

"If a man chooses to give and devise items of property as one aggregate gift, the net beneficial interest which he gives to the donee, reckoned in pounds, shillings, and pence, is the net amount of the profits to be received after discharging his outgoings; in other words, an account of outgoings and receipts being taken, the ultimate benefit actually given as the result of an aggregate gift, is the net balance. That seems to me to be the true meaning of saying that when there is a gift of an aggregate, the donee can not refuse a portion

of it and take the rest. He is not given the property item by item, but he is given the net result as a whole." (*In re Baron Kensington* (1902), 1, ch. 203, 213.)

In the case at bar the evidence shows that during the seven or eight years from the probate of the will to the settlement of the estate Mr. Brown collected from the executors and enjoyed the income from his wife's estate, including that produced by the one-third part bequeathed by item 2. He had no right to this save as legatee under such item. A specific legacy, or a general legacy of all or a fraction, or the residue of an estate, carries with it the profits or income arising after testator's death, as an incident to the legacy, in the absence of other disposition. (Page on Wills, section 1398; *Whitehead's Estate*, 268 Pa., 407; *Buchanan's case*, 166 Ia., 663.) Consequently acceptance of this income was acceptance of a part of the legacy and thereafter there could be no renunciation.

Concededly the decedent accepted the life estate in the Euclid Avenue residence given by item 2; and in the Mentor property given by the second item of the codicil. The will gave the use of these properties as homes for himself and children, and the testator evidently intended the one-third of her estate to pass and be enjoyed in connection with the residence. The gift was entire, and acceptance of the use of the residences, certainly of the one mentioned in item 2 of the will, bound the decedent to accept the rest of the gift.

Prima facie, the acceptance of part of the entire gift bound decedent to take it all, and, as stated by the authorities supra, this prima facie rule can only be rebutted if the will manifests a sufficient intention of the testator to the contrary. If the legatee disputes the entirety of the gift, he must support his contention by language found in the will. There is no language in that document indicating any intent that the gift under item 2 could be split into parts or accepted piecemeal.

It is no answer to say that when the one-third of Mrs. Brown's personal estate bequeathed to her husband became a part of her residuary estate, he became entitled to the income under item 3, the benefits of which he did not renounce; for the bequest under item 2 could not fall into the residue until it was renounced or transferred, and the acceptance of a portion of the gift made renunciation impossible. The acts of a beneficiary may establish his acceptance regardless of intent. (40 Cyc., 1392, 1393.) Assent to a bequest may be implied, and an executor may assent to a gift to himself. (*Blood* v. *Kane*, 130 N. Y., 514; *In re Brewer*, 289 Fed., 79, 86; *Northup* v. *Columbian Lbr. Co.*, 186 Fed., 770; Roper on Legacies, 568.) In *Ex parte Fuller*, 2 Story, 330, it was held:

"As to the other point, there is no doubt that the devisee must consent, otherwise the title does not vest in him. But where the estate is devised absolutely and without any trust or encumbrances, the law will presume it to be accepted by the devisee because it is for his benefit; and some solemn, notorious act is required to establish his renunciation or disclaimer of it."

Prior to Mr. Brown's rejection filed in the probate court in March, 1920, there was no solemn or notorious act indicating renunciation. Assuming that under more recent authorities a mere declaration of the legatee is sufficient, the rule still requires the act or declaration relied on be unequivocal and consistent with other conduct of the devisee. (See 2d Page on Wills, 2059; *Tarr* v. *Robinson*, 158 Pa., 60.) Mr. Brown's declarations that he would not take the legacy were inconsistent with his acceptance of a very substantial part of it.

Kuerze v. *Bank* (12 Ohio Ap., 412) is relied on by plaintiff. Testator's widow was his residuary legatee and also executrix of stock standing in her husband's name. She caused 700 shares to be transferred to her own name. In the suit to assess stockholders' liability it was held that she owned the 700 shares, but not the rest. And that it requires an affirmative act to transfer stock from an executrix to a legatee, so that the latter becomes liable on it. In view of the case cited in the opinion (127 N. Y., 296), the decision seems to turn on the view that title to the stock not transferred could only be held by the executrix in her representative capacity, and therefore she was not liable on it in her individual capacity. No such question is involved here and the case is not authority.

Plaintiff further contends that if the legatee did not successfully renounce in fact, still in the proceeding in the probate court the executors averred that he had done so and that his legacy had become a part of Mrs. Brown's residuary estate; that the court having found this to be true, approved its

distribution along with the balance of the residue; and that thus the renunciation and its effect were judicially established. The proceeding was under G. C. 10839, and was limited to securing approval of the probate court to distribute such assets of the estate as were in the form of choses in action, to such distributees as would receive them, in order to avoid the expense of a sale to reduce them to cash.

In Ohio the power of a probate court is exhausted in making an order of distribution, and the court has no authority to determine the persons who will receive the assets or the amount to be paid to each. (G. C. 10492(3); *First Nat. Bank of Cadis* v. *Beebe*, 62 O. S., 41; *Swearingen* v. *Morris*, 14 O. S., 424; *Cox* v. *John*, 32 O. S., 532; *Armstrong* v. *Grandin*, 39 O. S., 368.)

The presence of the testamentary trustees did not enlarge the court's jurisdiction. In administering the distribution statute a probate court assumes no responsibility and makes no finding that those whose assent the executor has procured or proposes to procure, are in fact entitled to the estate.

I do not agree with counsel for plaintiff that because the distributees were authorized to invest only in such securities as were approved by the court, the court's power in respect to determining who the distributees were and the amount coming to them, was different from in the ordinary case. In legal effect the order was no more than an authority to the trustees to accept the securities, provided they were rightfully entitled to take them. And the court lacked power to determine that Mr. Brown had renounced his legacy under item 2, or that the gift under that item had become a part of the residuary estate, or that the testamentary trustees, rather than the legatee, were entitled to it. The order was invalid, except as it authorized distribution in kind to the testamentary trustees of such choses as they were entitled to by the terms of the will. The statute seems to make this plain.

The court does not agree that on any of these points *Davis* v. *Davis* (11 O. S., 386) and *Bell* v. *Henry* (121 O. S., 241) are authorities. These cases hold that a probate court has no power to set aside an election, and it seems to be defendant's idea that unless the decedent could in some way get rid of his election, he could not renounce the legacy; but I think that he was not at all committed by his election to acceptance of the legacy; the Carder case, supra, seems to settle that.

There having been no renunciation, and decedent having accepted the legacy, the question is presented whether he transferred the property during his lifetime. As to the fee in the undivided third of the realty, I think he did transfer it by his quitclaim deeds of July 1, 1920. (Ex. 18 and 20.) Execution of these deeds was inconsistent with prior rejection of the property, and he had in fact accepted, regardless of the statements found in them that he had renounced.

Prior to distribution the personalty was held by the executors in trust, and the legatee had the entire beneficial interest, there being no debts. (*Lewis* v. *Hutsler*, 40 O. S., 355, 360; *McBride* v. *Vance*, 73 O. S., 258, 264.) Plaintiff cites *Orlopp* v. *Schueller* (72 O. S., 41) to support his view that prior to distribution a legatee holds no interest in personalty bequeathed and consequently can transfer none; but that case holds a legacy in the hands of an executor not subject to attachment by a creditor of the legatee, prior to an order of distribution; and I do not regard it in point. In this case, following the order of distribution, the decedent joined with the coexecutor in transferring the securities to the testamentary trustees. In his individual character he had executed a consent to this transfer. Subsequently he joined with the other testamentary trustees in receipting to the executors for the securities. Under these circumstances he could not have gotten his legacy back had he been so inclined. (*Phillips, Exec.*, v. *McConica*, 59 O. S., 1, 10; *Thompson* v. *Thompson*, 18 O. S., 73.) The personalty did not pass to the testamentary trustees under item 3 of the wife's will. But by acts of the executors, to which decedent was party and consented, it was transferred out of the estate into their hands, to be dealt with by them in all respects as if it had reached them under item 3. See *Frow* v. *Bowers* (12 F. (2d), 625) for a somewhat similar transfer into an existing trust. Defendant insists that the transfer was ineffectual because it was based upon a void order of the probate court. While the order went further than was proper, it was not void, as it gave the executors power to distribute in kind.

When this entire transaction is considered, with Mr. Brown's undoubted desire that the trustee should take the property, it should be considered as good a transfer, whether technically it was by way of gift, release, or estoppel, as if the securities had first been distributed to the decedent, and he had then indorsed each one over to the testamentary trustees. As the result of the deeds and this

transfer, Mr. Brown owned no portion of the legacy at his death in 1923. Or if the personalty did not pass by the transfer, it went under his will, and such bequest was certainly taxable.

A transfer made in contemplation of death is taxable, even though it takes effect prior to the death of the transferor and is irrevocable. If intended to take effect in possession or enjoyment at or after his death, it is taxable, whether made in contemplation of death or not. The Government admits this transfer was not intended to take effect at or after decedent's death, and consequently was not taxable unless made in contemplation of death. Originally the claim was that it took effect at death, but in view of *May* v. *Heiner* (281 U. S., 238 [Ct. D. 186, C. B. IX–1, 382]) and similar decisions, that claim has been abandoned. Plaintiff complains of this; but as the two theories of taxability are consistent, defendant is not estopped from now depending upon a transfer in contemplation of death. If the facts warrant, it is the duty of Government agents to assert any legitimate contention in favor of the public. It is said, too, that with all the facts before it, the Government made no claim that a certain irrevocable trust to the Cleveland Trust Co. created by Mr. Brown shortly after the transfer, was made in contemplation of death. That may be a circumstance to be considered, but is not conclusive; failure to make such claim may have resulted from oversight. Former contentions as to the transfer immediately involved or others, are of little help in deciding the question now presented—whether death was the controlling motive of decedent in effecting the transfer, or whether the gift sprang from a different motive. In *U. S.* v. *Wells* (283 U. S., 102 [Ct. D. 340, C. B. X–1, 475]), it is said that the circumstances of each case must be carefully scrutinized to detect the dominant motive of the donor in the light of his bodily and mental condition, and "the question necessarily is as to the state of mind of the donor."

When he died in August, 1923, Mr. Brown was 75, and at the date of the transfer, 72 years old. He was a successful business man and had been actively engaged in ore, steamships, manufacturing, and banking, either as head of the business or member of the directorate, and this continued until after the transfer. He belonged to fishing and hunting clubs, fished and shot ducks frequently, and played golf. About 1911 he was treated for varicose veins, was in bed some two weeks, and wore bandages the rest of his life. In July, 1922, he had an attack described by the doctor as a spasm of an artery, and from that time was not in good health. He then ceased coming to his office, though he was up and around. About five days before his death he had another attack which rendered him unconscious and resulted fatally. His physician, Dr. John Phillips, is dead, and no medical testimony was produced. Dr. Phillips signed the death certificate giving the cause of death as cerebral hemorrhage, duration five days, contributory cause—arteriosclerosis, myocarditis, chronic. From time to time decedent was examined by Dr. Phillips, and plaintiff says he would say that he felt well, and that the doctor reported his heart action O. K. It appears that he was a vigorous, rugged man, normally weighing 220 to 225 pounds. A sister of plaintiff testified that from 1920 to 1922 her father's health appeared good, with no indication of illness, and produced a letter written by him in July, 1920, in which he spoke of having played 18 holes of golf the day before; and another written in October telling of his activities at the shooting club on the marshes near Detroit, and mentioning his improved sleeping and usual good appetite. Other witnesses not members of the family testify that in 1920 and 1921 Mr. Brown appeared well and engaged in sports and business much as he had always done, making no complaint of his health. And they say that he became ill and stopped coming to the office in July, 1922. This was when he suffered the stroke or artery spasm, which his son-in-law testifies alarmed the family, affected his voice and impaired his ability to walk, etc.

From this it can not be said that in March, 1920, Mr. Brown anticipated or contemplated death as near at hand. But as it is "contemplation of death, not necessarily contemplation of imminent death, to which the statute refers" (*Wells case*, supra, page 117), the inquiry can not end here. Circumstances indicating his mental condition, his state of mind, as well as his physical health, must be examined in an effort to discover motive.

Upon decedent's death the plaintiff returned for purposes of the estate tax, a net estate of approximately $1,125,000. This did not include $1,034,000, the value of the one-third of the wife's estate here involved. Decedent was a successful, wealthy man of affairs, very active and intelligent. He had looked after

his wife's investments, but had not used any of her property in his own enterprises, which were of a character notoriously requiring large capital. Subject to the provisions of item 2, the third item of her will created a trust and made decedent one of the trustees thereof. As stated above, the trust covered all the residue, the income of which was to be paid to Mr. Brown during his life quarterly, and after his decease the property was directed to be divided equally among the five children or their issue. And this provision was inserted in item 3:

"It being understood that while and as long as my said husband and my said son shall act as such trustees, no disposition or sale, lease or investment of any part of the trust estate shall be made without their consent."

Mrs. Brown had no debts.

Although decedent and plaintiff qualified as executors in June, 1912, and the three testamentary trustees were appointed in August, 1913, no steps were taken to settle the estate until March, 1920. The reasons for not sooner winding up the estate, as given by plaintiff, are that it was thought expense would be avoided by retaining the property in the hands of the executors, rather than turning it over to trustees one of whom would be an outsider and would have to be paid. And that in 1914, when the war broke out, the pig iron and vessel business became very active, and no time was found for terminating the executorship. In 1916 plaintiff entered the service, and was away except for two or three months in 1917 until mustered out in April, 1919, and did not return to business until that fall.

It is testified by several witnesses that Mr. Brown said, after his wife's death, that he did not intend to take the legacy, or, as put by one or two witnesses, anything more than the income.

The plaintiff says his father told Pratt, the accountant, that he was not going to take that one-third and "gave him instructions to prepare the partial account on the basis of including all of the property in the estate." As the legacy was a part of the estate regardless of who got it, the quoted instruction is hard to understand. After he returned from the war, he says his father again told him he would not accept any part of the wife's estate.

Decedent told his daughter, Mrs. Brooks, "that he didn't wish to use my mother's property, that he wished that to come to the children intact as she had left it, and that he didn't need the use of it any way."

To Mr. Ely "he said definitely that he was not going to accept that provision of his wife's will, that he didn't intend to and never would"; and Ely heard him tell Pratt the same thing.

He told Mr. McClure, according to the witness Mills, that "he would take the income, that he would not touch the principal, that that was for his children"; and stated to Mr. Nichols that he "didn't want any of the one-third and would not accept it"—he had plenty of his own and wanted the children to have it.

It is conceded that the decedent did not in fact take over any of the legacy except the income and use of the residences.

Plaintiff's counsel argues that this evidence proves Mr. Brown's motive for renouncing or transferring. The reasons relied on being that he had helped accumulate his wife's property and never had used it: that he had sufficient of his own, and that he wanted it kept intact and to go to his children. And it is said this demonstrates that what he did was not in contemplation of death.

I can not see the force of this reasoning. The legacy was his in law and morals. That he had assisted in accumulating it and had never used any of his wife's money, would seem to be good ground for taking rather than refusing the gift. The statement that he had sufficient of his own was no more than an opinion which might be wrong; and the purely sentimental reason that he wanted it to go to the children intact is equally unsatisfactory.

Against these statements of alleged purpose are the cold facts that for nearly eight years he took and used the income and made no move to turn the principal over to his children or the testamentary trustees. Such a delay in definitely putting the property out of his power, if not satisfactorily explained, is quite convincing that his intention to get rid of it, as evidenced by the transfer was not his original intention. The proof shows there was no necessity for the delay. Books of the estate were kept by Pratt, now dead. There were no debts, nothing to collect in, no litigation or controversies, and settlement was a simple matter. It might easily have been made before plaintiff went into military service in 1916, or even before the business became

pressing after outbreak of the war in 1914. And the charges of the corporate trustee could not have been an item of much consequence.

In 1912 and during the war activities Mr. Brown might well be unwilling to part with this million dollars worth of property, while in 1920, due to advancing years and the approaching close of his business career, together with increasing death duties, Federal and State, he might feel differently about it. I think the inference inescapable that he did alter his plans and change his mind.

Taking all the circumstances into account, his declarations were no more than expressions to family and friends of his hope and belief that he would not need the property, in which case he would pass the principal on to his children. The witnesses testify to oral statements made nearly 20 years ago. When Mrs. Brooks puts it that "he didn't wish to use" the property, and "wished it to come to the children" she no doubt gets it nearer right than the others. One can see reasons for such a statement, but none whatever for others attributed to him, if they are taken literally. If the decedent had become involved and found that he did not have enough—for example to save one of his important enterprises from bankruptcy—there can be no reasonable doubt that, despite his declarations, he would have been free legally and morally, to use the principal as he had already used the income, would have felt free to do so, and would have done it.

The weight of the evidence indicates that originally Mr. Brown did not intend to renounce his legacy, and the transfer in 1920 was not in execution of any such original plan. His real motive must be sought elsewhere; it is not disclosed by these declarations.

