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Internal Revenue Bulletin

Cumulative Bulletin VIII–1

JANUARY–JUNE, 1929

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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

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Internal Revenue Bulletin

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

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

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

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

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INTRODUCTORY NOTES.

The Internal Revenue Cumulative Bulletin VIII–1, in addition to all decisions of the Treasury Department (called Treasury decisions) pertaining to Internal Revenue matters, contains General Counsel's opinions, and rulings and decisions pertaining to income, estate, sales, capital stock, and miscellaneous taxes, as indicated on the title-page of this Bulletin, published in the weekly Bulletins (Volume VIII, Nos. 1 to 25, inclusive) for the period January 1 to June 30, 1929. 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 June 30, 1929.

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.

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BOARD OF TAX APPEALS.

CUMULATIVE LIST OF ANNOUNCEMENTS RELATING TO DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS PUBLISHED IN THE INTERNAL REVENUE BULLETIN SERVICE FROM DECEMBER 22, 1924, TO JUNE 30, 1929, INCLUSIVE.

[1] VIII–25–4240

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

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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
Acorn Refining Co	1929	2	253
Adams, B. G	4361	5	113
Adams Motor Co	3522	4	589
Adamson, Charles B., trustee	17780	10	763
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
Albia Box & Paper Co	1907	4	1184
Alexander County National Bank	12075	12	1238
Alexander County Savings Bank	12616	12	1238
Alexander Manufacturing Co	5656	9	347
All America Cables, Inc.[2]	9092	10	213
Allen, H. A	7290	7	1256
Allen, Mrs. H. A	7289	7	1256
Allen et al., James A., executors [3]	8690	8	693
Allen, Louis	383	2	1313
Allerton, Robert	16431	13	1383
Alliance Milling Co	15649	10	457
Alling & Cory Co.[4]	6606	7	574

[1] Ruling No. 4240 includes all acquiescence and nonacquiescence notices published in the Internal Revenue Bulletin service to and including June 30, 1929.
[2] Acquiescence relates to all issues except as to tentative tax.
[3] Estate tax decision.
[4] Acquiescence relates to all issues except the third issue.

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Alsop, Edward B., estate of [1]	6519	7	848
Alsop, Edward H., executor [1]	6519	7	848
Aluminum Flake Co	4669 8444	6	1193
American Auto Trimming Co. et al	3430	6	1007
American Box Co	5418	3	824
American Colortype Co	7901	10	1276
American Cream of Tartar Co	2078	2	847
American Feature Film Co.[2]	4437	11	1271
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 Manganese Steel Co	8145	7	659
American Mills Co	1994	2	460
American Packing Co., Inc	1173	3	195
American Photo Player Co	1290	2	419
American Seating Co.[3]	4772	4	649
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 [4]	12962	13	105
American Valve Co	4696	4	1204
Ames, John S	8895	9	1336
Amigo Coal Co	11684	8	598
Anamosa Farmers Creamery Co	29352	13	907
Anderson & Gustafson	1556	3	531
Anderson & Lind Manufacturing Co	3074	2	1297
Anderson, Gustave E., trustee	32561	10	1376
Anderson-Harrington Coal Co	743	6	759
Anderson, Isabel	1394	5	27
Anderson, John, estate of	32561	10	1376
Anderson Lumber Co., J. F	9103	15	475
Andrews, Effie, estate of [4]	13096	13	651
Andrews et al., James M., executors [4]	13096	13	651
Angelo Co., G	10869	12	460
Angelo Fruit Co., G	10869	12	460
Anniston City Land Co	1368	2	526
Anthracite Trust Co., administrator estate of John Joseph Brown, deceased [4]	4947	3	486
Antonoplos, George	3925	3	1236
Antonoplos, Kast	4013	3	1236
Appalachian Realty Co	9685	12	52
Appell et al., Albert J., executors	7041	10	1225
Appell, Jacob, estate of	7041	10	1225
Applegate, Ralph Andrew, executor	7970	10	705
Aransas Compress Co	4378	8	155
Archbald, jr., et al., R. W., executors	4695	4	483
Archbold, John F., executor [5]	8629	8	919
Archer Paper Co., The	342	1	634
Archer-Strauss Rubber Co	17194 25188	9	809
Ardis & Co	13023	12	679
Armstrong, Bird	3297	6	384

[1] Estate tax decision; acquiescence relates only to 1912 trust.
[2] Acquiescence relates to issues involving officers' salaries and legal expenses.
[3] 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.
[4] Estate tax decision.
[5] Estate tax decision; acquiescence relates to third issue of decision.

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Arthurs, W. C	2468	3	374
Art Metal Construction Co	4943	4	493
Associated Dental Supply Co	5650	9	1022
Associated Gas & Electric Co	2296	2	263
Atkins, Alma Foster	15485	9	140
Atkins, John B., estate of	3377	9	140
Atlantic Coast Line R. R. Co	2505	2	892
Atlantic Coast Line R. R. Co.[1]	10983	9	1193
Atlas Tack Co	4725	9	1322
Atterbury, Grosvenor [2]	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
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 15928	9	455
Autovent Fan & Blower Co	240	5	282
Avery, Thomas J	27688	11	958
Avon Mills	6246	7	143
Avon Street Trust	4459	3	553
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
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
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 Rockingham	4682	3	1137
Banna Manufacturing Co	762	1	1037
Barker, George E., estate of	8728	13	562
Barker, O. B	3583	3	1180
Barnes Coal & Mining Co. and Columbus Coal & Mining Co	3209	3	891
Barrows, Fletcher L	3158	4	1221
Barry, E. J	99	1	156
Barry, John Anthony	1724	2	1095
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

[1] Acquiescence relates to first issue of decision.
[2] Nonacquiescence notice in the case of Grosvenor Atterbury (C. B. IV-1, 4) recalled.

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Bay State Securities Co	3685	3	43
Beach Amusement Corporation	18288	14	338
Beacon Coal Co.[1]	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
Bell, James A	8859	7	621
Bell-Rogers & Zemurray Bros. Co	1220	4	687
Bellamore, David H	6385	3	1133
Bellingrath, W. A	2018	3	11
Belmont Stone Co	12410 28531	12	1159
Belridge Oil Co	6296	11	127
Belt Railway Co. of Chicago [2]	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
Benham Ice Cream Co	3401	5	97
Bennie, George E., estate of [3]	12962	13	105
Bentley, J. A	2512	5	314
Benton County Hardware Co	9896	10	869
Berg Industrial Alcohol Co., David	13102	13	1349
Berlin, Inc., Irving	3049	2	377
Bermingham Lumber Co	2654	1	1201
Bernard's, Inc., George	5410	8	716
Bernd, John M	3340	4	291
Bernstein, E. R	1258	6	323
Bernstein, Fannie H	1258	6	323
Bernstorff, Hans	4054	8	787
Bessell, Maxwell E	4971	3	567
Bessemer Investment Co	5295	8	1011
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
Bills Bros. Memorial Corporation	1346	7	1182
Bird, Samuel	6721	4	259
Birkeland, K. B	3464	3	209
Birmingham Trust & Savings Co., executor	7440	5	245
Birn, Henry	610	1	416
Bishop, Martha J., executrix [3]	20069	14	130
Bishop, Roland P	14007	13	784
Bishop, Samuel D., estate of [3]	20069	14	130
Bishop, William T	14008	13	784
Bitter Root Stock Farm	5777	10	81
Bjornstad, Otto A	18115	12	20
Black & Yates, Inc	3442	2	873
Blackie, A. W	2282	2	747
Blackstone, D. L., administrator	10401	12	456

[1] Acquiescence relates to second and third issues of decision.
[2] Acquiescence relates only to issues involving computation of net income for 1918 and 1919 and excessive depreciation restored to income for 1918 and 1919.
[3] Estate tax decision.

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Blitzer, Max	5443	3	696
Bloch, J. H	10076	6	563
Blodget, Fannie H	29393	13	1243
Blodget, William, estate of	10344	13	1243
Blodget, William P	29392	13	1243
Blodget et al., William P., executors	10344	13	1243
Blodgett, John W	35356	13	1388
Blogg & Littauer, Inc	5297	3	427
Bloom Bros., Inc	9440	10	710
Bloomfield, Frederick	6501	6	298
Bludworth, Mrs. W. M	6285	7	495
Blue Ridge Overalls Co	10210	6	1335
Blue River Placer Mining Co	6299	8	166
Blumenthal, S. J	17082	12	1205
Boadwee, Isabelle M	10743	11	1205
Boas, Charles S., estate of	1139	2	522
Bockhoff, Harry W	3206	3	560
Boericke & Runyon	2981	3	684
Bogart, Lacey L., administrator Leon C. Riggs estate	1932	2	668
Boggs & Buhl, Inc	9269 18119	11	612
Boggs, Mary Walker, executrix [1]	12309	11	824
Boggs, R. H., estate of [1]	12309	11	824
Bogle & Co., Inc., W. S	2208	5	541
Boker Cutlery & Hardware Co., Inc	13267	12	1405
Bolinger-Franklin Lumber Co	8077	7	402
Bonaparte, Ellen C., estate of	1652	1	1101
Bonneville Lumber Co	3657	2	489
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 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
Bowen, Allan H	2690	2	1043
Bowman, J. W	7467	8	526
Boyce Extract Co	9327	9	34
Boyd, H. B	6751	6	1330
Boyer Co., B. F	5739	4	180
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
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[1] Estate tax decision.

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Brandeis & Sons, J. L	1546	3	1086
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
Brehmer, August F. W., estate of [1]	5844	9	423
Brehmer et al., Otto T., executors [1]	5844	9	423
Brevoort Hotel Co	539	1	269
Brewer Co., F	78	1	417
Brewster Laundry	14005	10	496
Briggs & Turivas	11672	11	62
Bristol, P. L	9173	10	306
Britt, Benjamin T	1905	2	53
Britt, Mary A., estate of	1904	2	48
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
Brooks, W. B	10991	12	31
Brown & Brown, Inc	9748	10	106
Brown, Charles	13932 27779 31427	13	981
Brown, Edward T	7994	6	895
Brown, Edwin M	499	1	502
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, Thatcher M	11162	10	1036
Brown, Walter F	12748	13	832
Brown, Warren E	2975	4	56
Brown Co., H. H	7967	8	112
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 Co., J. M. & M. S	1037	6	914
Brownsville & Matamoros Bridge Co	93	1	320
Bruce & Human Drug Co	129	1	342
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

[1] Estate tax decision.

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Brush, George De Forest	6568	9	171
Buck, Ellen B., estate of	12988	12	434
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, Thomas, estate of	12626	13	781
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
Burtsell et al., Bertram W., executors	2650	6	412
Busche, F. C	9447 10202 10755	10	1345
Buss Co	2952	2	266
Butler Grocery Co. et al., James	5978	4	378
Butler, Inc., John W	1572	1	1105
Byfield, Gladys R	989	2	19
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
Cairns, J. J	18143	12	20
California Brewing Association [3]	3903	5	347
California Canneries Co	2228	2	109
California Delta Farms, Inc	9820	6	1301
Callanan Road Improvement Co	13303	12	1109
Camden & Burlington County Ry. Co	4991	3	602
Camden Woolen Co	10655	12	1277
Cameron, W. J	9313	9	1123
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
Canton Art Metal Co	7111	6	446

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

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Canton Steel Ceiling Co	7112	6	446
Cantrell Co., The Fred	3141	3	1067
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
Carmichael, D. L	12061	5	456
Carmichael, J. H	12493	12	455
Carney, Richard	7027	6	457
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
Carroll Chain Co.[5]	104	1	38
Carroll Mercantile Co., J. S	4222 11744	7	1157
Carter Co., W. W	689	1	849
Carter, MacDonald & Miller, Inc	12954	14	522
Cartier, Warren A	9605	11	900
Case Plow Works, J. I	664	3	981
Cassidy Co., Inc	9368	11	190
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 Savings Bank[6]	5006	10	1408
Central States Coal Co	8735	4	1134
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
Chatham & Phenix National Bank	107	1	460
Chattanooga Mattress Co	3714	4	464
Chatterton & Son	6057	5	105
Cherokee Ochre Co	9846	9	406
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

[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] Nonacquiescence notice in case of Carroll Chain Co. (C. B. IV-1, 4) recalled.
[6] Acquiescence relates to cost of bank building, its physical life from date of acquisition, and March 1, 1913, value.

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Chicago Starch Co	19427	13	1364
Childs & Co., W. F	4127	3	855
Chisholm's Sons Co., Wm. (Chisholm Shovel Co.)	1840	3	1070
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
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
City Gas Co. of Norfolk [1]	11730 14199	9	468
City Park Brewing Co	7973	10	925
Clark, A. A., estate of	820	6	1085
Clark, Frank H., executor	8015	12	425
Clark, Grace Scripps and Rex B	536	1	491
Clark, Harold B	1707	2	555
Clark, Lillie M	8049	9	460
Clark & Co	5785	4	356
Clark Co., James T	3660	5	1291
Cleveland Home Brewing Co	73	1	87
Cleveland Snow-Church Co	169	1	234
Cleveland Trinidad Paving Co. of Delaware	17294	14	1209
Cleveland Woolen Mills	6029	8	49
Coates, Jane B	5456	3	429
Coatesville Boiler Works	8603 16097	9	1242
Cobb, L. S	7136	9	547
Cockran, H. T	3801	3	215
Cocks-Clark Engraving Co	6604	8	468
Codrington, Ethel M	4685	6	415
Coffin, Irene	5930	8	421
Coffin, Winthrop	11556 12498 28049	12	702
Coghlin Electric Co	1879	3	1071
Cohn & Sons Co., M.[2]	7361 9238	9	87
Cohn-Goodman Co	7167	7	475
Cole, Mrs. W. C	9134	7	903
Cole, W. C	9133	7	903
Coleman, James F	4891	3	835
Colitz, Benjamin	3004	3	947
College Point Boat Corporation	764	1	534
Collins, W. C. and C. C	5986	5	102
Collins and wife, W. D	11148	7	913
Collinson, John W	550	1	561
Colmer-Green Lumber Co.[3]	20916	12	256
Columbia Theatre Co	1414	3	622
Columbus Bread Co	5823	4	1126
Columbus Canning Co	9582	10	1085
Columbus Coal & Mining Co	3209	3	891
Colvert, Warner L	9170	6	623
Combs, sr., W. H	10182	6	249

[1] Acquiescence in so far as decision determines that City Gas Co. of Norfolk and Virginia Railway & Power Co. were affiliated with each other.
[2] Acquiescence relates to allowance of officers' salaries.
[3] Acquiescence relates to depreciation allowance.

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Comey & Johnson Co	11133	8	52
Commercial Co. of Egypt, Inc	5810	3	1163
Commercial Furniture Co	6507	8	71
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
Conlen, William J	815	1	472
Connecticut Electric Manufacturing Co	7549	6	1360
Connecticut National Pavements, Inc	3448	3	1124
Connell, Ezra H., estate of [1]	12368	11	1254
Connorized Music Co	7179	7	213
Conover Co., C. E	9830	7	1234
Conrad Hardware Co	11584	8	512
Conrad Shoe Co	597	1	798
Consolidated Electric Lamp Co	555	1	616
Consumer's Coal Co	8121	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 [2]	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
Corbett, Elliott R	11836	8	438
Corbett, Hamilton F	16643	8	438
Corbett, Henry L	11837	8	438
Corman Co	6227	13	75
Corning Glass Works	9826	9	771
Corsicana Gas & Electric Co	4499	6	565
Cotton Concentration Co	4625	4	121
Couch, H. C	202	1	103
Coulter, jr., Charles J	8181	6	426
Covert, Esther Belle [1]	20048	12	1343
Covington Cotton Oil Co	5534	12	1018
Cowell, Mattie, and Mona Cowell, executrices estate Robert Cowell	691	3	432
Cowell, Robert, deceased, estate of	691	3	432
Coxe, jr., et al., Alfred C., trustees	6805	6	1322
Coxe, Sophia G	2121	5	261
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, Frederick G., estate of	10695 15374 16789	9	437
Crane, Rose P., executrix	10695 15374 16789	9	437
Cravens, Walter	3381	3	282
Crawford Loan & Abstract Co	7681	10	403

[1] Estate tax decision.
[2] Acquiescence relates to all issues except Galloway note issue.

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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
Croker, jr., Richard	6096	12	408
Crompton Building Corporation	4301	2	1056
Crosby-Chicago	11674	14	19
Crosby, Everett U	3764	4	1147
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
Cruger Co	11974	11	306
Cuba Grapefruit Co., Inc	7954 15828 16487	6	260
Cullinan, J. S	5914	5	996
Cullum, Louis W	2678	3	334
Cummings, W. F	10640	9	1404
Cunningham & Sons Co., R. H	7099	10	113
Curlee, W. S	1638	6	557
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
Cusack Co., Thomas	1987	3	828
Cushman Manufacturing Co., H. T	2143	2	39
Cuyahoga Co., The	3721	3	401
D.			
Daigger & Co., A	14733 14734	13	35
Daily News Publishing Co., The	4158	4	31
Daily Pantagraph, Inc.[2]	4126	9	1173
Dalriada Realty Co., Inc	5275	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
Daniel Bros. Co	10840	7	1086
Darling, Jay N	6302	4	499
Darrow, Frank D	929	8	276
Dartt Co., C. E	1372	5	76
Davis, C. R	10299	10	1233

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

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Davis, I. M	2616	2	359
Davis, Mrs. W. E	8219	8	981
Davis, Sadie S., executrix [1]	3877	9	1212
Davis & Andrews Co	2691	2	328
Davis Co., The	5497	6	281
Davis Yarn Co., Inc	6885	8	299
Dean, Annie L	1552	3	896
Deck Clamp Tank Co	11227	10	191
Deerland Turpentine Co	6182	4	1236
Delano, Eugene, estate of	15610	10	1036
Delano, Moreau	11165	10	1036
Delano, Moreau and William A., executors	15610	10	1036
Delatour Beverage Corporation	10892	12	412
DeLisser, Horace, estate of [1]	2459	2	102
Deltox Grass Rug Co.[2]	6926	7	811
Denholm & McKay Co	643	2	444
	20950	15	225
Dental Co. of America	3331	3	343
Denver & Crown Hill Ry. Co	118	6	773
	532		
Deposit Trust & Savings Bank, executor	12195	11	706
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
Deutsch, Julius W	3005	2	729
De Van & Co	8630	7	94
De Vaux, Norman	13574	14	205
De Vore, Fred F	19462	13	1376
Dewey, Mildred McLean	5040	9	1155
	10012		
Dibble, Leon N., executor [1]	2528	6	732
Dibble, Louis N., estate of [1]	2528	6	732
Dicenso, Fellipo	13526	11	620
Dickey Grocery Co., L. Z	156	1	108
Dickinson, E. E	5193	8	722
Diesing, Fred D., executor	548	1	507
Dietrich, Gustav	8367	10	141
Dietrick, Herman T	9730	6	1371
Dill, Lewis	4563	3	65
Dilling Cotton Mills	1794	2	127
Dills Bros. & Co	3575	2	983
Dixie Manufacturing Co	475	1	641
Dobson, James	863	1	1082
Dockum, Harry A	3874	11	39
Doerfler, Magdalen, beneficiary, etc	14551	13	921
Doernbecher Manufacturing Co	14387	11	248
	19152		
Doherty & Co., Ben C	10300	11	812
Doig, Inc., William S	13905	13	256
	16312		
Domenico Fante's Sons, Inc	4468	2	1098
Donaghey Real Estate & Construction Co	1050	5	766
Donaldson Co., Inc., L. S	9974	12	271
Donaldson Iron Co	5762	9	1081
Donaldson Realty Co	25359	12	271
Donalson, Erle M., executor [1]	1629	6	455

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

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Dorn, Louis, estate of	11218	12	1102
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
Duffield et al., Divie B., executors	14954	14	1185
Duncan Co., J	3152	9	1216
Dunn Co., John A	7020	8	955
Dunson Mills [2]	17019	10	1150
Durabilt Steel Locker Co	3121	5	239
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.			
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
Edwards, Walter A	10021	10	39
Egan & Hausman Co., Inc	581	1	556
Eggink, Henry	6413	7	152
Ehrlich, jr., Franz, estate of	4695	4	483
Eimer & Amend	2270	2	603
Elba Manufacturing Co	6995	6	74
Electro Magnetic Tool Co	7096	7	290
Elias & Bro., Inc., G	11954	10	508
Elkins, Luther	18036	12	1058
Elliott, W. H	10639	9	1404
Elm City Cotton Mills	7636	5	309
Elm City Nursery Co	6503	6	89
Elmhurst Investment Co	22557	11	101
El Paso & Southwestern Co	672	2	44
El Paso Electric Co	7049	10	79
El Paso Electric Ry. Co	7048	10	79
Elsasser, Nelson A., executor [1]	11448	12	681
Empire State Finance Corporation	6805	6	1322
Engineers Oil Co	10399 11395 14631	14	1148

[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.

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Engleman, F. J	6193	8	1289
Engleman, M. S	5981	8	1289
Ennis-Brown Co	8471	10	1248
Entress Brick Co	10006	9	588
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
Ettenson Winnig Dry Goods Co	362	3	897
Evans, Leroy G	7347	5	806
Evans, W. L	3221	3	1180
Evens & Howard Fire Brick Co	6797	8	867
Eves, J. C	1669	2	115
Ewing, Joseph Neff	14068	13	705
Eyestone, Frank E	6463	12	1232
Eysenbach, Oscar K	21107	10	716
F.			
Fairchild, Marcus D., estate of [1]	19022	9	416
Fairchild, Nellie B., executrix [1]	19022	9	416
Faitoute Iron & Steel Co	10547	11	818
Falketind Ship Co	3706	6	44
Faltico, George	1601	3	726
Farlow, Samuel, estate of [1]	7268	7	172
Farm Implement Co	9823	6	1069
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' Fuel Co	210	1	1058
Farmers Loan & Trust Co., administrator [2]	1399	3	97
Farmers' Loan & Trust Co. and Isabelle W. Tilford, executors	3286	3	884
Farmers' Union Co-Operative Association	11055	13	969
Faroll-Bittel Co	737	1	467
Fawkes, Leslie H	11305	14	977
Fear & Co., Inc., Fred	9327	9	34
Federal Bearings Co., Inc	9233	9	1063
Federal Gas, Oil & Coal Co., trustees for	7888	15	273
Federal Holding Co	2003	1	1144
Federal Plate Glass Co	1055	6	351
Feiges, Max	6036	13	1366
Feldman, David	5604	3	434
Fell, A. H	2089	7	263
Fellows Medical Manufacturing Co	5592 8980	6	232
Fenner, Charles E. and Virginia S	2216	5	772
Ferry Market, Inc	3671	5	167
Fibre Container Co	7475	9	575
Fibre Yarn Co	7244	10	479
Ficklen Tobacco Co., E. B	10440	10	51

[1] Estate tax decision.
[2] Nonacquiescence notice in this case, published in Cumulative Bulletin IV-2, recalled.

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Fidelity Trust Co.[1]	13638	13	109
Field & Co., Marshall	15279	14	755
Filer Fibre Co	24877	14	757
Finance Exploration & Development Corporation of America	6805	6	1322
Finck Co., Henry	4339	4	1188
Fink Co., George A	1369	5	76
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 Los Angeles	2817	6	850
First National Bank of Marlow, Okla	9889	9	29
First National Bank of Rock Rapids, Iowa	687	6	816
First National Bank of Sleepy Eye, Minn	2334	7	84
First National Bank of Stoughton, Wis	2790	2	586
First State Bank	2581	5	1176
Fishel, Henry R	13912	14	87
Fishel & Marks	13912	14	87
Fisher, Carl G	7594	7	968
Fitchburg Steam Engine Co	433	1	242
Flach, John H	12809	13	383
Flaxlinum Insulating Co	5120	5	676
Fleming, C. F., estate of [2]	7212	9	419
Fleming et al., Edmund H., executors [2]	7212	9	419
Fletcher, Charles H., estate of [2]	7856	9	514
Flexible File Co	13829	13	909
Flint, Ernest P	17945	12	20
Flint River Brick Co	746	2	31
Florence Mills, Inc	10383	9	579
Florida Grocery Co	151	1	412
Floyd, T. B	12221	11	903
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, 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
Foster & Glassell, Ltd	9232	5	118
Fostoria Milling & Grain Co	17191	11	1401
Fowler, sr., J. S	3260	4	427
Fox & Sons, Inc., W. P	16389	15	115
Fox River Iron Co	4743	5	810
Francesconi & Co., J. C.[3]	10585	10	658
Francis, T. J	2525	2	1087
Frank & Seder Co	10614	13	1

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

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Frank & Seder, Inc	10615, 22514	13	1
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
Frees, jr., Peter	11307	12	737
Frey, jr., et al., Mitchell M., executors William B. Scaife estate	391	1	338
Friederich & Sons Co., A	3412	2	1318
Friend, George B	5000	8	712
Friend, Oscar, executor estate of Herman A. Meyer	1062	4	686
Frischkorn, E. S	7879	7	431
Frost et al., B. Y., executors	10441	12	1295
Fruen Investment Co	1126	2	542
Fuller, O. R	10801	11	1025
Fulton, Guy	9362	11	641
Furst Bros. & Co	3362	2	960
G.			
Galatis, Jerry	10747	8	213
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
Garber, B. A.[2]	3708, 14097	11	979
Garber, M. C.[2]	3710, 13909	11	979
Gardiner, H. K	5218	7	1089
Gardner Governor Co.[3]	321	5	70
Gardner Printing Co	5061	4	37
Garretson, Sophia M	5818	10	1381
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, Mike	5774	6	124
Georgia Car & Locomotive Co.[4]	3131	2	986

[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 does not relate to that part of decision involving application of Ayers decision (1 B. T. A., 1135).

[4] Acquiescence relates only to issue 1 in decision.

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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
Gerst et al., Herbert J	3879 3888 5365 5366 5367	4	658
Gettys, M. E	3495	3	441
Giant Tire & Rubber Co	9412	7	1249
Gifford, Harry N	2677	3	334
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
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 Outlet Co	14029	10	165
Goellner Furniture Co	3500	2	1290
Goerke Co., The	5992	7	860
Golconda Oil Co	10176	7	955
Goldberg, Harry S	5389	4	1073
Goldberg, Louis M	11615	9	1355
Goldberger, Leo G	243	1	249
Goldman, H	11907	12	874
Goldman, I	11173	12	874
Goldman, Louis J., eatate 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
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
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

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

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Gramercy Investing Co. of Pennsylvania	2373	8	13
Grand Rapids National Bank	21116	9	1119
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	1026
Gras, Rudolph	2340	5	1163
Graves, George K	8113	7	286
Gray, jr., J. J	716	2	672
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.[2]	10489	12	383
Great Northern Ry. Co.[3]	8433 11850	8	225
Green Oil Soap Co	3574	3	467
Greenbaum, Michael H	3836	2	979
Greenebaum, Moses E., executor [1]	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
Guggenheimer, H. Randolph	13625	9	418
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
H.			
Haas, Otto	3542	3	72
Hadaway, John B	12717	13	986
Hadden, jr., et al., John Aspinwall, executors [6]	9421	10	741
Hadden, Marie Torrance, estate of [6]	9421	10	741
Hagerstown Shoe & Legging Co	463	1	666
Hall, Charles Ward	11650	6	15
Hall Co., Inc., F. A.[7]	4612	3	1172
Hallam, Edwin C	3582	2	1220
Hallenbeck, Harry C., estate of	12470	10	1034

[1] Estate tax decision.
[2] Acquiescence relates to depreciation and obsolescence adjustments.
[3] 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.
[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.
[6] Estate tax decision; nonacquiescence notice in this case published in Cumulative Bulletin VII-2, page 47, revoked.
[7] Nonacquiescence notice in the case of F. A. Hall Co., Inc. (C. B. V-1, 6), recalled.

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Hallenbeck, John J., executor	12470	10	1034
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
Hammon, Hiram F., estate of [1]	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
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
Hardy, George W	7981	5	981
Harmony Grove Mills, Inc	4500	2	1200
Harnsberger's, Inc	7053	7	250
Harris, Allen	10980	10	1374
Harris, Charles L., administrator estate of William L. Harris, deceased [1]	4426	5	41
Harris, Sam H	8614 9623	11	871
Harris, William L., deceased, estate of [1]	4426	5	41
Harris-Emery Co	113	10	297
Harris Grocery Co., Inc., W. H	3884	3	216
Harrolds Motor Car Co	6184	5	429
Hart Cotton Mills	834 9032 12781	2 9	973 1062
Hart, John W	3916	7	211
Hartford & Connecticut Western R. R. Co	2021	2	211
Hartford-Fairmont Co	9016	12	98
Hartford Hat & Cap Co	7400	7	714
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.[2]	14817	13	1352
Hastings, Alice M	5106	8	670
Hastings, O. B	5107	8	670
Hatzel & Buehler, Inc.[2]	9501 11454	10	993
Haupt, Joseph J	5781	6	1297
Hausmann, Louis, executor [1]	5931	5	199
Hausmann, Theresa R., estate of [1]	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

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

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Heath, F. E	6015	7	114
Heathcote, Bruce, administrator [1]	11141	8	740
Heaton Construction Co., C. T	11944 13695	11	1302
Heineman Lumber Co.[2]	10175	11	1229
Held, Antoinette B., executrix estate of 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 Co., F. C	5272	5	570
Henderson Cotton Mills	5504	4	1212
Henderson Overland Co., The	4776	4	1088
Henderson, Mrs. Alice D., executrix	1875	2	327
Henderson, jr., Mrs. S. H	1917	2	327
Henderson, jr., S. H	1916	2	327
Henderson Tire & Rubber Co	11953	12	716
Heninger et al., J	205	9	1318
Henry, John	6375	6	131
Henry, Mattie F., conservatrix [1]	7268	7	172
Henry, R. D	3545	3	72
Hensler Brewing Co., Joseph	11874	12	25
Herald-Despatch Co	4556	4	1096
Herenden, Ellen C., estate of [1]	6983	5	1272
Hermalbrecht, John	752	6	1091
Heron Metal Bed Co	3236	2	305
Hess Bros.[3]	8039	7	729
Hessenbruch et al., Herman M., executors	17907	10	763
Hessenbruch, Ida M., estate of	17907	10	763
Heublein, Inc., G. F	13125	13	911
Hexter, Percy K	7878	8	888
Heydrick, L. C	4120 5503	7	950
Heyn, Otto P	3788	4	1256
Hibbard, Spencer, Bartlett & Co	7431	5	464
Hickory Spinning Co	367 367	2 1	439 409
Hickox, Lee	6702	7	142
Hicks, John A., estate of [1]	7253	9	1226
Hicks, L. R. and R. A., distributees [1]	7253	9	1226
Higginbotham-Bailey-Logan Co.[4]	4691	8	566
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., G. H., administrators [1]	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 [1]	1862	2	1322
Hillenmeyer, Mary, executrix estate of H. F. Hillenmeyer, deceased [1]	1862	2	1322
Hillman, M. P. G	2372	2	1265
Hinckley, Ralph L	4193	6	312
Hirst & Begley Linseed Co	7482	4	1160
Hitchcock, Halbert K	6107	4	273

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

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Hochschild, Harold K	3080 4057	8	787
Hodges, Fred G	7729	9	1353
Hoe & Co., Inc., R	7216	7	1277
Hof Brau Co.[1]	6134	6	442
Hof Brau Co	4636	12	1067
Hoffman, Ernest Gustav, estate of	7914	8	1272
Hoffman, H. C	6611	4	474
Holden & Martin Lumber Co	826	2	511
Hollingsworth, Turner & Co	656	1	958
Holmes, Lelia V., estate of	7970	10	705
Holt-Granite Mills Co	1784	1	1246
Holt Plaid Mills, Inc., E. M	8745	9	1360
Holton & Co., Frank	10261	10	1317
Home Industry Iron Works	7991	8	1267
Honig-Cooper Co	15000	11	896
Hood, Charles H	6990	4	1020
Hooper, Harry B	5271	8	397
Hopkins, Walter L	1476	2	549
Hortenstine, J. L., coadministrator [2]	3633	3	697
Hoskins, John	10241	7	299
Hoskins Lumber Co., J. S	2390	3	846
Hotel Grunewald Co., Ltd	1593	5	761
Houck Co., Ltd	8159	7	670
House & Herrmann	14090 30958	13	621
Houston Belt & Terminal Ry. Co.[3]	8494	6	1364
Hovely, Peter P	1677	2	1099
Hovey Co., C. F	5448	4	175
Howell, Fred H	12489	12	510
Howell, Thomas A	12492	12	510
Hower & Seaman, Inc	4196	4	261
Hub Dress Manufacturing Co	283	1	197
Hub Shoe Co	1170	2	836
Hub, Inc., The	3553 3554	3	1259
Huber, William D	9975	12	1
Hudson, Charles I., estate of [2]	3351	5	711
Huey, A. L	6132	4	370
Huff, Andrews & Thomas	336	1	542
Hughes Coal Co	7142	8	306
Hughes Co., Ed. S	6748 14120	6	949
Hughes, John N	9104	8	206
Hughson, Frank C	6690 11294	10	242
Hulbert, Edmund D., estate of [4]	11204	12	818
Hulme, J. H	11027	9	31
Humphries, C. C	3511	3	441
Huning Mercantile Co	15	1	130
Hunnicutt, Mary L	3621	10	1004
Hunt et al., Ethel P., executrices [2]	9801	12	396
Hunt, John K., estate of [2]	9801	12	396
Hunter Coal Co	2503	2	828
Hunter, Mrs. Ollie	6292	7	495

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

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Hurley, A. W	7339	6	695
Huron Portland Cement Co	3334 4973	9	181
Hutchins Lumber & Storage Co.[2]	3307	4	705
Hutchinson, James M	11284	11	789
Hutchinson, William N	11285	11	789
Hutchison, Charles [3]	8053	13	1187
Huyler's	1357 1445	8	13
Hyams Coal Co., Ltd., et al., Robert P	219	1	217
Hymel Planting & Manufacturing Co., Louis	2903	5	910
I.			
Illinois Merchants Trust Co., executor [4]	11204	12	818
Illinois Merchants Trust Co., executor estate of William R. Manierre, deceased	3106	4	103
Illinois Paper Box Co	770	4	1227
Imperial Furniture Co	16929	9	713
Independent Brewing Co. of Pittsburgh [5]	3242	4	870
Independent Electric Machinery Co	2742	3	1116
Index Notion Co.[6]	1023	3	90
Innes-Behney Optical Co	3368	7	982
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
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
Jackson, Annette T.[7]	9001	11	1257
Jackson, George A.[7]	9002	11	1257
Jackson, James J	12944 12945 15996 17856	12	702
Jackson, Willis K.[7]	9003	11	1257
Jackson & Tindle.[7]	9000	11	1257
Jackson Sanatorium & Hospital Co	3089	9	734

[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; acquiescence relates to issues concerning checking account, real estate, and pension fund.
[5] Acquiescence relates only to issue 1 in decision.
[6] Acquiescence does not apply to that part of decision relating to appeal of Guaranty Construction Co. (2 B. T. A., 1145).
[7] Acquiescence does not relate to "tentative tax" issue.

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James, J. R	4068	2	1071
Jamestown Worsted Mills	92	1	659
Jarecki Manufacturing Co	10798	12	1165
Jaudon Engineering Co., H. S	14060	15	161
Jenckes Spinning Co	215	4	765
Jennings, J. T	3222	3	1180
Jewelers Building Co	1533	2	540
Jewett & Co	5416	3	854
Joel, B. F	6801	9	1027
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]	955	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
Johnston, J. T. M	8466 10928	9	328
Johnston, Mary Virgil, executrix [2]	6352	7	1054
Johnston, W. F	15298	12	1205
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, George C	4864	6	451
Jones, Henry M	7325 12662	4	1286
Jones, Herschel V	944	1	1226
Jones Hollow Ware Co	14751	12	48
Jones Lumber Co	3275	5	1159
Jones, Mrs. E. W., estate of	8218	8	981
Jones & Co., T. P	4294	2	1218
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.			
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.

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Kamper, Louis	6100	14	767
Kanawha City Co	14630	13	912
Kansas Milling Co	2835	3	709
Kansas Savings & Trust Co. et al., administrators of estate of A. W. Shulthis, deceased	1827	2	1253
Karges Hosiery 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
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 [1]	4698	5	31
Kaufman Straus Co	2649	2	718
Kaufman, Una Libby, executrix [1]	4698	5	31
Kaufmann, Alfred D., estate of [1]	10907	11	412
Kaufmann, Raymond M., executor [1]	10907	11	412
Kaweah Lemon Co	4583	5	992
Kay, Wallace G	10102	10	534
Kean, Hamilton F	10745	10	97
Keeler, Isaac P	6379	8	914
Keeler Brass Co	6218	9	293
Keeler Realty Co	6218	9	293
Keenan, Katherine P.[1]	6352	7	1054
Keener's Oil, Natural Gas & Fuel Co	7862	6	263
Keewis Realty Co., Inc.[2]	10489	12	383
Keim, F. D	2488	4	1240
Keller, Ida E. B	291	2	494
Keller Mechanical Engineering Corporation	6741	6	990
Kelley, Harry P	6891	9	832
Kelley, Thomas F	7036	9	834
Kellogg Commission Co	3945	6	771
Kelly, Armin L., administrator [1]	7092	8	1193
Kelly, Daniel	8365	10	141
Kelly, H. J	1796	3	257
Kelly, Oliver Warren, estate of [1]	7092	8	1193
Kelsey, S. R	6082	6	1068
Kelso, Virginia	8351	9	232
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
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
Kentucky Electric Lamp Co	14337	14	603
Kentucky Land, Gas & Oil Co	1473	2	838

[1] Estate tax decision.
[2] Acquiescence relates to depreciation and obsolescence adjustments.

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Kessler, George A., estate of [1]	3182	3	1207
Ketcham, H. R	14531	9	1208
Keystone National Bank of Pittsburgh, Pa	10805	13	786
Kieser & Son Co., Inc., F	10990	15	359
Kilby Car & Foundry Co	6931	4	1294
Kimball, David	11968	8	475
King, Earl	9942	9	502
King, Ella Daly, executrix	8283	10	698
King Lumber & Oil Co	9695	4	1253
King-Parker, Inc	8315	6	884
King, Robert C., estate of	8283	10	698
King, William C	6729	10	308
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
Kirtland Bros. & Co., Inc	4482	3	669
Kistler et al., Florence L., administrators [2]	3707 11986 18061	11	979
Kistler, William F., estate of [2]	3707 11986 18061	11	979
Kistler Land & Improvement Co. [3]	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. [4]	4004 4005 6061 6102 10157	6	617
Kling, Mary Clark	1495	1	1048
Klise, Elmer	11318	10	1234
Knapp, Kittie A	2775	7	790
Kniffin, Leonard	7959	5	1274
Knapp Bros. Co	19430	13	1300
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., 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

[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 petitoners or whether such proportionate amounts are taxable one-half to the petitioners and one-half to their respective wives.

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

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

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		Volume.	Page.
Krauss, Alexander	3611	5	799
Kreipke, A. C	10716	7	777
Krieg Tanning Co	3318	4	1081
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
L.			
Lackawanna Trust Co. et al., executors [1]	12368	11	1254
La Francaise Piece Dye Works	15068	14	71
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
Lancaster Lens Co.[2]	11603	10	1153
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 & Michaels Co	6420	9	1020
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
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
Lawrence, A. M	13566	13	463
Lawson, John	2284	2	747
Lawson, W. H	4510	12	1076
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 [3]	3847	3	193
Lehigh Building Corporation	6607	7	460
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
Lenox Land Co	1083	5	1206
Leonard, Arthur H	3156	4	1221
Leonard, Charles M	3157	4	1221

[1] Estate tax decision.
[2] Acquiescence relates to issue whether invested capital for 1919 should be reduced on account of the 1918 deficiency barred by the statute of limitations.
[3] Nonacquiescence notice in this case, published in Cumulative Bulletin IV-2, page 6, recalled.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Lesser Bros. Co	13725 13726 29404	14	139
Lester, Lucy C., estate of	6056	4	74
Levelle, Anna L. Stark, executrix [1]	10587	8	1150
Levin, N	6444	5	892
Levine Bros. Co., Inc.[2]	6832	5	689
Levine, Hyman	7435	8	298
Levy & Co., Max	3247	3	422
Lewis, T. J	9987	10	536
Lewis-Hall Iron Works	3097	2	788
Lexington Realty Co	4639	12	850
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
Lickumovitz, Morris	6842	4	1181
Lidstone Co., R. D	4133	9	447
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
Limbert, Charles P., estate of	6725	9	24
Limbert Co., Charles P	6800 12738	9	1390
Lindlahr Sanitarium, Inc	1619	4	1245
Lindsey-Long Coal & Lumber Co	11279 11669	5	243
Linn, Gus	1935	4	76
Lister, James R	3411	3	475
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
Lloyd, Augustine M	12091	15	82
Lloyd, Edward H	12092	15	82
Lloyd, William S	12093	15	82
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
Loeb, Carl M	3082 9191 9192	8	787
Loeb, Julius	3083 4061	8	787
Loetscher, Christian, estate of [3]	14325	14	228
Loetscher et al., John A., executors [3]	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

[1] Estate tax decision.
[2] Acquiescence relates to issues 3, 5, and 8 in decision.
[3] Estate tax decision; acquiescence relates to all issues, except those involving deductions for executors' commissions, attorneys' fees, and miscellaneous administration expenses.

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Lonergan, John E	6441	4	1209
Long Island Foundry Co., Inc	2726	2	464
Long, M. A	7721	8	737
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
Los Angeles Cemetery Association	293	2	495
Los Angeles Towel Service Co	8866 23391	9	665
Los Angeles Trust & Savings Bank	2818	6	850
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
Lovett, Joanna, executrix estate of Thomas J. Lovett	2940	3	192
Lovett, Thomas J., deceased, estate of	2940	3	192
Lowry, F. Hunt	11972	11	409
Lozier, Charlotte C., estate of [1]	7513	7	1050
Luce Furniture Co	6536	9	1413
Lukins, F. W	2544	3	204
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
M.			
Mabel Elevator Co.[2]	1110	2	517
MacAdam & Foster, Inc	10443	8	967
MacDonald-Kaitchuck Printing Co	279	4	996
MacRae, Hugh	4284 19271	9	428
Mackay, Milton A	6833	11	569
Mackenzie, R. J., estate of [1]	11141	8	740
Macmillan Co., The	5240	4	251
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
Magnus, Mabee & Reynard, Inc	119	1	907
Maine Dairy Co	4675	4	375
Maisel, jr., Nicholas J	2422	2	66
Mallinckrodt, sr., Edward [4]	1750	4	1112
Mallinckrodt, sr., Edward, estate of	11032	14	323
Malone, Edwin B	5225	5	1226
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

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

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Manorial Development Corporation	611	1	575
Mantle, Lee	5808	13	145
Manville Jenckes Co	215	4	765
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
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
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
Massengale Advertising Agency	1496	2	26
	6514	11	973
Mather Paper Co.[1]	1378	3	1
Mathews, W. B	10032	13	1133
Mathis Bros. Co	3861	9	338
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'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
McCabe Co., M. J	21	1	57
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 [2]	3147	10	958
McColgan, Daniel A., estate of [2]	3147	10	958
McConnell, E. H	3211	6	116

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

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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
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
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
McMullin, M. K., estate of	8015	12	425
Mead et al., William W., executors	7228	6	752
Meade Cycle Co	5756	10	887
Meadow Fork Coal Co	9770	9	835
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 [1]	3098	6	341
Meinel, Ethel G., executrix [1]	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 National Bank	8179	6	1167
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
Mertz, Edward P	5695	5	694
Messenger Publishing Co	1569	2	30
Mesta Machine Co	2841	12	523
Metairie Cemetery Association	437	4	903

[1] Estate tax decision.
[2] Acquiescence relates to third issue of decision.
[3] Estate tax decision; acquiescence relates to issue regarding taxablity 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.

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Metcalf, Edwin D., estate of	13348	13	236
Metro Pictures Corporation of New England [1]	4437	11	1271
Metro Pictures Film Exchange of Pennsylvania	747	1	721
Metropolitan Laundry Co	538	2	1062
Metzger, L	9682	5	1230
Meurer Steel Barrel Co., Inc	7749	7	64
Mexican Telegraph Co.[2]	9093	10	213
Meyer, Anton M	5737	3	1329
Meyer, Herman A., estate of	1062	4	686
Meyer & Bro. Co., F	5384	4	481
Meyrowitz, Emil B	3241	3	1327
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
Midwest Hotel Co	2933	5	121
Miles Co., W. C	3439	5	625
	9559		
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, G. A	4469	6	401
Miller, Jennie L., executrix	4397	11	854
Miller, John L., estate of	4397	11	854
Miller, Stanley R	17002	12	702
Milliken, George W., estate of [3]	10123	7	785
Milling Moore Mercantile Co	7560	5	1060
Mills, Lucy M., estate of [3]	1028	3	1016
Milwaukee Brass Manufacturing Co	3424	10	936
	13542		
	21024		
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
Mitchell Advertising Agency, Inc	10351	10	1311
Mitchell Auto Co., A. P	7597	10	1001
Mitten, Robert	10891	11	731
Moberly Oil Co	3552	3	163
Mobile Delivery Co	7124	8	1224
Mobile River Saw Mill Co	8700	8	368
Mogg Coal & Coke Co	12408	10	588
Monarch Cooperage Co	11590	13	929
Monarch Electric & Wire Co	13405	12	158
Monk, Henry	11396	9	16
Monroe Coca-Cola Bottling Co	7288		
Monroe Cotton Mills	3310	6	172
Monroe Furniture Co., Ltd., et al	2543	2	743

[1] Acquiescence relates to issues involving officers' salaries and legal expenses.
[2] Acquiescence relates to all issues except as to tentative tax.
[3] Estate tax decision.

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Moon, Annie	8675	6	385
Moon, O. L	8674	6	385
Moore, Anna H., executrix [1]	10542	13	864
Moore, George A	14953	14	1185
Moore, H. B	3544	8	749
Moore, L. C [2]	3709, 13907	11	979
Moore, William, estate of [1]	10542	13	864
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
Morefield and wife, W. H	5721	4	394
Morgan, Claud	6290	7	495
Morgan, John	10978	10	1138
Morgan, Walter G	3449	5	1035
Morris, Homer P	6510, 6525	9	1273
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
Morton, A. D	3559	6	1295
Mosby & Co., Inc., J. B	2781	6	722
Mosenthal, Philip J., estate of	6994	12	365
Mosenthal, Walter J., executor	6994	12	365
Moser & Wacker, Inc	4475	4	1021
Mosher Manufacturing Co	1886	7	187
Mosier, M. H	5304	5	674
Mossberg Pressed Steel Corporation	8757	9	1161
Mossman, Yarnelle & Co. [3]	3269, 11076	9	45
Mt. Vernon Car Mfg. Co	14207	13	810
Mt. 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
Mumper, Hewlings	14053	13	977
Munn Hotel Co	13819	14	93
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

[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 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.

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Musser, R. C	4781	3	498
Mutual Chemical Co., of America	10083	12	578
Myer Thread Manufacturing Co., Henry	3641	2	665
N.			
Nabors Oil & Gas Co	7962	7	1091
Nace, Bruce E	10578	12	104
Nartzik, Julius J., estate of	4316	8	685
Nathan, Morris, estate of [1]	11448	12	681
National Bank of Baltimore	3844	3	1038
National Film Publicity Co	1807	4	118
National Grocer Co	562	1	688
National Industrial Alcohol Co	4853	7	1241
National Land Co	11130	10	527
National Oil Products Co	13570	12	1402
National Piano Manufacturing Co.[2]	3333 20486	11	46
National Pneumatic Co	3651	5	637
National Sash & Door Co	5788	5	931
National Talking Machine Sales Corporation	5272	5	570
Nazareth Cement Co	2446	4	1121
Neapolitan Ice Cream Co	11793	8	437
Neill, James	9290	8	299
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
Newlyn Coal Co	9753	9	835
Newman, Lewis D	19138	9	158
Newman Theatre Co	3694	4	390
Newman, William C.[3]	6530	10	158
Newmarket Co	1489	2	537
New Orleans Can Co	11994	7	1175
New Orleans, Texas & Mexico Ry. Co.[4]	400	6	436
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
Niagara Searchlight Co., Inc	9505	10	922
Nice Ball Bearing Co	2109	5	484
Nichols et al., George, executors [5]	9599	10	919
Nichols, John W. T., estate of [5]	9599	10	919
Nickey, A. B., estate of	1961	3	173
Nickey & Sons, A. B	1235 1236 1237 1238 1239	3	173
Nickey, S. M	1967	3	173

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

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Nickey, W. E	1962	3	173
Nixon, Kate I	1186	2	524
Noell, Richard A	3223	3	1180
Nokomis Cotton Mills	4557	2	1205
Nolde & Horst Co.[1]	9867	12	417
Norfolk & Western Ry. Co	3601	3	597
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 Trust Co. et al., executors	4316	8	685
Northern Trust Co., executor[2]	7127	9	96
Northwest Lumber Co	10650 15310	9	1111
Northwestern States Portland Cement Co.[3]	5763 10456	7	835
Northwestern Yeast Co	1511	5	232
Northwood & Co., H	5122	4	697
Norvell, B. R	7720	6	56
Norvell, Mrs. B. R	7719	6	56
Norwood, Calef & Co	9	1	261
O.			
Oates, Mrs. Omer J	8393	8	981
O'Brien et al, Blanche, executors	25747 13042	12 10	1195 682
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
O'Day Investment Co	16632	13	1230
Oeltjen, C. G	11643	11	608
O'Hair, P. E., estate of	4184	3	1039
O'Hare, J. Frank	30377	12	702
Ohio & Big Sandy Coal Co., trustees for	7888	15	273
Ohio Grease Co	6023	4	1207
Ohio Sheep & Wool Growers Association Co	15149	14	911
Old Farmers Oil Co	2824	12	203
Olect, 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
O'Meara, C. A	9822	11	101
O'Neill, John, estate of[4]	5185	4	78
O'Neill, jr., et al., John J., executors[4]	5185	4	78
O'Neill Machine Co	7922	9	567
Oppenheimer, Leon	9977	7	1156
Opperman Coal Co	3317 14729 15792	6	1215
Orlando Petroleum Co	20399	11	101
Orth, Frank L	5588	9	249
Osage Steamship Co., Ltd	3396	3	141

[1] Acquiescence relates to third issue of decision.
[2] Estate tax decision; acquiescence relates to trusts of 1912, 1919, and 1921.
[3] Acquiescence relates to first, second, third, fourth, and sixth issues of decision.
[4] Estate tax decision.

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Osborne & Clark Lumber Co	10493	8	382
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 Lumber Co	3946	2	489
Owen-Ames-Kimball Co	1637	5	921
Owens Bottle Co	1033	8	1197
Oyster, jr., George M., estate of	7390	4	108
Ozark Mills, Inc	4377	6	1179
P.			
Paauhau Sugar Plantation Co	13879	13	500
Pabst, Fridolin	2227	6	843
Pacific Baking Co	84	2	391
Pacific Car & Equipment Co	1093	2	348
Pacific Coast Pipe Co. [1]	7961	11	1329
Pacific Coast Redwood Co	1847	5	423
Pacific Novelty Co	8162	5	1017
Pacific Pipe & Supply Co	1943	2	870
Pacific Realty Corporation	4526	5	1223
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
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.[2]	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	2	851
	4894	4	605
Parisian, The	583	2	415
Park Bros. & Rogers, Inc	2460	6	719
Parker, Arthur M., estate of	14954	14	1185
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 Wire Goods Co	3999	8	448
	5452		
Parkersburg & Marietta Sand Co	12050	11	87
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 Produce Co	3994	4	950
Patterson, W. H	8901	7	621
Pauli, Karl	13927	11	784
Paulson, Peder, estate of	13571	10	732
Paulson et al., William I., executors	13571	10	732
Payne, Edward W	9065	12	781

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

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Pearce et al., Arthur P., trustees	9615	13	150
Pearce, jr., Charles F	5606	6	450
Pearsall, Gilbert H	11997	10	467
Pearsall & Co., Inc	12722	5	1177
Peck, Wilber S.[1]	11061		
Peebles et al., W. S., administrators [1]	9380	5	386
Peerless Pacific Co	14376	10	103
Peninsula Shipbuilding Co	5741	9	189
Penn Chemical Works	9247	7	442
Pennington-Geissler Co	10082	11	648
Pennsylvania Co. for Insurance on Lives and Granting Annuities, executor under the will of Mary A. Britt, deceased	1904	2	48
Peoples Ice & Cold Storage Co	14365	10	16
Peoples Trust Co., trustee	8472	10	1385
Perkins, B. F	5152	6	781
Perkins Land & Lumber Co	11363 17041	9	528
Permanent Loan and Savings Association	2268	2	132
Perry, E. G	9023	9	796
Perry, V. K	9022	9	796
Perry & Dorminey	852	1	995
Perryman, J. R	2735 6301	6	311
Persons, James H	3250	5	716
Peru Chair Works	3408	3	29
Petaluma & Santa Rosa R. R. Co.[2]	13830	11	541
Peters Manufacturing Co	2091	1	1198
Peterson Co., George C	1266	1	690
Pevely Dairy Co	161	1	385
Phelps, Martha B., executrix [1]	4803	6	648
Phelps, William L., estate of [1]	4803	6	648
Phillips, Edward S	2376	9	1016
Phillips, George E.[1]	6352	7	1054
Phillips, John D., estate of [1]	6352	7	1054
Phillips, Joseph Edward, executor [1]	6352	7	1054
Phillips, Joseph W., estate of [1]	6352	7	1054
Phillips, T. C	12802	9	153
Philmont Realty Co	11758	11	800
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-Mt. Airy Guano Co	8542 1757	8 3	72 1009
Pierce-Arrow Motor Car Co	893	2	396
Pierson & Co	21340	12	678
Pike County Coal Corporation [3]	7189	4	625
Pine Bluff Compress & Warehouse Co	7989	5	938
Pine Ridge Mines Co	2208	5	541
Pinhorn, Richard, estate of [1]	6388	7	1104
Pioneer Laundry Co	4739	5	821
Pittard, J. T	1804	5	929

[1] Estate tax decision.
[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] Acquiescence relates only to issue 1 in decision.

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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
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
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
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
Post, James H	12488	12	510
Pottash Bros	11990	12	190
Pottash, Harry	11992	12	190
Pottash, Max	11991	12	190
Potter Farms, Inc	5928	6	110
Powel, Hope Ives, estate of [1]	9888	10	166
Powel, T. I. Hare, executor [1]	9888	10	166
Powell Coal Co.[2]	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
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, 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
Price, Samuel B	11764	7	1237
Producers Fuel Co	159	1	202
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
Purcell, Annie L., executrix	3838	4	967

[1] Estate tax decision.
[2] Acquiescence relates to all issues except jurisdiction issue.

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Purcell, Joseph, estate of	3838	4	967
Purdy & Henderson Co	5198	4	70
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
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
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
Ransom, Inc., Stephen	7904 7905	9	120
Rauh & Sons Fertilizer Co., E.[2]	10720	12	468
Ravner, William	8284	10	698
Raymond-Hadley Corporation	5128	4	889
Read Phosphate Co	10238	13	39
Real Estate & Trust Co. et al., executors, estate of George W. Milliken [1]	10123	7	785
Realty Sales Co	18145	10	1217
Redlands Security Co	5703	5	956
Reed, F. M	6776	6	1140
Reed, Leila H	5110	8	670
Regal Shoe Co	784	1	896
Reichenback, Harry L	2015	1	1026
Reinhardt, Elaine R	994	2	19
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
Renfro, E. T	6138	8	1295
Renfro, Mrs. Inez C	6138	8	1295
Reserve Natural Gas Co. of Louisiana	8704 9006	12	219
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
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	7763 3703	6	1247

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

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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
Riker, jr., Samuel, executor	7102	6	890
Ringler & Co., George	8565	10	1134
Rio Electric Co	12756	9	1332
Riter, Joseph	14392	13	57
River & Rail Storage Co	1233	1	1098
Riverview State Bank	11180	12	1261
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
Robinson, Andrew P	14924	12	1195
Robinson Co., A. M.[1]	5652	5	1217
Robinson, F. M., estate of	6341	4	47
Robinson Shows Co., John	13893	12	806
Rock Island Sash & Door Works	7258	13	635
Rockford Brick & Tile Co	3873	4	313
Rockford Malleable Iron Works	2451	2	817
Rodefer Oil Co., David	10184	11	782
Roden Coal Co	7915	5	654
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, Katie	10843	7	711
Rogers, R. M	10842	7	711
Rogers, Robert C	13581	12	816
	24740		
Romayor Gravel Co	7532	11	828
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
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
Ross Co., Inc., F. J	7281	7	196
Ross, James, estate of [2]	8690	8	693
Ross-Spiller Glove Co	10212	10	1340
Rosser, Luther Z., estate of [2]	2161	3	809
Roth, Charles F., estate of	1508	3	868
Roth Hotel Co	542	1	1111
Roth Shoe Co., Whitney	89	1	453
Rouse, Hempstone & Co., Inc.[3]	7673	7	1018
	10987		

[1] Acquiescence relates to issues 2, 3, 4, 5, and 6 in decision.
[2] Estate tax decision.
[3] Acquiescence relates to issue concerning opening inventory at December 1, 1917.

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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 Co., Inc., M. J	2069	4	476
Rudolph, T. T	4570	6	265
Ruf, Frank A., estate of [2]	9528	13	85
Ruos, H. D	9119	13	240
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
Ryan Co	54	2	764
Ryan, John C., estate of	1986	2	1130
Ryan, Kate C., executrix	1986	2	1130
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 Screw Co	2077	2	649
St. Louis Malleable Casting Co. [3]	5490, 15168	9	110
St. Louis Union Trust Co., executor	11032	14	323
Sachs, 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	12231, 3725	8, 4	979, 1109
Sample Hat Stores, Co., Inc	6042	13	1366
Sampson, William C	204	1	73
Sand Springs Home	4871	6	198
Saner-Ragley Lumber Co	431	3	927
San Francisco Lumber Co	10643	10	1242
Sanger, Elias A., estate of	6981	8	107
Santa Maria Gas Co	11507	10	1412
Sargent, Marjorie L	3678	4	298
Saul, Maurice B	14067	13	705
Savannah Ship Chandlery & Supply Co	14805	13	958
Savinar Co., Inc	3624	9	465
Sayre Stamping Co	3040	2	166
Scaife, William B., estate of	391	1	338

[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.

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Schatzinger, Bernhard, estate of [1]	11383	12	1353
Schatzinger, Sabina, executrix [1]	11383	12	1353
Scheer, Abraham	10857	11	836
Scheuer, Herman, estate of [1]	4621	9	486
Schick, Andrew, deceased, estate of	3659	3	1026
Schiff, Benjamin J	4742	3	640
Schilling Grain Co	5939	8	1048
Schlemmer & 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
Schoellkopf, Walter H	6212	4	1032
Schroth, Joseph, estate of [1]	3914	5	326
Schroth, Julia Anna, executrix [1]	3914	5	326
Schubert, Andrew H	6667	4	35
Schulz, A. J., estate of [1]	5686	7	900
Schulz, Emma Jane, executrix [1]	5686	7	900
Schulz Baking Co	2074	3	470
Schwarzler Co., A. J	667	3	535
Schwing, Samuel P., estate of [1]	3633	3	697
Schwinn, Ignaz	8441	9	1304
Scott, John	10418	6	761
Scott, Shelby D	6180	9	1219
Scoville, George S	2443	2	813
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 [1]	10304	11	833
Security Trust Co., executor [1]	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
Sentinel Publishing Co	5712	8	325
Serrien, Anna, executrix [1]	8836	7	1129
Serrien, John, estate of [1]	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
Shaffer, John C	1072	9	504
Shamokin Valley & Pottsville R. R. Co	4944	3	604
Sharp, W. Z	10598	8	399
Shaw, A. W	15612	13	716
Shaw, Guthrie, executor	9644	9	459
Shaw, James G., jr., estate of	9644	9	459
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.[2]	11814	13	877

[1] Estate tax decision.
[2] Acquiescence relates to allocation of tax in consolidated return.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Sheldon Manufacturing Co., H	12836	13	1296
Shelton et al., Charles B., executors [1]	2161	3	809
Sheridan Meat Co	5493	10	211
Sheridan, Thomas F	13698	4	1299
Sherman Stalter Co	4313	4	23
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
Shotter, S. O. and Isabel, executors	3134	2	912
Shotter, S. P., deceased, estate of	3134	2	912
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
Silk, Mrs. W. W	10864	7	1256
Silk, W. W	10864	7	1256
Silver & Co., Inc., William	9708	10	1329
Silverman, Alexander	10389	6	1328
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
Sinsheimer, Sidney W	11068	7	1099
Skinker et al., Isabella N., executrices, et al. [1]	11155	13	846
Skinker, Thomas K., estate of [1]	11155	13	846
Slater, Chas. W	4134	5	804
Slater, H. N., trust	8191	9	521
Slattery, Stephen J	9312	9	1123
Sline, John T	6752	9	1222
Smith, Bert K	5329	5	480
Smith, Mrs. Bert K	5329	5	480
Smith, Mrs. D. Sydney [2]	3262	4	385
Smith, Francis E	1020	1	868
Smith, Harry A., executor [1]	3098	6	341
Smith, Harry A. P	2552	7	293
Smith, Theodore H	1054	9	57
Smith, Walter T	4841	4	397
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
Snyder, William J	13186	11	807
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
Southack, Augusta G., estate of	6359	3	1063
Southern Feed Co	13587	6	736
Southern Press Cloth Mfg. Co	13004	10	303
Southern Sand & Gravel Co., Inc	6603	5	879
Spalding, Katherine A	7302	7	588
Spang-Chalfant & Co., Inc	10469	9	858
Speizer, Lena	2389	3	413
Spencer, Marion Parsons	22194	11	437

[1] Estate tax decision.
[2] Revokes nonacquiescence notice published in Cumulative Bulletin VI-1 at page 8.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
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 [1]	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
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
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 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
Starr, C. L	12739	9	886
Starr, Howard W	101	1	681
Starret, Paul	6557	4	398
State Bank of Alcester	5913	8	878
Steele, Wedeles Co	10215	11	279
Stein et al., Sadie S., executors [1]	4621	9	486
Steinbach Co	2888	3	348
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, Jules	2187	5	89
Stern, Louis	19376	5	870
Stern et al., Samuel E. A., executors [1]	2459	2	102
Stevenson, D. M	14698	9	552
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
Stilwell Paper Co., E. J	7301	6	531
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

[1] Estate tax decision.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Stratton Grocery Co	7645	8	317
Strauss, David, estate of [1]	3877	9	1212
Strauss Market, Inc	3378	2	1264
Striffler, Inc., Edward C	5533	7	887
Stromberg Electric Co	3398	8	1170
Strong, Hewat & Co., Inc	5069	3	1035
Strong, J. E	1909	6	417
Strong, Stella	1909	6	417
Strother Lumber Co., G. F	15235	10	1174
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
Suburban Investment Co., The	1923	1	1121
Sugar Run Coal Mining Co	9236	11	587
Suhr, Charles L	6406	4	1198
Sullivan Granite Construction Co	8790	6	703
Summit Wholesale Grocery Co	676	1	1040
Sumpter Valley Ry. Co	13145	10	1325
Sumter Coca-Cola Bottling Co	9079	7	890
Sunflower Packing Corporation	531	2	1104
Sunnyside Coal & Coke Co. [2]	9442	9	984
Superheater Co	8383	12	5
Superior Engraving Co	7949 17814	8	861
Superior Motor Parts Co. [2]	10348	8	407
Superior Pocahontas Coal Co	5377	7	380
Susman, Otto	3077 9190	8	787
Sutliff, S. D	2786	4	1068
Swaney, Ewing B	2863	5	990
Swartz & Co., Inc., A. R	3688	5	264
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
T.			
Tait, James [3]	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., and Rowe, John J	3066 3067	2	1159
Taylor, Moses	8789	7	59
Taylor, P. L	10020	11	441
Taylor, T. J., estate of	7617	7	931

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

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
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
Templeton, Kenly & Co., Ltd	6145 18432	6	61
Ter Bush, David A	4015	4	984
Terrell, Edgar B	3132	7	773
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, J. W	7412	10	390
Thompson, Seletha O. (Mrs. J. C.)	1895	9	1342
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, Mrs. T. C., executrix [1]	5280	3	902
Thompson, T. C., estate of [1]	5280	3	902
Thompson, W. B	677	5	193
Thorkildsen, Thomas	385	2	570
Thorpe, Helen Converse	4206	3	1006
315 West 97th Street Realty Co., Inc	9898	10	368
Threefoot, K., estate of	521	9	499
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
Tilton, S. U., estate of	6378	8	914
Tindle, Frank T. [2]	8999	11	1257
Title Insurance & Trust Co	9195	11	288
Titus, Louis	85 2450	2 2	582 754
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
Topeka Tent & Awning Co	3440	3	521
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
Transatlantic Clock & Watch Co	4897	3	1064
Trathen, Mrs. J. Ries	8270	8	981
Treat Hardware Corporation	4524	6	768
Trefry, W. S	3397	10	134

[1] Estate tax decision.
[2] Acquiescence does not relate to "tentative tax" issue.

Taxpayer.	Docket No.	Board of Tax Appeals.	
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Tri County Light & Power Co	2710	2	1165
Troost Avenue Cemetery Association	1114	4	1169
Troxel Manufacturing Co., The	587	1	653
Troy Manufacturing Co	6585	7	119
Trust Co. of Georgia, executor	12988	12	434
Tschiffely, Frederick A	6407	5	1242
Tsivoglou, Constantine J	3634	3	743
Tucker, E. G	7863	13	932
Tucker, Genevieve	3470	2	796
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
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 & Hippach, Inc	995	6	636
Tyler, May L	10722	10	300
Tyler Warehouse Co	512	1	504
U.			
Ulferts, J. J	14034	11	408
Union Department Store Co	7835	8	1030
Uniola Real Estate Co	3457	3	1113
Union Metal Manufacturing Co	35	1	395
	2524	4	287
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 [1]	6983	5	1272
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. [2]	10439	13	164
United States Mortgage & Trust Co., executor [1]	2459	2	102
United States Refractories Corporation [3]	5642	9	671
United States Tool Co	4650	3	492
United States Trust Co. of New York et al., executors [1]	7856	9	514
United Thacker Coal Co., trustees for	7888	15	273
Unity School of Christianity	1799	4	61
Untermyer, Alvin	26612	11	405
Utica Motor Car Co	9086	10	878
V.			
Vanco Mills, Inc	13276	12	557
Vancouver Home Co	5550	4	525
Van de Kamps Holland Dutch Bakers	1430	2	1247
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 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

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

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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
Van Schaick, Ellen L., estate of [1]	7127	9	96
Vaudreuil Lumber Co	6908	8	383
Vaughan, John Charles, estate of [2]	10514	10	140
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 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
Voelbel, Jacob, estate of [2]	6009	7	276
Voelbel, Walter W., executor [2]	6009	7	276
Von Platen, Karl	16959	10	250
Voyer, A. L	5453	4	1192
W.			
Wadsworth, Harold B., estate of	1982	1	1043
Wadsworth, Jessie B., executrix estate of Harold B. Wadsworth, deceased	1982	1	1043
Wahl, Henry	2292	2	1106
Wahl, W. Wiley	2004	2	1106
Waimanalo Sugar Co	24879	13	323
Wald, Louis	4629	8	1003
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
Walsdorf, Mr. and Mrs. Edward	2410	4	367
Walsh, Joseph J., executor [2]	6388	7	1104
Walter, George L., estate of [2]	1782	2	453
Walter et al., Howard K., executors estate of George L. Walter, deceased [2]	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
Ward, Hamilton	11322	8	704
Ward, Wm	10471	7	1107
Warren Co., The	4588	3	1154
Warren, Kib H	2550	7	293
Washburn, Cheney D	2475	7	483
Washington Cadillac Co	4471	3	844
Washington Catering Co	7051	9	743
Washington Hotel Co.[4]	6609 7133	4	441
Washington Paper Stock Co	1321	1	1117

[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.
[4] Acquiescence does not relate to that part of decision involving application of the Ayers decision (1 B. T. A., 1135).

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Washington Piece Dyeing & Finishing Co	4619	4	987
Watson, Martha A., estate of	7228	6	752
Watson, Mrs. Myrtle B	6286	7	495
Watsontown Brick Co	3580	3	85
Waynesboro Manufacturers Association	1277	1	911
Weakley Cloak & Suit Co	4001	8	477
Weaver, Belle R	2925	2	976
Weaver, Belle R.[1]	2924	4	15
Weaver, James A	8488	8	943
Weaver, M. E	2922	2	976
Weaver, M. E., estate of [1]	3852	4	15
Weaver, S. P	2921	2	976
Weaver, T. L	2923	2	976
Weaver, Walter B	7955	4	664
Webb & Bocorselski, Inc	178	1	871
Webb, Leland D	1279	1	759
Webb Press Co., Ltd	7070	9	238
	2404	3	247
	2724	3	247
Webb, Stuart W	5591	5	366
Weber-Bunke-Lange Coal Co	9146	11	503
Wedgwood & Sons, Ltd., Josiah	3647	3	355
Weed, Henry D	2563	2	84
Weeks Co., L. S	2604	6	300
Weill-Jamison Co., Inc	9645	13	1342
Weiner, A. L	13048	10	1184
	14672		
Weingarten, David, estate of [2]	10433	13	249
Weingarten, Melville D., executor [2]	10433	13	249
Weiss, Paul E	10059	7	615
Weissenbach, Minna K	4004	6	617
	4005		
	6061		
	6102		
	10157		
Welch et al., E. Sohier, trustees	11134	9	1370
	21634		
Welch, Frank P	12587	12	800
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
Werner & Werner Clothing & Furnishing Goods Co	6984	9	69
Weser Bros., Inc	10548	12	1394
	17055		
	25239		
West Bay Co., The	2843	2	483
West Corporation, F. C	6872	4	629
West End Consolidated Mining Co	2172	3	128
Westergren, Inc., M. F	2723	5	1185
West Point Investment Co	300	1	436
West 28th Street Corporation	6032	4	147
Westermann & Pagano, Inc	3763	2	1308
Western American Oil Co.[3]	14452	10	17
Western Maryland Ry. Co.[4]	6475	12	889
Western Star Milling Co	2852	5	109
Western Wheeled Scraper Co.[5]	12001	14	496

[1] Revokes nonacquiescence notice published in Cumulative Bulletin V–2, page 4.
[2] Estate tax decision.
[3] Acquiescence relates to second issue of decision.
[4] Acquiescence relates to reduction by 2 per cent of income tax of taxpayer for calendar years 1918 and 1919.
[5] 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.

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Western Zinc Oxide Co	8604	7	972
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
When Clothing Co	428	1	973
White, jr., James	5622	4	995
White, Julia A	5623	4	995
White, Robert P	5554	4	995
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
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
Whorton et al., Glen C., executors [1]	3094	7	771
Whybrow, Clarence	609	1	725
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
Wiess, H. C	7615	7	467
Wiess, Olga	7637	7	467
Wigginton, George P	11425	9	1030
Wilbur, Loyd H	5636 10611	5	597
Wildermann Co., C	8289	8	771
Wilhite et al., Hugh, executors and trustees	7462	11	85
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
Williams, Harry E	4207	6	593
Williams, Robert W., executor of estate of Ellen C. Bonaparte	1652	1	1101
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, Mrs. W. T	15679	7	1256
Willis, W. T	15679	7	1256
Wilson Bros. & Co	8460	7	820
Wilson, Charles Scotto, estate of [1]	4909	5	615
Wilson, F. H	6911	12	403
Wilson, Fannie L., executrix [1]	4909	5	615
Wilson Furniture Co	11317	10	1294
Winship, Charles N	6754	10	237
Winter Garden, Inc	8246	10	71
Wisconsin Hydro-Electric Co	9601	10	933
Wolf, J. H. G	2970	8	1121
Wolf Manufacturing Co	8626	10	1161
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

[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.
[4] Estate tax decision; acquiescence relates to first issue of decision.

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Wood, Kay	13014	11	740
Wood, T. J	11029	9	1206
Woodcliffe Silk Mills	559	1	715
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
Worcester Bank & Trust Co. et al., administrators	14230	13	630
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's Automatic Tobacco Packing Machine Co	1837	1	1260
Wyatt et al., Elizabeth C. R., executors	17698	10	763
Wyman & Co., C. C	10676	8	408
Wyoming Tie & Timber Co	21370 24574	9	1143
Y.			
Yahola Sand & Gravel Co	2281	6	820
Yakima Hop Co	9527	8	441
Yale Brevda Paper Box Manufacturing Co	3353	2	900
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
Young, I. F., estate of	7440	5	245
Young, May S., executrix [1]	3847	3	193
Young, Minal E., executor	4720	6	472
Young, S. Marsh	1839	2	457
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

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.			
Aitkin, A. King	13189	12	692
All America Cables, Inc.[2]	9092	10	213
Alling & Cory Co.[3]	6606	7	574

[1] Nonacquiescence notice in this case, published in Cumulative Bulletin IV-2, page 6, is recalled.
[2] Nonacquiescence relates to issue as to tentative tax.
[3] Nonacquiescence relates to third issue.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Alsop, Edward B., estate of [1]	6519	7	848
Alsop, Edward H., executor [1]	6519	7	848
Amalgamated Sugar Co	6439	4	568
American Express Co	350	2	498
American Feature Film Co.[2]	4437	11	1271
American Leather Products Co	10619	7	1043
American Seating Co.[3]	4772	4	649
American Steel Co	669	1	839
Ankeny, John D., executor [4]	8904	9	1302
Ankeny, Levi, estate of [4]	8904	9	1302
Archbold, John F., executor [5]	8629	8	919
Atlantic Coast Line R. R. Co.[6]	10983	9	1193
Atlas Tack Co.[7]	11497	12	3
Audubon Park Realty Co	9629	6	875
Auld, J. W	12169	13	1213
Ayers & Co., L. S.[8]	1217	1	1135
B.			
Ball et al., Walter J., coexecutors	6858	8	180
Bamberg Cotton Mills Co	9445, 10104	8	1236
Bancker, jr., E. A	18617	11	420
Bank of Duplin	12950	12	652
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
Barton, Mary L., trustee	12934	5	1008
Barton, Otis, estate of	12934	5	1008
Bates, E. W. (Mrs.)	18611	11	420
Beacon Coal Co.[9]	11894	9	280
Behlow Estate Co	12670	12	1365
Belmont Iron Works	10454	6	722
Belowsky, Morris	9656	7	424
Belt Railway Co. of Chicago [10]	4289	9	304
Berger, Mathilda W	6110	10	747
Berger, Walter J	6111	10	747
Berks Foundry & Manufacturing Co	6998	5	756
Best Steel Castings Co	8326	6	274
Bingham, Robert W	8823	8	603
Blair, W. A., estate of [4]	2440	4	959
Blair Co., J. C	7147	11	673
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
Blumberg Bros. Co.[11]	12137	12	1021

[1] Estate tax decision; nonacquiescence relates only to 1917 trust.
[2] Nonacquiescence relates to tentative tax issue.
[3] Nonacquiescence in so far as it relates to inclusion in invested capital of the sum of $198,716.37.
[4] Estate tax decision.
[5] Estate tax decision; nonacquiescence relates to first and second issues of decision.
[6] Nonacquiescence relates to second issue of decision.
[7] Nonacquiescence relates to issue involving reduction of invested capital on account of dividend payment.
[8] 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.
[9] Nonacquiescence relates to first issue of decision.
[10] 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.
[11] Nonacquiescence relates to first issue of decision.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Blydenburgh, Vail	9921	5	834
Boger & Crawford, Inc	14745	13	835
Bonwit Teller & Co	26037	10	1300
Bourne, Emily H., estate of [1]	7883	8	582
Boyne City Lumber Co	4635	7	36
Brackenridge, George W., estate of	6515	11	148
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
Brittingham, Juan F	13557 16535 18435	13	375
Brittingham, Juan G	18535	13	375
Bronson et al., James D., trustees [2]	7702	7	127
Brown & Co., M	24864	9	753
Bryant & Stratton Commercial School, Inc	43	1	32
Buck, Truman, estate of [2]	17660	13	415
Burke Electric Co.[3]	1697	5	553
Burton, Lawrence Elmer	2689	5	99
Byck, W. S	2260	4	842
Byers, Howard Webster	10319	8	1191
C.			
California Brewing Association [4]	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
Capitol Hotel Co.[5]	6610 7134	4	441
Carbo Petroleum Co.[6]	9524	12	166
Carey, C. W.[7]	2432	6	539
Central Savings Bank [8]	5006	10	1408
Century Music Publishing Co	12840	12	647
Chapin, W. E	2267	4	842
Chapin Construction Co	3200	3	25
Clark, James B	11918	12	615
Cleveland, Painesville & Ashtabula R. R. Co	4927	4	637
Cleveland, Painesville & Eastern R. R. Co	4927	4	637
Clingan, Margaretta T	4227	6	8
Cohn & Sons Co., M.[9]	7361 9238	9	87
Collins-McCarthy Candy Co	4302	4	1280
Colmer-Green Lumber Co.[10]	20916	12	256
Connecticut & Passumpsic Rivers R. R. Co.[11]	8424 9100	8	492
Connellee, C. U	3363	4	359
Conover Co., S. A	3926	6	679

[1] Nonacquiescence does not relate to deductibility of New York inheritance tax.
[2] Estate tax decision.
[3] Nonacquiescence relates to issues 1 and 2, and issue 5 as to patent group No. 1.
[4] Nonacquiescence relates to question of affiliation as to the companies included in the "units."
[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 fourth issue of decision.
[7] Nonacquiescence relates to issues 1 and 3 in decision.
[8] Nonacquiescence relates to obsolescence issue.
[9] Nonacquiescence relates to 25 per cent penalty for failure to file a return.
[10] 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.
[11] 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.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Conway, J. W	2263	4	842
Coon Valley State Bank [1]	11352	13	132
Corbett & Stuart	11855	11	540
Cornelius Lumber Co	4273	5	215
Crabtree Co., E. B	5889	5	732
Crocker Co., H. S	4581	5	537
Cross Mountain Coal Co	1219	2	587
Crown Potteries Co	10043	12	1412
Curran, Maurice J	793	5	180
D.			
D'Aramon, Henrietta	10644	7	600
Daily Pantagraph, Inc.[2]	4126	9	1173
Darby, Rufus C	2265	4	842
Davis, Chas. A	18622	11	420
Davis, Oscar	18625	11	420
Day, Henry M	30198	12	161
De Forest, Julia N	5857	4	1059
Deinert, sr., Oscar	6937	11	651
Deltox Grass Rug Co.[3]	6926	7	811
Dennett, Fred	11498	7	1173
DeReuter, Ronald	6243	7	600
Dickerman & Englis, Inc	4928	4	447
Dillon, John P	10985	9	177
Doehne, George, estate of	9344	6	1071
Don, Harriet M., estate of [4]	5594	9	450
Dowling, Mary M	2394	6	976
Duggan, Hanna, estate of [5]	4706	8	482
Duggan, James, executor [5]	4706	8	482
Duhme, Ophelia, estate of	6858	8	180
Duncan Coal Co., W. G	12347	13	672
Dunson Mills [6]	17019	10	1150
Dustin, Annie M., estate of [7]	8629	8	919
Dwight & Lloyd Sintering Co	120	1	179
E.			
Elkin, Dr. Wm. S	18629	11	420
Emery et al., Earle C., executors	9766	9	328
Emery, jr., Lewis, estate of	9766	9	328
Esperson, Niels, estate of [5]	7071	11	1283
Esperson, Mrs. Niels (Mellie), executrix [5]	7071	11	1283
Excelsior-Leader Laundry Co	9221	8	183
F.			
Farmers Deposit National Bank and Affiliated Banks	6220	5	520
Fidelity Trust Co.[8]	13638	13	109
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

[1] Nonacquiescence relates to issue involving loss of $1,000 on Galloway note.
[2] Nonacquiescence relates only to issues involving reducing invested capital by reducing current earnings available for dividends by tax accrued for current year.
[3] Nonacquiescence relates to second issue in decision.
[4] Nonacquiescence does not relate to deductibility of New York inheritance tax.
[5] Estate tax decision.
[6] Nonacquiescence relates to issue regarding jurisdiction.
[7] Estate tax decision; nonacquiescence relates to first and second issues of decision.
[8] Nonacquiescence relates to issue concerning invested capital for 1920 and 1921.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Foster, Alice Fisher	10126	7	1137
Foster, James F., estate of [1]	11493	13	496
Francesconi & Co., J. C.[2]	10585	10	658
Frank, William G., administrator	9344	6	1071
Franklin et al., Thomas H., executors and trustees	6515	11	148
Fresh Pond Ice Co	7282	9	156
Fuller, jr., James W	3068	7	28
G.			
Gallum, Albert F., trustee	6101	10	747
Garber, B. A.[3]	3708 14097	11	979
Garber, M. C.[3]	3710 13909	11	979
Gardner Governor Co.[4]	321	5	70
Garneau Co., Inc., Joseph	40	1	75
General Manifold & Printing Co	14577	12	436
Georgia Car & Locomotive Co.[5]	3131	2	986
Gibson, Kate Viola, estate of [1]	7402	7	1144
Gillette, Katharine K	18754	14	580
Girard Trust Co., executor [1]	11298	10	1100
Glenn, Thomas K	2262	4	842
Goddard, John N	18621	11	420
Gonzolus Creek Oil Co. (dissolved), trustees for creditors of	13393	12	310
Goodrum, jr., J. J	18613	11	420
Graves et al., A. H., committee for creditors of Whittaker & Bacon	22631	12	124
Great Bear Spring Co.[6]	10489	12	383
Great Northern Ry. Co.[7]	8433 11850	8	225
Greene et al., Richard T., trustees	23973	15	401
Grelck Condensed Buttermilk Co	3691	7	79
Greylock Mills [8]	11926	9	1281
Guarantee Construction Co.[9]	1828 1848	2	1145
Guild Co., Inc., J. H	8741	11	914
Gulf States Steel Co	9276 18358 18359	12	1244
Gwin, Earl S	17983	14	393
H.			
Hadden, jr., et al., John Aspinwall, executors [1]	9421	10	741
Hadden, Marie Torrance, estate of [1]	9421	10	741
Haight, George W	6141	4	1075
Hamilton, Harris & Co	4170 15687	12	735
Hannibal Missouri Land Co	9084	9	1072

[1] Estate tax decision.
[2] Nonacquiescence relates to third issue 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 only to that part of decision which relates to application of the Ayers decision (1 B. T. A., 1135).
[5] Nonacquiescence relates only to issue 3 in decision.
[6] Nonacquiescence does not relate to depreciation and obsolescence adjustments.
[7] 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.
[8] Nonacquiescence in decision in so far as the Board holds that it has jurisdiction to determine the overpayment for 1917.
[9] Nonacquiescence relates to second issue of decision.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Harbour-Longmire Co	6905	7	314
Harlan & Co., O. A	1374	1	1027
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
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
Hawkins, Frank	2572	4	842
Haynes, Elwood, estate of	11724	13	796
Heineman Lumber Co.[3]	10175	11	1229
Heinrich, Samuel G., estate of	2420	2	406
Hemlock Hollow Coal & Coke Co	8837	10	1176
Hendricks, Harmon W	4554	4	1257
Henn, A. W., trustee	4303	8	190
Hepburn, C. Fisher, estate of [4]	9690	11	1386
Hermance, H. P	11192	11	420
Herzog, Philip W	6245	10	747
Hess Bros.[5]	8039	7	729
Hewitt Rubber Co	325	1	424
Hickey, J. E	19107	11	420
Higginbotham-Bailey-Logan Co. [6]	4691	8	566
Hinman, Thos. P	18615	11	420
Hirsch & Co., Adolph	3230	7	707
Hof Brau Co., The [2]	6134	6	442
Hoffman, Isabella C., estate of [4] Hoffman et al., Meyer C., executors [4]	5338	3	1361
Hoffmann, Frederick H	3361	3	964
Holifield, Mary D. Moore	10089	7	1302
Holyoke & Westfield R. R. Co	8425	9	127
Home Builders Shipping Association	7044	8	903
Home Laundry Co	6047	4	45
Houston Belt & Terminal Ry. Co.[7]	8494	6	1364
Hulbert, Edmund D., estate of [8]	11204	12	818
Humphreys, E. C	4069	9	656
Hupfel Co., Inc., J. Chr. G.[9]	9834	9	944
Hutchins Lumber & Storage Co.[10]	3307	4	705
Hutchison, Charles [11]	8053	13	1187
I.			
Illinois Merchants Trust Co., executor [8]	11204	12	818
Illinois Rural Credit Association	5058	3	1178
Independent Brewing Co. of Pittsburgh [12]	3242	4	870
Independent Brick Co	8198	11	862

[1] Nonacquiescence relates to first issue of decision.
[2] Nonacquiescence relates to third issue in decision.
[3] Nonacquiescence relates to issue as to tentative tax.
[4] Estate tax decision.
[5] Nonacquiescence relates to second issue of decision.
[6] Nonacquiescence relates to first, second, and fourth issues of decision.
[7] Nonacquiescence relates to second and fourth issues of decision.
[8] Estate tax decision; nonacquiescence relates to issue concerning transfer of stock.
[9] Nonacquiescence relates to obsolescence issue.
[10] Nonacquiescence relates only to that part of decision which relates to application of the Ayers decision (1 B. T. A., 1135).
[11] Nonacquiescence relates to deduction of amount expended for "training" to keep in condition for "stunt" acting.
[12] Nonacquiescence relates only to issue 2 in decision.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Indiana Rolling Mills Co	12259	13	1141
Indiana Stove Works [1]	8148	8	1008
Indianapolis Street Ry. Co	8787	7	397
Individual Towel & Cabinet Service Co	1231 12586	5	158
Inglewood Park Cemetery Association	3249	6	386
Inman, Edward H	2501	4	842
Interurban Construction Co	7028	5	1292
	2687	5	529
J.			
Jackson, Annette T.[2]	9001	11	1257
Jackson, George A.[2]	9002	11	1257
Jackson, Minnie L., estate of [3]	4219	3	832
Jackson, Willis K.[2]	9003	11	1257
Jackson & Tindle [2]	9000	11	1257
Johnson et al., Homer S., executors [4]	9550	11	534
Johnson, Stephen O., estate of [4]	9550	11	534
Johnston, Mrs. E. V., estate of	14355	12	185
Johnston, R. H., heir at law	14355	12	185
K.			
Keen, Herbert Ide	8423	6	275
Keewis Realty Co., Inc.[5]	10489	12	383
Kehota Mining Co	1117	3	885
Keystone Coal & Mining Co	10168	10	295
Kistler et al., Florence L., administrators [6]	3707 11986 18061	11	979
Kistler, William F., estate of [6]	3707 11986 18061	11	979
Kistler Land & Improvement Co.[7]	12355	9	671
Klein, Florence L.[8]	4004 4005 6061 6102 10157	6	617
Klyman, E	6753	4	832
Kuhn, J. J	18631	11	420
Kynett, Harold K	13190	12	692
L.			
Lancaster et al., John L., receivers	9863	9	365
Lancaster Lens Co.[9]	11603	10	1153
Lawson, John S	6108	10	747
Lee Live Stock Commission Co	280	7	532
Lee Shoe Co., Inc., John	10061	11	187
Levine Bros. Co., Inc.[10]	6832	5	689

[1] Nonacquiescence relates to second issue of decision.
[2] Nonacquiescence relates to "tentative tax" issue.
[3] Estate tax decision.
[4] Estate tax decision; nonacquiescence relates to trust instruments of 1918 and 1921.
[5] Nonacquiescence does not relate to depreciation and obsolescence adjustments.
[6] 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.
[7] Nonacquiescence relates to issue with respect to question of allowance of amortization in 1918 on costs incurred in 1919.
[8] Nonacquiescence relates to question in decision pertaining to the year 1919.
[9] Nonacquiescence relates to the issue 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.
[10] Nonacquiescence relates to issue 6 in decision.

Taxpayer.	Docket No.	Board of Tax Appeals.	
		Volume.	Page.
Ley & Co., Inc., Fred T	18168	9	749
Lieber et al., H. W., executors	9720	13	1175
Lightning Creek Oil & Gas Co	8584 23204	9	1150
Lloyd, Ernest E	24414	8	1029
Lock, Moore & Co., Ltd	9295	7	1008
Loetscher, Christian, estate of [1]	14325	14	228
Loetscher et al., John A., executors [1]	14325	14	228
Loewenstein Bros. Garment Co	8465	13	446
M.			
McAvoy Co	9216	10	1017
McClung et al., Hu L., executors	12468	13	335
McCormick et al., Cyrus H., executors [2]	22731	13	423
McCormick, Nettie Fowler, estate of [2]	22731	13	423
McGee, Nellie B	13292 29938	13	1181
McGowin-Foshee Lumber Co.[3]	10446	10	961
McMurtrie, Adnah	19740	8	1301
Magee Furnace Co.[4]	5600	11	1216
Mahoning Coal R. R. Co	2202	4	923
Malley Co., Edward	9677	6	462
Mallinckrodt, jr., Edward	11031	14	194
Mallinckrodt, sr., Edward [3]	1750	4	1112
Manhattan Brewing Co	693	6	952
Mann, Franklin P., estate of	6101	10	747
Maritime Securities Co.[5]	324	2	188
Martin Advertising Agency, Inc., Mac	8115	11	162
Mathews, John E	9583	8	209
Matthiessen, jr., F. W	2125	2	921
Mercantile Trust Co., executor [6]	9528	13	85
Metro Pictures Corporation of New England [7]	4437	11	1271
Mexican Telegraph Co.[8]	9093	10	213
Mianus Motor Works, Inc	6052	5	435
Middlesex Ice Co. et al	7282	9	156
Mid-West Box Co	11066	11	1223
Miller, Clarence A	14087	13	1081
Moir, Harry C	19135	14	23
Moore, L. C.[9]	3709 13907	11	979
Morgan, Brooks	18614	11	420
Morsman, jr., Edgar M., administrator [10]	17660	13	415
Morsman, Edgar M., estate of [10]	32075	14	108
Morsman, jr., Edgar M., administrator [10]	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

[1] Estate tax decision; nonacquiescence relates to issues involving executors' commissions, attorneys' fees, and miscellaneous administration expenses.