Decedent made his will on July 1, 1920, and left all his property to his son, the plaintiff. The same day he conveyed to plaintiff by revocable trust the greater part of his stocks and securities to the amount of over $1,000,000. This transfer was returned and the estate tax paid on it. Between $55,000 and $60,000 of personalty passed under his will, and including real estate, his total net estate, at the time of his death, not including the legacy from Mrs. Brown, or the trust to the Cleveland Trust Co., was $1,125,339.18. The income of the revocable trust estate was to be paid to the donor during his life, except $200 a month to a certain beneficiary. Upon his death, substantial amounts were directed to be paid to employees and friends, either outright or by way of life annuities, and the trustee was required to pay substantially all the remainder to Mr. Brown's five children. In the instrument he speaks of it as a "settlement," and provides that any property coming to the trustee by the donor's will shall be held and disposed of under the trust.

The same day, July 1, 1920, Mr. Brown executed quitclaim deeds covering the real estate included in his legacy. The attempted renunciation was approved by the probate court on June 7—24 days before execution of the will, deeds, and trust. It is apparent that whether this was a renunciation or a transfer, it would confer no immediate benefit on anyone. Mr. Brown expressly reserved the income for his life, and when the property was placed in the hands of the testamentary trustees, the provision from item 3 quoted above, gave him control of the sale or disposition of the principal while he lived. Plaintiff testified that there would be no immediate advantage to the children. On the same day or possibly a couple of days before, decedent placed his insurance policies with property to keep up the premium, and evidently worth about $400,000, in the hands of the Cleveland Trust Co. as trustee.

These transactions were evidently all a part of what the decedent regarded as a final disposition and settlement of his property on those who were the objects of his bounty and care. (*Shwab* v. *Doyle*, 269 Fed., 321, 332 (C. C. A. 6); *Tax Commission* v. *Parker*, 117 O. S., 215.) He had at least the general expectation of death which prompts the making of wills. And in March, 1920, when he acted upon the so-called renunciation, it is clear enough for a second reason that he contemplated death within the meaning of the law as interpreted in the Wells case, if this court understands that decision. He had a particular concern, giving rise to a definite motive. Whether or not he knew all about titles, estate taxes, etc., he certainly knew that if he died possessed of this legacy, or if at his death he appeared as owner on the public records, the tax would be assessed and probably collected. His concern was this tax, and his motive for executing the "renunciation" was to prevent its assessment after his death. If it can be said that although a general knowledge of the law must be imputed to decedent, still he should not be held to an understanding that acceptance of a part of the legacy prevented rejection of the rest; and that he intended to reject and therefore did not intend to evade a tax, no tax

being possible as to property never accepted, I think that no sufficient answer. His concern being with a tax to arise after his death, and his dominant motive springing from that concern, what he did was done in contemplation of death, whether his intention was a proper one—to reject and so avoid the tax—or was to transfer in the hope of evading it. This is not saying that had there been a genuine rejection there would be a tax because death was in contemplation; in such case, of course, there could be no tax.

Under the law as it stood in March, 1920, estate taxes and the newly created State inheritance taxes totaled a very large sum. No substantial purpose or motive but to save his estate from its payment appears, in my judgment; nor any cause to suppose decedent would not be affected by considerations that usually move men. It would not be difficult to argue himself into the belief that in justice no tax should be assessed on his legacy. He had not touched the principal, and had now put it out of his power ever to use it. Why then should it be regarded as his for purposes of death duties?

However that may be, I am compelled to hold that the legacy was accepted by Mr. Brown, that he formed no purpose of attempting its rejection until 1920, that the so-called renunciation was a transfer, that decedent appreciated that if he died in possession of the legacy, heavy Federal estate taxes and State inheritance taxes would be assessed on account of it subsequent to his decease, that his motive prompting the transfer was to protect his estate after death, and that his concern and purpose had to do so directly with the consequence of his death that the transfer was made in contemplation of that event, rather than for reasons having to do with continuing life.

When the evidence was all in, the defendant moved for judgment on the ground that plaintiff had failed to make a case. This motion will be overruled, with exceptions to plaintiff.

Thereupon plaintiff in writing requested that the court declare as a matter of law that under the pleadings and the evidence in this case, the plaintiff is entitled to judgment against the defendant.

Neither party is entitled to judgment as a matter of law. The case can not be decided without considering and weighing the evidence and inferences arising from it. (279 U. S., 792, 795.) Both motions are overruled and exceptions allowed to defendant and plaintiff, respectively.

Thereupon plaintiff requested the court to make and state its special findings of fact and conclusions of law separately, which request is allowed—the same to be prepared, filed and settled under rule 34.

Judgment for defendant.

TITLE II.—ESTATE TAX. (1916)

REGULATIONS 37 (1917), ARTICLE XVII. X–32–5166
Ct. D. 368

ESTATE TAX—REVENUE ACT OF 1916—DECISION OF COURT.

DEDUCTIONS—MASSACHUSETTS SUCCESSION TAX.

The Massachusetts legacy and succession tax is not deductible from the value of the gross estate under section 203(a)1 of the Revenue Act of 1916.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Malcolm E. Nichols, Formerly Collector of Internal Revenue, defendant, appellant, v. *Robert M. Leach, Executor, plaintiff, appellee.*

Appeal from the District Court of the United States for the District of Massachusetts.

[June 10, 1931.]

OPINION.

WILSON, J.: This is an appeal from the district court in an action originally brought by the executor to recover an overpayment of a Federal estate tax on the estate of William E. Walker, late of Taunton, Mass., who died in November, 1918.

In May, 1919, the executor filed a return and paid an estate tax of $37,700.68 assessed upon his return. He later received a notice from the Commissioner of Internal Revenue's office that an additional tax would be claimed and in March, 1922, the Commissioner made a final decision that the total tax due from the estate was $89,735.64; whereupon the executor having previously paid $50,000 to stop the running of interest, paid the additional amount claimed by the Government, together with the interest due.

The difference between the executor and the Commissioner as to the amount of the tax due arose in the first instance over a large amount of property given by the testator within two years of his death to members of his family. The value of the gifts totaled over $400,000.

A claim for refund was filed by the executor in June, 1925, to the amount of $49,634.70, and interest to the amount of $10,423.39, setting forth as grounds for the claim (1) that none of the gifts were made by the decedent in contemplation of death, and (2) that a deduction should have been made of the amount of the Federal estate tax.

At a conference in Washington between the Commissioner and the executor and his attorneys on November 16, 1925, at which they were advised that by the executor filing what is denominated an estate tax deposition in November, 1921, he had barred the estate from obtaining any refund on the grounds claimed, and the case was thereby closed; whereupon on December 1, 1925, the executor brought this action, and on March 16, 1926, filed the original declaration in the suit which was based on the grounds set forth in his claim filed in June, 1925. The case was heard on this declaration in the district court in November, 1926, and, on the ground that the estate tax deposition barred the plaintiff from recovery, judgment was ordered for the defendant.

On appeal this judgment was reversed in December, 1927, and the case sent back for further hearing.

In March, 1928, following the decision of this court reversing the judgment of the district court, counsel for the executor requested the Commissioner to reopen the case and sought an interview with him in Washington, at which interview the question of the refund was discussed with other members of his staff, and the Commissioner's attention was for the first time called to the fact that no allowance had been made for the payment of the Massachusetts inheritance taxes. Counsel, however, were informed that under a ruling by the Treasury Department, No. 2524, it was not deductible.

In July, 1928, the Commissioner, having reopened the case, ordered that a refund be made to the amount of $43,865.37, on the ground that the gifts were not in contemplation of death, but no deduction was made for the Federal estate tax, which was in accordance with the holding of this court in *Old Colony Trust Co.* v. *Malley* (19 Fed. (2d), 346 [T. D. 4084, C. B. VI-2, 364]).

In September, 1928, the plaintiff presented an amendment to his declaration in the original suit, which was allowed in the district court, setting forth as further grounds of recovery, that since the original assessment additional compensation had been paid to the executor and to his attorneys in the settlement of the estate; and the executor had also paid other miscellaneous administration expenses in addition to those deducted by the Commissioner in the original assessment; and that in arriving at the net estate upon which the estate tax was computed the Commissioner has refused to deduct the amount paid by the executor to the State of Massachusetts as inheritance taxes to the amount of $34,158.59.

To the amended declaration the appellant filed an answer and set up as a defense that in the claim for a refund filed in June, 1925, the only ground set forth was that certain gifts were improperly included in the gross estate as being made in contemplation of death, and that no deduction was allowable for a Federal estate tax; and that the original claim filed in June, 1925, did not furnish a sufficient ground for the recovery of any additional amounts due to any sums paid to the executor, to attorneys and for administration expenses after the 4-year limitation period for filing a claim for a refund, or for any amount because of a failure to deduct the Massachusetts inheritance taxes; and that as to the above items the claim for a refund filed in June, 1925, did not conform to section 3226, R. S., as amended by the Revenue Act of 1924, section 1012, and to Treasury Regulations 68, article 99.

In May, 1929, three years after the time for filing a claim for a refund had expired under the statute, and more than three years after this action was brought, and seven months after the amendment to his declaration was allowed,

in which it was not set forth that a claim for a refund on the new grounds had been filed, the executor filed with the collector what he described as an "amendment to claim for refund of taxes illegally collected," which set up a claim for overassessment of $1,000 in the original assessment, and also for a refund based on the last four grounds set forth in his amended declaration.

In July, 1929, the Commissioner issued his certificate for a refund of $1,000, which overassessment was due to mathematical errors in computing the refund allowed in July, 1928.

In February, 1930, the case came on for trial before the district judge, a jury being waived in writing. Before the trial and at its close, the defendant moved to dismiss the action for lack of jurisdiction on the ground that the action was prematurely brought, which was refused.

The defendant also filed a motion at the opening of the second trial that the action be dismissed on the ground that the declaration failed to set up that any claim for refund on the new grounds set forth in the amended declaration had been filed with the Commissioner prior to the commencement of the action or prior to the date of the amendment to the declaration in September, 1928, and at the close of the evidence renewed the motion on the ground that the evidence showed that no claim for a refund on the new grounds was presented within four years of the payment of the tax, or prior to the bringing of the action or the date of the amendment.

After the hearing which was based in part on an agreed statement of facts, and in part on evidence oral and documentary, the district judge held that jurisdiction of the district court was established, since the evidence disclosed a decision by the Commissioner denying the claim for a refund within six months of the filing of the claim and prior to the beginning of the action, though the Commissioner's formal certificate of denial was not issued until January, 1926, after the action was begun on December 3, 1925.

The only real issues in the case are (1) whether after four years from the date of a payment of a tax a new claim for a refund based on new grounds in the guise of an amendment to the original claim satisfies the statute; (2) whether the taxpayer can recover on a declaration which does not allege that a claim for a refund on the grounds relied upon in the declaration has been filed with the Commissioner before action was brought, or the amendment to the declaration setting up the new grounds was allowed; (3) whether a verbal suggestion at a conference with the Commissioner that there were other grounds for a refund not presented in the original claim is sufficient because the Commissioner is *required* to determine the estate tax; and (4) whether, if the statute requiring the filing of a claim stating the facts on which the refund is claimed, has been complied with, the Massachusetts inheritance tax should be deducted from the gross estate in arriving at the estate tax.

That amendments to a claim may be allowed within the 4-year period, and that a Commissioner may waive the provision of the regulations as to the form of a claim is settled; but whether the 4-year period is a period of limitation as to any new grounds not included in the original claim, which can not be waived, is not clear. (*United States* v. *Felt & Tarrant Mfg. Co.*, decided April 13, 1931 [Ct. D. 336, C. B. X–1, 431]; *United States* v. *Swift & Co.*, 282 U. S., 468 [Ct. D. 290, C. B. X–1, 283]; *Finn* v. *United States*, 123 U. S., 227.)

The cases in which the Supreme Court has considered this statute are *Rock Island, etc., R. R. Co.* v. *United States* (254 U. S., 141 [Ct. D. 2, C. B. 4, 342]); *Maryland Casualty Co.* v. *United States* (251 U. S., 342, 353, 354); *Kings County Savings Instit.* v. *Blair* (116 U. S., 200); *Nichols* v. *United States* (7 Wall., 122, 130); *Tucker* v. *Alexander* (275 U. S., 228 [T. D. 3973, C. B. VI–1, 287]); *United States* v. *Felt & Tarrant Mfg. Co.*, supra; and *United States* v. *Swift & Co.*, supra.

However, it is unnecessary to determine whether a claim for refund can be amended by inserting entirely new grounds after the 4-year period of limitation has expired, as we think the district court erred in holding that the Massachusetts succession tax was deductible, which is decisive of the case, as all the other claims for refund in the amended declaration were properly disallowed.

The statutes involved are 203(a)1 of the Revenue Act of 1916, and section 403(a)1 of the Revenue Act of 1918.

Section 203(a)1 of the Revenue Act of 1916 reads as follows:

"SEC. 203. That 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, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, *and such other charges against the estate as are allowed by the laws of the jurisdiction*, whether within or without the United States, under which the estate is being administered." [Italics supplied.]

The *ejusdum generis* rule of construction, unless Congress clearly intended otherwise, requires that the phrase "and such other charges against the estate" should be construed to include only such charges as are similar in character to those which have been enumerated before, and are ordinarily allowed in a court of probate. (Black on Interpretation of Laws, ch. 5, section 63.)

The Treasury Department followed the rule in its Regulations 2524, adopted September 10, 1917:

"An exhaustive study of the nature of State inheritance taxes has led this office to the conclusion that amounts paid to States on account of inheritance, succession, or legacy taxes are not 'such other charges against the estate as are allowed by the laws of the jurisdiction,' and accordingly are not deductible in arriving at the amount of Federal estate tax. Treasury Decision 2395 of November 19, 1916, is hereby revoked."

Congress in the 1918 Act, section 403, also clearly indicated that it was the correct rule of construction.

Section 403(a)1 of the Revenue Act of 1918 provided:

"That 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, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, *but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes.*" [Italics supplied.]

That it was not intended by Congress by the addition of the provision in italics in section 403(a)1 of the Act of 1918, expressly excluding succession taxes from the items deductible from the gross estate, to make any change in this respect in the Act of 1916, the report of the Committee on Ways and Means in recommending the change to Congress makes clear.

The congressional committee reporting the Revenue Act of 1918 to the House stated in explanation:

"Section 403, which takes the place of section 203 of the original Act (1916) defining the deductions for the purpose of arriving at the net estate, inserts a provision that income taxes upon income received after the death of the decedent, and *estate, succession, legacy* or *inheritance* taxes, are not to be deducted. Obviously, income taxes should not be deducted, for the reason that they are payable from and on account of income which is not included in the gross estate. Inheritance taxes payable to States are payable in respect to the benefits derived by individual legatees and beneficiaries, *and are not known until estate taxes have been ascertained.* These provisions are in conformity with existing rulings in the administration of the law, which rulings the committee thinks are in accord with the statute, and are now included for the sake of clarification, as in the case of additions made to section 402 mentioned above." [Italics supplied.]

The nature of the Massachusetts tax has been definitely settled (see *Attorney General* v. *Stone*, 209 Mass., 186; *Boston Safe Dep. & Tr. Co.* v. *Com'r. Corp. and Tax*, 267 Mass., 240) which construction was adopted by the United States Supreme Court in *Saltonstall* v. *Saltonstall* (276 U. S., 260) and many other Massachusetts cases, viz, that it is an excise tax on the right to receive

property by will, inheritance or gift, is assessed on the value of the legacy or gift or amount received by the legatee, distributee or donee, and is ultimately payable by the recipient. (G. L. Mass., 1921, ch. 65, sections 17–21.)

The provision in the Massachusetts statutes since 1907 that it shall be paid by the executor or administrator is evidently for the convenience and security of the State in collecting the tax. In 1902 the statute expressly provided that it should be paid by the legatee or donee. It has not, we think, become a charge upon the estate within the meaning of section 203(a)1 of the Revenue Act of 1916, because under chapter 563 of P. L. Mass., 1907, section 4, and the later acts, it is now required to be paid by the representative of the estate and then deducted from the legacy or distributive shares. (See sections 9, 10 of act of 1907.)

The court in *Attorney General* v. *Stone*, supra, in speaking of the act of 1902, said at page 191:

"By the third change, a personal liability for the tax is imposed upon the defendant. But this puts no greater burden upon him. Formerly the tax would have been paid by the administrator, and the defendant would have received so much less. By the new statute, he receives the full amount bequeathed to him, and must himself pay the tax. He is required to pay into the public treasury only the additional amount which by the statute he receives directly from the trustee and indirectly from the administrator. He is not harmed by this. Moreover, he is merely subjected to the payment of an excise tax *upon the privilege of receiving property bequeathed to him*, and is required to pay it only when he is allowed by our laws to have the actual enjoyment of this privilege." [Italics supplied.]

"It is settled," said the Massachusetts court in *Boston Safe Dep. & Tr. Co.* v. *Com'r. Corp. and Tax*, supra, "that the excise thus authorized 'is a tax upon "succession" which includes the privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of the property' * * * we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a doner's estate for an absolute gift made when no tax was thought of, * * * but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the State whether occasioned by death (*Stebbins* v. *Riley*, 268 U. S., 137) or effected by deed (*Keeney* v. *New York*, 222 U. S., 525; *Chanler* v. *Kelsey*, 205 U. S., 466; *Nickel* v. *Cole*, 256 U. S., 222). The present tax is not laid on the donor, but on the beneficiary. * * *"

"In this and earlier cases," said the United States Supreme Court in *Saltonstall* v. *Saltonstall*, supra, at page 269, "the Massachusetts court has held that the tax authorized by these statutes is a tax upon 'succession' which includes the 'privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property.' (See *Attorney General* v. *Stone*, 209 Mass., 186, 190; *Minot* v. *Winthrop*, 162 Mass., 113, 124; *Crocker* v. *Shaw*, 174 Mass., 266, 267.)"

The Federal statute seeks to reach only the total net estate transmitted at death, the payment by the representative of an estate of a succession tax which is eventually deducted from the legatee's or distributee's share does not lessen the net estate that passed at death and on which the Federal estate tax is computed. In case of a will the amount passing to the legatees, or in case of intestate property, the net estate actually passing at death to the distributees under the Massachusetts statutes, remains the same whether the legatees and distributees pay the tax directly or indirectly.

In *New York Trust Co.* v. *Eisner* (256 U. S., 345, 349), the Supreme Court held following the construction of the New York statute in the *Matter of Gihon* (169 N. Y., 443) that the New York transfer tax should not be deducted in determining the Federal estate tax, on the ground that it was not payable out of the estate. In this case Justice Holmes, who spoke for the court, said, referring to section 203(a)1 of the 1916 Act:

"For if the tax attaches to the estate before distribution—if it is a tax on the right to transmit, or on the transmission at its beginning, obviously it attaches to the whole estate except so far as the statute sets a limit. 'Charges against the estate' as pointed out by the court below are only charges that affect the estate as a whole, and therefore do not include taxes on the right of individual beneficiaries. *This reasoning excludes not only the New York succession tax but those paid to other States, which can stand no better than that paid in New York.*" [Italics supplied.]

In *Keith* v. *Johnson, Adm'x.* (271 U. S., 1 [T. D. 3864, C. B. V–1, 236]), which related to the assessment of the Federal income tax and followed later decisions by the New York courts, the transfer tax of that State was held to be deductible from the estate before anything passed to the legatee and therefore should be deducted in determining the Federal income tax. Since that decision, however, the Court of Appeals of New York (Cardoze, C. J.) has held in the *Matter of Oakes* (248 N. Y., 280) that the New York transfer tax is payable by the legatee or donee, and the Federal estate tax by the residuary legatees or out of the estate. Under the rule the Federal Supreme Court laid down in both the Eisner and Keith cases, and in many others (see *Saltonstall* v. *Saltonstall*, supra; *Stebbins* v. *Riley*, supra), it may be assumed that it will now follow the latest decision of the New York court in the *Matter of Oakes*, and hold that the New York transfer tax should not be deducted. The ruling in the Keith case did not reverse the ruling in the Eisner case. It merely followed the last construction of the New York statute by the local courts.

However, this court in *Old Colony Trust Co.* v. *Malley* (19 Fed. (2d), 346 [T. D. 4084, C. B. VI–2, 364]) held in principle, if not expressly, that Massachusetts succession taxes should not be deducted in arriving at the net estate of a decedent. It was determined in that case that the provision in section 403(a)1 of the Revenue Act of 1918, that estate and succession taxes should not be deducted, was merely declaratory of the intent of Congress in section 203(a)1 of the Act of 1916; that it was, as the committee of Congress stated at the time the change was proposed, merely "intended for the sake of clarification."

While that case applied to Federal estate taxes, this court pointed out in its opinion the difficulty of deducting a tax before the amount could be determined, except by an algebraic formula. It would be just as difficult to deduct succession taxes on residuary legacies, or on distributive shares in case of an intestate estate before determining the amount of the Federal estate tax, since the exact amount of the succession tax in either case can not be computed until the Federal estate tax has first been deducted and the residuum determined. The same argument against the deduction of the estate tax in determining the net estate so cogently applied in the Old Colony Trust Co. case, therefore applies with equal force to the deduction of a succession tax when it is ultimately paid by the recipient. It should not be presumed that Congress intended that a tax statute should be construed so as to render it necessary to resort to algebraic equations to determine a tax. (*Edwards* v. *Slocum*, 287 Fed., 651; also see *Edwards* v. *Slocum*, 264 U. S., 61 [T. D. 3584, C. B. III–1, 479].) The result of the plaintiff's contention is that succession taxes on residuary legacies and on the distributive shares of an intestate estate would be, in part, measured by the tax itself, which, we think, was not contemplated by the Massachusetts statute as construed by its courts.

Thus the authorities, we think, sustain the Government's contention that the inheritance or succession taxes on Massachusetts should not be deducted. Since the Federal courts follow the State courts in the interpretation of State laws, it is futile to try to harmonize the results of the decisions of the Supreme Court or of the several Circuit Courts of Appeals, where the opinions are based on local statutes as interpreted by local courts. (*Stebbins* v. *Riley*, 268 U. S., 137, 146; *New York Trust Co.* v. *Eisner*, 256 U. S., 345; *Keith* v. *Johnson, Adm'x.*, 271 U. S., 1, supra.)

Therefore, if we follow the construction of the Massachusetts statutes by the Massachusetts courts and the principles laid down by this court in *Old Colony Trust Co.* v. *Malley*, supra, and may apply the language of Justice Holmes in *New York Trust Co.* v. *Eisner*, quoted above, it must be held that the Massachusetts succession taxes are not deductible in this case.

The judgment of the district court is reversed with costs.

CAPITAL STOCK TAX RULINGS.

TITLE X.—SPECIAL TAXES. (1921)

REGULATIONS 64(1922), ARTICLE 11: Basis of the tax: "Carrying on or doing business." X–42–5258 Ct. D. 404

CAPITAL STOCK TAX—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. DOING BUSINESS.

A corporation engaged in mining, whose primary purpose is to hold the shares of another mining corporation, which in substantial part invests its revenue in current securities which it bought and sold, which lends money to a corporation in a speculative venture and invests in other mining property one of which has not been developed, which advances money repeatedly to disburse the taxes of its parent company and once to pay part of the purchase price of a property bought by its subsidiary mining company and on one or two occasions attempts to intervene in the policies of the mining company, is "doing business" within the meaning of section 1000(a) of the Revenue Acts of 1918 and 1921 and is therefore liable for the capital stock tax imposed by those sections.

2. "FAIR AVERAGE VALUE" OF CAPITAL STOCK.

The determination of the "fair average value" of the capital stock of a corporation under section 1000(a)1 of the Revenue Acts of 1918 and 1921 is primarily in the discretion of the Commissioner and the corporation assessed has the burden of proving the amount of tax illegally collected. Where such burden is not sustained the Commissioner's determination of the fair average value is approved.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Argonaut Consolidated Mining Co., appellant, v. Charles W. Anderson, as Collector of Internal Revenue for the Third District of New York, appellee.

Appeal by the plaintiff from a judgment of the District Court for the Southern District of New York dismissing a complaint at law upon a directed verdict in an action to recover for taxes erroneously exacted.

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

[July 15, 1931.]

OPINION.

L. HAND, Circuit Judge: The plaintiff is a Maine corporation, whose primary purpose is to hold the shares of the Argonaut Mining Co., which as its name implies, is engaged in the mining of gold, and whose properties are in California. The plaintiff in 1909 purchased 51 per cent of the shares of this company and has held them ever since; upon them it has received dividends, somewhat irregularly, from time to time, which it has used both in the declaration of dividends and for purposes to be mentioned later. A majority of the plaintiff's shares are in turn held by a third corporation, the White Knob Co., which may therefore be regarded as the parent of the other two. For the five years ending June 30, 1922 to 1926, both inclusive, the Commissioner of Internal Revenue assessed against the plaintiff a corporate stock tax whose validity and amount is the

subject of this action, the plaintiff having been forced to pay the assessments, which it now sues to recover. The questions at issue are whether the plaintiff was "doing business" within the meaning of the statute (section 1000(a) of the Acts of 1918 and 1921); and if so, what was the value of its capital stock on which the tax should have been calculated. As these are quite separate, it will be convenient to consider them independently.

Just what activities bring a corporation within the statutory definition the decisions, as is almost inevitable, do not certainly declare. That there is a degree of quietude which will exempt it, is indeed well settled (*Zonne* v. *Minneapolis Syndicate*, 220 U. S., 187; *McCoach* v. *Minehill, etc., Co.*, 228 U. S., 295; *U. S.* v. *Emery, etc., Co.*, 237 U. S., 28; *Eaton* v. *Phoenix Securities Co.*, 22 Fed. (2d), 497 (C. C. A. 2); *Rose* v. *Nunnally Co.*, 22 Fed. (2d), 102 (C. C. A. 3) [T. D. 4243, C. B. VII–2, 383]); but how far it may be active and still maintain its exemption, is in the nature of things impossible of statement in general terms. In most of those cases in which the corporation has succeeded its activities have been confined to holding the title of property, whose usufruct it receives and distributes in dividends. When this is the whole scope of its dealings, it does no business within the meaning of the statute.

However, it takes little to bring it from behind this shield. Thus, selling and leasing land, and exploring for ore, were enough in *Von Baumbach* v. *Sargent Land Co.* (242 U. S., 503); and borrowing money to assist the subsidiary in *Edwards* v. *Chile Copper Co.* (270 U. S., 452 [T. D. 3857, C. B. V–1, 410]). On the other side the investment of its funds in current securities from which income is derived was not enough in *McCoach* v. *Minehill, etc., Co.* (228 U. S., 295). The decisions in the lower courts represent so many variants that it is scarcely profitable to consider them; as in so many other matters we have to mark off a zone of increasing impenetrability, rather than to draw a line. On the whole it appears to us that the plaintiff's activities made an independent business.

It did not distribute all its revenue in dividends, but in substantial part invested them in current securities which it bought and sold, with an eye to their prospects of rise or fall. So far *McCoach* v. *Minehill, etc., Co.* is so closely akin that, if there had been nothing more, it would be hard to distinguish it. But several of the enterprises in which it engaged were of quite a different sort. It lent money to the Mojave Tungsten Co., a fruitless speculation; it invested in other mines, the Kennedy and the Sinaloa. It invested in a mining property in Minnesota, not then or ever since, developed. These can be accounted for only on the assumption that it was looking about for speculative ventures, and not merely seeking the usual financial investments for its surplus funds. The difference appears to us somewhat more real than it did to the learned judge, though doubtless in the end the issue is one of degree. Everyone who has any property puts it out at profitable investment, if he can; but if he can learn of its prospects from others and need not give it his continuous supervision, he may go about his other affairs; unless he devotes much time to it he can scarcely be said to be in business. Not, so, when he chooses ventures whose possibilities he must learn for himself, which he must follow up and as to which he has no ready means of information. Any substantial concern with such things is pro tanto a business; its amount is immaterial here.

Aside from these, the plaintiff advanced money repeatedly to disburse the taxes of its parent, the White Knob Co., and once, to pay part of the purchase price of a property bought by the mining company, which that company could not raise at once. Moreover, on one or two occasions it attempted to intervene in the policies of the mining company, though apparently without effect. It is true that the dealings we have recited overlapped the period here in suit. That does not matter, if they disclose the general character of the enterprise. Of course it is true that a company may be active at one season and inactive at another, depending upon its choice to engage in, or withdraw from, business, and in such a case only its dealings within the taxable period determine its liability. But the mere fact that activities, which may fairly be taken as characteristic, chance to happen outside the period concerned, is irrelevant. The sum of all these dealings appears to us to carry the corporation outside the class of those inert companies, which can assert that they are mere dry holders of property, and conduits to carry over its profit to the persons eventually entitled.

The remaining question is whether the plaintiff proved that the taxes properly assessable against it were less than those which it was forced to pay,

and if so, by how much. Not only has it the burden of proof in general (*U. S.* v. *Anderson*, 269 U. S., 422, 443 [T. D. 3839, C. B. V–1, 179]), but it is obvious that without proving the quantum of the illegal exaction there can be no ad damnum. Moreover, the appraisal of a corporation's capital stock under this section is a matter primarily in the discretion of the Commissioner (*Ray Consolidated Copper Co.* v. *U. S.*, 268 U. S., 374, 377 [T. D. 3721, C. B. IV–1, 333]), on whom the chief, if not the only, demand is that he honestly consider all relevant evidence which can affect the result. For this reason the occasional sales of the mining company's shares upon the San Francisco Stock Exchange were not controlling. In *Ray Consolidated Copper Co.* v. *U. S.*, the proof of this sort was far more persuasive than that offered here; the sales had been continuous throughout the period, and in very large quantities. They were not enough to control the Commissioner's appraisal, based upon an analysis of the property's value. Whatever we might independently think of the conclusiveness of such evidence, that decision forbids our adopting it as the authoritative measure of the value of the capital stock. Going about the matter as the Commissioner did, the only debatable item of the mining company's assets is the value of the ore body, and the method which he used to appraise this was reasonable; that is, from the tonnage in the ground on March 1, 1913, deduct extraction, and assume that what was left had a value determined by the estimated profit per ton. The figure so reached, since it represents a sum not presently available, must then be corrected to get its present value, by a formula which presupposes exhaustion within an assumed period, and which discounts future installments accordingly. This the Commissioner had done in fixing the taxes of the mining company, and he used the same figures for its shares held by the plaintiff. The propriety of this is challenged, but it is not necessary to pass upon it, because, even though the method were shown to be improper, the plaintiff can not compel a reassessment. It can recover only an ascertainable sum as proved excess. Such is the predicament of any taxpayer.

Its only substantial proof was in the deposition of one, Stent, an official of the mining company. He gave the original tonnage on March 1, 1913, the yearly extraction, and the gross return for each year. He also gave the yearly expense of extraction including incidental construction, but excluding fire and flood damage, a substantial item in the period in question, but sporadic. We can figure the gross return per ton for each of the five years, based upon that year and the four years before it, and deduct the average cost of extraction reckoned in the same way. The difference is the value per ton of what remained in the ground, based upon the same experience. The result for the several years varies a good deal, but that is natural in view of the differences in cost and in the value of the ore; it need not surprise us. If we multiply the amount left in the ground in each year by the figure so obtained, the result is its value, ignoring the necessary discount. For the years 1920, 1921, and 1922, representing the taxing periods ending June 30, 1922, 1923, and 1924, the figure taken by the Commissioner as the present value of the ore body was about 40 per cent of this amount; it was 42 per cent for 1923 and 60 per cent for 1924. For all the years except the last this is well within any reasonable discount, figured for example on Hoskold's table, if the life of the mine be taken as terminated in 1931, again a reasonable estimate. The last year is a little more doubtful, but even that allows for a rate of interest of about 11 per cent, which can not be regarded as arbitrarily low, even in such a business as mining. The plaintiff has not proved the proper interest rate for such a business.

In such complicated computations it is not possible to cut more closely. We therefore agree with the district judge also in his conclusion that the plaintiff as to this feature of the case has failed to show that the valuation was arbitrary.

Judgment affirmed.

MISCELLANEOUS TAX RULINGS.

TITLE IV.—TAX ON CIGARS, TOBACCO, AND MANUFACTURES THEREOF. (1926)

REGULATIONS 8 (1928), ARTICLE 127: Purchase of stamps. X–43–5270 T. D. 4328

PURCHASE OF STAMPS FOR IMPORTED TOBACCO MANUFACTURES.

Internal Revenue Form 923 to be used in lieu of Customs Form 3493; affidavit required relative to retail prices of imported large cigars.—Article 127, Regulations 8, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Customs Form 3493 heretofore used as authority from customs officers to collectors of internal revenue for the sale of stamps to owners, consignees, or importers for the tax-payment of imported tobacco manufactures has been abolished. (Customs T. D. 44749, dated March 24, 1931.) This form being used solely for internal revenue purposes, a revision thereof, approved by the Bureau of Customs, has been printed as Internal Revenue Form 923, which will be used hereafter in lieu of the abolished customs form.

Article 127 of Regulations 8, revised April, 1928, is amended to read as follows:

ART. 127. *Purchase of stamps.*—The same kinds of stamps required for the tax-payment of domestic tobacco manufactures must be affixed to packages of such articles imported from foreign countries. Sales of stamps by collectors of internal revenue for the payment of tax on imported tobacco, snuff, cigars, or cigarettes shall be made *only* to owners, consignees, or importers upon receipt of Form 923 (Order for stamps—Imported manufactures), properly filled out and certified by the proper customs officer having custody of such articles. These orders shall show the actual number of stamps of the required denominations and class needed for tax-payment of specific importations, and have the blank spaces properly filled in thereon.