[2] 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.

[3] Nonacquiescence relates to second issue of decision.

[4] Nonacquiescence relates to first issue of decision.

[5] 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.

[6] Estate tax decision; nonacquiescence relates to deductibility of remainder value of the residuary estate bequeathed to charity.

[7] Nonacquiescence relates to tentative tax issue.

[8] Nonacquiescence relates to issue as to tentative tax.

[9] 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.

[10] Estate tax decision.

Taxpayer.	Docket No.	Board of Tax Appeals. Volume.	Page.
Mossman, Yarnelle & Co.[1]	3269, 11076	9	45
M. S. C. Holding Corporation et al	4620	7	216
Muller, Carl, estate of	9720	13	1175
Murphy et al., James C., executors [2]	4166	5	952
Myers, Long & Co	12358, 24511	14	460
N.			
National Piano Manufacturing Co.[3]	3333, 20486	11	46
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 [2]	7702	7	127
New Orleans, Texas & Mexico Ry. Co.[4]	400	6	436
Newman, William C.[5]	6530	10	158
Nichols et al., George, executors	9599	10	919
Nichols, John W. T., estate of	9599	10	919
Niles Fire Brick Co	2628	6	8
960 Park Ave. Co., Inc., et al	6978	7	216
Nolde & Horst Co.[6]	9867	12	417
Nord Hop Ranch	6149	10	835
Nordholt, John B	3766	4	509
Norfolk Knitting Mills Corporation	4341	5	792
Northern Trust Co., executor [2]	2473	9	1310
Northern Trust Co., executor [7]	7127	9	96
Northside Viaduct Co. [8]	11728, 14200	9	468
Northwestern States Portland Cement Co.[9]	5763, 10456	7	835
Norton et al., Frank E., executors [10]	5594	9	450
Norwich & Worcester R. R. Co	2020	2	215
Norwood Lumber Co	3785	6	341
Nunnally, J. H	18627	11	420
Nunnally, Winship	18620	11	420
O.			
Old Colony R. R. Co	7820	6	1025
Olinger Corporation	25469	9	170
Ottley, John K	18623	11	420
Oul Building and Loan Association	3865	6	1196
P.			
Pacific Coast Pipe Co.[11]	7961	11	1329
Palmetto Coal Co	9478, 18272, 20306	11	154

[1] Nonacquiescence relates to issue involving deduction of tentative taxes in determining the earnings available for payment of dividends in 1918 and 1919.
[2] Estate tax decision.
[3] Nonacquiescence relates to tentative tax issue.
[4] Nonacquiescence relates to issues 1 and 4 in decision.
[5] Nonacquiescence relates to deduction of amount of bad debt ascertained to be worthless and charged off in 1920.
[6] Nonacquiescence relates to first issue of decision.
[7] Estate tax decision; nonacquiescence relates to trust created on February 9, 1917.
[8] Nonacquiescence in so far as decision determines that Highland Park Co. and Northside Viaduct Co. were affiliated with Virginia Railway & Power Co.
[9] Nonacquiescence relates to fifth issue of decision.
[10] Nonacquiescence does not relate to deductibility of New York inheritance tax.
[11] Nonacquiescence relates to issue 6 of decision.

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Parrett, O. S	6766	4	833
Paso Robles Mercantile Co	11655	12	750
Peerless Woolen Mills	12038	13	1119
Pelton, Honoro Gibson, executrix [1]	7402	7	1144
Petaluma & Santa Rosa R. R. Co.[2]	13830	11	541
Pietsch, Amy Lake, deceased, estate of [1]	5424	6	582
Pietsch, Walter G., executor [1]	5424	6	582
Pike County Coal Corporation [3]	7189	4	625
Pittsburgh Knife & Forge Co	7464	6	1083
Pittsburgh Valve, Foundry & Construction Co	9089	6	460
Potter, A. E	7432	10	563
Powell Coal Co.[4]	11945	12	492
Prescott et al., Oliver, executors [5]	7883	8	582
Prescott, Wm. R	18626	11	420
Pritzlaff, Frederick C	6109	10	747
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.			
Randall, George W., estate of	5850 6765	4	679
Rauh & Sons Fertilizer Co., E.[6]	10720	12	468
Reeb, M. A	9847	8	759
Reilly, Warren	5380	7	1327
Reliance Manufacturing Co	6021	7	583
Remington Rand, Inc	34726	11	773
Remington Typewriter Co	2788	4	880
Renziehausen, Frederick C	10658	8	87
Reynolds, Mary G., estate of	8625	8	360
Reynolds, Philip M., estate of	8624	8	360
Rhode Island Tool Co	2832	3	180
Rindge Land & Navigation Co	3698	2	1179
Robertson Co., H. P	14104	14	887
Robinson Co., A. M.[7]	5652	5	1217
Robinson, Mrs. C. H	8271	8	972
Rodenbough, Elizabeth McCahan, estate of [1]	465	1	477
Rodenbough, Elmer E., executor of the estate of Elizabeth McCahan Rodenbough, deceased [1]	465	1	477
Root, Henry L., estate of [1]	2825	5	696
Root, Susie M., executrix [1]	2825	5	696
Rosenbaum Bros., Inc	13050	11	736
Rosseter, John H	6179	12	254
Roth, W. A	6012	4	834
Rouse, Hempstone & Co., Inc.[8]	7673 10987	7	1018
Ruf, Frank A., estate of [9]	9528	13	85

[1] Estate tax decision.
[2] Nonacquiescence relates to that part of decision as to the purchase of taxpayer's own bonds at less than par which were retired.
[3] Nonacquiescence relates only to issue 2 in decision.
[4] Nonacquiescence relates to jurisdiction issue.
[5] Nonacquiescence does not relate to deductibility of New York inheritance tax.
[6] Nonacquiescence relates to issues 3 and 4 of decision.
[7] Nonacquiescence relates to first issue in decision.
[8] Nonacquiescence relates to final issue of decision.
[9] Estate tax decision; nonacquiescence relates to deductibility of remainder value of the residuary estate bequeathed to charity.

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S.			
St. Louis Malleable Casting Co.[1]	5490, 15168	9	110
Saeger, Wilford C	7562	9	890
Sage, Margaret Olivia, estate of	5882	6	36
Sarfert, Max	3436	5	977
Sass, Morris	6922	12	156
Schall, William	9721, 19163	13	1175
Schoettle Co., Edwin J	1941	13	950
Schreier Co., Konrad	3600	9	407
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
Shaffer, C. B	9872	12	298
Sheffield Dentifrice Co.[3]	11814	13	877
Shillito Co., John	6187	8	665
Shillito Realty Co	6186	8	665
Siegel, Inc., Joe	1739	1	1113
Silver King Consolidated Mining Co. of Utah	15153	8	41
Sinsheimer Bros., Inc	6498	5	918
Slocum et al., Herbert Jermain, executors	5882	6	36
Smith, Clarence C	3767	4	514
Smith Agricultural Chemical Co	13179	11	902
Smithers, Francis S., estate of[2]	665	1	1086
Standard Life Insurance Co. of America[4]	12475, 25842, 29779	13	13
Stange, A. H.[5]	553	1	810
Stanton, jr., John, estate of[2]	5892		
Starbuck, A. E., administrator	11724	13	796
Stetson & Ellison	8736	11	397
Stevens, H. G	16318	14	1120
Stevens & Thompson Paper Co	3501	5	1213
Stone, George L	10756	9	20
Stoney, Mary M. (Mrs.)	18628	11	420
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.[6]	9442	9	984
Superior Motor Parts Co.[7]	10348	8	407
Swift, Lucile W	18516	11	420
Swift Co., C. J	12315	12	974
T.			
Tait, James[8]	13908	11	979
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

[1] Nonacquiescence relates to "tentative tax" issue.
[2] Estate tax decision.
[3] Nonacquiescence relates to loss sustained through obsolescence of trade-mark.
[4] Nonacquiescence relates to issue involving the question of "reserve."
[5] Acquiescence notice in the case of A. H. Stange (C. B. IV-2, 4) recalled.
[6] Nonacquiescence relates to third issue of decision.
[7] Nonacquiescence relates to final issue of 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.

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Tighe, Anna M	13472	12	672
Tindle, Frank T.[2]	8999	11	1257
Turnure, George E	10045	9	871
U.			
Underwood, Lucy C., estate of [3]	2473	9	1310
United States Merchants & Shippers Insurance Co.[4]	10439	13	164
United States Refractories Corporation [5]	5642	9	671
United States Trust Co. of New York et al., executors of Francis S. Smithers, deceased [3]	665	1	1086
V.			
Van Schaick, Ellen L., estate of [6]	7127	9	96
Van Zandt, Jacobs & Co	6863 11605	8	561
Virginia Carolina Securities Corporation et	7484	6	84
Virginia Railway & Power Co.[7]	9040 11731	9	468
W.			
Waddell et al., Mary T	4228	6	8
Waggoner, Ada	5881	9	629
Waggoner, R. M	5880	9	629
Wagner, Richard G	4265	9	925
Walcott Lathe Co	1142	2	1231
Walker, William Hall, estate of	23973	15	401
Walters, Frances W. (Mrs.)	18616	11	420
Walworth, Charles W	8794	6	788
Wardlaw, W. C	2261	4	842
Warner, Fred W	3713	5	963
Warren, Wm. C	18632	11	420
Washington Hotel Co.[8]	6609 7133	4	441
Washington Post Co	8085	10	1077
Weissenbach, Minna K.[9]	4004 4005 6061 6102 10157	6	617
Western Exchange Bank	4967	12	66
Western Maryland Ry. Co.[10]	6475	12	889
Western Wheeled Scraper Co.[11]	12001	14	496
Wheatley, James A.[12]	9665	8	1246
Whitehouse, Sybil	13220	7	600

[1] Nonacquiescence relates to second issue of decision.
[2] Nonacquiescence relates to "tentative tax" issue.
[3] Estate tax decision.
[4] Nonacquiescence relates to premium reserve issue.
[5] Nonacquiescence relates to issue with respect to question of allowance of amortization in 1918 on costs incurred in 1919.
[6] Estate tax decision; nonacquiescence relates to trust created on February 9, 1917.
[7] Nonacquiescence in so far as decision determines that Highland Park Co. and Northside Viaduct Co. were affiliated with Virginia Railway & Power Co.
[8] Nonacquiescence relates only to that part of decision which relates to application of the Ayers decision (1 B. T. A., 1135).
[9] Nonacquiescence relates to question in decision pertaining to the year 1919.
[10] 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.
[11] Nonacquiescence relates to that portion of decision which holds that section 284 (c) of the Revenue Act of 1926 is applicable to the case.
[12] Nonacquiescence relates to item (3) in decision.

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Wickersham, Chas. A	18612	11	420
Widener, George D	7723	8	651
Widener, Joseph E	7724 7725	8	651
Wilson, Elihu Clement	8500	11	963
Wilson, George B	8501	11	963
Wilson, William W	8502	11	963
Wilson Syndicate Trust	12427 27808	14	508
Windfelder, John H., estate of [1]	4166	5	952
Winship, C. R	18618	11	420
Winship, Elizabeth T. (Mrs.)	18630	11	420
Wisconsin Bridge & Iron Co	13739	13	246
Wolf et al., Max, trustees	6149	10	835
Wolferman, Fred, executor [2]	11291	10	285
Wolferman, Louis, estate of [2]	11291	10	285
Woodruff, Ernest	2050	4	842
Woodruff, Geo. C	18518	11	420
Woodruff, Jas. W	18619	11	420
Woodward, David	2266	4	842
Woolston, Beulah H. J., estate of [1]	11298	10	1100
Wright, Inc., Ben T	12164	12	1149
W. T. & M. Co	8778 13093	11	722
Wyoming Central Association	9965 20546	8	1064
Y.			
Young, James K., estate of [1]	4976	5	1004
Z.			
Zakon, William	5450	7	687
Zeilerbach, Isadore	2028	2	1076
Zellerbach, Theresa	883	2	1076
Zinn, Arthur	2789	3	974
Zinn, Martin	3444	3	969

[1] Estate tax decision.
[2] Estate tax decision; nonacquiescence relates to second issue of decision.

INCOME TAX RULINGS.—PART I.

REVENUE ACT OF 1928.

SUBTITLE B.—GENERAL PROVISIONS.

PART II.—COMPUTATION OF NET INCOME.

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

ARTICLE 51: What included in gross income. VIII–20–4204
G. C. M. 6020

REVENUE ACTS OF 1924, 1926, AND 1928.

The income derived by a restricted member of the Otoe Tribe of Indians from land conveyed to him by deed executed by a noncompetent member of the tribe and approved by the Secretary of the Interior, subject to a restriction as to alienation without the consent of the Secretary of the Interior, is not exempt from taxation. General Counsel's Memorandum 2715 (C. B. VII–1, 56) revoked.

An opinion is requested concerning the correctness of the conclusion reached in General Counsel's Memorandum 2715, that the income derived by a restricted member of the Otoe Tribe of Indians from land conveyed to him by deed executed by a noncompetent member of the tribe and approved by the Secretary of the Interior, subject to a restriction as to alienation without the consent of the Secretary of the Interior, is exempt from taxation under the Revenue Acts of 1924 and 1926.

In this connection attention is directed to the case of *Shaw* v. *Gibson-Zahniser Oil Corporation* (276 U. S., 575), decided April 9, 1928, in which the Supreme Court of the United States had before it a case involving the taxability by the State of Oklahoma under its gross production tax law of the oil production of a lessee from land owned by an Indian under the supervision of the Secretary of the Interior. The land in that case was acquired for the Indian from a non-Indian citizen and had previously been subject to taxation by the State. It was purchased subject to the approval of the Secretary of the Interior, who as a condition of his approval required that the deed of conveyance should provide that the land could not be alienated by the Indian grantee before a given date without his consent and approval. The imposition of the restriction on alienation thus imposed by the Secretary was one authorized by Act of Congress. (Section 1, Act of May 27, 1908, 35 Stat., 312.) The Secretary, however, did not provide that the purchased land should be exempt from taxation, the restriction on alienation being the only condition im-

posed by him. One of the defenses of the lessee of said land was that the restriction in itself constituted an exemption of the land and its uses from taxation. The Supreme Court said:

> * * * the mere act of the Secretary in imposing the restriction is not the exercise of any power which may reside in Congress to exempt them (lands purchased for an Indian) from taxation.
>
> * * * * * * *
>
> 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.
>
> * * * No such action is to be implied from his authorized action in restricting the power of the Indian grantee to alienate the land.

Restricted "purchased" land is to be distinguished from restricted "allotted" land (which latter consists of land acquired by an Indian allottee from the United States or from an Indian tribe in the distribution of tribal lands). Some of the allotments of Indian land have been accompanied by the immediate issuance of patents in fee, subject to a restriction on alienation for a period of years imposed directly by an Act of Congress. Allotted land so restricted, though patented to the Indian allottees in fee, has been protected from State taxation, on the ground that the restriction continues a supervisory control of the land in the Federal Government during the continuance thereof as a part of the machinery for the settlement of Indian affairs, and for that reason constitutes an instrumentality of the Federal Government with which the States may not interfere by taxation or otherwise. (*The Kansas Indians*, 5 Wall., 737; *United States* v. *Rickert*, 188 U. S., 432; *Gillespie* v. *Oklahoma*, 257 U. S., 501, and other cases.) The decision in *Shaw* v. *Gibson-Zahniser Oil Corporation*, supra, views with favor the continuance of the protection from State taxation of restricted "allotted" Indian land on the Federal instrumentality theory. For reasons which are similar to those indicated, the Attorney General in an opinion dated March 20, 1925 (34 A. G., 439), published by this office as Treasury Decision 3754 (C. B. IV–2, 37), ruled that income from "allotted" land, restricted by Congress against alienation, is not subject to the Federal income tax laws during the restricted period, and this rule has been followed continuously by the Bureau since the date of its promulgation, but it does not purport to extend to "purchased" lands subject only to a restriction on alienation imposed by the Secretary of the Interior.

As stated, the case of *Shaw* v. *Gibson-Zahniser Oil Corporation*, supra, involved "purchased" land which had been acquired for the Indian from a non-Indian citizen of the State of Oklahoma, and such land had, therefore, previously become a part of the taxable property of Oklahoma. In General Counsel's Memorandum 2715 the land involved was acquired by a restricted Indian by a conveyance in fee simple to him from his mother, who also was a restricted Indian, who in turn had acquired the right to such land by a patent issued under the general allotment Act of 1887 (24 Stat., 388), pursuant to the terms of which Act the patent provided that the land should be held in trust for a period of 25 years. Allotted lands acquired by such trust patents have been held to be restricted "allotted" lands within the meaning of Treasury Decision 3754. (See

S. M. 5632, C. B. V–1, 193.) In the hands of the mother the land and its uses were, therefore, exempt from taxation under the Attorney General's ruling, as lands restricted directly by Act of Congress. While the transfer of such land from the mother to the son was a transfer from one restricted Indian to another, the restriction as to the son came by way of the act of the Secretary of the Interior and did not represent a restriction imposed directly by Congress. Furthermore, the acquisition thereof by the son represented an acquisition which in law was by way of "purchase." Consequently, under the ruling of the Supreme Court in *Shaw* v. *Gibson-Zahniser Oil Corporation*, supra, the restriction imposed by the Secretary of the Interior did not carry with it an exemption from taxation within the meaning of Treasury Decision 3754, and such restriction was merely one on alienation and nothing more.

Since General Counsel's Memorandum 2715 is not in harmony with the decision in *Shaw* v. *Gibson-Zahniser Oil Corporation*, supra, that memorandum is hereby revoked. The income from land so acquired by a restricted Indian—that is, from "purchased" land—is subject to the income tax imposed by the Revenue Acts of 1924 and later Revenue Acts.

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

ARTICLE 58: Sale of stock and rights. VIII–24–4233
I. T. 2474

REVENUE ACT OF 1928.

Warrants issued by the M Company evidencing the stockholders' rights to subscribe for additional shares were dated May 1, 1928, and were mailed on that date to stockholders of record on April 14, 1928. The stock of the company sold "ex-rights" on the N Stock Exchange beginning April 27, 1928.

Held, the date which should be used for making the apportionment required by article 58, Regulations 74, is April 14, 1928, it being the stockholders of record on that date to whom the stock rights were issued.

Advice is requested as to the date when rights to subscribe to stock are to be considered as issued under article 58 of Regulations 74, which article provides that where a corporation issues to its stockholders rights to subscribe to its stock and the stockholder sells his rights to subscribe, the cost or other basis of the stock in respect of which the rights are issued shall be apportioned between the rights and the stock in proportion to the respective values thereof at the time the rights are issued, and the basis for determining gain or loss from the sale of a right on one hand or a share of stock on the other will be the quotient of the cost or other basis assigned to the rights or the stock, divided, as the case may be, by the number of rights issued or by the number of shares held.

It appears that under the 1928 stock allotment of the M Company warrants evidencing the stockholders' rights to subscribe for additional shares were dated *May 1, 1928*, and were mailed on that date to stockholders of record on *April 14, 1928*. The stock of the M Company, however, sold "ex-rights" on the N Stock Exchange beginning *April 27, 1928*.

It further appears that the resolution under which the stock rights accrued to the stockholders was passed by the board of directors of the M Company on *March 28*, 1928. The resolution, so far as pertinent, reads:

> Resolved that stockholders registered on the books of the company at the close of business on the 14th of April, 1928, shall have the privilege of subscribing, to the extent of — per cent of their then respective holdings, at par, on or before the ———, 1928, to an amount not exceeding —— shares of the capital stock of the company * * *.

With respect to the question whether April 14, April 27, or May 1, 1928, should be used for making the apportionment required by article 58 of Regulations 74, it is held that April 14, 1928, is the date which should be used, it being the stockholders of record on that date to whom the stock rights were issued by the M Company. The reasons for selecting that date are stated by the Bureau in General Counsel's Memorandum 1394 (C. B. VI–1, 35), as follows:

> The date when such a separation of capital interest resulting in a cost attributable to the stock right occurs is the date when the stock right comes into existence separate and distinct from the shares of stock with respect to which it is issued, which in turn is the date the rights accrue to shareholders of record. Until that date the sale of a share of stock carries with it any right in connection therewith, and there is no diminution in the value of the shares. On that date, however, the rights accrue to and vest in shareholders of record, a portion of the capital interest is separated from the shares and vests in the shareholders individually * * *. It is on that date that there first arises a cost of the right, thereby constituting a basis for determining gain or loss resulting from the sale of such right. The portion of article 39 (of Regulations 69 or article 58 of Regulations 74) referred to lays down the rule for determining such cost or basis and relates to the date when such cost arises.

The date on which stock rights accrue to stockholders within the meaning of General Counsel's Memorandum 1394, supra, is, so far as a general rule may be laid down, the date which determines the stockholders who are entitled to the rights—in the instant case, April 14, 1928. It was the stockholders who were the owners of record of the stock of the M Company on that date who were entitled to the stock rights. The fact that the warrants evidencing the stockholders' rights to subscribe for additional shares were not dated or mailed until May 1, 1928, is immaterial, since the determining date is that upon which "the rights are issued" and not the date upon which the warrants evidencing the rights are sent to the stockholders. In General Counsel's Memorandum 1394, supra, it appears that immediately after the stock rights accrued to the stockholders the shares of stock themselves sold "ex-rights," but that was an incidental and not a controlling factor. Accordingly, in the instant case it is regarded as immaterial that the stock of the M Company did not sell "ex-rights" on the N Stock Exchange until April 27, 1928.

ARTICLE 62: Annuities and insurance policies.

REVENUE ACT OF 1928.

Combined life insurance and annuity contracts referred to as "Life annuity with death benefit" contract and "Participating life

income policy with principal sum payable at death." (See G. C. M. 6395, below.)

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

ARTICLE 81: Exclusions from gross income. VIII–9–4121
I. T. 2456

REVENUE ACT OF 1928.

Amounts received under the Tyson-Fitzgerald Act of May 24, 1928, by officers and former officers (other than officers of the Regular Army, Navy, or Marine Corps), physically disabled in line of duty in the World War, are exempt from Federal income tax as pensions.

ARTICLE 82: Proceeds of insurance—Compensation—Pensions. VIII–24–4234
G. C. M. 6395
(Also Section 22(a), Article 62.)

REVENUE ACTS OF 1926 AND 1928.

Certain combined life insurance and annuity contracts referred to as "Life annuity with death benefit" contract and "Participating life income policy with principal sum payable at death" should be treated, in part, as annuity contracts within the meaning of section 213(b)2 of the Revenue Act of 1926 and section 22(b)2 of the Revenue Act of 1928, purchased with that portion of the total premium or consideration paid which can be fairly allocated to the annuity feature.

An opinion is requested as to whether certain contracts referred to as the "Life annuity with death benefit" contract issued by the M Life Insurance Co. and the "Participating life income policy with principal sum payable at death" issued by the O Life Insurance Co. are annuity contracts within the meaning of section 213(b)2 of the Revenue Act of 1926 and section 22(b)2 of the Revenue Act of 1928.

The contract issued by the M Life Insurance Co. provides, so far as material to the present discussion, as follows:

Annuity payments.—This company hereby binds itself to pay to A (herein called the annuitant) the sum of $350 on the 1st day of December, 1928, if the said annuitant be then alive and a like yearly payment on the 1st day of December in each year thereafter, during the subsequent lifetime of the said annuitant.

Death benefit.—The company further agrees that on receipt at its office in the city of ——— of due proof of the death of the said annuitant, it will pay to B (herein called the beneficiary) or in the event of her death, to the executors, administrators or assigns of the annuitant the sum of ten thousand ($10,000) dollars (herein called the death benefit) together with a proportionate part of the annuity payment for the fractional period between the date on which the last annuity payment becomes due and the date of the death of the annuitant; provided, however, that the amount payable at the death of the annuitant shall not be less than the premium hereinafter set forth after deducting therefrom the total annuity payments received by the annuitant.

Participation in profits.—All annuity payments, including the proportionate payment on the death of the annuitant, shall be increased by such dividends as may be allotted by the company out of its surplus interest earnings.

This policy is issued in consideration of the payment of the sum of ten thousand five hundred ($10,500) dollars (herein called the premium), the receipt of which is hereby acknowledged.

Cash value.—This policy may be surrendered to the company at any time, provided there is no legal restriction to the contrary, for a sum equal to the amount of the death benefit as set forth on the first page hereof. The company shall have the right to defer the payment of any surrender value of this policy for a period not exceeding 90 days from the date of the application therefor.

The provisions of the contract issued by the O Life Insurance Co. are substantially identical.

The contention has been made that the contracts in question are annuity contracts in their entirety; that, as a matter of practice, the single premium is not allocated in part to the annuity feature and in part to the death benefit; and that, therefore, the total premium or consideration paid is to be returned exempt from taxation before any of the annuity payments are to be treated as gross income. This contention is not sound. The contracts uniformly provide for the payment to the annuitant of a stated sum annually, and also for the payment of a specified amount to a named beneficiary upon proof of death of the annuitant. It is obvious that the contracts consist of two features—the annuity feature and the life benefit feature. The insurance companies issuing such contracts state that the premium or consideration paid for such a contract is severable and can be allocated to the two features.

In view of the foregoing, it is concluded, with respect to the combined life insurance and annuity contracts of the character of the ones in question, that where the insurance companies are able to make a fair allocation of the total premium or consideration paid for a particular contract between the annuity feature and the life insurance feature thereof, and the portion of the premium or consideration allocated to the annuity feature is exhausted as the annual annuity payments are made, the contract should be treated, in part, as an annuity contract within the meaning of section 213(b)2 of the Revenue Act of 1926 and section 22(b)2 of the Revenue Act of 1928, purchased with that portion of the total premium or consideration paid which is fairly allocated to the annuity feature; and that the annuitant should be permitted to recover exempt from taxation the amount of the premium or consideration allocated to the annuity feature before being required to return as gross income any part of the annuity payments.

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

ARTICLE 83: Gifts and bequests.

VIII-11-4137
G. C. M. 5881

REVENUE ACT OF 1928.

The amount of an award received from the M Foundation by an individual taxpayer in recognition of noteworthy accomplishments constituted a gift within the meaning of section 22(b)3 of the Revenue Act of 1928, and is exempt from income tax.

An opinion is requested as to the taxability under the Revenue Act of 1928 of an award received by an individual taxpayer from the M Foundation.

The certificate of incorporation of the Foundation states that the corporation shall have for its particular objects the promotion of public welfare, the advancement of liberal thought, and the furtherance of peace through justice for the benefit of the people of the United States and of other nations, and to that end it is authorized to solicit, receive, hold, and maintain an endowment fund, and to apply the income therefrom in such manner as in the judgment of its directors shall best carry out the purposes of the corporation. It is further stated that the corporation shall be empowered to award prizes, to grant scholarships, to publish reports, to engage in research, to make studies of social, economic, political, and industrial problems, and to do and perform any and all things necessary and appropriate to a corporation created for the purposes hereinabove provided.

Section 22(b) of the Revenue Act of 1928 provides that the following items shall not be included in gross income and shall be exempt from taxation:

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income).

It appears that the award was made to the taxpayer in recognition of his achievements in science and his services in promoting the public welfare. An award of this kind made by one to whom no services have been rendered is a gratuity as distinguished from compensation for services. Clearly the award was not a competitive prize. This office is of the opinion, therefore, that the amount received by the taxpayer constituted a gift within the meaning of section 22(b)3 of the Revenue Act of 1928, and is exempt from income tax.

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

ARTICLE 85: Dividends and interest from Federal land banks, Federal intermediate credit banks, and national farm-loan associations. VIII-17-4181 I. T. 2470

REVENUE ACT OF 1928.

The exemption from Federal taxation of income derived from first mortgages executed to Federal land banks under the provisions of section 26 of the Federal Farm Loan Act of July 17, 1916 (39 Stat., 360), as amended, is a continuing exemption, and such income should be excluded from the gross income of an individual to whom such mortgages have been sold, under the provisions of section 22(b)4 of the Revenue Act of 1928.

Inquiry is made as to the taxability of income derived from mortgages executed to Federal land banks.

In this connection reference is made to the following provisions of section 26 of the Federal Farm Loan Act of July 17, 1916, as amended:

First mortgages executed *to* Federal land banks * * * shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the *income* derived therefrom shall be exempt from Federal * * * taxation. [Italics supplied.]

The question is raised as to whether this provision exempts from taxation the income derived from such mortgages regardless of the fact that the Federal land bank may have sold them to an individual. Specific reference is made to the case of a bank which has sold a number of these mortgages to individuals without recourse on such bank.

In the opinion of this office, the exemption provided for in the provision of law above quoted is a continuing exemption. The income derived from the mortgages executed to the Federal land banks should, therefore, be excluded from gross income under the provisions of section 22(b)4 of the Revenue Act of 1928 and article 85 of Regulations 74.

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

ARTICLE 101: Need of inventories. VIII–1–4054
Mim. 3692

Certificate of inventory, Form 1126.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., December 21, 1928.

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

The use of Form 1126, certificate of inventory, which taxpayers were required to file with their returns if engaged in a trade or business in which the production, purchase, or sale of merchandise was an income-producing factor, will be discontinued for the calendar year 1928 and thereafter. Corporations should therefore be instructed to furnish the information requested in question 10 on page 4 of Form 1120 in lieu of filing Form 1126 with their returns.

Queries regarding this mimeograph will refer to the number of the mimeograph and to the symbols IT:E:RR.

H. F. MIRES,
Acting Commissioner.

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

ARTICLE 121: Business expenses. VIII–3–4069
(Also Section 101, Article 501.) I. T. 2447

REVENUE ACT OF 1928.

When A became connected with the M Company he took with him into the organization a number of persons, one of whom was B, who had been associated with him in other enterprises. As one of the conditions of A's employment, he was given an option to purchase $2y$ shares of common stock of the company at $\$$—— a share. He planned in case a profit should result from his purchase and sale of the stock to pay 50 per cent of such profit to those who assisted him in rehabilitating the company. During 1928 he purchased $2y$ shares and sold them at a profit, placing the profit in a special account for payment in accordance with his plan. A paid x dollars from this account to B and the other persons associated with him.

Held, that, inasmuch as A did not hold the 2*y* shares of stock for more than two years prior to their sale, and as the period for which the option to purchase the stock was held by him may not be added to the period for which he held the stock, he may not elect to have the profit from the sale of such shares taxed to him as capital gain under section 101 of the Revenue Act of 1928.

Held, also, that the amounts paid by A to B and the other persons in accordance with his plan are not deductible from gross income by A as an ordinary and necessary business expense.

Advice is requested whether under the following circumstances A may elect to have the profit derived by him during 1928 from the sale of certain shares of stock taxed to him as capital gain under section 101 of the Revenue Act of 1928 and whether the amounts paid by him to B and other persons are deductible as an ordinary and necessary business expense.

The M Company had been in a poor financial condition for several years prior to ———, 192–, when A became connected with it. He took with him into the organization as executive, administrative, and operating officials a number of persons, one of whom was B, who had been associated with him in other enterprises. As one of the conditions of A's employment, he was given an option expiring in 1927 to purchase all or any part of 2*y* shares of the common stock of the company at $—— a share, which price at that time was greater than its market value. This option was subsequently extended to December 31, 192–. A planned from the first that in case he and his associates were able to rehabilitate the company so that a profit would result from the purchase of the stock under the option and its sale on the market, he would retain 50 per cent of such profit and pay the remainder to those who assisted him in rehabilitating the company, even though some of the persons were not in its direct employ. A, however, made no binding commitment to any of such persons. During 1928 A purchased 2*y* shares of stock under the option and sold them at a profit, placing the profit in a special account for payment in accordance with his plan. He paid *x* dollars from this account to B and the other persons associated with him.

In order that gain from the sale of property may be taxed as capital gain under section 101 of the Revenue Act of 1928, the property sold must have been, among other things, held by the taxpayer for more than two years. However, under section 101(c)8, in the following cases a period prior to the period for which the property itself was held is to be included in determining the period for which the taxpayer has held property for the purposes of section 101:

(a) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under section 203(c) of the Revenue Acts of 1924 and 1926 and section 112(g) of the Revenue Act of 1928, there is to be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution;

(b) In determining the period for which the taxpayer has held property received on an exchange, the period for which he held the property exchanged is to be included, if under section 113 of the Revenue Act of 1928 the property received has, for the purpose of

determining gain or loss, the same basis in whole or in part in his hands as the property exchanged;

(c) If property is acquired from any other person, and under section 113 of the Revenue Act of 1928 has the same basis in whole or in part for the purpose of determining gain or loss as it would have in the hands of the person from whom acquired, there is to be included in determining the period for which the taxpayer has held such property the period for which it was held by such other person.

Inasmuch as A did not acquire the 2*y* shares of stock until he exercised his option to purchase such stock in 1928, he did not hold the shares for more than two years prior to their sale. The period for which the option to purchase the stock was held by him does not come within any of the cases under section 101(c)8 in which a period prior to the period for which the property itself was held is to be included in determining the period for which the property was held for the purposes of section 101. Therefore, the period for which the option was held may not be added to the period for which he held the stock, and he may not elect to have the profit from the sale of the stock taxed to him as capital gain under section 101.

Provision is made in section 23(a) of the Revenue Act of 1928 for the deduction from gross income of business expenses which include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business. Both A and B are officers of the M Company and their business consists of rendering services in their official capacity to the corporation, for which they receive compensation from that organization. The amounts paid by A to B and the other persons with whom he was associated do not come within the provisions of section 23(a). Therefore, such amounts are not allowable deductions in A's return as an ordinary and necessary business expense.

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

ARTICLE 151: Taxes. VIII–13–4155
I. T. 2465

REVENUE ACTS OF 1926 AND 1928.

The 2 cents per gallon gasoline tax imposed by the State of Michigan is imposed upon the owners or drivers of motor vehicles and is deductible as a tax in the income tax returns of the owners or drivers by whom it is paid and to whom it is not refunded. If the tax is added to or made a part of the business expenses of such owners or drivers, it can not be deducted separately as a tax.

Inquiry is made as to whether a gasoline tax paid as required by the Michigan statute, approved January 29, 1925, is deductible in the income tax returns of the distributors or of the purchasers of the gasoline.

It appears that the purpose of the statute in question is to impose a privilege tax for the use of the public highways by the owners or drivers of motor vehicles, based upon the use, within the State of Michigan, of gasoline as that term is defined in the statute.

Section 2 of the statute reads as follows:

A tax of 2 cents per gallon is hereby imposed on all gasoline sold or used in this State by any dealer, which tax shall be paid by such dealers to the secretary of state on or before the 20th day of each month. It is the intent of this act to impose a tax upon the owners of motor vehicles using a combustible type of engine upon the public roads and highways by requiring them to pay for the privilege thereof, in addition to the general motor vehicle license tax, at the rate of 2 cents per gallon for all motor vehicle fuel so used, which tax is to be collected as hereinafter prescribed.

Section 5 reads in part as follows:

The purchaser of gasoline used for any purpose other than the operation of motor vehicles on the streets and highways of the State, and municipalities and the Federal Government using gasoline in municipal and Federal owned motor vehicles, respectively, shall be entitled to the refund of the tax paid thereon upon filing a sworn claim with the secretary of state, on forms prescribed by him, within 60 days from the date of purchase as shown by the invoice. * * *

As it appears from the language of the statute that the tax is imposed upon the owners or drivers of certain motor vehicles operated on the public roads and highways of the State, and not upon the gasoline distributors, as such, it is held that the tax is deductible as a tax in the income tax returns of the owners or drivers of motor vehicles by whom it is paid and to whom it is not refunded. If the tax is added to or made a part of the business expenses of such owners or drivers of motor vehicles, it can not be deducted separately as a tax.

ARTICLE 151: Taxes.

VIII–19–4196
I. T. 2471

REVENUE ACT OF 1928.

The gasoline tax imposed by the State of Connecticut under the provisions of section 4 of the act of 1925, as amended, is imposed upon the distributor. The tax so paid by a distributor is deductible as a tax for income tax purposes by the distributor who pays it, and not by the purchaser. If it is added to or made a part of the business expense of such distributor, it can not be deducted separately as a tax.

If the tax is imposed on, and paid by, the purchaser under the provisions of section 5 of the act of 1925, as amended, it is deductible for income tax purposes by the purchaser who pays it directly to the State, and not by the distributor. If it is made a part of the business expense of such purchaser, it can not be deducted separately as a tax.

A question is raised as to the deductibility for Federal income tax purposes of the gasoline tax imposed by the State of Connecticut.

The tax in question is imposed by chapter 145 of the Public Acts of 1925, as amended by chapter 62 of the Public Acts of 1927, entitled "An act providing for a tax upon gasoline and other products used in the propelling of motor vehicles."

Section 4 of the act provides in part as follows:

* * * On or before the 1st day of the calendar month succeeding the filing of such report, each distributor shall pay to the treasurer of the State a tax of 2 cents upon each gallon of such fuels sold or used in this State during the preceding calendar month, provided all fuels sold to any retailer for resale or use for motor boats shall be exempt from the payment of such tax upon satisfactory evidence to the commissioner of motor vehicles that all such fuels are intended for and will be used only for the propelling of motor boats. On

or before the 1st day of each calendar month, the commissioner of motor vehicles shall transmit to the treasurer of the State such information as shall show all taxes due from each distributor under the provisions of this act.

Section 5 of the act contains the following provision:

Any distributor who shall contract to make any distribution of fuels to any person, firm or corporation, to be used commercially or for the purpose of manufacture, may apply to the commissioner of motor vehicles for a permit to make such sale without tax, on a form provided by the commissioner for such purpose. * * * If any portion or the whole of such fuels so purchased shall be taxable under the provisions of this act, the purchaser shall be charged with the tax provided for in this act and shall pay the same in accordance with the provisions hereof.

Section 6 of the act contains the following provisions:

All money paid to the treasurer of the State under the provisions of section 4 hereof shall be expended under the direction of the highway commissioner for the construction, maintenance or reconstruction of State highways, without specific appropriation by the general assembly for such purpose.

Section 23(c) of the Revenue Act of 1928 provides in part 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 language of the Connecticut statute, above quoted, it is apparent that the gasoline tax imposed by the State of Connecticut under the provisions of section 4 of the act of 1925, as amended, is imposed upon the distributor. In accordance with section 23(c) of the Revenue Act of 1928 and article 151 of Regulations 74, the gasoline tax so paid by a distributor is deductible as a tax for income tax purposes by the distributor who pays it, and not by the purchaser. If, however, the tax in question is added to or made a part of the business expense of such distributor, it can not be deducted separately as a tax.

But if the tax is imposed on, and paid by, the purchaser under the provisions of section 5 of the act of 1925, as amended, then the tax is deductible for income tax purposes by the purchaser who pays it directly to the State, and not by the distributor. If the tax is made a part of the business expense of such purchaser, it can not be deducted separately as a tax.

ARTICLE 151: Taxes.

VIII-20-4205
I. T. 2472

REVENUE ACT OF 1928.

The gasoline tax imposed by the State of Ohio under the provisions of the General Code (Page's Annotated General Code, Vol. I, Part Second (Civil), Title I (Taxation), Chapter 9 (Public Utilities, Franchise Tax on Corporations)) is an excise tax imposed upon the sale and use of motor vehicle fuel sold or used by any dealer, and the tax so imposed is deductible by the dealer who pays it and not by the purchaser. If the tax in question is added to or made a part of the business expense of such dealer, it can not be deducted separately as a tax.

A ruling is requested as to whether the gasoline tax levied by the State of Ohio is deductible by the dealer or by the purchaser.

The Ohio gasoline tax is levied in accordance with the provisions of the General Code (Page's Annotated General Code, Vol. I, Part Second (Civil), Title I (Taxation), Chapter 9 (Public Utilities, Franchise Tax on Corporations)). Section 5527 of the law provides that for the purpose of providing revenue for maintaining the main market roads and intercounty highways of the State in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon, for resurfacing such highways where existing surfaces have become worn or rutted, for enabling the several counties and municipal corporations of the State properly to maintain and repair their roads and streets, and supplementing revenue already available for such purposes and arising from direct taxation and from registration fees of motor vehicles, and for distributing equitably upon those persons using the privilege of driving motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same, there is levied and imposed on the sale and use of each gallon of motor vehicle fuel sold or used by any dealer, as that term is defined in the law, within the State of Ohio, an excise tax of 2 cents.

However, the sale of motor vehicle fuel is not subject to such tax (a) if such motor vehicle fuel is sold in tank car lots to be used wholly for purposes other than propelling motor vehicles on the public highway; (b) if such motor vehicle fuel is exported or sold for exportation from the State of Ohio to any other State, or to any foreign country; (c) if such motor vehicle fuel is sold by a dealer to the United States Government or any of its agencies; or (d) if such motor vehicle is in process of transportation in international or interstate commerce, except in so far as the same may be permitted under the provisions of the Constitution of the United States and Acts of Congress.

Under the provisions of sections 5529 and 5530 of the law each dealer is required, not later than the 15th day of each calendar month, to file with the Tax Commission of Ohio a statement under oath of all motor vehicle fuel sold or used by him in the State during the preceding calendar month; and in turn the tax commission must transmit a monthly statement to the auditor of state. Upon receipt of this statement required each month from the tax commission furnishing information in regard to the sale of gasoline in the State of Ohio, the auditor of state computes the tax due from each such dealer at the rate of 2 cents per gallon.

Section 23(c) of the Revenue Act of 1928 provides in part 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.

As it appears from the foregoing sections of the Ohio General Code that the gasoline tax in question is an excise tax imposed upon the sale and use of motor vehicle fuel sold or used by any dealer in the State of Ohio, it is held that the tax so imposed is deductible by

the dealer who pays it and not by the purchaser. If, however, the tax in question is added to or made a part of the business expense of such dealer, it can not be deducted separately as a tax.

ARTICLE 151: Taxes.
(Also Section 41, Article 322.)

VIII-23-4224
G. C. M. 6075

REVENUE ACTS OF 1926 AND 1928.

Treatment of accruals of Wisconsin income taxes for the years 1926, 1927, and 1928.

An opinion is requested as to whether or not deductions by taxpayers on the accrual basis, in respect of the taxable year 1927, under sections 214(a)3 and 234(a)3, Revenue Act of 1926, for Wisconsin income "taxes * * * accrued within the taxable year" should be computed under the Wisconsin income tax act as it stood on the statute book of Wisconsin *at* the close of the (Federal) taxable year 1927, or as it stood on the statute book of Wisconsin *after* the close of such year. Certain essentially related issues are involved which require consideration in addition to the specific issue thus raised.

The Wisconsin income tax act (Wisconsin Statutes, 1925, chapter 71) was amended by Laws of Wisconsin, 1927, chapter 539 (approved August 10, 1927, published August 17, 1927, effective on publication), to provide for a tax assessable and payable in each year upon the "taxable income" of each taxpayer determined "by averaging the net income or loss reported by the taxpayer on his current return with the net incomes or losses for the two previous years, except that the taxable income assessed in the year 1928 shall be the average of the net incomes or losses for the years 1926 and 1927 or for the corresponding two fiscal years." (Wisconsin income tax act, section 71.10.) As thus amended the Wisconsin income tax act stood on the statute book of Wisconsin on December 31, 1927.

The Wisconsin income tax act, as amended by Laws of Wisconsin, 1927, chapter 539, was further amended by Laws of Wisconsin, 1928, chapter 4 (approved February 1, 1928, published February 2, 1928, effective on publication). Under this amendment, as under the preceding amendment, the tax was imposed upon the "taxable income" determined "by averaging the net income or loss reported by the taxpayer on his current return with the net incomes or losses for the two previous years, except that the taxable income assessed in the year 1928 shall be the average of the net incomes or losses for the years 1926 and 1927 or for the corresponding two fiscal years." Laws of Wisconsin, 1928, chapter 4, added to this provision the requirement that in the determination of such average "the net income or loss of 1926 [shall be given] two-thirds weight and the net income or loss of 1927 one-third weight."

The taxable year of a taxpayer is, by the Federal income tax laws themselves, made the "taxpayer's annual accounting period * * *," and the computation of the taxpayer's net income is by those laws required to be made upon the basis of that accounting period "in accordance with the method of accounting regularly employed in keeping the books of such taxpayer." (Section 41, Revenue Act

of 1928; section 212, Revenue Acts of 1926, 1924, 1921, and 1918.) Both by force of necessity as well as for reasons of convenience, the commercial and mercantile community generally does not keep its books, or measure its income, on the basis of cash receipts and disbursements, but does so on the basis of accruals, treating appropriate book accounts and bills receivable (liabilities owed the business, treated as assets in possession) as items of true income—property received in exchange for property or services rendered—and treating the obligations assumed by, or imposed upon, the taxpayer having a due relationship to such items of income (liabilities owed by the business, treated as having already diminished the assets) as items of real expense or outgo. The system of accrual accounting proceeds on the basis of expected receipts and expected expenditures as true income and true deductions therefrom. The necessity therefore arises of appropriate accounting adjustments when it becomes clear the expectations will not be realized.

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.

There is on that day upon the statute book of Wisconsin an income tax act which imposes a tax upon the taxpayer in respect of the average of the incomes for several periods, the last of which is the period in question. On that day for the first time the average becomes a fixed and determinable amount. In respect of that average, the Wisconsin income tax act has imposed a liability for tax. Just as the average itself is on the closing day of the period for the first time fixed and determinable, so the liability is itself on that day for the first time fixed and determinable. This liability thus fixed and de-

terminable constitutes a proper accrual for the accounting period in question, precisely as does the income or items thereof for the same period. (*United States* v. *Anderson*, 269 U. S., 422, T. D. 3839 (C. B. V-1, 179).)

Just as the actual collection and receipt of an item in a book account resulting from the sale by the taxpayer of goods are not necessary under the accrual method of accounting to a proper accrual as a real item of income, so an actual assessment and payment of an income tax are not necessary to its accrual as a real item of expense. Both the book account item and the income tax item may not yet be due; neither may ever actually be paid; the liability on the book account as well as the liability for the income tax may be extinguished by operation of law—yet none of these circumstances can alter the fact that as of the close of the accounting period both are proper accruals.

It results that taxpayers, subject to tax under the Wisconsin income tax act and employing the accrual method of keeping their books, may properly accrue the Wisconsin income taxes which, during or at the close of the particular taxable year in question, then for the first time become fixed and determinable and with respect to which a liability then for the first time becomes fixed and determinable, and may accordingly deduct such taxes for the taxable year, under sections 214(a)3 and 234(a)3, Revenue Act of 1926, and corresponding provisions of other Acts, for the purposes of the Federal income tax. Thus in respect of the taxable year 1927, such a taxpayer should accrue the tax determinable under the Wisconsin income tax act as it stood on the statute book of Wisconsin upon the closing day of his taxable year. A taxpayer whose taxable year 1927 closes on or before August 16, 1927, should accrue taxes in accordance with the provisions of Wisconsin Statutes, 1925, chapter 71. A taxpayer whose taxable year 1927 closes on or after August 17, 1927, should accrue taxes in accordance with the provisions of Wisconsin Statutes, 1925, chapter 71, as amended by Laws of Wisconsin, 1927, chapter 539. No such taxpayer may accrue for the taxable year 1927 Wisconsin income taxes in accordance with the amendment of the Wisconsin income tax act by Laws of Wisconsin, 1928, chapter 4, since that amendment was not law at the close of any taxpayer's taxable year 1927. The amount of Wisconsin income taxes which are accruable by Wisconsin taxpayers must, therefore, be determined in each instance under the Wisconsin income tax act as it stood on the statute book on the closing day of the taxpayer's taxable year.

Only two amendments have been discovered affecting the computation of the Wisconsin income tax after December 31, 1925, namely, Laws of Wisconsin, 1927, chapter 539, and Laws of Wisconsin, 1928, chapter 4. Assuming these to be the only relevant amendments, the system of accruals may be summarized as follows:

(1) Taxable year 1926: Accrue according to computation made under Wisconsin Statutes, 1925, chapter 71;

(2)(a) Taxable year 1927, ending on or before August 16, 1927: Accrue according to computation under Wisconsin Statutes, 1925, chapter 71;

(b) Taxable year 1927, ending on or after August 17, 1927: Accrue according to computation under Wisconsin Statutes, 1925, chapter 71, as amended by Laws of Wisconsin, 1927, chapter 539;

(3) (a) Taxable year 1928, ending on or before February 1, 1928: Accrue according to computation under Wisconsin Statutes, 1925, chapter 71, as amended by Laws of Wisconsin, 1927, chapter 539;

(b) Taxable year 1928, ending on or after February 2, 1928: Accrue according to computation under Wisconsin Statutes, 1925, chapter 71, as amended by Laws of Wisconsin, 1928, chapter 4.

The taxes thus accrued for the taxable year 1926, the taxable year 1927, and the taxable year 1928 (in cases where the taxable year 1928 ended on or before February 1, 1928) were either not assessed or paid at all by virtue of Laws of Wisconsin, 1927, chapter 539, or were actually assessed and paid in an amount other than the amount accrued by virtue of Laws of Wisconsin, 1928, chapter 4.

The Wisconsin taxpayer who properly accrued during the taxable year 1926 (or where his taxable year 1927 ended on or before August 16, 1927, during the year 1927) the Wisconsin State income tax must, during the subsequent taxable year (the taxable year in which August 17, 1927, falls), make, under the accrual method of accounting, a credit to profit and loss in order to reflect the fact that the liability for taxes theretofore shown on the books is no longer existent, and that the extinguishment of that liability results in gain or profit. Under the accrual method of accounting this gain or profit is a real gain or profit. Just as the entry, as of the moment it arose, on the books of the liability to pay the tax represented under the accrual method a real expense or outgo, so does the entry necessary to reflect the extinguishment of the liability under the circumstances of this case represent under the accrual method of accounting a real item of income. Congress in its prescription of the method of computing taxable income did not enact that "income actually received" should constitute gross income, or that "expenses actually paid" should constitute deductions therefrom, nor did it require a computation on the basis of cash receipts and disbursements. In permitting a diversity of methods of computing taxable income Congress in section 212, Revenue Act of 1926, and corresponding provisions of other Acts, did require the computation of income "in accordance with the method regularly employed in keeping the books of such taxpayer." The statute thus conformed itself to business usage and practice, and thus permitted the use of the accrual method of computing income. When the taxpayer thus regularly employs a method of keeping his books, he must, under the statute, compute his income accordingly. He can not for one purpose avail himself of the principles of an accrual method of accounting in order to take a deduction as a real expense or outgo and at the time repudiate the principles of the accrual method of accounting in order to prevent an item necessarily required by the accrual method to be shown on his books as an item of real income from being so treated and thus included in taxable income under the statute. The mandate of the statute is plain: "The net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer." Since the taxpayer, if he keeps his books on the accrual method, must credit the amount of the tax (accrued during the prior year, but not payable under the statute effective during the current taxable year) to profit and loss, it follows that the amount thereof must enter into the computation of net income as a constituent of gross income. Sections 212(b) and 213(a), Revenue Act of 1926,

and corresponding provisions of other Acts. (*Chicago, Rock Island & Pacific Railway Co.* v. *Commissioner*, 13 B. T. A., 988; *American National Co., Receiver*, v. *United States*, 274 U. S., 99, T. D. 4099 (C. B. VI–2, 193).) (And see the *Great Northern Railway Co.* v. *Lynch*, 292 Fed., 903, T. D. 3147 (C. B. 4, 277).)

Nor can the taxpayer arbitrarily depart from the accrual system regularly employed by him in order to effectuate the exclusion from profit and loss of the amounts here in question, and thus exclude the item from gross income. Since the mandate of section 212(b), Revenue Act of 1926, and corresponding provisions of other Acts, is that "if the method [of accounting] employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income," such an arbitrary departure from, and violation of, every sound principle of the accrual method could scarcely be called anything else than the abandonment of all method. In any event, the "opinion of the Commissioner" would certainly be that the method not only failed clearly to reflect the income but actually distorted it. Under the circumstances of this case, certainly the exercise of the discretion vested in the Commissioner, to the end that the tax thus properly accrued in the prior year and not payable under the statute effective in the current year is taken up as gross income, is so firmly grounded upon sound principles both of the theory and the practice of accounting that he is well within the powers granted him by the Federal income tax laws. (*Chicago, Rock Island & Pacific Railway Co.* v. *Commissioner* and *American National Co., Receiver*, v. *United States*, supra.)

Corresponding adjustments are also required in subsequent years (the taxable year in which February 2, 1928, falls) in respect of the Wisconsin income taxes accrued during the taxable year 1927 (in case that taxable year ended on or after August 17, 1927) or accrued during the taxable year 1928 (in case that taxable year ended on or before February 1, 1928). In so far as the adjustments relate to the variation between the method of computation prescribed by Laws of Wisconsin, 1927, chapter 539, and the method of computation prescribed by Laws of Wisconsin, 1928, chapter 4, it is altogether possible that the adjustment will result in a debit to profit and loss instead of a credit to that account. The debit will result in the year of adjustment in an additional allowable deduction to the taxpayer in computing the taxable net income, while the credit will result in the year of adjustment in an item of income in computing taxable net income.

Attention is directed to the fact that Laws of Wisconsin, 1927, chapter 539, became effective on the date of its publication, namely, August 17, 1927, and not on August 10, 1927, the date of its approval, or on August 12, 1927. Laws of Wisconsin, 1928, chapter 4, likewise took effect upon publication, February 2, 1928. Acts of the Wisconsin Legislature become law when approved by the governor. (Constitution, Article V, section 10.) But "no general law shall be in force until publication." (Constitution, Article VII, section 21.) (Cf. Wisconsin Statutes, section 4975.) The operation and coming into force of all Wisconsin general laws (among which are the income tax law and all amendments thereto) are, therefore, suspended until publication. Prior to its coming into force, a suspended law generally charges all persons with notice of its existence, of what is

suspended, and of the period of suspense, and all persons are then bound thereby in respect of all contracts, acts, etc., to be performed in whole or in part after the law comes into force. (*Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S., 611; *Stine* v. *Bennett*, 13 Minnesota, 153, 157; *Smith* v. *Morrison*, 22 Pick., 430, 432; *Ford* v. *Chicago Milk Shippers' Association*, 155 Illinois, 166, 181; *Dunne* v. *Rock Island County*, 283 Ill., 628.) (And see *People ex rel. Graham* v. *Inglis*, 161 Ill., 256.)

In Wisconsin, the constitutional requirement as to the publication of all general laws is specifically designed to give notice. (*O'Connor* v. *Fond du Lac*, 109 Wis., 253, 85 N. W., 327; *Smith* v. *Hoyt*, 14 Wis., 252; *Mead* v. *Bagnall*, 15 Wis., 156; *Mills* v. *Jefferson*, 20 Wis., 50; *State* v. *Frear*, 142 Wis., 320, 125 N. W., 961; *State* v. *Messmore*, 14 Wis., 163.) And that requirement has given rise to a constitutional custom and practice under which reliance is specifically placed upon publication in determining the existence of laws. Under such a special constitutional custom and practice, it is unnecessary to consider generally whether a proper accrual may be made of a tax pursuant to a statute which at the close of the taxable period is suspended. Until publication, taxpayers generally can not be presumed to know of the existence of the law, nor be charged with the requisite notice of its existence; and hence prior to such publication a proper accrual may not be made of a tax computed thereunder or imposed thereby.

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

ARTICLE 151: Taxes. VIII-25-4241
I. T. 2475

REVENUE ACT OF 1928.

The motor vehicle fuel tax imposed by the State of Virginia is deductible in the income tax return of the purchaser who pays it and to whom it is not refunded. If the tax is added to or made a part of the business expense of the purchaser, it can not be deducted separately as a tax. I. T. 2157 (C. B. IV-1, 35), in so far as it holds that the motor vehicle fuel tax imposed by the State of Virginia is deductible only by the dealers, is revoked.

A ruling is requested in regard to whether the gasoline tax imposed by the State of Virginia is deductible in the Federal income tax returns of the individual purchasers of gasoline.

The tax in question is levied under an act of the general assembly of the State approved March 26, 1923, as amended by acts approved March 21, 1924, March 10, 1926, March 13, 1928, and March 26, 1928.

In section 2 of the act, as amended, it is provided that in addition to the taxes provided by existing law, every dealer, who is engaged in the State of Virginia in the sale, distribution, or use of motor vehicle fuels, shall not later than the 20th of each calendar month render to the motor vehicle commissioner a statement on forms prescribed by said commissioner which shall show the quantities of motor vehicle fuels sold and delivered, or used, within the State of Virginia during the preceding calendar month, and such dealer shall at the same time pay the tax or taxes levied in the act on all motor vehicle fuels sold and delivered, or used, as shown by such statement. It is required that bills shall be rendered to all purchasers of motor

vehicle fuels by dealers selling the same, which bills shall contain a statement printed thereon in a conspicuous place that the liability to the State for the tax or taxes imposed by the act has been assumed, and that the dealer will pay the tax or taxes thereon on or before the 20th day of the following month.

Section 3 of the act, as amended, provides:

> There is hereby levied a tax of 4½ cents per gallon on all motor vehicle fuels, as herein defined, which are sold and delivered, or used, in this State, and are not under the protection of the interstate commerce clause of the Constitution of the United States. But nothing herein shall be construed to exempt from this tax any distributor of gas or oils on the gas used in making such distribution.
>
> In addition to the tax hereinabove in this section levied, there is hereby levied an additional tax of ½ cent per gallon on all motor vehicle fuels, as herein defined, which are sold and delivered, or used, in this State, and are not under the protection of the interstate commerce clause of the Constitution of the United States. But nothing herein shall be construed to exempt from this tax any distributor of gas or oils on the gas used in making such distribution.

It is provided in section 4 of the act, as amended, that 66⅔ per cent of the revenue derived from the tax levied under section 3 is appropriated for the construction of roads and projects comprising the State highway system and shall be applied to no other purpose. Thirty-three and one-third per cent of the revenue derived from the tax on motor vehicle fuels is appropriated primarily for the maintenance of roads and bridges embraced in, at the time of the passage of the act, or which may thereafter be added to, the several county highway systems of the State, as specified in the act, and shall be apportioned quarterly among the several counties of the State as required by the State law. Any balance remaining after such maintenance may then be applied to the construction or reconstruction of the roads and bridges embraced in such county highway systems.

It is further provided in section 7 of the act, as amended, that any purchaser who shall buy in quantities of 5 gallons or more at any one time any motor vehicle fuels as defined in the act for the purpose of, and the same is actually used for, operating or propelling boats, ships, stationary gas engines, tractors used for agricultural purposes, etc., and motor equipment belonging to counties and towns used exclusively in municipal activities, or who shall purchase and use any of such fuels for other commercial use except in motor vehicles operated or intended to be operated in whole or in part on any of the public highways, etc., of the State, on which motor fuels the tax or taxes imposed by the act shall have been paid, shall be reimbursed and repaid the amount of such tax or taxes paid by him, upon presenting to the director of the division of motor vehicles an affidavit accompanied by a ticket or other document from the dealer or retail distributor, showing such purchase, which affidavit shall set forth the total amount of such fuels so purchased and used by such consumer other than in motor vehicles operated or intended to be operated upon the public highways, etc., of the State, and how used.

The act, as amended, provides in section 9 that if any dealer as defined in the act shall fail to pay the tax or taxes on motor vehicle fuels due by such dealer under the provisions of the act, on or before the 20th day of the month in which such payment is due, there shall be automatically added thereto a penalty equal to 25 per cent of the said tax, to be paid or collected when the said tax is paid or collected.

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 except those specified in that section. 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 provisions of the sections of the law of the State of Virginia imposing the tax on motor vehicle fuels, referred to above, it appears that the tax is intended to be imposed upon the purchasers of motor vehicle fuels used as a propelling power for motor vehicles upon any of the public highways, etc., of the State. In view of the facts that the dealer is required to state on the bills that the tax imposed by the gasoline tax law of the State of Virginia has been "assumed by him," that the taxes collected from purchasers of gasoline used for purposes other than the operation of motor vehicles on the public highways, etc., of the State are to be refunded to them, and that the tax is to be applied to the construction, maintenance, and upkeep of the highways, streets, etc., of the State, it appears that the State legislature intended in enacting the act imposing the taxes in question to impose such taxes upon purchasers of motor vehicle fuels used as a propelling power for motor vehicles upon any of the public highways, etc., of the State.

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 fuel tax imposed by the State of Virginia is deductible in the income tax return of the purchaser 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 purchaser, it can not be deducted separately as a tax. The ruling appearing as I. T. 2157, in so far as it holds that the motor vehicle fuel tax imposed by the State of Virginia is deductible only by the dealers, is hereby revoked.

ARTICLE 153: Taxes for local benefits. VIII-12-4148
(Also Section 23(k), Article 202.) G. C. M. 5589

ALL REVENUE ACTS.

Treatment of assessments against local benefits.

An opinion is requested as to the proper treatment for income tax purposes of amounts paid as taxes assessed against local benefits, such as sidewalks and other similar improvements. Inquiry is also made as to whether any distinction should be made between assessments levied on the basis of the valuation of the property and assessments levied on a front-foot basis.

The rule of general applicability in the treatment of such taxes is contained in article 153 of Regulations 74 and the corresponding articles of prior regulations, and is to the effect that so-called taxes, more properly assessments, paid for local benefits, such as street, sidewalk, and other like improvements, imposed because of and measured by some benefit inuring directly to the property against which the assessment is levied, do not constitute an allowable deduction from gross income. Since, then, these special assessments are not deductible items, how should they be treated?

In those cases where the local improvement upon its completion is owned by the abutting property owners, the amount of the special assessment paid by any taxpayer measures the cost of the improvement to him, and, if the improvement is used in his trade or business, such cost may be recovered through depreciation allowances spread over the life of the improvement, as in the case of any other asset owned by the taxpayer and used in his trade or business.

Since, in those cases where the local improvement is not owned by the abutting property owners, the property against which the special assessment is levied is directly benefited by the improvement, the amount expended therefor is considered a capital expenditure properly chargeable to the property benefited, and accordingly may be added to the cost or other basis of such property. If the property which is benefited thereby is used by the taxpayer in his trade or business, the amount expended should be allocated between the land and the building thereon in proportion to the valuation of each, and that part of the expenditure which is attributable to the building may be recovered through depreciation allowances spread over the life of the building, whereas that part of the expenditure which is attributable to the land (such part being considered as a part of the cost or other basis of the land, a nondepreciable asset) may not be recovered through depreciation allowances. Where the property which is benefited is not used in trade or business—for example, the personal residence of a taxpayer—the amount paid as a special assessment should be capitalized, but no part thereof, whether attributable to the building or to the land, may be recovered through depreciation allowances.

There appear to be no reasonable grounds for making a distinction between special assessments for local benefits levied on the basis of the valuation of the property benefited and such assessments levied on a front-foot basis. In either case the same principles as to capitalization of the amounts expended and the recovery thereof through depreciation allowances should be applied.

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

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

ARTICLE 201: Depreciation.

VIII–5–4087
I. T. 2452

REVENUE ACT OF 1928.

If a trust instrument provides that the income of the trust computed without regard to depreciation is to be distributed to the designated beneficiaries, such beneficiaries will be entitled to the depreciation allowance to the exclusion of the trustee. If, however, the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee.

Advice is requested as to the interpretation to be placed on section 23(k) of the Revenue Act of 1928 in so far as it relates to the apportionment of the depreciation deduction between the trustee and the

beneficiaries in the case of property held in trust. This section of the statute provides as follows:

Depreciation.—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

As will be noted, the allowable deduction for depreciation in the case of property held in trust is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income which is allocable to the trustee and the beneficiaries, respectively. For example, if a trust instrument provides that the income of the trust computed without regard to depreciation is to be distributed to the designated beneficiaries, such beneficiaries will be entitled to the depreciation allowance to the exclusion of the trustee. If, however, the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee.

ARTICLE 201: Depreciation. VIII–15–4168
I. T. 2467

REVENUE ACT OF 1928.

The property of those Massachusetts trusts which file Federal tax returns as corporations is not "held in trust" within the meaning of the last sentence of section 23(k) of the Revenue Act of 1928.

Advice is requested as to whether the last sentence of section 23(k) of the Revenue Act of 1928 applies to those Massachusetts trusts which file Federal tax returns on corporation forms and pay taxes at corporation rates.

Section 23 of the Revenue Act of 1928 provides that in computing net income there shall be allowed as deductions:

(k) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

The last sentence of the subsection just quoted applies only to property "held in trust." While under local law a Massachusetts trust of the type described is, for some purposes, a trust, and may, for other purposes, constitute a partnership, such an organization under the Revenue Acts is neither a trust nor a partnership but is

an association and, therefore, is a corporation. (Section 1, Revenue Act of 1918; section 2(2), Revenue Act of 1921; section 2(a)2, Revenue Acts of 1924 and 1926; section 701(a)2, Revenue Act of 1928; *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S., 110, T. D. 3790, C. B. V–1, 147.) It is a corporation, moreover, not merely with respect to its tax rate but for other tax purposes as well (A. R. R. 643, C. B. 5, 230; G. C. M. 621, C. B. V–2, 5), for under the sections of the Revenue Acts just cited an association is a corporation without qualification or restriction. Therefore, the property of the association must be treated, under section 23(k) of the Revenue Act of 1928, as though the association were incorporated under the corporation statutes of the State and legal title to its property were vested in the association as a distinct legal entity.

It follows that such property is not "held in trust" within the meaning of the last sentence of section 23(k), and that that sentence does not apply to such Massachusetts trusts as are associations under the Revenue Acts.

ARTICLE 202: Depreciable property.

REVENUE ACT OF 1928.

Assessment for street improvements on front-foot or valuation basis. (See G. C. M. 5589, page 83.)

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

ARTICLE 261: Contributions or gifts by individuals.

REVENUE ACT OF 1928.

Navy and Marine Memorial Association. (See I. T. 2460, page 98.)

SECTION 25.—CREDITS OF INDIVIDUAL AGAINST NET INCOME.

ARTICLE 295: Date determining exemption. VIII–25–4242
G. C. M. 6275

REVENUE ACT OF 1928.

> Section 25(e)3 of the Revenue Act of 1928, which provides that in the case of an individual who dies during the taxable year the personal exemption shall be determined by his status at the time of his death, is exclusive in its terms and can not be applied in conjunction with section 25(e)2 of the Act, which provides for an apportionment of the exemption where there is a change in the status of the taxpayer during the taxable year.

An opinion is requested as to the credit for personal exemption allowable to a taxpayer under the following circumstances:

It appears that the taxpayer and his wife lived together until March 30, 1928, at which time they separated under the terms of a settlement agreement which was duly recorded among the records

of the city of R. The taxpayer died on June 3, 1928. The M Company as executor requests information as to the proper exemption to be claimed for the decedent in his 1928 income tax return. The husband had no dependents, and could not be classed as the head of a family after the separation.

Section 25(e) of the Revenue Act of 1928 provides in part:

(2) The personal exemption allowed by subsection (c) of this section shall, in case the status of the taxpayer changes during his taxable year, be the sum of an amount which bears the same ratio to $1,500 as the number of months during which the taxpayer was single bears to 12 months, plus an amount which bears the same ratio to $3,500 as the number of months during which the taxpayer was a married person living with husband or wife or was the head of a family bears to 12 months. For the purposes of this paragraph a fractional part of a month shall be disregarded unless it amounts to more than half a month, in which case it shall be considered as a month.

(3) In the case of an individual who dies during the taxable year, the personal exemption and the credit for dependents shall be determined by his status at the time of his death, and in such case full credits shall be allowed to the surviving spouse, if any, according to his or her status at the close of the taxable year.

It is suggested that section 25(e)2 is applicable in the instant case, and that the taxpayer's personal exemption should be apportioned in accordance with the number of months during which he was married and living with his wife and the number of months during which he did not have that status.

This suggestion is not sound. Section 25(e)3 of the Revenue Act of 1928, providing that in the case of an individual who dies during the taxable year the personal exemption shall be determined by his status at the time of death, is exclusive in its terms and is clearly applicable in the instant case. This provision can not be applied in conjunction with section 25(e)2, providing for the apportionment of the exemption where there is a change in the status of the taxpayer during the taxable year. Thus, where there is both a change of status and death within the taxable year, section 25(e)3 must govern.

Inasmuch as the taxpayer separated from his wife on March 30, 1928, and died June 3, 1928, his status at the time of his death was that of a single person. Accordingly, the personal exemption allowable in his 1928 income tax return is $1,500.

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

PART IV.—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING.

SECTION 41.—GENERAL RULE.

ARTICLE 321: Computation of net income. VIII–10–4129
I. T. 2459

REVENUE ACT OF 1928.

The following rates of exchange are accepted by the Bureau of Internal Revenue as the current or market rates of exchange prevailing as of December 31, 1928:

Country or city.	Monetary unit.	Value in terms of United States money.	Country or city.	Monetary unit.	Value in terms of United States money.
Austria	Schilling	$0.140678	Switzerland	Franc	$0.192745
Belgium	Belga	.139119	Yugoslavia	Dinar	.017594
Bulgaria	Lev	.007186	Hongkong	Dollar	.498125
Czechoslovakia	Krone	.029626	China	Shanghai tael	.634732
Denmark	Krone	.266983	China	Mexican dollar	.460125
England	Pound	4.852649	China	Yuan dollar	.457291
Finland	Markka	.025177	India	Rupee	.364828
France	Franc	.039121	Japan	Yen	.458925
Germany	Reichsmark	.238093	Singapore	Dollar	.562500
Greece	Drachma	.012930	Canada	Dollar	.997378
Hungary	Pengo	.174206	Cuba	Peso	.999718
Italy	Lira	.052340	Mexico	Peso	.482500
Netherlands	Guilder	.401773	Argentina	Peso (gold)	.957123
Norway	Krone	.266803	Argentina	Peso (paper)	.421134
Poland	Zloty	.111845	Brazil	Milreis	.119955
Portugal	Escudo	.044060	Chile	Peso	.120355
Rumania	Lev	.006017	Uruguay	Peso	1.027344
Spain	Peseta	.163127	Colombia	Peso	.970900
Sweden	Krona	.267772			

ARTICLE 322: Bases of computation.

REVENUE ACT OF 1928.

Accruals of Wisconsin income taxes. (See G. C. M. 6075, page 76.)

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

ARTICLE 342: When charges deductible. VIII–21–4209
I. T. 2473

ALL REVENUE ACTS.

The adjustments referred to in General Counsel's Memorandum 5265 (C. B. VII–2, 55) on account of freight charges on shipments of lumber in the case of lumber companies on the accrual basis require a revision of the estimated freight charges for the year in which the shipments were made and not for the year in which the amount of the freight charges is definitely ascertained.

A ruling is requested relative to the proper interpretation of General Counsel's Memorandum 5265.

The question at issue involves the following portion of General Counsel's Memorandum 5265, supra:

Under the circumstances shown in the instant case, it must be concluded that lumber companies which keep their accounts and render their returns on an accrual basis should be permitted to deduct as an accrued liability for the year in which the shipments are made the amount of freight charges thereon, where such charges are determined in accordance with the practice above indicated, subject to proper adjustments being made when the actual freight charges are finally ascertained.

In this connection it is stated that a number of accountants and attorneys for lumber companies have interpreted General Counsel's Memorandum 5265 to mean that estimated freight charges set up in accordance with the standard practice should not be adjusted for the year in which the shipments are made, but that the necessary adjustments should be reflected in the return for a subsequent year. This is not the proper interpretation. The adjustments re-

ferred to in General Counsel's Memorandum 5265 require a revision of the estimated freight charges on shipments of lumber in the case of lumber companies on the accrual basis for the year in which the shipments were made and not for the year in which the amount of the freight charges is definitely ascertained.

PART V.—RETURNS AND PAYMENT OF TAX.

SECTION 51.—INDIVIDUAL RETURNS.

ARTICLE 381: Individual returns. VIII-9-4122
I. T. 2457

REVENUE ACTS OF 1926 AND 1928.

An amendment of the Civil Code of California passed by the California Legislature, approved by the governor April 28, 1927, in effect July 29, 1927, reads as follows:

SECTION 1. A new section is hereby added to the civil code to be known as section 161a thereof to read as follows:

161a. 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.

The Supreme Court of California in the case of *Stewart* v. *Stewart*, July 18, 1928 (269 Pac., 439), held that this section of the code, whatever effect it may have upon community property acquired subsequent to its effective date, can not in any manner relate to or govern the ownership of property acquired prior thereto.

In view of section 161(a) of the California Civil Code, and pending final adjudication in court of the question as to whether the Government may tax to the husband the entire community income which under the State law is under his management and control, husband and wife domiciled in California may each hereafter in rendering original separate returns report one-half of the income from community property acquired on and after July 29, 1927. Where community property was acquired prior to that date, the income therefrom may not be divided for income tax purposes but is taxable to the husband in its entirety, regardless of when such income is received. Husband and wife may hereafter report in original separate returns one-half of salaries, wages, and fees earned by either spouse on and after July 29, 1927, which are community property.

ARTICLE 381: Individual returns. VIII-17-4182
Mim. 3723

Community property returns—1927 and subsequent years.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 6, 1929.

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and other Officers and Employees Concerned:

In order that taxpayers in community property States may be advised as to the position of the Bureau with respect to income tax

returns required to be filed in those States, and that a uniform treatment as to the audit of these returns may exist, the present situation is summarized and instructions issued as follows:

The Attorney General in an opinion dated September 10, 1929 (32 Op. A. G., 298, T. D. 3071 (C. B. 3, 221)), the date being stated as August 24 in the Treasury decision, with respect to Texas, and in an opinion dated February 26, 1921 (32 Op. A. G., 435, T. D. 3138 (C. B. 4, 238)), with respect to Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada, held that in rendering income tax returns husband and wife might each report one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, community property. These opinions were reconsidered by the Attorney General because of the decision of the United States Supreme Court in the case of *United States* v. *Robbins* (269 U. S., 315, T. D. 3817 (C. B. V-1, 188)), and under date of July 16, 1927 (35 Op. A. G., 265), he withdrew the former opinions in a letter addressed to the Secretary of the Treasury, stating that the decision in the case of *United States* v. *Robbins* has raised very substantial doubt as to the soundness of the two former opinions, leaving the Treasury Department to take any position it may consider proper under the laws of the several States with respect to the reporting of community income.

(1) The position of the Bureau is that community income can not be divided for income tax purposes, but must be returned, and the tax in respect thereof paid, by the spouse (usually the husband) having under the laws of the State the management and control thereof. However, pending final adjudication in court of this question husband and wife domiciled in Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington may each hereafter in rendering original separate returns report one-half of the income which simultaneously with its receipt becomes community property. Husband and wife domiciled in California may divide the community income only to the extent and as provided by I. T. 2457 (see on page 89).

(2) The audit of returns filed upon the so-called community property basis for 1927 and subsequent taxable years will be governed by the following rules:

(*a*) In all cases where such returns are in the process of audit, the return of the husband will be associated with the return of the wife and the returns audited concurrently.

(*b*) Where issues other than that of the community property basis are involved, the usual procedure (except as hereinafter stated) will be followed with respect to the other issues, with a view to their settlement. In such cases the 30-day letter from the internal revenue agent in charge or the collector will include a paragraph stating specifically that consideration of the community property issue is to be postponed pending the final court decision on the question, unless prior to such decision it becomes necessary to mail a formal notice of deficiency (60-day letter) because of the running of the statute of limitations on assessment, or because of the taxpayer's nonacquiescence in the proposed adjustment of the other issues.

(*c*) If the adjustment of all of the other issues results in no change in tax liability, the returns will be filed in the collector's office or the Income Tax Unit in Washington, as the case may be, after the usual review, and the returns will be appropriately flagged

in the files so that they may be readily withdrawn and assembled for a supplemental audit in the event the final decision of the court sustains the Bureau's position. (But see paragraph (*i*) below.)

(*d*) If the taxpayer acquiesces in the proposed adjustment of the other issues and such adjustment results in a change in tax liability, the administrative file in the case, after the usual review, will be appropriately labeled and pending the final court decision will be held in the office of the internal revenue agent in charge. This type of cases will be treated by collectors in the same manner as protest cases and will be transmitted to the appropriate internal revenue agent in charge. The taxpayer will be advised to protect his interests with respect to any overpayments by filing a claim for refund within the statutory period of limitation properly applicable thereto.

(*e*) For the purpose of securing the taxpayer's acquiescence in the proposed adjustment of the other issues the usual forms (Form 870, 873, etc.), waiving the right to file a petition with the Board of Tax Appeals and consenting to the assessment and collection of a deficiency or accepting an indicated overassessment, may be used.

(*f*) If the taxpayer does not acquiesce in the proposed adjustment of all of the other issues and such adjustment results in an overassessment the administrative file will be labeled and held as in paragraph (*d*) above. Also the taxpayer will be advised to protect his interests with respect to any overpayment by filing a timely claim for refund.

(*g*) If the taxpayer does not acquiesce in the proposed adjustment of all the other issues and such adjustment results in a deficiency, the case will be forwarded to the Income Tax Unit in Washington for the mailing of a 60-day deficiency letter, and the proposed deficiency stated in such letter will include the portion of the deficiency attributable to the position of the Bureau stated in paragraph (1) above with respect to the community property issue. Collectors will treat all such cases as protest cases.

(*h*) Those returns which are closed and filed, or which may hereafter be accepted and sent to the files as properly prepared (except for the community property issue), will be flagged in the files as in paragraph (*c*) above. This paragraph does not apply to those cases which may have been finally closed under section 1106(b) of the Revenue Act of 1926 or section 606 of the Revenue Act of 1928.

(*i*) If the final decision of the court is in favor of the Bureau's position the return sent to the files will be subject to a supplemental audit only in those cases where the additional tax will be sufficient in amount to justify the time and expense in taking such action.

(*j*) A closing agreement on Form 866 will not be entered into for 1927 or any subsequent year in any case contrary to the position stated in paragraph (1) above, prior to the final court decision.

(*k*) In the event of a final court decision sustaining the Bureau's position, every effort should be made to obtain the consent of the wife (for example) to apply the tax paid by her upon the community income against the additional tax due from the husband.

(*l*) Claims for refund based on a division of income under the community property laws will be held in the claims control section of the Income Tax Unit, and no refund will be allowed for 1927 or

any subsequent year contrary to the position stated in paragraph (1) of this mimeograph.

(*m*) If in any case the statutory period for assessment is about to expire, waivers will be asked and, if not received, the case will be forwarded to the Income Tax Unit in Washington in sufficient time for the mailing of a 60-day deficiency letter upon the basis of the position stated in paragraph (1) above prior to the expiration of the statutory period of limitation.

Queries regarding this mimeograph or procedure in connection therewith will be directed to IT:E:CBA.

D. H. BLAIR, *Commissioner.*

ARTICLE 382: Form of return. VIII-5-4090
Mim. 3701

Change in Form 1040 for calendar year 1928.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 1, 1929.

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

Reference is made to Form 1040, Individual income tax return for calendar year 1928. The heading of column 9, Schedule D, of this form reads "Net gain or loss (Enter 12½ per cent as Item 49)." The matter in parentheses should read "(Enter 12½ per cent as Item 47)."

D. H. BLAIR, *Commissioner.*

SECTION 53.—TIME AND PLACE FOR FILING RETURNS.

ARTICLE 403: Extensions of time in the case of foreign organizations, certain domestic corporations, and citizens of United States residing or traveling abroad. VIII-2-4060
I. T. 2446
(Also Section 236, Article 1121.)

REVENUE ACT OF 1928.

A foreign corporation having a place of business in the United States may be granted an extension of time for filing its return for 1928 until the 15th day of the sixth month following the close of its taxable year without the requirement that a tentative return be filed and at least one-fourth of the estimated tax be paid.

If a further extension is required, it will be necessary to file a tentative return not later than the 15th day of the sixth month following the close of the taxable year and to pay at least one-fourth of the estimated tax due.

Section 236 of the Revenue Act of 1928, relating to the payment of the tax, applies to a foreign corporation whether or not it has an office or place of business in the United States.

The M Company is a foreign corporation having a place of business in the United States and a fiscal year ended September 30, 1928. The corporation desires to secure an extension of time in which to file its return for the fiscal year ended September 30, 1928, and

refers to article 444 of Regulations 69, wherein foreign corporations are granted an extension of time until the 15th day of the sixth month following the close of the taxable year in which to file returns under the Revenue Act of 1926. Information is desired as to whether or not it is necessary to file a tentative return on the 15th day of the third month following the close of the fiscal year in order that such extension shall be operative. Information is also desired as to whether in case a further extension is applied for it will then be necessary to file a tentative return. The question is also raised as to whether section 236 of the Revenue Act of 1928 applies to a foreign corporation having an office or place of business in the United States.

In view of the practice of the Bureau as indicated by the provisions of article 444 of Regulations 69, pertaining to returns required to be filed under the Revenue Act of 1926, wherein it is recognized that foreign corporations should have additional time to file their income tax returns, and under authority of section 53(a)2 of the Revenue Act of 1928, an extension of time to March 15, 1929, is granted the corporation in which to file its return. Since under section 236(a) of the Revenue Act of 1928 payment of the tax is not required until the 15th day of the sixth month following the close of the taxable year, it will be unnecessary for the corporation to file a tentative return and to pay at least one-fourth of the estimated tax due on the 15th day of the third month following the close of its fiscal year. In case a further extension of time is necessary, the corporation should make application therefor to the collector before the expiration of the present extension period. In that case it will be necessary for the corporation to file a tentative return not later than March 15, 1929, and to pay at least one-fourth of the estimated tax due as shown by such tentative return. Interest on any deficiency in the tax on such first installment will begin to run from March 15, 1929.

Section 236 of the Revenue Act of 1928, providing for the payment of tax by a foreign corporation, applies to a foreign corporation whether or not it has an office or place of business in the United States. A foreign corporation may elect to pay the tax in four equal installments, the first installment being due on the 15th day of the sixth month following the close of the taxable year.

SECTION 55.—PUBLICITY OF RETURNS.

ARTICLE 421: Inspection of returns. VIII–12–4152
T. D. 4264

Amending Treasury Decision 3856—Publication of internal revenue tax refund decisions.

TREASURY DEPARTMENT,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Treasury Decision 3856 [C. B. V–1, 106], as amended (being regulations prescribed by the Secretary and approved by the President and applicable to the inspection of returns under the Revenue

Act of 1928 and prior Revenue Acts), is amended by adding at the end thereof the following new paragraph:

20. The Commissioner of Internal Revenue shall cause to be prepared a written decision in every case in which an overassessment (whether resulting in a refund, credit, or abatement) of an income, war-profits, excess-profits, estate, or gift tax is allowed, in excess of $20,000, and such decision shall be considered a public record and shall be open to inspection, during regular hours of business, in the office of the Commissioner of Internal Revenue or such office as he may designate. Such decision shall give the amount of the overassessment and shall be accompanied by a brief summary of the relevant facts and a citation of the authorities applicable thereto, or, in a case in which a decision of a court or of the Board of Tax Appeals has become final, by a citation of the court or Board decision. Under no circumstances shall the provisions of this paragraph be construed as making any return, or any part thereof, open to inspection, or as authorizing the source of any income, gains, or profits, or the specific transactions resulting in losses or expenditures, to be made public; nor shall any of the information contained in any return or relating thereto be made public except in accordance with, and to the extent necessary in carrying out, these regulations.

A. W. MELLON,
Secretary of the Treasury.

Approved March 14, 1929.
HERBERT HOOVER,
The White House.

EXECUTIVE ORDER.

Publication of internal revenue tax refund decisions.

Pursuant to the provisions of section 55 of the Revenue Act of 1928 and section 257 of the Revenue Act of 1926, it is hereby ordered that decisions of the Commissioner of Internal Revenue allowing a refund, credit, or abatement of income, war-profits, excess-profits, estate, or gift taxes, in excess of $20,000, shall be open to inspection in accordance, and upon compliance, with the regulations prescribed by the Secretary of the Treasury and approved by me, bearing even date herewith.

HERBERT HOOVER.

THE WHITE HOUSE,
March 14, 1929.

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.

REVENUE ACT OF 1928.

Sale in 1928 of stock purchased during the same year under an option held for a period of years prior to its exercise. (See I. T. 2447, page 70.)

ARTICLE 501: Definition and illustration of capital net gain. VIII–14–4162 I. T. 2466

REVENUE ACT OF 1928.

Pursuant to a resolution adopted January —, 1929, by the governing committee of the M Stock Exchange, increasing its membership, the taxpayer, a member of the exchange since March, 1919, became entitled on February —, 1929, to the right or privilege of transferring his proportionate part of the additional memberships created. In March, 1929, such proportionate part was sold for cash.

Held, the interest in the new membership was capital and its acquisition by the taxpayer did not result in the receipt of income.

For capital gain purposes, the interest in the new membership was property held for over two years, and the gain resulting from its sale may at the election of taxpayer be taxed as capital gain, in accordance with section 101 of the Revenue Act of 1928.

An opinion is requested as to the treatment for income tax purposes to be accorded to the acquisition and sale by A in 1929 of a one-quarter interest in a new membership in the M Stock Exchange.

It is stated that on March —, 1919, A acquired a membership in the M Stock Exchange by paying to the person from whom the membership was transferred $5x$ dollars, and that upon being admitted to the exchange, by transfer of this membership, he paid to the exchange the initiation fee then required.

Under the provisions of the constitution of the exchange the "membership of the exchange shall not be increased except by action of the governing committee, which shall prescribe the number by which the membership shall be increased and the terms of admission." In accordance with these provisions, a resolution was adopted by the governing committee on January —, 1929, which resolution so far as pertinent reads:

Resolved, That the membership of the exchange be increased by 275 memberships; and that each member of the exchange (or the legal representatives of any member who may then have died) on the date this resolution shall become effective, after it is submitted to the exchange pursuant to the constitution, shall have the right or privilege of transferring his proportionate part of such additional memberships within three years of said date to an applicant for membership who is approved by the committee on admissions pursuant to the constitution, it being understood that no such applicant shall be considered by the committee on admissions until he has contracted to purchase the proportionate part of such additional memberships belonging to 4 members of the exchange, and that on election to membership such applicant shall pay to the exchange the initiation fee prescribed by the constitution at the time of his election * * *.

Pursuant to the resolution referred to, A became entitled on February —, 1929, to the right or privilege of transferring his proportionate part of the additional memberships created by the resolution. Inasmuch as the membership of the exchange on February —, 1929, was 1,100, and 275 additional memberships were created, his proportionate part of the additional memberships was equal to one-quarter of a new membership. On February —, 1929, the first day on which the interests of the members in the additional memberships could be transferred for a monetary consideration, A contracted to transfer his interest in the new memberships to B, for the sum of $9x$ dollars. On March —, 1929, B was duly elected to membership in the exchange and pursuant to his agreement paid A the sum of $9x$ dollars in cash.

Upon consideration of the various aspects of the questions presented, this office has reached the conclusion that the one-quarter in-

terest in the new membership to which A became entitled under the resolution of January —, 1929, represented under the foregoing facts a proportionate part of his original investment in his membership in the exchange. Prior to the time that resolution became effective, his membership represented a 1/1100 interest in the exchange, whereas after the resolution became effective that same interest was represented not by his membership alone but four-fifths by his membership and one-fifth by his proportionate part of the additional memberships created. His membership thereafter represented but a 1/1375 interest in the exchange and his one-quarter interest in a new membership a 1/5500 interest, the two together representing the same 1/1100 interest in the exchange which his membership represented before the new memberships were created. This analysis of the situation is in accord with the regulations which were adopted by the exchange in connection with the transfer of these interests in the new memberships. The regulations provide that until "a member has transferred his right any transfer of his membership must carry with it his interest in the additional memberships," and that any "agreement to transfer a membership in the exchange by a member who has not disposed of his right shall be presumed to be an offer to transfer his membership and his right." The essence of the situation is that upon the creation of the new memberships in 1929 there may have been some change by way of addition in that which theretofore evidenced A's interest in the exchange, but there was no real change by way of addition or otherwise in his interest in the exchange. Since his interest in the exchange remained unaffected, the transaction did not result in any taxable income being received.

The transaction whereby A acquired a one-quarter interest in a new membership was in many respects similar to the acquisition by a stockholder from his corporation of a stock dividend, the action of the exchange in increasing the existing memberships being akin to a corporation increasing its authorized capital stock, and issuing a stock dividend payable in such newly authorized stock. In *Eisner* v. *Macomber* (252 U. S., 189, T. D. 3010, C. B. 3, 25) the following language quoted by the Supreme Court from *Towne* v. *Eisner* (245 U. S., 426), as to the nature of a stock dividend, succinctly sums up the effect of the creation by the exchange of the new memberships:

"A stock dividend [The creation of new memberships] really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders [members]. Its property is not diminished, and their interests are not increased. * * * The proportional interest of each shareholder [member] remains the same. The only change is in the evidence which represents that interest, * * *." (*Gibbons* v. *Mahon*, 136 U. S., 549, 559, 560.) In short, the corporation is no poorer and the stockholder [member] is no richer than they were before. (*Logan County* v. *United States*, 169 U. S., 255, 261.) If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed. * * * What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.

From what has been said it follows that the one-quarter interest in the new membership was capital and its acquisition by A did not result in the receipt of income; that the interest acquired represented one-fifth of the investment in his original membership in the exchange and so had a cost basis of x dollars ($5x$ dollars $\div$ 5); that

for capital gain purposes the interest in the new membership was property held for over two years, i. e., since March —, 1919 (article 501, Regulations 74); and that the gain of $8x$ dollars ($9x$ dollars − x dollars) resulting from the sale of the interest may at his election be taxed as capital gain at the rate of 12½ per cent, in accordance with section 101 of the Revenue Act of 1928 and article 501 of Regulations 74.

SECTION 103.—EXEMPTIONS FROM TAX ON CORPORATIONS.

ARTICLE 525: Building and loan associations and cooperative banks. VIII–9–4123 I. T. 2458

REVENUE ACTS OF 1926 AND 1928.

An organization otherwise qualified will not be denied exemption as a building and loan association under section 231(4) of the Revenue Act of 1926 and section 103(4) of the Revenue Act of 1928 because the holders of installment shares (both borrowers and nonborrowers) are not entitled to vote.

A ruling is requested as to whether the M Building and Loan Association is entitled to exemption under section 231(4) of the Revenue Act of 1926 and section 103(4) of the Revenue Act of 1928.

In the opinion rendered November 19, 1928, by the Supreme Court of the United States in the case of *The United States* v. *The Cambridge Loan & Building Co.* (49 Sup. Ct., 39, T. D. 4252, C. B. VII–2, 290), affirming the judgment of the United States Court of Claims of June 6, 1927 (63 Ct. Cl., 631), it was stated that the Federal statutes relating to the exemption of building and loan associations "speak of 'domestic' associations, that is, associations sanctioned by the several States," and such Federal statutes "must be taken to accept with the qualifications expressly stated what the States are content to recognize." Beginning with the Revenue Act of 1921, Congress incorporated in the exempting provisions of the statute the qualifying phrase "substantially all the business of which is confined to making loans to members."

It appears that the M Building and Loan Association was incorporated in February, 1926, under the building and loan association laws of the State of R; that it has made loans only to persons who subscribed for stock equal to the full amount of their loans; that the holders of installment stock (both borrowers and nonborrowers) are not permitted to vote; but that nonborrowing installment shareholders may convert their matured installment stock into full-paid stock, which stock carries the right to vote. While the holders of installment stock are not permitted to vote, the denial to an installment shareholder of the right to vote does not disqualify him as a member of the association.

In view of the fact that substantially all the business of the association is confined to making loans to members and that it meets all the other tests of exemption, it is held that the association is entitled to exemption under section 231(4) of the Revenue Act of 1926 and section 103(4) of the Revenue Act of 1928. Accordingly, the association will not be required to file returns for 1926 and subsequent years so long as it does not change its purposes or its method of doing business.

ARTICLE 525: Building and loan associations and cooperative banks. VIII-12-4149 I. T. 2463

REVENUE ACT OF 1928.

In loans made by the M Building and Loan Association under the so-called divided mortgage system each loan is covered by two mortgages, one with respect to the portion of the loan covered by subscription for shares and one with respect to the part not so covered. The loan is a single transaction, one application being made, one voucher drawn, and one receipt book given.

The divided mortgage loan in its entirety is a member loan, and the present exempt status of the organization as a domestic building and loan association will not be affected by the making of such loans.

Advice is requested relative to the effect upon the present exempt status of the M Building and Loan Association of loans made under the so-called divided mortgage system. The question is whether in view of this system it can be said that substantially all the business of the association is confined to making loans to members, a statutory requirement of exemption under section 103(4) of the Revenue Act of 1928.

It appears that under the so-called divided mortgage system each loan is covered by two mortgages, one mortgage with respect to the portion of the loan covered by subscription for shares and one mortgage with reference to the part of the loan not covered by subscription for shares. The portion of the loan not covered by subscription for shares is called a "flat loan," this portion of a divided mortgage loan being from 33⅓ per cent to 40 per cent of the total loan. The divided mortgage loan is a single transaction, one application for a loan being made, one voucher drawn, one receipt book given, one account opened on the books of the association, and one number given to the loan. The two mortgages are executed and recorded simultaneously. The mortgage covering the "flat loan" is made for three years and contains an agreement that the interest shall be paid monthly, and that the principal shall be due if default is made in any of the payments due on either mortgage. The avowed purpose of the divided mortgage loan is to make the payments smaller to the borrower, it being stated that a regular loan of $4,500 requires monthly payments of $49.50, while a divided mortgage loan of $4,500 ($1,500 representing the "flat loan" and $3,000 representing the portion of the loan covered by subscription for shares) requires a payment of $40.50 per month.

Since the divided mortgage loan is a single transaction although covered by two mortgages, and since each borrower subscribes for shares of the association, it is held that the divided mortgage loan is in its entirety a member loan, and the present exempt status of the organization as a domestic building and loan association will not be affected by the making of such loans.

ARTICLE 529: Civic leagues and local associations of employees. VIII-10-4130 I. T. 2460
(Also Section 23(n), Article 261.)

REVENUE ACT OF 1928 AND PRIOR REVENUE ACTS.

The Navy and Marine Memorial Association is entitled to exemption under the provisions of section 103(8) of the Revenue Act of 1928 and corresponding sections of prior Revenue Acts.

Contributions made to such association by individuals are deductible from gross income in the manner and to the extent provided by section 23(n) of the Revenue Act of 1928 and corresponding sections of prior Revenue Acts.

A ruling is requested as to the status of the Navy and Marine Memorial Association with respect to Federal income tax.

It appears that the association was formed for the purpose of raising a fund of money with which to erect a national monument in Washington, D. C., on a site in East Potomac Park designated by Congress, commemorating the country's sea services. The monument is to be suitably inlaid in the memorial platform with the insignias of every State in the Union, and the official seals of the United States Navy and the merchant marine are to be placed on two sides of the monument. The entire activities of the association have been directed toward the securing of contributions to make up the necessary fund. None of the income of the association may inure to the benefit of any private member or individual. Its entire income is received through contributions and is to be expended for meeting the overhead expenses of the association and for erecting the monument.

Based on these facts, it is held that the association is entitled to exemption under the provisions of section 103(8) of the Revenue Act of 1928 and the corresponding sections of prior Revenue Acts. It is not, therefore, required to file returns of annual income.

The exemption referred to does not apply to taxes levied under other titles or provisions of the respective Revenue Acts, except in so far as exemption is granted expressly under those provisions to corporations enumerated in section 103 of the Revenue Act of 1928 and in sections 231 of the Revenue Act of 1926 and prior Acts.

The Congress of the United States by a joint resolution approved February 16, 1924 (43 U. S. Statutes at Large, p. 14, chapter 36), authorized the erection of the memorial on public grounds of the United States, with the result that title to the memorial will rest in the Government of the United States. Any contribution to the association to be used for the purpose of erecting the memorial is therefore a contribution for the use of the United States for exclusively public purposes. Accordingly, it is held that contributions to the association by individuals are deductible by such individuals, in arriving at their taxable net income, in the manner and to the extent provided by section 23(n) of the Revenue Act of 1928 and corresponding sections of prior Revenue Acts.

SUPPLEMENT B.—COMPUTATION OF NET INCOME.

SECTION 113.—BASIS FOR DETERMINING GAIN OR LOSS.

ARTICLE 596: Property transmitted at death. VIII-22-4218
G. C. M. 6195

REVENUE ACT OF 1928.

Where under a general bequest a bank as executor distributed shares of stock to itself as trustee, the basis to be used for determining gain or loss in the event of the sale thereof by the trustee and the basis in the event the trustee transfers the stock to the beneficiary of the trust and the beneficiary sells it is the fair market value of the stock at the time of its distribution by the executor.

It appears that the M Bank was the executor of the will of A, deceased, and that as executor it distributed to itself, as trustee, certain corporate stock under a general bequest. Advice is requested as to the basis to be used for determining gain or loss in the event the bank, as trustee, now sells the stock and the basis in case it transfers the stock to the beneficiary of the trust, as it is authorized by the terms of the will to do, and the beneficiary sells the stock.

Section 113(a)5 of the Revenue Act of 1928 reads, in part, as follows:

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—

* * * * * * *

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.

It is fundamental that the duties of a testamentary trustee, where a trust is created by will and the executor under the will is nominated as the trustee, are to be distinguished from those of the executor. Thus in 11 R. C. L., Executors and Administrators, paragraph 4, it is stated:

There is no legal obstacle to the same persons being appointed as executors and trustees. * * * Questions of considerable difficulty and importance may arise in determining the exact line of demarcation between the two offices. The liability of a surety on the administration bond of an executor is generally limited to matters strictly pertaining to the executor's duties as such, and not to breaches of trust in regard to his additional powers as testamentary trustee. One fundamental difference between an executor and a trustee is, that the duties of the former pertain to the office, and those of the latter to the person. In accordance with this distinction a person administering the estate of a decedent as an executor is said to act as such by virtue of his office; but in serving as trustee he is deemed to act as the donee of a trust power.

When the bank distributed the stock to itself, as trustee, its functions as executor in respect of the distributed property ceased and its duties as trustee commenced. So far as the trust was concerned, this distribution of the stock was "the distribution to the taxpayer" referred to in section 113(a)5, supra, and in accordance with the provisions of that section the fair market value of the stock at that time is the basis to be used for determining gain or loss in the event of a sale thereof by the bank as trustee.

After the distribution the bank acted solely as a donee of a trust power with equitable liabilities to the beneficiary. Upon the date of such distribution the beneficiary of the trust became entitled to the income from a fixed and determined block of stock with a right to ultimate possession of that stock. The rights of the beneficiary attached instanter to the specific property then transferred in trust. Such rights were substantial and enforceable, arising through the trust relationship, and giving the beneficiary property interests of value. They were not postponed until the trustee surrendered the corpus of the trust estate. Among those interests was included the

right to receive the income produced by the trust property which, it has been decided, gives the beneficiary an equitable interest in the fund producing the income. (Roper on Legacies, volume 2, page 1476, and cases cited. Cf. *Irwin* v. *Gavit*, 268 U. S., 161, 45 S. Ct., 475 [T. D. 3710, C. B. IV–1, 123].)

The interposition of a trustee prevented the legal title from vesting in the beneficiary until the termination of the trust, but that did not alter the fact that upon the vesting of the trust estate the beneficiary became substantially the owner of the property. It is therefore the opinion of this office that there was a distribution of the trust property to the beneficiary within the intendment of section 113(a)5, supra, when the executor relinquished the property to itself as trustee, and that the surrender of such property by the trustee at the termination of the trust is not such a distribution as is contemplated by that section. It follows that when the bank as executor distributed the stock to itself as trustee under the general bequest, the stock took as its basis its then fair market value, not only for the determination of gain or loss to the trustee but also for the determination of gain or loss to the beneficiary after the legal title has merged in his equitable ownership through the surrender by the trustee of the corpus of the trust. (Cf. *Brewster* v. *Gage*, 30 Fed. (2d), 604, C. C. A., 2d Circuit, February, 1929; see Ct. D. 50, on page 229.)

To hold otherwise would result in undue discrimination between beneficiaries (such as the beneficiary in the instant case) under trusts created by general bequest and similar beneficiaries under trusts created by specific bequest. It is clear that under the provisions of section 113(a)5, supra, a specific bequest of personal property in trust under the circumstances existing in the instant case would require the bequeathed property to take as its basis in the hands of both the trustee and the beneficiary its fair market value at the date of the testator's death. If it were now held that a general bequest under similar circumstances resulted in the property taking as a basis its fair market value at the time it is surrendered by the trustee to the beneficiary, the specific legatee would be discriminated against to the extent of being required to pay a tax on any increase in value between the date of the testator's death and the date of the surrender of the securities by the trustee, while the general legatee would entirely escape such tax. Such discrimination should not be permitted to result unless specifically required by the terms of the statute.

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

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

ARTICLE 628: Stock dividends. VIII–4–4075
I. T. 2449

REVENUE ACT OF 1928.

When the entire stock of two stockholders of a corporation is purchased by the corporation and a part of such stock is distributed as a dividend to the remaining stockholders, the dividend is a stock dividend and is not subject to tax in the hands of the recipients.

Advice is requested as to whether a dividend paid by the M Company to its stockholders in treasury stock of the corporation is subject to income tax in the hands of the stockholders.

The M Company, a corporation with 900y shares of common stock outstanding of $—— par value, purchased out of surplus in 1925 the entire holdings of two of its stockholders, amounting to 114y shares, for $—— per share, which stock was held in the treasury of the company until December —, 1928, when the directors adopted a resolution declaring a dividend of 10 per cent of such treasury stock, or 11.4y shares, distributable to the remaining stockholders according to their respective holdings. The dividend was forthwith paid.

It is held that the dividend paid by the M Company in the treasury stock which it purchased from its stockholders has the same status for income tax purposes as a dividend paid in unissued stock. The dividend, being paid in the corporation's own stock, was a stock dividend. Accordingly, the dividend was not subject to income tax in the hands of the stockholders. (Section 115(f), Revenue Act of 1928.)

SUPPLEMENT C.—CREDITS AGAINST TAX.

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

ARTICLE 691: Analysis of credit for taxes. VIII–1–4055
I. T. 2445

REVENUE ACT OF 1928.

The tax imposed on domestic corporations operating in Ecuador, by Title III, article 14, of the 1928 tax law enacted by the Republic of Ecuador, is an income tax within the meaning of section 131(a)1 of the Revenue Act of 1928.

SUPPLEMENT D.—RETURNS AND PAYMENT OF TAX.

SECTION 143.—FIDUCIARY RETURNS.

ARTICLE 741: Fiduciary returns.

REVENUE ACT OF 1928.

Employees' trust. (See G. C. M. 6060, page 108.)

SECTION 144.—WITHHOLDING OF TAX AT SOURCE.

ARTICLE 761: Withholding tax at source. VIII–7–4104
I. T. 2454

REVENUE ACT OF 1928.

> The credit for tax withheld at the source is not merely a credit against "normal tax," but is a credit against the total amount of income tax as computed in the taxpayer's return, whether such amount is normal tax, normal tax and surtax, or surtax only.

A question is raised relative to the credit for tax withheld at the source on interest on tax-free convenant bonds.

Section 144(d) of the Revenue Act of 1928 provides that the income upon which any tax is required to be withheld at the source

shall be included in the return of the recipient of such income, "but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return." This language is clear and definite and admits of but one interpretation, and that is, that the amount of the credit is limited only by the amount of the tax which is required to be withheld at the source. No reference is made to the rate used in computing the tax in the taxpayer's return or the amount of his net income as shown in such return. As the amount of tax which is required to be withheld is governed by the form of ownership certificate accompanying the interest coupons, the amount of credit to which a taxpayer is entitled depends upon the form of ownership certificate submitted by him.

The amount of the tax required to be withheld is not a "normal tax," notwithstanding the fact that at one time the tax required to be withheld was at the same rate as the normal tax imposed upon a citizen or resident of the United States on the first $4,000 of his net income in excess of his credits including those for personal exemption and dependents. It is held, therefore, that the credit for tax withheld at the source is not merely a credit against "normal tax," but is a credit against the total amount of income tax as computed in the taxpayer's return, whether the amount of income tax as computed in such return is normal tax, normal tax and surtax, or surtax only.

ARTICLE 761: Withholding tax at source. VIII-13-4156
G. C. M. 5776

REVENUE ACT OF 1928.

Where, under the provisions of a trust indenture securing an issue of gold notes, the obligor agrees to pay the Federal income tax of 2 per cent and to reimburse the obligee for a portion of the tax imposed on the interest in excess of 2 per cent, withholding from nonresident alien individuals and nonresident foreign corporations is required at the rate of only 2 per cent.

An opinion is requested as to whether, in view of the covenant contained in the 5 per cent gold notes issued by the M Company, the debtor corporation is required to withhold a Federal income tax of only 2 per cent in the case of nonresident alien individuals and nonresident foreign corporations, or whether withholding is required at higher rates. The corporation reported only 2 per cent withheld on its Form 1012 filed for July, 1928. It has been suggested that the form should be revised to show an additional tax of 3 per cent withheld in the case of nonresident alien individuals and an additional tax of 10 per cent withheld in the case of nonresident foreign corporations.

The trust indenture, under which the notes were issued, contains a covenant whereby the corporation agrees to satisfy the interest without deduction for taxes except Federal income tax in excess of 2 per cent per annum. The trust indenture contains a further covenant whereby the corporation agrees that in addition to the United States income tax of 2 per cent per annum upon income derived from interest paid on its notes, which it agrees to pay as provided in section —, it will reimburse any person or corporation (other than a citizen or resident of the United States) having paid the same, any

United States Federal income tax, to the extent of 3 per cent per annum in the case of individuals and 11½ per cent per annum in the case of corporations, on income derived from the interest paid on the notes, provided that application is made therefor at the office of the trustee in the city of R or at the office of the agency of the corporation in a foreign country within —— days after the payment of such tax, and provided that the application is accompanied by an affidavit setting forth the ownership by the applicant of the notes, together with the number or numbers thereof, that the applicant at the time the tax was paid was not a citizen or resident of the United States, and that such tax was paid by reason of the deriving of income from such notes. The corporation contends that it has assumed a liability in excess of 2 per cent, and, therefore, that it is required to withhold only 2 per cent at the source.

Section 144(a) of the Revenue Act of 1928 requires that in any case where bonds or similar obligations of a corporation contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by the income tax title of that Act on the obligee, or to reimburse the obligee for any portion of the tax, or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon or to retain therefrom under any law of the United States, the obligor shall deduct and withhold a tax of 2 per cent of the interest upon such bonds or other obligations. It is provided, however, that if the liability assumed by the obligor does not exceed 2 per cent of the interest, withholding shall be at the rate of 5 per cent in the case of nonresident alien individuals, and 12 per cent in the case of nonresident foreign corporations.

In view of the provisions of the covenant under which the obligor agrees, in addition to paying the United States income tax to the extent of 2 per cent per annum upon income derived from interest paid on the notes, to reimburse the obligee for a portion of the tax in excess of 2 per cent imposed on the interest and paid by a nonresident alien individual or a nonresident corporation, the liability assumed by the obligor exceeds 2 per cent. Therefore, under section 144(a) of the Revenue Act of 1926, withholding is required at the rate of only 2 per cent. As this was the rate at which tax was withheld and reported on Form 1012 for July, 1928, it will not be necessary for the M Company to revise such form.

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

ARTICLE 765: Ownership certificates for bond interest. VIII–5–4092 Mim. 3691
(Also Sections 148 and 149, Articles 814 and 831.)

New forms of ownership certificates, withholding returns and information returns.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., December 21, 1928.

Collectors of Internal Revenue:

Effective upon receipt of revised forms, the use of ownership certificates now known as Forms 1000, 1000A, and 1001 will be discon-

tinued, and there will be substituted therefor Forms 1000 and 1001, both "Revised January, 1929." Form 1000, printed on white paper, will be used by all classes of owners except nonresident aliens. Form 1001, printed on colored paper, will be used exclusively by nonresident aliens.

None of the obsolete forms should be distributed after receipt of the revised forms. Persons making requests for Forms 1001 after you have received a supply of the new forms should be advised of the revision, and that Form 1001, formerly printed on yellow paper and used as an "exemption" certificate, will be used in the future by nonresident aliens. Persons who used the old Form 1001 for claiming exemption from withholding will in the future use Form 1000, line 1. Banks, paying agents, and others requesting supplies should be advised of these changes in the forms of ownership certificates.

Form 1012 has also been revised and should be used by all withholding agents making returns for February, 1929, and thereafter.

Forms 1001B and 1001C have been discontinued, and Form 1002 will be used by nonresident aliens for the purpose of claiming exemption from withholding from income paid during the calendar year 1928.

Form 1097, return of information of payments of dividends made during the calendar year, has been discontinued, and Form 1099 revised to include a line on which dividends should be reported, as required by Treasury Decision 4236 [C. B. VII–2, 71]. It is not necessary that the same Form 1099 show salary and dividends paid to the same person. If more convenient the payor may file separate returns on Form 1099, but each group of returns must be accompanied by Form 1096.

Any inquiries with respect to this mimeograph should be marked for the attention of IT:R:ABN.

H. F. Mires,
Acting Commissioner.

Article 765: Ownership certificates for bond interest. VIII–12–4150
(Also Section 148, Article 814.) Mim. 2725 (Rev.)

Incomplete and otherwise improperly executed ownership certificates not to be accepted by banks and other collecting agents.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., March 13, 1929.

To Banks and Other Collecting Agents:

The attention of the Bureau of Internal Revenue has been invited to the fact that in many instances indifference and carelessness have been shown by owners in executing ownership certificates accompanying coupons presented to banks and other collecting agents for collection of interest on bonds and other obligations of debtors, and also that banks and other collecting agents have been accepting incomplete and improperly executed ownership certificates with such coupons deposited for collection and have been transmitting same to debtors for payment.

Recently changes have been made in the forms of ownership certificates and the regulations pertaining to their use, with a view to the simplification of the administration of the withholding provisions of the statute.

The use of ownership certificate, Form 1000A, has been discontinued, and the use of Form 1001 by citizens and residents of the United States has been discontinued. Form 1000 (revised January, 1929), printed on white paper, will be used by a citizen or resident individual, fiduciary, or partnership. Form 1001 (revised January, 1929), printed on green paper, will be used by a nonresident alien individual, a nonresident foreign partnership, a nonresident foreign corporation, and in behalf of an unknown owner.

The use of Forms 1001B and 1001C, formerly filed by nonresident alien individuals for the purpose of claiming the benefit of the personal exemption and credit for dependents to which they were entitled, has been discontinued and Form 1002 has been substituted therefor. This form should be used for the calendar year 1928 and subsequent years.

The withholding provisions of the Revenue Act of 1928 are embodied in sections 144 and 145 of that Act. Section 148 requires returns of information in certain cases, among which are listed payments of interest upon bonds, mortgages, deeds of trust, or other similar obligations of corporations, and also interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations.

The attention of banks and other collecting agents is invited to paragraph (c) of section 148, which reads as follows:

> When necessary to make effective the provisions of this section, the name and address of the recipient of income shall be furnished upon demand of the person paying the income.

The regulations issued by the Bureau interpreting sections 148 and 144 of the 1928 Act provide that the ownership certificates in the case of payments of interest, regardless of amount, upon bonds and similar obligations of corporations, when duly filed, shall constitute and be treated as returns of information, and that if a bondholder fails to file proper ownership certificate in the case of payments of interest on registered bonds, the withholding agent shall make out such certificate in each instance and file it with his monthly return. The regulations further provide that if the person receiving a payment (banks or collecting agents) falling within the provisions of the statute for information at the source is not the actual owner of the income received, the name and address of the actual owners 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 in section 146 of the Revenue Act of 1928.

Banks and other collecting agents are not required by law or regulations to accept interest coupons for collection. If, however, as a matter of convenience to their customers, they do accept interest coupons for collection, it is their duty to see that the ownership certificates which are executed by the owner of the coupons are properly filled out. These ownership certificates can not be accepted as returns of information unless they are properly filled out, and

debtors receiving coupons from banks or collecting agents with incomplete or otherwise improperly executed ownership certificates are, under the foregoing quoted provisions of section 148, authorized to demand that the name and address of the owner of the coupons accompanied by incomplete or otherwise improperly executed ownership certificates shall be furnished.

If banks and other collecting agents accept coupons for collection to which are attached incomplete or otherwise improperly executed ownership certificates, such banks or collecting agents become a party to the filing of incomplete returns of information and shall upon demand of the debtor furnish the name and address of the owner of the coupons so that such ownership certificates may, when filed, be accepted as returns of information in accordance with the provisions of the regulations issued under section 148 of the Revenue Act of 1928.

A citizen or resident of the United States who presents for collection coupons detached from corporation bonds which contain a tax-free covenant is required to execute an ownership certificate. This certificate serves a double purpose. It is used as a return of information with respect to the income of the owner of the bond, and also as a guide to the debtor corporation in the matter of paying tax at the source. Form 1000 (revised January, 1929) contains three lines so designated as to indicate to the debtor corporation whether or not tax shall be paid in behalf of the bondholder or, if paid, whether at the rate of 1½ per cent or 2 per cent of the interest reported on the form. The bondholder, therefore, should be instructed to exercise care to see that the amount of interest received is entered on the proper line, as it serves as a notice both to the debtor corporation and to the Government as to the individual's liability for tax. An individual who at the time of presenting his coupons for collection knows that he will not be required to pay any income tax should, in justice to the debtor corporation, use line 1 of certificate, Form 1000, in order that no tax will be paid to the Government upon income which is not subject to tax. If, however, an individual does not discover his nonliability to tax until after the close of the taxable year, it is not too late to rectify the matter, as Form 1000 (revised January, 1929), showing the interest correctly entered on line 1, may be substituted for the Form 1000 previously filed.

Debtor corporations, accepting ownership certificates which indicates that tax should be paid, even though they appear to have been erroneously executed, become liable for such tax unless corrected certificates are filed.

It is desired that banking institutions which accept interest coupons for collection bring these facts to the attention of their customers, in order that debtor corporations may not be required to pay tax to the Government upon income which is not subject to tax.

Queries regarding this mimeograph or procedure in connection therewith should refer to the number of the mimeograph and the symbols IT:E:RR.

D. H. Blair, *Commissioner.*

SECTION 148.—INFORMATION AT SOURCE.

ARTICLE 811: Return of information as to payments of $1,500. (Also Section 143, Article 741.)

VIII–18–4186
G. C. M. 6060

REVENUE ACT OF 1928.

If an employees' trust comes under the provisions of section 165 of the Revenue Act of 1928, no fiduciary return on Form 1041 is required. If the trustee, however, distributes to any beneficiary of the trust in any taxable year an amount equal to or in excess of $1,500 (or $3,500 if the beneficiary is married) of the amount contributed to the fund by the employer and/or of earnings of the fund, the trustee is required under section 148 of the Revenue Act of 1928 to file an information return on Form 1099 in respect of such distribution.

Inquiry is made as to whether the trustee of an employees' trust coming under section 165 of the Revenue Act of 1928 must file a fiduciary return on Form 1041, or whether only an information return on Form 1099, under section 148, will be required.

In the case of trusts created by employers as a part of a stock bonus, pension, or profit-sharing plan for the exclusive benefit of some or all of their employees—that is, employees' trusts coming under section 165 of the Revenue Act of 1928—a fiduciary return on Form 1041 is not essential, but in some cases an information return on Form 1099 will be required under section 148 of the Act and articles 811 and 812 of Regulations 74, in respect of payments of income made by the trust. The Revenue Act of 1928 and the regulations both contemplate that the payments reported on such information return (Form 1099) should be payments of income only. Under section 219(f) of the Revenue Acts of 1921, 1924, and 1926, it was provided that the amount actually distributed or made available to the distributee of a stock bonus or profit-sharing trust should be taxable to him in the year in which distributed or made available, to the extent that it exceeded the amounts paid in by him. As a result, the distributee was taxed not only upon his share of the amount contributed to the trust by the employer and upon his share of the earnings of the fund, but was also taxed upon any appreciation in the value of stock distributed, though such value had not been realized by sale. This situation was changed by section 165 of the Revenue Act of 1928, which provides that only the amount contributed to the fund by the employer and all earnings of the fund shall be taxed to the distributee in the years in which distributed or made available to him. Thus, any appreciation in the value of stock distributed to an employee is not taxed until the gain is realized. (See the House report on the revenue bill, p. 22.) Accordingly, the information required under section 148 of the Revenue Act of 1928 and articles 811 and 812 of Regulations 74 is not as to distributions of $1,500 or $3,500 over and above the amounts contributed by the respective beneficiaries, but concerns distributions of $1,500 or $3,500 from amounts contributed by the employer and from earnings of the fund.

It is therefore concluded that the trustee of an employees' trust coming under the provisions of section 165 of the Revenue Act of

1928 is not required to file a fiduciary return on Form 1041, but if the trustee distributes to any beneficiary of the trust in any taxable year an amount equal to or in excess of $1,500 (or $3,500 if the beneficiary is married) of the amount contributed to the fund by the employer and/or of earnings of the fund, the trustee is required under section 148 of the Revenue Act of 1928 to file an information return on Form 1099 in respect of such distribution.

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

ARTICLE 814: Return of information as to interest on corporate bonds.

REVENUE ACT OF 1928.

Forms. (See Mim. 3691, page 104.)

ARTICLE 814: Return of information as to interest on corporate bonds.

REVENUE ACT OF 1928.

Ownership certificates to be properly executed before acceptance by banks or other collecting agents. (See Mim. 2725 (revised March, 1929), page 105.)

SECTION 149.—INFORMATION BY CORPORATIONS.

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

REVENUE ACT OF 1928.

Forms. (See Mim. 3691, page 104.)

SUPPLEMENT F.—PARTNERSHIPS.

SECTION 189.—PARTNERSHIP RETURNS.

ARTICLE 941: Partnership returns. VIII-7-4105
G. C. M. 5761

REVENUE ACT OF 1928.

A husband and wife may legally enter into a partnership in the State of New York.

An opinion is requested as to whether a husband and wife may legally enter into a partnership in the State of New York, as the court decisions of that State are conflicting.

The decisions of the lower courts of the State of New York are in conflict in regard to this question. However, the Court of Appeals

in the case of *Suan* v. *Caffe* (122 N. Y., 308, 25 N. E., 488) considered a number of these conflicting decisions and held that the provisions of the second section of chapter 90 of the Laws of 1860, which provides that "A married woman may * * * carry on any trade or business * * * on her sole and separate account," were intended to free the proceeds of her trade from her husband's marital right and not to disable her from entering into any contracts with him that she might make with others, and that this status permits her to engage in a business with her husband as a partner subject to all the liabilities as such. This case is considered as the controlling case.

It is therefore the opinion of this office that a husband and wife may legally enter into a partnership in the State of New York.

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

SUPPLEMENT I.—FOREIGN CORPORATIONS.

SECTION 236.—PAYMENT OF TAX.

ARTICLE 1121: Date on which tax shall be paid by foreign corporations.

REVENUE ACT OF 1928.

Payment of tax by a foreign corporation having place of business in the United States where extension of time is granted for filing return. (See I. T. 2446, page 92.)

SUPPLEMENT O.—OVERPAYMENTS.

SECTION 322.—REFUNDS AND CREDITS.

ARTICLE 1254: Claims for refund by taxpayers. VIII–13–4159
T. D. 4265

INTERNAL REVENUE TAXES.

Regulations applicable to claims for credit and refund.

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

To all Collectors of Internal Revenue and Others Concerned:

(1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in

detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

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

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

D. H. Blair,
Commissioner of Internal Revenue.

Approved March 27, 1929.

A. W. Mellon,
Secretary of the Treasury.

ARTICLE 1254: Claims for refund by taxpayers. VIII-13-4160
T. D. 4266

INTERNAL REVENUE TAXES.

Limitations on the perfection of incomplete or imperfect claims for credit and refund.

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

To all Collectors of Internal Revenue and Others Concerned:

(1) Except as provided in paragraph (2), a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitation applicable to the filing of a claim therefor (computed without regard to the filing of any so-called informal or defective claim) unless prior to the expiration of such period a formal claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed, nor will any claim which does not comply with such regulations be considered for any purpose as a claim for refund or credit. (See e. g. Reg. 14; art. 1036, Reg. 45 and 62; art. 1306, Reg. 65; art. 1304, Reg. 69; art. 1254, Reg. 74; Law Opinion 1116 [C. B. III-1, 350]; T. D. 4265 [page 110, this Bulletin].)

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in

respect of which a suit in court has been commenced at any time may be so perfected.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved March 27, 1929.

A. W. MELLON,
Secretary of the Treasury.

ARTICLE 1254: Claims for refund by taxpayers. VIII–19–4197
G. C. M. 6053

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

Form 1118, used by a taxpayer in furnishing information required in support of a credit claimed on an original return for foreign taxes paid, can not be regarded as an informal claim for credit or refund within the meaning of section 252 of the Revenue Act of 1918 and corresponding sections of later Acts.

An opinion is requested as to whether a further credit or refund of Federal income and profits taxes for 1918 should be allowed in the case of the M Company on account of a payment by that company of $6x$ dollars to the Dominion of Canada under its Business Profits War Tax Act of 1916. A claim for credit or refund was filed on November —, 1925, more than five years after the Federal return for 1918 was due. The claim was allowed in the amount of x dollars because it was filed within four years from the time the overpayment of 1918 taxes in such amount was made, but was rejected for the balance. The specific issue presented is whether the balance of the amount determined to have been overpaid for 1918 can be allowed on the basis of Form 1118 filed in October, 1922, in support of the credit for taxes paid to foreign countries claimed in the original return for 1918. In other words, can Form 1118 be considered an informal claim for credit or refund?

The credit for taxes paid to foreign countries, allowed under section 238 of the Revenue Act of 1918, is one of the items which is required under section 239 to be stated specifically on the return and is a deduction from income tax. The amount of this credit is computed by the taxpayer, but unless the taxpayer meets the conditions set forth in section 238(b) the credit claimed will not be allowed. Form 1118, which was prescribed by the Commissioner under the authority of section 238(b), calls for information and supporting evidence designed to satisfy the Commissioner that the taxpayer is entitled to the credit which it has computed and claimed. It is nothing more than a schedule containing information supporting one of the items stated specifically in the return.

Form 1118 is not a "claim for credit" within the meaning of section 252 of the Revenue Act of 1918 or corresponding sections of the later Acts. It is clear from the language used in these sections that the "credit" allowed thereunder is the amount of an overpayment of tax on one return against tax due on another return. On the other hand, the "credit" allowed under section 238 is merely a deduction from the tax imposed for the taxable year of the amount of income and profits taxes paid or accrued during such taxable year to a foreign

country or possession of the United States on income from sources therein, which is allowable only on condition that certain substantiating information is furnished. Form 1118, as stated above, has been prescribed for the use of the taxpayer in furnishing the information required under the law in support of the credit claimed.

Since there is no authority for treating Form 1118 as an informal claim for credit or refund within the meaning of section 252 of the Revenue Act of 1918 and corresponding sections of the later Acts, no further credit or refund for 1918 may be allowed in the case of the M Company.

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

ARTICLE 1254: Claims for refund by taxpayers. VIII–23–4225
G. C. M. 6197

REVENUE ACT OF 1928.

A surety company may not file a valid claim for refund to recover the whole or a portion of an income tax assessed against a taxpayer and paid by the surety company in accordance with the provisions of the bond executed by it.

The opinion of this office is requested as to whether a valid claim for refund may be filed by a surety company which wrote a bond in connection with a claim in abatement filed by a taxpayer, where the claim was rejected in part and the surety company paid the amount for which the claim was rejected.

It appears that during 1920 the M Company took over the business and the assets of the N Company, the taxpayer, and the taxpayer corporation was thereafter dissolved in accordance with the provisions of section 221 of the general corporation law of the State of New York. On June —, 1921, the taxpayer filed its corporation income and profits tax return for the year 1920, which return showed no tax due. In October, 1925, after an audit of the taxpayer's accounts, an assessment was made against the taxpayer for the year 1920 in the sum of $6x$ dollars. A claim in abatement covering this assessment was filed under date of October —, 1925, the taxpayer giving a bond to secure the payment of the tax. This bond was signed by the O Company as surety. A 60-day letter was addressed to the taxpayer under date of May —, 1926, in which the taxpayer was advised that its claim in abatement had been allowed for $4x$ dollars and rejected for $2x$ dollars. On July —, 1926, a petition was filed with the Board of Tax Appeals, which was dismissed because it was not filed within the 60-day period prescribed by the statute. The amount for which the claim in abatement was rejected was paid by the surety company on February —, 1927.

Under date of August —, 1928, there was filed by the surety company with the collector a claim for refund for the year 1920 in the sum of x dollars, being a portion of the assessment against the taxpayer which was paid by the surety company as set out above. There was attached to the claim a "statement in support of claim for refund of taxes erroneously assessed against the N Company, taxpayer, for the year 1920," wherein it was set out that the claim was based upon

an application for assessment under sections 327 and 328 of the Revenue Act of 1918 and on the further ground that certain deductions from net income were erroneously disallowed. The merits of the claim are not under consideration at this time, but the question has arisen as to whether the surety company had a right to file a claim for refund under the circumstances stated.

The surety company relies upon a purported assignment to it by the taxpayer of any claim which the taxpayer might have against the Government by reason of the payment of the tax in question. Section 3477 of the Revised Statutes provides that a transfer or assignment of any claim against the United States may be made only *after the allowance of such a claim*, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof. No claim having been allowed to the taxpayer in this case, the provisions in the agreement executed by the taxpayer to the effect that the surety company should be subrogated (after the payment of any loss) to all the right, title, and interest in and to such claim were invalid and of no effect.

Where a taxpayer gives a bond to secure the payment of a tax assessed against him, he assumes an obligation which is separate and distinct from his liability under the revenue laws. Both the taxpayer and the surety on the bond become subject to an entirely different kind of liability, which is voluntary and contractual. It is in form a direct obligation, not to pay a tax, but to pay a specified sum defeasible only upon payment by the taxpayer of a certain amount to be fixed by the subsequent action of the Commissioner. In a suit upon such a bond, neither the taxpayer nor the surety company may question the validity of the assessment. See, in this connection, the case of *Gray Motor Co.* v. *United States* (16 Fed. (2d), 367 [T. D. 3994, C. B. VI–1, 149]), decided by the Circuit Court of Appeals for the Fifth Circuit, from which the following quotation is taken:

> By giving bond the company postponed payment of the amount admitted to be due by the return and secured immunity from distraint of its assets. To contest the amount of tax found to be due by the Commissioner in this proceeding would be to permit a collateral attack upon the assessment, something not countenanced by the law.

A taxpayer who is dissatisfied with the determination of the Commissioner may, within 60 days after the mailing of a notice of a deficiency in tax, file with the Board of Tax Appeals a petition for a redetermination of the deficiency. A surety company upon a bond conditioned for the payment of income tax is given no right to contest the correctness of the proposed assessment. Should the surety company pay more than the amount specified in the bond it might have an action for money had and received, but where the conditions of the bond have been complied with and the surety company has been called upon to pay the amount set out in the bond its right of action, if any, is against the principal on the bond and not against the Government.

In the case of an overpayment of tax the taxpayer has the right to file a claim for refund in the manner prescribed by the statute. The various Revenue Acts provide that refunds of taxes shall be made "to the taxpayer," and the regulations set out the manner in which claims for refund may be filed "by the taxpayer." In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary or other similar evidence must be annexed to the

claim to show the authority of the administrator, executor, or other fiduciary by whom the claim is filed. It is also provided that where an amount of tax in excess of that properly due has been paid by a withholding agent the credit or refund of such excess amount shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent. (See articles 1252 and 1254 of Regulations 74.) The surety company in the instant case has not shown any relationship which would support the filing of a refund claim by that company. There is no provision of law authorizing a surety company to file a claim for refund to recover the whole or a portion of the income tax assessed against a taxpayer, which assessment has been paid by the surety company in accordance with the provisions of the bond executed by it.

In view of the above, it is the opinion of this office that the claim for refund filed by the surety company in the instant case was not a valid claim.

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

ARTICLE 1256: Claims for refund in case of judgment obtained against the United States. VIII-11-4138 T. D. 4262

JUDGMENT CLAIMS.

Claims for payment of judgments against the United States to be filed with Commissioner in duplicate.

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

To Collectors of Internal Revenue and Others Concerned:

Claims for the payment of judgments rendered by United States district courts and the United States Court of Claims against the United States representing taxes, penalties or other sums, should be executed on Form 843 in duplicate and filed directly with the Commissioner of Internal Revenue, Washington, D. C. The claimant should state the grounds of his claim under oath, giving the names of all parties to the suit, the cause of action, the date of its commencement, the date of the judgment, the court in which it was recovered, and its amount. To this affidavit there should be annexed two certified copies of the final judgment, and an itemized bill of the costs paid, receipted by the clerk or other proper officer of the court. In the case of a judgment rendered by the Court of Claims, there may be submitted in lieu of a certified copy of the final judgment, a certificate of judgment issued by the clerk of the court and two copies of the court's opinion, if any was rendered.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved March 8, 1929.

A. W. MELLON,
Secretary of the Treasury.

TITLE IV.—ADMINISTRATIVE PROVISIONS.

SECTION 604.—SUITS TO RESTRAIN ENFORCEMENT OF LIABILITY OF TRANSFEREE OR FIDUCIARY.

SECTION 604. VIII–16–4179
Ct. D. 53

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

COLLECTION—INJUNCTION—TRANSFEREE.

Section 604 of the Revenue Act of 1928 prohibits the maintenance of a suit (even though commenced prior to the passage of that Act) to restrain the collection of the amount of the liability of a transferee in respect of a tax assessed under section 280 of the Revenue Act of 1926.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WISCONSIN.

Carl J. G. Felland, complainant, v. *Alonzo H. Wilkinson, Collector of Internal Revenue for the District of Wisconsin, defendant.*

[November 22, 1928.]

OPINION.

On August 8, 1927, complainant filed his bill, seeking to have set aside assessments made against him as the transferee of Stoughton Lumber Association of a deficiency tax against the association, amounting to $109.65 for the year 1918 and $2,948.48 for the year 1919, and seeking to enjoin the defendant from collecting such assessment by distraint or otherwise. The assessments were made by the Commissioner of Internal Revenue under the provisions of section 280 of the Revenue Act of 1926, providing that the liability at law or in equity of a transferee of property of a taxpayer in respect of the tax shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by that title. Section 280 of the Revenue Act of 1926 is attacked by the complainant as unconstitutional in that it attempts to vest the Commissioner of Internal Revenue with judicial functions; in that it deprives plaintiff of his property without due process of law; deprives him of the right of trial by jury, and undertakes to vest judicial power in the Commissioner—contrary to section 1 of Article III of the Constitution. The bill alleges that neither of the sums involved is claimed to be or is in any way a tax due from the plaintiff to the United States, but on the contrary is claimed to be due from complainant on account of his alleged legal and equitable liability as transferee of the assets of the Stoughton Lumber Association; that said association, in which the complainant held 66 shares out of 200 shares of the capital stock, was dissolved November 7, 1921, in which dissolution the assets of the corporation were distributed in proportion to their respective stock holdings. How much property or money was received by the complainant in that transaction is not disclosed. As ground for equitable jurisdiction complainant says that he has no money with which to pay the alleged claims; that his property consists of real estate which can only be disposed of with great sacrifice, and standing and growing crops and a small quantity of live stock; that there is no market for standing and growing crops, and that the live stock would, under market conditions then existing, produce but a small portion of the amount required to pay the claims in question. The bill alleges that complainant is indebted for money borrowed in excess of $6,000, but also discloses that his real estate consists of 260 acres of agricultural land, besides two dwelling houses in the city of Stoughton, Dane County, Wis., all of which are free and clear of encumbrances except the lien created by filing the tax claim involved.

On August 8, 1927, a restraining order was issued returnable 10 days thereafter, but no hearing was had and same continued in effect until August 23, 1928, at which time respondent filed a motion to dismiss, setting up the grounds:

1. That plaintiff has a plain, adequate, and complete remedy at law; 2, that section 604 of the Revenue Act of 1928 prohibits the maintenance of this suit; and, 3, that the petition sets forth no facts which would entitle complainant to the relief prayed for.

LUSE, District Judge: The bill discloses that prior to its dissolution the Stoughton Lumber Association was careful to have its 1919 business examined by a field man of the Internal Revenue Department to determine the amount of income tax for which the association might be liable, apparently with a view to avoiding the very difficulty which now presents itself, and that fact naturally enlists the sympathy of a court of equity but is deemed insufficient to constitute one of those exceptional cases which would make section 3224 R. S. inapplicable to a tax case, or section 604 of the Internal Revenue Act of 1928 inapplicable to this case if valid and otherwise applicable. Complainant apparently has real estate which is unencumbered save for the lien of the claim here involved and the court is unable to perceive why complainant could not, without difficulty, make a loan on the security of such real estate notwithstanding the existence of such lien if money so raised was applied to the extinguishment of the lien. Section 604 of the Revenue Act of 1928 is quite manifestly a companion section to section 3224 R. S., and no doubt if the former section is valid and otherwise applicable, it limits the equitable jurisdiction of courts to enjoin the collection of a liability at law or in equity of a transferee of the assets of a taxpayer as effectively as the latter section did in the case of a tax. Section 3224 R. S. has been applied in all its rigor in numerous cases, some of which are cited and reviewed in *Graham* v. *Dupont* (262 U. S., 234, 254 [T. D. 3486, C. B. II-1, 226]). Only extraordinary and exceptional circumstances make inapplicable the provisions of section 3224 R. S. (*Bailey* v. *George*, 259 U. S., 16 [T. D. 3347, C. B. I-2, 342]; *Dodge* v. *Osborne*, 240 U. S., 118; *Hill* v. *Wallace*, 257 U. S., 310.)

Section 604 of the Revenue Act of 1928 provides, so far as material, that "no suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any income, war-profits, excess-profits or estate tax, * * *."

Manifestly the foregoing section is applicable by its terms to this suit, notwithstanding it was passed after it was commenced. (*Smallwood et al.* v. *Gallardo*, 275 U. S., 56.)

Complainant strongly urges the reasoning and conclusions of Judge Dawson in *Owensboro Ditcher & Grader Co.* v. *Lucas* (18 Fed. (2), 798) in support of his contention. The cogent reasoning of Judge Dawson leading to his conclusion that section 280 of the Act of 1926, in so far as it assigns to administrative officers the power to determine the liability of a transferee of a taxpayer, is invalid as a grant of judicial power, seems well nigh inescapable. However, assuming such invalidity, we have to deal in the instant case with section 604 of the Act of 1928, and there is no escaping the conclusion that it was intended by Congress to apply to just such cases as we now have before us. It is well settled that section 3224 R. S. applied so as to prevent injunctions issuing to restrain the collection of a tax, even though the law imposing such tax was unconstitutional. (*Bailey* v. *George*, 259 U. S., 16.) The only exceptions to that rule are cases where the so-called tax was in reality a penalty "in the nature of punishment for a criminal offense," as in *Lipke* v. *Lederer* (259 U. S., 557), and those wherein extraordinary circumstances existed making section 3224 inapplicable, as in *Hill* v. *Wallace* (259 U. S., 44). (See *Graham* v. *Dupont*, 262 U. S., 234, 257.) The instant case is not such a one as would constitute such an exception. The question presented, then, is whether section 604 of the 1928 Revenue Act should be given the same effect in its field as section 3224 R. S. has heretofore been given in its.

It is true that in determining the liability "at law or in equity" of a transferee of a taxpayer, the taxing authorities exercise a power not exercised in determining and collecting a tax from a taxpayer. The determination of the taxing authorities, however, is not final nor is it made so by the section in question. It is intended thereby to insure the Government a continuance and uninterrupted revenue, leaving to the transferee the duty to pay and then sue to recover. It must be borne in mind that while the liability of a transferee may not be a tax liability in the ordinary sense, nevertheless it is a liability for a tax; in other words, the Government is seeking to collect what is primarily a tax and continues to be a tax although because of the inability

to collect from the taxpayer proper it seeks to require his transferee to pay. From the standpoint of the Government the money sought in this case is as much an item of revenue as it would be were the proceedings to collect directed toward the Stoughton Lumber Association. Hence from its standpoint the same necessity exists for the collection of tax liabilities resting upon transferees as exists in the case of taxpayers. As restated in *Graham* v. *Dupont* (262 U. S., 234) at page 255:

"The system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures not judicial, to collect them, with appeals to special tribunals and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares by section 3224 that its officers shall not be enjoined from collecting a tax claimed to have been unjustly asssessed, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assessment and claim that it is valid."

In this view, it seems that section 604 may and should be given effect according to its terms, in the same manner as has section 3224, as a part of the "system of corrective justice, intended to be complete," placing the transferee in the same category as a taxpayer in so far as he is required to first pay the tax liability and thereafter seek recovery back.

The motion to dismiss will be granted.

SECTION 606.—CLOSING AGREEMENTS.

ARTICLE 1301: Closing agreements relating to tax liability in respect of internal-revenue taxes. VIII–4–4076 Mim. 3697

Agreement as to final determination of tax liability under section 606 of the Revenue Act of 1928.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 9, 1929.

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

1. Attention is invited to the following instructions supplementing and explaining the procedure outlined in mimeograph dated July 5, 1928 (Coll. No. 3652, R. A. No. 463 [C. B. VII–2, 79]), with respect to closing agreements under section 606 of the Revenue Act of 1928.

2. *Agreements to be secured only where tax liability is changed.*—It should be noted that the procedure referred to provides that agreements on Form 866 be secured only in those cases where the tax reported on the return or returns under consideration is either increased or decreased. Where a return is accepted as correct, or where no changes are made in returns forwarded from the Bureau for field or office audit Form 866 will not be submitted for signature and closing agreements will be entered into only upon the taxpayer's subsequent application therefor. Revenue agents will secure agreements, however, covering all years included in their reports if a change in liability is recommended for any year.

Applications for closing agreements received by collectors will be forwarded to the Bureau, attention of IT: C: P–2, for preparation of Forms 866, unless the return involved is one that has been retained

in the collector's office for filing, in which event the instructions in paragraph 9 of Mimeograph 3652 will be followed.

3. *Tax liability only to be stated on Form 866.*—Closing agreements secured from taxpayers and forwarded to the Bureau for completion must correctly state the principal sum of tax liability for the year or years involved, computed in accordance with the instructions in paragraph 5 of Mimeograph Coll. No. 3652, R. A. No. 463. The practice observed in some instances of including penalty and interest amounts on Form 866 or of stating thereon amounts designated as net losses should be immediately discontinued.

4. *Statute of limitations.*—The liability stated on Form 866 shall include only the net tax legally assessed or assessable, and/or collectible, and shall not include an amount the assessment or collection of which is barred by the statute of limitations.

5. *Signatures and evidence of authority to sign.*—Care should be observed in obtaining proper signatures to closing agreements and satisfactory evidence of the authority of the person signing the agreement where such evidence is required as provided in paragraphs 15 and 16 of Mimeograph Coll. No. 3652, R. A. No. 463. The importance of strict compliance with the provisions of this paragraph can not be too strongly urged.

6. *Nature of evidence; individuals.*—An agreement executed on behalf of an individual taxpayer by an attorney or agent must be accompanied by a power of attorney specifically authorizing said attorney or agent to sign the form.

7. *Nature of evidence; fiduciaries.*—The authority of administrators and executors to execute a closing agreement must be evidenced by attested copies of the letters testamentary or of the order of the court and a certificate to the effect that such authority remains in full force and effect as of the date the agreement is signed. Agreements signed by beneficiaries of an estate will be acceptable if accompanied by a court certificate evidencing discharge of the administrator or executor and a statement showing the names and addresses of the beneficiaries and the proportionate share of each in the estate. Trustees must submit with the signed agreement a true copy of the deed or declaration of trust under which they derive their authority. If one or more trustees have been succeeded by others who sign the agreement, documentary evidence showing such succession must be submitted.

8. *Corporations.*—Paragraph 16 of Mimeograph Coll. No. 3652 is hereby amended by revoking the first two sentences and substituting in lieu thereof the following:

If the taxpayer is a corporation the agreement shall be signed with the corporate name followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal, if any, of the corporation must be affixed. If the corporation has no seal an affidavit reciting such fact should accompany the signed agreement. When a signed agreement received either in the field or Washington offices of the Bureau bears no seal and is unaccompanied by the affidavit mentioned, the employee handling the case should satisfy himself that the person who signed the agreement is an officer of the corporation. If this can not be done by a comparison of the signature on the agreement with signatures appearing on other papers in the files, the agreement should be returned to the taxpayer with the request that the seal be affixed or that the affidavit herein before mentioned be furnished.

9. *Corporations in process of dissolution or liquidation and dissolved corporations.*—Agreements in this type of case shall be signed and the authority of the person signing shall be evidenced in accordance with the provisions of paragraph 16 of Mimeograph Coll. No. 3652, R. A. No. 463. A certified copy of the minutes of the meeting of the board of directors at which action was taken relative to dissolution or liquidation will be sufficient if the names of the persons designated to wind up the affairs of the corporation appear therein. An affidavit reciting that the authority of the person signing the agreement remains in full force and effect as of the date of signing must also be furnished.

10. *Corporations in receivership.*—Agreements of corporations in the hands of a receiver shall be signed by such receiver and his authority to act shall be evidenced by a certified copy of his appointment.

11. *Corporations: Change of name, merger, etc.*—Where a corporation has changed its corporate name since filing its return for the year covered by the agreement, Form 866 shall be prepared in the name stated on the return for the signature and seal of the corporation under its present name, as indicated by the following example:

This agreement, made in duplicate under and in pursuance of section 606 of the Revenue Act of 1928 by and between *John Doe Co., Inc.*

* * * * * * *

Signed this 15th day of October, 1928.

DOE & ROE MANUFACTURING CO., INC.,
Formerly JOHN DOE CO., INC.,
By JOHN DOE, *President.*

[Doe & Roe Manufacturing Co., Inc. (Seal)]

The agreement shall be accompanied by a certified copy of the minutes of the meeting of the board of directors at which action was taken relative to changing the corporate name.

Where a corporation since filing its return for the year covered by the agreement has been succeeded by another corporation as the result of a merger, Form 866 shall be prepared in the same manner as indicated in the above example, except that the words "successor to" shall be substituted for the word "formerly" in the signature.

Agreements in this type of case shall be accompanied by an affidavit reciting the manner in which the assets of the corporation whose liability is closed by the agreement were acquired by the corporation signing the agreement form. In lieu of an affidavit a certified copy of the purchase agreement, merger agreement, or contract of sale may be submitted.

12. *Consolidated returns.*—A special Form 866 (see attached exhibit) will be used in consolidated cases. If no change in affiliations is made the consolidated tax liability should be shown on the special agreement form, irrespective of the manner in which the tax may be assessed among the affiliated companies.

If the affiliations have been changed a separate agreement will be prepared on the printed Form 866 for each company ruled not affiliated and the special Form 866 will be drawn up to cover the tax liability of the companies left in the consolidation.

An exception to the rule requiring separate agreements from companies held nonaffiliated will be noted where the change in affiliation has resulted in two or more affiliated groups. In this type of case the special Form 866 will be prepared for each group.

13. *Preparation of Special Form 866.*—Form 866 in its special form (see attached sample form) for use in consolidated cases will not be printed but shall be prepared specially to meet the requirements of the particular case. The form must be typed in duplicate and the paper used for both the original and the duplicate must be of a weight at least equal to that used for the printed form. Each corporation included in the affiliated group must be listed on the form as parties to the agreement and space must be provided for the signature of each such corporation so listed. The language of the form must follow exactly the language of the sample form attached hereto.

14. *Statement of period covered by agreement.*—An accurate statement of the period or years covered by an agreement is essential. The closing date of fiscal years shall be stated and where a period other than a calendar or fiscal year is involved both the first and last dates of such period should appear on the agreement form.

The following example, which assumes a change from a fiscal year to a calendar year, will serve as a guide to the proper statement on Form 866 of the period covered by an agreement:

For the fiscal years ended July 31, 1923, and July 31, 1924, the period August 1, 1924, to December 31, 1924, and the years 1925 and 1926.

15. *Corrections, erasures, etc.*—Agreement forms submitted to the Bureau for completion must be accurately prepared and free from erasures or corrections of any kind. If an error is made in the preparation of Form 866, such form should be destroyed and a correct form prepared for submission to the taxpayer for signature. Agreements should be typewritten whenever such method of preparation is practicable, both to facilitate their review in the Bureau and to insure that the duplicate in every instance will be an exact copy of the original.

16. Correspondence concerning the provisions of this mimeograph should refer to the number thereof and the symbols IT:E:CBA.

H. F. MIRES,
Acting Commissioner.

[Treasury Department, U. S. Internal Revenue. Form 866 CR.]

AGREEMENT AS TO FINAL DETERMINATION OF TAX LIABILITY.

AGREEMENT, made in duplicate under and in pursuance of section 606 of the Revenue Act of 1928, by and between—

Name and address.	State of incorporation.
John Doe Co., Williamsport, Pa	West Virginia.
John Doe Manufacturing Co., Scranton, Pa	Delaware.
John Doe Milling Co., Reading, Pa	Delaware.
John Doe Steel Processing Co., Pittsburgh, Pa	Delaware.
John Doe Mills, Newark, N. J	New Jersey.

Taxpayers affiliated under the provisions of section 240 of the Revenue Act of ____, having their principal offices or places of business at the addresses given and for which a consolidated return of income has been filed for the _____ _____ and the Commissioner of Internal Revenue;

WHEREAS, there has been a determination of the tax liability of said taxpayers in respect of _____ tax for the _____ in the principal sum of _____ ($_____); and

WHEREAS, said taxpayers hereby agree to this determination and consent to the assessment and collection of any deficiency in tax included in the amount of the principal tax liability so determined, together with any penalty or

interest applicable thereto as provided by law, and/or to accept any abatement, credit, or refund made in accordance with such determination, together with any interest due thereon as provided by law.

NOW, THIS AGREEMENT WITNESSETH, that said taxpayers and said Commissioner of Internal Revenue hereby mutually agree that the principal amount of such liability so determined shall be final and conclusive if and when this agreement is approved by the Secretary of the Treasury or the Undersecretary.

IN WITNESS WHEREOF, the above parties have subscribed their names to these presents in duplicate.

Signed this _____ day of _____, 192_.
[SEAL.] JOHN DOE CO.
(Parent.)
By _____

Signed this _____ day of _____, 192_.
[SEAL.] JOHN DOE MANUFACTURING CO.
(Subsidiary.)
By _____

Signed this _____ day of _____, 192_.
[SEAL.] JOHN DOE MILLING CO.
(Subsidiary.)
By _____

Signed this _____ day of _____, 192_.
[SEAL.] JOHN DOE STEEL PROCESSING CO.
(Subsidiary.)
By _____

Signed this _____ day of _____, 192_.
[SEAL.] JOHN DOE MILLS.
(Subsidiary.)
By _____

Signed this _____ day of _____, 192_.

_____
Commissioner of Internal Revenue.

The above agreement has been approved by the Secretary of the Treasury in accordance with the provisions of section 606 of the Revenue Act of 1928, the approval being specifically enumerated on
Schedule No _____
Dated _____

ARTICLE 1301: Closing agreements relating to tax liability in respect of internal-revenue taxes.

VIII-21-4210
Mim. 3711

Agreement as to final determination of tax liability under section 606 of the Revenue Act of 1928.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., February 21, 1929.

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

Effective immediately all final agreements will be completed by adding on the reverse of the duplicate copy of Form 866 the following:

I have examined the return and recommend the acceptance of the agreement.

_____
Receiving officer.

_____
Title.

I have reviewed the return and approve the proposed agreement.

_____
Reviewing officer.

_____
Title.

I certify that the audit of the return has been completed, that the case has been closed, and that the proposed agreement is in accordance therewith.

Head, Clearing Division.

The officer securing the agreement will sign as receiving officer and will state his title in sufficient detail to identify the office in which the agreement is received. The employee responsible for the review of the case and the accompanying agreement will sign as reviewing officer. In so far as possible, in those cases in which agreements are obtained in the field, the signature of the receiving officer should be that of the revenue agent or deputy collector making the examination upon which the agreement is predicated. In certain cases where this will not be possible, due to the fact that the agreement is received in response to a 30-day letter, and the location of the agent or deputy would not warrant the forwarding of the agreement to such officer for signature, the person responsible for the issuance of the 30-day letter should sign as receiving officer.

The receiving officer who will sign in cases of agreements received in Washington in response to 30-day letters will be the auditor who prepared the letter, and in cases settled by stipulation the conferee will sign. Agreements received after the issuance of 60-day letters will be signed as receiving officer by the employee responsible for the handling of the case in proving section. The receiving officer who will sign agreements prepared in the Bureau in closed cases at the subsequent request of the taxpayer will be the employee responsible for the preparation of the agreement form.

In all cases the signature and title of the employee responsible for the review of the case and agreement will be affixed in the space provided.

Any inquiries in regard to this mimeograph should refer to the number thereof and the symbols IT:E:CBA.

D. H. Blair, *Commissioner.*

ARTICLE 1301: Closing agreements relating to tax liability in respect of internal-revenue taxes. VIII-24-4235 Mim. 3739

Agreement as to final determination of tax liability under section 606 of the Revenue Act of 1928.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 25, 1929.

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

It is deemed inadvisable to solicit or obtain closing agreements (Form 866) in cases where there is reason to believe that fraud has been committed unless and until the case has been considered by the General Counsel and it has been determined that no criminal proceedings will be instituted against the taxpayer.

Paragraph 5 of Mimeograph 3652 (C. B. VII-2, 79), dated July 5, 1928, is, therefore, hereby amended so as to read as follows:

5. Regular procedure will be observed in advising the taxpayer of the amount of any proposed deficiency.

(a) *Except in the case of fraud,* the notice will be accompanied by Form 866 properly filled out as to the section and year of the Revenue Act and the name and address of the taxpayer, and stating as the tax liability the amount shown on the return, increased or decreased by any prior deficiencies or overassessments as indicated by stamps on the return, plus the amount of the proposed deficiency.

Example:

Tax reported on return	$10,000.00
Additional tax previously assessed	2,000.00
	12,000.00
Overassessment allowed	4,000.00
	8,000.00
Proposed deficiency	1,500.00
Liability stated on Form 866	9,500.00

(b) If, in the course of a field audit, it appears that the taxpayer may be guilty of fraud and, therefore, may be liable to the fraud penalties and possible criminal prosecution, the examining officer should not seek to secure the execution by the taxpayer of a Form 866. In such cases the collector or internal revenue agent in charge should not forward Form 866 to the taxpayer, nor should the form be forwarded to the taxpayer with a 30-day notice of deficiency in any case in which criminal prosecution may be contemplated. In all such cases, Form 866 will be furnished the taxpayer only after it has been determined that no criminal proceedings will be instituted.

H. F. MIRES,
Acting Commissioner.

ARTICLE 1301: Closing agreements relating to tax liability in respect of internal-revenue taxes. VIII–21–4211 Mim. 3728

Agreement as to final determination of tax liability under section 606 of the Revenue Act of 1928.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 4, 1929.

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

1. Form 866, "Agreement as to final determination of tax liability," revised February, 1929, will be furnished on all requisitions received after this date. The form has been materially changed to adapt it for use with window envelopes and to separate the agreement as to liability from the consent to immediate assessment and collection of a deficiency, both of which have heretofore been included in the third paragraph of the agreement form. In the present revision the consent provision referred to appears at the bottom of the form as a "Waiver of restriction on assessment and collection of deficiency," this arrangement permitting the use of one form for both purposes where a taxpayer agrees to the findings of the examining officer and desires to finally close his case by agreement under section 606 of the Revenue Act of 1928. In the preparation and use of the revised form, the following instructions will be observed in addition to those issued in Mimeograph 3697, dated January 9, 1929 (see on page 118).

2. Form 866, revised, will be used in all cases where the taxpayer consents to the assessment and collection of a proposed deficiency and agrees that the determination made by the examining officer shall be final and conclusive. In such cases, the taxpayer's signature will be secured to the agreement and to the waiver on both the original and duplicate of the form.

3. Where a taxpayer consents to immediate assessment and collection of a proposed deficiency but does not desire to enter into an agreement under section 606 of the Revenue Act of 1928, Form 866, revised, will not be used. This is because the waiver printed on the form is so worded as to be appropriate only where the taxpayer also enters into an agreement as to final determination of tax liability. Accordingly, in cases referred to in this paragraph the consent to assessment and collection of a deficiency will be obtained by revenue agents on Form 870 and by collectors on Form 903. The investigating officer's report in this type of case will state the reason ascribed by the taxpayer for his refusal to execute Form 866.

4. Where final agreements are secured in cases where the report of the investigating officer discloses an overassessment only, the signature of the taxpayer on the waiver portion of Form 866, revised, is not necessary and should not be obtained.

5. Form 866, revised, is designed to permit the use of window envelopes in mailing agreements to taxpayers after their approval by the Secretary of the Treasury. In order that this purpose may not be defeated, the person preparing the form should be careful to place the name and address of the taxpayer on the lines in the space provided. The first line will be used for the name, the second line for the street address, and the third line for the city and State.

6. Attention is invited to Mim. 3711, dated February 21, 1929 (see on page 122), which directs that agreements be completed by a certificate on the reverse of the duplicate Form 866. It is imperative that this certificate be properly signed, as provided in the mimeograph mentioned, on every agreement submitted to the Bureau. Signatures should be in ink; the use of crayons and rubber stamps should be strictly avoided. The signatures of two different officers are essential; one employee should not sign both as receiving officer and reviewing officer. In every instance the title of the officer signing the certificate should be stated. Under no circumstances should there be any alteration in the wording of the certificate which is printed on Form 866, revised, as it appears in Mim. 3711.

7. Paragraph 2 of Mim. 3697, supra, captioned "Agreements to be secured only where tax liability is changed," is hereby modified to except from its provisions cases in which the principal amount of liability for the year under consideration exceeds $50,000. In *such* cases, examining officers will submit Forms 866 for taxpayers' signatures at the completion of investigations disclosing no change in tax liability.

8. Correspondence concerning the provisions of this mimeograph should refer to the number thereof and to the symbols IT:E:CBA.

D. H. Blair, *Commissioner.*

SECTION 607.—EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

SECTION 607. VIII-5-4088
G. C. M. 5601

REVENUE ACT OF 1928.

A waiver executed by a taxpayer March 8, 1926, after the statute of limitations upon assessment had run and after the date of the enactment of the Revenue Act of 1926, is ineffective for the purpose of extending the period of limitation for assessment. The deficiency in tax assessed on the basis of the waiver was therefore erroneously assessed, and the amount collected on account of such assessment constitutes an overpayment under the provisions of section 607 of the Revenue Act of 1928.

An opinion is requested relative to the case of the M Company, wherein the taxpayer within the applicable period of limitation filed a claim for refund of x dollars collected on account of a deficiency in tax assessed on March 19, 1927. The assessment was made upon the basis of a waiver executed March 8, 1926, after the statute of limitations upon assessment had run and after the date of the enactment of the Revenue Act of 1926.

The taxpayer contends that the waiver is invalid, for the reason that under the provisions of section 1106(a) of the Revenue Act of 1926 the liability for a deficiency in tax for the year under consideration was extinguished prior to the date the waiver was executed.

It is provided in that section that the bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability. In view of the express wording of the statute, it is the opinion of this office that waivers executed after the statute of limitations had run and during the time that the provisions of section 1106(a) of the Revenue Act of 1926 were in force are invalid for either assessment or collection.

Accordingly, the waiver executed by the taxpayer in the instant case was ineffective for the purpose of extending the statutory period of limitation for assessment. The deficiency in tax assessed on the basis of the waiver was therefore erroneously assessed, and the x dollars collected on account of such assessment constitutes an overpayment under the provisions of section 607 of the Revenue Act of 1928 and should be refunded.

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

SECTION 607.

REVENUE ACT OF 1928.

Overpayment credited against outlawed additional tax for prior year. (See G. C. M. 5665, page 130.)

SECTION 607. VIII-8-4113
G. C. M. 5739

REVENUE ACT OF 1928.

A so-called "claim for overassessment" filed for the years 1916 and 1918, in which the taxpayer made application for the credit of a portion of an alleged overpayment of income taxes for those years against an additional income tax assessed for 1917, can not be considered as a waiver extending the period for collection of the additional tax for 1917. Any payment on account of 1917 taxes made after expiration of the applicable statutory period constitutes an overpayment within the meaning of section 607 of the Revenue Act of 1928.

An opinion is requested relative to the validity of the collection from the M Company of an additional income tax for the year 1917.

The facts of the case are as follows:

1. The taxpayer company filed its return for the taxable year 1917 on April 1, 1918.

2. Assessment of the additional income tax for 1917 was made on March 20, 1923.

3. The taxpayer company was dissolved as of January —, 1921. At the time of the dissolution certain funds were placed in the hands of a trustee to cover any additional income taxes found to be due from the company.

4. On September 27, 1923, the taxpayer filed a so-called "claim for overassessment" for the years 1916 and 1918, and in the claim specifically directed that a portion of an alleged overpayment of income taxes for those years be applied as a credit against the additional income tax assessed for 1917. The "claim for overassessment" was disallowed.

5. Demand was made on the trustee and on the stockholders of the dissolved corporation for payment of the additional 1917 tax. Payment was refused on the ground that the statutory period for collection had expired. A bond, however, was given.

6. On or about January —, 1925, the amount of the tax was paid under protest.

7. No waiver or claim in abatement was ever filed with respect to 1917 taxes.

The so-called "claim for overassessment," mentioned above, was nothing more than a claim for credit for the years 1916 and 1918, with a request that part of an alleged overpayment of income taxes for those years be applied as a credit against the unpaid 1917 assessment.

Under the provisions of section 250(d) of the Revenue Act of 1921, the period of limitation for collection of the instant tax expired on April 1, 1923, unless the time was extended by a waiver. No waiver was filed by taxpayer, unless the request that part of an alleged overpayment of income taxes for 1916 and 1918 be applied as a credit against the 1917 taxes can be deemed to be a waiver by the taxpayer of its rights under the statute. The words of the statute are "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." The taxpayer made application for the allowance of a credit, which was refused. Such application can not be taken or construed to be anything other than it purported to be, namely, a request that an amount claimed to

be due to the taxpayer from the Government should, if allowed, be applied, in part, as a credit against the 1917 tax. There was no consent to a collection of the additional 1917 tax after the expiration of the five-year period, or to a collection by any other means than by the application of a credit, which was refused. The instant case is, in some respects, analogous to that of *National Tool Co.* v. *Routzahn* (28 Fed. (2d), 914). In that case the court said, in part:

> I do not think that the taxpayer, by claiming credit for taxes due for the years 1916 and 1917 against an overpayment for the year 1918, as an inducement to the collector not to distrain, constituted a waiver of the statute of limitations nor an estoppel from claiming the benefit of that statute. It could hardly be said that one entitled to the benefit of a statute of limitations may be held to have waived it by anything short of an express or implied intention to do so. The taxpayer's consent to a later application of overassessment for 1918 to the payment of taxes for the years 1916 and 1917 created neither an express nor implied waiver of the statutory limitation. Such an agreement was not, in my judgment, a voluntary foregoing of the time fixed by law for collection of the tax.

In view of the foregoing, this office is of the opinion that the collection in the instant case of the additional income tax for 1917 was made after the expiration of the statutory period properly applicable thereto, and that the amount collected constituted an overpayment within the meaning of section 607 of the Revenue Act of 1928.

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

SECTION 607. VIII–10–4131
G. C. M. 5764

REVENUE ACT OF 1928.

Taxpayer's return for 1918 was filed on March 20, 1919. No waiver was filed, and an assessment of additional tax was made in February, 1924. On March 15, 1924, a claim in abatement was filed, which was rejected on November 14, 1924. The additional tax was collected partly on August 2, 1926, and partly on January 29, 1927.

Taxpayer's return for 1919 was filed on March 13, 1920. No waiver was filed, and an assessment of additional tax for that period was made in January, 1925. A claim in abatement was filed on February 10, 1925, which was rejected October 19, 1925. The additional tax was collected in January, 1926.

Taxpayer died November 13, 1919. On October 21, 1924, his executor requested a closing of the returns of decedent in accordance with the provisions of section 277(a)3 of the Act of 1924.

Held, payment of the additional taxes assessed for the years 1918 and 1919 does not come within the scope of section 607 of the Revenue Act of 1928.

An opinion is requested relative to the applicability of sections 607 and 611 of the Revenue Act of 1928 to certain claims for refund filed in the case of A by the M Company, the executor of A's estate.

The facts are as follows:

A died November 13, 1919. On October 21, 1924, his executor requested a closing of the returns of the decedent for the calendar years 1918 and 1919 in accordance with the provisions of section 277(a)3 of the Act of 1924.

A's return for 1918 was filed on March 20, 1919. No waiver was filed for that year. An assessment of additional tax was made in February, 1924. On March 15, 1924, a claim in abatement was filed,

which was rejected on November 14, 1924. The additional tax was collected partly on August 2, 1926, and partly on January 29, 1927.

A's return for 1919 was filed by his executor on March 13, 1920. No waiver was filed for that year. An assessment of additional tax for that period was made in January, 1925. A claim in abatement was filed on February 10, 1925, which was rejected October 19, 1925. The additional tax was collected in January, 1926.

Under these facts the question is presented whether the case as it relates to 1918 falls within the scope of section 611 of the Revenue Act of 1928 or whether the additional tax for 1918 represents an overpayment as defined by section 607 of the Revenue Act of 1928, inasmuch as it was not collected within the 1-year period provided in section 277(a)3 of the Revenue Act of 1924 or the 5-year period provided in section 250(d) of the Revenue Act of 1921.

The question is also presented whether or not the tax in question for 1919 represents an overpayment as defined by section 607 of the Revenue Act of 1928, in view of the fact that although assessment was made within the 1-year period from the date of request for a closing in accordance with section 277(a)3, collection was not made within that period.

These questions will be discussed in the order presented.

1. As no waiver was filed for 1918, the 5-year period for assessment and collection provided by section 250(d) of the Revenue Act of 1921 expired on March 20, 1924. As this was before the 1924 Act became a law, section 277(a)3 of the 1924 Act does not affect the period within which collection could be made. The filing of a claim in abatement in and of itself does not suspend the running of the statute of limitations. Consequently the additional tax for 1918, collected in 1926 and 1927, was collected after the time within which collection could lawfully be made under the statute, and the payment of such tax after the expiration of the period of limitation properly applicable thereto would be considered as an overpayment within the intendment of section 607 of the Act of 1928, were it not for the provisions of section 611 of the 1928 Act. This section reads as follows:

> If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Inasmuch as the assessment was made before June 2, 1924, and a claim in abatement was filed, and the collection of the tax was thus stayed, the payment of the tax after the expiration of the period of limitation can not be considered as an overpayment under the provisions of said section 607. This office has expressed the opinion, in General Counsel's Memorandum 4639 (C. B. VII–2, 88), that if enforcement of collection was withheld or delayed while the claim in abatement was pending before the Bureau, there was a stay of collection within the contemplation of section 611. It follows that collection of the tax for 1918, now claimed as refundable, was stayed by reason of the filing of the claim in abatement. This office is therefore of the opinion, in view of the provisions of section 611, supra,

that payment of the additional tax for 1918 was not an overpayment within the intendment of section 607 of the Revenue Act of 1928.

2. The additional tax for 1919 was assessed in January, 1925. As the return was filed March 13, 1920, the assessment was properly made within the 5-year period of limitation. Under the provisions of section 250(d) of the 1921 Act, assessment and collection could be made at any time within five years from the time when the return was filed. This period had not expired when the Act of 1924 was enacted. By section 277(a)3 of the latter Act the collection by a proceeding in court was limited to the shorter of two periods, namely, the 5-year period or a period of one year dating from the time when the executor requests that such collection be made. Both periods had expired when collection of the additional 1919 tax was made in January, 1926. Section 277(a)3, it will be noted, relates only to collection by a proceeding in court. There remained another method of collection, by way of distraint. The Supreme Court, in the case of *Bowers* v. *New York & Albany Lighterage Co.* (273 U. S., 346, T. D. 4009, C. B. VI–1, 268), said that there are two methods of collecting tax, one by suit, a judicial proceeding, and the other by distraint, an executive proceeding. The latter method of collection was not affected by the provisions of section 277(a)3 of the 1924 Act. Inasmuch as the assessment was properly and timely made subsequent to the enactment of the Revenue Act of 1924, the Government had, under the provisions of section 278(d) of that Act, six years from the date of the assessment within which to make collection of the tax by distraint. The tax was paid in January, 1926, or well within the 6-year period. The payment, therefore, does not come within the scope of section 607 of the Act of 1928.

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

SECTION 611.—COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

SECTION 611. VIII–5–4089
(Also Section 607.) G. C. M. 5665

REVENUE ACT OF 1928.

Where an abatement claim accompanied by a bond is filed after the expiration of the statutory period of limitation on collection, such claim and bond can not be held to stay collection so that the case will fall within the scope of section 611.

The crediting of an overpayment for 1920 against an additional tax for a prior year at a time when collection of such additional tax was barred by the statute of limitations is void under section 609.

Where an abatement claim accompanied by a bond is filed after the collection of an outstanding tax is barred, and the bond is thereafter released by the Government, suit may not be instituted on the bond against the surety company.

The taxpayer filed an income tax return for the year 1917 on May 1, 1918; on January 19, 1923, a waiver was filed which extended the statutory period of limitation on assessment and collection of taxes for the year 1917 to January 19, 1924; on January 15, 1924, an additional tax was assessed for the year 1917; and on February 2,

1924, the taxpayer filed a claim in abatement for the full amount of the additional tax, the claim being accompanied by a bond.

On August 18, 1924, the taxpayer was advised that his claim in abatement for the year 1917 would be allowed in part. The balance of the additional tax assessed January 15, 1924, was taken care of by applying to the account a part of an overpayment made by the taxpayer on account of taxes for the year 1920. The schedule of overassessment upon which this item for 1920 appeared was signed by the Commissioner on March 13, 1926. The bond was released by the Government on May 17, 1926.

The opinion of this office is requested upon the following questions:

(1) Whether, where an abatement claim accompanied by a bond is filed after the expiration of the statutory period of limitation on collection, such claim and bond may be held to stay collection so that the case will fall within the scope of section 611 of the Revenue Act of 1928.

(2) Whether the fact that the abatement claim filed in this case was accompanied by a bond, even though such abatement claim and bond were filed after the expiration of the statutory period of limitation on collection, had the effect of taking the credit out of the class of credits which is contemplated by section 609(a) of the Revenue Act of 1928.

(3) Whether suit may be instituted by the Government against the surety company on the bond in the event it is determined that the credit referred to is void under section 609.

The questions will be answered in the order in which they are set out above.

(1) Section 611 of the Revenue Act of 1928 provides that if a tax was properly assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of the Revenue Act of 1928) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. Under the facts hereinabove stated, if no claim in abatement had been filed but payment of the additional tax had been made on February 2, 1924, undoubtedly such payment would have constituted an overpayment of tax under section 607. The mere filing of a claim in abatement does not satisfy the provisions of section 611. This is true whether the claim is filed with or without bond. Section 611 is applicable only if a timely assessment was made prior to June 2, 1924, and if collection was stayed upon the filing of a claim in abatement. Unless collection was stayed, within the meaning of section 611, the payment of the tax after the expiration of the period of limitation upon collection must be treated as an overpayment. Where collection of a tax is barred prior to the filing of a claim in abatement the legal right to enforce collection of the tax is not stayed as the result of the claim being filed. (See G. C. M. 4879, C. B. VII–2, 90.)

(2) Section 609(a) of the Revenue Act of 1928 provides with respect to a credit against a barred deficiency as follows:

> Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

Section 607, which deals with the effect of the expiration of the period of limitation against the United States, provides that any tax assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

As above stated, the period of limitation on assessment and collection of taxes due by the taxpayer for the year 1917, as extended by waiver, expired on January 19, 1924. There was a timely assessment of an additional tax on January 15, 1924, but collection thereof was not made prior to the expiration of the statutory period. In March, 1926, more than two years after the expiration of the period of limitation upon collection of taxes due for 1917, a part of an overpayment for the year 1920 was applied against the outstanding balance of the additional tax assessed for the year 1917. This case not falling within the provisions of section 611, referred to above, it follows that the application or crediting of the overpayment for the year 1920 against the additional tax for 1917 at a time when collection of the additional tax was barred by the statute of limitations was void under section 609(a), quoted above. It having been determined that the application of the overpayment for 1920 against the additional tax for 1917 was erroneous under the Revenue Act of 1928, proper adjustment of the taxpayer's account should be made in accordance with such determination.

(3) The final question to be answered is whether suit may be instituted by the Government against the surety company on the bond. The additional tax in the instant case was not actually paid by the taxpayer after the expiration of the statutory period of limitation nor has any reliance been placed upon the bond. A part of an overpayment for 1920 was applied against the additional tax for 1917 at a time when collection of the additional tax was barred, and shortly thereafter the bond which had been given by the taxpayer was released. Since the collection of the outstanding tax for 1917 was barred when the bond was filed, and since the bond was released by the Government in May, 1926, it is the opinion of this office that suit may not now be instituted by the Government against the surety company.

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

SECTION 611. VIII–23–4226
G. C. M. 6308

REVENUE ACT OF 1928.

The taxpayer in February, 1923, filed a brief protesting a proposed assessment of additional tax and asking for special assessment. In March, 1923, it filed a document prepared on abatement Form 843, referring to the brief and also protesting the proposed assessment. The additional tax was assessed in March, 1924, within the period of limitation properly applicable thereto.

Held, that the document filed was not an abatement claim, and therefore section 611 of the Revenue Act of 1928 is not applicable.

An opinion is requested as to whether section 611 of the Revenue Act of 1928 is applicable under the following circumstances:

On January —, 1923, the Commissioner sent to the taxpayer a letter proposing an additional assessment of x dollars for the year

1917 and stated therein that, in accordance with section 250(d) of the Revenue Act of 1921, the taxpayer was given 30 days within which to file an appeal and to show cause why the deficiency proposed should not be paid, but that no abatement claim by the taxpayer would be entertained. On February —, 1923, the taxpayer filed a brief protesting this proposed assessment and asking for special assessment. On March —, 1923, a document on abatement Form 843 referring to the brief and also protesting the proposed assessment was filed. The additional tax was not assessed until almost a year later, on March —, 1924, but was assessed within the period of limitation properly applicable thereto.

The question to be decided is whether the protest against the proposed assessment of tax filed March —, 1923, in conjunction with the brief theretofore filed on February —, 1923, was an abatement claim. If this question is answered in the negative, then the payment of the tax made on July 10, 1924, after the period of limitation on collection thereof had expired, constitutes an overpayment under section 607 of the 1928 Revenue Act and will have to be refunded.

Section 611 of the Revenue Act of 1928 provides as follows:

> If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Section 250(d) of the Revenue Act of 1921 provides in part as follows:

> If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than 30 days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within 10 days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: * * *

Article 1006 of Regulations 62 provides in part as follows:

> Where a taxpayer has been given an opportunity to appeal and has not done so, as above set forth, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment shall be entertained.

Since the taxpayer was given an opportunity to appeal from the proposed assessment by the letter of January —, 1923, it could not under the provisions of the statute just quoted have properly filed an abatement claim. When this fact is considered as well as the fact that the so-called claim was filed in conjunction with the brief already on file and before any additional tax had been assessed, it becomes apparent that the document filed was not an abatement claim within the meaning of the statute but merely a protest against a proposed assessment. It is also to be noted that the Commissioner, on October —, 1923, and prior to the making of the additional assess-

ment, advised the taxpayer that its application for special assessment had been allowed and resulted in an additional tax less than that originally proposed. This office is of the opinion, therefore, that the document filed was not an abatement claim, and that section 611 is not applicable under the facts stated.

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

SECTION 613.—LIEN FOR TAXES.

SECTION 613. VIII–1–4056
G. C. M. 5432

REVENUE ACT OF 1928 AND PRIOR REVENUE ACTS.

A notice of lien filed by a collector with the proper official covers all the property and rights of property, whether real or personal, belonging to the delinquent taxpayer, and operates as a lien on bank deposits of a taxpayer and on debts due a taxpayer though a specific notice of the lien has not been served on the bank or on the debtors of the delinquent taxpayer.

An opinion is requested as to whether a notice of an income tax lien duly filed and recorded operates as a lien on bank deposits of the taxpayer and on debts due to the taxpayer when specific notice of the lien has not been served on the bank or on the debtors.

Under the provisions of section 3186, Revised Statutes, as amended by section 613 of the Revenue Act of 1928, an income tax lien covers "all property and rights to property, whether real or personal," belonging to the delinquent taxpayer. This same provision was contained in section 3186 in its original form and also in its amended forms as appearing in the Act of March 4, 1913 (37 Stat., 1016), and in the Act of February 26, 1925 (43 Stat., 994), so that an outstanding income tax lien, whether notice thereof was filed before or after the enactment of the Revenue Act of 1928, must be regarded as covering all property and rights to property of the delinquent taxpayer.

The provisions of section 3186, Revised Statutes (in its original and its amended forms), have often received judicial construction. as, for example, in the following cases: *Osterberg* v. *United Trust Co.* (93 U. S., 424), *United States* v. *Snyder* (149 U. S., 210), *United States* v. *Kaufman* (267 U. S., 408), *United States* v. *Allen* (14 Fed., 263), *United States* v. *Curry* (201 Fed., 371), *In re Wyley Co.* (292 Fed., 900), *Heyward* v. *United States* (2 Fed. (2d), 467), *In re Baltimore Pearl Hominy Co.* (5 Fed. (2d), 553), and *Sherwood* v. *Sherwood* (5 Fed. (2d), 991).

The cited cases as a whole fully sustain the validity of the Government's lien for tax upon the property and rights to property of a delinquent taxpayer; and while those cases adjudicated since March 4, 1913 (when section 3186, Revised Statutes, was first amended to require the filing of a notice of the tax lien to make the same valid as against mortgagees, purchasers, and judgment creditors), do not specifically pass upon the question submitted, they recognize, by implication at least, the validity of tax liens notices of which were filed in the manner prescribed by the statute.

It will be noted from a reading of section 3186, Revised Statutes, as amended by the Act of February 26, 1925 (in which amended form the phraseology of the 1913 form was preserved *in totidem verbis*, there being inserted in appropriate places in the second proviso thereof a designation of certain local officers of the States of Connecticut, Rhode Island, and Vermont as among those with whom notice of tax lien might be filed), that a collector was under no obligation to furnish a copy of the notice of lien to any bank or debtor of the delinquent taxpayer. The collector's duty under the law was performed fully when he filed the notice of the lien in the office of the public official authorized under the statute to receive the same for filing. The identical situation is existent with respect to notices of lien filed since the enactment of the Revenue Act of 1928. As an administrative policy based on a desire the better to protect the interests of the United States and to enable depositaries (such as banks, trust companies, and other holders of assets or credits of delinquent taxpayers) to become advised of the existence of tax liens, collectors have been permitted to furnish depositaries with copies of the notice in exceptional cases. These copies are not furnished in all cases. Indeed, they could not be, for in a great majority of cases where notices of lien are filed the exact location of the taxpayers' property is unknown to the collector filing the notices. Neither is the copy, whenever furnished to a private person (whether corporate or individual, as distinguished from the public officer designated by law as the proper recipient of the original notice), furnished because of any legal right to receive the same. It is intended merely as an informative document respecting the claim of the United States upon the property and rights to property of the delinquent taxpayer. The question submitted for opinion must therefore be answered in the affirmative.

In this connection reference is made to another process in the internal revenue practice which often is confused with the filing of notices of lien. The process of distraint authorized by section 3187, Revised Statutes, et seq., is one of the processes by which an existing lien for taxes may be enforced. Under section 3187, as amended by section 1016 of the Revenue Act of 1924, a bank account is subject to distraint. Collectors are directed when levying upon a simple contract debt, such as a bank or other deposit, to attach to the original notification form, addressed to the depositary, a copy of the warrant of distraint and of the notice of lien. Whenever distraint of a bank account is sought to be made, the depositor is entitled to a copy of the notice of lien. In connection with the process of distraint, attention is directed to section 1114(e) of the Revenue Act of 1926, which indicates clearly the duty of all holders of assets belonging to a delinquent taxpayer, or in which he has legal rights, to surrender the same to the collector upon the service of a distraint warrant in order to avoid the liability imposed by this section upon one who declines to honor the collector's levy.

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

63133°—29——10

SECTION 614.—INTEREST ON OVERPAYMENTS.

SECTION 614. VIII–15–4169
G. C. M. 5835

REVENUE ACT OF 1928.

Where an installment of tax is overpaid and the overpayment is credited against the unpaid installments, leaving outstanding a part of the total tax assessed for the year, there has been no "overpayment in respect of any internal-revenue tax" within the meaning of section 614 of the Revenue Act of 1928 upon which interest is allowable.

An opinion is requested relative to the allowance of interest under section 614 of the Revenue Act of 1928 upon an overpayment by the M Life Insurance Co. of the first two installments of its income tax for the year 1927.

It appears that on March 15, 1928, the taxpayer filed its return of income for the year 1927, showing a total tax due of $280x$ dollars. The taxpayer elected to pay this tax by quarterly installments and paid the first installment of $70x$ dollars at the time of filing the return. On June 4, 1928, the Supreme Court of the United States rendered a decision in the case of *National Life Insurance Co.* v. *United States* (277 U. S., 508; T. D. 4206, C. B. VII–2, 296), in which it was held that life insurance companies are entitled to a deduction of 4 per cent of the mean of the reserve funds specified in section 245(a)2 of the Revenue Act of 1921 without diminution on account of interest from tax-exempt securities, and that the Act was invalid in so far as it undertook to abate the 4 per cent deduction by the amount of interest received from tax-exempt securities. Relying upon this decision, the taxpayer filed an amended income tax return for the year 1927 on June 15, 1928, showing a total tax due of $120x$ dollars, or quarterly installments of $30x$ dollars each. A payment having been made on March 15, 1928, in the sum of $70x$ dollars on the basis of the original return, the balance of $40x$ dollars, which remained after deducting from the amount paid the first installment of $30x$ dollars due on March 15, 1928, under the amended return, was credited against the second and third installments calculated to be due under the amended return. This sum of $40x$ dollars satisfied the second installment of $30x$ dollars due on June 15, 1928, and left a balance of $10x$ dollars to be applied against the third installment due on September 15, 1928.

The taxpayer is claiming interest in the sum of $.75x$ dollars, computed as follows: The amount of $.60x$ dollars, representing interest at the rate of 6 per cent per annum on the sum of $40x$ dollars from March 15, 1928, to June 15, 1928, and the amount of $.15x$ dollars, representing interest on the sum of $10x$ dollars from June 15, 1928, to September 15, 1928.

With respect to interest on overpayments, section 614 of the Revenue Act of 1928 provides in part as follows:

(a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum, as follows:

(1) In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, * * *.

The question to be determined is whether interest is allowable upon an overpayment of an installment of tax where such overpayment

is credited against the remaining unpaid installments and is not in excess of the entire tax assessed for the year in question.

Section 321 of the Revenue Act of 1928 provides as follows:

> If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

Section 322 provides that where there has been an overpayment of any income tax, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer. As stated above, the excess payment of the first installment of income tax for 1927 made by the taxpayer in the instant case was applied against the second and third installments, and the amount so paid does not exceed the amount estimated to be the total amount of the tax due under the amended return. This procedure is in accordance with the provisions of section 321 of the Revenue Act of 1928, quoted above. It is to be noted that there is no balance to be refunded to the taxpayer under the provisions of section 322, which section covers "Refunds and credits."

The Supreme Court of the United States, in the case of *Blair* v. *United States ex rel. Birkenstock et al.* (271 U. S., 348, T. D. 3886, C. B. V–1, 142), held that where a tax is paid in quarterly installments, interest is payable under the Revenue Act of 1924 only on the excess over the total amount of the tax. Section 1019 of the Revenue Act of 1924 provides that "upon the allowance of a credit or refund of *any internal-revenue tax erroneously or illegally assessed or collected*," interest shall be allowed on the amount of such credit or refund as set out therein. Section 614 of the Revenue Act of 1928 provides that "interest shall be allowed and paid upon *any overpayment in respect of any internal-revenue tax*." It is claimed by the taxpayer in this case that the difference in the wording of these two sections makes inapplicable to the instant case the decision of the Supreme Court in the case of *Blair* v. *Birkenstock*, cited above, and that inasmuch as section 321 of the Revenue Act of 1928 refers specifically to an "overpayment" of an installment, interest may be allowed on such an overpayment under section 614.