Importers of cigars weighing more than 3 pounds per 1,000 must determine for themselves the rate at which tax will be paid thereon, as provided in article 72(b), and will execute the affidavit on the back of the order form relative to the retail prices of the cigars in their principal market. Where separate forms are executed, as required for different classes of stamps to tax-pay an importation, the affidavit need be executed only on one of the forms, but reference should be made thereto on the other forms. The affidavit will be waived in case of importation by mail or in passenger's baggage.

In the case of importation by mail, customs officers will fill out and attach stamp order Form 923 to each mail entry on Customs Form 3419. When addressed for delivery at places other than where examined by customs officers and where no collector of internal revenue or stamp deputy is located, the customs officer will also fill out and attach the letter, Customs Form 3473, and forward the same to the postmaster with the package. The addressee

will sign Form 923 and tender it with remittance to cover value of the required stamps to the nearest collector of internal revenue. For location of collectors' offices see page 146. These stamps will be affixed to the packages and canceled, as prescribed in article 128, before delivery by the postmaster. (Customs Regulations, 1923, article 350.) See also Customs T. D. 44208, dated August 22, 1930, relative to mail shipments of cigars from Cuba.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved October 20, 1931.
A. W. MELLON,
Secretary of the Treasury.

TITLE VIII.—STAMP TAXES. (1926)

SCHEDULE A–2.

REGULATIONS 71, ARTICLE 25: Basis of tax. X–41–5247
ARTICLE 77: Further definitions. T. D. 4326

STAMP TAXES—SCHEDULE A–2, TITLE VIII, REVENUE ACT OF 1926.

Articles 25 and 77, Regulations 71, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 25 of Regulations 71 is hereby amended to read as follows:

ART. 25. *Basis of tax.*—The Act imposes the tax on each original issue of the certificates specified, irrespective of the purpose of the issue, the person to whom issued, or the time of delivery. Liability for the tax so imposed does not arise or accrue unless and until the certificates are actually issued. The phrase "whether on organization or reorganization," as used in the Act, means whether on organization or reorganization or not, and does not limit the operation of the statute to occasions of organization or reorganization.

Article 77 is hereby amended by omitting therefrom subdivision (b) of division (1) thereof defining the term "issue." Subdivisions (a), (c), (d), and (e) of division (1) will hereafter be designated as (a), (b), (c), and (d), respectively.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved October 1, 1931.
A. W. MELLON,
Secretary of the Treasury.

SCHEDULE A–5. PASSAGE TICKETS.

REGULATIONS 71, ARTICLE 54: Passage tickets issued to private individuals. X–38–5213 Ct. D. 386

STAMP TAXES—REVENUE ACT OF 1926—DECISION OF COURT.

PASSAGE TICKETS.

Where a company owning and operating a steamship makes a contract with a membership organization for a round trip to a place not in the United States, by the terms of which the owner

has charge at all times of the vessel by its officers and crew, pays the operating expenses of the vessel, and disposes of the full complement of passenger accommodations for a lump sum for a minimum number of passengers, and at a flat rate to cover all passengers in excess thereof, and the membership organization issues, pursuant to the authority of the contract, which is declared to be "in accordance with the general terms and conditions of the regular ocean steamship passenger tickets," "membership cards" to be "used as identification of the guests on board," the contract in connection with the identification tickets manifest that the agreement is for the transportation of the passengers by the steamship company involving a sale by it of "passage tickets" in bulk within the meaning of section 800, Schedule A, subdivision 5, of the Revenue Act of 1926, which is taxable to the steamship company under that subdivision.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Cosulich Line of Trieste, plaintiff-appellant, v. *Frank Collis Bowers, Executor of the Estate of Frank K. Bowers, Deceased, former Collector of Internal Revenue, defendant-appellee.*

[April 20, 1931.]

OPINION.

MANTON, Circuit Judge: This action is brought to recover a tax imposed by section 800, Title VIII, of the Revenue Act of 1926 (44 Stat. (part 2), 99) upon the sale of steamship tickets. It provides:

"* * * There shall be levied, collected, and paid, for and in respect of the several * * * documents * * * mentioned and described in Schedule A of this title, * * * by any person who makes, signs, issues (or) sells * * * the same * * * the several taxes specified in such schedule."

Schedule A–5 provides in part as follows:

"Passage ticket, one way or round trip, for each passenger, sold or issued in the United States for passage by any vessel to a port or place not in the United States * * *."

By agreement of May 27, 1926, the Salaam Temple, of Newark, N. J., agreed to purchase the full complement of passenger accommodations at a fixed charge, on the *Presidente Wilson* for a return trip from New York to Bermuda. The appellant claimed it contracted for a private charter of the vessel, while the appellee says it was a sale of tickets in bulk. The contract between the Salaam Temple and the steamship company provided, among other things, in paragraph 7, that—

"Operating expenses, including port charges—docking, pilotage, and other incidentals in operating the ship, will be borne by this company."

Paragraph 9: "The stay at Bermuda must be left to the discretion of the captain in order to insure his arrival back to New York on Monday morning, * * *."

Paragraph 10: "Membership cards: It is understood that each guest will be provided by you with a membership card on which will appear the berth and cabin assigned and will be used as identification of the guest on board."

Paragraph 12: "Contract as drawn up is in accordance with the general terms and conditions of the regular ocean steamship passenger ticket on file in this office and at the disposal of your committee at all times."

The identification ticket issued by the Salaam Temple provided: "While it is the aim of Salaam Temple to give all passengers the best possible service and attention throughout, responsibility must be declined by Salaam Temple for damages or delays on the pilgrimage, or through imposition of quarantine, customs inspection, or any casualty or untoward incident which may be occasioned by circumstances beyond the control of Salaam Temple. Transportation is furnished by the Cosulich Line in accordance with their general rules, regulations and passage contract."

These provisions of the contract and the understanding stated in the identification ticket show that the agreement was for the transportation of the passengers and while all the passenger space was reserved by the Salaam Temple, it is quite clear that this was not a demise of the vessel to the Temple. The control

of the vessel remained with the owner. Its navigation and operation were in the hands of the vessel owner. Indeed, the Salaam Temple exercised no degree of control over the vessel other than the right to transportation and the exclusive accommodation for its members and friends as passengers. The rule is stated in *Leary* v. *United States* (81 U. S., 607, 610) as follows:

"If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibility of the owner are not changed. In the first case, the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel."

(See also *The Allianca*, 290 Fed., 450 (E. D. Va.); *Boston Elevated Ry. Co.* v. *Malley*, 288 Fed., 864 (E. D. Mass.) [T. D. 3479, C. B. II–1, 251].)

The tax in question is to be paid, under the phrase of the statute, on passenger tickets sold or issued, one way or round trip for each passenger. The sale of tickets provided for a minimum of 400 passengers for a lump sum of $30,000. The berthing capacity of the vessel was stated to be in excess of 400 but a flat rate of $35 was specified to cover all passengers booked in excess of the minimum number of 400. An initial deposit of $5,000 was paid and "the balance of the total passage money, including passengers booked in excess of 400," was to be paid prior to the commencement of the voyage. There were 451 passengers and dividing that number into the lump sum of $30,000, the Commissioner arrived at the figure of $67 as the cost of passage per person. He assessed a tax of $5 for each of the 451 passengers. The tax is to be paid under the statute by the person who issues and sells the tickets. The Salaam Temple members were the passengers. It merely identified by its cards the persons and the accommodations they were to occupy on the vessel. The transportation was by the steamship company. It had control of the navigation and had charge at all times of the vessel—and this was by its officers and crew. It paid the expenses of the operation of the vessel, the lighterage and docking charges. The Temple merely purchased all the tickets for the voyage. When it obtained the tickets, it distributed them with identification cards to its members, but in the first instance the appellant sold the 451 tickets to the Salaam Temple for passengers to be carried on its vessel on a trip between New York and Bermuda. What happened after that sale is unimportant. It is a sale which is taxable within the statute.

Judgment affirmed.

TITLE XI.—GENERAL ADMINISTRATIVE PROVISIONS. (1926)

INTEREST ON REFUNDS AND CREDITS.

SECTION 1116: Interest on refunds and credits. X–38–5214 Ct. D. 385

FEDERAL TAXES—REVENUE ACTS OF 1924, 1926, AND 1928—DECISION OF COURT.

INTEREST—REFUND—TAX ON DISTILLED SPIRITS.

Interest is not allowable on a refund made pursuant to the Act of February 11, 1925, which provides "that the Commissioner of Internal Revenue may, pursuant to the provisions of section 3220, Revised Statutes, as amended, allow the claim of any distiller for the refund of taxes paid in excess of $2.20 per proof gallon on any distilled spirits produced and now owned by him and stored on the premises of the distillery where produced." That Act has no application to the statutory provisions with reference to interest, and the

tax refunded was not "erroneously or illegally assessed or collected or in any manner wrongfully collected" as required in section 1019 of the Revenue Act of 1924 or section 1116(a) of the Revenue Act of 1926, was not a sum which was "excessive" as provided by the latter section, and the tax paid was not an "overpayment" under section 614(a) of the Revenue Act of 1928.

COURT OF CLAIMS OF THE UNITED STATES. No. L–515.

Sunny Brook Distillery Co. v. *The United States.*

[April 13, 1931.]

OPINION—ON DEMURRER.

GREEN, Judge, delivered the opinion of the court.

The petition alleges in substance that the plaintiff is a corporation, and, being the owner of a certain number of cases of distilled spirits which it had produced on its premises, paid taxes thereon at the rate of $6.40 per proof gallon in the year 1919; that Congress, by an Act approved February 11, 1925, authorized the Commissioner of Internal Revenue to refund all taxes paid by the plaintiff in excess of $2.20 per proof gallon on such distilled spirits; that plaintiff filed claims for refund of said tax pursuant to the said Act; and that the Commissioner of Internal Revenue allowed said refund claims in the amount that had been paid in excess of $2.20 per proof gallon (with certain small deductions not disputed by plaintiff and not necessary to be mentioned here), but refused to allow plaintiff interest on the amount allowed from the dates of the payment of the taxes to the date of the allowance of the said refund, such interest amounting to $46,923.23.

The defendant demurs to the petition on the ground that it does not state a cause of action, and the issue arising on the demurrer is whether the ruling of the Commissioner in refusing to allow interest was correct.

The Revenue Act of 1924 (43 Stat., 253) provided:

"SEC. 1011. Section 3220 of the Revised Statutes, as amended, is reenacted without change, as follows:

"'The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *.'

"SEC. 1019. Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, * * *."

The Act of Congress approved February 11, 1925 (43 Stat., 860, ch. 208), provided:

"That the Commissioner of Internal Revenue may, pursuant to the provisions of section 3220, Revised Statutes, as amended, allow the claim of any distiller for the refund of taxes paid in excess of $2.20 per proof gallon on any distilled spirits produced and now owned by him and stored on the premises of the distillery where produced, * * *."

The Revenue Act of 1926 (44 Stat., 9) provided:

"SEC. 1116. (a) Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, * * *."

The Revenue Act of 1928 provided in section 614:

"SEC. 614. (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, * * *."

It is argued on behalf of the defendant that neither section 1019 of the Act of 1924, section 1116 of the Act of 1926, nor section 614 of the Act of 1928 provided for the allowance of interest in such a case as the one now before the court, and we think it must be conceded that these statutory provisions standing alone would not entitle the plaintiff to the interest which it seeks to recover. It is plain that the original payment of the taxes included no "overpayment," as required by the Act of 1928, nor were the taxes so paid "erroneously or illegally assessed or collected, * * * or in any manner wrongfully collected," as required in section 1019 of the Act of 1924 and section 1116 of the Act of 1926. The only specification of the Act of 1926 which could possibly be construed as having any application is found in the word "excessive," as applied to the tax. But we think it equally clear that this word did not in any way refer to matters which pertained to the propriety or equity of the tax, but simply to the question of whether or not it exceeded the amount which could be legally collected. Moreover, the language used in these two sections with reference to cases where interest can be allowed is substantially the same as the language of section 1011 of the Act of 1924, amending section 3220 of the Revised Statutes, and prescribing conditions under which refunds could be allowed. Evidently Congress considered that the provisions of the section last referred to were not sufficient to authorize a refund in a case like the one at bar, and consequently the provision under which the refund herein was granted was enacted. In other words, Congress did not consider that the circumstances of the instant case were included in any of the specifications of section 1011 of the Act of 1924, and not being included therein the case does not come under the provisions of section 1116 of the Act of 1926 or section 1019 of the Act of 1924.

It is contended, however, on the part of the plaintiff that by the terms of the Act of February 11, 1925, which provided for the refund granted in this case, section 1116 of the Revenue Act of 1926, providing for interest, becomes applicable. Attention is called to the fact that the Act of 1925 states that the refund may be made "pursuant to the provisions of section 3220, Revised Statutes, as amended," and it is said that this language has brought the taxes herein involved within the scope of the interest allowance provided in the Revenue Act of 1924 and subsequent Acts.

It is quite true that when a refund is allowed under the provisions of section 3220, as amended, interest is also allowed under the provisions of section 1019 of the Act of 1924 or of section 1116 of the Act of 1926, but this is because the requirements for the allowance of interest under these sections are the same as the requirements for the allowance of a refund under section 3220, and not because the sections providing for interest made any reference to the section providing for refunds. We do not think the language last above quoted can be construed to mean that a case like the one at bar should be held to be included within the provisions of section 3220. This would be doing too much violence to the language of that section which, as we have already shown, was not considered by Congress to include a case of the nature that we are now considering. The words "pursuant to the provisions of section 3220" mean, as we think, that the case should be treated by the Commissioner as if the provisions of section 3220 were applicable, but this does not lead us to the conclusion that the provisions of section 1019 of the Act of 1924 or of section 1116 of the Revenue Act of 1926 were applicable also, especially when it is considered, as shown above, that their terms and specifications exclude a case like the one at bar.

It is said that if this construction is applied, the words "pursuant to the provisions of section 3220" might as well have been left out, but this is not quite correct, as under section 3220 the Commissioner was not only authorized to allow the claim for refund (which is all that the Act of 1925 provided for), but also was authorized to pay back the taxes wrongfully collected.

Whatever may have been the application of the Act of 1925 to section 1011 of the Act of 1924, amending section 3220 of the Revised Statutes, we think it could have had no application to the statutory provisions with reference to interest. If these provisions with reference to interest had been contained in section 1011 above referred to, the argument would have had much more force, but they were in a different section, or in entirely different Acts, and even if the Act of 1925 can be said to have the effect to amend section 3220 (included in section 1011 of the Act of 1924), we do not think it can be held to amend any of these provisions in other sections and other Acts with reference to interest. The terms and specifications of the statutes with reference to interest still stand and are of such a nature as to exclude the claim of plaintiff made herein.

We are, therefore, of the opinion that the Act of 1925 in no way brought plaintiff's claim within the requirements made for the allowance of interest.

It follows that the demurrer must be sustained and the petition dismissed. It is so ordered.

BOOTH, Chief Justice, concurs.

LITTLETON, Judge, concurring: Section 600(a), Title VI, of the Revenue Act of 1918, approved February 24, 1919, provided—

"That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawing, and collected under the provisions of existing law."

The plaintiff corporation was engaged in the business as a distiller of alcoholic liquors with principal office at Louisville, Ky., and was liable to the tax imposed as above mentioned. It was required to make returns and pay the tax in question, and was liable to the penalty of $1,000 provided in section 1308(a) of the aforementioned Act for failure to make a return required by law or regulation. It was further liable under section 1308(b) to a fine of not more than $10,000 or imprisonment for not more than one year, or both, for willfully refusing to pay any such tax, make such return or supply such information at the time or times required by law or regulation, or for any willful attempt in any manner to evade such tax. Under subdivision (c) of the same section plaintiff was liable to a further penalty equal to the amount of the tax evaded or to the penalties provided in sections 3176 and 3256 of the Revised Statutes.

In 1919 plaintiff owned and had stored on its premises, in accordance with law, 6,455 cases of distilled spirits which had theretofore been produced by the plaintiff, as the distiller thereof, containing 19,220.4 proof gallons, upon which it was liable under the aforementioned section 600(a) to a tax at the rate of $6.40 per proof gallon. The tax so imposed on said distilled spirits was duly returned and paid by plaintiff during the months of March, April, May, and June, 1919, in the amount of $123,010.56.