This office is of the opinion that the principles enunciated by the Supreme Court with reference to the application of section 1019 of the Revenue Act of 1924 apply with equal force to section 614 of the Revenue Act of 1928. Under section 56 of the Revenue Act of 1928, a taxpayer may elect to pay the tax in installments, but if a taxpayer anticipates the quarterly installments and pays the whole tax in a single payment, he can not be said to be entitled to interest on the anticipated installments as upon an overpayment of tax under section 614. There is no provision in the Revenue Act of 1928 for the refund to the taxpayer of any excess payment of a quarterly installment when the whole tax for the year has not been paid. It is believed that the provision of section 614 with respect to the allowance of interest upon *any overpayment* does not apply to any payment in excess of the correct amount of a quarterly installment which the

Government is authorized to treat as a payment on account of the entire tax. In other words, where an installment of tax is overpaid and that overpayment is credited against the unpaid installments, leaving outstanding a part of the total tax assessed for the year, there has been no "overpayment in respect of any internal-revenue tax" within the meaning of section 614. It follows that, under the facts above set out, the taxpayer in the instant case is not entitled to any interest in connection with the payment of the first two installments of its income tax for the year 1927.

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

SECTION 615.—INTEREST ON JUDGMENTS.

SECTION 615. VIII–8–4114
Ct. D. 44

FEDERAL TAXES—REVENUE ACT OF 1928—DECISION OF COURT.

JUDGMENT—INTEREST—RETROACTIVITY.

Section 615(a) of the Revenue Act of 1928, providing for the allowance of interest in any judgment for any overpayment of tax to a date preceding the date of the refund check by not more than 30 days, is not applicable where final judgment was entered prior to the effective date of that section.

COURT OF CLAIMS OF THE UNITED STATES.

The S. S. White Dental Manufacturing Co. of Pennsylvania v. *The United States.*

[January 7, 1929.]

OPINION.

This case is before us on defendant's demurrer to the petition, first, on the ground that petition does not constitute a cause of action within the jurisdiction of this court; second, petition fails to state facts sufficient to constitute a cause of action against defendant.

The following are the facts:

This court rendered judgment in the case of *S. S. White Dental Manufacturing Co. of Pennsylvania* v. *The United States* (61 C. Cls., 143, 165 [T. D. 4059, C. B. VI–2, 198]) on November 10, 1925, and thereby awarded to the plaintiff the sum of $83,813.59, with interest.

On May 16, 1927, the Supreme Court affirmed the judgment of this court in the case of *The United States* v. *S. S. White Dental Manufacturing Co. of Pennsylvania* (274 U. S., 398), and its mandate was filed in this court on June 27, 1927, and contained the following direction:

"The court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of eighty-three thousand eight hundred thirteen dollars and fifty-nine cents ($83,813.59), with interest thereon at the rate of 6 per cent per annum from November 14, 1923, to the date of this judgment."

On July 1, 1927, the plaintiff filed with the Commissioner of Internal Revenue its judgment refund claim for $83,813.59 for payment and asked interest thereon at the rate of 6 per cent per annum from November 14, 1923, to the date of the Supreme Court mandate on June 27, 1927.

The Commissioner of Internal Revenue in due course forwarded said judgment claim to the Comptroller General of the United States for settlement, and

under date of November 10, 1927, plaintiff requested the Comptroller General, by letter, to withhold payment of its claim pending disposition of an additional claim by the General Counsel's Office, and informed the Comptroller General that he would be promptly notified of such disposition of the additional claim, at which time "you can then proceed to settle this claim for $83,813.59 with interest from November 14, 1923, to June 27, 1927."

On May 29, 1928, the Revenue Act of 1928, Public 562, was approved. Section 615 of said Act, amending section 177 of the Judicial Code, as amended, is as follows:

"(a) Section 177 of the Judicial Code, as amended is amended to read as follows:

"'SEC. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"'(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) 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.'

"(b) Subsection (a) of this section shall take effect on the expiration of 30 days after the enactment of this Act."

On June 29, 1928, plaintiff filed with the Comptroller General of the United States a letter dated June 28, 1928, in which plaintiff stated that the Bureau of Internal Revenue had acted upon the additional claim and requested Comptroller to proceed to settle its judgment claim for $83,813.59, with interest.

Under date of July 10, 1928, the Comptroller General of the United States settled plaintiff's judgment claim in the amount of $101,999.97, and held that the proper amount of interest allowable in this case was $18,186.38, being interest from November 14, 1923, to June 27, 1927, the date of mandate of the Supreme Court.

Plaintiff, under date of July 13, 1928, wrote to the Comptroller General of the United States requesting reconsideration of said settlement on the ground that additional interest is due plaintiff under said section 615 of the Revenue Act of 1928, supra, for the period from June 27, 1927, to July 11, 1928, and requested that it be permitted to cash the Treasury check for $101,999.97 without prejudice of its rights on account of plaintiff's claim for additional interest on its said judgment claim.

The Comptroller General replied by letter of July 13, 1928, informing plaintiff that no objection would be interposed to cashing said check; that such action would be without prejudice to its right to seek further review of the claim for additional interest.

On August 7, 1928, the Comptroller adhered to his original settlement and refused to pay plaintiff the additional interest requested from June 27, 1927, to July 10, 1928, on the ground that plaintiff was not entitled to interest during that period under the provisions of section 615 of the Revenue Act of 1928. On August 17, 1928, plaintiff requested the Comptroller General in writing to reconsider his decision of August 7, 1928. Under date of September 1, 1928, the Comptroller General, by letter to plaintiff, again adhered to his decision of August 7, 1928, and refused to pay the additional interest.

It is the contention of plaintiff that section 615 of the Revenue Act of 1928 is applicable and that it should be paid the additional interest from June 27, 1927, the date of the mandate of the Supreme Court, to July 10, 1928. On the date of the mandate of the Supreme Court, June 27, 1927, section 177 of the Judicial Code, as amended (44 Stat., 119), provided for the allowance of the interest in any judgment of any court to date of entry of final judgment. The Comptroller General so allowed interest to plaintiff. We think the Comptroller was correct, for the reason that section 615 of the Revenue Act of 1928 was given no retroactive effect by Congress.

The Supreme Court in the case of *United States* v. *Magnolia Petroleum Co.*, decided February 20, 1928 (276 U. S., 160 [T. D. 4153, C. B. VII-1, 287]), held:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legisla-

tive purpose so to do plainly appears. (*United States* v. *Heth*, 3 Cranch, 399, 413; *White* v. *United States*, 191 U. S., 545, 552; *Shwab* v. *Doyle*, 258 U. S., 529, 534 [T. D. 3339, C. B. I-2, 312].)"

Defendant's demurrer that the petition fails to state facts sufficient for cause of action against the United States will be sustained. Petition is dismissed. It is so ordered.

SECTION 615. VIII–16–4175
G. C. M. 6164

REVENUE ACT OF 1928.

Uniformity of practice with respect to judgments in suits for the recovery of internal revenue taxes. Interest, costs, certificates of probable cause, etc.

To Attorneys for the Bureau of Internal Revenue and Others Concerned:

Under date of December 31, 1925, the Comptroller General of the United States promulgated a decision to the effect (1) that judgments against the United States for refund of internal revenue taxes should be forwarded to him by the Commissioner of Internal Revenue for settlement in accordance with the Act of February 18, 1904 (33 Stat., 41), and (2) that judgments against collectors for the refund of such taxes should be paid, when a certificate of probable cause has been issued, together with interest and costs of suit, by the Commissioner of Internal Revenue under the authorization given him by section 3220, Revised Statutes, as amended.

By letter dated August 15, 1928, the Comptroller General was requested to advise the Secretary of the Treasury with respect to the following:

(1) Whether court costs would be approved for payment in connection with judgments when rendered against collectors of internal revenue or directly against the United States and irrespective of whether such costs are specifically provided for by the judgment, or whether they should be disallowed with respect to both types of judgment, if not awarded in the judgment.

(2) Whether interest would be approved for payment if not specifically provided for in the judgment as to either type of case.

(3) Whether the payment of judgments against collectors would be approved if not supported by certificates of probable cause.

The decision of the Comptroller General with respect to these questions, which is contained in a communication dated September 17, 1928 (8 Comp. Gen., 126), may be summarized as follows:

(1) Court costs in suits against the United States will be approved for payment where the United States has put in issue the right of the plaintiff to recover, but only where the judgment specifically provides for costs and then only such costs as are "actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court," as provided in section 152 of the Judicial Code of March 3, 1911 (36 Stat., 1138; U. S. C., Title 28, chapter 7, section 258). Consent judgments can not carry costs unless issue was joined.

(2) Court costs in suits against collectors may follow as a part of a judgment against a collector and may be paid by the United States when included in the judgment or when so provided by the State statutes of the jurisdiction in which the judgment was rendered.

(3) Interest may be paid as a matter of course under section 615 of the Revenue Act of 1928 irrespective of whether the judgment is rendered against the United States or a collector.

(4) Judgments against collectors may not be paid by the United States unless and until the certificates of probable cause provided for by section 989 of the Revised Statutes are furnished.

This decision furnishes the basis for the following simple suggestions which if observed will eliminate the misunderstandings, the delays, and the avoidable accumulations of interest which have frequently characterized the payment of judgments for refund of taxes:

(1) Judgments for the recovery of internal revenue taxes, whether in suits against collectors or against the United States, should contain a specific recital of the date or dates of payment of the tax which the court holds to have been illegally collected. This is necessary in order to avoid all disputes as to the date or dates from which the interest is to be computed.

(2) Such judgments should likewise contain one of the following general provisions—"with interest"; "with interest according to law"; "with interest thereon from the date or dates of payment as required by law"; or "with interest in accordance with the provisions of section 615 of the Revenue Act of 1928."

(3) Judgments in suits against collectors of internal revenue or their representatives should include *as a part thereof* the certificate of probable cause authorized by section 989 of the Revised Statutes, provided, of course, the case is a proper one for the entry of such a certificate. The certificate need not be a separate document. The following is a sufficient compliance with the statute and may be included in the judgment: "* * * The court hereby certifies that there was probable and reasonable cause for the act of the defendant, the collector of internal revenue, in demanding and collecting from the plaintiff the internal revenue tax, for the refund of which this judgment is entered."

(4) Judgments in suits against the United States for refund of taxes should be specific with respect to the allowance of costs. If the Government has joined issue in such suit, and if, in the discretion of the court, costs are to be included, it is suggested that the judgment provide: "With costs actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court." (For such fees see Act February 11, 1925, 43 Stat., 857, U. S. C., Title 28, chapter 16.)

(5) Upon receipt of advice from the Department of Justice that no appeal will be taken by the Government from a judgment for the refund of taxes, plaintiffs' counsel should be advised to promptly file with the Commissioner of Internal Revenue, Washington, D. C., a judgment claim for refund in accordance with articles 1255 and 1256 of Regulations 74. Delay in the filing of judgment claims results in the unnecessary accumulation of interest. (See section 615 of the Revenue Act of 1928.)

In addition to the foregoing, it is also suggested that arrangements be made in each case to have plaintiffs' counsel, upon the receipt of payment, satisfy the judgment upon the official records. An unsatisfied judgment against a collector constitutes a cloud upon his privately owned property. Failure to secure satisfaction of such judgments eventually subjects a collector to unnecessary embarrassment.

The suggestions contained herein are made in order to bring about a greater degree of uniformity in judgments rendered in internal revenue cases to the end that such judgments may clearly provide

for all details requisite to the expeditious payment thereof, with the consequent avoidance of unnecessary correspondence, delay to the annoyance of all concerned, and the payment of unnecessary interest.

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

TITLE V.—GENERAL PROVISIONS.

SECTION 701.—DEFINITIONS.

ARTICLE 1314: Association distinguished from trust. VIII-2-4061 G. C. M. 5504

REVENUE ACT OF 1928.

A trust created for the purpose of owning and operating an office building properly made returns as a corporation for 1927 and prior years. On July 1, 1928, the organization sold and conveyed all its real estate, receiving therefor cash and promissory notes. Since the sale the activities of the trustees have consisted merely of the receipt and distribution of payments of principal or interest on said notes. It is contended that from July 1, 1928, the trust should be taxed as a strict trust.

Held, the association still exists, and is taxable as a corporation on the income received.

An opinion is requested as to the taxable status of the M Building Trust.

It appears that the trust was created in 19— for the purpose of owning and operating an office building in the city of R. Originaliy the beneficiaries controlled the trust, but on June 1, 1923, the declaration of trust was amended so as to give the trustees complete control, except that the consent of the beneficiaries must be obtained in order to amend the instrument. In other respects, however, the original provisions of the declaration of trust were left substantially unchanged.

The amended instrument provides that the trustees shall have exclusive management and control of the trust property, including the power to make leases, to erect, tear down, alter, or rebuild buildings, to borrow money, to sell or exchange the property, and to invest and reinvest any and all moneys in their hands in any manner, whether authorized by law for trust funds or not. Neither the trustees nor the beneficiaries are personally liable for any debts or liabilities, but all persons dealing with the trustees are to look only to the property of the trust. No widower, widow, heir, or devisee of any beneficiary has any right of dower or any other real property rights in the trust property, the rights of the beneficiaries being solely against and through the trustees. The interests of the beneficiaries are represented by "receipts," which are transferable on the books of the trust like corporate stock. Vacancies among the trustees are filled by the remaining trustees.

In July, 1928, the organization sold and conveyed, as of July 1, 1928, all its real estate, consisting of the land and office building, receiving as consideration therefor $3x$ dollars in cash and 10 promis-

sory notes, 9 notes for x dollars each and 1 note for $2x$ dollars, all bearing interest at 5 per cent. These notes are payable serially on July 1 of each year, the first note for x dollars being payable July 1, 1929, the final note for $2x$ dollars being payable July 1, 1938.

The trustees have as assets the promissory notes above referred to, having an aggregate face value of $11x$ dollars, and a nominal amount of cash.

It is stated that since the sale of its real estate in July, 1928, the activities of the trustees have consisted merely of the receipt and distribution of payments of principal or interest on said notes. It is therefore contended that from July 1, 1928, at least, the trust should be taxed as a strict trust.

It appears that for 1927 and prior years the trustees filed returns as a corporation, on the theory that notwithstanding the fact that since June 1, 1923, the beneficiaries have not had positive control, the trust was nevertheless engaged in a business enterprise, and was therefore taxable as an association in accordance with article 1504 of the regulations. It is contended, however, that the trust has not been properly taxable as a corporation since June 1, 1923, because of the lack of control by the beneficiaries, because the trust does not sufficiently resemble a corporation in form of organization, because the care and rental of an office building does not amount to carrying on a business, and because, in any event, the business element is immaterial. In this connection, it is suggested that the Supreme Court stressed the carrying on of business in *Hecht* v. *Malley* (265 U. S., 144; T. D. 3595, C. B. III–1, 489) simply because it was dealing with an excise tax imposed on the privilege of carrying on or doing business, and that in all three trusts there considered the beneficiaries controlled the trustees.

The answer to this argument is that although *Hecht* v. *Malley* is a capital stock tax case, the court was discussing business in its capacity as an element of an association rather than in its capacity as a further prerequisite to tax liability once an association is found to exist. This is shown by the fact that the court distinguishes *Crocker* v. *Malley* (249 U. S., 223), an *income* tax case, on the ground that in that case no business was engaged in, and, therefore, in the absence of control, no association existed, whereas in *Hecht* v. *Malley* the court holds that the business element is present, and *therefore* an association was created, in spite of the fact (to quote from the opinion) that "such a slight measure of control may be vested in the beneficiaries that they might be deemed strict trusts within the rule established by the Massachusetts courts." The court then assumes without argument that the business element is also present in its second aspect, namely, as a further prerequisite to capital stock tax liability once the existence of the association is established.

It is quite immaterial whether in fact the beneficiaries had sufficient control in the trusts involved in *Hecht* v. *Malley* to constitute the trusts associations irrespective of the business element, because the court assumed for the purpose of argument that they did not have sufficient control for that purpose, and rested its decision on the ground that the trusts were carrying on business in quasi corporate form and *therefore* were associations.

It should be noted, moreover, that the capital stock tax provisions of the Revenue Act of 1918 (under which the court held the trusts

were associations) did not mention the word "associations." They provided simply that every "corporation" shall pay a special excise tax with respect to carrying on or doing business measured by the value of its capital stock. Unincorporated associations were taxed under these provisions for the same reason they are subject to income tax, namely, because the Revenue Acts provide (under "General definitions") that the term "corporation" includes associations, joint-stock companies, and insurance companies. Since for both the capital stock tax and the income tax this one definition is the source of the authority to tax unincorporated associations as corporations, it must be true that the essential elements of an association are the same with respect to each tax. It follows that carrying on business could not render an unincorporated organization taxable as a corporation for capital stock tax cases unless it also rendered it taxable as a corporation for income tax purposes; and since the court, in *Hecht* v. *Malley*, relied on the business element to determine the very existence of the associations, it follows that the same reliance may be placed on the business element for income tax purposes. That the court did so rely on the business element is further shown by the following quotation from the opinion:

> We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises, the trusts are to be deemed associations within the meaning of the Act of 1918; *this being true independently of the large measure of control exercised by the beneficiaries* in the Hecht and Haymarket cases, which much exceeds that exercised by the beneficiaries under the Wachusett Trust." [Italics supplied.]

It is well settled that where a court rests its judgment on two grounds, either of which is sufficient to sustain the judgment, each principle used is of equal force as a precedent in future cases. (*Union Pac. R. Co.* v. *Mason City, etc.*, 199 U. S., 160; *Florida Cent. R. Co.* v. *Schutte*, 103 U. S., 118.) It follows, a fortiori, that if a judgment may rest on either of two grounds, but, in fact, the court puts it upon only *one* of those grounds, the principle actually used by the court is authoritative for future cases, and is not a dictum simply because another ground may exist on which the decision could have been based. It is quite immaterial, therefore, whether sufficient control was present in all three trusts in the Hecht case to justify holding them associations, since the court in fact did not rely on the control feature.

The principle that control is not essential has been incorporated in article 1504 of Regulations 69 and has been upheld by the Board of Tax Appeals in the case of E. A. Landreth Co. (11 B. T. A., 1).

That owning and renting an office building is carrying on a business enterprise is also established by *Hecht* v. *Malley* (the Hecht trust being so engaged in that case) as well as by *Flint* v. *Stone-Tracy Co.* (220 U. S., 107) and *Zonne* v. *Minneapolis Syndicate* (220 U. S., 187).

The M Building Trust, moreover, is organized in quasi corporate form. The trustees, like the directors of a corporation, have carried on, or directed the carrying on, of the activities for a group of beneficiaries, who, like the stockholders of a corporation, take no

active part in the management, but share in the profits. Certificates of beneficial interest, resembling shares of corporate stock, have been issued, which are freely transferable like corporate shares, so that, like a corporation, the organization continues to exist without regard to changes in its personnel. Although the corpus of the trust consisted mainly of realty, the beneficial interests are in effect declared to be personal property, so that in this respect, also, they resemble corporate stock. Like stockholders and directors, moreover, the beneficiaries and trustees are declared to be free from personal liability for the debts of the organization. In fact, the trust resembles a corporation as much as did the E. A. Landreth trust (11 B. T. A., 1), where likewise there was no provision for election of officers or for meetings; and, for that matter, it has as many quasi corporate features as the Hecht trust in *Hecht* v. *Malley*, if the control provisions of that trust, which the court ignored as immaterial, be disregarded. This office has held many times that organizations bearing no more, or less, resemblance in form and structure to a corporation than the M Building Trust bears, are associations. (See, for example, S. M. 4180, C. B. IV–2, 274; G. C. M. 1881, C. B. VII–1, 42.)

In view of the foregoing, it is evident that the trust must, in any event, be classified as an association until the office building was sold in July, 1928. Section 704 of the Revenue Act of 1928 affords no relief, because (among other reasons) no return as a trust was filed, as required by subdivision (a), and the trust was not limited to a single trustee, as required by subdivision (b).

The sole remaining question is whether the association is changed, ipso facto, into a strict trust by the sale of the building and the consequent reduction of the activities of the trustees to collecting and distributing the interest and principal due, or to become due, by virtue of the purchase money notes. This office is of the opinion that in the absence, at least, of some formal change in the trust instrument so restricting the powers of the trustees that they may not properly carry on a business, the association continues as such until it has been entirely liquidated and its property distributed to the beneficiaries. Assuming, for the sake of argument, that the trustees are not now engaged in "business," and that in the absence of control by the beneficiaries the business element is essential to create an association in the first instance, it does not follow that once the association is established the removal of the business element will of itself change the organization into a strict trust. It is well settled, both at common law and under the Uniform Partnership Act, that the presence of a business enterprise is essential, in the first instance, to the creation of a partnership. (30 Cyc., 370; *Meehan* v. *Valentine*, 145 U. S., 611; Uniform Partnership Act, sec. 6(1).) But the partnership does not terminate the moment the partners cease to engage in active business. Even if the cessation of active business were held to effect a technical dissolution of the partnership, it is well established that a partnership, though dissolved, is not terminated until liquidation is completed. Section 30 of the Uniform Partnership Act provides:

> On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

This was true, also, at common law. Rowley on Partnership, section 592, states:

> That the partnership continues, even after dissolution for the purpose of settling its affairs, is so firmly settled that the citation in full of the numerous authorities to that effect is practically unnecessary. (Citing a great many cases.)

In *Oliver* v. *Lynn* (130 Mass., 143) a statute provided that "partners in mercantile or other business * * * may be jointly taxed under their partnership name, in the place where their business is carried on, for all the personal property employed in such business, except ships or vessels," and "when so jointly taxed each partner shall be liable for the whole tax." The plaintiff was formerly a member of the firm of "Stephen Oliver, Jr., & Co.," the firm being dissolved by the act of the partners in 1869. In 1872 and 1873 the assessors assessed to "Stephen Oliver, Jr., & Co." taxes for those years amounting to $2,208, which were paid by the plaintiff under protest, and he then brought suit to recover them. The court held he could not recover, saying:

> We assume * * * that the assessors intended, as the form implies, to tax the property of the firm; and that this is to be regarded as a distinct and independent tax * * *.
>
> The dissolution of a firm * * * does not immediately terminate its existence for all purposes. It still subsists * * * for the purpose of closing up its concerns. Such dissolution does not exempt the firm property from taxation; it does not work a division or separation of the property so that the share of each partner can be taxed to him, but it continues to be the property of the firm. We are of opinion that, for the purposes of taxation, the firm continues to exist until its affairs are wound up, or until the firm property is disposed of.

In *Barber* v. *Barnes* (52 Cal., 650) plaintiff and defendant were partners. The plaintiff brought suit for dissolution and accounting, alleging that he had advanced money over and above the amount contributed by the defendant, and that defendant collected sums due the firm and appropriated same to his own use. The defendant set up a plea of the statute of limitations, alleging that an attachment was levied May 4, 1874, and everything belonging to the firm was seized; that the attachment was released, and the attachment suit settled by the creditors of the firm meeting and appointing one of their number assignee, who took charge of the property, disposed of it, and paid the creditors 90 per cent of their indebtedness; that the firm never did any business after the day the attachment was levied; that the firm was therefore dissolved by operation of law in May, 1874, and, consequently, plaintiff's suit to have the firm declared dissolved was barred by the statute of limitations. The lower court granted nonsuit on this ground. The upper court reversed the judgment, saying:

> The seizure of the partnership property * * * and the application of the property to the payment of the creditors of the firm, and the fact that the plaintiff and defendant "did not do business after the attachment was levied," did not of themselves necessarily and conclusively operate as a dissolution of the partnership. The commencement of the action by the plaintiff and defendant against Hunt & Anderson to recover a debt alleged to be due to the firm—the action not yet having been determined—tends to rebut any inference of the dissolution of the partnership arising from the facts above stated.

In other words, according to this court, the cessation of business does not even dissolve a partnership (to say nothing of terminating it), so long as it has outstanding debts to be collected. (See also *Foster* v. *Hall & Eaton*, 4 Humph. (Tenn.), 346; *Williams* v. *Madison County Bank*, 33 Ga. App., 570, 126 S. E., 895.)

In the case of ordinary corporations it also appears that although a certain thing or set of circumstances may be necessary to create a corporation in the first instance, the later removal of the essential part does not ipso facto dissolve the corporation. Thus, under the laws of many States, one person alone can not organize a corporation, but if the corporation is once formed by the correct number, the purchase of all of the stock by a single individual does not dissolve the corporation. (14a C. J., 1113; *Louisville Banking Co.* v. *Eisenman*, 94 Ky., 83, 21 S. W., 531.) Nor does the fact that there are less stockholders than the charter requires invalidate the acts of the corporation. (Cook on Corporations, section 631; *Welch* v. *Importers', etc., Bank*, 122 N. Y., 177, 25 N. E., 269.) One reason given by the courts for this view is that at any time the stock may be sold to others, and the proper number of stockholders be achieved again. The same reasoning applies to the instant case, for the power of the trustees under the trust instrument to engage in active business has not been removed. There is nothing to prevent them from buying another office building with the proceeds of the notes or with money borrowed by their hypothecation. Moreover, even where an ordinary corporation has been formally dissolved, income earned in the process of liquidation is taxable to the corporation. (S. R. 3119, C. B. IV–1, 233; O. D. 231, 1 C. B., 213; O. D. 821, 4 C. B., 279; A. R. R. 1115, C. B. I–2, 200.)

In view of the foregoing, it must be concluded that in the absence, at least, of a formal amendment of the trust instrument revoking the right of the trustees to engage in business, the association still exists, and is taxable as a corporation on the income received. If such an amendment should be adopted, the question would arise whether a new taxable entity in the nature of a strict trust is created, to which the property of the association may be said to have been transferred. On this point no opinion need be expressed at this time.

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

SECTION 703.—DEDUCTION OF ESTATE AND INHERITANCE TAXES—RETROACTIVE.

SECTION 703. VIII–12–4151
I. T. 2464

REVENUE ACT OF 1928.

Where an estate filed an income tax return for 1925 claiming a deduction for State inheritance taxes paid, and no deduction for inheritance taxes was claimed by the beneficiaries in their returns, the deduction for such taxes is allowable only to the estate, under the provisions of section 703, Revenue Act of 1928. The fact that the estate may now file an amended return in which no deduction for such taxes is claimed, and that the beneficiaries may file amended returns claiming a deduction for such taxes, is of no consequence, since the original returns are controlling.

A ruling is requested relative to the application of section 703 of the Revenue Act of 1928 to the case of the estate of A.

It appears that the estate of A filed a return for the year 1925, claiming a deduction of x dollars on account of inheritance taxes paid during that year to the State of S, and that a deduction for such taxes was not claimed by the beneficiaries in their returns. The estate now proposes to file an amended return for 1925 in behalf of the estate in which no deduction for the inheritance taxes is claimed, contending that the deduction may then be taken pro rata by the beneficiaries in amended returns.

Section 703 so far as material to the question under consideration provides:

(a) In determining the net income of an heir, devisee, legatee, distributee, or beneficiary (hereinafter in this section referred to as "beneficiary") or of an estate for any taxable year, under the Revenue Act of 1926 or any prior Revenue Act, the amount of estate, inheritance, legacy, or succession taxes paid or accrued within such taxable year shall be allowed as a deduction as follows:

(1) If the deduction has been claimed by the estate, but not by the beneficiary, it shall be allowed to the estate;

(2) If the deduction has been claimed by the beneficiary, but not by the estate, it shall be allowed to the beneficiary; * * *

(b) As used in this section, the term "claimed" means claimed—

(1) In the return; * * *.

Inasmuch as it appears that the estate claimed the deduction for the inheritance taxes in question in the original income tax return filed by the estate, and a deduction for such taxes was not claimed by the beneficiaries in their original returns, and since in the opinion of this office the original returns are the controlling returns under the provisions of section 703, above quoted, it follows that the deduction on account of the inheritance taxes paid to the State of S "has been claimed by the estate, but not by the beneficiary," and therefore under section 703 of the Revenue Act of 1928 "it shall be allowed to the estate" and can not be allowed to the beneficiaries.

SECTION 704.—TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.

SECTION 704.

VIII-6-4096
G. C. M. 5426

REVENUE ACT OF 1928.

1. Where the trustee has elected to be taxed as a trust under section 704(b) and a loss has been sustained, the beneficiaries should be allowed to deduct their proportionate shares thereof.

2. Where a beneficiary purchases an interest in the trust during a taxable year, he is not, in general, taxable with respect to a proportionate share of the income of the trust earned prior to the acquisition of his interest.

3. The cost recovery method may not be used by the trust in determining its income from the sale of the property irrespective of whether or not the trustee has elected to have the concern taxed as a trust under section 704(b).

4. A trust having a fiscal year ending during the calendar year 1928 does not meet the requirements of section 704(b) for any part of that fiscal year.

5. Where a trust, as created, has more than one trustee and title to the property becomes vested in one trustee, it does not meet the

requirements of section 704(b) for the year of change and the year or years prior to the year of change. For years following the year of change, however, the trust meets the requirements.

6. Where the declaration of trust does not confine the purposes and activities of the trust to the requirements of section 704(b) but the actual activities meet such requirements, the right of election exists.

7. The fact that buildings were erected on the property of the trust does not destroy the right of election.

An opinion is requested with reference to certain questions arising in connection with the audit of cases under section 704(b) of the Revenue Act of 1928. These problems will be discussed in the order presented.

Section 704(b) of the Revenue Act of 1928 provides:

For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

(1) Assuming that the trustee of a trust which meets the requirements of section 704(b) has elected to be taxed as a trust, and the operations of the trust for the year result in a loss, may the beneficiaries deduct their proportionate shares of such loss?

Once an election is made under section 704(b) to have the concern taxed as a trust, it is treated, under that section, more like a partnership than like a strict trust, in spite of the fact that the word "trust" is used. The income is taxable to the beneficiaries whether distributed or distributable, whereas, in the case of a strict trust, income which is not distributed or distributable is taxed to the trust as an entity. Consistency seems to require, therefore, that the beneficiaries should be allowed to deduct their proportionate shares of the losses of the trust, provided, of course, that the bases of the interests of the beneficiaries in the trust must be reduced by the amount of the loss deductions which are granted them. Otherwise they would, in effect, get the benefit of the deductions again when they dispose of their interests. The view that they are entitled to the deductions is further strengthened by the rulings to the effect that where a trust serves only as a medium or conduit for the collection and distribution of tax-exempt income, the beneficiaries are not taxable on the sums so distributed to them. (See I. T. 2067, C. B. III-2, 78.) Where the beneficiaries of a trust are taxable on the income thereof whether distributed or distributable, it is obvious that the trust is more nearly in the nature of a mere conduit or medium than where taxation of the beneficiaries depends on the distribution or distributability of the income.

(2) Assuming that a trustee has elected to be taxed as a trust, and such election has been granted, what is the effect of the purchase of an interest in the corpus of the trust during a taxable year—that is, is the beneficiary taxable with respect to a proportionate share of the income of the trust earned prior to the acquisition of his interest?

In general, it is the opinion of this office that the beneficiary is not taxable with respect to a proportionate share of the income of the trust earned prior to the acquisition of his interest. The proper person to pay the tax on income earned prior to the time the beneficiary acquired his interest is the prior beneficiary. So far as a general formula can be given for these cases it is believed to be as follows: In computing the gain or loss on the sale or other disposition of the interest of any beneficiary, the excess, if any, of his proportionate amount of the actual earnings of the trust, whether distributed or not, during the time he was a beneficiary, over the sum of the distributions actually made to him, shall be added to his original basis; whereas, if the actual distributions made to him exceed his proportionate amount of the earnings of the trust, whether distributed or not, during the time he was a beneficiary, such excess shall reduce his original basis. On the sale or liquidation of his interest, his gain or loss will be the difference between the amount received through the sale or liquidation and the adjusted basis of his interest.

(3) Irrespective of whether or not an election is made, may the cost recovery method be used by the trust in determining its income from the sale of property?

In General Counsel's Memorandum 4842 (C. B. VII–2, 103), it was held that where section 704(b) is applicable, and the trustee has elected to have the concern taxed as a trust, the cost recovery method may not be used by the trust in determining its income from the sale of the property, and that this is so irrespective of whether or not the trust instrument prohibits distributions to the beneficiaries until after the cost of the entire venture has been recovered. It is the opinion of this office that the same answer must be made if the trustee has not elected to have the concern taxed as a trust. In that event, it will ordinarily be taxable as a corporation, but the rule laid down in article 43 of Regulations 45, 62, 65, and 69 applies equally whether the land is handled by an individual, a trust, or a corporation. That rule requires that the sale of each lot be treated as a separate transaction, and expressly forbids a method that would permit recovery of the capital in the entire tract before net income is realized.

(4) Does a trust having a fiscal year ended during the calendar year 1928 meet the requirements of section 704(b) for that taxable period?

Section 1 of the Revenue Act of 1928 provides that the provisions of Title I shall apply only to the taxable year 1928 and succeeding taxable years. Section 48(a) provides that "taxable year" means the calendar year, or the fiscal year ending during such calendar year, and that the first taxable year, to be called the taxable year 1928, shall be the calendar year 1928 or any fiscal year ending during the calendar year 1928. Section 704(b) makes that subdivision applicable only "for the purpose of the Revenue Act of 1926 and prior Revenue Acts," and in General Counsel's Memorandum 4842, supra, it was held that this phrase "specifically excludes from its operation the taxable year 1928 and all succeeding taxable years, since the Revenue Act of 1926 or any prior Revenue Act can have no application to taxes for any taxable year subsequent to the taxable year 1927." Since the "taxable year 1928" expressly includes "any fiscal year

ending during the calendar year 1928" (section 48), it would seem to follow that a trust having a fiscal year ending during the calendar year 1928 does not, for that fiscal year, or for years following, meet the requirements of section 704(b). However, the effect of section 105 of the Revenue Act of 1928 is still to be considered. It provides:

> If it is necessary to compute the tax for a period beginning in one calendar year * * * and ending in the following calendar year * * * and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then the tax *under this title* for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a tax for the entire period, determined under the law applicable to the first calendar year and at the rates for such year, which the portion of such period falling within the first calendar year is of the entire period; and (2) the same proportion of a tax for the entire period, determined under the law applicable to the second calendar year and at the rates for such year, which the portion of such period falling within the second calendar year is of the entire period. [Italics supplied.]

It is well settled that provisions like section 105, when read in connection with provisions like section 1 and section 48, incorporate the law of the former Revenue Act as a part of the *later Act*. In other words, wherever a fiscal year ending in the calendar year 1928 is concerned, the Revenue Act of 1928 governs, but the 1926 Act, to some extent, is incorporated into the 1928 Act for the purpose of determining the tax for the 1927 portion of the year. It is the *1928* Act, however, that governs for the 1927 portion of the fiscal year as well as for the 1928 portion of that fiscal year. (See *T. B. Hord Grain Co.* v. *Blair*, Apr. 2, 1928, Ct. of Appeals, District of Columbia, 25 Fed. (2d), 536; I. T. 1875, C. B. II–2, 238.)

Moreover, section 105 itself provides that the "tax under *this* title" (i. e., under the Revenue Act of *1928*) shall be the sum of, etc., showing that the tax is laid under the 1928 Act. Now, section 704(b), by its own terms, is applicable only "for the purpose of the Revenue Act of 1926 and prior Revenue Acts." To permit a trustee to elect under that section as to any part of a fiscal year ending in 1928 would be applying that section for the purpose of the Revenue Act of *1928*, and this is specifically prohibited by the section itself. It follows, therefore, that section 704(b) has no application to any fiscal year ending in the calendar year 1928. If a trust is taxable as an association apart from 704(b), it is taxable as an association for any fiscal year ending in the calendar year 1928, and the trustee can not elect to have it taxed as a trust for any part of that fiscal year. But (and herein the true application of section 105 becomes apparent) the corporate rate for the 1927 portion of the year will be 13½ per cent, as it was under the Revenue Act of 1926, while the corporate rate for the 1928 portion of the year will be 12 per cent.

(5) Whether a trust which, as created, had more than one trustee, and pursuant to the authority contained in the declaration, the title to the property becomes vested in one trustee during the life of the trust, meets the requirements of section 704(b) for the (1) year of change in the number of trustees, (2) year or years prior to the year of change, and (3) year or years subsequent to the year of change?

It is the opinion of this office that for the year of change and the year or years prior to the year of change, the trust does not meet the requirements of section 704(b). Certainly during the years prior to

the change, and during the first portion of the year of change, the trust does not have a single trustee. Now, since taxable years are treated as units, there can be no reasonable justification for holding that the later change to a single trustee brings the trust within the requirements for the period it had more than one trustee. And since each year is a unit, it is equally impossible, without specific authority, to hold that for the later portion of the year of change the trustee may elect to have the concern taxed as a trust. For years following the year of change, however, the trust meets the requirements, and, since the taxable years are distinct units, it is immaterial that for prior years the trust had more than one trustee. This is in harmony, moreover, with the third condition under section 704(b), which requires that the trust shall not have "made a return for the *taxable year* as an association." There is no requirement that it shall not have made such a return except during the year in question.

(6) In the case where the declaration does not confine the purposes and activities of the trust to the requirements of section 704(b) but the actual activities meet such requirements, does the right of election exist?

In the opinion of this office, the answer is in the affirmative. It is true that the second condition requires that the trust be "created" and "operated" for the sole purpose of liquidating real property, but it is believed the actual activities are better evidence of the purpose of creation than the trust instrument.

(7) Assuming that the trust meets the requirements of section 704(b) in all other respects, does the fact that the trust has erected houses or other buildings on the property and sold the improved property destroy its right of election?

In view of the fact that condition (2) in section 704(b) specifically includes "improvement" as "incidental" to the "sole purpose of liquidating real property," it is the opinion of this office that the fact that houses or other buildings were erected on the property does not destroy the right of election.

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

SECTION 704.

VIII–25–4243
G. C. M. 6417

REVENUE ACT OF 1928.

The date of publication of I. T. 2061 (C. B. III–2, 5), namely, August 11, 1924, is, under section 704(a) of the Revenue Act of 1928, the effective date of *Hecht* v. *Malley* (265 U. S., 144, T. D. 3595, C. B. III–1, 489), for income tax purposes, with respect both to regulations and rulings.

An opinion is requested in connection with the administration of section 704(a) of the Revenue Act of 1928, as to the date the principle announced in *Hecht* v. *Malley* is to be treated as being effective for income tax purposes.

Section 704(a) provides as follows:

If a taxpayer filed a return as a trust for any taxable year prior to the taxable year 1925 such taxpayer shall be taxable as a trust for such year and not as a corporation, if such taxpayer was considered to be taxable as a trust

and not as a corporation either (1) under the regulations in force at the time the return was made or at the time of the termination of its existence, or (2) under any ruling of the Commissioner or any duly authorized officer of the Bureau of Internal Revenue applicable to any of such years, and interpretative of any provision of the Revenue Act of 1918, 1921, or 1924, which had not been reversed or revoked prior to the time the return was made, or under any such ruling made after the return was filed which had not been reversed or revoked prior to the time of the termination of the taxpayer's existence.

It is apparent from a study of this subsection, and from a survey of the committee reports and of the situation in general, that section 704(a) was enacted to abrogate the retroactive effect of *Hecht* v. *Malley*, supra, with respect to trusts that had reasonably relied on the Department's own interpretation of the law before that decision was promulgated. The Department, relying on *Crocker* v. *Malley* (249 U. S., 223, T. D. 2816), had previously ruled that control by the beneficiaries was essential in order that a trust should be classified as an association. In *Hecht* v. *Malley* the United States Supreme Court held that, where the trustees are carrying on business in quasi corporate form, the trust is an association regardless of the extent of control vested in the beneficiaries. The effect of this decision was that many business trusts which, in reliance on the Department's interpretation of *Crocker* v. *Malley*, had filed returns and paid taxes as strict trusts, were, for past as well as for future years, subject to taxes as corporations. Section 704(a) was therefore inserted in the Revenue Act of 1928 in order to relieve these taxpayers from reclassification for the period during which they had relied on Treasury regulations or Bureau rulings. It was accordingly provided, in effect, that if a taxpayer had filed a return as a trust for any taxable year up to, and including, the taxable year 1924 (in which year the decision in *Hecht* v. *Malley* was rendered), such taxpayer should be taxable as a trust for such year if it " was considered to be taxable as a trust " either under the regulations or rulings in force when the return was made or when its existence terminated. Since the purpose of the subsection is to aid trusts that had relied on the Department's interpretation of the law, it is apparent that the phrase, " considered to be taxable as a trust," means " considered by the *Treasury Department* to be taxable as a trust." Indeed, the phrase could not well mean " considered by the *courts* to be taxable as a trust * * * under the regulations * * * or * * * under any ruling of the Commissioner," for the courts were interpreting the Revenue Acts themselves, not Treasury regulations or rulings, and one reason for the enactment of section 704(a) was because the few court decisions during this early period were deemed inconsistent with each other. (Report of Senate Committee on Finance, pp. 44, 45.)

It becomes necessary to determine, therefore, under section 704(a), at what date a business trust was first considered by the Department to be taxable as a corporation under the regulations and rulings, regardless of the control element.

Considering, first, the regulations, it appears that when the decision of the Supreme Court in *Hecht* v. *Malley* was rendered, articles 1502, 1503, and 1504 of Regulations 62 were in force, and provided as follows:

ART. 1502. *Association.*—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pur-

suant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in corporate form is an association or corporation within the meaning of section 2, but if it continues its business in the form of a trust, it becomes subject to the provisions of section 219.

ART. 1503. *Association distinguished from partnership.*—An organization the membership interests in which are transferable without the consent of all the members, however the transfer may be otherwise restricted, and the business of which is conducted by trustees or directors and officers without the active participation of all the members as such, is an association and not a partnership. A partnership bank conducted like a corporation and so organized that the interests of its members may be transferred without the consent of the other members is a joint-stock company or association within the meaning of the statute. A partnership bank the interests of whose members can not be so transferred is a partnership.

ART. 1504. *Association distinguished from trust.*—Where trustees hold real estate subject to a lease and collect the rents, doing no business other than distributing the income less taxes and similar expenses to the holders of their receipt certificates, who have no control except the right of filling a vacancy among the trustees and of consenting to a modification of the terms of the trust, no association exists and the cestuis que trust are liable to tax as beneficiaries of a trust the income of which is to be distributed periodically, whether or not at regular intervals. But in such a trust if the trustees pursuant to the terms thereof have the right to hold the income for future distribution, the net income is taxed to the trustees instead of to the beneficiaries. See section 219 of the statute and articles 341–348. If, however, the cestuis que trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association within the meaning of the statute.

These articles are identical with the corresponding articles in Regulations 45 (1920 edition), except that the last sentence in article 1502, supra, is not contained in article 1502 of Regulations 45 (1920 edition). It is apparent that these articles, on their face, are as much, or more, consistent with the view that control by the beneficiaries is *not* essential to the existence of an association as with the contrary view. Article 1502 does not mention control at all; article 1503 implies that control by the beneficiaries in the sense of their active participation in the conduct of the business tends to show that the organization is *not* an association; and the first sentence of article 1504 plainly implies that *either* the carrying on of business by the trustees *or* control by the beneficiaries will necessitate classification as an association. Only in the last sentence of article 1504 is there any implication that, even where the trust is engaged in business, control by the beneficiaries may also be essential to the existence of an association; and the implication to that effect is less apparent than the contrary implication expressed in the first sentence of the same article. The most that can fairly be said is that these articles are not, on their face, absolutely contrary to the view that control by the beneficiaries, in some sense, may be an essential element of an association, and that an examination of the Bureau rulings shows that, after the decision in *Crocker* v. *Malley* and prior to the decision in *Hecht* v. *Malley*, a trust was not, by the Department, "*considered* to be taxable as a * * * corporation * * * under the regulations in force" unless the beneficiaries, in some sense, did control the trust.

On the other hand, article 7 of Regulations 50 and article 8 of Regulations 64, applying to capital stock taxes under the Revenue Acts of 1918 and 1921, did contain unequivocal statements that, in order to constitute an association, the beneficiaries of a trust must have a voice in the control or management of its affairs. These articles, which are identical, provided as follows:

Massachusetts trusts.—The test of liability in all cases involving trusts of the Massachusetts type is whether the cestuis que trustent have by the terms of the trust agreement a voice in the management or control of the trust. Where the trustees are in complete control of the business, the beneficiaries having no control except the right of filling vacancies among the trustees or of consenting to a modification of the terms of the trust or of dissolving the trust, no association exists. If, however, the cestuis que trustent have a voice in the control or management of the business of the trust, whether through the right to elect trustees periodically or to remove the trustees or to restrict the trustees as to the management of the trust or otherwise, the trust is an association within the meaning of the statute. Where the trustees hold in their own right a sufficient number of the certificates of beneficial interest to constitute control as between the beneficiaries, the trust will be held to be an association regardless of the powers conferred upon the trustee by the instrument creating the trust.

The decision of the Supreme Court in *Hecht* v. *Malley* was promulgated as a Treasury decision on May 28, 1924 (T. D. 3595, C. B. III–1, 489), and 10 days later the above-quoted article of the capital stock tax regulations was amended by Treasury Decision 3598 (C. B. III–1, 489) to read as follows:

In order to give effect to the decision of May 12, 1924, by the United States Supreme Court in the case of *Hecht* v. *Malley* and in the other cases named therein (Nos. 99, 100, 101, and 119—October Term, 1923), article 7 of Regulations 50 (revised edition, approved June 21, 1920) and article 8 of Regulations 64 are amended so as to read as follows:

Trusts.—Two distinct classes of trusts are recognized by the Department, namely, holding trusts and operating trusts.

Holding trusts are those in which the trustees are merely holding property for the collection of the income and distributing it among the beneficiaries and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. Such trusts are not associations within the meaning of the law and are not subject to the tax.

Operating trusts are those in which the trustees are not restricted to the mere collection of funds and paying them over to the beneficiaries but are associated together in much the same manner as directors in a corporation for the purpose of, and are actually engaged in, carrying on some business enterprise. These trusts, whether of the Massachusetts type or otherwise, are to be deemed associations within the meaning of the Act, independently of any control exercised by the beneficiaries, and subject to the tax.

The income tax regulations relating to associations were not formally amended until the promulgation of Regulations 65 on October 6, 1924, but on July 10, 1924, I. T. 2061 (C. B. III–2, 5) (first published on August 11, 1924, in Bulletin III–32, 1) was issued, providing that:

The general rule in regard to holding trusts and operating trusts which is announced in the decision of the Supreme Court * * * in * * * *Hecht* v. *Malley* and in Treasury Decision 3598 [the amendment of the capital stock regulations just quoted above] is applicable under all titles of the Revenue Acts of 1918 and 1921.

It is unmistakable, therefore, that, from the date of I. T. 2061, an operating trust was, by the Department, "considered to be taxable as a * * * corporation * * * under the regulations in force," not only for capital stock tax purposes but for income tax

purposes as well, quite irrespective of any control exercised by the beneficiaries. The reason that the income tax regulations were not formally amended until the issuance of the new regulations in October was doubtless because, as pointed out above, such regulations had never been inconsistent on their face with the view that control was not essential to the existence of an association, and amendment, therefore, was not necessary. Furthermore, if the income tax regulations *had* been inconsistent with that view, it might well have been considered that they were amended, by implication, by the publication of *Hecht* v. *Malley* as a Treasury decision, just as an act of a legislature, though no mention is made of prior acts, will nevertheless modify or revoke those that are inconsistent with the later act.

It may be contended that if the foregoing is true, there was no occasion to change article 1504 in Regulations 65. But that does not follow. The change is easily justified as being intended to clarify what otherwise might require some study to determine. Furthermore, the change not only clarified the position of the Department that the business element was sufficient without control, but, like Treasury Decision 3598, supra, it discarded the control test altogether, by providing in effect that control by the beneficiaries, without business, was insufficient to constitute an association. This concession, which was not required by *Hecht* v. *Malley*, was eliminated some 10 months later by Treasury Decision 3748 (C. B. IV–2, 7).

It is apparent from the foregoing that under the strict letter of section 704(a), the date of publication of *Hecht* v. *Malley* as a Treasury decision could well be taken as the date when its principle first became effective for income tax purposes, on the theory that the Treasury decision revoked or modified all prior inconsistent income tax rulings (and inconsistent income tax regulations, too, if there had been any such).

However, the spirit of the subsection requires that taxpayers be protected who filed returns as trusts in reasonable reliance on the Department's attitude at the time. *Hecht* v. *Malley* was a capital stock tax case, and though, on strict theory, under the general definition in the Revenue Acts that "the term 'corporation' includes associations, joint-stock companies, and insurance companies," the essential elements of an association for income tax purposes and for capital stock tax purposes must be the same, it can not be said, in view of the fact that income tax regulations and capital stock tax regulations, defining the term "association," were both in existence in somewhat different language, that either the publication of *Hecht* v. *Malley* as a Treasury decision, or the publication of Treasury Decision 3598, supra, amending the capital stock tax regulations, made it clear to taxpayers that a business trust, uncontrolled by its beneficiaries, was, for income tax purposes, "considered [by the Treasury Department] to be taxable as a * * * corporation * * * under the regulations in force." That it was so considered was made entirely clear, however, by I. T. 2061, supra, and it is, therefore, the opinion of this office that August 11, 1924, the date of publication of that ruling, is, under section 704(a), the effective date of *Hecht* v. *Malley*, for income tax purposes, with respect both to regulations and rulings.

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

INCOME TAX RULINGS.—PART II.

REVENUE ACT OF 1926.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 206.—NET LOSSES.

ARTICLE 1624: Net losses for 1923 and 1924. VIII-4-4077
G. C. M. 5457

REVENUE ACT OF 1926.

Taxpayer voluntarily changed its accounting period from a fiscal year ending October 31 to the calendar year, and sustained a net loss for the period from November 1, 1923, to December 31, 1923.

Held, that the taxpayer may deduct the net loss sustained during the period from November 1 to December 31, 1923, from the income of the calendar year 1925, there being no net income derived in 1924. Recommended that Office Decision 445 (C. B. 2, 58), Office Decision 855 (C. B. 4, 54), I. T. 1211 (C. B. I-1, 47), Appeals and Review Recommendation 743 (C. B. I-1, 45), Appeals and Review Recommendation 1128 (C. B. I-2, 34), I. T. 1465 (C. B. I-2, 36), and I. T. 1509 (C. B. I-2, 39), in so far as they are inconsistent with this ruling, be revoked.

In 1923 the taxpayer voluntarily changed its accounting period from a fiscal year ending October 31 to the calendar year and sustained a net loss of x dollars for the period from November 1, 1923, to December 31, 1923. A net loss was sustained by the taxpayer for the calendar year 1924, but net income was derived in 1925. It is contended that the net loss for the two-month period in 1923 can not be carried forward and applied against the net income for the succeeding and next succeeding taxable years.

In the recent case of the *Pennsylvania Chocolate Co.* v. *C. G. Lewellyn* (27 Fed. (2d), 762, T. D. 4200, C. B. VII-2, 244), the District Court for the Western District of Pennsylvania held that a net loss sustained in an 11-month period resulting from a voluntary change in accounting period, approved by the Commissioner, may be applied against the net income for the preceding taxable year, such period of less than 12 months being a "taxable year" within the meaning of section 204(b) of the Revenue Act of 1918. After comparing a number of Board of Tax Appeals decisions upon this subject, the court used the following language:

* * * Having due regard to the various statutes in which the term is used by Congress, I think the words "taxable year," when fairly interpreted, mean taxable period, whether for 12 months or less. Any doubt or ambiguity regarding the meaning of "taxable year" has been removed in section 200 of the Revenue Acts of 1924 and 1926. By an express provision these Acts contain net loss or relief provisions somewhat similar to those contained in section 204(b) of the Act of 1918.

The return of this taxpayer for the period from February 1, 1919, to December 31, 1919, was required both by Act and regulations. It would appear rea-

sonably clear that that became the time unit for the periods of the tax, and thus the taxable year. If there is doubt on the subject it should be construed in favor of the taxpayer. The Acts of 1924 and 1926 do not explain or restrict the application of the Acts of 1918 and 1921, but seem rather to explain a provision in the former, the construction of which was doubtful.

It is my conclusion, therefore, that the term "taxable year" includes a period of less than 12 months when a taxpayer voluntarily, but subject to and with the approval of the Commissioner, changes its accounting period from a fiscal to a calendar year basis, and that the taxpayer is, therefore, entitled to apply the net loss sustained during that period against the net income for the fiscal year ending January 31, 1919. * * *

It is evident that the application of the foregoing decision to the instant case requires the recognition of the period from November 1, 1923, to December 31, 1923, as a "taxable year." Consequently, the net loss in the sum of x dollars sustained during the two-month period should be applied against the net income derived in the calendar year 1925, there being no net income derived in 1924.

It is recommended that Office Decision 445 (C. B. 2, 58), Office Decision 855 (C. B. 4, 54), I. T. 1211 (C. B. I–1, 47), Appeals and Review Recommendation 743 (C. B. I–1, 45), Appeals and Review Recommendation 1128 (C. B. I–2, 34), I. T. 1465 (C. B. I–2, 36), and I. T. 1509 (C. B. I–2, 39), in so far as they are inconsistent herewith, be revoked.

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

SECTION 208.—CAPITAL GAINS AND LOSSES.

ARTICLE 1651: Definition and illustration of capital net gain. VIII–16–4176 I. T. 2469

REVENUE ACT OF 1926.

Taxpayer purchased two vacant lots, one in 1923 and the other in 1925. Early in 1927 he erected a filling station on each lot, and later during the same year the entire properties were sold at a profit.

Held, inasmuch as the lots were "capital assets," within the meaning of section 208 of the Revenue Act of 1926, the taxpayer may elect to have the portion of the profit from the sale which is allocable to the lots taxed to him as a capital gain. Since the filling stations were erected less than two years prior to their sale, they were not held by the taxpayer for more than two years and were not capital assets within the meaning of section 208.

Advice is requested as to whether the taxpayer may elect to have the gain realized from the sale of certain properties taxed to him as capital gain under section 208 of the Revenue Act of 1926 or whether such gain must be treated by him as ordinary income.

It appears that the taxpayer purchased two vacant lots, one lot being purchased in 1923 and the other in 1925. Early in 1927 he erected a filling station on each lot. Subsequently, in 1927, the entire properties were sold at a profit.

Subdivision (a) (8) of section 208 of the Revenue Act of 1926 provides in part as follows:

The term "capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but

does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. * * *

Subdivision (b) of the same section provides:

In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain.

Inasmuch as the lots were "capital assets" within the meaning of section 208 of the Revenue Act of 1926, the taxpayer may elect to have the portion of the profit from the sale which is allocable to the lots taxed to him as a capital gain under that section. Since the filling stations were erected less than two years prior to their sale, they were not held by the taxpayer for more than two years and were not capital assets within the meaning of section 208. Therefore the taxpayer may not elect to have the portion of the profit which is allocable to the filling stations taxed to him as capital gain under section 208, but must treat such portion as ordinary income.

PART II.—INDIVIDUALS.

SECTION 212.—NET INCOME OF INDIVIDUALS DEFINED.

ARTICLE 22: Computation of net income. VIII–15–4170
I. T. 2468

REVENUE ACT OF 1926.

During 1927 the taxpayer sold shares of stock for $24x$ dollars. The purchaser paid $3x$ dollars cash. As part of the consideration he assumed an unpaid balance of x dollars due from taxpayer on the purchase price of the stock.

Held, the effect of the assumption by the purchaser of the unpaid balance due from the taxpayer is considered to be the same as that of the assumption of an existing mortgage in connection with a sale of property as provided in article 44, Regulations 69, as amended by Treasury Decision 4255 (see on page 165).

Advice is requested as to the proper treatment, for income tax purposes, of a sale of stock made by A during the year 1927.

It appears that the stock in question was sold for a total consideration of $24x$ dollars, of which amount $3x$ dollars was paid by the purchaser in cash during 1927. As part of the consideration the purchaser assumed an unpaid balance due from the taxpayer on the purchase price of the shares of stock in the amount of x dollars. The question is raised as to whether the amount so assumed should be considered as part of the initial payment on the sale received by the taxpayer during 1927, or whether the treatment of such amount should be similar to that of a mortgage assumed by the purchaser as provided in the last paragraph of article 44 of Regulations 69, as

amended by Treasury Decision 4255 (see on page 165). Such paragraph, so far as pertinent, provides:

> In the sale of mortgaged property the amount of the mortgage, whether the property is merely taken subject to the mortgage or whether the mortgage is assumed by the purchaser, shall be included as a part of the "purchase price," but the amount of the mortgage, to the extent it does not exceed the basis to the vendor of the property sold, shall not be considered as a part of the "initial payments" or of the "total contract price," as those terms are used in section 212(d), in articles 42 and 45, and in this article.

Held, the effect of the assumption by the purchaser of the unpaid balance due from the taxpayer on the stock mentioned is considered to be the same as that of the assumption of an existing mortgage in connection with a sale of property. Applying this rule to the instant case, it follows that the amount of x dollars in question did not constitute a part of the initial payment received by the taxpayer in 1927.

ARTICLE 23: Bases of computation.

REVENUE ACT OF 1926.

Accrual of real and personal property taxes. (See G. C. M. 6273, page 168.)

ARTICLE 23: Bases of computation.

REVENUE ACT OF 1926.

Accrual of Texas property taxes. (See G. C. M. 6272, page 170.)

ARTICLE 23: Bases of computation.

REVENUE ACT OF 1926.

Accruals of Wisconsin income taxes. (See G. C. M. 6075, page 76.)

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 31: What included in gross income. VIII–9–4124
G. C. M. 5741

REVENUE ACTS OF 1921, 1924, AND 1926.

> Amounts received under the terms of a will leaving property in trust and providing that the income from such trust should be paid to a designated beneficiary, the daughter of the testator, represent income to the recipient and constitute her separate property under the laws of Texas.

The will of A devised certain properties to trustees, a proportion of the income from which was to be paid periodically to his daughter,

B, the taxpayer. No part of the corpus of the trust was to be paid to her. The amounts received by her from the trustees during the taxable years in question constitute the income the status of which is in controversy. The taxpayer and her husband, C, are residents of the State of Texas.

Two questions are presented for opinion:

1. Was the income received by B from the trustees for the years 1923, 1924, 1925, and 1926 taxable income?

2. Was such income her separate property or was it community property under the laws of Texas?

The first question must be resolved in the affirmative. The Supreme Court, in the case of *Irwin* v. *Gavit* (268 U. S., 161, T. D. 3710, C. B. IV–1, 123), held that amounts received under the terms of a will leaving the residue of an estate in trust and providing that the income from the trust estate be paid to a designated person, are taxable as income. The facts in the instant case are clearly analogous, and it is therefore clear that the trust income received by B was taxable.

To ascertain whether the income under consideration was the separate property of the wife or was community property recourse must be had to the laws of Texas.

The constitution of the State of Texas, in Article XVI, section 15, clearly defines what is the separate property of the wife. The pertinent provisions are as follows:

> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband.

The Supreme Court of Texas, in *Arnold* v. *Leonard* (114 Tex., 535, 273 S. W., 799 (1925)), stated that this language had been incorporated in the constitution of 1845, and retained in all the constitutions of that State adopted since. In construing that section the court said:

> The plain and obvious import of the language of the constitution is to prescribe a test by which to determine when an acquest by the wife becomes a portion of the wife's separate estate. The test during coverture relates to the method by which the property is acquired. If the method be by gift, devise, or descent to the wife, then the constitution makes the property belong to the wife's separate estate. If the method of acquiring during marriage be different, then the property falls without the class of separate estate of the wife, as fixed by the constitution. We think the supreme court was doing no more than giving effect to the words of the constitution when it said:
>
> "But of the property which a wife may acquire during marriage, none becomes her separate estate, except such as is derived by gift, devise or descent." (*Ezell* v. *Dodson*, 60 Tex., 332.)

In the same case the court said that it could "conceive of no sound reason for concluding that the terms of the constitution of 1845 were not meant to furnish the *sole measure of the wife's separate estate.*" [Italics supplied.] The court also said that the legislature could not enlarge or diminish the separate property of a wife, as so defined in the constitution. Section 15 of Article XVI of the constitution of the State of Texas, then, remains the test whether property acquired by a wife subsequent to coverture is her separate property or is community property.

It is the opinion of this office that the income in the instant case, paid to the taxpayer by the trustees, under the terms of the will

of her father, was acquired by "devise" as that word is used in the constitution of the State of Texas. That the income was not "property acquired by gift, bequest, devise, or descent" within the meaning of section 213(b)3 of the various Revenue Acts (*Irwin* v. *Gavit*, supra) is deemed immaterial. The taxpayer received the income under the terms of a devise in the will of her father. The income was not acquired by purchase or by any other similar means whereby property is acquired. It thus comes within the definition of separate property of a wife as set forth in the above-mentioned section of the Texas Constitution.

This conclusion is supported by decisions of the Supreme Court of Texas. In the case of *McClelland* v. *McClelland* (37 S. W., 350), a testator had created a spendthrift trust for his son. The estate was left to trustees, with directions to pay over certain income to the son monthly for his support. The son's wife in a proceeding in divorce sought to recover an interest in the trust estate by virtue of the community property laws. The court denied recovery, and said, moreover, "the wife is not entitled to receive any interest in the amounts received by the appellant, McClelland, from the executors, because these amounts were his separate property, devised to him by the will, in which the wife had no community interest." This decision was adverted to by the Supreme Court of Texas in the case of *Hoffman* v. *Rose* (217 S. W., 424, 428), where the court said that on the McClelland case "the wife could not recover any interest in the income as a part of the community estate."

This office therefore has reached the conclusion that the income in the instant case was taxable to the wife and constituted her separate property under the laws of Texas.

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

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1926.

Income from restricted Indian land conveyed by one member of the Otoe Tribe of Indians to another member of the tribe, the deed containing restrictions as to alienation by the grantee. (See G. C. M. 6020, page 63.)

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1926.

Combined life insurance and annuity contracts referred to as "Life annuity with death benefit" contract and "Participating life income policy with principal sum payable at death." (See G. C. M. 6395, page 67.)

ARTICLE 32: Compensation for personal services. VIII-13-4157 G. C. M. 5792

REVENUE ACTS OF 1924 AND 1926.

In October, 1924, the stock of the M Company, an operating corporation, which was entirely owned by the N Company, a holding corporation, was sold to the O Company. In November, 1924, after consummation of the sale, a resolution was adopted by the board of directors of the holding corporation authorizing the payment of additional compensation to officers and employees of the operating corporation in recognition of long and faithful services. A payment of x dollars was made to the taxpayer, an executive of the old operating corporation, toward the end of 1924, and a payment of $2x$ dollars was made in 1925.

Held, the payments in question were not gifts to the taxpayer but additional compensation for services previously rendered and constituted taxable income.

An opinion is requested relative to the taxability of a payment made to A by the N Company, x dollars of which was received in 1924 and $2x$ dollars of which was received in 1925.

The taxpayer, A, was an executive of the M Company, an operating corporation, whose stock was entirely owned by the N Company, a holding corporation with very few stockholders. On October —, 1924, the capital stock of the operating corporation was sold by the holding corporation to the O Company, the consideration being specified as securities of the O Company.

On November —, 1924, after consummation of the sale of the operating corporation stock, the following resolution was adopted by the board of directors of the holding corporation, and later approved by the stockholders:

* * * The directors of the N Company request that the stockholders of the company authorize them, *in recognition of the long and faithful services of the officers and employees* of the M Company, to pay the officers and employees to be designated by the board of directors additional compensation to be decided by the board of directors, and that they be authorized to set aside for *such compensation* a sum not to exceed $10x$ dollars. [Italics supplied.]

This resolution was induced, in part, by the fact that the O Company made radical changes in the terms and conditions of employment of the employees of the M Company, some of whom severed their connection with the O Company at that time. It was also induced, in part, by a friendly feeling for the employees of the operating corporation, due to many years of association.

After the passage of the resolution, it was found that there were no available cash funds from which to make the payment. The holding corporation's stock in the operating corporation had all been transferred to the O Company, and as the holding corporation had no liquid assets, the holding corporation acting through its stockholders decided to raise the funds to make the payment by the sale of some of the O Company bonds. A committee of stockholders of the holding corporation was formed, and the O Company, on the order of the said stockholders acting for the holding corporation, turned over to the committee O Company bonds to an approximate amount of $10x$ dollars, this being part of the consideration for the sale of the operating corporation stock. The bonds were sold, and the proceeds then paid by the committee to the officers and employees of the old operating corporation, including the taxpayer, A. In making the payment

the committee was acting for the holding corporation and in pursuance of the resolution of November —, 1924.

The payment to the taxpayer in the instant case must be regarded not as a gift but as compensation paid for services previously rendered. Whether or not such a payment is a gift must depend upon the intention of the parties and the facts and circumstances surrounding the transaction.

The very purpose of the payment in question precludes the idea of a gift, inasmuch as there was a consideration for the payment, namely, "the long and faithful services of the officers and employees of the M Company," which were to be paid for by this "additional compensation." (See I. T. 1262, C. B. I–1, 71; I. T. 1600, C. B. II–1, 184; O. D. 570, C. B. 3, 144.)

From the wording of the resolution of November —, 1924, which was passed by the board of directors of the holding corporation and approved by the stockholders, and in pursuance of which the payment was made, it appears that it was the intention of the holding corporation to make payments to "officers and employees to be designated by the board." The distribution was made and intended to be made as "additional compensation" to those who had rendered services to the old operating corporation; that is, to those from whom the holding corporation had received a consideration in the past. Payment was to be made in accordance with the deserts of the persons to be benefited by the payment. The payment was thus to be in the nature of a bonus, which "is not a gift or gratuity, but a sum paid for services or upon a consideration in addition to or in excess of that which would ordinarily be given." (See *Noel* v. *Parrott*, 15 Fed. (2d), 669, T. D. 3908, C. B. V–2, 149, and cases there cited; and *Woods & Sons Co.* v. *Commissioner*, 8 B. T. A., 705, C. B. VII–1, 34.)

The instant case, in many essential features, is analogous to that of *Jones et al.* v. *Commissioner* (10 B. T. A., 202). In the latter case the taxpayer petitioners had received certain amounts out of a fund created by former stockholders of the employer corporation from the proceeds from the sale of their stock, which fund was created for the purpose, among others, of making payments to certain officers and employees of the corporation on account of the sudden termination of the business association and in recognition of the efforts and devotion of these officers and employees in the accession in the value of the stockholders' property. The amounts so received were regarded by the petitioners as gifts and excluded from gross income in their returns. The Board of Tax Appeals held that the amounts constituted taxable income.

The instant case is also somewhat similar to the case of *Mount* v. *Commissioner* (10 B. T. A., 1156), where the amount given to an employee after he resigned was held to be additional compensation; likewise to the case of *Beatty* v. *Commissioner* (7 B. T. A., 726), where the additional compensation was in consideration of past services and, therefore, not a gift. (And see O. D. 1029, C. B. 5, 85.)

An additional fact showing the nature of the payments is obtained from the language used in the minutes of the committee showing passage of the resolution authorizing the secretary of the committee to make the payments. This minute reads as follows:

Upon motion duly seconded and carried, the secretary was authorized to release the checks in payment of certain bonuses to the amount of 10x dollars, as per memorandum on file.

The taxpayer alleges that the amount paid in 1924 was in the nature of a Christmas gift. The time of the year when this part of the payment was made can not, ipso facto, transmute it into a Christmas gift. The deal with the O Company was practically consummated about November —, 1924. The resolution in question was passed on November —, 1924, and by the time the first part of the payment could be made the Christmas season of 1924 was reached. Such part of the payment merely happened to be made during the Christmas season. The time when it was made had nothing to do with its nature or purpose.

The instant case is clearly distinguishable from the appeal of Estate of David R. Daly (3 B. T. A., 1042, C. B. VII–1, 8). In the Daly case the Board of Tax Appeals held that the intention of the employer to make a gift was clear, as was the intention of the employer in the case of *Spang-Chalfant & Co., Inc.*, v. *Commissioner* (9 B. T. A., 858, C. B. VII–1, 28), and in the case of *Rosseter* v. *Commissioner* (12 B. T. A., 254), nonacquiesced in by Commissioner (C. B. VII–2, 51). In the instant case it is quite as clear that the payment to the taxpayer was intended as additional compensation.

In view of the foregoing, this office is of the opinion that the amounts paid to the taxpayer in 1924 and 1925 by the N Company were not gifts, but constituted taxable income.

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

Article 44: Sale of real property involving deferred payments. VIII–2–4067 T. D. 4255

INCOME TAX.

Article 44 of Regulations 69 amended.

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last paragraph of article 44 of Regulations 69 is hereby amended to read as follows:

In the sale of mortgaged property the amount of the mortgage, whether the property is merely taken subject to the mortgage or whether the mortgage is assumed by the purchaser, shall be included as a part of the "purchase price," but the amount of the mortgage, to the extent it does not exceed the basis to the vendor of the property sold, shall not be considered as a part of the "initial payments" or of the "total contract price," as those terms are used in section 212(d), in articles 42 and 45, and in this article. Commissions and other selling expenses paid or incurred by the vendor are not to be deducted or taken into account in determining the amount of the "initial payments," the "total contract price," or the "purchase price."

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

Approved January 8, 1929.

A. W. Mellon,
Secretary of the Treasury.

SECTION 213(b).—GROSS INCOME DEFINED: EXCLUSIONS.

ARTICLE 72: Proceeds of insurance—Compensation—Pensions.

REVENUE ACT OF 1926.

Combined life insurance and annuity contracts referred to as "Life annuity with death benefit" contract and "Participating life income policy with principal sum payable at death." (See G. C. M. 6395, page 67.)

SECTION 214(a)1.—DEDUCTIONS ALLOWED INDIVIDUALS: BUSINESS EXPENSES.

ARTICLE 101: Business expenses. VIII–2–4062
G. C. M. 5533

REVENUE ACT OF 1926.

Expenditures made by motion picture actors in entertaining newspaper reporters are not deductible as ordinary and necessary expenses directly connected with or pertaining to their business.

Expenditures made by such actors for the upkeep and operation of their automobiles are allowable deductions as business expenses to the extent that they represent the cost of transportation actually required in carrying on their business.

An opinion is requested regarding the deductibility of certain expenditures incurred by A and his wife in connection with their business as motion picture actors.

It appears that A and his wife, the taxpayers, spend considerable sums annually in entertaining newspaper reporters at luncheons, dinners, and the theater. The contention is made that actors must do entertaining of such nature in order to obtain favorable publicity and maintain their popularity with the public; that the cost of such entertaining is, in reality, an expense for advertising; and that the amount thereof should be allowed as a deductible business expense. Expenditures are also made by the taxpayers for the maintenance of an automobile and the employment of a chauffeur. Although A is employed under contract, he must furnish much of his own transportation, and his wife, who does "free lance" acting, must furnish all of hers. The automobile is used by the taxpayers not only in going from their home to their studios, but also in going from their studios to the studio-ranch, and in going from place to place to make tests for parts in new pictures. The taxpayers also use the car in going to view pictures, which is a part of their research work. Their plan is to see as many pictures as possible in order to detect errors, gather new ideas, and thus improve their own acting. The chauffeur drives the automobile on the various trips described and also drives alone on errands in connection with the taxpayers' business.

It is the opinion of this office that expenditures made by A and his wife in entertaining newspaper reporters are not ordinary and necessary expenses directly connected with or pertaining to their business and, therefore, should not be allowed as deductions for business expenses. (See article 101 of Regulations 69.) The ex-

penses are not those of advertising, as that term is generally used. They are, in fact, incurred in developing personal good will among publicity writers. It is expected by the taxpayers that, as a result of such entertaining, they will receive favorable publicity in the newspapers, that their popularity with the public will thereby be promoted, that the demand for films which they have helped to produce will be increased, and that their income from the producers will, in turn, be affected. While the expenditures may be beneficial to the taxpayers' business, they are too remote from that business and too personal in character to be considered business expenses within the meaning of the statute. Personal popularity, like broad acquaintanceship, good health, good reputation, and proper personal appearance, may play a more or less important part in the successful conduct of any business, yet it is, nevertheless, a personal attribute, and sums expended for its advancement must be regarded, for taxing purposes, as personal expenses. The law makes no exception in the case of a taxpayer who, by reason of his carrying on a certain business, is obliged to spend more for personal expenses than he would otherwise but for the carrying on of such business. (O. D. 1032, C. B. 5, 172.)

Expenditures made by the taxpayers for the upkeep and operation of their automobile should be allowed as deductions to the extent that they represent the cost of transportation actually required in carrying on their business. Article 105 of Regulations 69 authorizes the deduction of automobile expenses incurred by professional men in making professional calls. The same rule may be applied with respect to actors. Thus, the use of the automobile in going from the taxpayers' studios to the studio-ranch for the purpose of acting is a business use, and, if other means of transportation are not provided, the cost of operating the automobile for such purpose should be allowed as a deduction. (A. R. R. 266, C. B. 3, 131; *Kay* v. *Commissioner*, 10 B. T. A., 534, C. B. VII–1, 17.) If, however, other transportation is supplied by the moving-picture producers, use of the automobile is not necessary, even though convenient, and the expense of its operation is not deductible. The cost of transportation from the taxpayers' home to their studios is a personal expense and should not be deducted. (Appeal of Frank H. Sullivan, 1 B. T. A., 93.) It has been held that expenses incurred, not in the course of employment but in search for employment, are personal expenses (I. T. 1397, C. B. I–2, 145); hence, expenditures made by A's wife for transportation in seeking employment as a "free lance" actor are not deductible. Expenditures incurred in connection with educational or research work are also personal. (I. T. 1520, C. B. I–2, 145.)

The expense of employing a chauffeur should be regarded in the same manner as the expense of operating an automobile. If the expenditure is not ordinary and necessary with respect to the taxpayer's business, it should not be deducted as a business expense. On the other hand, if the expenditure appears ordinary and necessary, in view of all surrounding circumstances, it should be allowed as a deduction. (*Kay* v. *Commissioner* (supra).) In determining to what extent a chauffeur is employed for business purposes a similar

test should be applied as in determining the extent to which an automobile is employed for business purposes.

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

ARTICLE 112: When charges deductible.

REVENUE ACT OF 1926.

Freight charges of lumber manufacturers keeping books on accrual basis. (See I. T. 2473, page 88.)

SECTION 214(a)3.—DEDUCTIONS ALLOWED INDIVIDUALS: TAXES.

ARTICLE 131: Taxes. VIII–21–4212
(Also Section 212, Article 23.) G. C. M. 6273

REVENUE ACT OF 1926.

In the State of Illinois, the liability for real and personal property taxes is incurred on April 1 of each year, and accordingly such taxes accrue on that date for income tax purposes.

General Counsel's Memorandum 1240 (C. B. VI–1, 65), General Counsel's Memorandum 3244 (C. B. VII–1, 82), and all other General Counsel's memoranda inconsistent herewith are revoked.

This office has been requested to reconsider General Counsel's Memorandum 3244, on the ground that said memorandum is contrary to the decision of the United States Board of Tax Appeals in *H. H. Brown Co.* v. *Commissioner* (8 B. T. A., 112), in which decision the Commissioner has acquiesced (C. B. VII–1, 5).

From the Illinois Revised Statutes, it appears that before the 1st day of June of each year the county assessor is required to assess the value of both real and personal property as of the 1st day of April and deliver the assessment books to the county clerk on or before the 1st day of July. The assessments are reviewed and equalized as provided by law, and on or before the 7th day of September are delivered to the county clerk. The county clerk is then required to ascertain the rates per cent required to be extended upon the assessed valuation of the taxable property in the respective towns, townships, districts, incorporated cities, and villages in his county as equalized by the State tax commission for the current year to produce the several amounts certified for extension by the taxing authorities in the said county. There is no date specified by the statute upon which the property taxes are due and payable, but they are required to be paid upon demand by the collector, and in the case of neglect or refusal to pay the tax the property is subject to distraint. It is further provided that to each collector's book a warrant, under the hand and official seal of the county clerk, shall be annexed, commanding the collector to collect from the several persons named in said book the several sums entered in the column of totals opposite their respective names. (Smith-Hurd Illinois Revised Statutes, 1925, ch. 120, secs. 94 to 330.)

The revised statutes specifically provide that:

* * * the owner of property on the 1st day of April in any year shall be liable for the taxes of that year.

The purchaser of property on the 1st day of April shall be considered as the owner on that day. (Ch. 120, sec. 287.)

In *People ex rel. McCullough* v. *Ladies of Loretto* (246 Ill., 403, 92 N. E., 908), the Supreme Court of Illinois had before it for consideration the following state of facts: The Ladies of Loretto was a corporation, not for pecuniary profit, organized under the laws of Illinois for educational and charitable purposes. It purchased certain real estate on June 22, 1909, and claimed that the property was exempt from taxation. The court said in part:

Several objections to the sufficiency of the evidence to bring the property within the law exempting property from taxation were presented by the auditor to the board of review and certified to this court; but, inasmuch as there is a fatal objection to the petition, regardless of the evidence, the other objections will not be considered. The corporation was not the owner of the lots in question on the 1st day of April, 1909, but acquired the same by warranty deed on June 22, 1909. The lien of the State for taxes of the year 1909 attached to the property on the 1st day of April of that year, when it was subject to taxation, and, being charged with the lien, it was not relieved therefrom by the fact that the corporation acquired title afterward. If the property was afterward devoted to religious or educational purposes, that fact did not remove the lien or discharge the obligation. *People* v. *St. Francis Academy* (233 Ill., 26, 84 N. E., 55).

See also *People* v. *Catholic Bishop of Chicago* (311 Ill., 11, 142 N. E., 520), to the same general effect.

In *H. H. Brown Co.* v. *Commissioner*, the Board of Tax Appeals considered the question of when property taxes in Massachusetts may be deducted by a taxpayer keeping its accounts on an accrual basis. The petitioner kept its books and filed its income tax return on the basis of a fiscal year ending June 30. In Massachusetts real estate is assessed in the town where it lies, to the person who is either the owner or in possession thereof on the 1st day of April of each year. Personal estate is assessed to the owner in the town where he is a resident on April 1. The Board reached the conclusion that the property taxes paid by the petitioner in October, 1922, were liabilities of the petitioner on April 1 of that year, and under the accrual basis were deductible from gross income for the fiscal year ending June 30, 1922.

The Board relied in part on the decision of the Supreme Judicial Court of Massachusetts in *Richardson* v. *Boston* (148 Mass., 508, 20 N. E., 166), decided under a statute that fixed May 1, instead of April 1, as the day as of which property should be assessed. That case involved the following facts: Certain real estate in Boston was assessed as of May 1, 1883, to the then owner. On May 25, 1883, the Commonwealth took the property under the right of eminent domain. The court held that the owner on May 1 was personally liable for the tax as of that day, though the lien had been lost, since the Commonwealth was, after May 25, both the owner of the property and entitled to the tax.

In both *People ex rel. McCullough* v. *Ladies of Loretto* and in *Richardson* v. *Boston*, supra, the courts held in effect that the ownership or possession of property on a certain day created a liability for payment of the tax, and, as said in the Richardson case, with refer-

ence to the owners on that day, "The failure to actually assess and collect the tax on that day does not affect their legal position."

The United States Supreme Court said in *United States* v. *Anderson et al.* (269 U. S., 422, T. D. 3839 (C. B. V–1, 179)):

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

The ownership of property in Illinois on April 1 is the "event" which determines the liability for property taxes, and fixes the amount, although not ascertainable on that date. As the Board said in the Brown case:

> 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.]

In view of the foregoing, it is the opinion of this office that in the State of Illinois the liability for property taxes is incurred on April 1 of each year, and accordingly that such taxes accrue on that date for income tax purposes.

General Counsel's Memorandum 1240, General Counsel's Memorandum 3244, and all memoranda of this office inconsistent herewith are revoked.

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

ARTICLE 131: Taxes.

REVENUE ACT OF 1926.

Gasoline tax imposed by the Michigan statute, approved January 29, 1925. (See I. T. 2465, page 72.)

ARTICLE 131: Taxes.
(Also Section 212, Article 23.)

VIII–22–4219
G. C. M. 6272

REVENUE ACT OF 1926.

> In the State of Texas, the liability for property taxes is incurred on January 1 of each year. Accordingly, for income tax purposes, such taxes accrue on that date.

An opinion is requested as to the date of the accrual of certain property taxes imposed by the laws of Texas.

For 1924 the taxpayer filed its income tax return on an accrual-calendar year basis. Thereafter it changed to an accrual-fiscal year basis, and filed a return for the period January 1 to June 30, 1925. On this return the taxpayer deducted one-half of the State, county,

and city property taxes imposed with reference to property held or owned on January 1, 1925. This deduction was claimed on the theory that one-half of these taxes accrued prior to June 30, 1925. The taxes were not payable until October 1 and could be paid without incurring a charge for delinquency up to February 1 of the following year. The contention is made that no part of such taxes accrued prior to June 30, 1925.

From the Texas Revised Civil Statutes it appears that all property must be listed for taxation between January 1 and April 30 of each year, when required by the assessor, with reference to the quantity held or owned on the 1st day of January in the year for which the property is required to be listed or rendered. Any property purchased or acquired on the 1st day of January shall be listed by or for the person purchasing or acquiring it. Each assessor of taxes is required between the 1st day of January and the 30th day of April of each year to proceed to take a list of the taxable property in his county and assess the value thereof. The assessor is required prior to the first Monday in June or as soon thereafter as practicable to submit to the board of equalization for his county for inspection, approval, correction, or equalization all the lists of property rendered to him. After the approved list is returned to the assessor he is required to make a roll or book, as required by the comptroller, from the corrected list. On or before August 1 he must submit this roll or assessment book to the county board of equalization. After the board of equalization has returned the roll or assessment book, a copy thereof must be delivered to the tax collector. On or before October 1, or as soon thereafter as the collector is able to obtain the assessment roll or book, he is required to begin the collection of taxes. (Revised Civil Statutes of Texas, 1925, title 122, chapter 6, article 7151; chapter 7, articles 7189, 7218, 7219, 7222, and 7224; chapter 8, article 7255.)

In the case of *Winters et al.* v. *Independent School District of Evant* (208 S. W., 574), it was held by the Texas Court of Civil Appeals that "the ownership of property on the 1st day of January of any year creates a liability on the part of the owner for taxes levied upon such property for that year."

The United States Supreme Court said in *United States* v. *Anderson et al.* (269 U. S., 422–433, T. D. 3839 (C. B. V–1, 179)):

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

The ownership of property in Texas on January 1 is the "event" which determines the liability for property taxes, and fixes the amount, although not ascertainable on that date. (See G. C. M. 6273, on page 168.)

Accordingly, it is the opinion of this office that in the instant case, the liability for property taxes having been incurred on January 1, the taxes accrued on that date for income tax purposes. It follows that all of the property taxes, rather than one-half thereof, for which the taxpayer became liable on January 1, 1925, were properly deductible from gross income for the six-month period ended June 30, 1925.

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

ARTICLE 131: Taxes.

REVENUE ACT OF 1926.

Accruals of Wisconsin income taxes. (See G. C. M. 6075, page 76.)

ARTICLE 133: Taxes for local benefits.

REVENUE ACT OF 1926.

Treatment. (See G. C. M. 5589, page 83.)

SECTION 214(a)8.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPRECIATION.

ARTICLE 162: Depreciable property.

REVENUE ACT OF 1926.

Assessment for street improvements on front-foot or valuation basis. (See G. C. M. 5589, page 83.)

SECTION 214(a)10.—DEDUCTIONS ALLOWED INDIVIDUALS: CONTRIBUTIONS OR GIFTS.

ARTICLE 251: Contributions or gifts.

REVENUE ACT OF 1926.

Navy and Marine Memorial Association. (See I. T. 2460, page 98.)

ARTICLE 251: Contributions or gifts. VIII-15-4171
G. C. M. 5952

REVENUE ACT OF 1926.

A college fraternity having a fraternity house which is used as a meeting place and for entertainments, and at which many of its members live, is primarily a social organization and is not organized exclusively for scientific, literary, or educational purposes. Contributions to such an organization are not deductible in computing net income.

The question is submitted whether the amount contributed by A to the M fraternity at R College is deductible by him in computing net income, under section 214(a)10 of the Revenue Act of 1926.

Section 214(a)10 provides in part as follows:

In computing net income there shall be allowed as deductions [to individuals]:

(10) Contributions or gifts made within the taxable year to or for the use of: * * *

(B) Any corporation, * * * organized and operated exclusively for * * * scientific, literary, or educational purposes, * * *, no part of the net earnings of which inures to the benefit of any private shareholder or individual; * * *.

A states that the M fraternity, with its various chapters, is the usual type of college fraternity; that at R College, where the amount of his contribution was spent, the fraternity owns a chapter house, which was built from contributions from its members, and which contains living rooms, dining rooms, sleeping rooms, study rooms, and a library for its undergraduate members. The contention of A is that the fraternity is strictly a cultural and educational organization, contributing directly to the character and quality of the student life of the college, and existing solely as an adjunct of the college; that it would not exist except for the college; and that in its absence the college itself would have to provide the facilities and features which it now furnishes. According to A's statements, the fraternity is not organized for profit; there are no profits inuring to any member of the fraternity; and the fraternity generally operates at a loss.

Fraternal societies, as organized in the various universities and colleges, have a social purpose in a marked degree. With a fraternity house as a meeting place, as the living quarters of many of its members, as the place where meals are served to its members, and as the headquarters of its entertainments, it is primarily a social center for a group which has all these varied activities of a distinctive social nature as the main reason for the existence of a fraternity.

In the opinion of this office the M fraternity is not organized and operated exclusively for scientific, literary, or educational purposes. It must be concluded, therefore, that the contribution made by A to the M fraternity is not deductible by him in computing his net income under section 214(a)10 of the Revenue Act of 1926.

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

SECTION 219.—ESTATES AND TRUSTS.

ARTICLE 342: Method of computation of net income and tax. VIII-1-4057 G. C. M. 5479

REVENUE ACTS OF 1924 AND 1926.

By the terms of the will of A, trustees were directed to carry on and manage the business carried on by the testator during his lifetime in the manner which in their judgment and discretion they should deem to be for the best interests of the trust estate, and to distribute the net income of the trust estate remaining, after providing for any necessary charges, disbursements, and expenditures, to named beneficiaries. The testator during his lifetime made due allowance for the depreciation of the business property, but the will contained no express requirement that the trustees should make such allowance.

Held, that the will should be interpreted as authorizing the trustees, in determining the amount of the income of the trust estate to be distributed currently to the beneficiaries, to set aside from the gross income of the trust estate reasonable amounts for the depreciation of the business property, and that only the income actually distributed to the beneficiaries should be included in their individual returns.

An opinion is requested as to whether the beneficiaries of the trust estate of A should include in their individual returns for the taxable

years 1924 and 1925 only the income of the trust actually distributed to them, or whether their shares should be increased each year by the amounts set aside by the trustees from the gross income of the trust estate to provide for the depreciation of the trust property.

It appears that B and C are beneficiaries of the trust estate of A, created under the will of A, who died in 1923. The trustees have construed the provisions of the will as authorizing, in the determination of the amounts to be distributed to the beneficiaries, the setting aside from the gross income of the warehouse, general storage, safe deposit, moving, and packing business conducted by them as trustees, of reasonable amounts to provide for the depreciation of the trust property. The beneficiaries have acquiesced in the action taken by the trustees, and the surrogate's court has approved the accounting of the trustees rendered in accordance with their construction of the provisions of the will.

The pertinent parts of the will of A creating the testamentary trust in which B and C are named as beneficiaries are as follows:

Twenty-third: I authorize, direct, and empower the trustees or such of them as may qualify or the survivor of them to carry on, conduct, manage, supervise, and continue the warehouse, general storage, safe deposit, moving, and packing business and any and all other business now carried on and conducted by me in the premises at ——, during the term of the trust or trusts created by this, my will, or so long as such business shall yield a reasonable net profit, and by reason of my absolute faith and confidence in their ability and integrity, I do hereby authorize, direct, and empower them to so carry on, conduct, manage, supervise, and continue said business in any manner which in their judgment and discretion they shall deem to be for the best interests of the trust estate, * * *

Twenty-fourth: I authorize and empower the trustees, or such of them as may qualify or the survivor of them to pay all taxes, assessments, water rates, insurance, and other charges of every kind, nature, and description incurred or to be incurred in connection with the business conducted in the premises at ——, and any building or buildings used in connection therewith, and from time to time to disburse such sum or sums as in the judgment of the trustees may be necessary to improve, enlarge, or build additions thereto and to keep the said premises in good repair.

Twenty-seventh: I authorize, direct, and empower the trustees to collect and receive all of the income and profits of the business remaining after payment of any expenses and disbursements in connection with such business, and, after providing for all necessary charges, disbursements, and expenditures, to distribute such net income as follows:

To my wife, D, four-twelfths (4/12) thereof; to my daughter, C, three-twelfths (3/12) thereof; to my daughter, B, three-twelfths (3/12) thereof; and to my son, E, two-twelfths (2/12) thereof, during the life of my wife, D, or until she remarries.

Twenty-eighth: In case my wife shall remarry I direct that, from and after the date of her remarriage, she shall cease to be a trustee of the trust estate, and that, from and after such date, or in case she shall not remarry, then, from and after the date of her death, I direct my trustees to distribute such net income of the trust estate as follows:

To my daughter, C, three-eighths (3/8) thereof; to my daughter, B, three-eighths (3/8) thereof; and to my son, E, two-eighths (2/8) thereof, for a period of ten (10) years after the death or remarriage of my wife, D.

Section 219(b)2 of the Revenue Acts of 1924 and 1926 provides as follows:

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, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, 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. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year.

In order to determine the amount of the income of the trust estate distributable currently to the beneficiaries it is necessary to look to the provisions of the will. It is contended by the beneficiaries that the testator during his life in computing the income from the warehouse business made due allowance for the depreciation of the business property, and, since the will provides that the trustees carry on, conduct, manage, supervise, and continue the business, it was the testator's intention, and the will should be so construed, that the business should be carried on by the trustees in the same manner in which it was carried on by the testator, and that they should continue to make due allowance for depreciation.

The twenty-third clause of the will directs the trustees to carry on, conduct, manage, supervise, and continue the business so long as the business yields a reasonable net profit, and empowers them to continue the business in any manner which in their judgment and discretion they shall deem to be for the best interests of the trust estate. The twenty-seventh clause authorizes the trustees to collect the income from the business and after the payment of expenses, disbursements, and providing for all necessary charges of the business, to distribute the net income.

The general rule as to the duty of trustees in preserving the corpus of a trust is stated in *Stevens* v. *Melcher* (152 N. Y., 551, 46 N. E., 965):

> Ordinarily the duty devolves upon tenants in common in possession, life tenants, or trustees for equitable life tenants, of preserving the premises, defraying the expenses of ordinary repairs, and of paying the taxes and the accruing interest upon mortgages which may encumber the premises. (In re Albertson, 113 N. Y., 434, 439, 21 N. E., 117.)

See also *Spencer* v. *Spencer* (219 N. Y., 459, 465, 114 N. E., 849).

The court in these cases in stating the general rule refers only to the payment of taxes, interest accruing on mortgages, repairs and current expenses, and does not include the setting aside from gross income of reasonable amounts to provide for the depreciation of property. It therefore follows that unless the testator expressly provides in his will for the setting aside of reasonable amounts for depreciation, or unless the words "net income" when construed with all of the provisions of the will disclose that it was the testator's intention that an allowance should be made for depreciation, the trustees are not authorized to withhold income of the trust estate from the beneficiaries in order to provide for depreciation. In the instant case, since there is no express requirement in the will that reasonable amounts from the gross income of the trust be set aside to provide for the depreciation of the trust property, it is necessary to construe the will as a whole to ascertain the testator's intention. The testator in this case was a successful business man, who during his lifetime made due allowance for the depreciation of his business property, and in his will directed the trustees to carry on, manage, and continue the business then carried on by him in any manner which in their judgment and discretion they deemed to be for the best interests of the trust estate. It is highly improbable that this successful and prudent business man intended that the trustees

should distribute the entire income of the business without provision for depreciation, with the result that eventually the business could not continue.

Under the terms of the will the trustees are given wide discretion in operating the business, and the twenty-third clause of the will empowers them to continue the business in any manner which in their judgment and discretion they shall deem to be for the best interests of the trust estate. It is customary in a business of this nature to make due allowance for depreciation, and it is recognized as a sound business principle. To say that the twenty-third clause of the will does not empower the trustees to make such allowance would be tantamount to saying that the testator and trustees did not consider such action to be for the best interest of the business, which is refuted, however, by the fact that the testator himself did make due allowance for depreciation. It should be noted that part of the property used in connection with the business includes typewriters, office furniture, and automobiles, and it is manifestly unreasonable that the testator or the trustees would consider it for the best interests of the trust estate to allow depreciation of this property to continue without making allowance therefor from the gross income of the business.

The decisions of the Board of Tax Appeals in the cases of Mary P. Eno Steffanson (1 B. T. A., 979), C. D. Woodard (2 B. T. A., 432), Helene R. McConnell (3 B. T. A., 260), L. Whitcomb (4 B. T. A., 80), Sophia G. Coxe (5 B. T. A., 261, C. B. VI-1, 2), Arthur H. Fleming (6 B. T. A., 900) are not controlling in the instant case, since those cases involved the allowability of certain deductions to the beneficiaries of trust estates and not the question of what should be included in the gross income of the beneficiaries.

In view of the foregoing, it is the opinion of this office that the will should be interpreted as authorizing the trustees, in determining the amount of the income of the trust estate to be distributed currently to the beneficiaries, to set aside from the gross income of the trust estate reasonable amounts for the depreciation of the business property, and that only the income actually distributed to the beneficiaries should be included in their individual returns.

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

SECTION 223.—INDIVIDUAL RETURNS.

ARTICLE 401: Individual returns.

REVENUE ACT OF 1926.

Income from community property of husband and wife domiciled in California acquired on and after July 29, 1927. (See I. T. 2457, page 89.)

ARTICLE 401: Individual returns.

REVENUE ACT OF 1926.

Instructions relating to community property returns. (See Mim. 3723, page 89.)

PART III.—CORPORATIONS.

SECTION 231.—CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

ARTICLE 515: Building and loan associations and cooperative banks. VIII–18–4187 G. C. M. 5909

REVENUE ACTS OF 1921, 1924, AND 1926.

An association organized and operating under the building and loan statutes of the State of Kansas for the past 10 years has required borrowers to subscribe for shares of rural credit installment stock in an amount equal to their loans. Subscriptions for such shares constitute the borrowers members of the association.

Held, that the association is entitled to exemption under section 231(4) of the Revenue Act of 1926 and the corresponding provisions of the Revenue Acts of 1921 and 1924.

An opinion is requested in the case of the M Building and Loan Association (hereinafter referred to as the Association) as to whether the decision of the Supreme Court of the United States in the case of the *United States* v. *The Cambridge Loan & Building Co.* (278 U. S., 55, 49 S. Ct., 39, T. D. 4252, C. B. VII–2, 290) will cause the Bureau to grant exemption to the Association and to the other permanent stock associations in the State of Kansas under section 231(4) of the Revenue Acts of 1921, 1924, and 1926. The main issue involved is whether the borrowers of the Association who subscribed for shares of rural credit stock thereby became members of the Association, for if they did not the statutory requirement that substantially all the business of an exempt building and loan association be confined to making loans to members was not met.

In the case of the *United States* v. *The Cambridge Loan & Building Co.*, supra, the Supreme Court of the United States said:

* * * It is argued that, even admitting all that has been said thus far, a State can not make a bank exempt merely by calling it a building and loan association. No doubt extravagant cases might be imagined. But these associations are well known and a State is not likely to be party to a scheme to enable a private company to avoid Federal taxation by giving it a false name. The statutes speak of "domestic" associations—that is, associations sanctioned by the several States. They must be taken to accept, with the qualifications expressly stated, what the States are content to recognize, unless there is a gross misuse of the name. The State of Ohio has recognized and still recognizes the respondent as belonging to the class which its name indicates. Very possibly the company has strained its privileges to near the limit, but we are not prepared to condemn the nomenclature adopted by the State. * * *

Thus the Supreme Court laid down the principle that a corporation organized and operating under State laws which reasonably defined and qualified such corporation as a building and loan association should be regarded a "domestic building and loan association" within the meaning of the various Revenue Acts. In brief, in determining exemption, the Supreme Court considered the relationship existing between the Cambridge company and the State of Ohio, rather than the specific acts of that company. In accordance with this view, it becomes necessary to determine the question of membership in the Association by considering the legal relationship which existed between the Association and its rural credit shareholders.

Prior to 1915 the Association, which was incorporated under the building and loan laws of the State of Kansas on March —, 19—, and has since operated in accordance with such statutes, issued permanent, full-paid, prepaid, and installment shares. In 1915 the Kansas Legislature provided that building and loan associations might issue rural credit shares, both full-paid and installment, and that amounts to the credit of such rural credit shares should be exempt from all State taxation (Laws of 1915, ch. 96, pars. 1 and 7). The Kansas law further provided that all dividends on such shares should be distributed semiannually, and that the funds raised by the sale of such shares should be loaned when possible on proper security on farms in the State of Kansas, but that all surplus funds might be loaned on any other security permitted to building and loan associations in Kansas. The Association immediately adopted by-laws authorizing the issuance of rural credit shares and the payment of dividends thereon, and thereafter issued only permanent stock and rural credit shares, both full-paid and installment. The practical effect of such action was to permit the Association to loan on farms as well as city property and to relieve all shareholders, except the permanent shareholders, from State taxation on the amounts paid in on their shares. It must be noted that both the statute and the by-laws of the Association provide for the issuance of rural credit *shares* and the payment of *dividends* thereon. So also do the passbooks record payments made by, and the *dividends* credited to, the rural credit installment shareholders. It must further be noted that no provision in the statutes, the by-laws of the Association, or the rural credit certificates requires the payment of dividends on the rural credit shares regardless of earnings; unless profits are available no dividends are distributed to any class of shareholders.

Considering these facts, it is believed that the relation between the rural credit shareholders and the Association is that of shareholder and corporation rather than that of debtor and creditor. While it is true that the permanent stock guarantees the payment of dividends to the rural credit shareholders, this is only another way of saying that the rural credit shareholders are preferred as to dividends. The facts that rural credit shares are issued, that dividends are paid thereon only out of the Association's profits, that no provision requires the payment of dividends on rural credit shares out of the capital of the Association, and that the borrowers subscribe to rural credit installment shares to the full amount of their loans, lead to the conclusion that the subscriber to such shares is in fact a member of the Association.

This conclusion is supported by the case of *Abrahams* v. *Medlicott, County Treasurer* (86 Kansas, 106, 119 Pacific, 375). In Kansas personal property, including the cash withdrawal value of shares of stock in building and loan associations, was taxed at rather a high rate, and no offsets were permitted against the value of such property. "Credits," meaning the right to demand money either presently or in the future, were taxed at a considerably lower rate, and debts could be offset against them. The appellant had subscribed and paid for full-paid stock in the Capital Building and Loan Association, which was a permanent stock association and which had guaranteed payment of 6 per cent dividends on all stock other than

permanent stock. The appellant contended that his full-paid stock was therefore a demand for money rather than representative of an interest in the Association, and that he was entitled to offset certain debts against the cash withdrawal value of his building and loan shares. The court held that his interest was that of a preferred shareholder rather than that of a creditor. Since the Association in the instant case issued permanent stock, this authority would indicate that the rural credit shareholders, being preferred as to dividends, were in a position similar to that of ordinary preferred shareholders.

Since the Association was organized under and has been operated under the building and loan statutes of the State of Kansas, since for the past 10 years it has required borrowers to subscribe for shares of rural credit installment stock in an amount equal to their loans, and since subscriptions for such shares constituted the borrowers members of the Association, it is concluded that the Association and others similarly operated are entitled to exemption as domestic building and loan associations under section 231(4) of the Revenue Acts of 1921, 1924, and 1926.

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

ARTICLE 515: Building and loan associations and cooperative banks.

REVENUE ACT OF 1926.

Amendment of article 515, Regulations 69. (See T. D. 4253, page 263.)

ARTICLE 515: Building and loan associations and cooperative banks.

REVENUE ACT OF 1926.

Denial of right of installment shareholders to vote. (See I. T. 2458, page 97.)

ARTICLE 519: Civic leagues and local associations of employees.

REVENUE ACT OF 1926.

Navy and Marine Memorial Association. (See I. T. 2460, page 98.)

ARTICLE 521: Local benevolent life insurance associations, mutual irrigation and telephone companies, and like organizations. VIII-16-4177 G. C. M. 5921

REVENUE ACT OF 1926 AND PRIOR ACTS.

Approximately 50 per cent of the money received annually by a city firemen's protective association is derived from the so-called sale of tickets to a dance given for the benefit of its mem-

bers. Most of those who purchase tickets do so as an evidence of good will to the firemen and with no idea of deriving personal benefit therefrom.

Held, that substantially all of such amounts are contributions and should not be included in income for the purpose of determining whether the association is entitled to exemption under the provisions of section 231(10) of the Revenue Act of 1926 and similar provisions of prior Revenue Acts.

General Counsel's Memorandum 1268 (C. B. VI–1, 83) revoked in so far as inconsistent herewith.

An opinion is requested as to the status of the M Firemen's Protective Association under the exemption provisions of the various Revenue Acts.

It appears that the association was incorporated in 1914 under the general statutes of the State of R. Among its stated objects, as set forth in its constitution and by-laws, are:

To create and maintain loyalty among its members, to promote harmony and a fraternal spirit, and to protect them from any injustice and imposition.

The association has three classes of members—active, life, and honorary. Active members are firemen of the city and county of S, appointed under local civil service rules and in active service. Life members are those former active members who, while in good standing with the association, have been retired from the fire department on pension. Honorary members are citizens granted nominal membership by vote of the active members, in recognition of meritorious service in the interest of the association. Life members pay no dues or assessments, and receive only a fractional part of the death benefits provided as an attribute of membership for active members. Honorary members pay no dues or assessments, take no part in the government of the association, and are not eligible for the relief or death benefits provided for the active and life members and their beneficiaries.

Upon the death of any active member of the association in good standing, the secretary-treasurer is empowered and instructed to draw immediately from the funds of the association an amount for the beneficiary of the deceased member. The association recoups amounts so withdrawn on the pay day next following the withdrawal, through a flat assessment on each member of the association. The relief fund of the association is derived exclusively from the proceeds of dances, concerts, or other social activities, and from cash donations. This fund constitutes a separate and distinct account. Upon the death of an active member of the association in good standing, the treasurer is empowered and instructed to draw immediately from the relief fund an amount for the beneficiary of the deceased member. Payment from the relief fund of an amount to the beneficiary of a life member is also authorized. The certificate of membership in the association is an insurance policy and evidences the member's right to a specified amount of insurance. The association extends personal relief to needy members within the broad discretion of a special investigating committee. Such relief is payable from the relief fund and is limited to a specified amount in any one case.

The 1927 financial statement submitted by the association shows the following receipts during the year:

	Dollars.
Assessments	60x
Dues	53.32x
Interest	18.5x
Annual firemen's ball	137.16x
Total receipts	268.98x

Section 231(10) of the Revenue Act of 1926 exempts from taxation:

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

Since the M Firemen's Protective Association is a benevolent life insurance association or like organization operating only in the city and county of S, its right to exemption under the provisions of section 231(10) depends on whether or not 85 per cent or more of its income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

By the enactment of section 231(10) Congress intended to exempt from income taxes local benevolent associations of the type here considered which were operated by and for their members. In view of that purpose it seems unreasonable that Congress intended that exemption should be denied to an association, otherwise qualified therefor, by reason of the association's receipt of amounts contributed to it. Such amounts should not therefore be included in income as contemplated by section 231(10).

It appears in the instant case that substantially all the amounts realized from so-called sale of tickets for the association's benefit dance constitute contributions by the citizens of S to the association, for the benefit of the firemen of the city. Most of those who purchase tickets do so as an evidence of good will to the firemen and with no idea of deriving personal benefit therefrom. The fact that an unlimited number of tickets is distributed (many times in excess of the capacity of the hall where the dance is held) at prices ranging as high as $—— each, and that only a very small percentage of such tickets is ever used, lends ample support to the above conclusion.

Analysis of the financial statement of the association develops the fact that approximately 50 per cent of the money received annually by it arises from the so-called sale of tickets to the benefit dance. By the exclusion of substantially all of such receipts from income as contemplated by section 231(10), it becomes apparent that more than 85 per cent of the income of the association consists of amounts collected from members for the sole purpose of meeting losses and expenses.

It follows that the association should be granted exemption under the provisions of section 231(10) of the Revenue Act of 1926. General Counsel's Memorandum 1268 (C. B. VI–1, 83), to the extent that it is inconsistent with this memorandum, is hereby revoked.

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

SECTION 238.—CREDIT FOR TAXES IN CASE OF CORPORATIONS.

ARTICLE 611: Credit for foreign taxes. VIII-14-4163
G. C. M. 5971

REVENUE ACTS OF 1924 AND 1926.

British income tax assessable for the British year of assessment, April 6–April 5, on the average income of "three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up," is properly accruable as at the end of the third year in the average, and where the tax for the British year of assessment is based on the income of the preceding year, the tax accrues as at the end of such preceding year.

An opinion is requested relative to the credit to be allowed the M Company under section 238 of the Revenue Acts of 1924 and 1926 on account of taxes paid to Great Britain. The specific question involved is the time of accrual of British income taxes for a given year of assessment, April 6–April 5, which taxes are measured by the average income of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of such trade have been usually made up, or on the 5th day of April preceding the year of assessment.

The books of the M Company are kept on an accrual basis and are closed on a calendar-year basis. The corporation established a branch office in England on September 1, 1922. The operations during 1922 and 1923 resulted in losses, but for the years 1924 and 1925 the business of the branch office resulted in a profit. The profit of the third year, 1924, which was reported in the taxpayer's 1924 Federal income tax return, was averaged with the losses for 1922 and 1923 by the British Inland Revenue Department in arriving at the statutory income on which the British tax of x pounds was assessed during the fiscal year 1925–26. The profit of the fourth year, 1925, from the British branch office, which was reported as taxable income in the taxpayer's 1925 Federal income tax return, was averaged by the British Inland Revenue Department with the 1923 loss and the 1924 income in determining the amount of assessment for the British fiscal year 1926–27. The tax computed on this statutory income was $10x$ pounds. The taxpayer claims that the British tax of x pounds is an accrual as of December 31, 1924, and that the tax of $10x$ pounds is an accrual as of December 31, 1925, although in both cases the assessments were made and the tax paid after the close of the year. These accruals are claimed as credits against tax due the United States for 1924 and 1925, respectively.

The principle enunciated in the decision of the Supreme Court in the case of *United States* v. *Anderson* (269 U. S., 422, T. D. 3839, C. B. V–1, 179) and the application of that decision as made in Solicitor's Memorandum 4499A (C. B. V–1, 56) are relied on by the taxpayer as a basis for claiming the accruals as of the last day of the third year entering into the average. The taxpayer further submits that it is the intention of the Revenue Acts of 1924 and 1926 to permit the application of the credit for foreign taxes in the same year in which the United States tax is imposed upon the earnings; that British taxes are properly and accurately accruable at the close

of the period over which the net income upon which the tax is based is averaged; and that ample provision is made in section 238(b) of the Revenue Acts of 1924 and 1926 for proper adjustment in the event the accruals should differ from later payments.

It is the opinion of this office that British income tax assessable for the British year of assessment, April 6–April 5, on the average income of "three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up," is properly accruable as at the end of the third year in the average.

Such a rule will not cause any change in the time of accrual of British income taxes in the year in which the British income tax law does away with the 3-year average and treats the income of the year preceding the year of assessment as the statutory income in respect of which the tax is to be assessed. This change took place, except in the case of taxpayers who elected to continue the 3-year average under certain conditions and for a certain period, with respect to the year of assessment beginning April 6, 1927, and ending April 5, 1928. The income reported for assessment in the return for that year was the actual income for the preceding year. In the case of the M Company this would be the calendar year 1926, and the tax would be accruable at the end of that year.

It should be noted that the House of Lords in the cases of *National Provident Institution* v. *Brown* (1921, 2 A. C., 222, 8 T. C., 57) and *Whelan* v. *Henning* (1924, 10 T. C., 263) laid down the principle that the British income tax on the type of income involved in those cases is intended to be on the profits and gains forming income in the year of assessment, though not measured by the income of that year, and if, therefore, a person has no income from a given source in the year of assessment or has ceased to own the source, there is no income on which to base the tax, and no tax can be levied or collected in respect of a nonexisting income. In view of those decisions there was inserted in the British Finance Act of 1926 a provision which prevented the principle enunciated in those decisions relative to income assessable under Case III (interest, discounts, etc., not taxed at source and profits of an uncertain value) and Case V (income from Dominion and foreign possessions) of Schedule D from being thereafter applied in respect of such income, and which made it clear that that principle never was applicable to income assessable under Cases I (profits of trade, manufacturing, etc.), II (income from professions, vocations, and employments not contained in any other schedule), and VI (miscellaneous profits not falling under foregoing cases and not taxed under any other schedule) of Schedule D.

Section 22 of the British Finance Act of 1926, which remedies this situation, is as follows:

22. (1) Where it is provided by the income tax acts that income tax in respect of profits or gains or income from any source or in respect of the property in lands, tenements, hereditaments or heritages is to be computed by reference to the amount of the profits or gains or income of some period preceding the year of assessment, then, notwithstanding that no profits or gains or income arise from that source or that property for or within the year of assessment, income tax as so computed shall be charged for that year, and section 1 of the income tax act, 1918, shall be construed to have effect accordingly, * * *.

(2) The foregoing provisions of this section shall be deemed always to have had effect * * * in relation to profits or gains falling within Cases I, II, or VI of Schedule D.

The provision contained in the second paragraph quoted above removes any objection which might have existed, in view of the two decisions referred to herein, for treating the tax as an accrual in the last year of the 3-year average.

General Counsel's Memorandum 2983 (C. B. VII–1, 110) is hereby revoked in so far as it is in conflict with the foregoing.

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

ARTICLE 611: Credit for foreign taxes. VIII–17–4183
G. C. M. 6042

REVENUE ACT OF 1926.

A domestic corporation paying the tax on income imposed by the Republic of Chile, under the provisions of Decree-Law No. 755 of December 16, 1925, and Law No. 4113 of January 25, 1927, modified and reenacted by Decree-Law No. 225, dated February 17, 1927, may claim such tax as a credit against taxes due the United States, subject to the limitation provided by section 238(a) of the Revenue Act of 1926.

The M Company, a domestic corporation, has filed a claim for refund of income tax for 1926 and a claim for credit for 1927, on the ground that the corporation was entitled to credit the tax shown to be due on its income tax returns, Form 1120, filed for those years, with the amount of certain taxes paid to the Republic of Chile. Request is made for an opinion as to whether the taxes so paid are income taxes and may be taken as a credit under section 238 of the Revenue Act of 1926.

The claim for refund for 1926 is based upon a payment of Chilean income tax amounting to $18x$ dollars, of which $16x$ dollars represented taxes paid to the Chilean Government on the general profits of the corporation and $2x$ dollars represented tax withheld at the source. The claim for credit for 1927 is based upon a payment by the corporation of Chilean income tax totaling $33x$ dollars, of which $32x$ dollars were taxes paid to the Chilean Government on the corporation's general profits and x dollars represented tax withheld at the source. The items of income tax referred to as withheld at the source constitute tax withheld and paid at the source to the Chilean Government by Chilean corporations on interest and dividends due the M Company.

It appears that Decree-Law No. 755, imposing an income tax, was enacted by the Government of Chile December 16, 1925. By Law No. 4113, dated January 25, 1927, the Chilean National Congress modified the Decree-Law No. 755, and by Decree-Law No. 225, dated February 17, 1927, the preexisting laws were modified and reenacted into the present income tax law, reading in part as follows:

ART. 2.—There is established for government revenue an annual tax on income.

ART. 3.—Excepting provision to the contrary in the present law, every person domiciled or resident in Chile shall pay a tax on their incomes from whatever source, whether the source thereof is situated within or without the coun-

try, and persons nonresidents of Chile are subject to the tax on the income which they derive from sources within the country.

* * * * * * *

ART. 14.—A tax of 5 per cent is established, to be determined, collected and paid annually on the taxable net income derived from business and industry. Brokers licensed or otherwise, commission merchants, auctioneers and builders are also subject to the tax of this category on the net income resulting from their respective occupations.

Agricultural exploitation carried on by companies of any kind, which are legally constituted, and those carried on by persons who are not the owners of the property nor their representatives, shall likewise be subject to this tax.

Partners or associates who do not contribute capital shall be exempt from the foregoing tax.

ART. 15.—All income, benefits and profits, whatever their origin, nature and designation, the taxing of which is not expressly provided for in other provisions of this law, shall be taxed in accordance with the rate and other provisions of this category.

Under article 46, relating to surtax, it is provided:

ART. 46.—An additional tax on income shall be applied, collected and paid in the following cases:

(a) Sociedades, empresas, or juridical persons constituted outside the country, having branch offices, agents or representatives in Chile, shall pay a surtax of 3 per cent on the income or profits of all their business or investments in Chile.

The tax established by the foregoing clause shall be paid as a special tax by the above-mentioned persons or entities not subject to the taxes of any of the categories created by this law.

The persons to which the above clauses have reference may use as a voucher for the payment of said tax, the total amount of the 6 per cent tax which they are obliged to withhold from the profits or dividends paid in the country to their stockholders.

With respect to income tax withheld at the source, it is provided in article 11 and article 12:

ART. 11.—A tax of 6 per cent is imposed, to be determined, collected and paid annually, on the income from movable capital consisting of interest, dividends, pensions or any other products derived from the ownership, possession or holding by indeterminate title of securities, whatever may be their names, not otherwise expressly excepted, including income from:

* * * * * * *

(b) Mortgage credit bank bonds and those of other institutions, governed by the law of August 29, 1855, as amended.

* * * * * * *

(d) Bonds, debentures or credit certificates of private empresas.

* * * * * * *

(g) Money deposits, whether on time or at sight.

* * * * * * *

ART. 12.—Whenever possible, the tax established in the present category shall be withheld before paying the income, in conformity with the provisions of article 69, by the person, firm, company, employer or office who is charged with paying dividends, interest, pensions or other returns taxed under the present law, whatever may be the name given it in general use or for purposes of payment.

Section 238(a) of the Revenue Act of 1926 provides that in the case of a domestic corporation the income tax imposed on corporations shall be credited with the amount of any income, war-profits, and excess-profits taxes paid or accrued during the same taxable year to any foreign country, or to any possession of the United States. It is also provided that the amount of such credit shall in no case exceed the same proportion of the tax (computed on the basis of the tax-

payer'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 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 its entire net income (computed without such deduction) for the same taxable year.

By the use of the term "income taxes" in section 238(a) is meant a tax on income. In *Eisner* v. *Macomber* (252 U. S., 189, T. D. 3010, C. B. 3, 25) consideration was given to the meaning of the term "income," and reference was made to the definition in *Stratton's Independence* v. *Howbert* (231 U. S., 399), wherein it was stated that "income may be defined as the gain derived from capital, from labor, or from both combined." The Supreme Court stated in *Eisner* v. *Macomber*, supra, that it had little to add to that definition "provided it be understood to include a profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle case (247 U. S., 183)."

In view of the fact that the law enacted by the Chilean Government declares that there is established for government revenue an annual tax on income; and provides that the tax shall be imposed upon all income, benefits, and profits, whatever their origin, nature, or designation; and further provides for the imposition of a tax on income derived from movable capital consisting of interest, dividends, etc.; the tax is clearly a tax on income and profits and is therefore an income tax within the meaning of section 238. The M Company may therefore take the amount of taxes paid to the Chilean Government as a credit against tax due the United States subject to the limitation contained in section 238(a), and its claims for refund and credit should be disposed of accordingly.

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

SECTION 240.—CONSOLIDATED RETURNS OF CORPORATIONS.

ARTICLE 632: Consolidated returns. VIII–3–4070
(Also Sections 246 and 247, Article 691.) G. C. M. 5609

REVENUE ACT OF 1926.

Insurance companies taxable under sections 243 and 246 of the Revenue Act of 1926 may not be included in the same consolidated return with a corporation taxable under section 230 of that Act.

A question has been raised as to the correctness of I. T. 2355 (C. B. VI–1, 98), which holds that—

Where a tax is assessed upon the basis of a consolidated return, and one of the affiliated companies, on the basis of a separate return, would be entitled to the lower rate of tax allowed domestic insurance companies under the provisions of section 246(a)1 of the Revenue Act of 1926, no part of the consolidated net income will be taxable at such lower rate unless the group of affiliated corporations as a whole can qualify as a domestic insurance company.

The facts of the case in which the question has arisen are as follows:

The M Company, the O Company, and the P Company filed a so-called consolidated return for the calendar year 1925. The M Company and the P Company are fire insurance companies. The O Company was incorporated June —, 191–, for the purpose of holding title to a piece of real estate which the M Company desired to acquire for the purpose of erecting thereon a building for its own occupancy. In 1925 the O Company sold this piece of real estate and realized a profit thereon. In the so-called consolidated return filed for 1925 by the three corporations this profit was not included in taxable income. The rate of 12½ per cent as provided by section 246 of the Revenue Act of 1926 was used in computing the tax on the so-called consolidated net income.

The Revenue Act of 1926 contained no definite direction as to the application of the consolidated returns section in cases where insurance companies were affiliated with companies other than insurance companies, and the Revenue Act of 1928 had not been enacted when I. T. 2355 was being considered. Section 141 of the Revenue Bill of 1928 (H. R. 1), as passed by the Senate, also failed to contain specific language in this regard. But, as finally passed, the Revenue Act of 1928 contained a provision which is described in the conference report (House of Representatives, No. 1882, May 25, 1928, p. 17) as follows:

> The House recedes with a clarifying amendment to subdivision (e) of the Senate amendment providing specifically that an insurance company subject to the tax imposed by section 201 or 204 shall not be included in the same consolidated return with a corporation subject to the tax imposed by section 13.

This, being a clarifying provision, may, it is believed, be taken as an expression of the legislative intent with regard to the corresponding section of the Revenue Act of 1926. It is the opinion of this office, therefore, that section 240 of the Revenue Act of 1926 should be construed so as to prohibit the inclusion of corporations taxable under sections 243 and 246 of that Act in a consolidated return with corporations taxable under section 230 thereof.

In view of the foregoing it is recommended that I. T. 2355 (supra) be revoked.

As previously stated, two of the affiliated corporations in the instant case, the M Company and the P Company, are fire insurance companies. The statute does not prevent these companies from making a consolidated return. It may very well be that the third corporation in owning property to be used for an office building by the insurance companies was carrying on no business other than that which could have been carried on by a fire insurance company. But this does not make it a fire insurance company. It issued no contracts of insurance, and it received no income of the type described in section 246 of the Revenue Act of 1926. It can not be classified with the other affiliated corporations as a fire insurance company. (S. M. 5501, C. B. V–1, 102; G. C. M. 2640, C. B. VI–2, 259.) It is, therefore, taxable under section 230 of the 1926 Act, and may not be included in a consolidated return with the M Company and the P Company.

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

ARTICLE 632: Consolidated returns. VIII-3-4071
I. T. 2448

REVENUE ACT OF 1926.

I. T. 2355 (C. B. VI-1, 98), holding that where a tax is assessed upon the basis of a consolidated return, and one of the affiliated companies, on the basis of a separate return, would be entitled to the lower rate of tax allowed domestic insurance companies under the provisions of section 246(a)1 of the Revenue Act of 1926, no part of the consolidated net income will be taxable at such lower rate unless the group of affiliated corporations as a whole can qualify as a domestic insurance company, is revoked, in view of General Counsel's Memorandum 5609, on page 186.

SECTIONS 246 AND 247.—TAXES ON INSURANCE COMPANIES.

ARTICLE 691: Tax on insurance companies.

REVENUE ACT OF 1926.

Insurance companies filing consolidated returns with companies other than insurance companies. (See G. C. M. 5609, page 186.)

PART IV.—ADMINISTRATIVE PROVISIONS.

SECTION 257.—RETURNS TO BE PUBLIC RECORDS.

ARTICLE 1090: Inspection of returns.

REVENUE ACT OF 1926.

Inspection of refunds. (See T. D. 4264, page 93.)

PART V.—PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES.

SECTION 270.—DATE ON WHICH TAX SHALL BE PAID.

ARTICLE 1205: Liens and enforcement of tax liens by bill in equity.

REVENUE ACT OF 1926.

Notice of tax lien filed by a collector. (See G. C. M. 5432, page 134.)

SECTIONS 277 AND 278.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

ARTICLE 1272: Period of limitation upon collection of tax. VIII-23-4230 Ct. D. 65
(Also Section 1106, Article 1341.)

FEDERAL TAXES—LIABILITY ON BOND—DECISION OF SUPREME COURT.

SUIT—LIMITATION—BOND.

A suit, commenced after the expiration of the statutory period within which suits for the collection of a tax may be begun, to recover on a bond given prior to the expiration of such period in connection with a claim for abatement of the tax and conditioned for the payment of the tax found to be due is not barred by the statute of limitations applicable to the collection of taxes, nor is the liability on the bond extinguished by section 1106(a) of the Revenue Act of 1926.

SUPREME COURT OF THE UNITED STATES. No. 526.

The United States, petitioner, v. *The John Barth Co. and the United States Fidelity & Guaranty Co.*

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

[May 13, 1929.]

OPINION.

Mr. Chief Justice TAFT delivered the opinion of the court.

This was a suit by the United States, through its district attorney for the eastern district of Wisconsin, against the John Barth Co., a corporation of Wisconsin, and the United States Fidelity & Guaranty Co., a corporation of Maryland. The subject matter of the suit is the recovery of the amount due on a bond in the sum of $60,000 whereby the respondents bound themselves jointly and severally to pay the United States the sum therein named under the following circumstances and conditions:

On June 25, 1919, the United States Commissioner of Internal Revenue assessed income and profits taxes against the Barth company for the year 1918 in the sum of $126,182.81, and of this sum the company paid $74,764.40. On September 15, 1919, and March 17, 1925, the company filed claims for the the following circumstances and conditions:

The Barth company as principal, and the United States Fidelity & Guaranty Co. as surety, in consideration of the United States refraining from and suspending the collection of taxes thus outstanding against the Barth company for the year 1918, pending consideration and adjudication of the foregoing claims for abatement, executed and delivered a bond on September 20, 1919, binding them to pay "on notice and demand by the collector * * * any part of such tax found by the Commissioner to be due, with interest at the rate of 12 per cent per annum from the time such tax would have been due, had no such claim been filed."

The Barth company filed its claim of abatement on the ground that it had sustained a substantial loss resulting from a material reduction of the value of its inventory for the taxable year and from actual payment after the close of the taxable year of rebates in pursuance of contracts entered into during such year upon sales made during the year.

On March 25, 1926, the Commissioner considered the claims, allowed about $10,000, and rejected the rest in the sum of $29,842.32. The Barth company was notified and payment under the bond of the tax as determined, with interest thereon, requested on February 27, 1926, and on April 5 and 20, 1926, but the Barth company refused to pay. On August 10 and 27, 1926, the Guaranty company was notified of the rejection of the abatement claims in the sum above stated, and of the amount and interest due, but that company also refused payment. The suit was authorized by the Commissioner of Internal Revenue.

To the petition respondents filed a demurrer "for the reason that * * * the action was not commenced within the time limited by law, which time is prescribed by section 250(d) of the Revenue Acts of 1918 and 1921, and sections 277(a)2, 278(d), and 278(e) of the Revenue Act of 1924, and sections 277(a)3, 278(d), 278(e), and 1106(a) of the Revenue Act of 1926."

The district court sustained the demurrer, the United States elected to stand on its complaint, and judgment was entered dismissing the complaint.

The United States carried the judgment on writ of error to the circuit court of appeals, which after an unsuccessful effort to certify to this court certain questions, which were dismissed (276 U. S., 606), heard the writ of error and affirmed the judgment of the district court. (27 F. (2d), 782.) The case is now here on writ of certiorari.

Paragraph 14(a), section 234(a), of the Revenue Act of 1918 (ch. 18, 40 Stat., 1057), provides that:

"At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement, based on the fact that he has sustained a substantial loss * * * resulting from any material reduction * * * of the value of the inventory for such taxable year, or from the actual payment, after the close of such taxable year, of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case, payment of the amount of tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per cent per month from the time the tax would have been due had no such claim been filed."

In section 250(d) the provision is:

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made."

Section 250(d) refers to a failure of the Commissioner of Internal Revenue to pass upon the return made by the taxpayer and to assess the tax. It is the determination preceding the assessment that is referred to in that section. If there is no determination and assessment within five years after the return is made, or after the return should have been made, then the statute bars an assessment and the collection of the tax due.

But section 250(d) does not apply to the proceeding under paragraph 14(a), which relates to a case in which there is a return with a resulting assessment, as there was here, and the taxpayer seeks to reduce the assessed tax by presenting a claim for an abatement of part of it, and to avoid the collection of that part pending action on the claim for abatement by giving a bond.

In this case there was a return and there was an assessment, but the bond was given well within the five years after the return, and when the bond was given it required the obligors, if the abatement was not allowed, to pay interest from the time such tax would have been due had no such claim been filed. In other words, the limitation of section 250(d) has no application to a situation following a claim of abatement and the giving of bond.

The plain purpose of paragraph 14(a) was to effect a substitution for the obligation arising under the return and assessment to pay the tax, of the contract entered into in the bond to pay any part of the tax found to be due upon the subsequent determination of the Commissioner, and this with interest at the rate of 1 per cent per month from the time the tax would have been due, had no such claim been filed.

Of course it is not difficult in the somewhat complicated provisions to suggest, as on behalf of respondent it has been suggested, that some other than the ordinary inference to be given to this set of facts should be drawn, but the common sense view of the return and the delay in the payment due after the claim of abatement and the giving of the bond is as already stated. The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had.

The statutes now pleaded to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective.

Section 250(d) of the Revenue Act of 1921 (ch. 136, 42 Stat., 227, 265) repeats the limitation of 1918, adding thereto "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax," and like section 250(d) of the Act of 1918 has no relevancy or effect here. The Revenue Act of 1924, section 277(a)2 (ch. 234, 43 Stat., 253), repeats a similar limitation of five years. Section 1106(a) of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 113), provides that the bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability. This last Act was repealed as of the date of its enactment. (See section 612, ch. 852, 45 Stat., 791, 875.)

The Government contends that this restores and gives life to the tax retroactively. It is not necessary for us to examine this claim, for the reason that the Act of 1926 does not affect, and was not intended to affect, the obligation arising out of the bond. Such bonds are not referred to in the amendments of 1921 or 1924 or 1926, nor in any way is the taxpayer expressly or impliedly relieved from such contracts. To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. 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. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

It is hardly necessary to refer to authority to justify this conclusion, but it is sustained by *United States* v. *Onken Bros.* (23 F. (2d), 367 [T. D. 4108, C. B. VI–2, 270]); *Gray Motor Co.* v. *United States* (16 F. (2d), 367 [T. D. 3994, C. B. VI–1, 149]); *United States* v. *Rennolds* (27 F. (2d), 902); *McCaughn* v. *Philadelphia Barge Co.* (27 F. (2d), 628 [T. D. 4199, C. B. VII–2, 168]); *United States* v. *United States Fidelity & Guaranty Co.* (221 Fed., 27); *Raymond* v. *United States* (Fed. Cas. No. 11596).

The judgment of the circuit court of appeals should be reversed and the cause remanded for further proceedings.

Reversed.

SECTION 284.—CREDITS AND REFUNDS.

ARTICLE 1304: Claims for refund by taxpayers.

REVENUE ACT OF 1926.

Form 1118. (See G. C. M. 6053, page 112.)

TITLE XI.—GENERAL ADMINISTRATIVE PROVISIONS.

SECTION 1104.—EXAMINATION OF BOOKS AND WITNESSES.

ARTICLE 1331: Examination of records and witnesses. VIII–23–4227 Ct. D. 64

GENERAL ADMINISTRATIVE PROVISIONS—REVENUE ACT OF 1926—DECISION OF COURT.

EXAMINATION OF RECORDS—RECORDS OF THIRD PERSONS.

Section 1104 of the Revenue Act of 1926 authorizes the Commissioner, by an agent designated for the purpose, to require the production of the books and records of one person bearing upon the tax liability of another person under investigation.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

G. W. Brownson, appellant, v. *United States of America, appellee.*

Appeal from the District Court of the United States for the Western District of Missouri.

[April 24, 1929.]

OPINION.

BOOTH, Circuit Judge, delivered the opinion of the court.

The facts involved in the present appeal are few and undisputed. During an investigation and hearing being held in Kansas City, Mo., in January, 1928, by the Commissioner of Internal Revenue, through his agent, relative to the tax liability of Frank DeMayo and Bessie DeMayo, his wife, for the years 1924–1926, inclusive, a summons signed by said agent was served upon appellant requiring him to appear and testify in said matter, and to bring with him any and all books, papers, and documents in his possession showing transactions for, with, or on behalf of said Frank DeMayo and Bessie DeMayo, and especially any papers, receipts, or documents pertaining to the receipt by telegraph of $500 by Frank DeMayo from Denver, Colo., on or about February 16, 1926. Appellant was the city superintendent of the Western Union Telegraph Co. at Kansas City, Mo. He appeared at the time and place specified, but did not produce the documents requested. This failure to obey the summons was thereafter reported to the United States District Court for the Western District of Missouri by the United States district attorney in a petition which prayed that a writ of attachment be issued to bring the appellant before the court for such action as might be deemed proper. An order of attachment was issued. Appellant appeared before the court, a hearing was had, and an order was made requiring appellant to appear before the internal revenue agent and to produce the documents requested. Owing to certain inadvertent omissions in the order, a later order was issued February 23, 1928. This order, after reciting the facts, contained the following:

"It is therefore ordered by the court that the said G. W. Brownson forthwith appear before the said Harry D. Beach and produce all records of the Western Union Telegraph Co. showing the receipt of five hundred ($500) dollars by Frank DeMayo, which was wired to him by way of the Western Union Telegraph Co. from Denver, Colo., on or about February 16, 1926, and that he stand committed in the common jail of Jackson County, Mo., at Kansas City, unless and until he complies with the foregoing order of this court, to which order and commitment the said G. W. Brownson excepts."

The present appeal was taken from this order.

At the outset the question of jurisdiction, though not raised by counsel, yet suggests itself by reason of the form of the order appealed from. Viewed as an order of commitment for contempt its finality may well be doubted. Its

character might be called conditional, alternative, or anticipatory *nisi*. Such orders are generally held not appealable. (13 C. J., sec. 156, pp. 99–100; *Jones* v. *Craig*, 127 U. S., 213; *City of Paducah* v. *East Tenn., &c., Co.*, 229 U. S., 476.) And this is especially true if the order involves possible punishment for contempt. (*Semrow* v. *Semrow*, 46 N. W., 446 (Minn.); *Brinkley* v. *Brinkley*, 47 N. Y., 40; *Sherwood* v. *Sherwood*, 32 Conn., 1; *Cherry* v. *Cherry*, 253 Mass., 172; *Eure* v. *Taylor*, 126 Miss., 155.)

The order under discussion is, however, dual in its nature. It first unconditionally orders the witness to appear and testify and to produce certain papers; it secondly commits the witness to jail conditionally. We think that for the purpose of determining appealability the first part of the order, which is complete in itself, should alone be considered. That such an order is appealable we think is established. (*Perlman* v. *United States*, 247 U. S., 7; *Ellis* v. *I. C. C.*, 237 U. S., 434, 442; *United States* v. *First National Bank*, 295 F., 142, affirmed 267 U. S., 576 [T. D. 3546, C. B. III–1, 422].) In the case last cited the Supreme Court entertained an appeal from an order of the district court directing a witness to appear and testify and to produce books and papers in a case very similar to the case at bar. The affirmance of the order necessarily involved a holding that the order was appealable.

We turn to the merits. The statutory provisions under which authority is claimed by appellee for the proceedings in the present case are as follows:

Section 1247, Title 26, U. S. C. "*Examination of books, papers, and records; taking testimony.*—The Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

This provision first appeared in section 1305 of the Revenue Act of 1918 (40 Stat., 1142). It was reenacted as section 1308 in the Revenue Act of 1921 (42 Stat., 310), as section 1004 of the Revenue Act of 1924 (43 Stat., 340), as section 1104 of the Revenue Act of 1926 (44 Stat., 113), and again as section 618 of the Revenue Act of 1928 (45 Stat., 878).

Section 2617, Title 26, U. S. C. A. "*Jurisdiction of courts.*—(a) If any person is summoned under the internal-revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers, or other data."

The equivalent of this provision appeared in section 1318 of the Revenue Act of 1918 (40 Stat., 1148). It again appeared in section 1310 of the Revenue Act of 1921 (42 Stat., 310); and again as section 1025(a) in the Revenue Act of 1924 (43 Stat., 348). It also appears as section 1122(a) in the Revenue Act of 1926 (44 Stat., 121); and as section 617(a) in the Revenue Act of 1928 (45 Stat., 877).

Other relevant provisions of the statutes will be referred to later.

It is the contention of appellant that the statutes above quoted do not expressly authorize the Commissioner of Internal Revenue to require the production of the books and papers of any person except the one whose tax liability is being investigated; that if Congress had intended to give the Commissioner such authority it would have used explicit language to that effect. It is contended further that where such authority has been given as to other cognate matters, explicit language has been used. Section 94, Title 26, U. S. C., is cited. That section contains the following provision:

"And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, or refuses to allow any regularly authorized Government officer to examine the books of such person, firm or corporation, it shall be lawful for the collector to summon such person, or any other person having possession, custody, or care of books of account

containing entries relating to the business of such person or any other person he may deem proper, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof."

That provision was originally contained in section 3173, Revised Statutes, and related to matters somewhat different from that now under discussion. However, the provision has latterly been expressly made applicable to matters such as the present one.

By section 1244, Title 26, U. S. C., it is provided:

"All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act."

This same provision appears in the Revenue Acts of 1918, section 1305 (40 Stat., 1142); 1921, section 1300 (42 Stat., 308); 1924, section 1000 (43 Stat., 339); and 1926, section 1100 (44 Stat., 111).

It is further contended by appellant that section 94, Title 26, U. S. C. (R. S. 3173), above quoted, does not itself authorize the Government official, in investigating the return of a specified person, to require a third person to produce his own books. We are unable to agree with these several contentions of counsel for appellant.

The history of the law of evidence lends no support to such contentions. For more than 300 years it has been a maxim that the public has a right to every man's evidence. Privileges of exemption are exceptions to the rule. (Wigmore on Evidence, sections 2190–2193. See *Blair* v. *United States*, 250 U. S., 273; *Consolidated, &c., Co.* v. *Vermont*, 207 U. S., 541; *Wilson* v. *United States*, 221 U. S., 361; *In re Meador*, 16 Fed. Cas. No. 9375.)

This testimonial duty to attend and disclose applies equally to the production of documents; and the process for documents will be implied wherever testimonial compulsion in general is predicated by a statute. (Wigmore on Evidence, section 2193 and note.)

Congress, we think, has made no such distinctions as counsel for appellant suggests in the authority granted to various investigating bodies. On the contrary, Congress in passing enactments granting authority to such bodies to take evidence, and the Supreme Court in construing such enactments have taken the broad view that when a duly authorized governmental agency is making an investigation and is authorized to summon witnesses and require the production of books and papers, such authority extends not only to the production of the books and papers of the party or corporation under investigation, but also to the production of the relevant books and papers of third parties or corporations, all subject, of course, to the limitations and conditions contained in the fourth and fifth amendments to the United States Constitution.

Hale v. *Henkel* (201 U. S., 43) was an appeal from an order of a United States circuit court dismissing a writ of *habeas corpus*. Hale had been served with a *subpœna duces tecum* to testify before a Federal grand jury which was investigating the corporation of which he was secretary-treasurer and to produce books and papers of his corporation. He refused, and was committed for contempt. The judgment was affirmed.

Wilson v. *United States* (221 U. S., 361) was a writ of error to review a judgment of a United States circuit court committing Wilson for contempt. A Federal grand jury was investigating alleged violations of sections 5440 and 5480, Revised Statutes, by Wilson and others. A *subpœna duces tecum* addressed to the corporation was served on Wilson to produce a letter-press copybook of the corporation of which he was president. He refused, and was committed for contempt. In affirming the judgment the court said (p. 382):

"What then is the status of the books and papers of a corporation, which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand expressed in lawful process, confining its requirements within the limits which

reason imposed in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress."

(P. 385:)

"Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection, despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend upon the question whether or not another was accused. The only question was whether as against the corporation the books were lawfully required in the administration of justice. When the appellant became president of the corporation and as such held and used its books for the transaction of its business committed to his charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize."

See *Drier* v. *United States* (221 U. S., 394) to same effect.

Wheeler v. *United States* (226 U. S., 478) was an appeal and writ of error to review denial of writ of *habeas corpus* and commitment for contempt by a United States district court. A Federal grand jury was investigating Wheeler and another for violation of the statute prohibiting the use of the United States mail in a scheme to defraud. A *subpœna duces tecum* was issued to the corporation, Wheeler & Shaw, Inc., to produce books and papers. The corporation had gone out of existence. Wheeler refused. Commitment for contempt followed. Judgment was affirmed.

Essgee Co. v. *United States* (262 U. S., 151) was an appeal and writ of error to review an order of a United States district court denying a petition for return of papers produced by an officer of two corporations before a Federal grand jury in response to a *subpœna duces tecum*, addressed to the corporations requiring them to appear and produce named papers. The investigation before the grand jury was as to charges of fraud in importations by the two corporations. In affirming the order denying return the court quoted with approval from *Wilson* v. *United States*, supra, as to the status of corporate books and papers.

We think that the power granted to the Commissioner of Internal Revenue by the statutes above quoted to require the attendance of witnesses and the production of books and papers in matters properly under investigation by him is similar to the power vested by analogous statutes in Federal grand juries to perform similar acts, such as are illustrated by the cases above cited; and that the statutes involved, granting such power to the Commissioner, should receive a like liberal construction in view of the like important ends sought by the Government.

We have been cited to but one case which appears to be directly in point: *United States* v. *First National Bank* (295 F., 142). That case arose under the Revenue Act of 1921, but the provisions of that Act and of the later Acts of 1924 and 1926 are substantially the same so far as they relate to the questions now being considered. In the case last cited the tax liability of William J. Hanlon and wife was being investigated by the authorized agents of the Commissioner of Internal Revenue. The bank was subpœnaed to appear with its books and papers bearing upon the tax liability of Mr. Hanlon and his wife. The bank refused. The court after a hearing made an order requiring the bank to appear and furnish the information. In its opinion the court, after citing and quoting from the statutes heretofore given, said:

"The petition sets out that the said Hanlon and his wife have not made full, true, and correct statements of their respective incomes of the years 1918, 1919, 1920, 1921, and 1922, and that the ledgers and other books of the bank containing the accounts of the said Hanlons will be of material assistance to

the United States in arriving at the true and correct incomes of said individuals of the respective years; that summons to appear and testify and produce the books had been served on D. P. Bester, jr., as president of the bank, and that the said bank and its officers had failed to appear at the time and place designated in the summons, and they now refuse to appear and permit the duly authorized agents of the internal revenue of the United States to have access in any manner to the records and accounts of said bank—and prays for the assistance of the court to require the bank officers and employees to testify and the bank to produce its books and accounts.

"Said bank refuses to testify and produce the books, and contends that it is protected by the fourth amendment to the Constitution from doing so. As I understand the fourth amendment, it protects the parties to criminal prosecution against unreasonable searches and seizures of their papers, and I do not understand this to authorize a third party, who has books and papers which may be relevant to the inquiry, to refuse to produce such books and papers because of this amendment. This is not a question of a search and seizure of a party's books and papers, but of whether a witness who has information as to a party's dealings may be required to testify to those facts, and produce book entries as to such entries in connection with and supporting such testimony."

The case was appealed to the Supreme Court. That court affirmed the order of the court below (267 U. S., 576) on the authority of *Essgee* v. *United States*, *Hale* v. *Henkel*, *Wheeler* v. *United States*, and *Wilson* v. *United States*, above cited.

It is suggested by counsel for appellant that it does not appear that the order made by the district court in *United States* v. *First National Bank*, supra, required the production of the books of the bank. We think that this does clearly appear both by the excerpts from the opinion of the court above quoted and by the fact that the affirmance by the Supreme Court was based upon the holdings in the Essgee, Hale, Wilson, and Wheeler cases—all of which involved the production of books and papers and not merely the giving of testimony.

The affirmance, based expressly upon those cases, establishes, we think, the proposition that the power of the Commissioner of Internal Revenue, under the statutes already cited, to examine corporate books and papers is analogous to the power of the Federal grand juries in the cases cited; and establishes further that the fact that the corporation whose books and papers are required to be produced is not under investigation is immaterial.

Our conclusion is that the steps taken by the Commissioner and by the court to secure the desired evidence were authorized and regular.

Order affirmed.

SECTION 1106.—FINAL DETERMINATIONS AND ASSESSMENTS.

ARTICLE 1341: Final determination and assessment of tax or penalty.

REVENUE ACT OF 1926.

Recovery on bond given in connection with a claim in abatement. (See Ct. D. 65, page 189.)

INCOME TAX RULINGS.—PART III.

REVENUE ACT OF 1924.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 203.—RECOGNITION OF GAIN OR LOSS FROM SALES AND EXCHANGES.

ARTICLE 1579: Involuntary conversion of property. VIII-3-4072 G. C. M. 5302

REVENUE ACT OF 1924.

"Money" received in payment for property taken by condemnation proceedings includes the amount deducted from the award to pay indebtedness on such property. The excess of the gross amount awarded, less legal expenses incurred in defending the property, over the amount expended for actual replacement, is the maximum amount of gain which may be recognized from the conversion, the actual gain depending on the cost or other applicable basis of the property converted.

The taxpayer was compulsorily divested of its property by the United States. Compensation therefor was determined by a commission appointed for the purpose. The taxpayer appealed from the commission's finding, and the court handed down a decision holding that the taxpayer was entitled to the sum of $507x$ dollars. From the award of $507x$ dollars, the Government withheld the sum of $103x$ dollars, made up as follows:

	Dollars.
Indebtedness to Government	$92x$
Interest	$5x$
Taxes	$6x$
	$103x$

The taxpayer incurred expenses in the legal proceedings totaling $35x$ dollars, which, added to the sum of $103x$ dollars aforesaid, makes a total of $138x$ dollars. Thus the net amount which inured to the taxpayer after all deductions and expenses was $369x$ dollars. The taxpayer expended in the acquirement of a new plant $378x$ dollars. Inasmuch as this latter amount exceeded the net sum which inured to the taxpayer from the court's award, it is contended that under the provisions of section 203(b)5 of the Revenue Act of 1924 no taxable income was derived from the transaction.

Section 203(b)5 of the Revenue Act of 1924 provides, in part, as follows:

If property (as a result of * * * an exercise of the power of requisition or condemnation * * *) is compulsorily or involuntarily converted into * * * money which is forthwith in good faith, under regulations * * * expended in the acquisition of other property similar or related in service or use * * *, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended.

The principal question raised is whether under the facts stated all or only part of the money into which the taxpayer's property was involuntarily converted was expended in the acquisition of the new plant. If all of the money was so expended, no gain or loss to the taxpayer would be recognized under the provisions of section 203(b)5.

The important word of section 203(b)5, from the standpoint of the question raised, is "money." The taxpayer contends that the word should be construed narrowly so as to include only cash actually received. To accept this contention, however, would be to render tax liability dependent upon the mere form of the consideration, and would work against uniformity. Under the taxpayer's contention, if in the instant case the taxpayer had received the full consideration in cash, and had then out of the cash paid its debts, there would have been a taxable gain, but because the Government set off the taxpayer's indebtedness to it and paid only the net amount due, there is no taxable gain. Such a result is not compelled even by the literal language of the Act. The Act does not specify money received by the taxpayer, and the anomalous result referred to would be avoided by treating "money" received by all parties as within the intent of the statute. But assuming that only "money" received by the taxpayer is intended, there is adequate precedent for regarding money not actually paid to a taxpayer in cash, but devoted to satisfaction of his obligations, as constructively received by him. In the instant case the sum withheld by the Government was withheld to pay obligations of the taxpayer, and therefore should be regarded as constructively received by it.

The same effect can be given to the statute by construing the word "money" in a broad instead of a narrow sense. There is considerable precedent for such construction. As said in 40 Corpus Juris, page 1489:

> The word "money" may have a very broad meaning; it may be used as a generic term, in a general and comprehensive sense, or in a large sense. In its generic sense it is a word of a very comprehensive import. * * * The term has different meanings depending upon whether it applies to coins or paper currency or whether it refers to debts or credits.

A broad construction is supported by the history of the Revenue Act. In the corresponding provisions of the Act of 1921 (section 214(a)12 and section 234(a)14), the word "money" is not used, but instead the term used in one place is "cash or its equivalent," and in another "proceeds." These latter expressions would cover the credits involved in the instant case. The logic of the situation would indicate that by "money" in the 1924 Act Congress meant the same thing described as "cash or its equivalent" and "proceeds" in the previous Act. That such was the intended meaning is suggested by the report of the Committee on Ways and Means of the House of Representatives on the Revenue Bill of 1924, wherein (pages 13 and 14) it is stated:

> Paragraph (5) corresponds to sections 214(a)12 and 234(a)14 of the existing law. The existing law exempts from tax the proceeds from an involuntary conversion of property, but fails to grant an exemption if the property is replaced in kind by the insurance company or similar person. The bill exempts the gain from an involuntary conversion whether the replacement is made by the taxpayer or by the insurance company.

Under the existing law if only a portion of the proceeds from an involuntary conversion is used in the replacement, then only a corresponding part of the gain or loss is not recognized. In the bill the gain from the transaction is recognized, but in an amount not to exceed the unexpended portion of the proceeds.

The report of the Senate Committee on Finance on the Revenue Bill of 1924 (page 15) contains the same explanation.

These explanations indicate no purpose to adopt a narrower substitute for the expressions "cash or its equivalent" and "proceeds." On the contrary, the use in the committee reports of the word "proceeds" (note particularly the last word of the quoted matter) indicates that to the committee the word "money" in the pending bill meant "proceeds."

The apparent opinion of Congress that the word "money" alone in the new Act would convey the same meaning as the expression "cash or its equivalent" appearing in the previous statute is supported by the court decisions. It has been held that "money" is a broader and a more generic term than "cash" (*McGovern* v. *U. S.*, 272 Fed., 262, 263 (C. C. A.)), and that "money or money's worth" means cash or its equivalent (*Gillett* v. *Chicago Title & Trust Co.*, 82 N. E., 891, 904). The framers of the Act were presumably familiar with the broad construction given to the word "money" by the courts.

Even though this broad construction of the word "money" were not relied upon and the other principles, previously mentioned, were not resorted to, the same result would follow under the view that where the consideration from the involuntary conversion of property is other than money, the case is, to the extent of such other consideration, beyond the purview of section 203(b)5. Under this view, the gain, if any, would be recognized regardless of the disposition of the proceeds, to the extent of the amount of the consideration received other than in money.

In the opinion of this office, only part of the money into which the taxpayer's property was involuntarily converted was expended in the acquisition of the new plant, and therefore any gain inuring to the taxpayer from the transaction may be recognized in an amount not in excess of the difference between the gross amount awarded to the taxpayer, $507x$ dollars, less legal expenses of $35x$ dollars, or a balance of $472x$ dollars, and the amount expended for replacement, $378x$ dollars, the difference being $94x$ dollars. This does not mean that the $94x$ dollars is taxable gain. The taxable gain must still be determined on the basis of the cost or other applicable basis of the property converted. $94x$ dollars is merely the largest amount that can be recognized in any event.

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

SECTION 207.—FISCAL YEARS.

ARTICLE 1631: Fiscal years ending in 1924. VIII–6–4098
I. T. 2453

REVENUE ACT OF 1924.

Mimeograph 3308, Example VII (C. B. IV–1, 7), in so far as it holds that income distributed by a trust at the close of its fiscal year

ended January 31, 1924, is taxable to a beneficiary keeping his books on a calendar-year basis at the different rates prescribed by the Revenue Acts of 1921 and 1924, is revoked, in view of General Counsel's Memorandum 5735, on page 203.

PART II.—INDIVIDUALS.

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1924.

Income of trust estate under will paid to husband or wife in Texas. (See G. C. M. 5741, page 160.)

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1924.

Income from restricted Indian land conveyed by one member of the Otoe Tribe of Indians to another member of the tribe, the deed containing restrictions as to alienation by the grantee. (See G. C. M. 6020, page 63.)

ARTICLE 32: Compensation for personal services.

REVENUE ACT OF 1924.

Payments made by a holding corporation to an officer of an operating company as additional compensation for services rendered. (See G. C. M. 5792, page 163.)

ARTICLE 47: Annuities and insurance policies.

REVENUE ACT OF 1924.

Annual payments under testamentary provision to a widow in lieu of dower. (See T. D. 4256, page 243.)

ARTICLE 48: Improvements by lessees. VIII-11-4139
G. C. M. 5866

REVENUE ACTS OF 1918 AND 1924.

Payment by a lessee of a special assessment for construction of a public driveway is analogous to the making of an improvement on the leased premises by the lessee in pursuance of an agreement with the lessor and results in taxable income to the lessor in accordance with, and to the extent provided by, article 48 of Regulations 65. Recommended that Office Decision 373 (C. B. 2, 123) be revoked.

An opinion is requested as to whether the amount of a special assessment on certain property owned by a taxpayer, which was paid

in 1924 by the lessee of the property, constituted income to the taxpayer.

The taxpayer is the owner of certain improved real estate in the city of Y, which was leased to the M Company for a period of 198 years from August 1, 1913, at a stipulated annual rental. The lease provided in part that the lessee was to pay all taxes, special assessments, and other charges accruing against the property. It further provided that the lessee was to construct a building on the property suitable to produce a rental income sufficient to guarantee the rent provided in the lease, by May, 192–, which date was later changed to May, 193–. During 1924, the lessee paid a special assessment levied against the property by the city of Y for an improvement known as the ——— Drive. The specific question at issue is whether the lessor derived taxable income on account of this payment, and if so, in what amount.

Article 110 of Regulations 65 provides that taxes paid by a tenant to or for a landlord for business property are additional rent and constitute a deductible item to the tenant and taxable income to the landlord, the amount of the tax being deductible by the latter.

Office Decision 373 reads as follows:

Assessments for local benefits paid by a tenant for his landlord according to agreement are held to be additional rent paid by the tenant, and therefore deductible from his gross income, provided the tenant uses the property for business purposes. The amount so received by the landlord is taxable income to him, but because of its nature is not an allowable deduction from his gross income.

In accordance with this ruling, it is contended that the payment by the M Company of the special assessment here under consideration constituted to the full extent thereof taxable income to the lessor for 1924.

There is a clear distinction between a tax and a special assessment for local benefits. As stated in *De Clercq* v. *Barber Asphalt Paving Co.* (167 Ill., 215, 47 N. E., 367):

* * * A tax is imposed for a general or public purpose. It is levied for the purpose of carrying on the government. It is a charge on lands and other property which lessens its value, and in the proportion in which the owner is required to pay is his pecuniary ability diminished. This is the sense in which the term "taxation" is used and understood. On the other hand, a special assessment contains none of the distinctive features of a tax. It is assessed or levied for a special purpose, and not for a general purpose. It is not a charge on property which reduces its value. The assessment is made in the ratio of advantages accruing to the property in consequence of the improvement. In no case can the assessment exceed the advantages accruing to the property assessed. It is therefore regarded but an equivalent or compensation for the increased value the property will derive from the improvement the assessment is levied to discharge.

In this connection see also appeal of Caldwell Milling Co. (3 B. T. A., 1232).

The Revenue Acts and regulations distinguished between taxes and special assessments, providing that taxes are deductible from gross income, but that payments of assessments made for the purpose of constructing local benefits are in the nature of capital expenditures and are not deductible. (Section 214(a)3 of the Revenue Act of 1924 and articles 131–133 of Regulations 65.)

The Supreme Court of the United States in the case of *Duffy* v. *Central Railroad Co. of New Jersey* (268 U. S., 55, T. D. 3704, C. B.

IV–1, 143) held that expenditures made by a corporate lessee, as required by the lease, to create additions and betterments to the leased property and not for upkeep, were not deductible from gross income as maintenance or operating expenses, nor were they deductible as "rentals or other payments" required to be made as a condition to the continued use or possession of the property, since "rental" is used in the Revenue Act of 1916 in the usual sense implying a fixed sum, or property amounting thereto, payable at stated times for the use of property, and "other payments" means payments *ejusdem generis* with rentals, such as taxes, insurance, interest on mortgages, and the like. The court held that the expenditures to create additions and betterments to the leased property constituted a capital investment by the lessee. Following the principle of the Duffy decision, it must be concluded that the payment by the lessee of the amount of the special assessment here under consideration can not properly be considered as additional rent paid by the lessee.

In view of the conclusion just reached, it is the opinion of this office that the payment by the lessee of the special assessment was analogous to the making of an improvement on the leased premises by the lessee in pursuance of an agreement with the lessor, and so resulted in taxable income to the lessor in accordance with the provisions of article 48 of Regulations 65. As the lessor's proprietorship is subject to the rights of the lessee during the term of the lease, the lessor in 1924 received income only to the extent of the estimated value of the improvement subject to the lease. (Article 48, Regulations 65.)

It is recommended that Office Decision 373, which is in conflict with the conclusions reached herein, be revoked.

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

SECTION 214(a)1.—DEDUCTIONS ALLOWED INDIVIDUALS: BUSINESS EXPENSES.

ARTICLE 112: When charges deductible.

REVENUE ACT OF 1924.

Freight charges of lumber manufacturers keeping books on accrual basis. (See I. T. 2473, page 88.)

SECTION 214(a)3.—DEDUCTIONS ALLOWED INDIVIDUALS: TAXES.

ARTICLE 133: Taxes for local benefits

REVENUE ACT OF 1924.

Treatment. (See G. C. M. 5589, page 83.)

SECTION 214(a)8.—DEDUCTIONS ALLOWED INDIVIDUALS: DEPRECIATION.

ARTICLE 162: Depreciable property.

REVENUE ACT OF 1924.

Assessment for street improvements on front-foot or valuation basis. (See G. C. M. 5589, page 83.)

SECTION 214(a)10.—DEDUCTIONS ALLOWED INDIVIDUALS: CONTRIBUTIONS OR GIFTS.

ARTICLE 251: Contributions or gifts.

REVENUE ACT OF 1924.

Navy and Marine Memorial Association. (See I. T. 2460, page 98.)

SECTION 219.—ESTATES AND TRUSTS.

ARTICLE 341: Estates and trusts. VIII–6–4097
G. C. M. 5735

REVENUE ACT OF 1924.

Income of a trust for its fiscal year ended January 31, 1924, distributable to a beneficiary making his returns on a calendar-year basis must be included in the return of the beneficiary for the calendar year 1924 and is taxable in full to the beneficiary at the rates prescribed by the Revenue Act of 1924 for the calendar year 1924. Recommended that Mimeograph 3308, Example VII (C. B. IV–1, 7), be revoked in so far as it is inconsistent with this memorandum.

An opinion is requested as to the method under the Revenue Act of 1924 of taxing income distributable to the beneficiary of a testamentary trust where the return of the trust is filed on a fiscal-year basis and the return of the beneficiary is filed on a calendar-year basis.

The facts of the instant case are as follows:

A, who died in 190–, devised his estate in trust, the income thereof to be paid principally to his widow, B, and to his sons, C and D, the latter being the taxpayer beneficiary in this case. The will provided in part that the sons were to receive from the net income of the estate from x dollars to $3x$ dollars per annum, depending on their age. When they reached the age of y years, each was to receive one-half of the net income of the residuary estate, remaining after deducting the income which was to be paid to the decedent's widow and other individuals, under the will. The will further provided that if either son should die without leaving issue, the executors and trustees were to set aside $20x$ dollars, and to pay the income therefrom to the widow of such son during her life. The trustees had the power, if they saw fit, to pay to the sons as they reached the age of z years, one-third of their respective shares of the principal of

the estate held in trust for them. The trustees were given the usual powers of managing and investing. The trust filed its returns upon the basis of a fiscal year ended January 31, while D filed his return upon the calendar-year basis.

Two questions arise in the case, which are answered in the order stated.

(1) In what year must D report the portion of the income of the trust for its fiscal year ended January 31, 1924, distributable currently to him?

The answer to this question is found in section 219(e) of the Revenue Act of 1924, which provides:

SEC. 219. (e) If the taxable year of a beneficiary is different from that of the estate or trust, the amount which he is required, under paragraph (2) of subdivision (b) of this section, to include in computing his net income, shall be based upon the income of the estate or trust for its taxable year ending within his taxable year.

It appears, therefore, that D is required to include in his return for the calendar year 1924 the amount of income of the trust for its entire fiscal year ended January 31, 1924, distributable to him pursuant to the terms of the will, whether distributed or not.

(2) Is the amount of income so included by D in his return for the calendar year 1924 taxable at the rates prescribed by the Revenue Act of 1924 for the calendar year 1924 or is it to be taxed partially at such rates and partially at the rates prescribed by the Revenue Act of 1921 for the calendar year 1923 as provided by section 207(b) of the 1924 Act in the case of the distributive share of the income of a partner in a partnership having a fiscal year beginning in one calendar year and ending in another calendar year, the rates of tax for such calendar years being different?

The Income Tax Unit held, in accordance with Mimeograph 3308, Example VII, that of the income of the trust for its fiscal year ended January 31, 1924, distributable currently to D, 11/12 should be taxed at the rates prescribed by the Revenue Act of 1921 for the calendar year 1923 and 1/12 at the rates prescribed by the Revenue Act of 1924 for the calendar year 1924.

Section 207(b) of the Revenue Act of 1924 provides in part:

If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then (1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and (2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. * * *

Trusts and partnerships differ in essential respects. The provisions relating to the taxability of individuals carrying on business in partnership and the provisions under which the income of a trust is taxable to the trust beneficiaries are contained in separate sections. (See sections 218 and 219, Revenue Act of 1924.) There is no authority in the Act for applying the provisions made applicable in the case of partnerships to trusts. It follows that section 207(b) does not apply to the facts of the instant case.

This office is therefore of the opinion that the portion of the income of the trust for its fiscal year ended January 31, 1924, which D was required under section 219(e) of the Revenue Act of 1924 to include in his individual return for the calendar year 1924 is taxable to him at the rates prescribed by the Revenue Act of 1924 for the calendar year 1924. It is recommended that Mimeograph 3308, Example VII, in so far as it is inconsistent with this memorandum, be revoked.

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

ARTICLE 342: Method of computation of net income and tax.

REVENUE ACT OF 1924.

Income to be returned by beneficiaries where will authorized trustees to set aside reasonable amounts for depreciation of the trust property. (See G. C. M. 5479, page 173.)

PART III.—CORPORATIONS.

SECTION 231.—CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

ARTICLE 515: Building and loan associations and cooperative banks.

REVENUE ACT OF 1924.

Amendment of article 515, Regulations 65. (See T. D. 4253, page 263.)

ARTICLE 515: Building and loan associations and cooperative banks.

REVENUE ACT OF 1924.

Kansas association requiring borrowers to subscribe to shares of rural credit installment stock. (See G. C. M. 5909, page 177.)

ARTICLE 519: Civic leagues and local associations of employees.

REVENUE ACT OF 1924.

Navy and Marine Memorial Association. (See I. T. 2460, page 98.)

ARTICLE 521: Local benevolent life and mutual insurance companies and like organizations.

REVENUE ACT OF 1924.

City firemen's protective association receiving money from so-called sale of tickets to dances. (See G. C. M. 5921, page 179.)

SECTION 238.—CREDIT FOR TAXES IN CASE OF CORPORATIONS.

ARTICLE 611: Credit for foreign taxes.

REVENUE ACT OF 1924.

Time of accrual of British income taxes. (See G. C. M. 5971, page 182.)

PART V.—PAYMENT, COLLECTION, AND REFUND OF TAX AND PENALTIES.

SECTION 270.—DATE ON WHICH TAX SHALL BE PAID.

ARTICLE 1204: Liens and enforcement of tax liens by bill in equity.

REVENUE ACT OF 1924.

Notice of tax lien filed by a collector. (See G. C. M. 5432, page 134.)

SECTIONS 277 AND 278.—PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION OF TAX.

ARTICLE 1272: Period of limitation upon collection of tax. VIII-4-4083 T. D. 4260

INCOME AND PROFITS TAXES—REVENUE ACT OF 1924—DECISION OF SUPREME COURT.

1. COLLECTION—SUIT—LIMITATION.

The period of limitation within which suit must be brought for the recovery of income and profits taxes imposed by the Revenue Act of 1918, assessed prior to the enactment of the Revenue Act of 1924, is not extended by section 278 of the latter Act.

2. JUDGMENT REVERSED.

Judgment of the United States Circuit Court of Appeals (22 Fed. (2d), 249 (T. D. 4107 [C. B. VI-2, 133])) reversed.

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

To Collectors of Internal Revenue and Others Concerned:

The following decision of the Supreme Court of the United States, in the case of *Benjamin Russell et al.* v. *The United States of America*, is published for the information of internal revenue officers and others concerned.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved January 19, 1929.

A. W. MELLON,
Secretary of the Treasury.

SUPREME COURT OF THE UNITED STATES.

Benjamin Russell et al., petitioners, v. *The United States of America.*

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1929.]

OPINION.

Mr. Justice McREYNOLDS delivered the opinion of the court.

The United States by bill filed January 23, 1925, sought to recover from petitioners, stockholders of the Pine Lumber Co., additional income and profit taxes for the year 1918 assessed against that corporation in March, 1924. The company made a return to the collector for 1918 on June 12, 1919, and afterwards paid the amount indicated thereby.

Petitioners claimed the suit was barred under the limitation specified by the applicable statute. They succeeded in the district court; but the circuit court of appeals held another view and reversed the decree dismissing the bill.

The statutory provisions which require special consideration are printed below.

Revenue Act, 1918 (ch. 18, 40 Stat., 1057, 1083):

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. * * *

Revenue Act, 1921 (ch. 136, Title II—Income Tax. 42 Stat., 227, 265):

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, * * * 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, * * * 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. * * *

Revenue Act, 1924 (ch. 234, Title II (effective January 1, 1924), 43 Stat., 253, 299, 300, 301, 303, 352):

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279 (274 and 279 are not here important)—

(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four 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.

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, 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.

SEC. 278. (a) * * * (b) * * * (c) * * *

(d) Where the assessment of the tax is made within the period prescribed in section 277 *or in this section* (the italicized words are unimportant here), such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

(Title XI) SEC. 1100. (a) The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivisions (b) and (c);

Title II (called "Income Tax") as of January 1, 1924; * * *

(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 (316 is not important here) and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax Acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. * * *

From the foregoing it appears: Under the Act of 1918 both assessment and suit within five years were necessary. The Act of 1921 required that taxes imposed thereby should be assessed within four years; that taxes payable under the Acts of 1918, and earlier ones, should be assessed within five years; and it limited the period within which any suit might be brought to five years after the return. With the exceptions specified by section 278, the Act of 1924 requires that assessment of taxes laid by it or the Act of 1921 and any suit to collect the same shall come within four years after the return; also in respect of taxes due under the Acts of 1918, etc., that no assessment or suit shall be permitted later than five years after the return.

The exceptions to the general rule of section 277 which are specified by section 278, and here important, relate to those cases only where there has been assessment but no suit; and petitioners aver that these exceptions do not apply where the assessment was made prior to June 2, 1924.

According to the general limitations contained in the Acts of 1918, 1921, and 1924, the time within which suit might have been brought upon the assessment of March, 1924, against the Pine Lumber Co. expired June 12, 1924—five years after the *return* date. And unless the Act of 1924 repealed the old limitation and established another, petitioners must prevail. The United States claim that section 278, Act of 1924, extended the limitation to March, 1930—six years after the *assessment*. Petitioners deny that the Act of June 2, 1924, should be so construed. They maintain that it did not extend the period for suit where an assessment had been made prior to its passage, and say that section 278 (e), (2), expressly negatives the contrary theory.

When the Revenue Act of 1924 passed many parties were liable for taxes imposed by former Acts—1921, 1918, etc.; against some there were assessments; others had not been assessed. It made provision concerning taxes thereafter to accrue; also for those already due. It distinguished between existing assessments and those which were to follow. It established a Board of Tax Appeals and gave the right of appeal thereto whenever thereafter the Commissioner should propose to assess for deficiency. It thus created a radical distinction between assessments prior to June 2, 1924, and later ones, which, generally at least, if objected to, could not be made without assent of the Board. To secure proper action by the Board might require considerable time, and this was provided for by extending the limitation to six years after assessment. But the taxpayer was afforded protection against any improper action by the

Commissioner through an appeal before any assessment could be actually imposed—a new and valuable right.

Section 1100, Act of 1924, kept in force "except as otherwise provided in sections 280 and 316 (316 is unimportant here) and except as otherwise specifically provided in this Act" those parts of the Act of 1921 which provided for assessment and collection of taxes imposed by that Act or earlier ones. Section 280 plainly relates only to assessments made subsequent to June 2, 1924; but counsel for the United States maintain that within the meaning of section 1100 modification of the Act of 1921 was specifically provided by sections 277 and 278 when read in conjunction.

Section 277, as above shown, limits suits for taxes imposed by the Act of 1918 to five years after the return, except (section 278) in certain cases where an assessment has been made. In the excepted cases the period for suit is extended to six years after the assessment. But section 278 further provides that it shall not authorize the collection of a tax after the same has been actually barred by the applicable statute, and further that it shall not affect any assessment made prior to June 2, 1924.

Manifestly, but for section 278 petitioners would be free from liability under the five-year limitation in the Act of 1918, continued by the Act of 1921. If section 278 refers only to assessments made after June 2, 1924, petitioners are not liable.

If an assessment made before that date comes within the ambit of section 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had almost expired. *United States* v. *Magnolia Petroleum Co.* (276 U. S., 160) declares "Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears." No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in section 278 or otherwhere.

Paragraph (e), (2), of section 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not "affect" an assessment within the meaning of the paragraph. We can not agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive section 278 of any possible application to cases where assessment had been made prior to June 2, 1924.

The legislative history of the Act of 1924 lends support to the conclusion which we have reached. The changes introduced into the Act of 1926 can not authorize construction of the earlier one not consonant with the language there employed.

The judgment is reversed. The cause will be remanded to the circuit court of appeals for further proceedings in conformity with this opinion. Reversed.

ARTICLE 1272: Period of limitation upon collection of tax. VIII-6-4099 Ct. D. 35

INCOME TAX—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

1. ASSESSMENT AND COLLECTION—LIMITATION—COMMENCEMENT OF PERIOD.

The period of limitation provided by section 250(d) of the Revenue Act of 1921 within which the amount of taxes due must be assessed and collected runs from the date of filing a completed return and not from the date of filing a tentative return.

2. COLLECTION—LIMITATION—WAIVER.

Where the right to assess and collect taxes for the year 1918, which would otherwise expire on June 14, 1924, is extended by an agreement in writing to June 14, 1925, an assessment made before the latter date by virtue of the agreement may be collected within six years from the date of such assessment as provided by section 278(d) of the Revenue Act of 1924.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Florsheim Bros. Dry Goods Co., Ltd., appellant, v. *United States of America, appellee.*

Appeal from the District Court of the United States for the Western District of Louisiana.

[December 21, 1928.]

OPINION.

BRYAN, Circuit Judge: This was a suit by appellant to recover back the amount of taxes which it paid under protest upon its income, war profits, and excess profits for the year 1918. It was based on the sole ground that the Government forced collection of the taxes after the running of the statute of limitations. The district court held that the taxes were collected within the period prescribed by law, and entered judgment dismissing the suit.

On March 15, 1919, appellant filed a tentative tax return for the year 1918, and received an extension of time for filing its completed return, which was made on June 14, 1919. On March 1, 1924, appellant and the Commissioner of Internal Revenue signed a written or printed instrument in the following form:

"In pursuance of the provisions of subdivision (d) of section 250 of the Revenue Act of 1921, Florsheim Bros. Dry Goods Co., Ltd., of Shreveport, La., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits or war-profits taxes due under any return made by or on behalf of the said Florsheim Bros. Dry Goods Co. for the year 1918 under the Revenue Act of 1921, * * *. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waiver already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned."

The additional taxes here involved were assessed by the Commissioner on June 11, 1925, and were paid under protest on dates later than June 14, 1925.

Under section 250(d) of the Revenue Act of 1921, it was required that taxes for prior years, including 1918, should be returned 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 * * * shall be begun, after the expiration of five years after the date when such return was filed." As a final return was made on June 14, 1919, the statute of limitations, unaffected by the written consent, would have run on June 14, 1924. It is suggested in argument that the statutory period of limitations began to run from the date of the tentative return in March of 1919; but we are of opinion that the return meant by the statute was the final or completed return. The consent in writing, entered into by appellant and the Commissioner, had the effect of extending the limitation of the statute for one year, or until June 14, 1925. The Revenue Act of 1924, which became effective on June 2, 1924, by section 278(d) provides that a tax which had been assessed within the period prescribed by law could be collected by distraint or by a proceeding in court begun within six years after the assessment thereof. As the taxes here involved were assessed on June 11, 1925, they were assessed within the statutory period of five years as extended by the written consent of appellant and the Commissioner. In *United States* v. *Crooks* (18 F. (2), 449) this court held that, if the statutory period of limitations had not expired at the time of the passage of the Revenue Act of 1924, and if the assessment of the tax had been timely made after its passage, the period for collection was extended for six years from the date of the assessment. A result of that decision is that the collection of taxes in the instant case was not barred by the statute of limitation. The consent in writing simply served to enlarge the period of limitations and otherwise to leave unchanged the provisions of law relating to collection as well as to determination and assessment of the taxes. The form adopted is in strict compliance with section 250(d) of the Act of 1921, and it was not intended by that section to authorize an agreement by the Commissioner to change the existing rights of the parties. Postponement of

the period of limitation was all that was authorized by the law or attempted by the consent in writing. This case does not in anywise differ in principle from the case of *United States* v. *Crooks*, supra.

The judgment is affirmed.

SECTION 281.—CREDITS AND REFUNDS.

ARTICLE 1306: Claims for refund of taxes erroneously collected.

REVENUE ACT OF 1924.

Form 1118. (See G. C. M. 6053, page 112.)

ARTICLE 1307: Limitations upon the crediting and refunding of taxes paid. VIII-6-4100 Ct. D. 36

INCOME AND PROFITS TAXES—REVENUE ACT OF 1924—DECISION OF COURT.

CREDITS AND REFUNDS—LIMITATIONS.

Section 281(c) authorizes a refund, where the period of limitation provided in section 281(b) of the Revenue Act of 1924 has expired, of only so much of an overpayment of taxes as results from a failure of the taxpayer to take adequate deductions in any year by reason of which invested capital is decreased by the Commissioner in a subsequent year.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Southwestern Oil & Gas Co., plaintiff, v. *The United States of America, defendant.*

[September 15, 1928.]

OPINION.

GIBSON, District Judge: The facts in the instant case have been stipulated by the parties, and the court has adopted the stipulation as its finding of facts, as follows:

FINDING OF FACTS.

1. The plaintiff, the Southwestern Oil & Gas Co., is a corporation organized under the laws of the State of Delaware, with its principal place of business at Pittsburgh, Pa., and was such corporation at all times material herein.

2. C. G. Lewellyn was the duly authorized and acting United States collector of internal revenue for the twenty-third district of Pennsylvania, at Pittsburgh, Pa., from the first date material herein up to August 1, 1921, on which date he was succeeded in office by B. B. Heiner, the present incumbent.

3. On April 30, 1918, plaintiff duly filed its return of corporate income and profits taxes for the calendar year 1917, showing thereon a total tax liability of $36,405.21, which sum was duly assessed against and paid by the plaintiff to the defendant on June 14, 1918.

4. On or about June 15, 1919, plaintiff voluntarily filed an amended tax return for the year 1917, which said amended return disclosed a total tax liability of $54,586.25, or $18,181.04 in excess of the amount shown by its original return. The amended return so filed consisted of corporation income tax return, Form 1031, and corporation excess profits tax return, Form 1103. Said amended return disclosed a net income of $115,161.76, and an invested capital for the year of $148,144.22.

5. Under date of February 26, 1920, the Commissioner of Internal Revenue advised the plaintiff that the total amount of its tax liability for the year 1917 was $54,873.94, which amount was $18,468.73 in excess of the amount of tax shown by its original return. Said additional amount of tax of $18,468.73

was duly assessed in April, 1920, and was paid by the plaintiff June 4, 1920. In his determination of plaintiff's tax liability for the year 1917 of $54,873.94, the Commissioner made no adjustments whatever to plaintiff's net income of $115,161.76, as shown by amended return filed by it, and an invested capital of $145,584.01.

6. Thereafter, plaintiff filed its income and profits tax return for the year 1918. Its correct tax liability for that year was finally determined by the Commissioner and paid by the plaintiff upon the basis of an invested capital of $203,904.11. In arriving at this amount of invested capital, the Commissioner decreased the invested capital shown on the plaintiff's 1918 return by the sum of $60,505.08, due to the failure of the plaintiff to take adequate deductions from gross income for depletion in prior years. Of said decrease of $60,505.08, the sum of $4,579.33 is attributable to the failure of the plaintiff to take adequate deduction for depletion in 1917.

7. On February 2, 1925, plaintiff filed a claim for refund in an unstated amount for the year 1917. Attached to said claim for refund was a letter dated January 27, 1925, in which, among other things it was stated:

"In support thereof the following propositions are submitted:

"(a) That there was an overpayment of our taxes for the calendar year 1917.

"(b) That the Commissioner is required, under section 281(c) of the Revenue Act of 1924, to refund the amount found to have been paid in excess of the correct amount."

8. By Bureau letter dated April 28, 1925, plaintiff was advised, among other things, as follows:

"You are advised that inasmuch as your claim was not filed with the collector of internal revenue for your district until February 2, 1925, which is subsequent to the expiration of the period of limitation for making refunds for the year 1917, it is of no effect and will, therefore, be rejected in the next schedule to be approved by the Commissioner."

Said claim for refund was rejected on Schedule of Overassessments, No. 14449, signed by the Commissioner on May 11, 1925. Said Schedule of Overassessments, No. 14449, discloses that there was allowed to the plaintiff, on account of taxes paid by it for the year 1917, an overassessment or reduction of tax liability in the amount of $2,857.50. This overassessment or refund of $2,857.50 was allowed by the Commissioner under the provisions of section 281(c) of the Revenue Act of 1924, and was paid by Treasury check on August 14, 1925. The aforesaid sum of $2,857.50 was arrived at by a computation wherein there was employed a net income of $110,582.43 and an invested capital of $145,594.01. The former figure was arrived at by reducing the net income of $115,161.76, shown on plaintiff's amended 1917 return, by $4,579.33, referred to in paragraph 6, supra. The latter figure was arrived at by taking the invested capital shown by the plaintiff on its amended 1917 return, and making a minor adjustment thereof (which adjustment is not here in controversy), referred to in paragraph 5, supra.

9. On April 1, 1927, plaintiff's representative called on and interviewed a representative of the Commissioner at Washington, and at that time presented an application dated March 30, 1927, for the reconsideration of the Commissioner's previous rejection of the taxpayer's claim for refund. Thereafter, by letter dated August 31, 1927, the Commissioner advised the plaintiff in part as follows:

"Your request dated March 30, 1927, for the reopening of your 1917 refund claim has been granted under the provisions of Treasury Decision 3240 and the merits of the claim reconsidered.

"Your claim will remain closed on the basis of the adjustment made in your tax liability as set forth in office letter dated April 28, 1925."

10. The plaintiff's correct tax liability for the year 1917 is as shown by computation attached as Exhibit A to plaintiff's complaint, provided, however, the defendant does not concede that said computation discloses the correct amount legally refundable to the plaintiff.

11. This suit was instituted January 9, 1928.

OPINION.

It is apparent from the finding of facts that the plaintiff, in the settlement of its 1917 taxes, has paid to the defendant the sum of $11,634.26 more than

was actually due. This admission appears in defendant's answer. The overpayment is admitted on behalf of the defendant, but counsel for the latter urges that plaintiff is precluded from the recovery of the excess payment by suit by the statute of limitations. The provisions of law upon which they rely are the following:

STATUTES.

The Revenue Act of 1926, approved February 26, 1926, provides in part as follows:

"SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully 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 established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

The Revenue Act of 1924, approved June 2, 1924, provides in part as follows:

"SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum."

"SEC. 281. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, 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 Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment 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.

"(b) Except as provided in subdivisions (c) and (e) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

"(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) has expired."

Counsel for defendant point out that plaintiff's 1917 tax was paid on June 4, 1920, that no claim for a refund of the overpayment was made upon the Commissioner of Internal Revenue until January 27, 1925, more than four years

after the payment of the 1917 taxes, and assert that such delay defeats plaintiff's present action. It further asserts that the Commissioner finally rejected plaintiff's claim for refund of the overpayment on April 28, 1925, the formal rejection schedule being signed on May 11, 1925, and that plaintiff's action, instituted on January 9, 1928, was not begun either within a period of five years from the date of the overpayment or within two years from the date of the rejection of the claim by the Commissioner, as required by section 1113 of the Act of 1926, supra.

The plaintiff, in answer to defendant's contention, asserts that its claim to the Commissioner was within the scope of section 281(c) of the Revenue Act of 1924, supra, and therefore no limitation existed against it. It further contends that the date of the Commissioner's final rejection of its claim was not April 28, 1925, but August 31, 1927, as the Commissioner, pursuant to plaintiff's request made prior to the expiration of two years following the original rejection, had reopened the judgment and reconsidered the claim. We find the last of these contentions to be sustained by the findings of fact, and that the claim was actually reopened and reconsidered, and finally decided on August 31, 1927, and consequently plaintiff's action is not barred by section 3226, R. S., as reenacted by section 1113 of the Revenue Act of 1926, and section 281 (a) and (b) of the Revenue Act of 1924, if it fell within the scope of section 281(c) of the Act of 1924.

The decision in respect to the date of the Commissioner's rejection of plaintiff's claim brings us to a consideration of the contentions of the parties in respect to the scope of section 281(c) of the Act of 1924, supra. The intention of Congress in this paragraph of section 281 is plain without any reference to legislative history. The decrease of the invested capital of a taxpayer for the year 1918 by the Commissioner obviously increased the tax for that year. If the decrease was due to the failure of the taxpayer to claim proper deductions from his gross income in preceding years, then it is apparent that he has paid tax on amounts which were not part of his income during such years, and, from the standpoint of abstract justice, that he is entitled to the return of the tax so paid on such amounts if he is to be called upon to pay the increased tax imposed by the Commissioner's action. But, without such a provision of law as the paragraph under consideration, the return of the overpayments would be impossible by reason of the expiration of the time within which a claim for refundment could be made. To remedy this injustice of increasing the taxpayer's taxes on account of his mistakes in accounting without giving him the benefit of the sums already received by reason of those mistakes, the provision in question was enacted.

A reading of the paragraph, 281(c) of the Act of 1924, in connection with an examination of the stipulated facts, will make it plain that the instant case presents the situation which Congress had in mind in the enactment of the paragraph. In the determination of the 1918 taxes, the Commissioner reduced plaintiff's invested capital, as carried on its books, to the extent of $60,505.08, due to the failure of the plaintiff in previous years to properly set off depletion against its invested capital. The plaintiff had erroneously included the amounts of such depletion as part of its gross income during such previous years without claiming any deductions for them. The action of the Commissioner in this correction of plaintiff's accounting methods had the effect of increasing plaintiff's tax for 1918 and gave it the right to a refund of the overpayment which resulted from its failure to deduct depletion from its gross income.