On February 11, 1925, an Act of Congress (43 Stat., 860), quoted in part in the foregoing opinion, authorized the Commissioner of Internal Revenue, pursuant to the provisions of section 3220 of the Revised Statutes as amended, to allow the claim of any distiller for the refund of taxes paid in excess of $2.20 per proof gallon on any distilled spirits produced and owned by him and stored on the premises of the distillery where produced. In February, 1925, plaintiff made claim upon the Commissioner of Internal Revenue for the refund of the tax paid on the 19,220.4 proof gallons of spirits in excess of $2.20 per proof gallon, said claim for refund being for $80,725.68, or such greater amount as might be legally refundable. July 13, 1925, the Commissioner notified plaintiff that he had allowed the claim in the amount of $80,135.79 and rejected it in the amount of $589.89. That portion of the claim disallowed resulted from leakage, breakage, etc., which reduced the total number of proof gallons on hand. No claim is made for the disallowed portion. Treasury check for $80,135.79 was received by plaintiff with the Commissioner's notice of his action upon the claim.

On May 8, 1928, plaintiff owned 2,545 cases of distilled spirits which were then in a tax-paid warehouse operated in connection with and contiguous to an internal-revenue bonded warehouse upon the premises of plaintiff. The aforementioned cases contained 7,635 proof gallons of distilled spirits theretofore produced by the Associated Distilleries of Kentucky, a subsidiary of and owned by plaintiff. The tax of $6.40 per proof gallon imposed by section 600(a) of the Act of February 24, 1919, on the aforementioned 7,635 proof gallons had been duly returned and paid by the distiller thereof during the months of May and June, 1919, amounting to a total of $48,864.60.

On May 8, 1928, Congress passed another Act (45 Stat., 492, ch. 509), providing "That in addition to the authority contained in the Act entitled 'An Act to refund taxes paid on distilled spirits in certain cases,' approved February 11, 1925, the Commissioner of Internal Revenue may allow the claim of the owner (whether the distiller or his successor or other person) for the refund of taxes

paid (whether by such owner or any other person) in excess of $2.20 per proof gallon on any domestic distilled spirits which are now in a tax-paid warehouse operated in connection with and contiguous to an internal-revenue bonded warehouse, if proof satisfactory to the Commissioner of Internal Revenue is furnished of the ownership and identity of the distilled spirits as to which the refund is claimed, and of the amount of tax paid thereon."

May 8, 1928, plaintiff made claim upon the Commissioner for the refund of $32,067, or such greater amount as might be legally refundable, being the tax alleged to have been paid on the 7,635 proof gallons of distilled spirits in excess of $2.20 per proof gallon. August 9, 1928, the Commissioner notified plaintiff that he had allowed the claim for $31,903.83 and had rejected it in the amount of $163.17, the latter amount being that portion of the claim relating to the quantity of distilled spirits missing. Plaintiff received Treasury check for $31,903.83. No question is raised as to that portion of the claim which the Commissioner rejected.

Section 3220 of the Revised Statutes, as amended by section 1011 of the Revenue Act of 1924 and section 1111 of the Revenue Act of 1926, authorized the Commissioner, subject to regulations prescribed by the Secretary of the Treasury to refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes unjustly assessed or excessive in amount, or in any manner wrongfully collected. The provisions of law with reference to the payment of interest upon taxes refunded at the time both of the aforementioned Acts of Congress of 1925 and 1928 became effective were contained in section 1019 of the Revenue Act of 1924 and section 1116 of the Revenue Act of 1926, which provided for the payment of interest upon the refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected.

The reference in the Act of February 11, 1925, authorizing the Commissioner to allow the claim of any distiller for a refund of taxes paid in excess of a certain amount, to the provisions of section 3220 of the Revised Statutes was for the purpose of making it certain that in the preparation, presentation, and investigation of the claim the Commissioner of Internal Revenue should have authority to proceed as in other claims for the refund of taxes in accordance with regulations duly made. In other words, Congress recognized that there already existed under section 3220 an established practice in the Treasury Department with reference to the preparation and presentation of claims for refund and with reference to investigations and hearings thereon, and the Commissioner was authorized to follow the provisions of section 3220 relating to refunds of all taxes in allowing the claim of any distiller for the refund of the taxes authorized in the Acts of 1925 and 1928. The amount of tax which Congress by the Acts of 1925 and 1928 authorized the Commissioner to refund was a tax levied by Congress, legally collected, and was not excessive in amount. From the time the tax became due under the statute, it belonged to the United States and at no time after it was paid was it wrongfully withheld. The Government was at no time using funds that belonged to the plaintiff. The underlying purpose of the allowance of interest upon a refund of a tax is that the Government has collected from the taxpayer amounts in excess of those authorized by the taxing Acts and has had the use of money that did not belong to it. The reason for the allowance of interest did not exist in respect of the tax in question and in the absence of specific authorization for the payment of interest upon the refund of amounts which had been legally collected and at all times belonged to the United States, we should not read into the two Acts in question the general provisions of law with reference to the payment of interest upon a tax erroneously or illegally assessed or collected. Prior to the Revenue Act of 1921, approved November 23, 1921, no interest was payable upon taxes overpaid and refunded. By that Act interest on overpayments was allowed under certain conditions. The Revenue Act of 1924 (43 Stat., 253), in section 1019, contained a provision for the payment of interest from the date of overpayment to the date of allowance of refund. The Revenue Act of 1926 (44 Stat., 9), in section 1116, again restricted the allowance of interest upon refunds and credits by paying interest upon amounts wrongfully withheld by the Government during the time when the taxpayer was not indebted to the Government for a like amount and also shortened the period during which the taxpayer could receive interest upon a claim. (See *Riverside & Dan River Cotton Mills* v. *United States*, 69 C. Cls., 70 [Ct. D. 215, C. B. IX–2, 269], and

George U. Hind v. *United States*, 70 C. Cls., 288 [Ct. D. 226, C. B. IX–2, 272].) Section 614 of the Revenue Act of 1928, approved May 29, 1928, continued the provisions of the 1926 Act with reference to the payment of interest on credits and refunds but changed the date to which interest on a refund should be paid from the date of the allowance thereof to a date preceding the date of the refund check by not more than 30 days. By reason of the changes in the interest provisions subdivision (c) of section 1116 of the Revenue Act of 1926 made that section applicable to any refund paid and to any credit taken on or after the date of the enactment of that Act even though such refund or credit was allowed prior to such date and subdivision (d) of section 614 of the Revenue Act of 1928 contained a similar provision with reference to the provisions of that section. Subdivision (c) of the 1926 Act and subdivision (d) of the 1928 Act have no bearing on the question here. They were inserted to guard against the computation of interest under a prior statute because of certain action taken by the Commissioner of Internal Revenue. (*George U. Hind*, supra.)

The United States is not liable for interest except by its consent. The allowance of interest against the Government is a matter of grace, manifestly restrictive, is never to be presumed and should not be allowed unless clearly and specifically authorized. We may not, therefore, presume that Congress in authorizing the refund of a portion of a tax duly imposed and legally collected by a special Act which makes no mention of interest, intended that other provisions of law for the payment of interest upon taxes erroneously and illegally collected and wrongfully withheld should apply. Neither may we read into the special Acts of 1925 and 1928 for the benefit of distillers the general-interest provisions with respect to illegal collections merely because such special Acts refer to section 3220, Revised Statutes, as the authority by which the Commissioner may allow the refund.

Congress authorized the Commissioner to follow the provisions of section 3220 in allowing the claim for a refund of a portion of a tax paid on distilled spirits on hand at the date of the enactment of those Acts. The fact that he was authorized to proceed in conformity with section 3220 indicates that Congress recognized that in authorizing the repayment of a portion of the tax in question it was making an exception to the general rule with reference to refunding taxes, and it inserted the words "Pursuant to the provisions of section 3220, Revised Statutes, as amended," to permit the Commissioner to invoke the provisions of that section and no other, in connection with whatever action he might take in considering and allowing the claim. If we read into the Acts of 1925 and 1928 the general-interest provisions of the internal-revenue laws, it would seem that we would also be compelled to read into those Acts the limitation provisions as well, for no exception in this regard was made. In that event the refunds upon which interest is here claimed were barred and therefore illegal.

I am of opinion that Congress simply intended to return to distillers the difference between the tax of $6.40 per gallon levied and collected upon liquor withdrawn and held for sale for beverage purposes, and the lesser tax of $2.20 levied and collected upon liquor held in bond and not yet withdrawn for beverage purposes or for the manufacture of any article used or intended for use as a beverage, *without interest thereon.* The reason for the return of a portion of the tax levied, assessed, and paid was because the liquor upon which levied and collected could not, because of the eighteenth amendment to the Constitution, be sold for beverage purposes. It was purely a voluntary act, and we may not assume that Congress intended to return more money than it specifically authorized.

MISCELLANEOUS RULINGS.

TOBACCO.

REGULATIONS 8, ARTICLE 83: Cancellation of cigar and cigarette stamps. X–32–5167 T. D. 4319

CANCELLATION OF CIGAR AND CIGARETTE STAMPS.

Certain large cigar stamps, small cigarette and small cigar stamps, when so affixed as to seal the package need not be further canceled. Article 83, Regulations 8, amended accordingly.

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

To Collectors of Internal Revenue and Others concerned:

The first sentence of article 83 of Regulations 8, revised April, 1928, is amended to read as follows:

(*a*) Except as provided in subdivision (*b*) of this article, each stamp affixed by the manufacturer to a box, package, or other container of cigars or cigarettes shall be canceled in the following manner.

Subdivision (*b*) of said article 83 is amended so as to read as follows:

(*b*) Stamps need not be canceled as provided in subdivision (*a*) when they are so affixed to package goods containing 3, 5, 7, or 10 cigars weighing more than 3 pounds per 1,000, or to packages of cigarettes or cigars weighing not more than 3 pounds per 1,000, as effectually to seal the packages and render it impracticable to remove the contents without breaking the stamp.

H. F. MIRES.
Acting Commissioner of Internal Revenue.

Approved July 31, 1931.

S. LOWMAN,
Acting Secretary of the Treasury.

REGULATIONS 8 (1928), ARTICLE 86: Classification labels. X–47–5300 T. D. 4329

CIGARS—CLASSIFICATION LABELS.

The classification label may be reduced in size or affixed elsewhere than on the front of boxes or containers for cigars. Article 86, Regulations No. 8, amended accordingly.

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

To Collectors of Internal Revenue and Others Concerned:

Article 86 of Regulations No. 8, approved April 24, 1928, as amended by Treasury Decision 4250, approved November 24, 1928 [C. B. VII–2, 402], is further amended to read as follows:

ART. 86. *Classification labels.*—Every manufacturer must affix to each box or container of cigars weighing more than 3 pounds per thousand a conspicuous label indicating the clause of the section under which the cigars therein contained have been tax paid, which must correspond with the tax-paid stamp on said box or container. Except as hereinafter provided, such label shall be not less than 1½ inches long nor less than three-fourths of an inch wide and shall be affixed to, or printed directly on, the box or container. In the case of boxes or containers, the size or style of which will not permit compliance with the above provisions, the label may be proportionately reduced in size. In all cases the label must be legible and bear the appropriate one of the following statements:

"The cigars herein contained were manufactured to retail at not more than five cents each and are so tax paid."

"The cigars herein contained were manufactured to retail at more than five cents each and not more than eight cents each, and are so tax paid."

"The cigars herein contained were manufactured to retail at more than eight cents each and not more than fifteen cents each, and are so tax paid."

"The cigars herein contained were manufactured to retail at more than fifteen cents each and not more than twenty cents each, and are so tax paid."

"The cigars herein contained were manufactured to retail at more than twenty cents each, and are so tax paid."

In order to minimize the possibility of error in affixing proper labels, manufacturers will be permitted to use the appropriate class letter, A, B, C, D, or E, on such labels, which letter should appear directly to the left of the printed matter and the length of the label may be increased approximately one-half inch for this purpose. The price limitations of the different classes may be expressed in numerals, if desired, at the option of the manufacturer.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved November 13, 1931.

A. W. MELLON,
Secretary of the Treasury.

X–29–5147
Mim. 3885

REGULATIONS 76 (REVISED JULY 3, 1931).

Principal changes embodied in new Regulations 76, relating to shipment or delivery of manufactured tobacco, snuff, cigars, or cigarettes for consumption beyond the jurisdiction of the internal revenue laws of the United States without payment of internal revenue tax.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., July 7, 1931.

To Collectors of Internal Revenue:

Regulations 76, revised, relating to 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 without payment of internal revenue tax, approved July 3, 1931, have been submitted to the Public Printer for printing. Mimeograph copies of said regulations have been forwarded to collectors of internal revenue, also to the Commissioner of Customs for distribution to collectors of customs.

The principal changes are as follows:

Article 1 provides that "shipments or deliveries under section 317 of the Tariff Act of 1930 may be made only for consumption of the articles on the high seas beyond the 3-mile limit on vessels actually engaged in the foreign trade, or operating on a regular schedule in trade between one (customs) great district of the United States and another (customs) great district thereof, or between the United States and the Philippine Islands, the Virgin Islands, American Samoa, or the island of Guam, or on vessels of war or other governmental activity in, or en route to, places beyond the jurisdiction of the internal revenue laws of the United States."

Article 3 makes a change in the legend of the label for packages of tobacco sea stores. Manufacturers will advise the Bureau through collectors as to the number of present labels on hand and the probable length of time it will take to use the same, and request authority to use their present supply.

Article 4(a)1 clarifies the requirements with reference to shipments by parcel post.

Article 5 makes a change in respect to the number of copies of Form 550–A required and specifies the data to be filled in on said form.

Article 8 combines old articles 8 and 9; also makes special provision for parcel-post shipments and includes shipments to sea stores warehouses, old article 15 being eliminated.

Article 15 specifies the data to be filled in on Form 550–B. The last sentence of this article requires delivery of one copy of Form 550–B to the customs inspector at the time the merchandise is deposited on the pier.

Article 16 gives authority to collectors of customs to permit change of consignee necessary when a vessel sails prior to arrival of shipment or the sailing of the vessel is canceled and another is substituted.

Article 17 now requires certificate of receipt to be executed on customs and internal revenue copies of Form 550–A or Form 550–B, old article 24 being eliminated.

Article 19 is new matter inserted for the purpose of fixing the responsibility of the manufacturer or warehouse proprietor.

Slight changes will be noted in other articles of these regulations.

Inquiries in regard to this mimeograph should refer to the symbols MT:T.

H. F. Mires, *Acting Commissioner.*

OLEOMARGARINE.

REGULATIONS 9(1925), SECTIONS 39 AND 40. X-28-5138
T. D. 4318

OLEOMARGARINE—ACT OF JULY 10, 1930.

Regulations No. 9 amended.

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

To Collectors of Internal Revenue and Others Concerned:

The Act of Congress approved July 10, 1930 (Public, No. 540—Seventy-first Congress—H. R. 6), amending the definition of oleomargarine, reads as follows:

An Act to amend the definition of oleomargarine contained in the Act entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886, as amended, is amended to read as follows:

"SEC. 2. That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, fish oil or fish fat, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat; if (1) made in imitation or semblance of butter, or (2) calculated or intended to be sold as butter or for butter, or (3) churned, emulsified, or mixed in cream, milk, water, or other liquid, and containing moisture in excess of 1 per centum or common salt. This section shall not apply to puff-pastry shortening not churned or emulsified in milk or cream, and having a melting point of one hundred and eighteen degrees Fahrenheit or more, nor to any of the following containing condiments and spices, salad dressings, mayonnaise dressings, or mayonnaise products nor to liquid emulsion, pharmaceutical preparations, oil meals, liquid preservatives, illuminating oils, cleansing compounds, or flavoring compounds.

"SEC. 2. This Act shall take effect twelve months after the date of its enactment.

"Approved, July 10, 1930."

In accordance with the terms of that law, sections 39 and 40 of Regulations No. 9 (revised August, 1925) are hereby amended, effective July 10, 1931, to read as follows:

SEC. 39. *Oleomargarine defined.*—(a) That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and

neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, fish oil or fish fat, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat; if (1) made in imitation or semblance of butter, or (2) calculated or intended to be sold as butter or for butter, or (3) churned, emulsified, or mixed in cream, milk, water, or other liquid, and containing moisture in excess of 1 per centum or common salt. (Sec. 2, Act Aug. 2, 1886, as amended by the Act of July 10, 1930.) (Ref. 18 Op. Atty. Gen., 489.) While the ingredients named above are commonly used in the manufacture of oleomargarine, the use of other ingredients except those adjudged deleterious to the public health (see sec. 41) is not prohibited.

(b) That for the purposes of this Act, the following compounds and substances are exempt from tax as oleomargarine: Puff-pastry shortening not churned or emulsified in milk or cream, and having a melting point of one hundred and eighteen degrees Fahrenheit or more; salad dressings, mayonnaise dressings, and mayonnaise products, containing condiments and spices; and liquid emulsions, pharmaceutical preparations, oil meals, liquid preservatives, illuminating oils, cleansing compounds, and flavoring compounds.