No substantial disagreement exists between the parties herein as to the applicability of section 281(c) of the Act of 1924 to plaintiff's 1917 tax. The actual dispute is in respect to the extent and method of the application. The Commissioner, when he determined plaintiff's 1918 tax, not only corrected plaintiff's return by reducing invested capital in amount of $60,505.08, depletion included in gross income, but also made certain other corrections of the return which increased plaintiff's invested capital for taxation purposes. The net result of all the corrections was an increase of invested capital for the year 1917 from $145,594.01, shown by plaintiff's return, to $279,838.21. The plaintiff contends that it has the right in the instant suit to recover the full amount of the difference between the sum paid as its 1917 tax and the sum actually due, as shown by a calculation based upon an invested capital of $279,838.21 and a net income of $110,582.43, less the sum of $2,857.50 returned by the Commissioner. Plaintiff paid a tax based upon an invested capital of $145,584.01 and a net income of $110,582.43, and the amount it claims herein

is $14,481.76, less $2,857.50 already paid it by the Commissioner, or $11,624.26. On the other hand, counsel for the defendant assert that plaintiff has already received the only refund of its 1917 tax which was legal at the time its claim was filed with the Commissioner. They insist that the overpayment contemplated by section 281(c), supra, is one which has been made wholly as a result of the failure of the taxpayer to take adequate deductions from his gross income, and is not, as here, one made by reason of the failure of the plaintiff to report the full amount of its invested capital. Plaintiff's depletion for the year 1917 amounted to $4,579.33 and was not deducted from plaintiff's gross income on its tax return. As a result of such failure to deduct this amount, say counsel, plaintiff, under section 281(c), supra, was entitled to have the amount of the depletion deducted from its gross income for 1917, and its taxes for that year, with that deduction made, calculated in accordance with its return upon which they were finally paid. The Commissioner, by section 281(c), supra, was authorized to correct the overpayment resulting from the failure to take such deduction, without regard to the limitations prescribed by section 281(b) of the Act of 1924, and other Acts cited, and did repay the amount due to that failure by returning $2,857.50 to plaintiff; but, counsel contend, the Commissioner's power to return overpayments of 1917 taxes is strictly limited. Except in case of an overpayment resulting from a failure to take adequate deductions, and a subsequent reduction of invested capital by the Commissioner in consequence, the Commissioner is specifically prohibited by section 281(b) from allowing any refund or credit unless a claim therefor has been made within four years from the date of payment of the tax. Nor is the power of the court any greater. Section 1113 of the Revenue Act of 1926, reenacting section 3226, R. S., defendant asserts, prevents the court from entertaining a suit against the United States unless prior demand be made upon the Commissioner for the return of the amount overpaid within four years from the date of payment, and suit be brought within five years from the date of payment or within two years from the Commissioner's refusal of the claim.

The plaintiff's contention is, in substance, that having had its invested capital for 1918 reduced by the Commissioner, and such decrease having been made by reason of its failure to take proper deductions in 1917 and previous years, its situation has brought it within the scope of section 281 (c) of the Act of 1924, which relieves it of making claim upon the Commissioner, and limits its action, if at all, to a period of two years after the Commissioner has rejected its claim. Having the right to a return of the overpayment of 1917 taxes, due to failure to take proper deductions, it claims it is entitled to a correction of all errors in the calculation of its 1917 taxes, no matter how arising, and so entitled to the judgment sought in the instant action.

After giving the claim our careful consideration, we have concluded that plaintiff has misapprehended the effect of section 281(c) of the Act of 1924. That paragraph excepted from the four years' limitation period of claim for refund upon the Commissioner only overpayments resulting from a failure of the taxpayer to take adequate deductions in previous years, and such overpayments only when they had been made to appear as such by the decrease of the taxpayer's invested capital by the Commissioner in consequence of the failure to take such deductions. In the present action plaintiff seeks to recover an overpayment which appears as such not by reason of a decrease, but by an increase, in plaintiff's invested capital. It will be remembered that the Commissioner, in the adjustment of the 1918 taxes, not only decreased the invested capital, as reported by plaintiff, by subtracting the amount of depletion in previous years, but also otherwise increased it, so that the net result was a large increase. The overpayment due to the inadequate deduction for depletion in 1917 has already been returned to plaintiff. As to the balance of the overpayment, the subject of this suit, it is not within the scope of section 281(c) of the Act of 1924 and is subject to the statutes of limitation quoted supra. Those statutes prevent recovery by the plaintiff.

Judgment will be entered for the defendant.

INCOME TAX RULINGS.—PART IV.

REVENUE ACT OF 1921 OR PRIOR REVENUE ACTS.

TITLE II.—INCOME TAX.

PART I.—GENERAL PROVISIONS.

SECTION 200.—DEFINITIONS.

ARTICLE 1523: Personal service corporation. VIII-7-4106
Ct. D. 38

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

PERSONAL SERVICE CLASSIFICATION—BUSINESS OF OPERATING A SCHOOL.

A corporation employing a large number of teachers in addition to its two stockholders in its business of operating a boarding and day school and which boards and lodges approximately 35 per cent of its students is not entitled to classification as a personal service corporation under section 200 of the Revenue Act of 1918.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF EASTERN PENNSYLVANIA.

The Shipley School, a Corporation, v. *Blakeley D. McCaughn, United States Collector of Internal Revenue for the First Collection District of Pennsylvania.*

[September 13, 1928.]

OPINION.

This is an action in assumpsit for the recovery of $2,586.66, with interest, being an additional tax assessed against the plaintiff on account of excess profits and income taxes for the year 1918, capital stock taxes for 1919 and 1920, and penalty. No part of the tax is due if the plaintiff is entitled to classification as a personal service corporation. The case was tried by the court, a jury trial having been waived in writing by the parties.

FINDINGS OF FACT.

1. The Shipley School is a Pennsylvania corporation incorporated in 1911. In the same year it succeeded to the business and purchased all of the assets, furniture and fixtures, good will, and cash of a then existing school owned by the Misses Hannah T. Shipley, Elizabeth A. Shipley, and Katherine M. Shipley, who had been engaged in the business of operating a girls' boarding and day school at Bryn Mawr, Pa., since 1893.

2. At the date of the incorporation and purchase Miss Alice Howland and Miss Eleanor C. Brownell became associated with the school, with the object and purpose of gradually becoming the owners of it, and, under an agreement made at or about the time of the incorporation, they each purchased 25 shares each of the capital stock, and from 1911 to 1916 were exclusively occupied in learning the operations of the school in its various departments and in teaching classes. In 1916 the Misses Shipley retired wholly from the management of the school and Miss Howland and Miss Brownell acquired for the consideration of $150,000 all the remaining shares of capital stock of the corporation as well as the real estate which belonged, not to the corporation, but to the Misses

Shipley. They still own all the stock with the exception of three shares which are outstanding in order to qualify a third director.

3. For the fiscal year ending June 30, 1919, the school buildings and property and real estate were leased by the corporation for a term of one year for cash rental of $10,000 and payment of taxes and repairs. During the year in question the plaintiff corporation owned house furnishings and school equipment, table and bed linen, chinaware, silverware, laboratory equipment, and other tangible personal property valued approximately at $25,000 to $30,000. They carried some cash on hand at all times and during the year on at least one occasion borrowed the sum of $25,000 for the purpose of meeting current expenses, buying food and supplies, etc., to carry it until the semiannual payments of tuition came in.

4. During the fiscal year involved the plaintiff conducted the business as a preparatory school for girls. It had at that time 205 pupils, of whom 126 were day pupils and 79 boarded at the school. Almost all of the income of the school was derived from semiannual payments called tuition. The boarders paid an average of $1,100 a year and the day pupils $300. It appears that the boarding feature of the school was not a source of profit but was maintained as a part of the general policy of the school in order to attract pupils from various parts of the country, it being considered that a student body of such a character was desirable. In addition to board and lodging, the girls who lived at the school received certain attention which the day scholars did not get. They took their meals with the teachers and were required to speak French at the table, and were taken upon educational trips to various parts of the neighboring country. They were also required to take certain athletic instruction. The school employed 31 teachers in addition to Miss Howland and Miss Brownell. These teachers came into direct contact with the students in the class rooms, in the dining room, and in connection with the various school activities. Certain of them known as house mothers lived in the school building and were at all times more or less in personal contact with the boarding pupils.

5. Of the income of the school some $700 was derived from the sale of textbooks to the pupils. This practice was for the purpose of convenience and to save time in getting the required books and was merely incidental to the main business of the school.

6. Miss Howland and Miss Brownell were regularly engaged in the active conduct of the affairs of the school to the exclusion of all other occupations. They drew salaries of $6,500 a year each. They conducted all of the business of the school, were engaged in overseeing the educational work, and in addition taught in one or two classes and maintained close personal contact with the girls at the school, through personal acquaintance with individuals and through meeting with class groups once every week for a discussion of educational and other matters connected with school life.

DISCUSSION.

The question involved is whether or not the plaintiff is a personal service corporation within the definition contained in section 200 of the Revenue Act of 1918, which is as follows:

"The term 'personal service corporation' means 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 the corporation, and whose capital (whether invested or borrowed) is not a material income producing factor."

In *Metropolitan Business College* v. *Blair* (24 Fed. (2d), 176) personal service classification was denied to a large business college having a student body of some 5,000 and a teaching force of more that 50 members. The decision was placed upon two grounds: First, where the day to day business of educating students is carried on by a large body of skilled teachers and not by the principal stockholders of the company alone, the corporation income is not primarily attributable to the activities of the principal stockholders. The "personal service" involved is that rendered by the teachers and not by the owners. If this basic principle be accepted, then it does not in the least affect the situation that the owners themselves did some teaching or maintained considerable personal contact with the students. In the case at bar, it must be obvious from a reading of the testimony that the duties of both Miss Howland and Miss Brownell were primarily business and executive

rather than educational. But if it had appeared that, in addition to their other duties, they had acted as full-time teachers, it would make no difference in the conclusion. As was said in the Metropolitan Business College case, "The teaching body is here a skilled working force, without which the income would have been restricted to such as would arise from a student body which these three men alone might handle." That language is strictly applicable here. Under the principle on which the decision rests employment of any number of stenographers, messengers, or other employees in like capacities would not bar the conclusion that the personal activities of the managing stockholders were a primary factor in producing the income, but the whole point of the decision is that teachers who come into contact with the student body are in an entirely different class. Their functions are not merely incidental to the activities of the managing stockholders.

The other point upon which the Metropolitan Business College case was decided was that the capital of the company was a material income-producing factor. This is also true in the case at bar. Approximately 35 per cent of the students in the school were boarders. The corporation sold these students food and space for lodging. It is no doubt true that during the year in question the school lost money on its boarders, but the question is whether the capital of the school which was used for this purpose produced a material part of the school's income, and it is clear that it did. It may also be true that the principal reason that boarders were taken was in order to carry out a general policy deemed beneficial to the school. I hardly think that this was the only reason and I do not understand that either Miss Howland or Miss Brownell meant to give the impression that if they had come to a definite conclusion that the boarders could never be anything but a source of financial loss they would have continued to take them in order to carry out the policies in question. The fact is that charges for tuition, which covered board and lodging, were considerably increased in a subsequent year. At all events, I am unable to reach the view that the boarding and lodging of a portion of the pupils during the taxable year was so entirely incidental to the primary function of the school that it can not be described as a material income-producing factor.

Judgment may be entered for the defendant.

SECTION 201.—DIVIDENDS.

ARTICLE 1541: Dividends. VIII–8–4115
I. T. 2455

REVENUE ACT OF 1921.

A transfer from surplus to capital account to pay the uncalled portion of the par value of outstanding stock held to constitute a stock dividend.

An opinion is requested as to whether a transfer by the M Company from surplus to capital account to pay the uncalled portion of the par value of outstanding stock constituted a stock dividend or a taxable dividend.

Prior to June —, 1923, the corporation had outstanding its entire authorized capital stock of 100,000 shares of a par value of $25x$ dollars per share. On this stock only $12x$ dollars per share had been paid in, the balance of $13x$ dollars per share being subject to call. At meetings of the stockholders and the directors, held on June —, 1923, resolutions were passed by both stockholders and directors, authorizing an increase in the authorized capital stock from 100,000 shares to 800,000 shares, and the transfer from surplus to capital account of an amount sufficient to pay the uncalled portion of the par value of the then outstanding stock. There was no cash distribution.

In the cases of *C. F. Michaels* v. *McLaughlin* and *C. F. Michaels, Executor*, v. *McLaughlin*, both reported in 20 Fed. (2d), 959, the United States District Court for the Northern District of California held that a similar action by the corporation involved in those cases constituted a stock dividend. In the course of its opinion the court said:

> This corporation was in a flourishing condition and had accumulated a large surplus. Its right to call for the * * * $20 per share remaining unpaid * * * was contingent upon a formal call in accordance with the provision of section 334 of the Civil Code of California. (*Los Angeles Athletic Club* v. *Spires*, 166 Cal., 177.) No such call was made at the time when the resolution in question here was passed. Until such call was made the obligation did not ripen into a debt to start the running of the statute of limitations. (*Spencer* v. *Anderson*, 193 Cal., 1.) At the time when the resolution was passed, therefore, the liability of the stockholders was contingent and had not been formally fixed by any action of the corporation. * * *
> * * * The incidental extinction of the contingent and, in view of the existing surplus, remote liability to pay $20 a share in the event of formal call can not be regarded as an individual gain subject to tax. * * *

The Government did not appeal from the decision in the Michaels cases.

In the instant case it appears that the facts closely resemble those relied upon by the court in the Michaels cases. The M Company had a surplus in 1923 of over y dollars. Its right to the $13x$ dollars per share remaining unpaid was contingent upon a formal call by the directors. (Art. XXI, by-laws; sec. 7797, Howell's Michigan Statutes, Ann.; *Dexter, etc.*, v. *Millerd*, 3 Mich., 91; *Halsey Fire-Engine Co.* v. *Donovan*, 57 Mich., 318, 23 N. W., 828.) Until such call was made the obligation did not ripen into a debt so as to start the running of interest (Howell's Michigan Statutes, supra, sec. 7797), and no call had been made when the resolutions in question were passed.

In view of the foregoing, the decision of the court in the Michaels cases appears to be applicable in the instant case. It is held, therefore, that the transfer in 1923 by the M Company from surplus to capital account of $13x$ dollars to pay the uncalled portion of the par value of its outstanding stock constituted a stock dividend.

ARTICLE 1541: Dividends. VIII-19-4198
Ct. D. 58

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. DIVIDEND—RIGHTS TO PURCHASE STOCK.

Where a corporation acquires the capital stock of another corporation and issues to its stockholders rights to purchase the stock, the value of the rights received by a stockholder constitutes a taxable dividend under section 201 of the Revenue Act of 1921.

2. DECISION AFFIRMED.

The decision of the United States Board of Tax Appeals (13 B. T. A., 236) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Estate of Edwin D. Metcalf (Carrie W. Metcalf, Edwin F. Metcalf, Harold G. Metcalf, and Stanley W. Metcalf, as Executors) v. *Commissioner of Internal Revenue.*

[April 8, 1929.]

OPINION.

MANTON, Circuit Judge: The petitioners, executors of the estate of Edwin D. Metcalf, appeal from the determination of the Board of Tax Appeals, which held they must pay an income tax on the sale of rights in 1921 (Revenue Act 1926, ch. 27, 44 Stat., 9, 109, 110). The decedent was a stockholder of the Southern Pacific Co. and his executors received purchase rights to shares of stock of the Pacific Oil Co. under the following circumstances: On December 1, 1920, the board of directors of the Southern Pacific Co. advised its stockholders of a plan they adopted for the separation of its California oil properties. The essential feature of the plan was the organization of the Pacific Oil Co., with a capital stock of 3,500,000 shares of no par value. It allocated 1 share of stock of the Pacific Oil Co. to each share of the Southern Pacific Co. The latter company subscribed for shares of the Pacific Oil Co. at $15 per share and turned over to the Pacific Oil Co. the California properties and received a purchase price of $47,250,000. This left in the treasury of the Pacific Oil Co. a fund for working capital. The Southern Pacific Co. then issued to each of its stockholders the right per share to subscribe to 1 share of capital stock of the Pacific Oil Co. at $15 per share. The stock of the Southern Pacific Co. and the Pacific Oil Co. were listed on the New York Stock Exchange and actively bought and sold. On February 7, 1921, the Southern Pacific Co. stock was sold with rights and quoted at 96 low, 97⅛ high; on February 8, it was sold x-rights at 78¼ low, 79⅞ high. The rights were sold on February 8 at 33⅝ low and 34¼ high. The subscription cost of $15 per share would make the rights worth $18 per share. The estate sold its rights for $18 a share.

It is argued that if the estate had sold its Southern Pacific stock, including its rights, at the market on February 7, 1921, it would have suffered a loss of $5.50 per share, because when the decedent died, in 1915, the stock was assessed for the New York transfer inheritance tax at $102.50 per share, and on February 7 it was selling at 97. It is said that if on February 8 it sold its shares of stock as well as its rights, it would have received 97—rights $18 and stock 79—and it is argued that, selling its rights alone, it suffered a proportionate loss. The question presented is whether, by the selling of these rights, the petitioner received taxable income under section 211 of the Revenue Act of 1921 (42 Stat., 227). As the term "dividend" is used in the Act of 1921, section 201 defines it as meaning any distribution by a corporation to its stockholders or members, whether in cash or other property, out of its earnings or profits accumulated since February 28, 1913. By section 213 gross income includes dividends paid to distributees. The Commissioner contends that these rights were the equivalent of dividends received and as such liable to tax.

A stock dividend of a corporation issuing it is not taxable income. (*Towne* v. *Eisner*, 245 U. S., 418; *Eisner* v. *Macomber*, 252 U. S., 189 [T. D. 3010, C. B. 3, 25].) This was held to be so because a stock dividend takes nothing from the property of the corporation and adds nothing to the interest of the shareholder. In *Peabody* v. *Eisner* (247 U. S., 347), the Union Pacific Railroad Co. declared a dividend partly in cash and partly in preferred and common stock of the Baltimore & Ohio Railroad Co. The tax imposed on this dividend was paid under protest. The Supreme Court approved the tax, saying the case was not ruled by *Towne* v. *Eisner* (supra), since the dividend of the Baltimore & Ohio shares was not a stock dividend but a distribution in specie of a portion of the assets of the Union Pacific and "it is governed for all present purposes by the same rule applicable to the distribution of a like value of money." In *United States* v. *Phellis* (257 U. S., 156 [T. D. 3270, C. B. 5, 37]), the New Jersey Dupont Co. decided to reorganize in Delaware. Its funded debt and capital stock were in excess of $60,000,000. The new corporation was to have a capital of $240,000,000. The assets and good will of the old were transferred to the new at $120,000,000; the shareholders of the old received 2 shares of common stock of the new company in exchange for 1 share of the old. The officers of the two corporations were the same. The dividend in stock was held to be taxable. By this exchange, the court said, "the parties were acting in the

exercise of their rights for the very purpose of placing the common stockholders individually in possession of new and substantial property rights *in esse*, in realization of their former contingent right to participate eventually in the accumulated surplus. * * * Its distribution transferred to the several stockholders new individual property rights which they severally were entitled to retain and enjoy, or to sell and transfer, with precisely the same substantial benefit to each as if the old company had acquired the stock by purchase from strangers." In *Rockefeller* v. *United States* (257 U. S., 176 [T. D. 3271, C. B. 5, 34]), the Prairie Oil Co. of Kansas organized a pipe line company to take over its pipe line property. The new company turned over all its stock to the oil company and the stock was distributed to the stockholders of the Prairie company; the Ohio Oil Co. did likewise. The plaintiff brought separate suits to recover the taxes imposed upon the transfer to them of the shares of the pipe line company. In affirming a judgment of the Court of Claims upholding a tax on the income, the court held that the new stock represented assets of the oil companies which were formerly their pipe line properties, part of their surplus assets. The distribution of the stock constituted, in the case of each individual, a gain in the form of exchangeable assets for his separate use in place of his former contingent interest in the corporate surplus. This was an increase in wealth, for the gain in value in the form of new pipe line stock caused a diminution in value of the oil stock. In *Cullinan* v. *Walker* (262 U. S., 134 [T. D. 3508, C. B. II–2, 55]), the plaintiff in 1915 owned $26,645 capital stock of the Farmers Petroleum Co., for which he paid cash. Acting as one of the trustees in liquidation, he turned over the assets of the Farmers company to two new corporations—one a pipe line company and the other a producing company. Half the assets went to each company and from each of the trustees received all the stock and bonds issued—in each one million five hundred dollars in stock and one million five hundred in bonds. Then a third corporation was formed in Delaware, and the trustees turned over the stock of the Texas company, receiving in turn $3,000,000 of the stock of the Delaware company. The trustees distributed $6,000,000 in stock pro rata according to the stockholders of the Farmers Petroleum Co., and the plaintiff's share was worth $1,598,400. The collector assessed the tax on the gain over the original investment. In affirming the judgment sustaining the tax, the court held that the stock received was not a stock dividend; that the plaintiff's gain was the result of a dividend in liquidation not essentially different from the ordinary dividend. If the assets had been disposed of for cash, there would be no doubt that the subsequent distribution would be of profits. The distribution being of stock of a company to which the assets had been transferred, the case was controlled by the Rockefeller and Phellis cases (supra). The Delaware corporation, as a holding corporation, differed from the old company, which was a pipe line and producing company. It differed also in that it was organized under the laws of another State. The gain was not an incident of a reorganization and the plaintiff's gain was held to have been realized in 1916 and must be taxed as income of that year. In *Marr* v. *United States* (268 U. S., 536 [T. D. 3755, C. B. IV–2, 116]), the plaintiff owned preferred and common stock of the General Motors Co. He paid for this in cash in 1913, the par value amounting to $76,400. In 1916, the General Motors of Delaware was formed and in the transfer he received stock of the new corporation valued at $400,866.57. The Government imposed a tax on the difference—$324,466.57. In a suit to recover the tax paid, the court affirmed the judgment for the defendant, pointing out that the New Jersey company had outstanding 15,000,000 of 7 per cent preferred stock of the par value of $100 per share and 15,000,000 of common stock of the par value of $100. The new company had an authorized capital stock of 20,000,000 of 6 per cent nonvoting preferred and 82,600,000 in common stock; all being $100 par value. The old company had a large surplus, and on each share of preferred 1⅓ shares of preferred stock of the new corporation was given and for each share of common 5 shares of common stock of the new company. The new company took over the business and assets of the old company, which was dissolved. All the new securities issued in excess of the capitalization of the old company represented income earned by it and when distributed the gain was taxable. The gain was represented by securities with essentially different characteristics and in an essentially different corporation and it was held to be income under the authority of the Phellis, Rockefeller, and Cullinan cases.

Thus, where a stockholder receives a distribution of the assets of a corporation in cash or in stock of a different enterprise, such distribution is for taxing purposes a dividend. No sound distinction can be drawn between a distribution

of stock of another corporation and one of valuable rights to purchase such stock. Each may be sold at its selling price. The rights this petitioner sold netted $18 per right. They amounted to a distribution of assets of the company of which it was a stockholder, just as much as an actual distribution of stock of the Baltimore & Ohio Railroad by the Union Pacific Co. did in the Peabody case. There was a distribution of specie of a portion of the assets of the Southern Pacific Co. A distribution of earnings or assets of a corporation is a distribution, whether or not so determined.

In *Miles* v. *Safe Deposit Co.* (259 U. S., 247 [T. D. 3365, C. B. I–1, 721]), relied upon by the petitioner, the guardian of an infant held for the infant certain shares of the Hartford Fire Insurance Co. This company had outstanding 20,000 shares of the par value of $100. It was decided to issue 20,000 additional shares, with the privilege to stockholders to take the new shares in proportion to their holdings in the company at $180 a share. The rights there involved were similar to the rights here considered. They were not dividend rights, but the rights there involved were to purchase stock in the company granting the rights, whereas in the case at bar the rights were to purchase stock in another company. This distinction is made clear in the Peabody, Phellis, and Marr cases, to which we have referred. The Commissioner, in determining the deficiency predicated it upon a determination that the value of the rights did not draw from the capital of the Southern Pacific Co. but from its surplus. (*Wickwire* v. *Reinecke*, 275 U. S., 101 [T. D. 4126, C. B. VII–1, 316].) The Board properly held that the income received, as a result of the sale of the rights in question, constituted taxable income.

Affirmed.

ARTICLE 1543: Distributions out of earnings or profits accumulated prior to March 1, 1913.

VIII–15–4173
Ct. D. 52

INCOME TAX—REVENUE ACT OF 1916—DECISION OF COURT.

DIVIDEND—TAXABILITY—"DISTRIBUTION MADE"—INTERPRETATION.

A distribution is made, within the meaning of the second sentence of section 31(b) of the Revenue Act of 1916, added thereto by section 1211 of the Revenue Act of 1917, on the date of payment of a dividend and not on the date of its declaration.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

C. G. Lewellyn, Formerly Collector of Internal Revenue for the Twenty-third District of Pennsylvania, appellant, v. *Ralph W. Harbison, appellee.*

Appeal from the District Court of the United States for the Western District of Pennsylvania.

[March 11, 1929.]

OPINION.

DAVIS, Circuit Judge: This is an appeal from a judgment of the district court ordering to the appellee a refund of income taxes arising out of an extra dividend declared by the Harbison-Walker Refractories Co., August 3, 1917, and paid August 25, 1917.

There are 15 cases in all but by agreement all of them are controlled by the judgment in the case of *Ralph W. Harbison* v. *C. G. Lewellyn.*

On August 3, 1917, the Harbison-Walker Co. declared an extra dividend of 6 per cent on its common stock payable on August 25, 1917, out of the surplus of the company accumulated prior to March 1, 1913. The dividend was accordingly paid on August 25, 1917. The question at issue is, When was the "distribution made" of the dividend—the day it was declared, August 3, 1917, as the appellee contends, or the day it was paid, August 25, 1917, as the collector contends?

Section 31(a) of the Revenue Act of 1916 (added to the Act of 1916 by section 1211 of the Act of October 3, 1917, 40 Stat., 300, 337, 338) provides:

"That the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation * * * out of its earnings or profits accrued since March 1, 1913, and payable to its shareholders, whether in cash or in stock of the corporation * * * which stock dividend

shall be considered income, to the amount of the earnings or profits so distributed."

Section 31(b) of that Act provides that:

"Any distribution made to the shareholders or members of a corporation * * * in the year 1917 or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits, or surplus, and shall constitute a part of the annual income of the distributee for the year in which received * * *. This subdivision shall not apply to any distribution made prior to August 6, 1917, out of earnings or profits accrued prior to March 1, 1913."

It will be seen that August 6, 1917, is the crucial date and the question is, Was this "distribution made" when *declared* on August 3, 1917, or when *paid* on August 25, 1917? If it was made on the former date, it was not taxable, but if made on the latter date, it was taxable and the judgment should be reversed, for the provisions of section 31(b) would not apply to the distribution.

A "distribution made" and a "distribution ordered to be made" are not the same thing. A "distribution made" is a completed act. It involves the order and the execution thereof, or the declaration and payment. Consequently, when the Congress said that "this subdivision shall not apply to any distribution made prior to August 6, 1917," it doubtless had in mind both the *declaration* and the *payment* thereof, for if it had not, it would have said, this subdivision shall not apply to "any distribution made or ordered to be made," in accordance with its language which it used in section 31(a) in defining "dividends." In the report of Senator Simmons, to whose committee in the Senate this bill was referred, he spoke on page 21 of "dividends declared and paid." Accordingly, the committee, which considered and reported this Act, and the Congress distinguished between the declaration and the payment of a dividend. We agree with the Circuit Court of Appeals for the Sixth Circuit that a "distribution made" means "dividends paid" and not merely declared. (*Routzahn* v. *Mason*, 13 Fed. (2d), 702.) The language involved is clear, precise, and unambiguous and in our opinion resort to the legislative history of the Act is unnecessary in order to determine its meaning. (*Edwards* v. *Douglas*, 269 U. S., 204, 210 [T. D. 3797, C. B. V–1, 158].)

In the case of *United States* v. *Phillips* (24 Fed. (2d), 195), we said the question was "whether distribution should be considered made when the dividend is declared, as contended by the plaintiff, or when the dividend is paid, as contended by the Government." We held, following *Mason* v. *Routzahn* (275 U. S., 175, 178 [T. D. 4131, C. B. VII–1, 194]), that "the date of payment, not the date of the declaration of the dividend, is the date of distribution."

The learned district judge held that in construing the words, "distribution made," in determining the *rate* of taxes, rather than the *exemption* of taxes, the above cases would control, but that the history of the enactment of the section shows that, in an exemption case, the words "distribution made" refer to the *declaration* and not to the payment of the dividend.

This conclusion does not seem well founded. When the same word or phrase is used in the same section of an Act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place. (*Ryan* v. *State*, 174 Ind., 468; *James* v. *DeBois*, 16 N. J. L., 285, 293.) We do not think that the history of the Act or the exemption provisions require a different interpretation of the words "distribution made," when considering the exemption of taxes, than that given to them by the Supreme Court in determining the *rate* of taxes.

While a statute imposing taxes is construed most strongly against the Government (*Gould* v. *Gould*, 245 U. S., 151), it is also true that a statute allowing exemptions is construed strictly in favor of the Government (*Bank of Commerce* v. *Tennessee*, 161 U. S., 134, 146). When the section under consideration is so construed, the judgment must be reversed and a new trial awarded.

SECTION 202.—BASIS FOR DETERMINING GAIN OR LOSS.

ARTICLE 1561: Basis for determining gain or loss from sale. VIII–18–4188 Ct. D. 54

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

INVENTORIES—BASIS OF VALUATION—COMMISSIONER'S CONSENT.

Section 202(a)2 of the Revenue Act of 1918 does not authorize a taxpayer to change, without the consent of the Commissioner, the basis of valuing inventories of merchandise from cost to market value, the latter being higher than cost.

COURT OF CLAIMS OF THE UNITED STATES.

The James Clark Distilling Co. of Cumberland, Md., for the Use of James Clark and Safe Deposit & Trust Co. of Baltimore, a Corporation, as Executor of the Will of John Keating, v. *The United States.*

[February 4, 1929.]

OPINION.

SINNOTT, Judge, delivered the opinion of the court.

On July 24, 1926, plaintiff brought this action against the defendant, for the use of James Clark and John Keating, to recover the sum of $61,253.92 paid as additional income and profit taxes for the year 1918. After the commencement of action John Keating died and, by order of the court, his executor, Safe Deposit & Trust Co. of Baltimore, a corporation, was substituted as plaintiff.

Plaintiff was for years engaged in the business of manufacture and selling the whisky. Until May, 1921, James Clark and John Keating were the sole stockholders of the plaintiff company, each owning one-half of the capital stock. In May, 1921, plaintiff distributed its assets to its two stockholders, on condition that they would indemnify plaintiff against loss in connection with Federal taxes, and thereafter Clark and Keating sold all the capital stock.

Plaintiff carried its unsold manufactured product on its books at cost. However, in the year 1919, after the passage of the Revenue Act of 1918 (40 Stat., 1057), plaintiff changed its inventories for the calendar year 1918, substituting market value for cost value—the former being higher than the latter—and made its tax return for 1918 in accordance with the altered inventories. Also it filed adjusted returns for 1917 and prior years. The Commissioner of Internal Revenue never gave plaintiff permission to use for inventory purposes any other basis than cost. Of the taxes paid by plaintiff, the sum sued for herein, $61,253.92, resulted from the action of the Commissioner of Internal Revenue in computing plaintiff's inventories at cost instead of at market value.

Plaintiff filed with the collector of internal revenue a claim in the name of the plaintiff for the use of James Clark and John Keating for refund of said sum of $61,253.92, being the amount of income and profits taxes for the year 1918, exacted from and paid by plaintiff as a result of computing such taxes on the basis of cost instead of inventory value at market. Said claim for refund was disallowed by the Commissioner of Internal Revenue, July 9, 1925.

The following are the pertinent sections of the Revenue Act of 1918 (40 Stat., 1057):

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer * * *.

"SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property real, personal, or mixed, the basis shall be—

"(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

"(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

"SEC. 203. 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."

The Treasury Department promulgated regulations from time to time presenting methods to which inventories must conform for tax purposes. All of them contained substantially the same provisions, requiring inventories to be taken or valued "either (a) at cost or (b) at cost or market price, whichever is lower," except the Treasury Decision 3296 [C. B. I–1, 40], promulgated March 8, 1922, permitted dealers in securities to value the inventories "either (a) at cost or (b) at cost or market, whichever is lower, or (c) at market value." See Treasury Decision 2609, December 19, 1917; Treasury Decision 2690, January 2, 1918; Treasury Decision 2831, April 16, 1919; Treasury Decision 3108, December 30, 1920 [C. B. 4, 49]; Treasury Decision 3296, March 3, 1922.

Prior to February 24, 1919, the effective date of the Revenue Act of 1918 (40 Stat., 1057), plaintiff carried a stock of whisky on its books at cost. During the years 1917 and 1918 the market price of whisky greatly increased in value, due to increased cost, war-time prohibition of its manufacture, and the approach of general prohibition, so that whisky manufactured in 1913, 1914, 1915, and 1916, although carried on the plaintiff's books at cost, was worth considerably more at market price from January 1, 1917, and reached a still higher valuation on January 1, 1918, and was sold during 1918 for a still higher figure.

The result of the ownership of the whisky throughout the entire period of six years from 1913 to 1918, inclusive, was that the plaintiff received on the sales made in 1918 a profit which was the result of a gradual increase in value covering the whole period.

Plaintiff's position is that, on being compelled to pay the taxes in dispute, its capital has been confiscated under the guise of taxing income. This position is negatived by the language of the statute, section 213, supra, which provides that gains, profits, and income shall be included in the gross income for the taxable year in which received by the taxpayer.

Plaintiff's contention is answered in the cases of *Merchants Loan & Trust Co.* v. *Smietanka* (255 U. S., 509 [T. D. 3173, C. B. 4, 34]) and *Goodrich* v. *Edwards* (255 U. S., 527 [T. D. 3174, C. B. 4, 40]). In the Smietanka case the property in question increased in value from $561,798 on March 1, 1913, to $1,280,996.64 on February 2, 1917. In the Edwards case the property had increased in value from $695 on March 1, 1913, to $13,931.22 in March, 1916. In both of these cases the Supreme Court held that the appreciation in value was income and taxable when converted into money. The Smietanka and Edwards cases, supra, involve the Revenue Act of 1916, containing language practically identical with section 213, supra, of the Act of 1918. The language is quoted in this Smietanka case, page 516:

"Section 2(a) of the Act of September 8, 1916 (39 Stat., 757; 40 Stat., 300, 807, sec. 212), applicable to the case, defines the income of 'a taxable person' as including 'gains, profits and income derived from * * * sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, * * * or gains or profits and income derived from any source whatever.'"

Plaintiff avoids the force of the Smietanka and Edwards cases by contending that section 202(a)2, supra, of the Revenue Act of 1918—

"* * * Expressly authorized the use, at the taxpayer's option, of 'inventory value,' i. e., market value, instead of 'cost,' as the 'basis' for 'ascertaining the gain derived' from sales."

If this were the case it would render nugatory the language of section 203, supra:

"* * * 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."

We think that section 202(a)2, must be read in connection with section 203, supra, and when so read it is apparent that both the use and the basis of inventories were matters left to the administrative discretion of the Commissioner.

We have decided this day that the basis of inventories was specially confided by Congress to the Commissioner and Secretary. (*Riverside Mfg. Co.* v. *United States*, No. F-324.) Our opinion is further strengthened by the quotation in defendant's brief from the House report on the revenue bill for 1918 (Rept. No. 767, 65th Cong., 2d sess., p. 4), as follows:

"BASIS FOR DETERMINING GAIN OR LOSS.

"In determining gain or loss from the sale or disposition of property, real, personal, or mixed, the bill provides that the basis shall be as follows:

"In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and in the case of property acquired on or after that date, (1) the cost thereof, or (2) the inventory value, if the inventory is made in accordance with the rules and regulations to be prescribed by the Commissioner of Internal Revenue in order that the inventory may clearly reflect the income.

"INVENTORY.

"In many cases the only way that the net income can be determined is through the proper use of inventories. This is largely true in the case of manufacturing and merchandise concerns. The bill authorizes the Commissioner to require inventories whenever in his opinion the same is necessary in order clearly to reflect the income of the taxpayer."

In connection with the different regulations of the Treasury Department referred to above, requiring inventories to be taken "Either (a) at cost or (b) at cost or market price, whichever is lower," it is significant that in each succeeding Revenue Act, since 1918, Congress has reenacted, without change, the provisions of section 203 of the Revenue Act of 1918. (See sec. 203 of the Revenue Act of 1921, 42 Stat., 227; sec. 205 of the Revenue Act of 1924, 43 Stat., 253; sec. 205 of the Revenue Act of 1926, 44 Stat., 9; sec. 22(c) of the Revenue Act of 1928, approved May 29, 1928.) It has been held that where a statute has been construed by the executive departments of the Government and has been reenacted without change, that such reenactment is an adoption of such construction by Congress:

"It is a familiar and well-established rule that where a statute that has been construed by the courts has been reenacted in the same or substantially the same terms, the legislature is presumed to have been familiar with its construction and to have adopted it as a part of the law unless a different intention is indicated, and the same principle is applied to statutes and parts of statutes which have been reenacted after they have been construed by the legislative or executive departments of the Government." (*Edwards, Collector*, v. *Wabash Ry. Co.*, 264 Fed., 610 [T. D. 3002, ST-1-20, 93].)

We conclude that the Commissioner was correct in rejecting the claim for the refund. The petition will be dismissed. It is so ordered and adjudged.

ARTICLE 1562: Sale of property acquired by gift after December 31, 1920. VIII-10-4135 Ct. D. 49

INCOME TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. INCOME—GAIN—BASIS—GIFT AFTER DECEMBER 31, 1920—CONSTITUTIONALITY.

The provision of section 202(a)2 of the Revenue Act of 1921 that the basis for ascertaining the gain derived from a sale of property

acquired by gift after December 31, 1920, shall be the same as that which it would have in the hands of the donor is constitutional.

2. JUDGMENT AFFIRMED.

Judgment of the circuit court of appeals (20 Fed. (2d), 561 (T. D. 4063 [C. B. VI-2, 164])) affirmed.

SUPREME COURT OF THE UNITED STATES.

16. *Elizabeth C. Taft, petitioner*, v. *Frank K. Bowers, Collector of Internal Revenue for the Second District of the State of New York.*

17. *Gilbert C. Greenway, jr., petitioner*, v. *Frank K. Bowers, Collector of Internal Revenue for the Second District of the State of New York.*

On writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 18, 1929.]

OPINION.

Mr. Justice MCREYNOLDS delivered the opinion of the court.

Petitioners, who are donees of stocks, seek to recover income taxes exacted because of advancement in the market value of those stocks while owned by the donors. The facts are not in dispute. Both causes must turn upon the effect of paragraph (2), section 202, Revenue Act, 1921 (ch. 136, 42 Stat., 227), which prescribes the basis for estimating taxable gain when one disposes of property which came to him by gift. The records do not differ essentially and a statement of the material circumstances disclosed by No. 16 will suffice.

During the calendar years 1921 and 1922 the father of petitioner, Elizabeth C. Taft, gave her certain shares of Nash Motors Co. stock then more valuable than when acquired by him. She sold them during 1923 for more than their market value when the gift was made.

The United States demanded an income tax reckoned upon the difference between cost to the donor and price received by the donee. She paid accordingly and sued to recover the portion imposed because of the advance in value while the donor owned the stock. The right to tax the increase in value after the gift is not denied.

Abstractly stated, this is the problem:

In 1916 A purchased 100 shares of stock for $1,000, which he held until 1923, when their fair market value had become $2,000. He then gave them to B, who sold them during the year 1923 for $5,000. The United States claim that under the Revenue Act of 1921 B must pay income tax upon $4,000 as realized profits. She maintains that only $3,000—the appreciation during her ownership—can be regarded as income; that the increase during the donor's ownership is not income assessable against her within intendment of the sixteenth amendment.

The district court ruled against the United States; the circuit court of appeals held with them.

Act of Congress approved November 23, 1921 (ch. 136, 42 Stat., 227, 229, 237):

"SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

"(1) * * *

"(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of

such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) 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; but

"(b) Does not include the following items, which shall be exempt from taxation under this title;

"(1) * * * (2) * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); * * *."

We think the manifest purpose of Congress expressed in paragraph (2), section 202, supra, was to require the petitioner to pay the exacted tax.

The only question subject to serious controversy is whether Congress had power to authorize the exaction.

It is said that the gift became a capital asset of the donee to the extent of its value when received and, therefore, when disposed of by her no part of that value could be treated as taxable income in her hands.

The sixteenth amendment provides—

"The Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several States and without regard to any census or enumeration."

Income is the thing which may be taxed—income from any source. The amendment does not attempt to define income or to designate how taxes may be laid thereon, or how they may be enforced.

Under former decisions here the settled doctrine is that the sixteenth amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income.

Also, this court has declared "Income may be 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, 207 [T. D. 3010, C. B. 3, 25].) The "gain derived from capital," within the definition, is "not a gain accruing to capital, nor a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested, and coming in, that is, received or drawn by the claimant for his separate use, benefit, and disposal." (*United States* v. *Phellis*, 257 U. S., 156, 169 [T. D. 3270, C. B. 5, 37].)

If, instead of giving the stock to petitioner, the donor had sold it at market value, the excess over the capital he invested (cost) would have been income therefrom and subject to taxation under the sixteenth amendment. He would have been obliged to share the realized gain with the United States. He held the stock—the investment—subject to the right of the sovereign to take part of any increase in its value when separated through sale or conversion and reduced to his possession. Could he, contrary to the express will of Congress, by mere gift enable another to hold this stock free from such right, deprive the sovereign of the possibility of taxing the appreciation when actually severed, and convert the entire property into a capital asset of the donee, who invested nothing, as though the latter had purchased at the market price? And after a still further enhancement of the property, could the donee make a second gift with like effect, etc.? We think not.

In truth, the stock represented only a single investment of capital—that made by the donor. And when through sale or conversion the increase was separated therefrom, it became income from that investment in the hands of the recipient subject to taxation according to the very words of the sixteenth amendment. By requiring the recipient of the entire increase to pay a part into the Public Treasury, Congress deprived her of no right and subjected her to no hardship.

She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold the stock she actually got the original sum invested, plus the entire appreciation, and out of the latter only was she called on to pay the tax demanded.

The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the purpose of Congress to take part of all gain derived from capital investments. To prevent that result and insure enforcement of its proper policy, Congress had power to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. And in so doing, it acted neither unreasonably nor arbitrarily.

The power of Congress to require a succeeding owner, in respect of taxation, to assume the place of his predecessor is pointed out by *United States* v. *Phellis* (257 U. S., 156, 171)—

"Where, as in this case, the dividend constitutes a distribution of profits accumulated during an extended period and bears a large proportion to the par value of the stock, if an investor happened to buy stock shortly before the dividend, paying a price enhanced by an estimate of the capital plus the surplus of the company, and after distribution of the surplus, with corresponding reduction in the intrinsic and market value of the shares, he were called upon to pay a tax upon the dividend received, it might look in his case like a tax upon his capital. But it is only apparently so. In buying at a price that reflected the accumulated profits, he of course acquired as a part of the valuable rights purchased the prospect of a dividend from the accumulations—bought 'dividend on' as the phrase goes—and necessarily took subject to the burden of the income tax proper to be assessed against him by reason of the dividend if and when made. He simply stepped into the shoes, in this as in other respects, of the stockholder whose shares he acquired, and presumably the prospect of a dividend influenced the price paid, and was discounted by the prospect of an income tax to be paid thereon. In short, the question whether a dividend made out of company profits constitutes income of the stockholder is not affected by antecedent transfers of the stock from hand to hand."

There is nothing in the Constitution which lends support to the theory that gain actually resulting from the increased value of capital can be treated as taxable income in the hands of the recipient only so far as the increase occurred while he owned the property. And *Irwin* v. *Gavit* (268 U. S., 161, 167 [T. D. 3710, C. B. IV–1, 123]) is to the contrary.

The judgment below is affirmed.

The Chief Justice took no part in the consideration or decision of these causes.

ARTICLE 1563: Sale of property acquired by gift on or before December 31, 1920, or by bequest, devise, or inheritance. VIII–11–4140 Ct. D. 50

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. GAIN OR LOSS—BASIS—PROPERTY ACQUIRED BY BEQUEST.

A legatee under a will acquires property within the meaning of section 202(a)3 of the Revenue Act of 1921 at the date of the testator's death, and the fair market value of the property at that time, and not its value at the date of distribution, is the basis provided by that section in ascertaining profit or loss on the sale of the property.

2. JUDGMENT REVERSED.

The judgment of the district court (25 Fed. (2d), 915) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

E. Franklin Brewster, defendant in error, v. *Bert P. Gage, Collector of Internal Revenue, plaintiff in error.*

Writ of error to the District Court for the Western District of New York. Action by E. Franklin Brewster, plaintiff, against Bert P. Gage, collector of internal revenue, defendant, to recover income taxes alleged to have been illegally collected as additional taxes. Judgment for plaintiff; defendant appeals. Reversed.

[February 4, 1929.]

OPINION.

MANTON, Circuit Judge: This action was brought to recover income taxes alleged to have been erroneously and illegally collected as additional taxes for the years 1920, 1921, and 1922. Defendant in error filed his return for these years and reported profits to him realized on the sale of securities which he received as a residuary legatee under his father's will. His income or profit differs in amount according to the date of the death of his father—May 20, 1918—or the date of distribution—April 19, 1920. The court below held the profit was determinable by subtracting from the sale price the value of the stock so sold at the date of distribution.

Section 213 of the Revenue Act of 1918 (40 Stat., 1065), in referring to the term "gross income," provides that it does not include "The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income)." And section 202(a) of the Revenue Act of 1918 (40 Stat., 1060) provides that for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, the basis shall be, in the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date, and, in the case of property acquired on or after that date, the cost thereof. Section 202(a) of the Revenue Act of 1921 (42 Stat., 229) provides that in ascertaining profit or loss on the sale or other disposition of property acquired after February 28, 1913, that—

"In the case of such property, acquired by bequest, devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition."

The question presented to us is whether the defendant in error "acquired," as such residuary legatee, the securities which he sold at the date of his father's death or the date of the order of distribution. Upon death, the executor or administrator of an estate obtains legal title and maintains it during a suitable period of administration, but he holds the property so obtained as a trustee for the proper administration for all the parties interested therein. The legal title of all personal property of a decedent, including chattels and choses in action, vests in the personal representative as of the date of death of the decedent. (Schouler on Wills, sec. 2061.) But a legatee under a will, subject to the use of the property for the purpose of administration, acquires that to which he is entitled at the instant of the testator's death. (Matter of Lansing, 182 N. Y., 238; *Vail* v. *Vail*, 49 Conn., 52; *Cook* v. *McDowell*, 32 N. J. Equity, 351; *Harvey* v. *Boaz*, 29 Ala., 168.) When the testator makes his will, he makes his gift. The rights of the legatee are thus fixed. Of course, his property is subject to his debts and the residuary legatee's rights to the property he may obtain must stand proportionately the burden of that obligation. (*Blood* v. *Kane*, 130 N. Y., 514.) But the legatee obtains a right which he may convey or devise by will. His is an equitable title. The executor (or administrator, if it be a case of intestacy) must account as the will (or law) directs and perform his trust accordingly. When the decree of distribution is made, it relates back to this original right and distribution gives to the distributee no new title to the property but only asserts the property to which title shall attach. (*Wager* v. *Wager*, 89 N. Y., 161; *Foster* v. *Fifield*, 20 Pick. (Mass.), 67; *Thompson* v. *Thomas*, 30 Miss., 152.) Equitable assets are governed by the same rules as legal assets. (Perry on Trusts (6th ed.), sec. 357.) The owner may sell and dispose of them or make conveyance thereof by will. (*West* v. *Burke*, 219 N. Y., 7; *Sanders* v. *Soutter*, 136 N. Y., 97.) The legal title which is outstanding in the executor during the period of administration has no value in and of itself and had it been sought to have been made the subject of a sale, carrying no right to equitable title, it would have commanded no price nor interfered with the carrying out of the

trust of the administrator. To ignore the gain upon so much of the sold title as was equitable would be a subordination of that which is real and substantial to that which is neither. It could not have been the intent of Congress to take the legal title apart or separate from that which would pass as earnings to one who is entitled to the equitable title or beneficial interest in the property. It surely was not the intent of Congress that the acquisition of a mere legal title should completely wipe out or render untaxable the gain which had been acquired by the equitable ownership and which was, in fact, realized upon the sale made when the date of distribution arrived. Moreover, it would be an unfortunate construction, which is not demanded by the statute, that would place it within the power of personal representatives and the real owners, namely, the legatees or distributees, to defer distribution in order to escape tax. This should be avoided. Frequently the personal representatives and the beneficiaries are the same persons or members of the same family, and the temptation would be opened, where there is a period of rapidly increasing values, to defer distribution until, in the judgment of all concerned, the peak in the market had been reached so that thereafter sales of the distributed property would register little or no profit and perhaps losses. It would not do to permit heirs and devisees to bring about a postponement of the acquisition of property for such purposes. Heirs and devisees to realty have legal title vested in them at the date of decedent's death. It is just and reasonable to place both classes of property upon the same basis without a distinction resting solely upon whether the property be realty or personalty. The Treasury Department in considering the Revenue Acts since 1913 and the exemption from income tax of property acquired by gift, bequest, devise, or descent (sec. 4, Act of 1916, 39 Stat., 358; sec. 1200, Act of 1917, 40 Stat., 329; sec. 213(b) (sub. div. 3), Act of 1918, 40 Stat., 1065; Act of 1921, 42 Stat., 238; Act of 1924, 43 Stat., 268; Act of 1926, 44 Stat., 24) has consistently held that the basic date for the computation of gain or loss on the sale of property so acquired is that of the decedent's death. (Par. 44, Regulations 33, 1918; art. 1562 of Regulations 45, 1919; art. 1562 of Regulations 45, 1920; art. 1563 of Regulations 62, 1922; art. 1594 of Regulations 65, 1924; and art. 1594 of Regulations 69, 1926.) Great weight will be given to contemporaneous construction of an Act of Congress by department officials who are called upon to act under and carry out its provisions, particularly if there be uncertainty or ambiguity. (*Swendig* v. *Washington Co.*, 265 U. S., 322; *Natl. Lead Co.* v. *United States*, 252 U. S., 140; *United States* v. *Hermanos*, 209 U. S., 337; *United States* v. *Finnell*, 185 U. S., 236.)

Three decisions were referred to in the court below and are urged upon us here. Matter of F. W. Matthiessen, jr. (2 B. T. A., 921); *Alice Fisher Foster* v. *Commissioner* (7 B. T. A., 1137); and *Matthiessen* v. *United States* (in the Court of Claims, reported in the Commerce Clearing House Federal Tax Service for 1927, vol. 111, p. 7535). In the Matter of Matthiessen, jr., supra, the taxpayer was a residuary legatee under the will of his father, who died February 11, 1918, in Illinois, and on March 13, 1918, the executors, trustee, and beneficiaries agreed upon a distribution of the estate subject to a provision for refunding *pro rata* to the executor sufficient funds wherewith to meet liabilities of the estate. Shares of corporate stock which remained in the father's name on November 12, 1918, were made out in the name of Matthiessen, the son. On November 19, 1918, he sold the stock. The Board held that he acquired it at the date of the agreed distribution and not at the date of his father's death. The Board said that it was true the taxpayer did acquire a right on the death of the testator, but that right was not a property right in the stock which was the subject matter of the transaction involved in the appeal. The most that the taxpayer, as residuary legatee, could do was to demand at the time of the death of the testator a proper administration of the estate and a distribution of the assets as they remained after all debts and claims were settled. But under the law, the right to a distributive share of personalty in an estate of an intestate vests *instanter* in the heir upon the death of the owner and not from the time of distribution. Distribution gives the distributee no new title but only ascertains the property to which the title attaches. (*Christie* v. *Railroad Co.*, 104 Iowa, 207.) *United States* v. *Jones* (236 U. S., 106), relied upon by the Board, involved a succession tax. No account was taken of the vesting in interest, but only the question of the vesting in possession and enjoyment, and it is not in point. The court did say that personal property did not pass "directly from the decedent to the legatees or distributees but goes primarily to the executor or administrator." This, of course, means that possession and enjoyment by the legatee was postponed. It

was there held that, until the distribution, the distributee certainly was not entitled to receive or enjoy any part of the property. *Foster* v. *Commissioner* (7 B. T. A., 1137) followed the Matthiessen case. Later, Matthiessen, after paying the tax, brought the action in the Court of Claims to recover the taxes found by the Board and also a larger sum, the claim being that his acquisition did not occur until his certificates of stock were handed to him and transferred on the books of the issuing corporation. The Court of Claims followed the Board's decision, relying upon *United States* v. *Jones* (236 U. S., 112). But for the reasons which we have advanced, we can not agree with the decisions in the Matthiessen case, either by the Board of Tax Appeals or in the Court of Claims. These reasons are more persuasive to us and, with the departmental construction justified by the rules of law, lead us to direct that the judgment below be reversed.

Judgment reversed.

SECTION 203.—INVENTORIES.

ARTICLE 1582: Valuation of inventories — VIII–8–4116
Ct. D. 43

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

INVENTORY—VALUATION—REDUCTION BY AMOUNT OF ANTICIPATED LOSS.

A taxpayer obligated under firm sales contracts at the end of 1919 to sell its product at a price less than cost and less than the then market price may not inventory at less than cost merchandise on hand at the end of the year, suitable for filling the contracts but not specifically set aside for them, in order to reflect a loss which it estimated it would sustain in the performance of such contracts.

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Ewing-Thomas Converting Co., a Corporation, v. Blakeley D. McCaughn, Collector of Internal Revenue.

[October 9, 1928.]

OPINION.

This is an action at law to recover $24,338.97, alleged to have been erroneously collected from the plaintiff as income taxes for the year 1919. The taxpayer took an appeal to the United States Board of Tax Appeals from a deficiency in tax proposed to be assessed against it by the Commissioner of Internal Revenue. The United States Board of Tax Appeals held the proposed action of the Commissioner was lawful and the tax was thereupon assessed and collected. Thereafter the plaintiff instituted this suit, which was tried before the court, jury having been waived by written stipulation.

FINDINGS OF FACT.

1. The taxpayer is a Pennsylvania corporation with its principal office at Chester, Pa. It is engaged in the business of mercerizing cotton yarn. It buys from southern spinners cotton yarn in the warped form known in the trade as natural or gray yarns. It mercerizes this yarn and then winds it, placing it on cones, and sells its output to the knitting trade for use in making stockings.

2. It was the regular and constant practice of the taxpayer during the year 1919, and for many months prior thereto, in every case of the sale of yarn, if it did not have sufficient yarn on hand to fill the order sold, immediately to cover the contract by purchasing natural yarn necessary to take care of the sale.

3. Between September 25, 1918, and May 25, 1919, the taxpayer in the ordinary course of its business entered into a number of contracts for the sale of

mercerized yarn to one Clarence L. Meyers, of Philadelphia, Pa., all of which yarn should have been delivered to Meyers in the ordinary course of business by the middle of 1919. Deliveries were not made, however, in accordance with the understanding of both parties, and some of the yarn owed Meyers was not delivered until after December 31, 1919.

4. The taxpayer accepted orders from and sold mercerized yarn to many persons besides Clarence L. Meyers, of Philadelphia. Its transactions with Meyers during 1919 were from 10 to 15 per cent of its entire transactions.

5. During the period from February, 1919, to April, 1920, prices of cotton yarn both natural and mercerized advanced very greatly. Certain kinds of yarn doubled and trebled in price during the period.

6. Some of the natural yarn which had been purchased against the Meyers contracts was used in filling orders received from others than Meyers at later dates.

7. On December 31, 1919, the close of the taxpayer's taxable year, the taxpayer was under binding contracts to sell Clarence L. Meyers 53,198 pounds of mercerized yarn at prices much under the then market prices. On that date the taxpayer had on hand approximately 40,000 pounds of yarn of a quality and grade suitable for filling the Meyers contracts. None of this yarn was, however, specifically set aside for the filling of those contracts and the taxpayer was free to do with it as he wished. The taxpayer's inventory at the close of 1919 was taken upon the basis of cost. Inasmuch, however, as the taxpayer was obligated to sell to Meyers 53,198 pounds of mercerized yarn at less than the then market prices and at less than the cost of the approximately 40,000 pounds of yarn on hand available for filling the contracts, the inventory of all yarn on hand at December 31, 1919, was written down to the extent of $53,198, which amount represents the estimated loss which the taxpayer was of the opinion that it had sustained upon the Meyers contracts.

8. To take care of its estimated loss of $53,198, the taxpayer opened a special account known as the "C. L. Meyers Special Account" and charged off this estimated amount as a loss and made a counter-entry in its profits and loss ledger. The income-tax return form for 1919 did not contain any provision for the entry of such an item as a deduction and the taxpayer accordingly reported its inventory as reduced by $53,198.

9. The Meyers contracts were completed by deliveries commencing January 2, 1920, and ending on May 20, 1920. Most but not all of the 40,000 pounds of yarn on hand at December 31, 1919, suitable for filling the Meyers contracts was used in the making of these deliveries; some natural yarn was purchased after December 31, 1919, and used in making the deliveries.

10. The Commissioner has added to the taxpayer's net income reported for 1919 the $53,198 in question and has proposed the assessment of an additional tax of $28,242.66 for said year.

NOTE.—The above findings were introduced as evidence as the facts found by the United States Board of Tax Appeals. This court also so finds. To the above may be added the following based on testimony produced at the trial:

11. During the year 1919 deliveries of raw products to the plaintiff were delayed from 60 to 90 days. The amount of raw products upon hand remained about constant during the year 1919. The manufacture of the products produced by the plaintiff required approximately 30 days from the receipt of the raw material. Neither the plaintiff's contracts with Meyers nor its contracts for the purchase by it of natural yarn were subject to cancellation. There was no agreement between the plaintiff and Meyers extending the time for deliveries under the contracts. During 1919 Meyers was continually calling on the plaintiff for more prompt deliveries but never suggested to the plaintiff that he would bring suit by reason of its default or that he would hold it liable therefor. All yarn necessary to fill the Meyers contract was purchased by the plaintiff during the year 1919.

DISCUSSION AND CONCLUSION.

At the close of the year 1919, the plaintiff found itself under binding contracts entered into during that year for the sale of its product at a price less than the cost of manufacture and less than the market price of similar merchandise at the close of the year. It conceived (and it now so contends) that in making its income tax return it was entitled to take as a deduction a sum equal to the loss which it estimated it would sustain by the performance of such contracts. It proceeded to do so by subtracting from the values shown by its inventory

taken at the end of 1919, at cost, the amount of such estimated loss. This resulted in the entire inventory being at a figure below either cost or market value. I am of the opinion that the taxpayer did not have the right to take its estimated loss in the contracts in question as a deduction for the year 1919, nor was the method by which it endeavored to effectuate its claim authorized by law.

The Revenue Act of 1918 authorizes the deduction of "losses sustained during the taxable year. * * *" Article 141 of Regulations 45 (issued in connection with the Revenue Act of 1918) provided that losses claimed during any taxable year "Must usually be evidenced by closed and completed transactions." Most business losses result from transactions covering a period of time of appreciable extent. It is obvious that, in order to determine in what year a loss has accrued so as to be deductible, some fixed point in the transaction producing the loss must be taken and it is desirable that a general rule applicable to all cases must be established. The rule established by the regulations is reasonable and in accordance with the purposes and intent of the Act. The plaintiff's position is practically that the time of accrual for purposes of a deduction is the time when it becomes reasonably certain that the loss will be incurred. I say reasonably certain, because in a transaction of this kind there can be no absolute certainty, and, while the plaintiff in his argument refers to absolute certainty, he does not really mean so much. It is a matter of ordinary knowledge that it sometimes occurs that for various reasons parties may be relieved of improvident or unprofitable contracts, or more favorable terms granted, or contracts apparently binding nullified on legal grounds. The safe and certain rule is that laid down by the regulations. This conclusion is supported by the current of judicial authority. (*New York Life Insurance Co.* v. *Edwards*, 271 U. S., 109 [T. D. 3872, C. B. V–1, 305]; *U. S.* 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.) In *Brewer* v. *Orr* (19 Fed. (2d), 230) the court said "It is, we think, indisputable that losses occurring in trade or business which are deductible as such in computing net income are only such losses as have been realized." This has also been the consistent holding of the Board of Tax Appeals in numerous cases. It may or may not be true that a statement for banking or credit purposes which did not take into account the probability of the loss would be an incorrect statement, but that question is beside the point, because for credit purposes the important point is the probability of a loss accruing and it is unimportant exactly when it occurs. For tax purposes the exact time when it occurs is an important consideration.

As to the taxpayer's right to reduce his inventory by the estimated loss, this question to a large extent is bound up with that just discussed, but it should be said that the taxpayer's procedure in this case was not authorized by law. If articles 1582 and 1584 of Regulations 45 be carefully read it will be seen that market value can be used as a basis for valuation only when it is lower than cost. Otherwise cost must be used. It follows that the provision of article 1584 for a valuation lower than market under certain abnormal conditions is only available to the taxpayer when the market is lower than the cost. Even if it were available when the cost was the lower of the two values, it would not apply here, because there is no evidence that the taxpayer had regularly sold such merchandise as is herein involved at prices lower than the current bid price.

Judgment may be entered for the defendant.

SECTION 204.—NET LOSSES.

ARTICLE 1602: Claim for allowance of net loss. VIII–4–4078
I. T. 2450

REVENUE ACTS OF 1918 AND 1921.

Office Decision 445 (C. B. 2, 58), Office Decision 855 (C. B. 4, 54), I. T. 1211 (C. B. I–1, 47), Appeals and Review Recommendation 743 (C. B. I–1, 45), Appeals and Review Recommendation 1128

(C. B. I-2, 34), I. T. 1465 (C. B. I-2, 36), and I. T. 1509 (C. B. I-2, 39), in so far as they are inconsistent with General Counsel's Memorandum 5457, published on page 157, are revoked.

ARTICLE 1604: Net losses, for what periods allowed. VIII-21-4215 Ct. D. 62

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

DEDUCTION—NET LOSS—FISCAL YEAR ENDED AFTER DECEMBER 31, 1919.

No part of a net loss sustained in a fiscal year ending February 28, 1920, may be deducted under subsection 204(b) of the Revenue Act of 1918, which provides for the deduction of a net loss only where the taxable year in which it is sustained falls wholly within the period therein specified.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

De Haven Manufacturing Co., petitioner, v. *United States of America, respondent.*

[March 30, 1929.]

OPINION.

COOPER, J.: Plaintiff brings suit to have its income taxes for its fiscal year ending February 28, 1919, redetermined pursuant to the provisions of section 204(b) of the Revenue Law of 1918.

Plaintiff is a corporation. It keeps its books of account and makes its income tax returns on the basis of a fiscal year ending on the last day of February of each year. During the fiscal year ending February 28, 1919, its net income was $83,181.27, and it paid an income and excess profits tax thereon $30,242.54. During the fiscal year ending February 29, 1920, it sustained a net loss of $51,046.64. It now claims the right to deduct under section 204(b) so much of the net loss as it sustained during the 10 months of the year 1919 (March to December, inclusive) from the net income of the former year ending February 28, 1919, and to have its taxes for the former year redetermined, and upon such redetermination to recover the sum of $26,726.84, excess taxes paid.

Section 204(b) reads as follows:

"If for any taxable year beginning after October 31, 1918, and ending prior to January 1, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount of such net loss shall under regulations prescribed by the Commissioner with the approval of the Secretary be deducted from the net income of the taxpayer for the preceding taxable year; and the taxes imposed by this title and by Title III for such preceding taxable year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. If such net loss is in excess of the net income for such preceding taxable year, the amount of such excess shall under regulations prescribed by the Commissioner with the approval of the Secretary be allowed as a deduction in computing the net income for the succeeding taxable year."

Taxable year is defined in section 200 of the Act as follows:

"The term 'taxable year' means the calendar year or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or section 232. The term 'fiscal year' means an accounting period of 12 months ending on the last day of any month other than December."

The facts are stipulated. The decision turns upon the construction of the statute. In considering the meaning of the Act the subject will be discussed as of the date of the passage of the Act, and, as far as possible, the verbs used will be used in the present tense.

Plaintiff contends that the 10 months March to December, 1919, inclusive, of its taxable year ending February 29, 1920, comes within the terms of section 204(b) properly construed.

Defendant claims that plaintiff does not come under this section because its taxable year is not wholly included within the 14 months' period from October 31, 1918, to January 1, 1920, specified in the section.

The Revenue Act of 1918 was not passed until February 14, 1919. The armistice terminating active hostilities of the World War was entered into on November 11, 1918, and, while this was not a treaty of peace, Congress was satisfied that the war was over and that a period of deflation of values had begun.

To give relief from the deflation and subsequent losses was the purpose of Congress in including the aforesaid section 204(b) in the Revenue Act of 1918.

In the appeal of the Norfolk Knitting Mills Corporation (5 B. T. A., 792), the Board of Tax Appeals said with reference to provisions in this section:

"The purpose of Congress in enacting this provision seems too obvious to be a matter of debate; its purpose was to provide that taxpayers suffering losses during the period between November 1, 1918, and December 31, 1920, were to be allowed relief from taxation by crediting such losses first against 1918, when taxpayers were believed to have enjoyed the benefit of war prices and to have made large profits and carried proportionately heavy burdens of income and profit taxes, and, in the event that profits of 1918 were insufficient to absorb the loss, the balance thereof, or so much of it as possible, should be absorbed by the profits of the year 1920, when it was expected that business conditions and commodity prices might again become normal."

On the face of the statute, giving the words their usual and ordinary meaning, it is not to be doubted that only those taxpayers come under section 204(b) who have a taxable year beginning after October 31, 1918, and ending prior to January 21 [1], 1920. Clearly this excludes all taxpayers whose taxable year does not come wholly within the 14 months' period, and would, of course, exclude the plaintiff. Such construction would also exclude ten-elevenths of all taxpayers who have a fiscal year other than the calendar year, because only those taxpayers having a fiscal year ending November 30 would have their entire taxable year within the 14 months' period. It is almost common knowledge that a large number of taxpayers have a taxable year, that is, a fiscal year, which is not wholly within the 14 months' period.

In fact the statute itself in another section, namely, section 205(b) of the same Revenue Act of 1918, plainly indicates that Congress knew at the time of the enactment of this statute that there were taxpayers whose fiscal year began in one calendar year and ended in another and part of which was outside of the 14 months' period.

Section 202(b) of the same Act also refers to the taxpayers having a like fiscal year.

It is clear, therefore, that Congress, in attempting by section 204(b) to provide relief for taxpayers who would suffer deflation losses during the 14 months' period, either inadvertently used language which on its face excluded all taxpayers whose taxable year did not begin and end within the 14 months' period or deliberately intended to exclude such taxpayers. The sole question in this case is what was the intent of Congress.

Plaintiff asserts that if the statute is construed as the Government contends, it works discrimination, injustice, and inequality to the many taxpayers whose fiscal year begins or ends outside the 14 months' period, and that no such construction should be given a statute if a more reasonable meaning avoiding such inequalities can be found in the statute itself or when the object sought to be attained and evil to be remedied are to be considered. Plaintiff has authority for its contention.

In *Heydenfeldt* v. *Daney Gold & Silver Mining Co.* (93 U. S., 634) the United States Supreme Court said:

"If a literal interpretation of any part of it (statute) would operate unjustly or lead to absurd results or be contrary to the evident meaning of the Act, taken as a whole, it should be rejected."

In *Knowlton* v. *Moore* (178 U. S., 41) the court, in an opinion by Mr. Justice White, said:

"We are, therefore, bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality

or injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Of like import are: *Church of the Holy Trinity* v. *U. S.* (143 U. S., 457); *Scandinavian Belting Co.* v. *Asbestos & Rubber Works of America* (257 Fed., 937); *Roxford Knitting Co.* v. *Moore et al.* (265 Fed., 177); *Bankers' Trust Co.* v. *Bowers* (295 Fed., 89).

There seems to be no reason on the face of things why Congress should have any greater solicitude for those taxpayers who had the entire taxable period within the 14 months and were given relief than for those whose taxable period was partly within and partly without such period and who were denied such relief.

But a consideration of the situation of income-tax payers independent of section 204(b) of the Act in question shows that under that section there is no such discrimination and inequality in favor of some taxpayers and against others as the face of the statute seems to indicate.

If, for instance, a taxpayer has for his taxable year the fiscal year ending June 30, 1919, even without the provision of subdivision 204(b) the taxpayer can and does apply the losses for the eight months from October 31, 1918, to June 30, 1919, against the profits of the preceding four months from June 30, 1918, to October 31, 1918. So far as the losses for the remaining six months of 1919, the first six months of the next fiscal year, namely, June 30 to December 31, are concerned, without the provision of section 204(b), the taxpayer may apply the losses of these six months against the profits of the remaining six months of the second fiscal year, viz, the six months from January 1, 1920, to June 30, 1920.

It is not to be lost sight of that Congress expected the period of deflation would end on December 31, 1919, and that the year 1920 would be one of profits. So that in effect the taxpayer having his fiscal year ending June 30, 1918, may have his losses for the entire 14 months' period applied, as to the first 8 months, against all profits of the 4 months of 1918, and, as to the other 6 months, against the profits of the first 6 months of 1920 Thus a very large portion of the supposed discrimination disappears.

The taxpayer does not, of course, in his accounting, segregate his profits and losses according to these portions of a year within and without the 14 months' period and then offset one against the other. His accounting period is one continuous 12 months' period, but his right to limit his taxes to his profits in the taxable year as a whole accomplishes the same result as if he did segregate or allocate the losses of the portion within the 14 months and offset them against the profits of the portion without that period.

A taxpayer like the plaintiff, whose fiscal year ends February 28, is in a similar situation. His loss during the 4 months from October 31, 1918, to February 28, 1919, is deductible against profits of the 8 months of 1918 from February 28 to October 31, and his losses for the remaining 10 months of 1919, namely, from February 28, 1919, to December 31, 1919, may be offset against the expected profits of the 2 months, January and February of 1920.

True, a taxpayer having a fiscal year ending February 28, like plaintiff, may not fare quite as well as a taxpayer whose fiscal year ends June 30, but it is not always possible to make laws which apply with equal effect to all persons.

But the taxpayer whose fiscal year corresponds with the calendar year can not offset his losses incurred in the calendar year 1919 against the profits of either 1918 or 1920, or any part of either of such years, except under section 204(b). Without section 204(b) the taxpayer having a fiscal year which did not begin and end within the 14 months' period would have a decided advantage over the taxpayer with a calendar year or with a fiscal year beginning and ending within such period.

If the taxpayer having a taxable year beginning in one calendar year and ending in another may also avail himself of the provisions of 204(b), in a sense he has a double relief, while the taxpayer whose taxable year coincides with the calendar year or comes wholly within the 14 months' period has only the relief provided in section 204(b). Except for 204(b) there would be thus an inequality or discrimination running against taxpayers having a calendar year or fiscal year within the 14 months' period. Section 204(b) is intended to remove such discrimination and restore such taxpayers to a position of relative equality with the others.

It is reasonably clear, then, that by section 204(b) Congress did not, either through inadvertence or design, create inequality among taxpayers, but, on

the contrary, did remove inequality, which, because of changed economic conditions, would otherwise have arisen under existing law.

The authorities cited by plaintiff to support its contention that the letter of the law must be overridden if a contrary intent is manifest from the whole statute or because of the object to be attained or the evil to be remedied have, therefore, no application here.

That Congress did not intend to include within the provisions of section 204(b) taxpayers whose taxable year was not wholly within the 14 months' period may also be gathered from the history of the legislation.

When the Revenue Act of 1918 passed the House of Representatives in its first form there was no net loss provision in the bill. After the bill reached the Senate and had been referred to the proper committee and reported to the Senate by that committee, the Senate adopted certain amendments to the bill suggested by the committee. One of the amendments was the insertion of a provision to give relief against net losses due to deflation of values. This amendment was inserted under the designation "Net losses," in section 204, and particularly in subdivisions (b) and (c), which read as follows:

"(b) If for any taxable year beginning after December 31, 1916, and ending not later than December 31, 1918, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer (other than a life insurance company) has sustained a net loss, the amount of such net loss shall under regulations prescribed by the Commissioner with the approval of the Secretary, be allowed as a deduction in computing the net income of the taxpayer for the *succeeding* taxable year.

"(c) If for any taxable year ending after January 1, 1919, it appears— * * * that any taxpayer * * * has sustained a net loss, the amount of such net loss * * * be deducted from the net income of the taxpayer for the *preceding* taxable year."

(Congressional Record, pages 513–518, volume 57, part 1, Sixty-fifth Congress, third session.)

The House did not agree with this Senate amendment nor with certain other amendments, and conference committees appointed by the two branches of Congress finally compromised various disputed matters and among them section 204(b). As finally agreed upon by the conference committees and enacted in the language now appearing in the statute, section 204(b) seems to be a combination of sections 204(b) and 204(c) of the Senate amendments. The period of time to be covered by the net loss provision was finally limited to a taxable year "beginning after October 31, 1918, and ending prior to January 1, 1920." And the loss was to be deducted, not from the succeeding taxable year, as was provided in the Senate amendment, section 204(b), but from the *preceding* taxable year, as was provided in the Senate amendment section 204(c), with the addition that if the loss in the taxable year wholly within the 14 months' period was greater than the profit of the *preceding* taxable year, the excess could be offset against the profit of the *succeeding* taxable year.

After such agreement by the conference committees, the chairman of the House committee, Congressman Kitchin, made a report with reference to the various things the conference committee had done and included therein was the following concerning this section 204(b) as agreed upon by the conference committee:

"Another innovation to which I have referred which the Senate put in the bill was the net loss provision. As I said, the Senate had the time unlimited for the future, and it reached back to the taxes of 1916; that is, the Senate provision permitted a redetermination of the taxes as far back as 1916 and for all time in the future. The conferees finally concluded that the best thing to do was to limit it to the transition period; in other words, the one year 1919. The inventory and net loss relief provisions are emergency provisions and the conferees agreed to treat them in that way.

"The net loss provision is this. If a business or trade shows in 1919 (or) in its fiscal year, between October 31, 1918, and January 1, 1920, which includes the calendar year of 1919, a net loss instead of a net profit, it can take that loss from the income upon which it paid the taxes for 1918 and have the 1918 tax redetermined, just as I have explained in the case of the inventory, and have the difference between the tax paid and the tax as redetermined refunded to it.

"In other words, if the trade or business makes $500,000 clear net profit in 1918 and this year 1919, during the transition period, instead of making a profit it loses $100,000, then we permit that business to go to the Commissioner and

ask for a redetermination of its tax for 1918. The Commissioner will deduct from the income of $500,000 as returned for 1918 the $100,000 loss, leaving $400,000. Upon the basis of $400,000 income the 1918 tax will be recomputed and the difference between the tax paid on the $500,000 and the tax computed on $400,000 income will be returned to the taxpayer."

Had section 204(c) of the Senate amendment remained in the Act, plaintiff and all other taxpayers would have come within its terms, for the language "any taxable year ending after January 1, 1919," was broad enough to cover every taxpayer and every taxable year. But it was eliminated because the House of Representatives would not accept it.

The fact that a relief provision broad enough to include all taxpayers was inserted by the Senate in the bill and such a provision eliminated before passage and the present narrower provision substituted limiting the relief to those taxpayers whose fiscal year comes wholly within the 14 months' time limits of statute as enacted, warrants the conclusion that Congress intended to exclude all taxpayers except those whose fiscal year comes within such 14 months' period.

One further inference drawn from the statute militates also against the plaintiff's contention. If the statute could be construed as plaintiff contends, to include taxpayers like plaintiff whose fiscal year is partly within and partly without the 14 months' period, the statute would not be a harmonious whole.

If the relief provisions of section 204(b) were to run to taxpayers whose taxable year was not wholly within the 14 months' period, then it could not run to the entire taxable year of such taxpayers but only to the fractions or portions thereof within such period. If a taxpayer had a fiscal year like that of the plaintiff, which ended on February 28, there would be 4 months of one taxable year within the 14 months' period and 10 months of the taxable year within the same period.

If Congress had intended that all taxpayers should have the benefit of the remedial provisions of 204(b) to make the provisions effective, a formula or method would be necessary for determining or prorating the losses for so much of each taxable year as come within the 14 months' period or a provision would be necessary requiring taxpayers to take an inventory at the end of the portion of the year coming within the 14 months' period. Or at least there would have been need for a provision that the Commissioner of Internal Revenue could devise by regulation or otherwise some method of so determining or prorating the net losses for fractional parts of a taxable year. But the statute is silent on that point.

True, section 201(e) provides for determining ratably the amount of profits earned during a portion of a year for the purpose of fixing profits out of which dividends are deemed payable, but this provides no method of prorating losses. Nor was there any applicable provision in previous Revenue Acts for prorating losses. There will be no presumption that Congress inadvertently neglected or omitted any subject or class of persons from the provisions of any Act of Congress, nor that Congress hastily enacted legislation. On the contrary, the opposite presumption must prevail.

The absence of any provision for determining or prorating net losses for fractional parts of a year apparently is significant. If there are no fractional parts of a taxable year within the terms of section 204(b), there is no need for provision for determining or prorating the net losses during such fractional parts of the taxable year. Conversely, if there is no provision for determining or prorating losses, it is a reasonable inference that there is no intent to include that which would make such provision necessary.

One more of plaintiff's contentions remains to be considered. That is the contention that it has been authoritatively held by both the court and the Board of Tax Appeals that despite the provisions of section 204(b) and section 200, a period of less than 12 months has been held to be a taxable year within the meaning of section 204(b). Plaintiff relies upon *Pennsylvania Chocolate Co.* v. *Lewellyn* (27 Fed. (2d), 762 [T. D. 4200, C. B. VII-2, 244]); *U. S.* v. *Carroll Chain Co.* (8 Fed. (2d), 529); *U. S.* v. *Stimson Computing Scale Co.* (D. C. W. D. Ky., no opinion, overruling decision of the Board of Tax Appeals), and upon appeal of Norfolk Knitting Mills Corp. (5 B. T. A., 792), appeal of Lynch Construction Co. (3 B. T. A., 313), appeal of Purity Oats Co. (4 B. T. A., 585), appeal of *Durabilt Steel Locker* v. *Commissioner* (5 B. T. A., 239), appeal of Bruner Woolen Co. (6 B. T. A., 881).

Plaintiff, therefore, contends that since the taxable year of section 204(b) may under the above authorities be less than a full 12 months' year, that sec-

tion should be so construed as to cover so much of the taxable year as comes within the 14 months' period of the section. In the case at bar, that would bring 10 months from February 28, 1919, to December 31, 1919, within the provisions of section 204(b).

The difficulty with plaintiff's position is that the cases upon which plaintiff relies are distinguishable from the case at bar in two respects, viz:

(1) The less than 12 months' period was a full accounting period or fiscal or taxable year, arising either because the taxpayer had not been in business 12 months, or because of dissolution before the expiration of the full 12 months' fiscal year, or because of a change of taxable year with the consent of the Commissioner, making the first new fiscal and taxable year one of less than 12 months, and,

(2) The whole of the less than 12 months' period was within the 14 months' period of section 204(b).

These distinctions seem to entirely differentiate plaintiff's case from the authorities on which it relies and limit their application to the fact that a taxable year may, under the circumstances of these cases, be less than 12 months.

That is really no support at all for plaintiff's contention. His accounting period and fiscal and taxable year are alike 12 months, and the same 12 months. They do not come wholly within the 14 months' period.

Despite the 10 years since the enactment of this law there is only one decision construing section 204(b) in a case with a taxable year of 12 months which is partly within and partly without the 14 months' period. This is the Ennis-Brown case, B. T. A., decided March 8, 1928.

In that case the fiscal year began before the 14 months are ended within it, while in the case at bar it begins within and ends after that period. This distinguishes the case in detail but not in principle. In other respects the facts are alike and the decision is in the closest analogy.

The Board of Tax Appeals held in the Ennis-Brown case that the taxpayer did not come within the provisions of section 204(b).

For the reasons set forth herein it must be held that section 204(b) runs only to taxpayers whose taxable year falls wholly within the 14 months' period of the section, and as plaintiff's taxable year does not fall wholly within that period, plaintiff must be defeated.

Judgment may be entered dismissing the complaint on the merits.

PART II.—INDIVIDUALS.

SECTION 213(a).—GROSS INCOME DEFINED: INCLUSIONS.

ARTICLE 31: What included in gross income. VIII–8–4119
(Also Section 219, Article 341.) Ct. D. 46

INCOME TAX—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. INCOME—TRUST—LIFE ESTATE—EXEMPTION—GIFT.

Amounts received under the terms of a will as modified by an agreement of compromise and settlement by which a life interest in a trust is given to a designated person with power to appoint the principal by will are taxable as income under the Revenue Acts of 1918 and 1921 and are not exempt as property acquired by "gift, bequest, devise, or descent."

2. DEDUCTION—EXHAUSTION OF LIFE ESTATE.

A life beneficiary to whom income of a trust created by will is distributed is not entitled to deduct therefrom an allowance for exhaustion of the value of the life estate under the Revenue Acts of 1918 and 1921.

3. DECISION FOLLOWED.

The decision in the case of *Irwin* v. *Gavit* (268 U. S., 161 (T. D. 3710 [C. B. IV–1, 123])) followed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Martha C. Codman, appellant, v. *Joshua W. Miles, Former Collector of Internal Revenue for the District of Maryland, appellee.*

Martha C. Codman, appellant, v. *Galen L. Tait, Collector of Internal Revenue for the District of Maryland, appellee.*

Appeals from the District Court of the United States for the District of Maryland at Baltimore.

[October 22, 1928.]

OPINION.

NORTHCOTT, Circuit Judge: These suits were instituted by the appellant, who was the plaintiff below, against the appellees, who were defendants below, to recover income taxes paid by the plaintiff under protest on income received in the years 1918, 1919, 1920, 1921, and 1922. Both suits involve the same questions, although the taxes were paid under different Revenue Acts and to different collectors of internal revenue at Baltimore, Md., defendant Tait having succeeded defendant Miles as collector during the years named.

In 1902 Maria P. Codman, of Bristol, R. I., died, leaving a will by which she created certain trusts. The plaintiff was the sole heir-at-law and next-of-kin and contested the probating of the will when it was offered in the probate court for the town of Bristol, R. I. In due course a compromise was brought about and all persons interested, whether as executors, trustees, heirs-at-law, next-of-kin, legatees, or devisees, entered into an agreement of compromise and settlement, by which the contest was terminated and the interests of the different persons settled.

By the terms of the agreement the residue of the property went to Robert M. Morse and Edmund D. Codman, to collect the rents and receipts and, after paying expenses, to pay one half of the income to the plaintiff during her life and the other half to one Catherine A. Codman during her life. On the death of either, one-half of the fund was to be transferred as the deceased should by will appoint and in default of appointment to her heirs. The residue consisted of personal property and real estate and was all situate in Boston, Mass.

During the years involved the trustees paid to the said Martha C. Codman one-half of the net income from said trusts. Martha C. Codman, in making her income tax returns for these years, respectively, did not include in her gross income the amount paid to her by the trustee, for the reason that she had contended that the said payments constituted a gift, devise, bequest, or inheritance, and were, therefore, not to be included in gross income under the Revenue Acts of 1918 and 1921. Upon review and reaudit of these returns the Commissioner of Internal Revenue determined that the sums so paid to her were a part of her gross income and added them to the amount of income shown on the respective returns, thus giving rise to the additional taxes involved in this litigation.

The taxes for the years 1918, 1919, and 1920 were computed under the Revenue Act of 1918. The taxes for the years 1921 and 1922 were computed under the Revenue Act of 1921.

The plaintiff then brought these suits. A demurrer was filed to the declaration, which demurrer was sustained, and an amended declaration was filed, to which a demurrer was again filed, which was sustained by the court below, and judgment was directed for the defendant. From this action this appeal was taken.

It is contended for the plaintiff that because the income ceased with her death, even though she had the right of appointment as to the principal, she was entitled to have a deduction from the tax because of exhaustion. With this contention we can not agree.

That the amount paid to the plaintiff is income is clearly settled by the Supreme Court of the United States in the case of *Irwin* v. *Gavit* (268 U. S., 161). A careful study of this case would seem to settle the question of exhaustion, depreciation, or obsolescence against the plaintiff's contention. The attorneys for the plaintiff contend that the Irwin case arose under the Act of 1913, yet the principles there settled are the same as those here involved.

While the language of the Act of 1913 in providing for deductions is not in the identical form of the language employed in the Acts of 1921 and 1922,

there is a provision in all the Acts requiring an allowance or deduction for the exhaustion of property by its use in business. In the latter Acts, the provisions, which eliminated from taxable income the value of property acquired by gift, bequest, devise, etc., meticulously provided that the income from such property should be included in the gross income for taxation. The line of demarcation between property so conveyed and the income from such property, which should remain subject to taxation whether in the hands of the original owner or after it had passed into the hands of the beneficiary, was carefully drawn. The principal difference as relating to the case in hand between the Act of 1913 and the later Acts was in the designation of the person who should make the return and pay the taxes. There is nothing in the language of the later statutes that indicates that, because the returns were to be made by the beneficiary under a trust and the taxes paid by such beneficiary, it was intended to deny to the Government the right to collect the tax in the same manner and to the same extent as before. It was made clear, however, that the mere gift, devise, or bequest of the property was not to furnish a basis for collecting additional taxes upon incomes. In section 219 of the Revenue Acts governing this case, subdivision a4, it is provided that the interest to be distributed to beneficiaries periodically, whether or not at regular intervals, and income collected by a guardian of an infant to be held or distributed as the court may direct, is made subject to the tax. It is true that in a sense the income conveyed to the plaintiff for life is properly designated as property, but it clearly retains its character as taxable income, and there is no provision in the law nor any terms employed in the statute to indicate an intention upon the part of Congress to relieve such income from the normal tax levied upon incomes merely because its payment ceased after a term of years. If by special provision the plaintiff had been entitled to receive the specific amounts equaling each year's income as bequest or gifts and not income *eo nomine*, appellant's contention might have been well taken, but in such instance the estate itself would have been subject to the tax. The contention that the value of the estate was each year depleted by exhaustion is intriguing rather than logical. What the plaintiff received and was entitled to receive was not the corpus of the property but the increment annually accruing therefrom. It is nowhere suggested that the corpus of the property, from which the income was derived, was in any way depleted. There is no destruction or diminution by use of the property which furnishes the source of the income, and to allow an abatement for any portion of the taxes accruing each year because of the limited time of the plaintiff's enjoyment of the income would not only defeat the reiterated purpose of Congress as expressed in various provisions of the Act but would invite as well as permit, to an unlimited extent, subterfuges whereby those entitled to large incomes could avoid their just obligations to the Government.

The right of the Government to collect a tax on the earnings of the estate either in the hands of the trustees or the distributees can not be questioned, and the effect, as far as the plaintiff is concerned, would be the same, in either event.

"The money was income in the hands of the trustees and we know of nothing in the law that prevented its being paid and received as income by the donee." (*Irwin* v. *Gavit*, supra.)

In *Stratton's Independence* v. *Howbert* (231 U. S., 399) the question of a daily lessening of enjoyment or user is discussed, and the court says:

"But the same is true of the earnings of the human brain and hand when unaided by capital, yet such earnings are commonly dealt with in legislation as income. So it may be said of many manufacturing corporations that are clearly subject to the Act of 1909; especially of those that have to do with the production of patented articles; although it may be foretold from the beginning that the manufacture will be profitable only for a limited time, at the end of which the capital value of the plant must be subject to material depletion, the annual gains of such corporations are certainly to be taken as income for the purpose of measuring the amount of the tax."

In view of the conclusion reached by us on the merits of the case, it is not necessary to discuss the questions raised by the Government as to whether the pleadings show a sufficient compliance with the statute governing the filing of a claim for refund.

The court below properly sustained the demurrer and the judgment is accordingly affirmed.

ARTICLE 31: What included in gross income.

REVENUE ACT OF 1921.

Income of trust estate under will paid to husband or wife in Texas. (See G. C. M. 5741, page 160.)

ARTICLE 47: Annuities and insurance policies. VIII-4-4079
T. D. 4256

INCOME TAX—REVENUE ACTS OF 1918, 1921, AND 1924—DECISION OF COURT.

INCOME—ANNUITY IN LIEU OF WIDOW'S STATUTORY RIGHTS.

Where a widow under the laws of a State elects to accept annual payments for life as provided in the will of her husband in lieu of the interest in his estate fixed by the laws of the State, she is a purchaser for value of an annuity and such annual payments received by her are exempt from income tax under the Revenue Acts of 1918, 1921, and 1924 to the extent that such payments are a return of the value of her statutory interest in his estate.

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

To Collectors of Internal Revenue and Others Concerned:

The following decision of the United States Circuit Court of Appeals, Eighth Circuit, in the cases of *Arthur B. Allen, Collector of Internal Revenue*, v. *Mrs. Arthur D. Brandeis (Mrs. Joseph Helfman)*, and *United States of America* v. *Mrs. Arthur D. Brandeis (Mrs. Joseph Helfman)*, is published for the information of internal revenue officers and others concerned.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved January 16, 1929.

A. W. MELLON,
Secretary of the Treasury.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Arthur B. Allen, Collector of Internal Revenue for the District of Nebraska, plaintiff in error, v. *Mrs. Arthur D. Brandeis (Mrs. Joseph Helfman), defendant in error.*

United States of America, plaintiff in error, v. *Mrs. Arthur D. Brandeis (Mrs. Joseph Helfman), defendant in error.*

In error to the District Court of the United States for the District of Nebraska.

[November 17, 1928.]

OPINION.

POLLOCK, District Judge, delivered the opinion of the court.

Defendant in error, plaintiff below, was the wife of Arthur D. Brandeis, of Omaha, Nebr. Arthur D. Brandeis, a man of large wealth, died testate June 10, 1916. By the laws of the State, Mrs. Brandeis was entitled to receive as her dower right out of the estate a very large sum of money or property

measured in money at the sum of $483,727.79. Of no part of this amount could the will of her husband deprive her without her consent. At his decease it became her interest in his estate, due and payable to her out of his estate. By the terms of his will provision was made for her, as follows:

"Eighth. I give and bequeath to my beloved wife, Zerlina Brandeis, ten thousand dollars ($10,000), to be expended by her for charitable and benevolent purposes.

"Ninth. I give and bequeath to my beloved wife, Zerlina Brandeis, all my automobiles and household furniture and effects, for her sole use and benefit absolutely forever.

"Tenth. I give and bequeath to my beloved wife, Zerlina Brandeis, fifty thousand dollars ($50,000) per annum, to be paid to her each year in equal quarterly installments, for her sole use and benefit during her natural life; said bequest and payments to be in lieu of dower or other distributive share of my estate to which by law she would otherwise be entitled.

"Thirteenth. Pending the administration of my estate, the foregoing bequests shall be paid by my executors, and thereafter they shall be paid by my trustees; provided, however, only the net income and profits from my property shall be available to pay the bequests mentioned in the seventh, tenth, eleventh, and twelfth paragraphs hereof. Should such income and profits be insufficient at any time to pay the bequests mentioned in said paragraph in full, each of said bequests shall bear a proportionate part of such deficiency. A deficiency arising during any year may be made up out of the income and profits for any succeeding year or years."

The widow elected, as she must do to deprive her of her right in the estate, to take under the will the $50,000 per annum and relinquish to the estate her interest therein. On these annual payments of $50,000 there was charged and collected by the Government income taxes for different years aggregating $24,874.40. Deeming the collection of these amounts from the source stated not taxable under the law, a claim for refund was made and denied, and this action instituted by her to recover the same.

To the petition of plaintiff the collector of internal revenue interposed a demurrer, which was overruled and denied, and thereafter the collector electing to stand on his demurrer and not plead further, judgment was entered for plaintiff for the amounts theretofore paid as income on the payments made, and the collector brings error.

From the foregoing statement it is apparent the question of merit presented for decision is this: In case a widow, under the laws of the State of Nebraska, elects to accept annual payments or installments of money as provided in the will of her husband in lieu of that interest in his estate fixed by the laws of the State, are such annual payments taxable income to her until the aggregate of such payments shall equal or exceed her interest in the estate as by the statutory law of the State provided?

In this case the value of her interest in the estate was well pleaded and admitted by the demurrer to be $483,737.79. To this sum, out of her husband's estate, the widow was absolutely entitled under the law of that State. As it was her individual property on her husband's decease, and as by his last will and testament he proposed to her the payment of $50,000 per annum out of the estate in lieu of her absolute statutory interest, which she was entirely free to accept or reject, and as she decided to and did elect to take the offer made her by the will of her deceased husband, it is quite too clear for argument she was a purchaser for value of the annuities or yearly payments of $50,000 each, and to this end come many adjudicated cases. *Lord* v. *Lord* (23 Conn., 327), *Security Co.* v. *Bryant* (52 Conn., 311), *Green* v. *Saulsbury* (6 Del. Ch., 371), *Moore* v. *Alden* (80 Me., 301), *Pollard* v. *Pollard* (1 Allen (83 Mass.), 490), In re Gotzian (34 Minn., 159), *Bank of Commerce* v. *Chambers* (96 Mo., 459), *ReQua* v. *Graham* (187 Ill., 67), *Schaffenacker* v. *Beil* (320 Ill., 31), In re Estate of Strahan (93 Neb., 828), In re Estate of Sanford (91 Neb., 752), *Borden* v. *Jenks* (140 Mass., 562), and a wealth of other cases.

The taxes in question were collected on the annual payments of $50,000 made to plaintiff for the years 1920 to 1924, both inclusive. Therefore, the income tax laws involved are those of 1918, 1921, and 1924.

It is freely conceded if the widow had taken the amount of her interest in the estate and with that sum had purchased an annuity of $50,000 per annum for a period of years such annuities when paid to her would not have been taxable to her under the law, for the laws above referred to so provide.

In legal effect is that not precisely what was done in this case? She took her property by her acquired under the laws of the State, turned the same over to her husband's estate under an agreement she should receive as the purchase price of her interest $50,000 per annum from the estate. That is to say, her invested capital was the value of her interest in her husband's estate, to-wit, $483,727.79. By the expenditure of this sum, the same being her own money, she purchased an annuity of $50,000 per annum from those representing her husband's estate to be paid out of that estate. Clearly, in such case, under the law, she should not be required to pay any income tax on the annual payments received until her capital invested in the annuities shall have been returned to her. After that time, it is conceded, she should pay tax. To this conclusion come the adjudicated cases in which the facts are identical or similar to the facts of this case. See *Warner* v. *Walsh* (15 Fed. (2d), 367), from the Circuit Court of Appeals for the Second Circuit; *Bolster, Executor,* v. *United States,* District Court Mass. November 21, 1927, affirmed by Circuit Court of Appeals for the First Circuit under title *United States* v. *Bolster, Executor,* decided June 13, 1928. It is insisted by the Government this case is similar in its facts to that of *Irwin* v. *Gavit* (268 U. S., 161 [T. D. 3710, C. B. IV-1, 123]). But as will be seen by a reading and consideration of the case above cited, the facts of that case and the instant case are clearly and readily distinguishable from this and all like cases.

We are of the opinion the judgments in these cases are right and must be affirmed.

ARTICLE 47: Annuities and insurance policies. VIII-4-4080
T. D. 4257

INCOME TAX—REVENUE ACTS OF 1916 AND 1918—DECISION OF COURT.

INCOME—ANNUITY IN LIEU OF WIDOW'S STATUTORY RIGHTS.

Where under the will of a deceased husband an annuity for life is payable to his widow and this provision is made in lieu of her statutory rights in his estate under the laws of the State and is so accepted by her, the relinquishment of her statutory rights is the purchase price of her annuity and the annual payments received by her are exempt from income tax under the Revenue Acts of 1916 and 1918 to the extent that they are a return of the value at her husband's death of her statutory rights.

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

To Collectors of Internal Revenue and Others Concerned:

The following decision of the United States Circuit Court of Appeals, Second Circuit, in the case of *Eva F. Warner* v. *James J. Walsh, Collector of Internal Revenue,* is published for the information of internal revenue officers and others concerned.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved January 16, 1929.

A. W. MELLON,
Secretary of the Treasury.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT. No. 65—OCTOBER TERM, 1926.

Eva F. Warner, plaintiff in error, v. *James J. Walsh, as Collector, etc., defendant in error.*

In error to the District Court of the United States for the District of Connecticut.

[November 8, 1926.]

Before HOUGH, MANTON, and MACK, Circuit Judges.

MACK, Circuit Judge: Under the will of plaintiff's deceased husband, a large and ample trust fund was created, out of the income, and, if necessary, out of the principal, of which plaintiff was to receive $50,000 a year for life. This provision was expressly made in lieu of her statutory rights in the estate under the laws of Connecticut and was so accepted by her. She personally was compelled to pay Federal income tax on the $50,000 for each of the years 1917 and 1918. Her claims for refund were rejected. A demurrer to her complaint, seeking recovery of the taxes so paid, was sustained, and the complaint dismissed, on the authority of *Irwin* v. *Gavit* (268 U. S., 161; 45 S. Ct., 475, 69 L. Ed., 897 [T. D. 3710, C. B. IV–1, 123]).

The conditions in the two cases are not, however, as the district judge stated, identical; on the contrary, in the Gavit case there was absent the vital element, present here, of a very valuable consideration for the so-called bequest, the widow's relinquishment of her statutory rights. There the sole question was whether income, payable to a son-in-law quarter-annually for life, but not exceeding a number of years, out of a trust fund created by the will, was property acquired by bequest or income within the meaning of the Revenue Acts; here the question is whether an annuity, payable first out of income, but, if necessary, out of principal, of a similar trust fund, but acquired solely in lieu of, and in consideration for, the relinquishment of valuable statutory rights in the estate, is income, bequest, or annuity. If it be a bequest, it would be exempt under Revenue Act 1916, section 4 (39 Stat., 758), as amended by Revenue Act of 1917, section 1200 (40 Stat., 329 [Comp. St., section 6336d]), and Revenue Act 1918, section 213(b) (3), being 40 Stat., 1065 (Comp. St., section 6336¼ff); if a purchased annuity, it is not taxable until its cost has been returned. Revenue Act 1916, section 4; Revenue Act 1918, section 213(b) (2).

We need not consider whether it is a bequest; furthermore, we need not consider whether or not, because of the death of plaintiff's husband before March 1, 1913—a fact conceded in argument, though not apparent from the pleadings—or because the amount payable annually is fixed, or because it is also payable out of principal, if necessary (*Beatty* v. *Heiner* [D. C.], 10 F. [2d], 390), the Gavit case is distinguishable. For what we have here is, in fact and in legal effect, the purchase of an annuity, in no way differing from an annuity purchasable by the widow from an insurance company, with the proceeds of her statutory rights in the estate, except only that in such a purchase she would have an unsecured obligation, whereas here the obligation is secured by the income and principal of the trust fund. That such a relinquishment of dower rights is a purchase of the will provision is well and long established. (*Burridge* v. *Beabyl*, 1 Pere Wms., 127 (1710); *Isenhart* v. *Brown*, 1 Edw. Ch. (N. Y.), 413 (1832); *ReQua* v. *Graham*, 187 Ill., 67, 58 N. E., 357, 52 L. R. A., 641 (1900).) That a purchased annuity, even if income, is exempt as and to the extent that it is a return of premiums paid therefor—that is, until the purchase price shall have been returned—is determined by the express provisions of the Acts above cited, as construed by the Bureau of Internal Revenue. (I. T. 1484, Int. Rev. Cum. Bull. I–2, 1922, p. 66.) Concededly, the annuities, including those of 1917 and 1918, did not equal the purchase price, the value at her husband's death of the widow's statutory rights.

Reversed and remanded.

ARTICLE 47: Annuities and insurance policies. VIII-4-4081
T. D. 4258

INCOME TAX—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. INCOME—ANNUITY IN LIEU OF WIDOW'S STATUTORY RIGHTS.

Where a widow accepts the provisions of her husband's will and is paid annually the entire income from a residuary trust in lieu of her statutory share of the corpus of the estate, she is a purchaser for value of the annual payments received by her and such payments are not taxable income under the Revenue Acts of 1918 and 1921 to the extent that they are a return of the value of the property which she relinquished by accepting the provisions of the will.

2. DECISION DISTINGUISHED.

The decision in *Irwin* v. *Gavit* (268 U. S., 161 (T. D. 3710 [C. B. IV-1, 123])) distinguished.

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

To Collectors of Internal Revenue and Others Concerned:

The following decision of the United States Circuit Court of Appeals, First Circuit, in the case of *United States of America* v. *Wilfred Bolster, Executor*, is published for the information of internal revenue officers and others concerned.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved January 16, 1929.

A. W. MELLON,
Secretary of the Treasury.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

United States of America, defendant, plaintiff in error, v. *Wilfred Bolster, Executor, plaintiff, defendant in error.*

[June 13, 1928.]

OPINION.

HALE, J.: Sarah A. Davenport, of Boston, was the beneficiary under the will of her husband, Orlando H. Davenport, who died on the 11th day of January, 1925. The will provided that the residue of the decedent's estate should be held in trust; and, after payment of expenses of administering the trust, the income was to be paid over to Sarah A. Davenport, for and during her life; and that the provision made for her should be "in lieu of dower and all claims she might or could have by any possibility upon the estate."

The wife accepted the provisions made for her in the will, and received the net income of the trust during the years 1919 to 1923, inclusive, namely $113,811.82. This sum Sarah A. Davenport included in her income tax returns for the above years as a part of her gross income.

On May 28, 1923, Sarah A. Davenport died; Wilfred Bolster was duly qualified and appointed her executor. Contending that the amounts paid to Sarah A. Davenport under the trust provisions were erroneously included by her in her gross income, the executor filed a claim for refund. The Commissioner of Internal Revenue rejected this claim. The executor then brought a petition

in the nature of a suit to recover the Federal income taxes for the years 1919 to 1923 upon the amounts which she accepted and received from the estate of her husband, Orlando H. Davenport, "in lieu of dower and every and all claims she may or can have, by any possibility, upon my estate."

The defendant demurred. On November 7, 1927, the District Court of Massachusetts entered its decree, overruling the demurrer and giving judgment to the petitioner for the sum of $20,266.09. The case comes before us on writ of error upon the petition for same by the United States. The substantial question involved is presented on the second assignment of errors. It is this:

Where a widow accepts the provisions of her husband's will and is paid, annually, the entire income from his estate, in lieu of her statutory share of the corpus of the estate, are such annual payments taxable income to her before or until the aggregate amount of such annual payments equals and exceeds the value of the property she relinquished by accepting the provisions of the will?

The plaintiff, the executor, contends that, by the provision of the husband's will, Sarah A. Davenport acquired the legal status of a purchaser for value; that the basis for determining whether she realized any taxable gain or income is the value of a statutory share of the corpus of the estate as of the date she was entitled to receive it; that the annual payments received by Sarah A. Davenport during the years in dispute did not exceed the value of her statutory share in the corpus of the estate; and that those payments by the trustee represented returns of capital, not income.

The Government urges that this contention of the petitioner overlooks section 213(b)3 of the Acts of 1918 and 1921, which provides that, although the value of the *property* acquired by gift, bequest, devise, or inheritance shall not be included in the gross income, the income from such property shall be included in the gross income. It contends that Mrs. Davenport, the taxpayer, acquired her right to the income by bequest; that the cost to her of her dower right was nothing, she having acquired it by marrying; and that, while this was a valid consideration, it does not represent a financial cost or outlay. (*Prewit* v. *Wilson*, 103 U. S., 22; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S., 179.)

The Federal income tax laws recognize the legal status of the taxpayer as created by local law, and fix the taxes in accordance with such law. By the General Laws of Massachusetts, chapter 191, section 15, as well as under the earlier statutes, a surviving husband or wife may refuse to accept the provisions of a will and take his or her statutory share in the corpus of the estate as if the deceased had died intestate. When the surviving husband or wife accepts the provisions of the will, whether or not such provisions are expressly declared to be "in lieu of such statutory rights," the survivor is in the position of one who sells property to the estate, and acquires the legal status of "a purchaser for a valuable consideration."

In *Pollard* v. *Pollard* (1 Allen, 490, 491), speaking for the Supreme Court of Massachusetts, Chief Justice Bigelow said:

"The bequest in this case to the widow of the testator is made in express terms in lieu of dower, and on condition that she relinquishes all her right and title thereto.

"A wife can not be deprived of her dower except by her own consent. Therefore, when she accepts a provision in her husband's will as a substitute for this existing legal right, the law regards her as standing in the light of a purchaser for a valuable consideration, and entitled to receive the whole of the sum given by the will, for which she has relinquished her life estate in one-third of the testator's real estate, in preference to other legatees, who, being only objects of the bounty of the testator, and not having any legal claim on his estate, are regarded as volunteers, and are not allowed to take until the widow has received the full amount of the bequest to her."

(*Towle* v. *Swasey*, 106 Mass., 100, 105; *Farnum* v. *Bascom*, 122 Mass., 282, 283, 288, 289.)

In *Borden* v. *Jenks* (140 Mass., 562, 564), speaking for the court, Judge Devens said:

"The widow is a purchaser for value in accepting the provisions of the will, and is not treated as a gratuitous object of the testator's bounty. By relinquishment of her dower, the estate acquires a valuable right of property. Whether the provisions be more or less, so far as the testator, the widow and all pure beneficiaries under the will are concerned, it is the right of the testator to

affix what consideration he pleases for the relinquishment of dower, and for the widow to accept or reject it."

Under the principles announced by the Supreme Court of Massachusetts, we think that, in the case before us, the payments made to Sarah A. Davenport during the years in dispute represented "purchase money" or "installment payments" by the estate, in consideration for her share in the corpus of the estate. We think, then, that she was a "purchaser for value."

Article 347 of the Regulations 45, relating to the Federal income tax, provides:

"In ascertaining whether an estate or trust comes within any one of the cases just enumerated, the provisions of the Federal statutes and regulations—rather than the provisions of the will or trust and the provisions of State laws—shall determine what items constitute taxable income or allowable deductions; the provisions of the will or trust and of State laws shall determine the allocation of items of gross income or deduction; that is, to which of the different interests making up the whole such items shall be charged or allowed."

In the case at bar the local law gave Sarah A. Davenport the status of a "purchaser for value." The Federal income tax law recognizes that status. We think it clear that she was not liable for the payment of any of the taxes in dispute; that it is not a question whether the income of the Orlando H. Davenport estate was liable for this tax or whether it entirely escaped the tax, for we are considering only the taxability or nontaxability of Sarah A. Davenport. Cases have arisen under the income tax law in which the question was whether the individuals to whom the trustee paid over the income of the trust, or the trustee himself, was liable for the tax. But this is not such a case.

The trustee would not be taxable in this case, as it happens, because the entire residue of the Orlando H. Davenport estate, including the share in the corpus of the estate purchased from Sarah A. Davenport, was under this will "permanently set aside for the benefit of charitable institutions." Revenue Act of 1918, section 219(b).

In *Lederer* v. *Stockton* (260 U. S., 3 [T. D. 3407, C. B. I–2, 156]), in speaking for the Supreme Court, Chief Justice Taft said:

"This residuary fund was vested in the hospital. The death of the annuitant would completely end the trust. For this reason, the trustee was able safely to make the arrangement by which the hospital has really received the benefit of the income subject to the annuity. As the hospital is admitted to be a corporation whose income when received is exempted from taxation under section 11(a), we see no reason why the exemption should not be given effect under the circumstances. To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

In the case before us, Sarah A. Davenport had no interest in the corpus of the estate until the death of her husband, the testator, on January 11, 1915. At that date she was entitled to receive her statutory share in the corpus of the estate, and "acquired" her property rights in it. During the years in dispute the annual payments received by Sarah A. Davenport did not exceed the value of her statutory share in the corpus of the estate at the fair market value of the property at the time of its acquisition.

The district court decided this case on the authority of *Warner* v. *Walsh* (15 Fed. (2d), 367, 368 [see T. D. 4257, on page 245]). In that case, speaking for the Circuit Court of Appeals for the Second Circuit, Judge Mack said:

"Under the will of plaintiff's deceased husband a large and ample trust fund was created, out of the income, and, if necessary, out of the principal, of which plaintiff was to receive $50,000 a year for life. This provision was expressly made in lieu of her statutory rights in the estate under the laws of Connecticut, and was so accepted by her. She personally was compelled to pay Federal income tax on the $50,000 for each of the years 1917 and 1918. Her claims for refund were rejected. A demurrer to her complaint, seeking recovery of the taxes so paid, was sustained, and the complaint dismissed on the authority of *Irwin* v. *Gavit* (268 U. S., 161, 45 S. Ct., 475, 69 L. Ed., 897).

"The conditions in the two cases are not, however, as the district judge stated, identical; on the contrary, in the Gavit case there was absent the vital element, present here, of a very valuable consideration for the so-called bequest, the widow's relinquishment of her statutory rights. There the sole question was whether income, payable to a son-in-law quarter-annually for life, but not exceeding a number of years, out of a trust fund created by the will, was property acquired by bequest or income within the meaning of

the Revenue Acts; here the question is whether an annuity payable first out of income, but, if necessary, out of principal, of a similar trust fund, but acquired solely in lieu of, and in consideration for, the relinquishment of valuable statutory rights in the estate, is income, bequest, or annuity. * * *

"That a purchased annuity, even if income, is exempt as and to the extent that it is a return of premiums paid therefor—that is, until the purchase price shall have been returned—is determined by the express provisions of the Acts above cited, as construed by the Bureau of Internal Revenue."

In the instant case the Government contends, as it did in the Warner case, that the principle announced by the Supreme Court in *Irwin* v. *Gavit* (268 U. S., 161) applies, and that the payments made to Mrs. Davenport are the income produced by the property acquired by the bequest; citing also *Heiner* v. *Beatty* (17 Fed. (2d), 743), affirmed by United States Supreme Court (48 Supreme Court Reporter, 320).

We think the instant case is clearly distinguished from *Irwin* v. *Gavit*. In that case Gavit was a son-in-law of the testator and had no statutory rights in the testator's estate. He had no vested interest in the corpus of the estate. The income in dispute arose under the Revenue Act of October 3, 1913; and there was a question whether the sums received by Gavit were income taxable to him. The Supreme Court clearly limited its decision to the Revenue Act of 1913 and the facts of that case. The essential question was whether or not any tax attached to the income of the corpus of the trust that was not taxable in the hands of Gavit and the other beneficiaries.

Speaking for the court, Mr. Justice Holmes said:

"The statute in Section II, A, subdivision 1, provides that there shall be levied a tax 'upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States.' If these payments may properly be called income by the common understanding of that word and the statute has failed to hit them it has missed so much of the general purpose that it expresses at the start. Congress intended to use its power to the full extent." (*Eisner* v. *Macomber*, 252 U. S., 189, 203 [T. D. 3010, C. B. 3, 25].)

By the later Acts Congress provided that the tax should apply to "income of estates and trusts" and "should be paid by the trustee" in certain cases where the trustee could not be reached by the earlier Act. In the instant case we do not have to consider the possibility of the Government losing its rightful tax upon income which Congress intended should be taxed. It is not a question of a statute "failing to hit" something which ought to be taxed. Under the statute with which we are dealing a trust is the subject of taxation just as an individual. We think the Government must look to the trustee for its tax; and that the trust would clearly be taxable upon this income if it were not expressly exempted because of its charitable character.

In *Heiner* v. *Beatty*, supra, it was contended that income received by the taxpayer under the will of the decedent was exempt from taxation because that income constituted a "bequest." In the instant case the ground of the exemption is not that the income received is a bequest, but that such income is exempt because it represents "purchase money" or a return of capital. In that case the record disclosed facts similar to those in *Irwin* v. *Gavit*, supra.

In the Warner case Judge Mack discusses fully both cases to which we referred, and points out the clear distinction between those two cases and the case before him.

While in the Warner case the court had before it an annuity, the provision relating to the annuity was made expressly in lieu of statutory rights of the beneficiary in the estate; we think the principles announced in that case are controlling in the case before us, and that the district court was right in overruling the demurrer and ordering judgment to be entered for the plaintiff.

The judgment of the district court is affirmed.

SECTION 214(a)1.—DEDUCTIONS ALLOWED: BUSINESS EXPENSES.

ARTICLE 105: Compensation for personal services.

REVENUE ACT OF 1916.

Unusual and extravagant amounts paid by a corporation to its officers in the guise of compensation for services but having no substantial relation to the measure of their services and being wholly disproportionate to their value. (See Ct. D. 39, page 279.)

ARTICLE 109: Rentals.

REVENUE ACT OF 1918.

Revocation of Office Decision 373 (C. B. 2, 123), regarding assessments for local benefits paid by tenant for landlord. (See I. T. 2462, page 256.)

ARTICLE 109: Rentals. VIII-24-4237
Ct. D. 68

INCOME TAX—REVENUE ACTS OF 1918 AND 1921—DECISION OF COURT.

1. DEDUCTION—RENTAL—PERMANENT IMPROVEMENTS—TENANT AT WILL.

The cost borne by a tenant from month to month in making permanent improvements to the occupied premises is not deductible in its entirety as a business expense of the taxable year in which they were made, where the tenant continued its occupancy beyond that year.

2. DECISION AFFIRMED.

The decision of the United States Board of Tax Appeals (7 B. T. A., 399) affirmed.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA. No. 4720.

The George H. Bowman Co. v. *Commissioner of Internal Revenue.*

[April 1, 1929.]

VAN ORSDEL, Associate Justice: During the year 1920 the appellant corporation, a wholesale and retail dealer in chinaware, glassware, and kindred articles, doing business in the city of Cleveland, Ohio, rented for storage purposes a building known as the Eagle Street warehouse.

By stipulation filed in the hearing before the Board of Tax Appeals, February 28, 1927, it was agreed, among other things, that the building belonged to Augusta B. Bowman, owner of 490 shares out of a total of 5,067 shares of stock in said corporation; and that she is the wife of George H. Bowman, owner of more than 50 per cent of the capital stock of the corporation. The stipulation, among other things, contained the following statement of facts: "The petitioner has not, and did not have during said year, a lease on the Eagle Street warehouse, but occupied the same as a month to month tenant, paying therefor a monthly rental of $1,750. There is not now, and there has never been, any definite arrangement as to the duration of petitioner's tenancy of said warehouse nor for the reimbursement of the petitioner for any amounts expended by it for repairs, improvements, or betterment of said Eagle Street warehouse."

To better adapt the warehouse to the use of appellant company, it installed certain improvements, consisting of an elevator, fire doors, partitions, and

plumbing, at a cost of $7,084.69. The corporation in making return of its income and profits tax for the year ending January 31, 1921, deducted from its tax the total cost of the improvements as business expense. The Commissioner disallowed the deduction, on the theory that the improvements represented a capital expenditure which could be recovered only by annual deduction for depreciation extending over the useful life of the property. The Board sustained the decision of the Commissioner, and from the decision this appeal was taken.

The provisions of the Revenue Act of 1918 (40 Stats., 1057) and the Revenue Act of 1921 (42 Stats., 227) are identical in so far as they relate to the question here involved. Reference hereafter made to the Act will apply to the 1918 statute.

By section 234(a)1 of the Act, a corporation in computing its net income may make among others the following deductions: "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, 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."

Section 215 of the Act provides: "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." This provision of the statute includes amounts paid out "In any case" by either an owner or a tenant "of any property or estate," not merely to keep the property going, but for permanent improvements; and which may not be considered as mere upkeep, but as investment, increasing the value of the property or estate. (*Duffy* v. *Central Railway Co. of N. J.*, 268 U. S., 55 [T. D. 3704, C. B. IV–1, 143].)

Section 234(a) provides that the taxpayer, in making his return, may deduct—(7) "A reasonable allowance for the exhaustion, wear and tear of property used in trade or business, including a reasonable allowance for obsolescence."

It is the law that a tenant who makes permanent improvements on leased property, with the expectation of using the improvements in his trade or business during the term of the lease, may not deduct the cost as expense in a single year but can recover only their cost by annual charges for depreciation. (*Duffy* v. *Central Railroad Co. of N. J.*, supra; *National City Bank of Seattle* v. *United States*, 64 Court of Claims Rep., 236; certiorari denied, 276 U. S., 620.)

It is sought, however, to distinguish the instant case from the decisions cited on the ground that in those cases the lease was for a fixed number of years, while in the present case the tenancy was merely from month to month. We are of opinion that the period of the lease is not controlling where it is shown that the tenancy extended for a period substantially beyond the taxable year in which the adjustment for the improvements is claimed. In the present case the tenancy was still continuing at the time the stipulation was made in 1927, and, for aught that appears in the record, it is still in existence. It may well be that if the tenancy had terminated prior to or at the end of the taxable year a different case would be presented; but the taxing authorities are not confined to any fixed or rigid rule in applying the statute, since each case must depend largely upon its own facts. To meet contingencies that may arise in the administration of the complex revenue laws the Department, by lawful authority, has established rules and regulations, of which article 109, among other things, provides: "The cost borne by a lessee in erecting buildings or making permanent improvements on ground of which he is lessee is held to be a capital investment and not deductible as a business expense. In order to return to such taxpayer his investment of capital, an annual deduction may be made from gross income of an amount equal to the total cost of such improvements divided by the number of years remaining of the term of lease, and such deduction shall be in lieu of a deduction for depreciation. If the remainder of the term of lease is greater than the probable life of the buildings erected, or of the improvement made, this deduction shall take the form of an allowance for depreciation."

The method of computing depreciation allowance is provided in article 165, as follows: "The capital sum to be replaced should be charged off over the usual life of the property either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and should be described in the return."

It will be observed that this furnishes an equitable basis for the protection of all parties concerned. In the case of tenancy, the life of the improvement can be estimated in years and a proportionate depreciation allowed for each year, and if the tenancy expires before the expiration of the life period of the improvement, the difference between the depreciation already allowed and the cost of the improvement represents the credit to which the taxpayer is entitled for the year in which the lease terminates. This was the method employed by the Commissioner and approved by the Board in the present case. The Board in its opinion defined the rule applicable to leases, and especially to an indeterminate lease like the one before us, as follows: "If the petitioner's tenure extends over the period of the useful life of the improvements, it will have recovered its cost through the annual allowance for exhaustion; if the tenure should for any reason terminate prior to the useful life of the improvements, petitioner will then be entitled to a deduction from gross income of the unextinguished cost of such improvements. In either event petitioner will have obtained the deduction to which, under the statute, he is entitled."

This procedure is in accord with the rule announced in the Duffy case, as follows: "In respect of the 999-year leases, the additions and betterments will all be consumed in their use by the lessee within a fraction of the term, and, as to them, allowances for annual depreciation will suffice to meet the requirements of the statute. In the case of the pier leases, the improvements may and probably will outlast the term, and, as to them, deductions may more properly take the form of proportionate annual allowances for exhaustion."

The law makes no distinction between an owner and a tenant. If the owner is operating the property and makes repairs, the cost may be deducted from his income and profits taxes for the current year. If, however, the improvements are permanent, he may only deduct for the proportionate amount as depreciation. The same rule applies, and should apply, to a tenant operating a property for profit. If the improvement he makes amounts merely to repairs, the same rule of deduction would apply as in the case of the owner. If, on the other hand, the improvement which he makes for his own use and convenience is permanent, he should be required to comply with the rule of depreciation as adopted in this case.

The decision of the Board of Tax Appeals is affirmed with costs.

ARTICLE 111: When charges deductible.

REVENUE ACT OF 1921 AND PRIOR REVENUE ACTS.

Freight charges of lumber manufacturers keeping books on accrual basis. (See I. T. 2473, page 88.)

SECTION 214(a)3.—DEDUCTIONS ALLOWED: TAXES.

ARTICLE 133: Taxes for local benefits. VIII-11-4141
(Also Section 214(a)1, Article 109.) I. T. 2462

REVENUE ACT OF 1918.

Office Decision 373 (C. B. 2, 123), holding that assessments for local benefits paid by a tenant for his landlord according to agreement are additional rent paid by the tenant, and therefore are deductible from his gross income, provided the tenant uses the property for business purposes; and that the amount so received by the landlord is taxable income to him, but because of its nature is not an allowable deduction from his gross income, is revoked, in view of General Counsel's Memorandum 5866 (see on page 200).

ARTICLE 133: Taxes for local benefits.

REVENUE ACT OF 1921 AND PRIOR ACTS.

Treatment. (See G. C. M. 5589, page 83.)

SECTION 214(a)4, 5, 6.—DEDUCTIONS ALLOWED: LOSSES.

ARTICLE 141: Losses.

VIII-24-4238
Ct. D. 69

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. DEDUCTION—LOSS—GOOD WILL—PROHIBITION.

Loss of the value of good will is not sustained in 1919, within the meaning of section 234(a)4 of the Revenue Act of 1918, by reason of the discontinuance of the manufacture of beer in that year on account of prohibition legislation, where the business of manufacturing and selling near beer is continued for several years thereafter, though at a yearly loss, in the same place, under the same name, and with the same physical assets as previously used in the manufacture and sale of beer.

2. SAME.

No loss of value of good will is sustained within the meaning of section 234(a)4 of the Revenue Act of 1918 until it is realized by a sale or other disposition of the business or property to which it is attached.

COURT OF CLAIMS OF THE UNITED STATES.

Dick & Bros. Quincy Brewing Co., a Corporation, v. *The United States.*

[May 6, 1929.]

OPINION.

SINNOTT, Judge, delivered the opinion of the court.

Plaintiff from the year 1883 to June 30, 1919, when prohibition became effective, was engaged in the business of manufacturing and selling beer. The value of plaintiff's good will on March 1, 1913, was $119,940.10. (Finding III.)

On July 1, 1919, on the advent of prohibition, plaintiff discontinued its business of manufacturing and selling beer and engaged in the business of manufacturing and selling what is commonly known as near beer, and continued in such business until the year 1925, using in such manufacture and sale of near beer the same physical assets as it had previously used in the manufacture and sale of beer. While plaintiff was engaged in the manufacture and sale of near beer from July 1, 1919, until the year 1925, it operated each year at a loss. In the year 1925 plaintiff ceased the manufacture and sale of near beer and liquidated its assets and liabilities and terminated business operations.

In the year 1920 plaintiff paid income and excess-profits taxes for the year 1919 in the sum of $2,293.46, which is the amount involved in this case. It is plaintiff's contention that its good will, which on March 1, 1913, had a value of $119,940.10, became entirely worthless during the taxable year 1919 on account of prohibition, and that during that year it thereby sustained a loss in that amount, and is entitled to deduct such loss from its gross income for its taxable year 1919, and to have refunded $2,293.46 taxes paid for 1919, pursuant to the terms of subsection (4) of section 234(a) of the Revenue Act of 1918 (40 Stat., 1057), the pertinent parts of which read 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: * * *

"(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise."

We have denied plaintiff's request for two additional findings of fact, which it claims necessarily flow, as conclusions of ultimate fact, from the stipulated Finding VI.

The rejected findings are as follows:

"1. During the year 1919, by reason of the passage of prohibition legislation, plaintiff's good will was made worthless and of no value.

"2. During the year 1919 plaintiff sustained a loss in the amount of $119,940.10."

We are confronted with the question: Did plaintiff's good will become worthless during the year 1919 because it was deprived by prohibition of the right to manufacture and sell beer, although it continued, as a going concern until 1925, to manufacture and sell near beer under the old firm name and at the same place of business? In other words, did plaintiff's good will consist solely of its right to manufacture and sell beer?

Good will has been variously defined by the courts. A favorite definition, repeated in many decisions, is the probability that old customers will resort to the old place. It has been referred to as an asset, separate and distinct from its stock of goods, or capital, consisting of the advantage inuring to the firm because of general public patronage; as a favor which the management of a business wins from the public; every advantage which the firm may have acquired with the name of the firm or business, its location or reputation.

The Supreme Court in *Menendez* v. *Holt* (128 U. S., 521) says with reference to good will:

"Good will was defined by Lord Eldon, in *Cruttwell* v. *Lye* (17 Ves., 335, 346), to be 'nothing more than the probability that the old customers will resort to the old place'; but Vice Chancellor Wood, in *Churton* v. *Douglas* (Johnson, V. C., 174, 188), says it would be taking too narrow a view of what is there laid down by Lord Eldon, to confine it to that, but that it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises on which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

The Supreme Court in *Metropolitan Bank* v. *St. Louis Dispatch Co.* (149 U. S., 446) defines good will as follows:

"Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. Mr. Justice Story defined good will to be 'the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices.' (Story, Part., sec. 99.)"

It is apparent from the various definitions of good will, and particularly from the two citations, supra, from the Supreme Court, that many attributes other than the goods sold enter into the definitions and composition of good will. It must be obvious, therefore, that while plaintiff continued as a going concern at its old place of business and under its old firm name, with many other advantages acquired in the progress of its business, as suggested in *Menendez* v. *Holt* and *Metropolitan Bank* v. *St. Louis Dispatch Co.*, supra, that its good will, built up during many years, in part at least still adhered to the firm until it ceased operations in 1925.

It is doubtless true that this good will was diminished in value on account of the change from beer to near beer, but we are only concerned with the question whether plaintiff's good will became worthless in 1919, for in the case of *United States* v. *S. S. White Dental Manufacturing Co.* (274 U. S., 398 [T. D. 4059, C. B. VI-2, 198]), cited by plaintiff, commenting upon the statute in question, the Supreme Court said:

"* * * The statute obviously does not contemplate and the regulations forbid the deduction of losses resulting from the mere fluctuation in value of property owned by the taxpayer. * * *"

It is plaintiff's contention because it suffered a loss each year in its near-beer operations, as is shown in Finding VI, that it follows that its good will became worthless in the year 1919. As all the elements which made up plaintiff's good will, with the exception of its right to manufacture and sell beer, remained with the firm until it terminated business in 1925, it might well be argued that plaintiff's loss would have been even greater than it was during its near-beer operations but for the value of the remnant of good will which remained as an inseparable part of its business until 1925. We can not escape the conclusion that plaintiff's good will was of some positive advantage to the firm in the manufacture and sale of near beer, and that therefore the year 1919 was not the "identifiable event," as the Supreme Court terms it in *United States* v. *S. S. White Dental Manufacturing Co.*, supra, which fixed the loss of plaintiff's good will.

In this connection it may be well to recur to the statement of the Supreme Court in *Metropolitan Bank* v. *St. Louis Dispatch Co.*, supra, that good will "is not susceptible of being disposed of independently." The same was the reasoning of the Circuit Court of Appeals in *Red Wing Malting Co.* v. *Willcuts* (15 Fed. (2d), 626, 633 [T. D. 3980, C. B. VI–1, 225]).

The loss of good will, in connection with section 234(a)4, supra, of the Revenue Act of 1918, has been the subject of two decisions by the United States Board of Tax Appeals, from which we quote, as follows:

"Good will being merely an incident of a going business, inseparably attached to tangible property and incapable of segregation and independent disposition, it is difficult to conceive upon what theory an allowance for the loss of its alleged value can be made as a deduction under section 234(a)4, independently of the tangible property or business to which it is attached. If, and when, the business or property of which the good will is an incident is disposed of, the gain derived or the loss sustained by reason of the value, or loss of value, of the good will must of necessity be reflected in the return received from the disposition of such business or property. In the instant case the business or property was not disposed of but was continued and in use, and although its value may have been materially reduced, due to the operation of the prohibition law, no deductible loss has been sustained by the petitioner. See *Frederick C. Renziehausen* v. *Commissioner* (8 B. T. A., 87)." (Garneau Co., 8 B. T. A., 1045.)

"In a supplemental brief, petitioner presents the alternative proposition that it is entitled, under the provisions of section 234(a)4 of the Revenue Act of 1918, to deduct from income the loss, based on March 1, 1913, value, arising out of the destruction of its intangibles by prohibition legislation; although it contends that the loss should be spread over the years 1918 and 1919 in conformity with the same principle which would apply in the case of obsolescence. It is difficult to apprehend that the claimed deductions may be brought within the provisions of the statute upon which the petitioner relies. They provide for the deduction of only such losses as are 'sustained during the taxable year'; and surely the facts do not support a finding that petitioner has sustained such a loss as to bring it within those provisions. A loss is sustained, within the meaning of the statute, only when it is a realized loss and is evidenced by a completed and closed transaction (appeal of A. J. Schwarzler, 3 B. T. A., 535; appeal of Old '76 Distilling Co., 3 B. T. A., 1346; and *A. H. Fell* v. *Commissioner*, 7 B. T. A., 263); and until the investment is converted into terms of money by sale or other disposition, or its worthlessness otherwise demonstrated, there is neither loss nor gain and income is neither greater nor less. (*Marigold Garden Co.* v. *Commissioner*, 6 B. T. A., 368.) Petitioner continued in business after the advent of prohibition; and its good will continued as an inseparable part of the business. There could be no loss in respect of the good will until the business is terminated by sale or other disposition, and neither of these events occurred within the taxable years in question. (Cf. *Frederick C. Renziehausen* v. *Commissioner*, supra.) It is literally true that prohibition wholly destroyed the predominating and most lucrative feature of its business; and that after the advent of prohibition it carried on with a mere remnant of its former business in new marts of trade. But the most favorable view to the taxpayer to be had in these circumstances is that the March 1, 1913, value of its good will was greatly diminished by prohibitory legislation; but a loss of this character is not within the statute." (Morand Bros., 8 B. T. A., 1266.)

We conclude that the Commissioner was correct in denying plaintiff's refund. The petition will be dismissed. It is so ordered and adjudged.

SECTION 214(a)8.—DEDUCTIONS ALLOWED: DEPRECIATION.

ARTICLE 161: Depreciation. VIII–20–4206
Ct. D. 60

INCOME TAX—REVENUE ACT OF 1918—DECISION OF SUPREME COURT.

DEDUCTION—DEPRECIATION—LESSEE.

A lessee of real estate and buildings under a 99-year lease renewable forever is not entitled to a deduction for depreciation under section 214(a)8 of the Revenue Act of 1918 on buildings erected by the lessor, the lessee having no capital investment therein.

SUPREME COURT OF THE UNITED STATES.

Harry H. Weiss, Collector of Internal Revenue, petitioner, v. *J. Harry Wiener.*

C. F. Routzahn, Collector of Internal Revenue, petitioner, v. *J. Harry Wiener.*

On writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

[April 22, 1929.]

OPINION.

Mr. Justice HOLMES delivered the opinion of the court.

These are suits brought by Wiener, the respondent, to recover amounts that he says should have been allowed as deductions from his income taxes but that were disallowed. The petitioners, the defendants, prevailed in the district court (17 F. (2d), 650), but the judgment was reversed by the circuit court of appeals (27 F. (2d), 200), and a writ of certiorari was granted by this court.

Wiener was in the business of taking long leases of property and subletting. He held 13 leases for 99 years, renewable forever. He claimed the right to make an annual deduction from his income tax for estimated depreciation of the buildings, relying upon section 214(a)8 of the taxing Act (Revenue Act of 1928, ch. 18; 40 Stat., 1057, 1066, 1067), which granted deduction of a "reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." He was allowed all sums paid for repairs but nothing for the estimated obsolescence for which he had not paid.

It may be taken for the purposes of decision that Wiener undertook to keep the buildings up to their present condition, to pay rent even if the buildings were destroyed, and that his obligations were sanctioned by a liability to forfeiture. It is argued with much elaboration that not only covenants but economic necessity required the respondent to keep the buildings up to the mark and that the amount needed for this purpose should be allowed.

The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer. They do not charge for appreciation of property or allow a loss from a fall in market value unless realized in money by a sale. (*United States* v. *S. S. White Dental Co.*, 274 U. S., 398, 401 [T. D. 4059, C. B. VI–2, 198].) A stockholder does not pay for accumulated profits of his corporation unless he receives a dividend.

That is the general principle upon which these laws go. It is true that they allow for obsolescence of buildings, etc., where the loss is of materials, not of money, but there, as elsewhere, the loss must be actual and present, not merely contemplated as more or less sure to occur in the future.

If the taxpayer owns the property the loss actually has taken place. But with Wiener it had not, and it might never fall on him, as was pointed out by the district judge. Some of the leases were assigned and others surrendered to the lessor. In such cases it would be a mere speculation to suppose that depreciation was taken in account in the transactions. Probably other and dominant considerations induced the acts. The event showed that in those cases there was no true basis for Wiener's claim.

The circuit court of appeals, interpreting *United States* v. *Ludey* (274 U. S., 295 [T. D. 4046, C. B. VI–2, 157]), said that the purpose of the Revenue Act is to tax only gain, and that the amount thus allowed to be set aside is not gain, but is capital that has gone into gross income. But it is very clear that as yet the capital of the lessee has not gone into it, and upon the considerations just mentioned it is not enough that he has made a contract that very possibly may not be carried out to replace that capital at some future time. If, as we think, such a contract is not enough to cause the lessee a present loss by wear and tear, the fact, which may be assumed, that the property was used by him in his business, does not matter. Of course he must show an interest in the property and a present loss to him to make the statute apply.

In *Lynch* v. *Alworth-Stephens Co.* (267 U. S., 364 [T. D. 3690, C. B. IV–1, 162]), a statutory provision for deducting from gross income a reasonable allowance for depletions of mines was held applicable to a lessee bound to mine a minimum tonnage and to pay a stated royalty. In such a case the whole value of the lease is in the right to remove the ore; that is, to destroy as rapidly as may be the real object of the lease.

But in the case of a house or shop, the value is not in the right to destroy and the destruction is only an undesired, gradual, and subordinate incident of the use. The diminution in the value of a mine to the lessee is conspicuous, necessary, and intended, and is the very source of the gross income of the lessee from which it is deducted, whereas the wear and tear of a house or shop in any given year may be only recognizable by theory and, as has happened in this case, may cost the lessee nothing while the premises are in his hands.

It does not matter that in Ohio, where the properties lie, these long leases are treated as in many respects like conveyances of the fee. The Act of Congress has its own criteria, irrespective of local law, that look to certain rather severe tests of liability and exemption and that do not allow the deductions demanded whatever the lessees may be called. We understand this to be the view taken by the Department for a long time and we are of opinion that it should not be disturbed.

Judgment of circuit court of appeals reversed. Judgment of district court affirmed.

ARTICLE 162: Depreciable property.

REVENUE ACT OF 1921 AND PRIOR ACTS.

Assessment for street improvements on front-foot or valuation basis. (See G. C. M. 5589, page 83.)

SECTION 214(a)11.—DEDUCTIONS ALLOWED: CHARITABLE CONTRIBUTIONS.

ARTICLE 251: Charitable contributions. VIII–7–4109
Ct. D. 41

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. DEDUCTION—CHARITABLE CONTRIBUTIONS—LIMITATION—INCOME OF INDIVIDUAL'S BUSINESS TAXED AS THAT OF A CORPORATION.

Where the net income of the business of an individual is at his option taxed as that of a corporation as provided in section 330 of the Revenue Act of 1918 the deduction from his gross income allowed for charitable contributions under section 214(a)11 of that Act is limited to 15 per cent of his net income excluding that part of it taxed as corporate income pursuant to section 330.

2. JUDGMENT AFFIRMED.

The judgment of the district court (25 Fed. (2d), 1014; T. D. 4175 [C. B. VII–2, 280]) is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reuben Sadowsky, plaintiff in error (plaintiff below), v. *Charles W. Anderson, Collector of Internal Revenue, defendant in error (defendant below).*

[December 10, 1928.]

OPINION.

AUGUSTUS N. HAND, Circuit Judge: The sole question before us is the extent to which charitable gifts and donations made by the plaintiff during the years 1918 and 1919 may be deducted in calculating his income tax. There are two causes of action, one affecting his income for 1918, and one for 1919, but as they each are governed by the same principles, our discussion may be limited to the income of the first year.

During 1918 the plaintiff received net income from a clothing manufacturing business, which he owned, amounting to $493,718.70. From other sources, such as salaries, interest, rents, and dividends, he derived a net income of $125,016.94, making an aggregate net income of $618,735.64. His charitable gifts and contributions during the year were $70,604.92.

On June 26, 1919, plaintiff incorporated his manufacturing business and thereupon exercised the option granted to him by section 330 of the Revenue Act of 1918 to have the net income from that business for the year 1918, to wit, $493,718.70, taxed "as the net income of a corporation is taxed."

Section 330 of the Revenue Act of 1918, which was approved February 24, 1919, contained the following provision:

"In the case of the organization as a corporation before July 1, 1919, of any trade or business in which capital is a material income-producing factor and which was previously owned by a partnership or individual, the net income of such trade or business from January 1, 1918, to the date of such reorganization may at the option of the individual or partnership be taxed as the net income of a corporation is taxed under Title II and III; in which event the net income and invested capital of such trade or business shall be computed as if such corporation had been in existence on and after January 1, 1918, and the undistributed profits or earnings of such trade or business shall not be subject to the surtax imposed in section 211, but amounts distributed on or after January 1, 1918, from the earnings of such trade or business shall be taxed to the recipients as dividends, and all the provisions of Titles II and III relating to corporations shall so far as practicable apply to such trade or business: *Provided*, That this paragraph shall not apply to any trade or business the net income of which for the taxable year 1918 was less than 20 per centum of its invested capital for such year: *Provided further*, That any taxpayer who takes advantage of this paragraph shall pay the tax imposed by section 1000 of this Act and by the first subdivision of section 407 of the Revenue Act of 1916, as if such taxpayer had been a corporation on and after January 1, 1918, with a capital stock having no par value."

The Commissioner of Internal Revenue held that the tax upon the net income from the plaintiff's business in 1918 was, notwithstanding the exercise of the option, assessable against and payable by plaintiff, the individual, and not by the corporation, but in fixing the amount to be deducted for charitable contributions in computing the net income of the taxpayer he allowed only 15 per cent of $125,016.94, which was plaintiff's income from other sources than the business afterwards incorporated, instead of allowing his contributions to the extent of 15 per cent of his entire income from all sources. The method of calculation adopted by the Commissioner made a difference in plaintiff's tax for the year 1918 of $23,668.70, which he seeks to recover in this action.

The plaintiff contends that the statute allowing a deduction of 15 per cent of his net income for charitable contributions is applicable to his entire net income; that the income derived from the business, though payable at corporate rates, is still *his* income and not that of a corporation, and that he may, therefore, enjoy as to it the beneficial provisions of the section which allow a deduction of the charitable contributions of an individual taxpayer in calculating his net income to the extent of 15 per cent thereof. Section 214(a)11 of the Revenue Act of 1918 reads as follows:

"Contributions or gifts made within the taxable year to corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of

the net earnings of which inures to the benefit of any private stockholders or individual, * * * to an amount not in excess of 15 per centum of the taxpayer's net income as computed without the benefit of this paragraph. * * *"

Judge Thacher sustained the ruling of the Commissioner, and we can see no escape from his reasoning. The taxpayer in availing himself of the provisions of section 330 and incorporating his business exercised a valuable option. He avoided the high surtax rates of 1918 which would have been levied on income had it been taxed against him as an individual. He was subjected to nothing but the corporate tax on all undistributed net earnings that had remained in the business and secured the corporate rate of 12 per cent. Section 330 provides that in such an event the net income of the business "be taxed as the net income of a corporation is taxed under Titles II and III." The provisions relating to the taxation of the income of corporations include no deduction for charitable contributions. This fact in connection with the language of the statute as to how the income from the business is to be taxed seems to determine the case against the taxpayer.

But it is said that the income though taxed as that of a corporation remained the income of an individual and was so returned under the ruling of the Commissioner; that section 330 merely fixed new percentages for the tax and did not deprive the plaintiff of the deductions allowed by section 214(a)11 for charitable contributions. It is true that the business income remained that of an individual, but section 330 not only says that it shall "be taxed as the net income of a corporation is taxed" but that it "shall be computed as if such corporation had been in existence on and after January 1, 1918." By this language the method of computation and rate and mode of taxation are brought under sections 232 to 236 of the Act and the taxpayer receives no benefits from section 214(a)11.

The fact that the allowance of charitable gifts was not cut off where income of individuals derived from capital gains was taxed at special rates under section 206 of the Revenue Act of 1921 and that it was similarly available where dividends of prior years were received in 1917, or subsequent years, but taxed at prior years' rates, can not extend the deduction to income derived from plaintiff's closing business. The option in those cases related merely to rates and was accompanied by no language providing for the "computation" of the income as that of a corporation.

While the income all belongs to the plaintiff, yet, under the scheme of taxation prescribed by the statute, it is as fully divided as though the "corporation had been in existence" all along. Had that been the case, the 15 per cent deduction could only have been taken upon the $125,016.94 of income arising from sources other than the manufacturing business and the business income would have been computed with no such allowance. The Commissioner properly computed the plaintiff's income upon this hypothesis and accordingly made no deduction for charitable contributions in calculating the taxable income from the business.

Judgment affirmed.

ARTICLE 251: Charitable contributions.

REVENUE ACT OF 1921.

Navy and Marine Memorial Association. (See I. T. 2460, page 98.)

SECTION 219.—ESTATES AND TRUSTS.

ARTICLE 341: Estates and trusts.

REVENUE ACTS OF 1918 AND 1921.

Allowance for exhaustion of life estate. (See Ct. D. 46, page 240.)

ARTICLE 345: Estates and trusts taxed to beneficiaries. VIII–9–4127 Ct. D. 48

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. INCOME—LIFE BENEFICIARY—DEDUCTION OF LOSS TO ESTATE.

Under section 219(d) of the Revenue Act of 1918 there must be included in computing the net income of a life beneficiary the entire amount distributed to him without deduction of a loss on the sale of capital assets of the trust estate.

2. DECISION FOLLOWED.

The decision of the circuit court of appeals in the case of *Baltzell* v. *Mitchell* (3 Fed. (2d), 428 (T. D. 3668 [C. B. IV–1, 191])) followed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Walter W. Abell, Elizabeth M. Abell, and Mary Abell Morgan, appellants, v. *Galen L. Tait, Collector of Internal Revenue, appellee.*

Appeals from the District Court of the United States for the District of Maryland, at Baltimore.

[January 14, 1929.]

OPINION.

NORTHCOTT, Circuit Judge: These are appeals from judgments of the District Court of the United States for the District of Maryland, at Baltimore, in favor of the appellee, the collector of internal revenue for the district of Maryland, in actions at law brought to recover additional Federal income tax paid for the years 1918 and 1919.

The stipulated facts are as follows:

Edwin F. Abell, the husband of the appellant Elizabeth M. Abell, and the father of the appellants Walter W. Abell and Mary Abell Morgan, died in 1904, leaving a will which was fully admitted to probate in Maryland.

Under the terms of this will each of the three appellants, who were plaintiffs below and will be here referred to as plaintiffs, was entitled to receive, and did receive, in the years 1918 and 1919, in quarter-yearly installments one-fourth of the net proceeds of the rents, issues, income, and profits of the Edwin F. Abell estate, after paying the expenses of administering and managing the property, and after deducting a reasonable commission for the trustee. The amount so received for the year 1918 by each of the plaintiffs, was $28,071.49, and for the year 1919 was $27,795.47.

During the years 1918 and 1919 the trust estate received income from many different sources. Also it sustained losses upon the sale of securities theretofore owned and held by the trust as capital assets. In the year 1918 this loss was $45,094, and in the year 1919 it was $49,914.95.

In proper time the appellant, Mary Abell Morgan, filed a return for the year 1918, and instead of reporting the sum of $28,071.49, the amount of net income of the trust estate actually received, reported in the taxable income one-fourth of the net income received by the trust estate less capital losses that the estate had sustained, or the sum of $15,913.92, and each of the appellants filed a return for the year 1919 on the same basis. The Commissioner of Internal Revenue held that the taxable income received by the appellants was the amount actually received under the terms of the will out of the gross income of the estate, instead of one-fourth of the "net income of the estate" as calculated by the trustee under the Federal Revenue Act, as a result of which the appellee collected, under protest, the sum of $2,274.98 from the appellant Mary Abell Morgan, for the year 1918, and $1,921.23 for the year 1919, and $3,596.93 from the appellant Walter W. Abell, for the year 1919, and $1,668.08 from the appellant Elizabeth M. Abell for the year 1919. Refund claims were duly filed and rejected.

General issue pleas were filed by the defendant, and the court, sitting as a jury under written waivers of trial by jury, tried all of the cases at one time under the stipulation of facts, no further proof being taken, and granted the defendant's prayer for judgment in each case, ruling as a matter of law that

there was no evidence under which the plaintiff might recover. and entered verdicts and judgments in favor of the defendant.

That part of the Revenue Act of 1918 which is pertinent to the question here raised is subdivision (d) of section 219, and reads as follows:

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust."

It is admitted that the regulations of the Treasury Department with respect to this section are in accord with the Government's contention here, that the plaintiffs were not entitled to deduct the losses of the estate from the amount actually distributed to them, but it is contended by appellants that the construction given this section by the Department is erroneous, and that the regulations promulgated in accordance with such erroneous construction have no weight.

It is also admitted that the Revenue Act of 1921 is clear on the point here raised, and does not permit the deduction here claimed. It is contended by the Government that the Act of 1921 was passed by Congress to avoid the uncertainty and ambiguity existing under the Act of 1918, while appellants contend that the passage of the Act of 1921 showed that Congress intended to change the law.

A question to be considered in determining what basis of taxation Congress intended to adopt in dealing with trust estates of this character is whether the fiduciaries and beneficiaries are separate entities.

It seems clear to us that in this case the fiduciaries and the beneficiaries are entirely separate entities. (*Baltzell* v. *Mitchell*, 3 Fed. (2), 428 [T. D. 3668, C. B. IV–1, 191]; *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S., 509 [T. D. 3173, C. B. 4, 34].)

The language of the statute is "there shall be included in computing the net income of each beneficiary his distributive share of the net income of the estate or trust." Congress, had it seen fit to do so, could have adopted the basis insisted upon by the taxpayer, but it did not in our opinion do this. The amount actually distributed to the beneficiaries could not have included any part of the capital of the trust estate, for any such distribution would have been contrary to the express provisions of the trust.

The principle controlling this question was succinctly stated in *Baltzell* v. *Mitchell*, supra, as follows:

"Therefore the distributive share which Congress must have had in mind and intended to be taxed was the distributive share of the income allotted to her under and in accordance with the terms of the trust."

In this connection, the Court of Appeals of the District of Columbia in *Whitcomb* v. *Blair* (25 Fed. (2), 528) held:

"Therefore the payment made by the trustee to appellant was in fact and law the distributive share of the income to which she was entitled as life tenant, and consisted in no part of capital depreciation restored to her. It was therefore taxable in her hands."

It is argued that the loss in the capital of the trust estate is in reality a loss to those who receive the entire income of the estate less expenses of administration. We do not think so. As was said in the case of *Baltzell* v. *Mitchell*, supra:

"Wise and prudent management of the trust estate may dictate the sale of worthless securities, or those which yield a small return, and the purchase of others which yield a larger return. Such an exchange, while it may show

a bookkeeping loss in the securities sold, may increase future returns upon the whole trust estate, and instead of entailing any loss upon the beneficiary may increase the income to be distributed to him thereafter."

This precise question was raised in the United States District Court for the District of Massachusetts (*Baltzell* v. *Casey*, 1 Fed. (2), 29 [T. D. 3642, C. B. III-2, 184]), and judgment given for the Government. This judgment was affirmed by the Circuit Court of Appeals for the First Circuit (*Baltzell* v. *Mitchell*, supra), and certiorari was denied by the Supreme Court (*Baltzell* v. *Mitchell*, 268 U. S., 690).

See also *Whitcomb* v. *Blair*, supra.

We agree with the reasoning and the conclusion reached in these cases, and the judgments are accordingly affirmed.

PART III.—CORPORATIONS.

SECTION 231.—CONDITIONAL AND OTHER EXEMPTIONS OF CORPORATIONS.

ARTICLE 515: Building and loan associations and cooperative banks. VIII-2-4065 T. D. 4253

INCOME TAX.

Building and loan associations, exemption of.—Articles 515 of Regulations 45 (1920 edition), 62, 65, and 69 amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 515 of Regulations 45 (1920 edition), as amended by Treasury Decision 3179 (C. B. 5, 200), is hereby further amended to read as follows:

A building and loan association organized pursuant to and operating in accordance with the laws of the United States or a State or Territory thereof is entitled to exemption.

Cooperative banks without capital stock organized and operated for mutual purposes and without profit are exempt. Credit unions such as those organized under the laws of Massachusetts, being in substance and in fact the same as cooperative banks, are likewise exempt from tax.

Articles 515 of Regulations 62, 65, and 69 are hereby amended to read:

A building and loan association organized pursuant to and operating in accordance with the laws of the United States or a State or Territory thereof, substantially all the business of which association is confined to making loans to members, is entitled to exemption.

Cooperative banks without capital stock organized and operated for mutual purposes and without profit are exempt. Credit unions such as those organized under the laws of Massachusetts, being in substance and in fact the same as cooperative banks, are likewise exempt from tax.

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

Approved January 7, 1929.

A. W. MELLON,
Secretary of the Treasury.

ARTICLE 515: Building and loan associations and cooperative banks.

REVENUE ACT OF 1921.

Kansas association requiring borrowers to subscribe to shares of rural credit installment stock. (See G. C. M. 5909, page 177.)

ARTICLE 518: Business leagues.

VIII-25-4244
Ct. D. 70

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. CORPORATION—EXEMPTION—BUSINESS LEAGUE.

A corporation, organized by several insurance companies to print and supply to them at cost standardized forms, policies, and other supplies, which in 1918 increases its charges over cost creating a surplus that was expended for replacements and additions, is not exempt from income tax as a business league under section 231(7) of the Revenue Act of 1918.

2. DECISION AFFIRMED.

The decision of the United States Board of Tax Appeals (9 B. T. A., 251) affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Uniform Printing & Supply Co. v. *Commissioner of Internal Revenue.*

Petition for review of order of United States Board of Tax Appeals.

[April 10, 1929.]

OPINION.

BALTZELL, District Judge: The petitioner, Uniform Printing & Supply Co., challenges the correctness of an order of the United States Board of Tax Appeals, wherein petitioner is ordered to pay a deficiency in income and profits taxes for the year 1918 in the sum of $34,060.86. The decision of said Board was promulgated on the 23d day of November, 1927.

The petitioner is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office in the city of Chicago, Ill. It was organized prior to the year 1918 and was doing business during the entirety of that year.

It appears that, prior to 1915, various fire insurance companies had their forms, policies, literature, and other supplies printed by various persons and at various places throughout the United States. It also appears that practically each insurance company used forms, policies, and literature which were different from those of other companies. If, therefore, an agent in any locality represented more than one insurance company, he was compelled to keep a supply of different forms, policies, etc., for each company represented by him. This entailed a tremendous expense upon the company and occasioned considerable waste.

A plan was devised by many of the leading insurance companies whereby uniform forms, policies, etc., were to be used by all such companies. These forms, policies, and other supplies of such companies were to be printed by a cooperative company of their own, and supplied to such companies at actual cost. As a result of this plan, the petitioner company was organized for the purpose of doing the printing and furnishing the supplies for such companies. It is the policy of the petitioner to print and distribute forms, policies, etc., at a price which is sufficient only to pay the expenses of operation and maintenance of the plant and organization. However, it was anticipated that in 1919, and subsequent years, it would be necessary for the company to spend substantial sums in replacement of and additions to the plant and equipment. Therefore,

in order to provide the necessary funds for such contemplated expenditures, the price charged for forms, policies, etc., was increased over the actual cost during the year 1918, resulting in a surplus of $74,521.62 for that year. This amount was subsequently expended for replacements and additions. This surplus is taken as the basis upon which the deficiency taxes ordered paid are calculated.

The only question for this court to determine is whether or not the petitioner is such an organization as is exempt from taxation under section 231(7) of the Revenue Act of 1918, which provides as follows:

"SEC. 231. That the following organizations shall be exempt from taxation under this title * * *.

"(7) Business leagues, chambers of commerce, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private stockholder or individual;"

It is the contention of the petitioner that it is a *business league* and is, therefore, exempt from taxation by virtue of the above provision of the Revenue Act.

Since the enactment of the Revenue Law in 1913, there has been contained therein a provision for the exemption of "business leagues, chambers of commerce, and boards of trade, not organized for profit." The Treasury Department has issued regulations from time to time, since the enactment of said law, defining the term "business leagues" and giving examples thereof.

Article 518 of Treasury Regulations 45, made and promulgated pursuant to section 1309 of the Revenue Act of 1918, reads as follows:

"ART. 518. *Business leagues.*—A business league is an association of persons having some common business interest, which limits its activities to work for such common interest and does not engage in a regular business of a kind ordinarily carried on for profit. Its work need not be similar to that of a chamber of commerce or board of trade. An association engaged in furnishing information to prospective investors, to enable them to make sound investments, is not such a league, since its members have no common business interest, and it is not exempt, even though all of its income is devoted to the purpose stated. A clearing house association, not organized for profit, no part of the net income of which inures to any private stockholder or individual, is exempt provided its activities are limited to the exchange of checks and similar work for the common benefit of its members. An association of persons who are engaged in the business of carrying freight and passengers by boats propelled by steam, which is designed to promote the legitimate objects of such business, and all of the income of which is derived from membership dues and is expended for office expenses and the salary of a secretary-treasurer, is exempt from tax. An incorporated cotton exchange, whose shares carry the right to dividends, is organized for profit and is not exempt."

The construction given this statute by the Treasury Department has been substantially the same since its enactment. This construction, extending over a long period of time, when not plainly erroneous, must be treated as read into the statute. (*New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S., 361.)

The Board, in this case, adopted the construction given in Regulations 45, article 518.

The petitioner was organized under the general corporation laws of Illinois, and is engaged in the printing business, which, according to the laws under which it is incorporated, may be operated for a profit.

In accordance with the general plan of petitioner company, adopted at the time of its incorporation, all forms, policies, etc., were furnished to its stockholders at actual cost prior to the year 1918. During that year, however, a sum in excess of the actual cost was charged for the entire output of petitioner company, resulting in a profit or net earning for the year in the sum of $74,521.62. True, such profits or net earnings were invested in machinery and additions, but that does not mean that such profits or net earnings did not inure to the benefit of the stockholders, so as to exempt petitioner from the payment of taxes. The value of the property of petitioner was enhanced to the extent of the profits earned during that year. Therefore, such profits or net earnings did inure to the benefit of the stockholders. The property of petitioner company may be sold at any time, and the proceeds thereof divided among the stockholders. In other words, the profits or net income is included in the value of the property owned by petitioner company, and upon ultimate

dissolution, the proceeds may be divided among its stockholders. (*Kemper Military School* v. *Crutchley*, 274 Fed., 125 [T. D. 3164, C. B. 4, 266].)

It necessarily follows, therefore, that petitioner was organized for profit, and that the profits or net income of petitioner company for the year 1918 did inure to the benefit of the stockholders, thereby removing it from that class of taxpayers which is exempt under section 231(7) of the Revenue Act of 1918.

The order of the Board of Tax Appeals is affirmed.

ARTICLE 519: Civic leagues.

REVENUE ACT OF 1921 AND PRIOR REVENUE ACTS.

Navy and Marine Memorial Association. (See I. T. 2460, page 98.)

ARTICLE 521: Local mutual insurance companies and like organizations.

REVENUE ACT OF 1921 AND PRIOR REVENUE ACTS.

City firemen's protective association receiving money from so-called sale of tickets to dances. (See G. C. M. 5921, page 179.)

SECTION 234.—DEDUCTIONS ALLOWED CORPORATIONS.

ARTICLE 562: Donations.

VIII-18-4189
Ct. D. 55

INCOME TAX—REVENUE ACT OF 1921—DECISION OF COURT.

1. DEDUCTION—CORPORATION—CHARITABLE CONTRIBUTIONS.

Contributions by a corporation to charitable corporations are not deductible from gross income as ordinary and necessary expenses under section 234(a)1 of the Revenue Act of 1921.

2. DECISION FOLLOWED.

The decision of the Court of Claims of the United States in the case of *Consolidated Gas Electric Light & Power Co. of Baltimore* v. *United States* (65 Ct. of Cls., 252 (T. D. 4182 [C. B. VII-2, 294])) followed.

COURT OF CLAIMS OF THE UNITED STATES.

Alfred J. Sweet, Inc., v. *The United States.*

[February 4, 1929.]

OPINION.

Moss, Judge, delivered the opinion of the court.

Plaintiff's predecessor, Lunn & Sweet Co., a corporation existing under the laws of the State of Delaware, filed its income and excess-profits tax return for the fiscal year ending November 30, 1921, in which it claimed as deductions from gross income the following contributions: To the Y. M. C. A., $16,875; to the Y. W. C. A. at Lewiston, Me., $500; to the Androscoggin County Y. M. C. A., $200; and to the Maine Central Hospital at Lewiston, Me., $2,500. These deductions were claimed as ordinary and necessary business expenses. An additional tax was assessed by the Commissioner of Internal Revenue covering the total amount of said contributions, to wit, $22,023.72, which additional tax was paid under protest. A claim for the refund of said amount was duly filed and was rejected.

This action is for the recovery of same. In 1923 said Lunn & Sweet Co. was reorganized under the name of Lunn & Sweet (Inc.), which latter corporation was reorganized in 1925 under the name of McLaughlin-Sweet (Inc.), and in January, 1927, it changed its corporate name to Alfred J. Sweet (Inc.), plaintiff in this suit.

It is provided by section 234(a) of the Revenue Act of 1921 (42 Stat., 254):

"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 * * *."

The same provision had been carried into the earlier Acts.

It is plaintiff's contention that the contributions in question fall within the meaning of the term "ordinary and necessary expenses."

It will be observed that under the Act of 1921, as well as the Act of 1918, Congress provided for deductions by individuals for contributions or gifts of the nature and character of the contributions made by plaintiff in this case. See section 214(a) of the Act of 1921, subparagraph 11 (42 Stat., 241), and section 214(a) of the Act of 1918, subparagraph 11 (40 Stat., 1068). However, Congress has never extended this deduction to corporations. On the contrary, it has expressly refused to do so. When the Revenue Act of 1918 was under consideration in the lower House of Congress, an amendment was offered providing for the deduction by corporations of gifts or contributions similar to the rights granted to individuals. This amendment was the subject of active discussion on the floor of the House and on a vote was defeated. (Cong. Record (House), vol. 56, part 10, pp. 10426–7–8; September 17, 1918.) In the light of this specific action there can be no doubt as to the intention of Congress on the subject in controversy. In the case of *Consolidated Gas Electric Light & Power Co. of Baltimore* v. *The United States*, decided in this court on April 2, 1928, involving the identical question presented in this case, the court, in an opinion by Chief Justice Campbell, said:

"But it was not an ordinary expense, nor was it a necessary one. The amount was what the corporation thought proper to subscribe, and whether to be subscribed at all, was a voluntary act.

"* * * It is sufficient for this case to say that Congress has authorized certain deductions, and the court can not extend the terms they have employed. * * *"

Conceding that plaintiff company was benefited by the construction and maintenance of the institutions for which the contributions were made, it was merely an indirect benefit such as would be enjoyed by the general public in that community. However praiseworthy the act of plaintiff company in its contributions, Congress has not authorized their deduction from the gross income of corporations, but on the contrary has specifically declined to do so.

Taxing statutes may not be extended by implication beyond the clear import of the language used. (*Gould* v. *Gould*, 245 U. S., 151; *United States* v. *Merriam*, 263 U. S., 179.)

Plaintiff is not entitled to recover and the petition will be dismissed.

SECTION 240.—CONSOLIDATED RETURNS OF CORPORATIONS.

ARTICLE 633: When corporations are affiliated. VIII–23–4231 Ct. D. 66

INCOME TAX—REVENUE ACT OF 1918—DECISION OF COURT.

1. CONSOLIDATED RETURN—WHEN CORPORATIONS ARE AFFILIATED.

Ownership by the same interests of 94.85 per cent of the shares of stock of one corporation and 55.63 per cent of the shares of another corporation is not sufficient to authorize affiliation under section 240 of the Revenue Act of 1918. The fact that the minority is acquiescent and permits the majority to manage the business does not prove actual control of the stock of the minority, nor does a

control based upon friendship or professional relations satisfy the statute.

2. DECISION REVERSED.

The decision of the Board of Tax Appeals (7 B. T. A., 707) reversed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Commissioner of Internal Revenue, petitioner on review, v. *Adolph Hirsch & Co., Inc., respondent on review.*

Appeal from the Board of Tax Appeals. Petition filed by the internal revenue collector to review a determination as to a tax imposed upon Adolph Hirsch & Co., Inc. Petition granted, with directions that the determination of the Board of Tax Appeals be reversed.

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

[February 4, 1929.]

OPINION.

MANTON, Circuit Judge: The respondent was incorporated under the laws of the State of New York on August 18, 1919. The Brazilian Rubber Plantation & Development Co. was also incorporated in New York on July 6, 1919. Both corporations had their place of business at a common address in New York City. Adolph Hirsch and his brother were engaged as partners in business as importers from South America, having branches there. Adolph Hirsch had a 60 per cent interest in the firm and his brother 40 per cent. They then incorporated in 1919 as Adolph Hirsch & Co., Inc.; 15 per cent of the stock was transferred to their nephew. The capital stock was $400,000. The assets and liabilities of the partnership were transferred to the corporation. The Brazilian company was engaged in working plantations in Brazil. Prior to its incorporation, title to this plantation was in the name of Adolph Hirsch. It was incorporated for 20,000 shares, of the par value of $100, and was issued as follows: 67.85 per cent to Adolph Hirsch, 27 per cent to his brother, and 5.15 per cent to his nephew. In 1920 there was an aggregate of 4,240 shares owned and controlled as follows: Adolph Hirsch, 43.47 per cent; his brother 13.21 per cent; the Bloomberg family and others, 44.37 per cent. The affairs of the Brazilian company were handled by the Hirsch brothers, first through the partnership and later through the corporation Adolph Hirsch & Co., Inc. No regular set of books were kept regarding the affairs of the Brazilian company, that is, there was no ledger, cash book, or sales book, and since 1913 it had no separate bank account.

All activities were commenced and managed entirely by the Hirsch company; funds necessary for the conduct of the affairs of the Brazilian company were advanced by the Hirsch company by cable, by transferring or opening a bank credit against which a draft would be made by people in Brazil. Sales were made through and in the name of the Hirsch company and the proceeds were credited on the books of the Hirsch company. In a word, the Brazilian company was conducted as a department of the Hirsch company's business. No stock of either company was sold to the general public. Mr. Bloomberg was the personal attorney of the Hirsch brothers and had been intimately associated with them for years, and was the attorney who incorporated the Brazilian company. The Commissioner refused to permit the two corporations to file a consolidated return for the year 1920, upon the claim that they were affiliated corporations within the provisions of section 240(b) of the Revenue Act of 1918, and assessed a deficiency of $12,386.24. This result was reversed by the Board of Tax Appeals, which held there was affiliation and determined the deficiency to be $2,364.01. This difference is the amount of tax involved on this appeal.

Section 240(b) provides that "two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

The Hirsch brothers owned together 94.85 per cent of the shares of stock of the respondent and 55.63 per cent of the Brazilian company. We may regard

the Hirsch brothers as of the same "interest." "Substantially all" was not intended to be interpreted as being any particular percentage but must be applied to the particular facts of each case. We held in *Ice Service Corp.* v. *Commissioner of Internal Revenue*, decided January 7, 1929, that 75 per cent was not a control of "substantially all" of the stock. In the Revenue Acts of 1924, 1926 (section 240(c), 43 Stat., 253, 44 Stat., 9), and 1928 (section 141(d), section 142(c), Public No. 562, Seventieth Congress), Congress has substituted for "substantially all" of the stock the words "at least 95 per cent of the stock." It was the apparent intent of Congress that the test of unity of control of substantially all the stock of the corporation depended upon whether there could be made intercompany arrangements affecting invested capital or net income of the separate members and thus enable them to be considered as a unity. Congress recognized that an equitable and convenient way of dealing with such a situation was to treat a group of corporations thus controlled as a business unity and hence to provide for a consolidated return. A consolidated return can be carried out where there are no conflicting interests among the stockholders and, as affiliated corporations, they are required to file a consolidated return of the net income and invested capital and the taxes are computed and determined on the basis of such return and assessed in the first instance as a unit. Thus the corporate entity can be disregarded only where there is no divergent interest among the stockholders. Stockholders of two or more corporations, if the same persons, and their holdings in different corporations are in the same proportion, bear the ultimate burden of taxes equally and equitably regardless of whether it rests primarily upon one or the other of the affiliated corporations, if only such corporations be deemed affiliated, but it is where the proportions of the stockholders are different that inequities result. The Brazilian company appears to have stockholders to the extent of 43.37 per cent who own no stock in the respondent. These stockholders would suffer disadvantages and might receive benefits through the operations of the respondent in which they have no interest or representation. Thus there is no fair basis of affiliation of ownership and there is no control of substantially all of the stock by the same interests. (*Montana Mercantile Co.* v. *Rasmussen*, 28 Fed. (2d), 916; *Alameda Inv. Co.* v. *McLaughlin*, 28 Fed. (2d), 81; appeals of Gould Coupler Co., 5 B. T. A., 515.) The management of the business of the corporation is not the control required by the statute. It refers to stock control. The fact that the minority is acquiescent and permits the majority to manage the business does not prove actual control over the minority interest. Nor does a control based upon friendship or professional relations satisfy the statute. The control of the stock owned by the same interest refers to beneficial interest. This meaning is consistent with the purpose of the statute to extend to those subject to the hazard of the enterprise, when they are substantially one and the same, the benefit of the consolidated reports. Because the minority stockholders of the Brazilian company hold no stock in the respondent, in no way was the stock of the minority of that company controlled within the proper statutory acceptation of that term.

The necessary stock ownership or control required by the statute not existing in the present case, it was error for the Board of Tax Appeals to hold that the respondent and the Brazilian company were affiliated corporations entitled to file a consolidated return.

The order is reversed, with directions to assess the tax in accordance with this opinion.

SECTION 245.—TAX ON LIFE INSURANCE COMPANIES.

ARTICLE 682: Reserve for deferred dividends. VIII–10–4132
G. C. M. 5782

REVENUE ACT OF 1918.

The annual net additions to the deferred dividend reserves maintained by the taxpayer, a stock life insurance company in Nebraska, are not deductible under section 234(a)10 of the Revenue Act of 1918.

Recommended that Solicitor's Opinion 40 (C. B. 3, 274), in so far as it pertains to question 1, be revoked.

The M Life Insurance Co., a stock life insurance company organized under the laws of Nebraska, filed claims for the refund of profits tax for the years 1918 and 1919, based on the contention that the Income Tax Unit erred in refusing to permit it to include in its invested capital for those years the reserve maintained for the payment of deferred dividends. Upon consideration of this question it was concluded that this reserve represented earned surplus and undivided profits within the statutory definition of invested capital, and should be included in computing the invested capital of the taxpayer. The Income Tax Unit reaudited and readjusted the profits tax liability of the taxpayer for the years 1918 and 1919. However, at the same time the Income Tax Unit also readjusted the taxpayer's income tax liability for those years (by disallowing as a deduction under section 234(a)10 of the Revenue Act of 1918 the net addition made by the taxpayer to the deferred dividend reserve for the years 1918 and 1919 and increasing its income tax liability accordingly) and correspondingly reduced the profits tax refundable. The correctness of the action of the Unit in the latter particular is the question under consideration. The question, briefly stated, is: Are the annual net additions to the deferred dividend reserves maintained by the taxpayer deductible under section 234(a)10 of the Revenue Act of 1918? This section authorizes, in the case of insurance companies, the deduction of "the net addition required by law to be made within the taxable year to reserve funds * * *."

This question was previously considered in Solicitor's Opinion 40, in which opinion it was concluded that the reserves maintained by life insurance companies in the State of Nebraska for the protection of deferred dividend policies were reserves required by law in ascertaining the net addition to reserve funds deductible in computing the net income subject to tax under the Revenue Act of 1916.

It is apparent from a reading of Solicitor's Opinion 40 that the conclusion therein reached was based on the reasoning and conclusion of the Supreme Court in the case of the *Maryland Casualty Co.* v. *United States* (251 U. S., 342). However, in the more recent decisions of the Supreme Court, notably, in the case of *United States* v. *Boston Insurance Co.* (269 U. S., 197, T. D. 3792, C. B. V–1, 300) and in the case of the *New York Life Insurance Co.* v. *Edwards, Collector* (271 U. S., 109, T. D. 3872, C. B. V–1, 305), the principles announced by the Supreme Court in the case of the *Maryland Casualty Co.* v. *United States* were substantially modified. In this connection reference is made to the case of the *Minnesota Mutual Life Insurance Co.* v. *United States*, decided by the Court of Claims on December 3, 1928. In that case the Court of Claims sustained the action of the Commissioner in disallowing as a deduction from gross income under section 234(a)10 of the Revenue Act of 1918 and the corresponding sections of prior Revenue Acts, the net additions to the plaintiff's deferred dividend reserves, "a reserve maintained by the plaintiff and required by the law of Minnesota." In the course of its opinion the court said:

In *New York Life Insurance Co.* v. *Edwards* (271 U. S., 109) the Supreme Court again applied the principles of the McCoach and Boston Insurance Co. cases. On page 116 of the opinion the court said:

"Overpayments by deferred dividend policyholders for 1912 amounted to $8,198,918. The collector refused to deduct this sum from the total receipts and

demanded the prescribed tax of 1 per centum thereon. We think he acted properly. Both courts below so held."

* * * * * * *

While both the Penn Mutual and the Edwards cases did not involve the issue of "net additions to reserve funds required by law," we abstract from the opinions the governing principle that the purpose of Congress in the taxing Act was to restrict the allowable deductions to the class of reserves required "as against the contingent liability on outstanding policies." Deferred dividends, as the term imports, are retained by the company for years. The question of an annual allocation of deferred dividends is contingent upon the prosperity of the company, and the statutory requirement as to a reserve against the liability is, it seems to us, no more than a wholesome provision that the stated annual financial condition of the company in this respect shall be maintained.

In view of the cases which have been decided, we think the petition as to these items of the claim must be dismissed.

The Court of Claims in its opinion does not indicate that the particular language of the Minnesota statute requiring the maintenance of a deferred dividend reserve was important in determining the question decided, but rests its decision on the principle that the deferred dividend reserve was not one required to be held "against the contingent liability on outstanding policies." However, if it be conceded that the language of the statute under which the reserve was maintained was a determining factor in that case, it is the opinion of this office that the provisions of the Nebraska statutes upon which Solicitor's Opinion 40 is based are so nearly identical with those of the Minnesota statutes considered by the Court of Claims in the Minnesota Mutual case that a distinction between insurance companies operating under the provisions of the Nebraska statutes and companies operating under the provisions of the Minnesota statutes is not justified.

It is accordingly recommended that Solicitor's Opinion 40, in so far as it pertains to question 1, be revoked, and that the action of the Income Tax Unit in the instant case be sustained.

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

ARTICLE 682: Reserve for deferred dividends. VIII–10–4133
I. T. 2461

REVENUE ACT OF 1918.

Solicitor's Opinion 40 (C. B. 3, 274), in so far as it pertains to question 1, is revoked, in view of General Counsel's Memorandum 5782 (see on page 269).

PART IV.—ADMINISTRATIVE PROVISIONS.

SECTION 250.—PAYMENT OF TAXES.

ARTICLE 1008: Collection of tax by suit. VIII–11–4146
Ct. D. 51

INTERNAL REVENUE LAWS—SUIT ON BOND—DECISION OF COURT.

1. SUIT—BOND—ABATEMENT CLAIM—SURETY—DEFENSE.

Liability on a bond, given in support of a claim for abatement and conditioned for the payment of the tax assessed so far as the

Commissioner should not abate it, arises as soon as the claim for abatement is disallowed, and the invalidity of the tax is not a defense to a suit on the bond.

2. SAME—ESTOPPEL.

Where a claim in bankruptcy to which the United States is not a party is filed in the name of the United States by the surety on a bond conditioned to pay the assessment, neither an order of the bankruptcy court expunging the claim nor the refusal of the United States to prove the claim against the trustee in bankruptcy creates an estoppel in a suit upon the bond.

3. SAME—PARTY PLAINTIFF.

A suit upon a bond in favor of a named collector and his successors in office as obligees may be brought by his successor in office.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Frank K. Bowers, Collector of Internal Revenue, appellant, v. *American Surety Co., appellee.*

[January 7, 1929.]

OPINION.

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

Appeal from a judgment of the District Court for the Southern District of New York dismissing a complaint at law upon a bond given to secure the payment of taxes.

L. C. Blancke, Inc., a New York corporation, filed an income tax return in New York for the year 1917, upon which on January 3, 1920, the Commissioner of Internal Revenue assessed an additional tax on the assessment lists for December, 1919, and transmitted the assessment to Edwards, then collector for New York, on January 13, 1920. Edwards notified the corporation of the assessment and demanded payment on February 17, and the corporation on March 2 complied in part and filed a claim for the abatement of the remainder. On December 24, 1920, the corporation as principal and the defendant as surety executed and delivered a bond to Edwards in favor of himself and his successors in office as obligees, reciting that the corporation had been assessed the sum remaining due, and had asked Edwards to suspend collection of the assessment for one year, that it might pay so much as remained unpaid "with interest thereon until paid as required by law," should the claim for abatement be disallowed. The condition of the bond was that the corporation should pay "the balance aforesaid" to the collector at the expiration of the extended period.

The corporation was adjudicated a bankrupt on May 20, 1921, and on September 15, 1921, the Commissioner denied the greater part of the claim for abatement. The trustee in bankruptcy on November 22, 1921, petitioned the referee to determine what amount was due from the bankrupt as taxes and the referee gave notice of the proceeding to the plaintiff, who had then succeeded in office to Edwards. The defendant thereupon demanded that the United States file its claim in bankruptcy, but both the United States and the plaintiff failed to do so. Thereupon the defendant filed a claim as surety in the name of the United States for the tax as assessed, the trustee objected to it, and the district court expunged it.

Upon a trial before a jury of one the parties stipulated the foregoing facts, together with more not necessary to set forth, and the district judge directed a verdict for the defendant, on which the judgment appealed from was entered.

L. HAND, Circuit Judge: Section 250(b) of the Revenue Act of 1918 provided that if the Commissioner should determine that the amount paid by a taxpayer was less than should have been paid, the balance should be paid upon notice and demand by the collector. Section 3187 of the Revised Statutes provided that if any person was liable to pay taxes which for 10 days after notice and demand it neglected to pay, the collector might distrain upon his chattels and land. It is quite true that in an action at law to recover a tax the United States must prove that the tax is due (*U. S.* v. *Rindskopf*, 105

U. S., 418; *Clinkenbeard* v. *U. S.*, 21 Wall., 65), though the assessment makes a prima facie case (*Becker* v. *U. S.*, 21 Fed. (2), 1003 (C. C. A., 5) [T. D. 4106, C. B. VI–1, 175]). But the duty is nevertheless imposed to pay the assessment and carries the sanction of the distress which the taxpayer has no means of avoiding.

The bond in suit was a substitute for the duty to pay the assessment and was intended to hold off the distress. The condition was not that the L. C. Blancke Co. should pay the tax due but the tax assessed so far as the Commissioner should not abate it within the year. This is plain from the language of the recitals which the condition incorporated by the word "aforesaid." These say that the collector whose duty it is to collect the assessment has assessed the tax, and that the taxpayer wishes him to suspend "the collection thereof." The words relied upon by the appellee, "until paid as required by law," do not modify this language, but refer to the payment of the assessment required by section 250(b). This being true, the bond became due as soon as the Commissioner denied the rebate, and the defendant was liable for its principal's default. (*Gray Motor Co.* v. *U. S.*, 16 Fed. (2), 367 (C. C. A., 5) [T. D. 3994, C. B. VI–1, 149]; *U. S.* v. *Onken Bros. Co.*, 23 Fed. (2), 367 [T. D. 4108, C. B. VI–2, 270]; *McCaughn* v. *Phil. Barge Co.*, 27 Fed. (2), 628 [T. D. 4199, C. B. VII–2, 168].)

The learned district judge agreed so far, but it seemed to him that the circumstances of the bankruptcy established "equities" which forbade the recovery. This appears to us erroneous for several reasons. The United States was not estopped by the order expunging the claim; it was not a party to the bankruptcy proceedings; on the contrary, it steadfastly refused to be drawn into them. The surety could not conclude it by a suit which it would not undertake, whatever might be its liability for refusing to undertake it. Apparently the appellee supposes that the case is like those in which a person secondarily liable may, when sued, vouch in the principal and so fix as between them the fact and extent of his liability. (*Washington Gas Light Co.* v. *District of Columbia*, 161 U. S., 316; *L. Boyer's Sons Co.*, 25 Fed. (2), 602, 607; *Oceanic Steam Nav. Co.* v. *Compania Transatlantica*, 134 N. Y., 461.) But that is quite another matter from estopping the obligee by a judgment between the surety and the principal, a result which would take the collection of the claim out of the obligee's hands and subject him to the event of a suit which he has no duty to promote.

Moreover, the issues decided by the bankruptcy court were irrelevant in any event; they concerned, and could concern, only the question whether the tax had been properly assessed, not whether it had been assessed at all. Since the condition of the bond was the payment of the assessment, it made no difference even if the order of the bankruptcy court had created a good estoppel against the plaintiff. It seems indeed a harsh rule that the Government should collect a tax which its courts have already decided not to be due, yet this is exactly the consequence of section 3224 of the Revised Statutes. (U. S. Code, Title 26, sec. 154; *Graham* v. *Dupont*, 262 U. S., 234 [T. D. 3486, C. B. II–1, 226]; *Ellay Co.* v. *Bowers*, 25 Fed. (2), 637 (C. C. A., 2).) The unimpeded collection of a nation's taxes is a condition of its life, and it must serve as a redress to such citizens as are wronged that they have recourse to its courts after payment.

Nor did it make a difference that the plaintiff and the United States refused to prove the claim against the trustee in bankruptcy. (*Bank* v. *Sawyer*, 177 Mass., 490 (semble).) We need not consider upon what conditions a surety may secure the aid of a court of equity to compel the obligee to proceed against the principal; equity does not do so, when the obligee's delay will not prejudice the surety's rights against the principal. No such injury was possible here; section 57–i of the Bankruptcy Act gave to the defendant full protection, of which it availed itself, with the active assistance of the plaintiff so far as lay in his power.

The most difficult question in our view is whether the plaintiff could sue upon the bond. In the case of parol contracts, the rule seems to be well settled since *Bowen* v. *Norris* (2 Taunt., 374) that when a public officer is the promisor, suit must be brought in the name of his principal. (*Bainbridge* v. *Downie*, 6 Mass., 253 (a written contract); *Irish* v. *Webster*, 5 Me., 171 (a note); *Balcombe* v. *Northrup*, 9 Minn., 172 (a note); *United States* v. *Gordin*, 287 Fed. Rep., 565, 570.) So far as we can find, the doctrine has never been extended to specialties, and in the absence of some enabling statute the obligee named in a bond must sue upon it. (*Equitable Surety Co.* v. *Board of Commissioners*, 256 Fed. Rep.,

773, 775 (C. C. A., 5); *Ayres* v. *Toland*, 7 Harris and Johnson, 3; *Wilson* v. *Donnelly*, 19 R. I., 113; *People* v. *Laidlaw*, 120 Mich., 358; *Farmington* v. *Hobert*, 74 Me., 416; *Henricus* v. *Englert*, 137 N. Y., 488; *Owens* v. *Ga. L. Ins. Co.*, 165 Ky., 507.) Moreover, this rule has been extended to prevent suit by the successors in office of the obligee, though they are named as such in the bond (*Sumner* v. *Steward*, 2 N. H., 39 (semble); *Stevens* v. *Hay*, 6 Cush., 229; *McDowell* v. *Hemphill*, 60 N. C., 96), and such is no doubt the common law. On the other hand, in *Tyler* v. *Hand* (7 How., 573, 585), President Tyler was allowed to sue upon bonds given to President Van Buren and his successors on behalf of orphan Indians, and the decision has never since that time been questioned, except in *Stevens* v. *Hay* (6 Cush., 229). The case arose on demurrer to a declaration upon which the defendant assigned five several grounds. The court, observing that the defects assigned were not to the form but to the substance of the declaration, nevertheless considered them severally. The second ground was that the plaintiff showed no title to the bonds or any interest which would authorize him to sue, and its disposition was summary and without discussion. Yet, while it is not clear just what the ground of the decision was, the defect appeared on the face of the declaration and was certainly ground for demurrer if valid, so that we must conclude that the court meant to declare a new rule in such instances which we feel not only authorized but bound to accept.