SEC. 40. *Substances, etc., taxable as oleomargarine—Commissioner's decision final.*—When any substance declared by any collector of internal revenue to be oleomargarine and liable to tax is claimed by the owner to be butter or some other substance not liable to tax, the collector will submit a sample of the article for the decision of the Commissioner of Internal Revenue, under whose direction it will be subjected to tests to determine its character. Each such sample must weigh not less than one pound, and must be taken in the presence of an internal revenue officer. In case search is to be made for unusual coloring matter in oleomargarine, at least two pounds should be sent. (For more specific instructions relative to sampling, see sec. 112.) The Commissioner's decision as to any substance will not afford any indication as to what his decision will be as to another substance, although such other substance may be similarly marked and labeled. If the decision of the Commissioner, when rendered, is favorable to the claimant, the collector will be directed to release the goods. If the Commissioner's decision sustains the collector, forfeiture proceeding will be instituted.

H. F. MIRES,
Acting Commissioner of Internal Revenue.

Approved July 6, 1931.

S. LOWMAN,
Acting Secretary of the Treasury.

X–27–5131
MS. 116

Schedule of oleomargarine produced and materials used during the month of May, 1931, as compared with May, 1930.

	May, 1931.	May, 1930.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 14,566,645	23,683,188
Ingredient schedule for uncolored oleomargarine:		
Butter	33,413	119,121
Cocoanut oil	8,357,552	12,827,632
Cottonseed oil	1,163,024	1,990,145
Derivative of glycerine	11,892	10,840
Edible tallow		200
Lecithin	442	62
Milk	3,688,780	6,623,061
Mustard oil	1,539	2,175
Neutral lard	510,719	1,034,263
Oleo oil	1,234,272	2,787,024
Oleo stearine	374,799	492,782
Oleo stock	55,785	91,688
Palm oil	99,727	28,473
Peanut oil	310,034	490,581
Salt	1,127,489	1,990,508
Sesame oil	1,150	
Soda (benzoate of)	4,114	6,268
Soya bean oil	10,331	214,268
Total	16,985,062	28,709,091
Total production of colored oleomargarine	[2] 345,288	1,128,356
Ingredient schedule for colored oleomargarine:		
Butter	258	1,989
Cocoanut oil	103,725	408,412
Color	380	1,467
Cottonseed oil	37,406	124,983
Derivative of glycerine	10	19
Lecithin		2
Milk	101,722	312,264
Neutral lard	27,743	118,068
Oleo oil	84,014	269,591
Oleo stearine	4,030	13,015
Oleo stock	6,324	6,489
Palm oil	12,760	10,684
Peanut oil	4,396	15,527
Salt	29,426	95,649
Soda (benzoate of)	15	97
Total	417,209	1,378,256

[1] Of the amount produced, 42,876 pounds were reworked.
[2] Of the amount produced, 1,540 pounds were reworked.

X–33–5177
MS. 117

Schedule of oleomargarine produced and materials used during the month of June, 1931, as compared with June, 1930.

	June, 1931.	June, 1930.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 12,248,815	21,000,190
Ingredient schedule for uncolored oleomargarine:		
Butter	5,141	99,750
Cocoanut oil	7,013,374	11,466,899
Corn oil		352
Cottonseed oil	964,114	1,781,674
Derivative of glycerine	8,710	8,955
Edible tallow		230
Lecithin	352	62
Lotisene concentrate		43
Milk	3,332,569	5,787,075
Mustard oil		1,715
Neutral lard	509,058	945,030
Oleo oil	991,309	2,504,221
Oleo stearine	393,964	505,778
Oleo stock	53,281	89,556
Palm oil	14,508	29,588
Peanut oil	319,850	387,572
Salt	925,394	1,756,387
Sesame oil	20,635	
Soda (benzoate of)	4,791	6,249
Soya bean oil	2,105	190,913
Total	14,561,155	25,562,099
Total production of colored oleomargarine	[2] 387,270	905,746
Ingredient schedule for colored oleomargarine:		
Butter	360	2,589
Cocoanut oil	91,703	295,670
Color	436	1,132
Cottonseed oil	47,600	100,070
Derivative of glycerine	2	10
Milk	99,625	287,067
Neutral lard	30,688	107,780
Oleo oil	83,267	240,285
Oleo stearine	5,480	11,590
Oleo stock	7,684	8,828
Palm oil	16,003	20,393
Peanut oil	3,698	12,284
Salt	30,454	78,673
Soda (benzoate of)	22	84
Soya bean oil		291
Total	417,022	1,166,752

[1] Of the amount produced, 31,950 pounds were reworked.
[2] Of the amount produced, 2,658 pounds were reworked.

X–37–5207
MS. 118

Schedule of oleomargarine produced and materials used during the month of July, 1931, as compared with July, 1930.

	July, 1931.	July, 1930.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 10,959,348	[2] 20,149,391
Ingredient schedule for uncolored oleomargarine:		
Butter	2,185	98,563
Cocoanut oil	6,081,909	11,190,994
Corn oil		31,447
Cottonseed oil	845,389	1,497,873
Derivative of glycerine	9,499	12,034
Lecithin	537	103
Letisene concentrate		44
Milk	2,848,737	5,594,907
Mustard oil		1,172
Neutral lard	546,345	925,304
Oleo oil	1,012,284	2,358,911
Oleo stearine	367,296	426,520
Oleo stock	85,132	110,383
Palm oil	8,175	32,942
Peanut oil	266,520	432,191
Salt	814,575	1,722,079
Sesame oil	37,900	
Soda (benzoate of)	2,612	13,221
Soya bean oil	1,640	176,912
Total	12,930,735	24,625,600
Total production of colored oleomargarine	[3] 311,843	[4] 827,006
Ingredient schedule for colored oleomargarine:		
Butter	60	1,361
Cocoanut oil	86,757	263,777
Color	444	1,194
Corn oil		420
Cottonseed oil	30,689	89,125
Derivative of glycerine	16	20
Milk	94,350	242,008
Neutral lard	30,696	99,771
Oleo oil	83,632	225,008
Oleo stearine	5,190	14,094
Oleo stock	9,218	9,160
Palm oil	8,330	18,564
Peanut oil	6,451	10,289
Salt	28,879	72,813
Soda (benzoate of)	9	74
Soya bean oil		48
Total	384,721	1,047,726

[1] Of the amount produced, 23,271 pounds were reworked.
[2] Of the amount produced, 11,417 pounds were reworked.
[3] Of the amount produced, 2,743 pounds were reworked.
[4] Of the amount produced, 3,608 pounds were reworked.

X–41–5248
MS. 119

Schedule of oleomargarine produced and materials used during the month of August, 1931, as compared with August, 1930.

	August, 1931.	August, 1930.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 15,760,052	[2] 22,203,929
Ingredient schedule for uncolored oleomargarine:		
Butter	2,595	103,955
Cocoanut oil	9,382,520	11,217,172
Corn oil	5,600	26,107
Cottonseed oil	883,159	2,812,100
Derivative of glycerine	12,514	14,912
Lecithin	439	110
Letisene concentrate		44
Milk	4,101,384	5,909,243
Mustard oil		1,717
Neutral lard	681,792	839,860
Oleo oil	1,208,238	2,489,342
Oleo stearine	377,052	466,976
Oleo stock	94,152	104,640
Palm oil	7,200	32,365
Peanut oil	409,004	465,143
Salt	1,126,377	1,894,162
Sesame oil	50,275	
Soda (benzoate of)	7,121	7,202
Soya bean oil	3,710	206,253
Total	18,353,132	26,591,243
Total production of colored oleomargarine	[3] 314,834	[4] 867,521
Ingredient schedule for colored oleomargarine:		
Butter	120	3,434
Cocoanut oil	90,613	261,386
Color	426	1,150
Cottonseed oil	26,848	93,669
Derivative of glycerine	7	28
Lecithin		19
Milk	97,462	264,068
Neutral lard	24,530	128,151
Oleo oil	85,548	231,097
Oleo stearine	5,140	10,789
Oleo stock	6,069	18,647
Palm oil	5,510	26,191
Peanut oil	5,796	11,582
Salt	27,604	77,550
Soda (benzoate of)	43	89
Soya bean oil	15	
Total	375,731	1,128,450

[1] Of the amount produced, 5,536 pounds were reworked.
[2] Of the amount produced, 32,057 pounds were reworked.
[3] Of the amount produced, 2,019 pounds were reworked.
[4] Of the amount produced, 1,266 pounds were reworked.

X–45–5284
MS. 120

Schedule of oleomargarine produced and materials used during the month of September, 1931, as compared with September, 1930.

	September, 1931.	September, 1930.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 18,428,460	[2] 27,483,217
Ingredient schedule for uncolored oleomargarine:		
Butter	2,721	123,352
Cocoanut oil	10,834,927	15,472,145
Corn oil	6,100	91,195
Cottonseed oil	1,113,485	2,030,997
Derivative of glycerine	19,812	21,545
Edible tallow		70
Lecithin	599	870
Milk	4,739,272	7,492,524
Mustard oil		2,280
Neutral lard	875,930	920,086
Oleo oil	1,531,774	3,210,989
Oleo stearine	429,627	527,117
Oleo stock	103,230	139,860
Palm oil	27,214	37,173
Peanut oil	412,078	574,476
Salt	1,363,362	2,395,633
Sesame oil	62,374	9,175
Soda (benzoate of)	7,430	9,583
Soya bean oil	1,572	306,316
Total	21,531,467	33,365,386
Total production of colored oleomargarine	[3] 407,162	[4] 1,071,118
Ingredient schedule for colored oleomargarine:		
Butter	60	3,013
Cocoanut oil	112,372	345,713
Color	568	1,551
Corn oil		195
Cottonseed oil	40,380	119,734
Derivative of glycerine	29	36
Lecithin		25
Milk	109,801	306,306
Neutral lard	42,599	123,036
Oleo oil	116,947	267,556
Oleo stearine	9,890	11,912
Oleo stock	10,545	7,015
Palm oil	11,820	30,954
Peanut oil	6,995	15,143
Salt	35,777	90,767
Soda (benzoate of)	33	96
Soya bean oil	225	888
Total	498,041	1,323,940

[1] Of the amount produced, 20,591 pounds were reworked.
[2] Of the amount produced, 14,453 pounds were reworked.
[3] Of the amount produced, 948 pounds were reworked.
[4] Of the amount produced, 834 pounds were reworked.

Schedule of oleomargarine produced and materials used during the month of October, 1931, as compared with October, 1930.

	October, 1931.	October, 1930.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	[1] 23,439,119	[2] 31,022,184
Ingredient schedule for uncolored oleomargarine:		
Butter	2,329	127,277
Cocoanut oil	13,721,855	17,856,869
Corn oil	27,182	8,563
Cottonseed oil	1,416,012	2,369,723
Derivative of glycerine	22,289	18,607
Egg yolk		50
Lecithin	595	1,470
Milk	5,976,072	8,719,262
Mustard oil		2,981
Neutral lard	1,263,421	1,034,883
Oleo oil	1,849,834	3,285,931
Oleo stearine	473,280	556,115
Oleo stock	51,908	90,515
Palm oil	20,771	43,551
Peanut oil	484,814	561,915
Salt	1,612,775	2,625,411
Sesame oil	52,710	17,747
Soda (benzoate of)	8,115	9,434
Soya bean oil	1,315	343,333
Whale oil	150	
Total	26,985,427	37,673,637
Total production of colored oleomargarine	[3] 526,324	[4] 1,169,207
Ingredient schedule for colored oleomargarine:		
Butter	40	3,771
Cocoanut oil	136,891	391,591
Color	739	1,479
Cottonseed oil	63,562	135,269
Derivative of glycerine	43	51
Lecithin		41
Milk	165,604	346,347
Mustard oil	187	
Neutral lard	60,954	133,705
Oleo oil	149,971	296,524
Oleo stearine	6,601	11,081
Oleo stock	9,415	1,748
Palm oil	15,600	7,775
Peanut oil	7,082	17,874
Salt	45,390	97,353
Sesame oil		3
Soda (benzoate of)	29	131
Soya bean oil		1,099
Whale oil	117	
Total	662,225	1,445,842

[1] Of the amount produced, 10,491 pounds were reworked.
[2] Of the amount produced, 57,792 pounds were reworked.
[3] Of the amount produced, 539 pounds were reworked.
[4] Of the amount produced, 2,073 pounds were reworked.

MISCELLANEOUS.

Symbols for use in correspondence.

X–35–5190
Mim. 3893

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., August 8, 1931.

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 3761 [C. B. VIII–2, 442] 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 be in reply to a communication from the Bureau, will bear, immediately above the body of the letter and near the center of the sheet, the symbol that appears in the communication that is being answered; thus: "Attention: IT:AR:B3:STK." If the letter be 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 to determine 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.
AP—Appointment 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: 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: Ap—Appeals Division.
GC: R—Review Division.
GC: C—Civil Division.
GC: Adm—Administrative Division.
Mail and Record Section.
Library and Manuscript Section.
GC: Adm: C—Compromise Section.

INCOME TAX UNIT.

IT: E—Deputy Commissioner.
Assistant Deputy Commissioner.
IT: E: P—Personnel Section.
IT: E: RR—Rules and Regulations Section.
IT: E: Sr—Service Section.
IT: E: Aj—Special Adjustment Section.
IT: E: F—Field Procedure Division.

AUDIT REVIEW DIVISION.

IT: AR—Head of Division.
IT: AR: A—Section A.
IT: AR: B—Section B.
IT: AR: C—Section C.
IT: AR: D—Section D.
IT: AR: E—Section E.

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: M—Miscellaneous Division.
MT: T—Tobacco Division.

H. F. MIRES, *Acting Commissioner.*

Powers of attorney filed in field offices.

X–39–5219
Mim. 3896

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., September 8, 1931.

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

The instructions contained in Mimeograph 3730 (C. B. VIII–1, 333), dated May 6, 1929, to the effect that all powers of attorney filed in field offices of the Bureau will be immediately forwarded to Washington to be recorded, are hereby revoked, and the following instructions are issued in lieu thereof, to take effect immediately:

Whenever a power of attorney is filed in the office of a collector of internal revenue or an internal revenue agent in charge in connection with an income tax return which is being investigated or audited in such office, it will be properly recorded in the respective office and associated with the return to which it relates. When the investigation and other appropriate action are completed, the return and report with the power of attorney attached will be forwarded to the Income Tax Unit in Washington in the usual manner.

Upon receipt in Washington of a return to which a power of attorney is attached, the power of attorney will be detached and forwarded to the public relations division to be recorded and sent to the division or section to which the case is assigned for association with the file.

Collectors of internal revenue and internal revenue agents in charge are hereby charged with the duty of carefully examining all powers of attorney filed in their offices in connection with returns being examined or investigated by their offices, and determining whether or not the attorneys or agents named therein and the documents as executed meet all the requirements of Treasury Department Circular No. 230, revised July 1, 1927 (C. B. VI–2, 392), and Conference and Practice Requirements, Bureau of Internal Revenue, revision of July

1, 1925 (C. B. IV–2, 320), as amended by Mimeograph 3724 (C. B. VIII–1, 332).

The provisions of this mimeograph are applicable only to powers of attorney which are filed in the offices of collectors of internal revenue and internal revenue agents in charge in connection with returns actually being investigated and audited by those offices and they do not apply to powers of attorney, court papers, and other documentary evidence submitted by taxpayers through collectors' offices for use in connection with cases being reviewed and adjusted in the Income Tax Unit in Washington. This latter class of documents should be promptly transmitted to the Bureau in accordance with the usual procedure.

Correspondence from collectors regarding the provisions of this mimeograph should refer to the number and to the symbols A&C: Col., and correspondence from internal revenue agents in charge should refer to the number and to the symbols IT: E: JCW.

DAVID BURNET, *Commissioner.*

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[1]X–52–5338

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.
Clark, Earl S.	Providence, R. I.	Oct. 30, 1931	Charged with having prepared a false claim for refund; with having forged the signatures of the taxpayer and notary to such claim in a tax case barred by the statute of limitations, and with having surreptitiously inserted such false claim for refund and other documents into the files of the Bureau of Internal Revenue. Charges found proven.
Curson, Samuel T.	Formerly Hollywood, Calif., later Los Angeles, Calif.	Oct. 28, 1931	Charged with aiding and counseling a taxpayer to make a false income tax return. Charges found proven.
Cutler, H. C.	Seattle, Wash.	Apr. 1, 1931	Charged with making false income tax returns for a taxpayer. Charges found proven.
Davidson, Clifford D.	Baltimore, Md.	June 17, 1931	Charged with the misappropriation of funds of a client to his own use. Charges found proven.
Falconer, Robert M.	New York, N. Y.	Oct. 30, 1931	Charged with entering into an agreement to divide the fee in a tax case with a deputy collector. Charges found proven.
Forge, G. Wallace.	Formerly Los Angeles, Calif., now Hollywood, Calif.	June 23, 1931	Charged with making a false Federal income tax return for a taxpayer with the intent to aid such taxpayer to evade the payment of taxes legally due the Government. Charges found proven.

[1] This ruling (5338) includes also ruling Nos. 5132, 5139, 5146, 5154, 5160, 5168, 5178, 5185, 5192, 5200, 5208, 5215, 5223, 5233, 5249, 5259, 5269, 5277, 5285, 5292, 5299, 5307, 5314, 5322, and 5330. 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, 1931, and all suspensions in effect during the 6-month period July 1–December 31, 1931, inclusive. It does not include those barred from practice by reason of disapproval of their application for enrollment.

Disbarments and suspensions from practice before Treasury Department of attorneys and agents—Continued

Name.	Address.	Date of disbarment.	Cause.
Leffler, Louis	Formerly New York, N. Y., now Brooklyn, N. Y.	Jan. 5, 1931	Charged with having attempted to extort money by threatening to charge a taxpayer with making a false statement in regard to taxes. Charges found proven.
May, Harry P	Formerly Washington, D. C., now Los Angeles, Calif.	July 6, 1931	Charged with soliciting employment in Federal tax matters, and with entering into an agreement to split fees in Federal tax matters. Charges found proven.
Miller, Michael	Baltimore, Md	Oct. 31, 1930	Charged with embezzlement of funds of clients. Charges found proven.
Norwood, Seth W	Portland, Me	July 6, 1931	Charged with knowingly having made a false income tax return for a client. Charges found proven.
Prull, LeRoy A	Boston, Mass	July 20, 1931	Charged with having represented clients of an accounting corporation in Federal tax matters before the Department and with making false statements in his application for enrollment. Charges found proven.
Prussian, Aaron	Formerly New York, N. Y., later Detroit, Mich.	July 8, 1931	Charged with forging the signature of a client to a check drawn on the Treasurer of the United States; uttering such check; and misappropriating the money received on such check. Charges found proven.
Reed, John P	Chicago, Ill	Sept. 30, 1931	Charged with having been disbarred as an attorney by the Supreme Court of the State of Illinois. Charges found proven.
Spier, Joseph N	Brooklyn, N. Y.	Jan. 5, 1931	Charged with having attempted to extort money by threatening to charge a taxpayer with making a false statement in regard to taxes. Charges found proven.
Turner, Alexander	Dallas, Tex	July 13, 1931	Charged (1) with issuing checks on banks when respondent had no money on deposit in such banks; (2) with having been convicted for issuing checks when respondent had no money on deposit to pay such checks; and (3) with receiving $250 fee and failing to perform services for such fee. Charges found proven.

DISBARMENT MODIFIED.

The Secretary of the Treasury has ordered that the order of disbarment entered against the following-named person on July 20, 1931, be modified as indicated below:

Name.	Address.	Remarks.
Prull, LeRoy A	Boston, Mass	Disbarment ordered July 20, 1931; disbarment modified on Nov. 23, 1931, to terminate on Jan. 20, 1932, and reinstatement to practice to begin on Jan. 20, 1932.

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.
Coopersmith, Morris	New York, N. Y.	1 year, from May 2, 1931.	Charged with testifying falsely in a proceeding before the Committee on Enrollment and Disbarment of the Treasury Department. Charges found proven.
Dusenbery, Samuel	Los Angeles, Calif.	60 days, from Nov. 30, 1931.	Charged with soliciting employment in Federal tax matters. Charges found proven.
Fisher, F. J.	Racine, Wis.	6 months, from June 23, 1931.	Charged with soliciting employment in Federal tax matters. Charges found proven.
Lundin, Gustaf Clarence.	Laurinburg, N. C.	30 days, from July 8, 1931.	Charged with preparing and filing claim for refund in a tax matter of which respondent gained knowledge while in the service of the Bureau of Internal Revenue. Charges found proven.
Moore, J. Edward	New Bedford, Mass.	3 months, from June 23, 1931.	Charged with having been convicted and fined for violation of the National Prohibition Act. 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. The Secretary of the Treasury has accepted his resignation and ordered his name stricken from the roll of attorneys and agents enrolled to practice before the Treasury Department. He is therefore no longer entitled to practice before the Treasury Department.

Name.	Address.	Designation.	Date of acceptance.
Disney, Wesley E.	Tulsa, Okla.	Attorney	Sept. 12, 1931

INDEX.

	Ruling No.	Page.
A.		
Abatement, claims for, interest and penalty	5174	381
Accounting methods, accrual basis, automobile credit sales, rebate from finance company	5162	153
Affiliated corporations. (*See* Corporations.)		
Aliens, nonresident. (*See* Nonresident aliens.)		
Alterations, expense deduction	5144	357
Amendments:		
Regulations 8—		
Article 83	5167	453
Article 86	5300	453
Article 127	5270	444
Regulations 9, sections 39 and 40	5138	456
Regulations 62, article 612	5236	366
Regulations 65, article 612	5235	256
Regulations 69, article 612	5235	256
Regulations 70 (1929), article 36	5224	420
Regulations 71—		
Article 25	5247	445
Article 77	5247	445
Regulations 74—		
Article 251	5171	145
Article 451	5250	157
Article 561	5172	169
Article 698	5234	187
Assessment, taxes. (*See* Taxes.)		
Associations:		
Insurance through a common attorney in fact, Texas	5228	211
Trusts distinguished	5151	213
	5157	214
	5297	315
Attorneys and agents:		
Disbarments and suspensions	5338	467
Powers of attorney filed in field offices, instructions	5219	466
Resignation from enrollment	5338	467
Automobiles:		
Accessories tax, refund	5175	408
Manufacturer's excise tax, purchaser's deduction	5267	334
Sales. (*See* Sales.)		
Awards, condemnation, street improvements, gain or loss	5272	170
B.		
Bad debts:		
Partial recovery after deduction, income	5290	249
Worthless in part, collateral security unsold	5218	362
Bonds:		
Conversion into stock, discount and expense deduction	5182	354
Sale and retirement, taxable gain	5306	356
Stay of tax collection, defense, suit for recovery of tax	5199	395
Treasury, interest paid nonresident alien, withholding	5227	191

	Ruling No.	Page.
Brokers, forms of ownership certificate, dividends on stock, procedure	5203 5303	195 196
Bureau of Internal Revenue, correspondence symbols	5190	464
Business expenses:		
Compensation—		
Additional, paid trustee by beneficiary	5165	346
Personal services. (*See* Compensation.)		
Convention attended by business association members	5281	130
Exempt and taxable income	5136 5296 5334	342 253 254
Permanent improvements	5144	357
Rentals—		
Advanced payment or bonus, when deductible	5274	238
Safety deposit box	5126	129
Stock registration and transfer fees	5149	129
C.		
California, community property. (*See* Community property.)		
Capital expenditures, permanent improvements	5144	357
Capital gains and losses:		
Property held for sale in trade or business	5294	158
Sale consummated after December 31, 1921	5283	337
Stock acquired upon exercise of rights	5332 5337	159 339
Capital stock tax, basis of tax: "Carrying on or doing business"	5258	441
Carrying charges, effect on gain or loss basis	5143	219
Cigars, classification labels, regulations amended	5300	453
Citizens and citizenship:		
American-born women marrying aliens, taxable status	5279 5280	107 109
Nonresident, earned income from sources outside United States, exclusion	5273	178
Claims, abatement, interest and penalty	5174	381
Closing agreements. (*See* Taxes: Final determination and assessment.)		
Community property and income:		
California—		
Division of partnership profits, earned income credit	5252	146
Husband's earnings, separate property under agreement	5309	115
Texas, estate taxes, deduction for funeral expenses and loan by wife	5312	425
Compensation:		
Additional—		
Deduction. (*See* Business expenses: Compensation.)		
Employees' stock bonus trust distribution	5189	245
Services rendered in prior years	5145	359
Compromise, tax liability, suit to recover	5244	386
Condemnation awards, street improvements, gain or loss	5272	170
Connecticut excise tax, accrual date	5210	137
Consolidated returns. (*See* Returns.)		
Contracts, Government, excess profits tax	5329	391
Contributions, charitable, unemployment relief	5288	161
Corporations:		
Affiliation, determination of	5246 5319	397 370
Dissolved, unpaid taxes, transferees' liability under trust fund doctrine	5256	384
Personal service, tobacco business on commission basis	5230	318
Correspondence symbols, Bureau of Internal Revenue	5190	464

	Ruling No.	Page.
Court decisions:		
Alexander; Darby-Lynde Co. v	5229	224
Alexander v. *Mid-Continent Petroleum Corporation*	5254	259
Allen v. *Commissioner*	5297	315
Allen; First Trust Co. of Omaha et al. v	5257	422
American Woolen Co. v. *White*	5282	257
Anderson; Argonaut Consolidated Mining Co. v	5258	441
Argonaut Consolidated Mining Co. v. *Anderson*	5258	441
Army and Navy Club of America v. *United States*	5311	401
Atkinson & Co. v. *Willcuts*	5304	266
Baton Coal Co. v. *Commissioner*	5274	238
Bauer Bros. Co. v. *Commissioner*	5145	359
Becker; Dubinsky v	5204	286
Bemis Bros. Bag Co. v. *United States*	5335	297
Blair v. *Stewart*	5312	425
Bowers; Cosulich Line of Trieste v	5213	445
Bowers; Kenan, jr., et al. v	5165	346
Bowers; Martin v	5158	348
Bowers; Phipps v	5158	348
Bowers; Schaefer v	5189	245
Brast; Welch Insurance Agency v	5181	258
Brown v. *Routzahn*	5321	427
Bryant Paper Co. v. *Holden*	5196	295
Burnet; Handy & Harman v	5319	370
Burnet; Hubbell Son & Co., Inc., v	5276	250
Burnet v. *North American Oil Consolidated*	5328	367
Burnet; Parkersburg Iron & Steel Co. v	5144	357
Burnet v. *San Joaquin Fruit & Investment Co*	5265	260
Central Real Estate Co. v. *Commissioner*	5143	219
Collin County National Bank v. *Commissioner*	5218	362
Commissioner; Allen v	5297	315
Commissioner; Baton Coal Co. v	5274	238
Commissioner; Bauer Bros. Co. v	5145	359
Commissioner; Central Real Estate Co. v	5143	219
Commissioner; Collin County National Bank v	5218	362
Commissioner; Dahlinger v	5283	337
Commissioner; Esperson v	5310	350
Commissioner; Finance & Guaranty Co. v	5298	331
Commissioner v. *Garber*	5264	233
Commissioner v. *Kistler Estate et al*	5264	233
Commissioner; Leland et al. v	5217	300
Commissioner; Lewis v	5136	342
Commissioner; Long v	5230	318
Commissioner; Putnam National Bank v	5290	249
Commissioner v. *Moore*	5264	233
Commissioner; Parker Co. v	5245	388
Commissioner; Shearer v	5267	334
Commissioner v. *Stephens-Adamson Mfg. Co*	5333	228
Commissioner v. *Tait*	5264	233
Commissioner; Wright et al. v	5326	324
Cosulich Line of Trieste v. *Bowers*	5213	445
Crooks; Volker et al. v	5336	332
Crossett Co. v. *United States*	5183	392
Dahlinger v. *Commissioner*	5283	337
Darby-Lynde Co. v. *Alexander*	5229	224
Dime Trust & Safe Deposit Co.; Phillips v	5320	420
Dubinsky v. *Becker*	5204	286
Esperson v. *Commissioner*	5310	350
Fidelity & Columbia Trust Co., trustee, v. *Lucas*	5275	240
Finance & Guaranty Co. v. *Commissioner*	5298	331
First Trust Co. of Omaha et al. v. *Allen*	5257	384
Fleming v. *Reinecke*	5176	410

	Ruling No.	Page.
Court decisions—Continued.		
Frommel & Bro. et al.; United States v	5197	307
Garber; Commissioner v	5264	233
Garfunkel et al.; United States v	5256	384
Handy & Harman v. *Burnet*	5319	370
Harris v. *United States*	5228	211
Heebner v. *United States*	5130	291
Holden; Bryant Paper Co. v	5196	295
Hopkins; Planters Oil Co., Inc., et al. v	5135	231
Hopkins; Twentieth Century Manufacturing Co., Inc., v	5175	408
Hubbell Son & Co., Inc., v. *Burnet*	5276	250
Kenan, jr., et al. v. *Bowers*	5165	346
Kentucky River Coal Corporation v. *Lucas*	5268	364
Kirby Lumber Co.; United States v	5306	356
Kirschbaum Co. v. *United States*	5329	391
Kistler Estate et al.; Commissioner v	5264	233
Klivans, Inc., v. *Routzahn*	5191	412
Leach; Nichols v	5166	435
Leland et al. v. *Commissioner*	5217	300
Lewis v. *Commissioner*	5136	342
Long v. *Commissioner*	5230	318
Lucas; Fidelity & Columbia Trust Co., trustee, v	5275	240
Lucas; Kentucky River Coal Corporation v	5268	364
Lucas v. *United States ex rel. Blackstone Manufacturing Co*	5129	270
MacLaughlin v. *Williams*	5291	409
Mahoning Coal Railroad Co.; Routzahn v	5246	397
Mahoning Coal Railroad Co. et al.; United States v	5246	397
Martin v. *Bowers*	5158	348
Maryland Casualty Co.; United States v	5174	381
Maxson v. *United States*	5242	311
Mellon et al. v. *United States ex rel. Orono Pulp & Paper Co*	5188	209
Mid-Continent Petroleum Corporation; Alexander v	5254	259
Mills Novelty Co. v. *United States*	5184	417
Moore; Commissioner v	5264	233
Murdock; United States v	5318	192
Mutual Life Insurance Co. of New York v. *United States*	5152	292
Nichols v. *Leach*	5166	435
North American Oil Consolidated; Burnet v	5328	367
Parker Co. v. *Commissioner*	5245	388
Parkersburg Iron & Steel Co. v. *Burnet*	5144	357
Phillips v. *Dime Trust & Safe Deposit Co*	5320	420
Phipps v. *Bowers*	5158	348
Planters Oil Co., Inc., et al. v. *Hopkins*	5135	231
Poe; Women's University Club of Seattle v	5206	406
Putnam National Bank v. *Commissioner*	5290	249
Reinecke; Fleming v	5176	410
Routzahn; Brown v	5321	427
Routzahn; Klivans, Inc., v	5191	412
Routzahn v. *Mahoning Coal Railroad Co*	5246	397
Routzahn; Simmons Manufacturing Co. v	5199	395
Routzahn; Snyder v	5244	386
San Joaquin Fruit & Investment Co.; Burnet v	5265	260
Schaefer v. *Bowers*	5189	245
Schrader's Son, Inc., v. *United States*	5255	276
Shearer v. *Commissioner*	5267	334
Siegel et al.; United States v	5325	321
Simmons Manufacturing Co. v. *Routzahn*	5199	395
Snyder v. *Routzahn*	5244	386
Stephens-Adamson Mfg. Co.; Commissioner v	5333	228
Stewart; Blair v	5312	425

	Ruling No.	Page.
Court decisions—Continued.		
Sugar Land Railway Co. v. *United States*	5205	309
Sunny Brook Distillery Co. v. *United States*	5214	447
Tait; Commissioner v	5264	233
Title Guarantee & Trust Co. v. *United States*	5153	379
Trust No. 5833, Security-First National Bank of Los Angeles v. *Welch*	5157	214
Twentieth Century Manufacturing Co., Inc., v. *Hopkins*	5175	408
United Cigar Stores Co. of America v. *United States*	5220	413
United States; Army and Navy Club of America v	5311	401
United States; Bemis Bros. Bag Co. v	5335	297
United States ex. rel. Blackstone Manufacturing Co.; Lucas v	5129	270
United States; Crossett Co. v	5183	392
United States v. *Frommel & Bro. et al*	5197	307
United States v. *Garfunkel et al*	5256	384
United States; Harris v	5228	211
United States; Heebner v	5130	291
United States v. *Kirby Lumber Co*	5306	356
United States; Kirschbaum Co. v	5329	391
United States v. *Mahoning Coal Railroad Co. et al*	5246	397
United States v. *Maryland Casualty Co*	5174	381
United States; Maxon v	5242	311
United States; Mills Novelty Co. v	5184	417
United States v. *Murdock*	5318	192
United States; Mutual Life Insurance Co. of New York v	5152	292
United States ex rel. Orono Pulp & Paper Co.; Mellon et al. v	5188	209
United States; Schrader's Son, Inc., v	5255	276
United States v. *Siegel et al*	5325	321
United States; Sunny Brook Distillery Co. v	5214	447
United States; Sugar Land Railway Co. v	5205	309
United States; Title Guarantee & Trust Co. v	5153	379
United States; United Cigar Stores Co. of America v	5220	413
United States; Waud et al. v	5232	340
United States; Wausau Sulphate Fibre Co. v	5212	274
United States; Wessel et al. v	5231	328
United States; Women's University Club v	5221	402
United States v. *Woolner Distilling Co*	5239	202
Volker et al. v. *Crooks*	5336	332
Waud et al. v. *United States*	5232	340
Wausau Sulphate Fibre Co. v. *United States*	5212	274
Welch Insurance Agency v. *Brast*	5181	258
Welch; Trust No. 5833, Security-First National Bank of Los Angeles v	5157	214
Wessel et al. v. *United States*	5231	328
White; American Woolen Co. v	5282	257
Willcuts; Atkinson & Co. v	5304	266
Williams; MacLaughlin v	5291	409
Women's University Club of Seattle v. *Poe*	5206	406
Women's University Club v. *United States*	5221	402
Woolner Distilling Co.; United States v	5239	202
Wright et al. v. *Commissioner*	5326	324
Courts, State, construction of will, res judicata	5275	240
Credit or refund:		
Certificate of overassessment understated, credit application	5242	311
Claims—		
Amendment after disallowance	5152	292
Informal, disallowed, amendment, statutory filing period expired	5242	311

	Ruling No.	Page.
Credit or refund—Continued.		
Claims—Continued.		
Prerequisite, suit for recovery of taxes	5152	292
	5183	392
	5196	295
	5212	274
Purchaser under a sale in bankruptcy, validity of title	5244	386
Reopening, limitation period for bringing suit	5130	291
Supplemental, specific grounds not stated in original, effect	5205	309
Tax on distilled spirits, interest	5214	447
Deficiency and overpayment adjustment, Commissioner's authority	5129	270
Erroneous, suit to recover, limitation	5239	202
Estoppel of taxpayer	5305	279
Interest. (*See* Interest.)		
Invested capital adjustment, amount of deduction allowed in determining overpayment	5255	276
Limitation period. (*See* Limitation period.)		
Redetermination of tax liability, method of calculation	5266	271
Suits. (*See* Suits: Recovery of tax.)		
Credits:		
Earned income. (*See* Earned income.)		
Taxes, foreign—		
Cuba, gross revenues	5253	184
Domestic corporation owning majority of stock, regulations amended	5234	187
	5235	256
	5236	366
Cuba, tax on gross revenues, credit	5253	184
D.		
Dealer in securities:		
Capital gains and losses	5294	158
Inventories	5170	127
Deficiencies, taxes. (*See* Taxes.)		
Depletion:		
Oil and gas—		
Income from sale of oil and gas property	5229	224
Lessee's allowance	5211	221
Trust beneficiary's deduction	5198	353
Depreciation:		
Patents, application pending March 1, 1913	5333	228
Public improvements, special assessments	5276	250
Disbarments. (*See* Attorneys and agents.)		
Discount, bond, deduction of unamortized portion after stock conversion	5182	354
Distilled spirits, interest on refund	5214	447
Dividends:		
Debenture stock, interest on, deduction	5268	364
Presumption as to earnings from which paid	5217	300
Stock subscription rights	5180	173
Dues, clubs:		
Life membership, excise tax	5291	409
Social, taxability	5176	410
	5206	406
	5221	402
	5311	401
Duress, bond given to prevent distraint	5199	395

	Ruling No.	Page.
E.		
Earned income:		
Nonresident citizens, sources outside United States, exclusion	5273	178
Partnership profits—		
Accounting, assistants' services	5164	304
Community property division, California	5252	146
Credit allowance, limitation	5287	152
Employees' stock bonus trust, income from	5189	245
Estate tax:		
Gross estate—		
Estate by entirety, bank deposits, constitutionality	5320	420
Real estate in Nebraska and Iowa	5257	422
Massachusetts succession tax	5166	435
Pledges, article 36, Regulations 70 (1929), amended	5224	420
Renunciation of gift by will	5321	427
Texas community property, deduction for funeral expenses and loan by wife	5312	425
Transfers—		
Conveyance to testamentary trustees	5321	427
In contemplation of death	5321	427
Estates and trusts:		
Depletion allowance, beneficiary's deduction	5198	353
Income—		
Current distribution, taxability	5238 5243	197 353
Future distribution, single trust, fiduciary's liability	5275	240
Payable to estate of beneficiary, taxability	5232	340
Estoppel, refund of taxes	5305	279
Excess profits tax, Government contracts	5329	391
Exchanges of property, stock, gain or loss, stock dividend distinguished	5325 5326	321 324
Exempt corporations:		
Farmers' and other cooperative marketing and purchasing associations	5150	164
Golf club	5128	162
Unemployment relief organization	5288	161
Exempt income. (*See* Exemption: Income.)		
Exemption:		
Corporations. (*See* Exempt corporations.)		
Income—		
Earned income, nonresident citizens, sources outside United States	5273	178
Indians, Choctaw, restricted allotments	5134	111
Insurance proceeds	5222	123
Interest, condemnation award, State	5324 5327	124 342
State employees. (*See* State: Officers and employees.)		
Wives of clerks of foreign embassies and legations	5141	177
F.		
Farmers' and other cooperative marketing and purchasing associations, exemption	5150	164
Fees, registration and transfer of capital stock	5149	129
Fiscal year, partnership, member on calendar-year basis, tax computation	5267	334
Florida, Federal tax liens, filing of notices	5163 5289	205 208
Foreign embassies and legations, employees' income, exemption	5141	177

	Ruling No.	Page.
Forms:		
923 to be used in lieu of abolished Customs Form 3493	5270	444
1087 (or substitute), ownership certificate, dividends on stock, illustration	5203 5303	195 196
1122, subsidiary's consent to consolidated return, when required	5316	188
Funeral expenses, Texas, community property, estate taxes	5312	425
G.		
Gain or loss:		
Condemnation awards, street improvements	5272	170
Exchange of property. (*See* Exchange of property.)		
Royalty payments under lessee's assignment	5211	221
Sales. (*See* Sales.)		
Gasoline tax. (*See* Taxes: Motor vehicle fuel.)		
Gifts, income from estate in trust, payable to estate of beneficiary, taxability	5232	340
Golf club, exemption	5128	162
Good will, invested capital	5183	392
Government contracts. (*See* Contracts.)		
H.		
Hawaii, Territorial officers' inspection of Federal income tax returns	5263	157
I.		
Improvements:		
Lessee's, lessor's income	5202	120
Public, special assessments, depreciation deduction	5276	250
Indians, Choctaw, income from restricted allotments, reinvestment	5134	111
Information at source, ownership certificate, dividends on stock, record owner's procedure	5203	195
Injunctions, restraint of tax assessment or collection against transferee	5254	259
Inspection of returns. (*See* Returns.)		
Installment:		
Obligations, final distribution of trust estate, tax liability	5195	156
Sales. (*See* Sales.)		
Insurance proceeds transferee's exemption	5222	123
Insurance companies, trust and escrow departments, classification	5153	379
Interest:		
Bonds, Treasury, paid nonresident alien, withholding	5227	191
Charges on unproductive property, gain or loss sales basis	5143	219
Debenture stock dividend payments, deduction	5268	364
Indebtedness to purchase tax-exemption securities, deduction	5158	348
Judgments	5188	209
Nonpayment of tax, abatement claim rejected	5174	381
Refunds, tax on distilled spirits	5214	447
State obligations, condemnation award, exemption	5324 5327	124 342
Inventories:		
Dealer in securities, classification	5170	127
General financing transactions	5298	331
Invested capital:		
Good will	5183	392
Inadmissible assets, proof	5245	388
Iowa:		
Gasoline tax, deduction	5226	140
Property taxes, accrual date	5262	142

	Ruling No.	Page.
J.		
Jewelry:		
Giving of premiums	5220	413
Lease of, when attaches	5191	412
Judgments, interest. (*See* Interest.)		
Jurisdiction:		
Board's, deficiency notice, sufficiency	5265	260
Courts', suit, appeal pending before Board	5282	257
L.		
Leases:		
Assignment of lessee's interest, royalty payment, gain or loss, depletion	5211	221
Improvements by lessee, lessor's income	5202	120
Jewelry, when tax attaches	5191	412
Taxes paid by lessee for lessor, income	5246	397
Liens, Federal taxes:		
Filing of notices—		
Florida	5163 5289	205 208
List of States	5295	208
New Mexico	5240	206
Subsequent to recovery of judgment, rental claims	5241	207
Limitation period:		
Assessment of taxes—		
Commencement date, tentative return	5304	266
Decedent's income, written request by fiduciary	5310	350
Collection of taxes—		
1921, assessment prior to 1926 Act and within statutory period	5181	258
Transferees, trust fund doctrine	5197	307
Suit, recovery of amount paid in compromise	5244	386
Suits, recovery of tax—		
Bond staying tax collection	5199	395
Erroneous refund	5239	202
Reopening of refund claim, extension effect	5130	318
Sufficiency of claim	5335	297
Waivers, absence of Commissioner's signature, validity	5245	388
Liquid fuels tax. (*See* Taxes.)		
Losses:		
Debt worthless in part, collateral security	5218	362
Stock—		
Sale and repurchase, "identical property" differentiated	5173	182
Sale not a bona fide transaction	5310	350
M.		
Manufacturer's excise:		
Automobile accessories tax, refund	5175	408
Games, coin-operated gambling machines	5184	417
Married women, naturalization and citizenship, taxable status	5279 5280	107 109
Merchant Marine Act, deductions, profits tax computation	5159	374
Motor vehicle fuel tax. (*See* Taxes.)		
N.		
Naturalization, American-born women marrying aliens	5280	109
Net income, consolidated, Merchant Marine Act deductions	5159	374
Net losses:		
Affiliated corporations	5135 5317	231 189
Identity of two corporations	5336	332
Stock market transactions, application of section 117, 1928 Act	5142	180

	Ruling No.	Page.
New Jersey gasoline tax, deduction	5194	135
New Mexico, Federal tax liens, filing of notices	5240	206
Nonresident aliens:		
American and British born women marrying aliens, taxable status	5279	107
Interest on Treasury bonds, withholding	5227	191
Wives of clerks of foreign embassies and legations, exemption	5141	177
O.		
Oil and gas, depletion. (*See* Depletion.)		
Oklahoma gasoline tax, deduction	5127	131
Oleomargarine:		
Definition of, regulations amended	5138	456
Statistics of production and materials used—		
May, 1931 and 1930	5131	458
June, 1931 and 1930	5177	459
July, 1931 and 1930	5207	460
August, 1931 and 1930	5248	461
September, 1931 and 1930	5284	462
October, 1931 and 1930	5313	463
Substances, etc., taxable as, regulations amended	5138	456
Ownership certificate (Form 1001), name of fiduciary required	5302	192
P.		
Partnerships, member's different accounting basis, tax computation	5267	334
Patents, depreciation. (*See* Depreciation.)		
Penalties, nonpayment of tax, abatement claim rejected	5174	381
Pennsylvania, liquid fuels tax, deduction	5187	134
Permanent improvements, expense deduction	5144	357
Personal service corporations. (*See* Corporations.)		
Powers of attorney filed in field offices, procedure	5219	466
Property taxes. (*See* Taxes.)		
R.		
Receivers, returns. (*See* Returns.)		
Refunds. (*See* Credit or refund.)		
Regulations, amendments. (*See* Amendments: Regulations.)		
Rentals:		
Advanced payment or bonus, when deductible	5274	238
Safety deposit box, deduction	5126	129
Purchase of property at execution sale, priority	5241	207
Returns:		
Community income. (*See* Community property and income.)		
Consolidated—		
Affiliation determination. (*See* Corporations: Affiliation.)		
Intercompany profits eliminated from 1918 opening inventory	5137	372
Subsidiary's—		
Consent, Form 1122, when required	5316	188
Transportation services for parent, deductions under Merchant Marine Act	5159	374
Examination, tax determination, regulations amended	5250	157
Inspection of, Hawaii Territorial officers	5263	157
Receiver holding only part of corporation's property	5328	367
Tentative, assessment limitation period	5304	266
Royalties, lessee's assignment, gain or loss	5211	221

	Ruling No.	Page.
S.		
Safety deposit boxes, rent deduction	5126	129
Sale and repurchase of stock, losses. (*See* Losses.)		
Sales:		
Automobiles, credit basis, method of accounting	5162	153
Gain or loss—		
Property acquired by transfer in trust	5156	171
Unproductive property, carrying charges	5143	219
Installment, personal property, election, estoppel	5264	233
Stock—		
Rights—		
Acquired upon exercise of, capital gain	5332	159
Valuation determination	5261	118
Transaction not bona fide, loss deduction	5310	350
Social club dues. (*See* Dues.)		
Stamp taxes:		
Basis of tax, regulations amended	5247	445
Imported tobacco manufacture, regulations amended	5270	444
"Issue" defined, regulations amended	5247	445
Passage tickets	5213	445
State:		
Inspection of Federal tax returns	5263	157
Obligations, interest. (*See* Interest.)		
Officers and employees, official stenographers for public bodies	5136	342
Taxes—		
Connecticut excise, accrual date	5210	137
Iowa property, accrual date	5262	142
Stock:		
Bonus trust, distributions under, income	5189	245
Debenture, borrowed capital, dividend deduction	5268	364
Exchanges. (*See* Exchanges of property.)		
Rights to subscribe to, sale of. (*See* Sales: Stock.)		
Sale and repurchase, losses	5173	182
Sales. (*See* Sales.)		
Suits:		
Court's jurisdiction. (*See* Jurisdiction.)		
Injunction. (*See* Injunctions.)		
Limitation period. (*See* Limitation period.)		
Recovery of amount paid in compromise	5244	386
Recovery of amounts erroneously refunded	5239	202
Recovery of taxes—		
Assessment made under closing agreement	5204	286
Claim for refund, prerequisite, sufficiency of claim	5152	292
	5183	392
	5196	295
	5212	274
	5242	311
	5335	297
Defense, bond staying tax collection	5199	395
Suspensions. (*See* Attorneys and agents.)		
Symbols, correspondence, Bureau of Internal Revenue	5190	464
T.		
Taxes:		
Assessment—		
Deficiencies. (*See* Taxes: Deficiencies.)		
Limitation period. (*See* Limitation period.)		
Carrying charges, gain or loss sales basis	5143	219

	Ruling No.	Page.
Taxes—Continued.		
Collection—		
Limitation period. (*See* Limitation period.)		
Suits. (*See* Suits.)		
Compromise, suit to recover	5244	386
Credits. (*See* Credits.)		
Deficiencies—		
Assessment during 60-day period, consent, Commissioner's signature	5304	266
Definition, amount collected without assessment	5282	257
Notice, transferee designation omitted, Board's jurisdiction	5265	260
Prima facie correctness	5245	388
Excise, automobile manufacturer, purchaser's deduction	5267	334
Federal liens. (*See* Liens.)		
Final determination and assessment, closing agreement, suit to recover tax thereunder	5204	286
Foreign, credits for. (*See* Credits.)		
Gasoline. (*See* Taxes: Motor vehicle fuel.)		
Lessee's payment for lessor, income	5246	397
Liens for Federal taxes. (*See* Liens: Federal taxes.)		
Liquid fuels, Pennsylvania	5187	134
Motor vehicle fuel—		
Iowa	5226	140
New Jersey	5194	135
Oklahoma	5127	131
Pennsylvania	5187	134
Property, Iowa, accrual date	5262	142
Stamp. (*See* Stamp taxes.)		
State. (*See* State.)		
Withholding at source. (*See* Withholding at source.)		
Texas:		
Community property. (*See* Community property.)		
Insurance through a common attorney in fact, classification	5228	211
Tobacco:		
Cigars, classification labels, regulations amended	5300	453
Regulations 76, changes in	5147	454
Stamps, cancellation of, Regulations 8 amended	5167	453
Transferred assets, claims against	5197 5230 5254 5256 5265	307 318 259 384 260
Traveling expenses, convention attended by business association members	5281	130
Trusts:		
Associations distinguished	5151 5157 5297	213 214 315
Certificates, distribution in kind by trustee, taxable gain	5297	315
Depletion allowance, beneficiary's deduction	5198	353
Income held for future distribution, fiduciary's liability	5275	240
Installment obligations transferred in final distribution, tax liability	5195	156
U.		
Unemployment relief, contributions to	5288	161
United States Board of Tax Appeals:		
Decisions of, list of acquiescences and nonacquiescences	5331	1–106
Evidence beyond stipulation of facts	5136	342
Findings of fact, court's review	5326	324
Jurisdiction, deficiency notice, transferee designation omitted	5265	260

	Ruling No.	Page.
V.		
Vessels, deductions under Merchant Marine Act	5159	374
W.		
Waiver of statute of limitations. (*See* Limitation period: Waivers.)		
Will, construction by State court, res judicata	5275	240
Withholding tax at source:		
Bonds, Treasury, interest paid nonresident alien	5227	191
Ownership certificates (Form 1001), name of fiduciary required	5302	192
Witnesses, refusal to testify	5318	192

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