The situation is an instance of the unwillingness or incapacity of the common law to recognize an office as a legal person, and even the classic exception, a corporation sole, has been criticized on historical grounds by Mr. F. W. Maitland with great acumen and scholarship. Yet, whatever the source, and however alien in its origin, nobody can question that fictional personality got a place in our law, though the tendency to-day be against it. Of the convenience of recognizing an office as a legal person in cases like that at bar there can be no question; the purpose of such bonds is to create an obligation in favor of the incumbents, as they succeed each other; and the existence of many statutes which permit what the common law denied are evidence of its need. A similar situation arises upon the abatement of an action brought by a public officer who dies or retires pendente lite, and the common law was followed in *U. S.* v. *Boutwell* (17 Wall., 604), *U. S.* v. *Chandler* (122 U. S., 643), *Warner Valley Stock Co.* v. *Smith* (165 U. S., 28) and *U. S. ex rel Bernardin* v. *Butterworth* (169 U. S., 600). The Act of February 8, 1899 (U. S. Code, Title 28, section 780), was passed to relieve the difficulty so created and answered so far as Federal officials were concerned (*Caledonian Coal Co.* v. *Baker*, 196 U. S., 432), though it did not cover the substitution of State officials (*Pullman Co.* v. *Croom*, 231 U. S., 571), unless the State statutes gave the power (*Gorham Mfg. Co.* v. *Wendell*, 261 U. S., 1). These were all, indeed, cases where the substitution sought was of parties defendant, and there is a difference in the case of parties plaintiff, since in the first case the wrongful act laid is not that of the substituted defendant, while the right sued upon generally in fact devolves upon the successor, virtute officii. Unless we hold that *Tyler* v. *Hand* covers the case, we are forced to a curiously anomalous conclusion. Had Edwards sued the bond pending his term of office, the plaintiff could have been substituted upon his retirement; yet Edwards must sue to the use of the plaintiff because he retired before the writ issued, and in such an action the plaintiff may not be substituted. All things are indeed possible, and perhaps we should tenaciously cling to the letter, but it seems to us that after Congress has declared its policy broadly, we are warranted in assuming that *Tyler* v. *Hand* covers what might otherwise have been regarded as casus omissus.

The judgment is reversed, and since the case was tried upon stipulated facts, the cause is remanded with instructions to direct judgment for the plaintiff.

ARTICLE 1008: Collection of tax by suit. VIII–18–4193
Ct. D. 56

INSOLVENCY—FEDERAL TAXES—DECISION OF SUPREME COURT.

INSOLVENCY—FEDERAL TAXES—PRIORITY OVER STATE TAXES.

Section 3466 of the Revised Statutes establishes priority of payment of taxes due to the United States over those due to a State in the case of an insolvent debtor.

SUPREME COURT OF THE UNITED STATES.

County of Spokane and County of Whitman, Wash., Petitioners, v. *The United States of America.*

On writ of certiorari to the Supreme Court of the State of Washington.

[April 8, 1929.]

OPINION.

Mr. Chief Justice TAFT delivered the opinion of the court.

This case presents the question of the priority of payment of debts due to the United States over those due to a State or its agencies against the same fund for State taxes, under section 3466 of the Revised Statutes of the United States.

In August, 1922, a receiver for the Culton-Moylan-Reilly Auto Co., an insolvent corporation, was appointed by the Superior Court of Spokane County, Wash. Under the order of the court the receiver sold the personal property of the corporation and reduced the same to cash, which he held for distribution. On March 1, 1921, and March 1, 1922, Spokane and Whitman Counties of the State of Washington had assessed against the personal property of the company the total amounts of $6,195.38 and $410.36, respectively; but the taxes were not paid and the proceeds of the subsequent sale of assets by the receiver were deposited in court. On September 23, 1924, Spokane County assessed the money in the hands of the receiver for the years 1923 and 1924, and levied taxes thereupon in the total amount of $1,390.10. On December 20, 1926, Spokane County made a further assessment and levy on the moneys in the hands of the receiver for the years 1925 and 1926 in the total amount of $1,229.52.

The United States Commissioner of Internal Revenue, on February 28, 1923, and May 2, 1923, assessed Federal income taxes and penalties for the years 1917, 1918, 1919, and 1920 in the total amount of $70,268.58. But none of these taxes or penalties were paid.

The funds in the hands of the receiver are insufficient to pay in full the claims of the United States and Spokane and Whitman Counties. By proper pleadings, issues were made presenting the question of the comparative priorities in distribution of the fund in his hands. The superior court held that the two counties were entitled to priority not only as to the county taxes levied against the corporation but for the county taxes for 1923–1926 assessed on the money in the receiver's hands. On an appeal to the Supreme Court of Washington, the judgment was reversed and priority awarded to the United States. (147 Wash., 176.)

Section 3466 of the Revised Statutes provides in part that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied."

The Constitution, Article I, section 8, provides that Congress shall have power to lay and collect taxes and to make all laws which shall be necessary and proper to carry this and its other powers into execution. Article IV of the Constitution declares that the Constitution and the laws made in pursuance thereof shall be the supreme law of the land.

The constitutional validity of the priority of claims of the United States against insolvent debtors, declared in section 3466, was established by this court very early in the history of the Government. (*United States* v. *Fisher*, 2 Cranch, 358.) But it was not established as between debts owing to the States and debts owing to the United States until after a critical controversy between those who looked to the maintenance of the supremacy of the National Government and those who were anxious to sustain undiminished the power of the States.

Section 3466 R. S. was section 5 of an Act entitled "An Act to provide more effectually for the settlement of accounts between the United States, and receivers of public money," enacted in 1797 (ch. 20; 1 Stat., 515). It was amended by an Act of 1799 (sec. 65, ch. 22; 1 Stat., 676).

The language has been varied very little since these original enactments. The whole Act of 1797 came up for consideration in *United States* v. *Fisher*. There seems to have been a division among the judges. Chief Justice Marshall

delivered the opinion of the court, which upheld the priority of the United States as against the claims of the States and held that the Act extended not only to revenue officers and persons accountable for public money, but to debtors generally. The Chief Justice said (p. 395):

"If the Act has attempted to give the United States a preference in the case before the court, it remains to inquire whether the Constitution obstructs its operation. * * *

"The Government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.

"This claim of priorty on the part of the United States will, it has been said, interfere with the right of the State sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers.

"But this is an objection to the Constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends."

This case was decided in 1805. Later that year the question arose in a Pennsylvania State court. (*United States* v. *Nicholls*, 4 Yeates, 251.) Nicholls was indebted to the United States, and on June 9, 1798, executed a mortgage to the United States supervisor of the revenue for the use of the United States. There was a levy upon the lands of Nicholls and they were sold for $14,530. The money was deposited in the hands of the prothonotary of the court, subject to the court's order. Nicholls made an assignment for the benefit of his creditors and a commission of bankruptcy issued against him. The Attorney General relied on this same fifth section of the Act of 1797, and the issue arose whether in the distribution of that fund the laws of Pennsylvania giving a preference to that State in the payment should prevail over the Federal Act of 1797. Mr. Justice Yeates, speaking for the court, said (p. 259):

"Congress have the concurrent right of passing laws to protect the interest of the Union, as to debts due to the Government of the United States arising from the public revenue; but in so doing, they can not detract from the uncontrollable power of individual States to raise their own revenue, nor infringe on, or derogate from the sovereignty of any independent State. * * * The rights of the General Government to priority of payment, and the rights of individual States, are contemplated as subsisting at the same time, and as perfectly compatible with each other. This can only be effected by giving preference to each existing lien, according to its due priority in point of time. I know of no other mode whereby the several conflicting claims can with justice be protected and secured."

The colleagues of Judge Yeates concurred with him, but one of them expressed regret that the opinion in the Fisher case, supra, delivered previously, had not been furnished for comparison. The decisions in the Fisher and the Nicholls cases created much popular excitement, and, united with other issues of a similar character as between the supporters of the Federal Government and the State Governments, led to much concern over the open defiance of the decisions of this court, until the issues were disposed of in the case of *United States* v. *Judge Peters* (5 Cranch, 115). See the account of the litigation in Charles Warren's Supreme Court in United States History, volume 1, pages 372, 538 et seq. Four years after the decision in the Nicholls case, a review of that case was sought in this court on a writ of error. When it came to be heard after nine years more of inaction, it was dismissed for lack of jurisdiction, on the ground that the record did not disclose the insolvency of the debtor so as to make section 3466 applicable, and thus was eliminated the Federal question. (4 Wheat., 311.)

No question of the construction of section 3466 seems to have come before this court again until in *Field* v. *United States* (9 Pet., 182) it was sought to make certain trustees liable from their own funds, because they had made disbursements out of a bankrupt's estate, as to which the United States was entitled to priority. It was objected that the distribution had been made under order of the parish court in an action in which the United States was not a party. This court held that the United States was not bound to become a party and said (p. 201):

"The local laws of the State could not, and did not, bind them (the United States) in their rights. They could not create a priority in favor of other creditors in cases of insolvency, which should supersede that of the United States."

The power of the Congress of the United States in giving preference to the debts of the Government of the United States over those of the separate States is very clearly brought out in *Lane County* v. *Oregon* (7 Wall., 71), and may well be referred to here, because there are some expressions in that opinion which, taken away from their context, have been used to give an erroneous view.

After discussing the taxing powers of the National and State Governments, the court, speaking by Chief Justice Chase, said of the State power of taxation (p. 77):

"It is indeed a concurrent power, and in the case of a tax on the same subject by both Governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government."

In *United States* v. *Snyder* (149 U. S., 210), the question was raised whether the tax system of the United States could be made subject to the recording liens of the States. This court said (p. 214):

"* * * the grant of the power and its limitation are wholly inconsistent with the proposition that the States can by legislation interfere with the assessment of Federal taxes * * *."

In *United States* v. *San Juan County* (280 Fed., 120 [T. D. 3298, C. B. I–1, 306]), and in *Stover* v. *Scotch Hills Coal Co.* (4 F. (2d), 748 [T. D. 3666, C. B. IV–1, 325]), section 3466 came directly under consideration, and the priority of the United States against that of the States was fully sustained. It was also sustained by an unreported decision of the District Court of the Eastern District of Washington, in a proceeding relating to the very taxes here involved, but the judgment was reversed for lack of jurisdiction because the jurisdiction of the State courts had first attached. (*Merryweather* v. *United States*, 12 F. (2d), 407.)

Petitioners rely on *Ferris* v. *Chic-Mint Gum Co.* (14 Del. Ch., 232), where there were several claimants—a mortgagee, the State, and the United States. Under R. S. 3186 the mortgagee was given priority over the United States. By State law, the State was preferred to the mortgagee. The chancellor allowed the claims in the order of the State, the mortgagee, and the United States, holding that "when the Government agreed by section 3186 to take rank after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior." The chancellor observed that his conclusion arose out of the peculiar facts of the case, and that it was unnecessary for him to venture into the broad field of constitutional law. Without concurring in the conclusion of the chancellor, it is enough to say that as there is no such third creditor here, the case is not in point. Moreover, it is contended by the Government that the relative priorities could have been maintained in that case by setting apart sufficient funds to pay the mortgage before paying the Federal taxes and then providing for payment of the State tax out of the sum so set apart.

In *United States* v. *National Surety Co.* (254 U. S., 73), the question was whether in the distribution of a bankrupt's estate the United States had priority over a surety company entitled to subrogation under section 3468 of the Revised Statutes. Upon this point this court said (p. 76):

"The priority secured to the United States by section 3466 is priority over all other creditors; that is, private persons and other public bodies."

After these cases came the case of *United States* v. *Oklahoma* (261 U. S., 253), in which the question was of the application of section 3466 to the liquidation of a State bank under the State law and of priority of debts of the United States in such case. This court found that the section did not apply, because there did not appear to be insolvency of the bank as used therein.

But the court had to consider the meaning and effect of the section, and said (p. 260):

"Where the debtor is divested of his property in one of the modes specified in the Act, the person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property. (*Beaston* v. *Farmers' Bank of Delaware*, 12 Pet., 102, 133–135.) The priority given the United States can not be impaired or superseded by State law."

Section 3466 was fully considered in the case of *Price* v. *United States* (269 U. S., 492 [T. D. 3820, C. B. V–1, 318]), and its history from 1789 clearly traced. See also *United States* v. *Butterworth-Judson Corp.* (269 U. S., 504 [T. D. 3825, C. B. V–1, 321]); *Bramwell* v. *U. S. Fidelity Co.* (269 U. S., 483); *Stripe* v. *United States* (269 U. S., 503). In these cases the word "debts" used in the section was held to include taxes. The court said in the Price case, citing an opinion of Mr. Justice Story (p. 499):

"The claim of the United States does not rest upon any sovereign prerogative; but the priority statutes were enacted to advance the same public policy which governs in the cases of royal prerogative; that is, to secure adequate public revenue to sustain the public burdens. (*United States* v. *State Bank of North Carolina*, 6 Pet., 29, 35.) And to that end section 3466 is to be construed liberally. Its purpose is not to be defeated by unnecessarily restricting the application of the word 'debts' within a narrow or technical meaning."

The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority for them over those of the States.

There remains only to determine what priority it has conferred. It may withhold it or vary it, and it has sometimes done so. When in this case did the priority attach and apply? It was said in *United States* v. *Oklahoma* (261 U. S., 253, 260) that in a case like this it applied when the receiver was appointed. The appointment was on August 28, 1922. The taxes and penalties due the United States, amounting to $70,268.58, were assessed on February 28, 1923, and May 2, 1923, and therefore the priority of the United States attached on or before those dates. No assessment by the counties upon specific property in the hands of the receiver was made until September 23, 1924. The claim of the United States, therefore, had priority over such claims.

Assessments for Spokane County for $6,195.38, and of Whitman County for $410.36, were made in 1921 and 1922 before the receiver was appointed. What is the effect of those claims against the fund in court? In *Wilberg* v. *Yakima County* (132 Wash., 219), it is held that the amount of the tax is the personal obligation of the person who owned the property at the time of the assessment and that the tax is to be collected, if the property still continues in the hands of the person against whom it was assessed, from the property; if that specific property does not exist in such hands, the amount of the tax may be collected as a lien upon all the real and personal property of the person assessed, and may be collected from the other personal or real property of such person by seizure, distraint, or other specific proceedings. It would seem to follow that a lien for these particular taxes could not interfere with the priority of the United States, for there is nothing in this record to show that distraint by the sheriff or any of the necessary procedure mentioned in the statute followed.

From the judgment of the majority of the Supreme Court of Washington in this case, we must infer that the liens of the two counties for the taxes levied before the receiver was appointed and not collected were not specific. This is really a State question. It is explained by the concurring opinion of Judge Parker, as follows:

"I concur in the result reached in the foregoing majority opinion solely upon the ground that this tax debt due to the United States, viewed apart from any supporting lien right, has priority over this tax debt due the State of Washington, viewed apart from any supporting lien right. It seems to me that each of these two tax debts primarily came into existence by the levy of a tax in personam, and not by the levy of a tax in rem. I think a critical reading of the revenue legislation of the respective sovereignties, the United States and the State, and the record in this case showing the manner of levying in these respective taxes, will render this plain. The revenue legislation of each has prescribed procedure by which its personam tax debts may be made specific liens upon property of one personally owing such tax debt. This record, I think, warrants the conclusion that neither the United States, the State of Washing-

ton, nor Spokane County for the State of Washington has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds. I therefore view these respective tax debts wholly apart from any supporting lien right. Thus I think the question of which shall be first satisfied out of these funds is determinable by the language of section 3466, quoted in the majority opinion, and hence must be determinable in favor of the United States."

Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the State, upon the priority of the United States herein, the attitude of the State court relieves us of consideration of it.

Judgment affirmed.

ARTICLE 1010: Liens and enforcement of tax liens by bill in equity.

REVENUE ACT OF 1921 AND PRIOR REVENUE ACTS.

Notice of tax lien filed by a collector. (See G. C. M. 5432, page 134.)

ARTICLE 1011: Compromise of tax cases. (Also Section 214(a)1, Article 105.)

VIII-7-4107
Ct. D. 39

INCOME AND PROFITS TAXES—REVENUE ACTS OF 1916 AND 1917—DECISION OF SUPREME COURT.

1. COMPROMISE—AGREEMENT WITH SUBORDINATE OFFICIAL OF BUREAU.

An informal agreement between a representative of a taxpayer and a subordinate official of the Bureau of Internal Revenue whereby disputed items of tax liability are adjusted and which is put into effect by the filing of an amended return and payment of the tax so agreed upon does not preclude such taxpayer from recovering by suit any portion of the tax so paid in excess of that legally due.

2. DEDUCTIONS—COMPENSATION—PERCENTAGE OF PROFITS.

Unusual and extravagant amounts paid by a corporation to its officers in the guise of compensation for services but having no substantial relation to the measure of their services and being wholly disproportionate to their value are not in reality payment for services and can not be regarded as "ordinary and necessary expenses" within the meaning of section 12(a) of the Revenue Act of 1916 even though paid in accordance with an agreement between the corporation and its officers.

SUPREME COURT OF THE UNITED STATES.

Botany Worsted Mills, Petitioner, v. The United States.

On writ of certiorari to the Court of Claims.

[January 2, 1929.]

OPINION.

Mr. Justice SANFORD delivered the opinion of the court.

The Botany Worsted Mills, a New Jersey corporation engaged in the manufacture of woolen and worsted fabrics, made a return of its net income for the taxable year 1917 under the Revenue Act of 1916 and the War Revenue Act of 1917. By section 12(a) of the Revenue Act it was provided that in

ascertaining the net income of a corporation organized in the United States there should be deducted from its gross income all "the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties." Under this provision the Mills deducted amounts aggregating $1,565,739.39 paid as compensation to the members of its board of directors, in addition to salaries of $9,000 each. It paid an income tax computed in accordance with this return. Thereafter, in 1920, the Commissioner of Internal Revenue assessed an additional income tax against it. Of this, $450,994.06 was attributable to his disallowance of $783,656.06 of the deduction claimed as compensation paid to the directors, on the ground that the total amount paid as compensation was unreasonable and the remainder of the deduction as allowed represented fair and reasonable compensation. The Mills, after paying the additional tax, filed a claim for refund of this $450,994.06. The claim was disallowed; and the Mills thereafter, in September, 1924, by a petition in the Court of Claims, sought to recover this sum from the United States, with interest—alleging that the disallowance of part of the compensation paid the directors was illegal. After a hearing on the merits the court, upon its findings of fact, dismissed the petition upon the ground that the additional tax was imposed under an agreement of settlement which prevented a recovery. (63 C. Cls., 405.) And this writ of certiorari was granted.

The first question presented is whether the Mills is precluded from recovering the amount claimed by reason of a settlement.

Section 3229 of the Revised Statutes provides that:

"The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, * * * with his reasons therefor, with a statement of the amount of tax assessed, * * * and the amount actually paid in accordance with the terms of the compromise."

The Government did not claim that there had been a compromise under this statute, but contended in the Court of Claims that, irrespective thereof, an agreement of settlement had been entered into between the Mills and the Commissioner under which the Mills had accepted the partial disallowance as to the compensation paid the directors, and had also received concessions as to other disputed items the benefit of which it still enjoyed, and was therefore estopped from seeking a recovery.

As to this matter the findings of fact show that after the Mills had paid the amount of the tax shown by its original return an investigation of its books disclosed to the Commissioner the necessity of making an additional assessment, to be determined by the settlement of questions relating to the compensation (or, as it was termed, bonus) paid to the directors, depreciation charged off on its books, and reserves charged to expenses. After much correspondence and numerous conferences extending over several months between the attorney and assistant treasurer of the Mills and the chief of the special audit section of the Bureau of Internal Revenue and others of his official associates, a compromise was agreed to as to all the differences, by which the amount to be allowed as reasonable compensation to the directors and as depreciation were agreed upon, and the claim as to reserves was allowed. Thereupon the Mills prepared and filed an amended return based upon the figures agreed upon in the conferences, with documentary evidence which it had agreed to furnish; and the additional assessment was made in accordance with this return.

The court, in sustaining the Government's contention, said:

"With the payment of the tax under the circumstances surrounding this case the agreement, which is mentioned in the record as a 'gentleman's agreement,' became in legal effect an executed contract of settlement;" and that, as the Mills was seeking to recover on account of the particular item which it regarded as unfavorable to its interests, and at the same time hold to the advantage derived from the settlement of other items in dispute involved in the same general settlement, it should not be allowed a recovery.

The Mills contends that the Commissioner had not been given, at the time in question, any authority, either in express terms or by implication, to compromise

tax cases except as provided in section 3229; that this statute in granting such authority under specific limitations as to the method to be pursued, negatived his authority to effect a valid and binding agreement in any other way; that as the Government could not have been estopped by the unauthorized transactions of its officials, the Mills likewise could not be estopped thereby; and further, that the findings are insufficient to establish an estoppel.

The Government does not here challenge any of these contentions. In the brief for the United States filed in this court the Solicitor General states that the question whether such an informal adjustment of taxes as was made in this case is binding on the taxpayer is submitted for decision in deference to the opinion of the Court of Claims and the importance of the question—but no argument is made in support of the Government's previous contention that the Mills was estopped from questioning the settlement. And, on the contrary, it is stated that "Before and since the date of the alleged settlement in this case Congress has evidently proceeded on the theory that no adjustment of a tax controversy between representatives of the Bureau of Internal Revenue and a taxpayer is binding unless made with the formalities and with the approval of the officials prescribed by statute. The authority of officers of the United States to compromise claims on behalf of or against the United States is strictly limited. * * * The statutes which authorize conclusive agreements and settlements to be made in particular ways and with the approval of designated officers raise the inference and adjustments or settlements made in other ways are not binding." And, further, that "No ground for the United States to claim estoppel is disclosed in the findings."

Independently of these concessions, we are of the opinion that the informal settlement made in this case did not constitute a binding agreement. Section 3229 authorizes the Commissioner of Internal Revenue to compromise tax claims before suit, with the advice and consent of the Secretary of the Treasury, and requires that an opinion of the Solicitor of Internal Revenue setting forth the compromise be filed in the Commissioner's office. Here the attempted settlement was made by subordinate officials in the Bureau of Internal Revenue. And although it may have been ratified by the Commissioner in making the additional assessment based thereon, it does not appear that it was assented to by the Secretary, or that the opinion of the Solicitor was filed in the Commissioner's office.

We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. (*Raleigh & G. Railroad Co.* v. *Reid*, 13 Wall., 269, 270; *Scott* v. *Ford*, 52 Or., 288, 296.)

It is plain that no compromise is authorized by this statute which is not assented to by the Secretary of the Treasury. (*Leach* v. *Nichols* (C. C. A.), 23 F. (2d), 275, 277.) For this reason, if for no other, the informal agreement made in this case did not constitute a settlement which in itself was binding upon the Government or the Mills. And, without determining whether such an agreement, though not binding in itself, may when executed become, under some circumstances, binding on the parties by estoppel, it suffices to say that here the findings disclose no adequate ground for any claim of estoppel by the United States.

We therefore conclude that the Mills was not precluded by the settlement from recovering any portion of the tax to which it may otherwise have been entitled.

This brings us to the question whether on the findings of fact the Mills is entitled to recover the portion of the additional tax attributable to the disallowance of $783,656.06 of the amount paid to the directors which it had claimed as a deduction.

Under section 12(a) of the Revenue Act of 1916 the Mills was not entitled to this deduction unless the amount paid constituted a part of its "ordinary and necessary expenses" in the maintenance and operation of its business and properties. And in this suit the burden of establishing that fact rested upon it, in order to show that it was entitled to the deduction which the Commissioner had disallowed, and that the additional tax was to that extent illegally assessed. The Court of Claims, however, made no finding that the amount disallowed by the Commissioner constituted a part of the ordinary and necessary

expenses of the Mills. The findings are silent as to this ultimate fact—essential to a recovery by the Mills—and only show certain circumstantial facts relating to the payment made to the board of directors.

Where the Court of Claims does not make a finding upon the ultimate question of fact upon which the rights of the parties depend, but merely makes findings as to subsidiary circumstantial facts which bear upon it, such findings will not support a judgment unless the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference and may be held to result as a conclusion of law. See *United States* v. *Pugh* (99 U. S., 265, 269); *Winton* v. *Amos* (255 U. S., 373, 395).

The findings show that for many years it has been the practice of many corporations engaged in the woolen manufacturing business to base the compensation of the directors and executive officers upon a percentage of profits. Upon the organization of the Mills in 1890 the stockholders adopted a by-law providing that at the close of the business year the net profits should be distributed by paying a dividend of 6 per cent to stockholders and applying the balance remaining as follows: (a) Placing 5 per cent in a reserve fund; (b) paying 25 per cent "as a bonus to the board of directors"; and (c) paying 70 per cent as additional dividend to the stockholders. The stockholders amended this by-law in 1903 by increasing the bonus of the board of directors to 40 per cent; in 1905, by providing, instead of a "bonus," that "compensation" equal to 40 per cent should be "paid to the board of directors for their services"; and in 1908, by reducing such compensation to 32 per cent (that is, 30.08 per cent of the net profits). This by-law remained in force until after the taxable year 1917; and during the entire period "compensation" was paid to the directors in accordance therewith. From the outset the determination of the total amount of profits and of the aggregate amount payable to the board of directors was made by the board itself; and it likewise determined the basis of the apportionment among the several directors of the aggregate amount payable to the board as a whole. No contract was made with any director as to what his compensation should be other than such as was implied from his election and service as a member of the board in accordance with the by-law and the customary practices of the company, which each knew. At all times each director also held a position as an executive officer or manager of a department of the Mills.

The gross assets of the Mills increased from $1,114,149.63 in 1890 to $28,893,777.12 in 1917; and its net assets, including reserves, from $37,136.35 to $10,999,862.48. Its net income increased from $784,334.44 in 1910 to $7,953,512.80 in 1917; and the amount paid the directors, in pursuance of the by-law, increased, with some fluctuations, from $268,444.19 in 1910 to $400,935.18 in 1915, $693,617.16 in 1916, and $1,565,739.39 in 1917. In 1917 there were 10 members of the board, so that if the total amount had been apportioned ratably, each would have received $156,573.93. And in that year each member of the board, in addition to the part of the aggregate in fact apportioned to him individually, also received a salary of $9,000.

The findings do not show the nature or extent of the services rendered by the board of directors or its individual members, either as directors, executive officers, or department managers—the amounts apportioned and paid to each director—the basis of apportionment, whether the nature and extent of their individual services, the amount of their stock holdings, or otherwise—the value of their services—or the reasonableness of the purported compensation.

We do not find it necessary to determine here whether the amounts paid by a corporation to its officers as compensation for their services can not be allowed as "ordinary and necessary expenses" within the meaning of section 12(a) merely because, and to the extent that, as compensation, they are unreasonable in amount. However this may be, it is clear that extraordinary, unusual, and extravagant amounts paid by a corporation to its officers in the guise and form of compensation for their services, but having no substantial relation to the measure of their services and being utterly disproportioned to their value, are not in reality payment for services, and can not be regarded as "ordinary and necessary expenses" within the meaning of the section; and that such amounts do not become part of the "ordinary and necessary expenses" merely because the payments are made in accordance with an agreement between the corporation and its officers. Even if binding upon the parties, such an agreement does not change the character of the purported compensation or constitute it, as against the Government, an ordinary and necessary expense. (Compare 20 Treas. Dec., Int. Rev., 330; *Jacobs & Davies*

v. *Anderson* (C. C. A.), 228 Fed., 505, 506; *United States* v. *Philadelphia Knitting Mills Co.* (C. C. A.), 273 Fed., 657, 658 [T. D. 3203, C. B. 5, 219]; and *Becker Bros.* v. *United States* (C. C. A.), 7 F. (2d), 3, 6.)

In the light of this principle, it is clear that the findings do not show, as a matter of necessary inference resulting as a conclusion of law, that the amount paid the directors in excess of the $782,083.33 allowed by the Commissioner constituted part of the ordinary and necessary expenses of the Mills. On the contrary, as this amount so greatly exceeded the amounts which, as a matter of common knowledge, are usually paid to directors for their attendance at meetings of the board and the discharge of their customary duties, and was much greater than the amounts that had been paid in prior years, and as there is no showing as to the amounts paid the individual directors, in addition to the salaries of $9,000 which each received—presumably for his services as an executive officer or department manager—or as to the nature, extent, or value of their services, the findings raise a strong inference that the unusual and extraordinary amount paid to the directors was not in fact compensation for their services, but merely a distribution of a fixed percentage of the net profits that had no relation to the services rendered.

Therefore, as the Mills has not sustained the burden of showing that the amount disallowed by the Commissioner was in fact part of its ordinary and necessary expenses, the judgment must, for this reason, be affirmed.

Mr. Justice HOLMES agrees with the result.

ARTICLE 1012: Assessment of tax.

VIII-4-4082
I. T. 2451

REVENUE ACT OF 1918.

Although the original consolidated return may have been incomplete and incorrect as to details, it contained sufficient facts respecting the gross income and allowable deductions and credits of the M Company, an affiliated subsidiary, to constitute the return required of that corporation and started the running of the statute of limitations for assessment of the tax due from that corporation. The filing of an amended consolidated return did not operate to extend the period of limitation.

During the year 1918 the M Company and certain other corporations were affiliated, as subsidiaries, with the O Company as the parent company. On September —, 1919, a consolidated return, Form 1120, was filed for 1918, on which the name of the M Company appeared as one of the subsidiaries. This return showed a total tax of $38x$ dollars, against which an item of x dollars, representing an alleged credit due the corporation, was applied, and the balance of $37x$ dollars was assessed.

An amended consolidated return for 1918 showing a total tax of only $20x$ dollars was filed July —, 1923. During March, 1924, a deficiency of $122x$ dollars was assessed against the parent company on the basis of the consolidated returns. During 1926 and 1927 overassessments aggregating $121x$ dollars in favor of the parent company were allowed and scheduled. An assessment of $2x$ dollars was made against the M Company during July, 1927, such assessment being based on an allocation of the tax, then determined to be due to the various members of the affiliated group. Although more than five years had elapsed since the original return was filed in September, 1919, and no waivers had been filed by the M Company, the position was taken that, as the original return was incomplete, the statute of limitations for assessment did not begin to run until the complete amended return was filed in July, 1923, and that the assessment of $2x$ dollars was, therefore, validly made.

An examination of the original consolidated return discloses that all schedules relating to income and deductions were properly and completely filled in, and that the return was accompanied by several supporting schedules which show in detail the items of gross income, deductions, and credits and the balance sheets of each company, including the taxpayer company. The amended consolidated return was made out in substantially the same manner as the original return, except that additional deductions and credits were claimed and certain minor changes made, and it was accompanied by amended and additional schedules which, if accepted, would have had the effect of materially reducing the tax as shown by the original return.

While the original return may have been incomplete and even incorrect as to some of the details, it contained sufficient facts respecting the gross income and allowable deductions and credits of the M Company to constitute the return required of that corporation by section 239 of the Revenue Act of 1918 and, accordingly, started the running of the statute of limitations for assessment of the tax due from that corporation. The filing of the amended consolidated return did not operate to extend the period of limitation. Reference is made in this connection to the decision of the United States Board of Tax Appeals in the case of F. A. Hall Co., Inc. (3 B. T. A., 1172), which has been acquiesced in by the Commissioner (C. B. VI-1, 3).

In view of the foregoing, it is held that the statutory period of limitation for assessment of the tax due from the M Company for the year 1918 expired five years from the date the original consolidated return was filed, or on September —, 1924, and that assessment of the deficiency of $2x$ dollars was, therefore, barred when the amount was assessed in July, 1927.

ARTICLE 1012: Assessment of tax.

REVENUE ACT OF 1921.

Commencement of limitation period where tentative return filed. (See Ct. D. 35, page 209.)

SECTION 252.—REFUNDS.

ARTICLE 1036: Claims for refund of taxes erroneously collected.

REVENUE ACTS OF 1918 AND 1921.

Form 1118. (See G. C. M. 6053, page 112.)

TITLE III.—WAR-PROFITS AND EXCESS-PROFITS TAX FOR 1921.

PART II.—IMPOSITION OF TAX.

SECTION 301.—IMPOSITION OF TAX.

ARTICLE 718: Illustration of computation where return is for period of less than 12 months. VIII-11-4142 G. C. M. 5695

REVENUE ACT OF 1917.

Where the first return of a corporation under the Revenue Act of 1917 included income received from November 15, 1916, the date of its incorporation, to May 31, 1917, the return was one for a taxable year of 12 months, and the war excess profits tax for that year is that proportion of the tax computed upon the net income received during such fiscal year which the time from January 1, 1917, to May 31, 1917, bears to 12 months. The same ratio should also be used in computing the 4 per cent income tax imposed by section 4, Title I, of the Revenue Act of 1917.

An opinion is requested in the case of the M Corporation, the taxpayer, as to the proper fraction to be used in determining the amount of the war excess profits tax and the 4 per cent war income tax imposed by the Revenue Act of 1917 for the period ended May 31, 1917.

The taxpayer corporation, having established a fiscal year ending May 31, filed its first return, which included income received from November 15, 1916, the date of its incorporation, to May 31, 1917. It is the contention of the taxpayer that the portion of the war excess profits tax applicable to that part of the fiscal year falling within the calendar year 1917 should be based on the ratio of the number of months falling within 1917 to 12 months, instead of to the number of months in the period during which the income included in the return was received, namely, 6½ months. The same contention is made with respect to the computation of the 4 per cent tax.

Title II of the Revenue Act of 1917 imposes a war excess profits tax upon the income of every corporation in addition to the income tax imposed under the Revenue Acts of 1916 and 1917.

In section 200 of the 1917 Act it is stated that the term "taxable year" means the 12 months ending December 31, excepting in the case of a corporation or partnership which has fixed its own fiscal year, in which case it means such fiscal year. It is also stated that the first taxable year shall be the year ending December 31, 1917, except that in the case of a corporation or a partnership which has fixed its own fiscal year, it shall be the fiscal year ending during the calendar year 1917. It is provided, however, that if a corporation or partnership prior to March 1, 1918, makes a return covering its own fiscal year, and includes therein the income received during that part of the fiscal year falling within the calendar year 1916, *the tax for such taxable year shall be that proportion of the tax computed upon the net income during such full fiscal year which the time from January 1, 1917, to the end of such fiscal year bears to the full fiscal year.*

The following article of Regulations 41, relative to the war excess profits tax, is of importance in consideration of the question.

ART. 19. *Computation of tax for fiscal year, part of which falls within the calendar year 1916.*—If a corporation or partnership prior to March 1, 1918, makes a return for a fiscal year, part of which falls within the calendar year 1916, the tax for the first taxable year shall be that proportion of the tax computed upon the net income for such fiscal year which the number of months from January 1, 1917, to the end of such fiscal year bears to the entire number of months in such fiscal year.

In the case of *Louis Hymel Planting & Manufacturing Co.* v. *Commissioner* (5 B. T. A., 910, C. B. VII–1, 15), the Board of Tax Appeals held that where a corporation on a calendar-year basis dissolved March 31, 1919, the return which included the income from January 1 to that date was a return for a full year of 12 months, and the taxpayer was entitled to the entire specific exemption of $3,000 under the Revenue Act of 1918. The question whether a return including the income received by a decedent up to the date of his death, which occurred during the taxable year, was a return for a full year or for only a fractional part of a year was considered by the Circuit Court of Appeals for the Second Circuit in *Bankers' Trust Co.* v. *Bowers* (295 Fed., 89, T. D. 3547, C. B. III–1, 237). The court held that the return, which included the decedent's income received from January 1, 1921, to April 4, 1921, the date of death, and which was filed for the decedent by his executors, was a return for the full calendar year and not a return for a period of less than a year. The decisions referred to are deemed controlling in the case of a return filed by a corporation for the taxable year in which it was incorporated. (See I. T. 2239, C. B. IV–2, 58; G. C. M. 2292, C. B. VI–2, 78; and G. C. M. 2080, C. B. VI–2, 288.)

It follows therefore in the instant case that the taxpayer's first return, which included income received from November 15, 1916, the date of its incorporation, to May 31, 1917, was a return for a taxable year of 12 months rather than a return for a fractional part of a year. Since the taxpayer's return for the period ended May 31, 1917, was for a taxable year of 12 months, the tax should be computed on the same basis and in the same manner as if the corporation had been in existence during the entire 12-month period.

Applying the foregoing principles, the war excess profits tax for the taxable year ended May 31, 1917, is that proportion of the tax computed upon the net income received during the fiscal year which the time from January 1, 1917, to May 31, 1917, namely, 5 months, bears to 12 months. The same ratio should also be used in computing the 4 per cent income tax imposed by section 4 of Title I of the Revenue Act of 1917.

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

TITLE XIII.—GENERAL ADMINISTRATIVE PROVISIONS.

SECTIONS 1318, 1319, AND 1320.—LIMITATIONS UPON SUITS AND PROSECUTIONS.

ARTICLE 1050: Suits for recovery of taxes erroneously collected. VIII-7-4111 Ct. D. 42

FEDERAL TAXES—LIMITATIONS UPON SUITS—DECISION OF COURT.

SUIT—LIMITATION—CLAIM FOR REFUND.

Where strict compliance with section 3226 of the Revised Statutes as amended is insisted upon by the Government a suit can not be maintained for the recovery of any tax alleged to have been illegally collected unless a prior claim for a refund has been duly filed, and a suit can not be maintained upon a ground different from that presented in such claim for refund.

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

Meinrath Brokerage Co., plaintiff, v. *Noah Crooks, Collector of United States Internal Revenue, Sixth Collection District of Missouri, defendant.*

[September 12, 1928.]

OPINION.

Plaintiff brings this action to recover $14,052.29, with interest, alleged to have been wrongfully assessed and collected as income and excess-profits tax for 1917. The total amount assessed against plaintiff, after an earlier payment which the plaintiff voluntarily made and which is not in question, was, for the year mentioned, $23,985.60. The plaintiff paid this amount under protest June 30, 1923. September 11, 1923, plaintiff filed a claim for refund of the amount paid, which was allowed to the amount of $7,649.28 and on May 19, 1924, rejected as to the balance. It is conceded in effect that plaintiff is entitled to judgment if, as it claims, it should have been assessed under section 209 of the Revenue Act of October 3, 1917, as a "trade or business having no invested capital or only a nominal capital" unless it should be denied judgment because of failure of compliance by it with the requirements of section 3226 of the Revised Statutes as amended by the Revenue Act of 1924.

I shall first consider the second of the two questions involved.

1. Section 3226, as amended (43 Stat., 343), provides that—

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof."

Undoubtedly this means, where strict compliance with the statute is insisted upon by the Government, not only that a suit can not be maintained unless a prior claim for a refund has been duly filed but that a suit can not be maintained upon a claim of a different nature than that shown to have been filed. So it has been held. (*Tucker* v. *Alexander*, 15 Fed. (2d). 356. 357 (Eighth Circuit Court of Appeals [T. D. 3973, C. B. VI-1, 287]).) While this case later was reversed by the Supreme Court of the United States (275 U. S., 228), the decision reversing it does not question the principle stated but holds that the Government may by stipulation waive strict compliance with the statute.

The plaintiff's petition as amended pleads the filing and rejection of three separate and distinct claims. It pleads, in the twelfth paragraph—

"That * * * on or about September 10, 1923, plaintiff filed with the defendant a claim for refund * * * which said claim for refund was allowed for $7,649.28 * * * and rejected for $16,336.32 on May 19, 1924."

And it pleads in the same paragraph (by way of amendment allowed at the inception of the trial)—

"That the plaintiff did * * * on April 10, 1925, file a claim with the Commissioner of Internal Revenue requesting that plaintiff's claim for refund be reopened, reconsidered and allowed on the basis of classification under section 209 of the Revenue Act of 1917 * * * and that plaintiff did * * * on or about April 29, 1925, file an additional letter with the Commissioner of Internal Revenue protesting against the decision of the Commissioner contained in his letter of April 23, 1925, refusing to reconsider this case for the year 1917 under the provisions of section 209 of the Revenue Act of 1917 * * * and more than six months have elapsed since the claims contained in the letters of April 10, 1925, and April 29, 1925, were filed."

So three claims for refund are alleged—that of September 10, 1923, that of April 10, 1925, and that of April 29, 1925. The defendant admits that the allegations are sufficient to give the court jurisdiction.

As to the proof concerning the claims for refund.

The agreed statement of facts sets out that the claim of September 10, 1923, was made. The claim itself plaintiff did not introduce. Defendant, however, offered it on cross-examination. It was on Treasury Department Internal Revenue Service Form 843 and states as grounds for refund—

"Assessment under section 209 of the Revenue Act of 1917 was denied this corporation upon a mere technicality, and the amount of tax due should, therefore, be determined under section 210 of the Revenue Act of 1917."

The alleged claim of April 10, 1925, was sought to be proved by the introduction of a letter of that date from plaintiff's attorneys to the Commissioner of Internal Revenue, in which, after acknowledgment of receipt of a letter of April 7 rejecting claims for further allowance, is in the following language:

"We believe the taxpayer is entitled to classification under section 209 of the Revenue Act of 1917. Our position is supported by [cases cited].

"It is, therefore, respectfully requested that this case be reopened, reconsidered and allowed on the basis of the classification under section 209 of the Revenue Act of 1917 * * *. Otherwise our client has instructed us to institute suit * * *."

The alleged claim of April 29, 1925, was sought to be proved by the introduction of a letter of that date from plaintiff's attorneys to the Commissioner of Internal Revenue, in which, after a protest against the Commissioner's decision, refusing reconsideration, is the language—

"The question of the right of our client to assessment as a personal service corporation under the Revenue Act of 1918 for the years 1918, 1919, and 1920 is pending before the Solicitor of Internal Revenue * * *.

"In view of the pendency for the years 1918, 1919, and 1920 in the office of the Solicitor, it is requested that you refer all the papers in the case for the year 1917 to the Solicitor's office in order that it may be considered at the same time.

"In this connection we believe you must agree that our client is entitled to further consideration of his case for the year 1917 in view of [citing cases]."

To this last letter the Commissioner of Internal Revenue replied as follows, under date of May 7, 1925:

HUMPHREYS & DAY,
Munsey Building,
Washington, D. C.

SIRS: Receipt is acknowledged of your letter dated April 29, 1925, requesting that the file of Meinrath Brokerage Co., Kansas City, Mo., for the year 1917, be forwarded to the Solicitor of Internal Revenue for consideration with the return of that corporation for years 1918, 1919, and 1920, for which years personal service classification under the provisions of section 200 of the Revenue Act of 1918 was claimed.

The records of the Bureau indicate that the 1917 case of Meinrath Brokerage Co. was previously considered by the Committee on Appeals and Review and the taxpayer's claim for assessment of excess profits tax under the provisions of section 209 of the Revenue Act of 1917 denied. The tax was assessed and a claim for refund filed, the basis of which was request for relief under the provisions of section 210 of the Revenue Act of 1917. Since the question of assessment under section 209 of the Revenue Act of 1917 has previously been

given consideration in a ruling by the Commissioner, and no evidence has been submitted to warrant a change in the decision rendered, your request to have the 1917 file forwarded to the Solicitor of Internal Revenue is denied.

Respectfully,

J. G. BRIGHT, *Deputy Commissioner.*
By F. R. CLUTE, *Head of Division.*

Now, the present suit is based upon section 209. The claim for refund of September 10, 1923, was based on section 210. That claim, therefore, does not support this suit under the authority of the Tucker case, supra. Are the letters of April 10, 1925, and April 29, 1925, sufficient? Was either "a claim for refund * * * 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 established in pursuance thereof"?

The question divides itself thus: Were the letters claims for refund at all; if claims for refund, were they according to the provisions of law and the regulations of the Secretary of the Treasury?

It seems to me that in no true sense can either of these letters be called a claim for a refund. They do not even purport to be claims. The first is a request for the consideration of a rejected claim and on a ground different from that stated in the original claim. The second is a request for a reference of the whole matter to the Solicitor of the Treasury [Internal Revenue]. And whether they were claims, certainly they were not in accordance with the regulations.

Article 1036, Regulations 62, Treasury Department, United States Internal Revenue, provides that—

"Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. * * * All the facts relied upon in support of the claim should be clearly set forth under oath. * * * The affidavit may be made by an agent of the person assessed, but in such case a power of attorney must accompany the claim * * *."

None of the requirements of this article of the regulations was complied with in connection with either the second or third alleged claim for refund.

Notwithstanding the positive mandate of the statute that "no suit shall be maintained * * * until a claim for refund * * * has been duly filed * * * according to the regulations of the Secretary of the Treasury * * *" it is urged here that nevertheless this suit can be maintained because plaintiff's contention that it should be assessed under section 209 was several times presented and was as often rejected before the suit was filed. The reason of the rule, it is said, was fully satisfied by the facts. The claim that the assessment should be made under section 209 was urged, it is contended, first before the tax was collected at the time of the assessment, although of that there seems no proof in the record. It was urged, second, in a brief submitted in connection with the claim for refund of September 10, 1923, although of that also there is no proof in the record. It was urged for a third time and again for a fourth time in the letters of April 10, 1925, and April 29, 1925. So, it is argued, the claim of applicability of section 209 was fully and clearly placed before the Commissioner and had been fully considered and rejected by him.

But it was not sufficient that what was done was within the reason of the rule. "Men must turn square corners when they deal with the Government. If it attaches purely formal conditions to its consent to be sued those conditions must be complied with." (*Rock Island, etc., R. Co.* v. *United States*, 254 U. S., 141, 143.) The words of the statute and the regulations (and, as I think is the plain import of the case cited, that includes the procedure and the form prescribed by the regulations, 254 U. S., 141, 142, 143) "mark the conditions of the claimant's right." "Literal compliance with statutory requirement that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States." (*Tucker* v. *Alexander*, 275 U. S., 228.)

In this case the plaintiff did not turn "the square corners" fixed by the statute. It did not comply with the "formal conditions" imposed. What it did was not within the procedure outlined by the regulations.

I would be firmly of the opinion that for these reasons the plaintiff had not made out a case were it not for the decision of the Supreme Court of the United States in the Tucker case reversing the same case in the Court of Appeals of the Eighth Circuit, although not questioning the principle stated by the circuit court of appeals that strict compliance with the statute must be complied with.

The Supreme Court said in this case:

"The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of Government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the Government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon the Government and taxpayer the necessity of further legal proceedings."

Now it is clear from the letter of the Commissioner, dated May 7, 1925, and hereinabove set out, that the claim of the plaintiff that it should have been assessed under section 209 at some time was presented, considered, and rejected. It is clear also from the record that plaintiff's contention that it should have been assessed under section 209 was repeatedly called to the attention of the Commissioner, although not in the precise form required by the regulations. If "the statute and the regulations must be read in the light of their purpose," then it seems to me that since the purpose of the statute essentially was satisfied it must very clearly appear that the Government has insisted upon a strict compliance with the statute and regulations before the case can be dismissed on that ground. How has it so insisted in this case? Not by the answer, for that was only a general denial. Not by any motion, for no motion based upon such insistence is in the record. So far as the record goes, it discloses no insistence on this point except in an objection to the alleged claim of April 10, 1925, repeated to the alleged claim of April 29, 1925, *but this objection was full and undoubtedly contained all of the insistence that could be required.* The objection was in this language:

"We object to the admission of this letter in evidence for the reason that it is wholly foreign to the claim made in this case; that it is not a part of the original cause of action; that it is too remote from the claim upon which this action is based; that there is no reference in the claim for refund to such a claim; for the further reason that if this be considered as an independent claim for refund it is wholly foreign to this case; that it doesn't appear to be—not offered as an amendment to the original claim for refund and is not in the form required by statute and prescribed by regulation by the Commissioner of Internal Revenue."

My conclusion upon this branch of the case, and I have reached that conclusion reluctantly, is that there was not here that "literal compliance with statutory requirements" upon which the Government has the right to insist and that it has insisted upon such literal compliance.

I proceed, however, to a discussion of the remaining branch of the case and to a decision of the issue therein involved so that if it should be determined that I am in error as to the disposition of the question involved in the branch of the case above discussed, a further hearing will not be made necessary.

2. The evidence clearly warrants the conclusion that plaintiff should have been assessed under section 209. The evidence overwhelmingly establishes the claim of plaintiff that it was doing only a brokerage business and that the capital employed by it was nominal within the meaning of the statute and the decisions construing the statute. Its stockholders were engaged exclusively in this brokerage business. Such capital as was employed was used only incidently to the real business of the plaintiff. It produced no income, it was not used nor intended to be used for profit. These conclusions are supported by all of the evidence. The Government introduced no evidence disputing them and they are not negatived by any testimony developed on the cross-examination of plaintiff's witnesses. Where such facts exist the assessment should be under section 209. (Opinion of Judge Woodrough, District of Nebraska, *Cartan & Jeffrey Co.* v. *Allen, Collector*, not reported; affirmed *Cartan & Jeffrey Co.* v. *Allen, Collector*, 5 Fed. (2d), 1011; opinion of Judge Barrett, Southern District of Georgia, in *Alexander & Garrett* v. *United States*, U. S. Daily, Aug. 19, 1927, p. 8; opinion of Judge Schoonmaker, Western District of Pennsylvania in *Hurst, Anthony & Watkins, Inc.*, v. *Heiner, Collector*, U. S. Daily, April 4, 1928, p. 4; *Gordon & Co.* v. *Lines, Collector*, 25 Fed. (2d), 894.) If the plaintiff had strictly complied with section 3226 and the regula-

tions of the Treasury Department as to its claim for refund it would be entitled to judgment for the amount asked, $14,052.29, with interest.

The case must be dismissed. It is so ordered.

SECTION 1324.—INTEREST ON REFUNDS AND JUDGMENTS.

ARTICLE 1040: Interest on refunds and judgments. VIII–9–4126 Ct. D. 47

INTERNAL REVENUE TAXES—REVENUE ACT OF 1921—DECISION OF COURT.

INTEREST—REFUND—CLAIM FOR REFUND.

A letter addressed to the Commissioner containing a request for special assessment is not a claim for a refund within the meaning of section 1324(a) of the Revenue Act of 1921, and interest on a refund resulting from special assessment is not allowable under that section, which provides for interest only upon the allowance of a claim.

COURT OF CLAIMS OF THE UNITED STATES.

Stauffer, Eshleman & Co., Ltd., v. *The United States.*

[October 15, 1928.]

OPINION.

Moss, Judge, delivered the opinion of the court.

The sole question for determination in this case is whether or not the letter from plaintiff to the Commissioner of Internal Revenue, dated October 4, 1920, may properly be treated as a claim for refund within the meaning of section 1324(a) of the Revenue Act of 1921 (42 Stat., 227) and section 1113 of the Act of 1926 (44 Stat., 116). The pertinent language of section 1324(a) is as follows:

"That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit * * *."

Section 1113(a) of the Act of 1926 is an amendment to section 3226 of the Revised Statutes and reads in part as follows:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or of any sum alleged to have been excessive or in any manner wrongfully 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 established in pursuance thereof; * * *."

It is clear, therefore, that unless the letter in question can be construed as a *claim for refund*, this court is without jurisdiction in the case.

The purpose of the letter of October, 1920, was to file amended separate returns. It is evident from its context that plaintiff had been denied the right to file consolidated returns. The attention of the Commissioner was called to the "great amount of taxes we are now compelled to pay, which we believe is far greater than any large corporation has paid." It is then stated, "In view of the foregoing, and since we are not permitted to file consolidated returns, we respectfully request that you take our returns of June 30, 1918, June 30, 1919, and June 30, 1920, under consideration for assessment under the relief sections of the Act of October 3, 1917, and the 1918 Revenue Act." This is the only request contained in the letter, the remainder of which may properly be considered as an argument for the granting of the request. It is in no sense a claim for a refund of taxes. It is nothing more nor less than an application for special assessment under the relief provisions of the Revenue Acts of 1917 and 1918. (Finding II.) The Commissioner complied with plaintiff's request, and as a result of the special assessment a certain sum was refunded. No

interest whatever was collectible under the Act of 1921 upon the *allowance of a refund*. The right of taxpayers to receive interest on amounts refunded as illegal or erroneous collections was first recognized and provided for by section 1324(a) of the Act of 1921 above quoted, and under the terms of that Act interest was allowed only upon the *allowance of a claim for refund*. The letter of October, 1920, was not a claim for refund, and can not be so construed. The petition is hereby dismissed.

SINNOTT, Judge; GRAHAM, Judge; and BOOTH, Chief Justice, concur.

GREEN, Judge, concurring:

In determining whether the letter of the plaintiff to the Commissioner of Internal Revenue, dated October 4, 1920, may be treated as a claim for refund, it is necessary to consider the Treasury regulations in force at the time. These regulations required that a claim for refund should be made upon a certain form; that all the facts relied upon in support of the claim should be clearly set forth therein under oath; and that it should be accompanied by the collector's receipt or the canceled check showing payment of the tax. Treasury regulations of this nature have uniformly been upheld by the courts. The decisions on this point are so numerous as to make citations unnecessary. The provisions of a Treasury regulation may, of course, be waived; and it may be said that it has not been the practice of the Treasury to insist on the requirement that the claim should be made upon a particular form, but the letter of the plaintiff complied with absolutely none of the requirements. It merely asked that the plaintiff's taxes be assessed on a different basis. In the recent case of *Tucker* v. *Alexander* (275 U. S., 228), in a suit brought to recover a tax refund, the Supreme Court said:

"Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States." [Citing several Supreme Court cases.]

Some claim is made, however, that the action of the Commissioner in redetermining the tax in accordance with a request contained in the plaintiff's letter of October 4, 1920, operated as a waiver of the provisions of the law. In the case last cited it was stipulated that if the court found that a certain deduction had been erroneously made, judgment should be for the plaintiff, and the court held that this stipulation and agreement waived the requirements of the regulations. But there is absolutely no evidence in the case at bar to show that anything in the nature of a waiver was done or made on the part of the Government. The Commissioner proceeded to reassess the tax as he might have done either with or without the letter. To hold that this action operated as a waiver of the filing of a claim for refund would be to engraft without authority an exception to the law. This, I think, we can not do.

The original intent of Congress that interest should be paid only upon the *allowance of a claim* for refund is shown by the fact that Congress subsequently, by the Act of 1924, amended the law so that interest was collectible simply upon the *allowance* of a refund. This amendment, however, is of no aid to the plaintiff, since it was held in *United States* v. *Magnolia Petroleum Co.* (276 U. S., 160 [T. D. 4153, C. B. VII–1, 287]) that it had no retroactive effect.

ARTICLE 1040: Interest on refunds and judgments.

VIII–22–4220
G. C. M. 6041

REVENUE ACT OF 1921.

Interest is not allowable, under the provisions of section 1324(a) of the Revenue Act of 1921, on that portion of an overpayment of tax which represents a payment made after the filing of the taxpayer's claim for refund.

The opinion of this office is requested as to the amount of interest which was allowable upon an overpayment of tax by the taxpayer for the year 1917 under the following statement of facts:

The taxpayer's return for 1917 was filed on April 1, 1918, and showed an excess-profits tax liability of 25.5x dollars. On June 18, 1918, a payment was made in the sum of 17x dollars and an abatement claim was filed to cover the balance of the assessment. This claim in abatement was based on an application for reassessment under section 210 of the Revenue Act of 1917. Under date of June 5, 1920, the taxpayer filed a claim for refund for 1917 in the sum of 6.6x dollars, in which the history of the taxpayer's business was set out at length, reference was made to the findings of the revenue agent, and special assessment was requested under the relief provisions of the statute. The claim in abatement was allowed for 4.9x dollars and rejected for 3.6x dollars, and the claim for refund was rejected in full. The sum of 3.6x dollars, being that part of the abatement claim which was rejected, was paid by the taxpayer without protest on December 10, 1920. No claim for refund for the year 1917 was filed subsequent to this payment.

The taxpayer's tax liability for 1917 was subsequently redetermined under the provisions of section 210 of the Revenue Act of 1917, and an overassessment was found in favor of the taxpayer in the sum 10.2x dollars. The schedule of overassessments upon which this item appeared was signed by the Commissioner on November 1, 1922, and the schedule of refunds was approved on December 12, 1922.

It appears that interest has been allowed and paid, under section 1324(a) of the Revenue Act of 1921, on 6.6x dollars from December 5, 1920, to December 12, 1922. This sum represents that portion of the amount paid by the taxpayer prior to the filing of the claim for refund which is in excess of the taxpayer's correct tax liability, and interest has been computed thereon from six months after the date of the filing of the refund claim to the date the schedule of refunds was approved by the Commissioner. No interest was allowed on 3.6x dollars for the reason that no claim for refund was filed after payment was made of that amount of tax.

The computation of interest upon the refund allowed in the instant case was governed by section 1324(a) of the Revenue Act of 1921, which reads in part as follows:

> That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: * * * (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit.

The allowance of interest as hereinabove described was, in the opinion of this office, in entire accord with the provisions of section 1324(a) of the Revenue Act of 1921. No interest was allowable on the overpayment of 3.6x dollars made December 10, 1920, because that amount was paid without protest and not pursuant to an additional assessment, and no claim for refund as to that payment was ever filed. Such overpayment was made by the taxpayer more than six months after the claim for refund of June 5, 1920, in respect of the payment of tax made on June 18, 1918, was filed. A claim for refund filed by a taxpayer can be treated as a "claim for the refund of internal revenue taxes paid" within the meaning of section 1324(a) of the Revenue Act of 1921 only with respect to taxes

paid before the filing of such claim. An application for a refund can be made only after payment of the amount which it is sought to have refunded.

The conclusion of this office, supported by the express language of section 1324(a) of the Revenue Act of 1921, is that interest has been correctly computed on the refund made to the taxpayer in the instant case.

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

SALES TAX RULINGS.

TITLE VI.—EXCISE TAXES. (1926 AND 1924)

SALES BY THE MANUFACTURER.

REGULATIONS 47, ARTICLE 4: Discounts and expenses. VIII-19-4202
T. D. 4267

MANUFACTURER'S EXCISE TAXES—DISCOUNTS AND EXPENSES.

Article 4 of Regulations 47, relating to the excise taxes on sales by the manufacturer (secs. 600 and 903, Revenue Act of 1926), amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 4 of Regulations 47 (revised March, 1926), relating to the excise taxes on sales by the manufacturer, as imposed under the provisions of sections 600 and 903 of the Revenue Act of 1926, amended by Treasury Decision 4005, dated April 2, 1927 [C. B. VI-1, 298], is hereby again amended to read as follows:

ART. 4. *Discounts and expenses.*—A discount not provided for at the time of sale but made subsequently thereto, can not be deducted in determining the price upon which the tax is to be computed.

An adjustment in price, where articles are sold over a period of time, under an agreement for a quantity rebate, or an agreement for a so-called wholesale bonus, i. e., a rebate on goods resold by a distributor or dealer to so-called subdealers, is held not to be a discount made subsequently to the sale, and the tax, if originally computed on the gross price, may be adjusted in the return for the month in which the price is finally determined. If in such cases the tax assumed to be due on the original selling price has been billed to the dealer and by him to the purchaser as a separate item, and collected from the purchaser, the overcollection of tax arising from the adjustment of the sale price under the contract between the manufacturer and the dealer must be refunded to the purchaser.

Where articles are sold under an agreement for a rebate on goods remaining unsold in the hands of the dealer, and which were purchased by such dealer within a definitely specified period, in case of a decline in the market, a reduction in price made in accordance with such agreement is not considered a discount made subsequently to the sale, and if the manufacturer refunds to the dealer a portion of the original or tentative price, together with the amount for which he was reimbursed to cover the tax thereon, he may take credit on his return for the month in which such adjustment in price is made, for the amount of overpayment on the original sale, resulting from the price adjustment.

Commissions to agents and other expenses of sale are not deductible from the price.

Freight and delivery charges are taxable as part of the sales price when the price to the purchaser includes transportation and delivery charges paid by the manufacturer, or when the amount charged the purchaser, whether

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billed as a separate item or not, does not represent the actual transportation charges.

Freight and delivery charges are not a part of the sales price subject to tax, when the goods are sold and actually become the property of the purchaser at the factory or are sold f. o. b. cars at place of manufacture and the transportation charges are paid by the purchaser as a specific item in addition to the price.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved May 8, 1929.

A. W. MELLON,
Secretary of the Treasury.

REGULATIONS 47, ARTICLE 16: Parts or accessories. VIII–22–4221
Ct. D. 63

EXCISE TAX—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

"PARTS" OR "ACCESSORIES" FOR AUTOMOBILES—TRANSMISSION LININGS.

Transmission linings completely prepared and cut into strips of the required length for use on Ford automobiles and sold in packages exclusively for such use are taxable as "parts" or "accessories" for automobiles under section 900(3) of the Revenue Act of 1921 and section 600(3) of the Revenue Act of 1924.

COURT OF CLAIMS OF THE UNITED STATES.

Advance Automobile Accessories Corporation, a Corporation, v. *The United States.*

[October 22, 1928.]

OPINION.

Moss, Judge, delivered the opinion of the court.

During the period involved in this controversy plaintiff was engaged in the manufacture of transmission linings for Ford automobiles, and the sale of same to the automobile jobbing trade. Between the dates June 1, 1922, and February 26, 1926, plaintiff paid taxes in the aggregate sum of $32,768.35, same having been assessed under the provisions of subdivision (3) of section 900 of the Revenue Act of 1921 and subdivision (3) of section 600 of the Revenue Act of 1924. On June 7, 1926, plaintiff filed a claim for the refund of said taxes, which claim was rejected by the Commissioner of Internal Revenue. This is an action for recovery of said amount.

Section 900 of the Revenue Act of 1921 (42 Stat., 227) is as follows:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tire, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Articles 14 and 15 of Treasury Regulations No. 47, relating to the administration of the above Act, are as follows:

"ART. 14. * * * The words 'tires, inner tubes, parts, or accessories' shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as 'tires, inner tubes, parts, or accessories,' and shall not be understood to embrace raw materials used in the manufacture of such articles. * * *

"ART. 15. *Definition of parts.*—A 'part' for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adapted only for use as a component part of such vehicle. * * *"

Section 600 of the Act of 1924 is similar in substance to that of 1921, and the regulations relating to same, so far as the question involved here is concerned, are identical.

The question for determination is whether or not plaintiff's product, as prepared and sold, constituted a part of a Ford automobile within the meaning of the Acts above mentioned.

Plaintiff was engaged in the business of making replacement parts for Ford automobiles, principally transmission lining, timers, and, for a portion of the time, shock absorbers. Material for the transmission lining, a woven product, was purchased by plaintiff in rolls from the manufacturer. Plaintiff dealt with three types of lining—(1) the "White Stripe," which is a plain woven lining; (2) the "Feltbak," which is the same type of lining, except that plaintiff placed a felt backing on it, to act as a cushion; and (3) the "Cork Feltbak," which is the same as the Feltbak, with the exception that cork disks are placed by plaintiff in the woven portions of the lining. The lining is then cut into strips of 2 feet each in length, which is the standard length of the Ford transmission band. There being three transmission bands in a Ford automobile, these strips, so prepared, are placed three in a package for sale, together with the requisite number of rivets by which the lining is attached to the band. The attachment of said lining requires no skill whatever, and consists merely in properly placing the rivets and, in some instances, trimming the edges of the lining to the exact length of the band. It was sold only through the automobile jobbing trade, exclusively for use on Ford automobiles.

It is the contention of plaintiff that the product in question was merely repair material, and as such is not subject to the tax. We are unable to agree with this contention. In a general sense it is a repair material. In this connection it should be noted that a negligible portion, about 3 per cent, of plaintiff's product is sold in bulk, and no tax is exacted as to this portion. However simple may have been the preparation to which this article was subjected, it was a process which left nothing further to be done, except to place the rivets, and trim the edges where the material joined. It was complete for the use for which it was intended. From a casual reading of the statute, it is plain, we think, that the word "parts" as used in the statute can be given no other than the ordinary meaning of that word as it is customarily used, and applying that rule we have reached the conclusion that the particular articles involved in this case, and upon which plaintiff paid taxes for a number of years, fall within the meaning of the term "parts." (*Worth Bros. Co.* v. *Lederer*, 251 U. S., 507.)

The petition will be dismissed, and it is so adjudged and ordered.

AUTOMOBILE PARTS AND ACCESSORIES.

REGULATIONS 47, ARTICLE 16: Parts or accessories. VIII-25-4245 Ct. D. 71

EXCISE TAXES—REVENUE ACT OF 1924—DECISION OF COURT.

1. "PARTS OR ACCESSORIES" FOR AUTOMOBILES—STORAGE BATTERIES.

Storage batteries manufactured and designed to meet the exact specifications required for use in furnishing the motive power for electrically-propelled automobile trucks, advertised for this purpose and sold for this specific use, are subject to tax as "parts or accessories" for automobiles under section 600(3) of the Revenue Act of 1924.

2. DECISION FOLLOWED.

The decision in *Cole Storage Battery Co.* v. *United States* (65 C. Cls., 164 (T. D. 4159 [C. B. VII-1. 299])) followed.

COURT OF CLAIMS OF THE UNITED STATES.

Edison Storage Battery Co. v. *The United States.*

Edison Storage Battery Supply Co. v. *The United States.*

Edison Storage Battery Garage, Inc., v. *The United States.*

[May 6, 1929.]

OPINION.

GRAHAM, Judge, delivered the opinion of the court.

There are involved here six cases which by order of the court dated May 11, 1928, were consolidated. Two suits each brought by the three corporations by agreement were briefed, argued, and submitted as one case.

The details of the relations and operations of these corporations are set out in the findings, and it is not necessary for the decision to rehearse them here.

They are seeking a refund of taxes assessed on storage batteries manufactured and sold for motive power for electrically-propelled automobile trucks.

The question involved is whether or not storage batteries manufactured and designed to meet, and meeting, the exact specifications required for use in furnishing motive power for electrically-propelled automobile trucks, advertised for this purpose, and sold for this specific use, are subject to excise sales tax as "parts" of automobile trucks under section 600 of the Revenue Act of 1924 (43 Stat., 322). We hold that they are liable.

There have been a number of cases similar to the instant cases decided by this court and apparently there will be others of a similar kind; that is to say, cases involving a tax on the manufacture of batteries of different kinds, which to a greater or lesser degree and in one form or another, with and without attachments and with and without changes, are used on automobiles and automobile trucks. In each case there is an attempt by a construction of the statute and by proof of slight differences in the facts, the use, the method of attachment, something necessary to be done to attach the battery to the frame, to show that the plaintiff in interest was not subject to taxation. These efforts to show exemption from taxation, for that is what they amount to, grow out of refinements and strained constructions of the Act of Congress.

Section 900 of the Revenue Acts of 1918 and 1921 (42 Stat., 291), after providing for a sales tax on automobiles, automobile trucks, motor cycles, etc., provides (3) for a sales tax where tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2) are sold to any person other than the manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), section 600 of the Revenue Act of 1924. The litigation grows out of construction put upon "parts and accessories." These statutes were passed by Congress for the purpose of raising revenue for the conduct of the Government. They were necessary acts of sovereignty, and these and all taxing statutes must be construed, as far as possible, to ef-

fectuate that purpose. While it is true that if there is a doubt as to the taxpayer's liability it should be resolved in his favor, it is also true that in considering the conditions out of which this doubt grows the purpose of the statutes must be given full consideration.

Furthermore, it is to be assumed that Congress, if it intended to give an exemption, would have so stated, or have limited the language of the statutes so as to afford clearly an exemption, and therefore, when it uses the generic word "parts," which must be taken in its broadest signification to effectuate the purpose of the statutes, it intended it to be used in its widest and general sense and not in a technical or limited sense.

Congress did not intend that the application of the Acts should be based upon such a labyrinth and tangle of distinctions in its application.

In *Worth Bros. Co.* v. *Lederer* (251 U. S., 507–510), the court in discussing the meaning of the words "any part" in the munitions tax Act (sec. 301, ch. 463, 39 Stat., 781), which provides "that every person manufacturing" certain articles and "shells" "or any part of the articles mentioned * * * shall pay" an excise tax, etc., said:

"* * * Is not every element (we use the word for want of a better) in the aggregation or composition or amalgamation (whichever it is), of a shell, a part of it? If not, what is it? And what is the test to distinguish a part from not a part? * * *"

And further, speaking of the contention that forgings were not a part of a shell, the court said:

"* * * Congress did not intend to subject its legislation to such artificialities and make it dependent upon distinctions so refined as to make a part of a shell not the taxable 'part' of the law. * * *"

See also the case of *Forged Steel Wheel Co.* v. *Lewellyn* (251 U. S., 511), affirming the Worth case, and construing the same statute.

As was said by the court in *Carbon Steel Co.* v. *Lewellyn* (251 U. S., 501, 505), in construing the same statute as that involved in the Worth case, the rule of construction "can not be carried to reduce the statute to empty declarations." The rule of construction will not be pressed so far as to reduce a taxing statute to a practical nullity by permitting easy evasion.

It is fair to assume that if Congress had intended in the use of the word "parts" to exempt the seller where the thing sold was used in connection with the operation of an automobile, automobile truck, or motor cycle, because of the fact that the article sold could be used for other purposes, or that only a small portion of the production of the seller was used in connection with automobiles, or automobile trucks, or because the article sold could be used for other purposes, or because it had been sold and used for other purposes before the passage of the Act, or because it required something to be done by the purchaser to attach it to the automobile, or because, when shipped, all the parts that constituted the article sold were not put together or were shipped in different packages and required something to be done by the purchaser in order to apply them, it would have stated as much in the Act. Having failed to do this, it is fair to assume that it did not intend that a limited meaning should be given to the word "parts." See *United States* v. *Rindskopf* (105 U. S., 418); *United States* v. *Anderson* (269 U. S., 422, 443 [T. D. 3839, C. B. V–1, 179]); *Metcalf & Eddy* v. *Mitchell* (269 U. S., 514, 520 [T. D. 3824, C. B. V–1, 218]); *United States* v. *Mitchell* (271 U. S., 9, 12 [T. D. 3865, C. B. V–1, 233]); and *Wickwire, etc.*, v. *Reinecke* (275 U. S., 101 [T. D. 4126, C. B. VII–1, 316]).

Further, the Acts authorized the Commissioner of Internal Revenue to make rules and regulations for carrying them into effect. It is recognized that Congress in enacting such statutes could not go into all the details of administrative application and definition, and therefore intrusted this to the Commissioner of Internal Revenue. It is to be assumed that the Commissioner in making the regulations exercised the care and fairness and the knowledge of the subject required for preparing the regulation. And so the courts have held that if the regulation is reasonable and does not violate the spirit and purpose of the Act involved, it should be upheld, and also that where the regulation applies, where the taxpayer seeking relief comes within the language of the regulation, the burden is upon him to show clearly and satisfactorily that the regulation is unreasonable and violates the spirit and purpose of the Act—another way of saying that where a taxpayer claims that he has been illegally assessed and taxed the burden upon him is to establish the illegality.

The Commissioner of Internal Revenue has undertaken to define "parts and accessories." In the rapid changes that are being made in the construction of automobiles, automobile trucks, etc., and the parts and accessories used in the operation of them, by inventions, improved construction, and the application to them of articles used for other purposes with or without slight changes, or which had previously been used for other purposes, it is readily appreciated that the regulations and definitions must, as far as possible, have a general application and could not possibly be so expressed as to cover all possible exigencies and every diversity of circumstances; and, therefore, in the interest of securing to the Government the income which the taxing Acts were designed to provide, cases such as this must be approached in the light of what has been stated.

It is also clear that no general rule can be laid down in cases like the instant one, and that each of these cases involving different articles must rest upon its own facts and the fair and reasonable application to it of the statute and the regulations.

This court has decided several cases involving parts and accessories, commencing with the Atwater Kent case (62 C. Cls., 419), which held that timers and coils were not to be classified as parts of automobiles simply because they might be used on automobiles, in the absence of proof that at the time when sold it was intended that the articles should be used on automobiles, and where also there had been no setting aside or allocation by advertising or otherwise of timers or coils for automobile use. It will be seen that that case stood upon its facts and must be left there. It was intended to establish no binding rule, and in so far as it may be construed to be in conflict with the views herein stated, it is hereby modified.

In the prior case of *Martin Rocking Fifth Wheel Co.* v. *United States* (60 C. Cls., 466 [T. D. 3716, C. B. IV–1, 317]), there was involved a semitrailer whose body overlapped the frame of the drawing vehicle. It was a separate article, not used in connection with the operation of the automobile, etc., but attached to it and moved by it, and contributed nothing to the operation of an automobile or its use, and was not a part of its structure when in operation.

The next case, the *National Rubber Filler Co.* v. *United States* (63 C. Cls., 337), concerned a substance used to fill up the inside of worn-out tubes, and was nothing more than the application externally of a substance to prolong the life of a tube, as the repainting of a car prolongs the life of the body. It was not an integral part of the machine, nor was it a part of its original construction. It might be that to-morrow this material would be utilized by some invented process to make complete tires to be used as such in the operation of an automobile. It unquestionably would then become a part. This illustrates the shifting sands upon which the construction of the statute rests. Each of these cases, it also appears, rested on its own facts.

The last case decided by this court was *Cole Storage Battery Co.* v. *United States* (65 C. Cls., 164 [T. D. 4159, C. B. VII–1, 299]), in which on October 29, 1928, a writ of certiorari was denied by the Supreme Court. In that case it was held that a storage battery especially adapted and so designed and advertised as to meet the essential requirements of motive power is a part or accessory of an automobile, and this was held to be true of the battery in that case. It was further held that where the device or battery is necessary to the accomplishment of the functioning in a certain way of the combination of various elements and parts of the machine, it is a part or accessory of the machine, and that where the manufacturer who seeks the custom of the automobile trade advertises the special qualities of his product and claims its advantageous use as a part of an automobile or automobile truck, the battery comes within the statute and regulation of the Commissioner.

The decision in that case is controlling in this. While the Edison battery might not perform exactly the same function as the Cole battery, it possesses all the characteristics necessary for a battery, in that in the automobile industry it is utilized for furnishing motive power for automobile trucks. The particular class of batteries taxed here was extensively advertised for this use by the plaintiffs and when sold these batteries were shipped direct to the consumers of batteries for the operation and propulsion of electric street trucks. The facts establish that several classes of automobile trucks used storage batteries for motive power, and that they would serve no useful purpose without the battery. The plaintiffs' batteries, which were taxed, could be and were applied to these uses. It also appeared that some of the trucks when sold were equipped with Edison batteries. The fact that these batteries in voltage requirements

are used for other purposes does not affect the issue. Nor is the matter of the assemblage of batteries in standard trays relevant. The facts clearly show that the Edison battery possesses all the necessary characteristics of a battery for furnishing, and does furnish, motive power to automobile trucks. The fact that these batteries can be used for other purposes is not important. There are many parts of an automobile that can be and are used for other purposes. The form of battery taxed here was clearly specially adapted and designed and advertised to meet the requirements of motive power on automobile trucks. The plaintiffs were only taxed for batteries sold in connection with the operation of automobile trucks. The cases relied upon in plaintiffs' brief deal with the tax classification of an entire product and the incidental use independent of the principal use. Had the Commissioner of Internal Revenue taxed the plaintiffs on all their storage batteries, irrespective of their adaptable use, it would have presented a different case. But this was not done in these cases. The batteries taxed were the batteries admittedly sold for use in the operation of automobile trucks, advertised for that use, and when sold shipped direct to the consumers for that use.

It follows that the plaintiffs can not recover. But, further, the plaintiffs have clearly failed to establish any right to exemption or to show to the satisfaction of the court that the Commissioner's regulation under which this tax was assessed and collected was unreasonable, much less in violation of the spirit and purpose of the Act. We think it was altogether reasonable and in full accord with the spirit and purpose of the Act.

The petition in each of the said six cases submitted, viz, Nos. F–359 and H–322, F–358 and H–324, and F–403 and H–323, should be dismissed, and it is so ordered.

TITLE V.—TAX ON ADMISSIONS AND DUES. (1924)

REGULATIONS 43–II, ARTICLE 5: Social clubs. VIII–8–4118
Ct. D. 45

TAX ON DUES—REVENUE ACTS OF 1921 AND 1924—DECISION OF COURT.

SOCIAL CLUB—CHARACTER OF ORGANIZATION.

A manufacturers' club, which is organized under an act that states the purpose of clubs organized thereunder to be "the maintenance of a club for social enjoyment," whose charter provides that the purpose of the organization, among other things, is to maintain a club for social enjoyments and which makes elaborate provisions for social functions and participates in a great variety of social activities, 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.

COURT OF CLAIMS OF THE UNITED STATES.

John Fisler v. *The United States.*

[October 8, 1928.]

OPINION.

GREEN, Judge, delivered the opinion of the court.

Plaintiff brings this suit to recover $22 paid to the collector of internal revenue at Philadelphia in 1924 and 1925 as taxes upon dues to the Manufacturers' Club of Philadelphia, the Commissioner of Internal Revenue having ruled that the social features of said club form a material purpose of the organization and that it is a social club within the meaning of the Federal Revenue Act in force at that time. The question in the case is whether this ruling was correct.

To set out all of the activities of the Manufacturers' Club would be to unduly extend this opinion, but a list of some of the most important features in a social way is, we think, sufficient for the decision of the case.

This club was incorporated in 1887 under the laws of the State of Pennsylvania. The act under which it was incorporated provides, among other things, for the creation of corporations "for the encouragement and protection of trade and commerce." Provision VI of this corporation act states the purpose of clubs organized thereunder to be for "The maintenance of a club for social enjoyments," and the charter provides that the purpose of the association is to maintain the club for social enjoyments, to bring the manufacturers of the city of Philadelphia and vicinity into more cordial and social relations, and to enable them to act unitedly in all affairs of interest to their industries. It appears, however, that the membership of the club is not confined to persons connected with the manufacturing industry.

The club occupies a 10-story and basement stone building, which cost approximately $2,700,000.

In the basement of this building is a barber shop, Turkish bathroom, bowling alley, pool and billiard room, and a large grillroom. On the first floor there is a large lobby and a large waiting room equipped with comfortable chairs and lounges, a clerk's office, telephone booths, and a small room used for quick lunch and refreshments. On the second floor there are directors' and committee rooms, a large library and reading room, and a large assembly room. On the third floor is an auditorium used for large meetings, conventions, lectures, entertainments, etc., which is available for private functions, and is rented to private parties for social purposes. The fourth, fifth, sixth, and seventh floors contain 74 rooms, principally used as bedrooms, suites of rooms and living quarters for club members who desire to live at the club and guests having appropriate cards. On the eighth floor is the general dining room, in which ladies are permitted to be present with members. There is also a wing of the dining room which can be cut off, making a large private dining room for small meetings and conferences. The tenth and top floor contains the main all-the-year-round dining room.

A partial list of the celebrations, social activities, and special events for the entertainment of members is found in Finding XIV. It is too long for repetition in the opinion and includes a great variety of entertainments, such as dinners for guests of honor and dinners with entertainers, luncheons, smokers, dances, musicales, and motion pictures. Bowling alleys and a pool and billiard room were provided which were supervised by special committees. The bowling alleys were also used for interclub bowling tournaments. The facilities of the club were available and used for wedding parties, receptions, and other social functions which club members might desire. The fees received for such private functions formed a portion of the club revenue.

It is probable that there are few clubs of a purely social nature anywhere in this country that make such elaborate provisions for social enjoyments. It may be that the other activities of the club, which are shown in the findings of fact and which are also too numerous to be set out in the opinion, were more extensive than those of a social nature. Among them was the publication of a journal known as "The Manufacturer," and while mostly devoted to business matters, it contained a department concerning the social life of the club. In a general way the activities of the club may be separated into three divisions: First, those connected with business, particularly in manufacturing lines; second, those of a civic nature, having for their object some public benefit; and third, those of a purely social nature. The social activities were so extensive as to make it clear that they were and are a material part of the activities of the club organization and not merely incidental to its main purpose. In such a case, under the regulations of the Treasury Department and the rulings of the Commissioner of Internal Revenue, the organization is a social club within the meaning of the law. We think this ruling is correct.

The petition must be dismissed. It is so ordered.

TITLE X.—SPECIAL TAXES. (1921)

SECTION 1001(11).—PASSENGER AUTOMOBILES.

REGULATIONS 59(1922), ARTICLE 31: Basis of tax. VIII-6-4101
Ct. D. 37

SPECIAL TAXES—REVENUE ACT OF 1921—DECISION OF COURT.

OCCUPATIONAL TAXES—RENTING AUTOMOBILES—"DRIVE IT YOURSELF" PLAN.

Section 1001(11) of the Revenue Act of 1921 applies to a corporation carrying on the business of renting automobiles under what is commonly known as the "drive it yourself" plan.

COURT OF CLAIMS OF THE UNITED STATES.

Saunders System Washington Co., a Corporation, v. *The United States.*

[December 3, 1928.]

OPINION.

Section 1001(11) of the Revenue Act of 1921 (42 Stat., 296) was in force during the period involved in this case and is as follows:

"Persons carrying on the business of operating or renting passenger automobiles for hire shall pay $10 for each such automobile having a seating capacity of more than two and not more than seven, and $20 for each such automobile having a seating capacity of more than seven."

The plaintiff contends that this provision is ambiguous and that Congress did not intend thereby to impose a tax upon persons who let automobiles without drivers to those who intend to do their own driving.

We can not agree with this contention. The law appears to us to be plain and unambiguous. We think it clear that it applies to persons and corporations who, in the language of the stipulation and as set out in the findings, were "engaged in the business of letting or renting passenger automobiles without drivers" under an agreement by which they were to receive payment for the use of the cars.

The Commissioner correctly assessed the tax in controversy against the plaintiff and it is ordered that its petition be dismissed.

TITLE VI.—TAX ON BEVERAGES. (1918)

BEVERAGES SOLD IN BOTTLES OR OTHER CONTAINERS.

REGULATIONS 52(1919), ARTICLE 8: Basis of tax: Sale price. VIII-4-4084
T. D. 4259

TAX ON BEVERAGES—REVENUE ACT OF 1918—DECISION OF SUPREME COURT.

1. SALES TAX—MEASURE OF TAX.

Where a manufacturer of beverages, upon which sales taxes are imposed by Title VI, section 628, of the Revenue Act of 1918, sold and invoiced such product to his customers at a specific price with the understanding that the tax was included in that price, such price constitutes the measure of the tax.

2. DECISION AFFIRMED.

The decision of the Court of Claims (64 Ct. Cls., 252 (T. D. 4105 [C. B. VI-2, 324])) affirmed.

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

To Collectors of Internal Revenue and Others Concerned:

The following decision of the Supreme Court of the United States, in the case of *Lash's Products Co., Petitioner*, v. *The United States*, is published for the information of internal revenue officers and others concerned.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved January 19, 1929.

A. W. MELLON,
Secretary of the Treasury.

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SUPREME COURT OF THE UNITED STATES.

Lash's Products Co., petitioner, v. *The United States.*

(On writ of certiorari to the Court of Claims.)

[January 2, 1929.]

OPINION.

Mr. Justice HOLMES delivered the opinion of the court.

This is a suit to recover the amount of certain taxes paid under the Revenue Act of 1918 (Act of February 24, 1919, ch. 18, sec. 628, 40 Stat., 1057, 1116). By section 628 there is imposed on "soft drinks, sold by the manufacturer, * * * in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold." This tax was paid by the petitioner, calculated at 10 per centum of the sum actually received by it for the goods sold. But the petitioner had notified its customers beforehand that it paid the 10 per cent tax and it contends that in this way it passed the tax on and that the true price of the goods was the sum received less the amount of the tax. The phrase "passed the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. (*Hichman & Co.* v. *I. S. Dawes & Son Co.*, 12 F. (2d), 154.) The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. Still the question as to the meaning of the statute remains.

The petitioner supports its position by a regulation of the Commissioner that when the tax is billed as a separate item it is not to be considered as an increase in the sale price. Naturally a delicate treatment of a tax on sales might seek to avoid adding a tax on the amount of the tax. But it is no less natural to avoid niceties and to fix the tax by the actual price received. Congress could do that as properly as it could have added one-tenth to the tax on the price as fixed by the other items determining the charge to the buyer. The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price, and if the statute were taken literally, as there would be no reason for not taking it if it were now passed for the first time, there might be difficulty in accepting the Commissioner's distinction even if the tax were made a separate item of the bill. But if, in view of the history in the Solicitor General's brief, we assume with him that the practice of the Commissioner has been ratified by Congress, we agree with his argument that the petitioner must take the privilege as it is offered. It did not bill its tax as a separate item, and the Commissioner's regulations notified it that "if the sales price of a taxable beverage is increased to cover the tax, the tax is on such increased sales price," although they purported to make a different rule "when the tax is billed as a separate item." There has been some difference of opinion in the lower courts, but we regard the interpretation of the law as plain.

Judgment affirmed.

ESTATE TAX RULINGS.

TITLE IV.—ESTATE TAX. (1921)

GROSS ESTATE.—TRANSFER BY DECEDENT IN HIS LIFETIME.

REGULATIONS 63, ARTICLE 17: Nature and time of transfer. VIII-5-4094 T. D. 4261

ESTATE TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

1. GROSS ESTATE—TRANSFER TO TAKE EFFECT AT DEATH—POWER OF REVOCATION—RETROACTIVITY.

Where a decedent creates a trust before September 8, 1916, by the terms of which the income therefrom is payable to himself for life and after his death to a designated beneficiary, with remainders over upon termination of the trust, and there is reserved to the settlor alone a power of revocation, upon the exercise of which the trustee is required to return the corpus of the trust to him, the transfer is not complete until his death. As applied to such a trust section 402(c) of the Revenue Act of 1921 is not retroactive and void where his death follows the enactment of that Act, and the value of the property so conveyed in trust should be included in the decedent's gross estate.

2. GROSS ESTATE—TRANSFER TO TAKE EFFECT AFTER DEATH—POWER TO MODIFY TRUST—GIFT INTER VIVOS.

Where a decedent conveys property to a trustee in trust to pay the income to a third person with remainders over after the death of the settlor and there is reserved to the settlor the power to alter, change, or modify the trust, which was to be exercised by him and the life beneficiary, acting jointly, the transfer is a completed gift inter vivos and, not having been made in contemplation of death, is not subject to the estate tax imposed by the Revenue Act of 1921.

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

To Collectors of Internal Revenue and Others Concerned:

The following decision of the Supreme Court of the United States, in the case of *Mabel G. Reinecke, Collector of Internal Revenue*, v. *The Northern Trust Co., Executor under the Last Will and Testament of A. C. Bartlett, Deceased*, is published for the information of internal revenue officers and others concerned.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved January 30, 1929.

A. W. MELLON,
Secretary of the Treasury.

SUPREME COURT OF THE UNITED STATES.

Mabel G. Reinecke, Collector of Internal Revenue for the First District of Illinois, petitioner, v. *The Northern Trust Co., Executor under the Last Will and Testament of A. C. Bartlett, Deceased.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 2, 1929.]

OPINION.

Mr. Justice STONE delivered the opinion of the court.

Respondent executor brought suit in the District Court for Northern Illinois to recover from petitioner, a collector of internal revenue, the amount of a tax alleged to have been illegally assessed and collected upon the estate of respondent's testator under the Revenue Act of 1921 (ch. 136, 42 Stat., 227). Judgment of the district court for the executor, upon an overruled demurrer, was affirmed by the Court of Appeals for the Seventh Circuit. (24 F. (2d). 91.) This court granted certiorari April 23, 1928. (277 U. S., 579.)

Respondent's testator died May 30, 1922. On various dates between 1903 and 1919 he established seven trusts by deed which are conceded not to have been in contemplation of death. Two of them were created respectively in 1903 and 1910. They are identified in the record as trusts No. 1831 and No. 3048, and referred to here as the "two trusts." By them the income from the trusts was reserved to the settlor for life and on his death the income of each trust was to be paid to a designated person until the termination of the trust as provided in the trust instrument, with remainders over. By the terms of each trust there was reserved to the settlor alone a power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him.

The remaining five trusts, designated in the record as trusts Nos. 4477, 4478, 4479, 4480, and 4481, referred to here as the "five trusts," were created in 1919, before the passage of the Revenue Act of 1921, but after the enactment of the similar provisions of the estate tax of the Revenue Act of 1918. (40 Stat., 1096, 1097.) By each, life interests in the income, on terms not now important, were created. In one the life interest was terminable five years after the death of the settlor or on the death of the designated life beneficiary should she survive that date, with a remainder over. In the other four, life interests in the income were created, terminable five years after the settlor's death or on the death of the respective life tenants, whichever should first happen, with remainders over. The settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustee to execute proxies to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to appoint successor trustees. With respect to each of these five trusts a power was also reserved "to alter, change or modify the trust," which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one of the trusts, by the settlor and a majority of the beneficiaries named, acting jointly.

The settlor died without having revoked either of the two trusts and with the beneficiaries and life tenants designated in the trusts surviving him, and without having modified any of the five trusts except one, and that in a manner not now material.

The Commissioner, in fixing the amount of the estate for tax purposes, included the corpus of all seven trusts. Section 401 of the statute imposes a tax at a graduated rate "upon the transfer of the net estate of every decedent" dying after the passage of the Act. By 402 it is provided that in calculating the tax there shall be included in the gross estate all property, tangible and intangible "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) * * *."

As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied

to them is unconstitutional and void, because retroactive, within the ruling of *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI–2, 351]). In that case it was held that the provisions of the similar section 402 of the 1918 Act (40 Stat., 1097), making it applicable to trusts created before the passage of the Act was in conflict with the fifth amendment of the Federal Constitution and void as respects transfers completed before any such statute was enacted. But in No. 77 (*Chase National Bank* v. *United States*, — *U. S.*, —), decided this day, the decision is rested on the ground, earlier suggested with respect to the fourteenth amendment in *Saltonstall* v. *Saltonstall* (276 U. S., 260, 271), that a transfer made before the enactment of the statute now in question and subject to a power of revocation in the transferor, terminable at his death, is not complete until his death, and hence section 402, as applied to it, is not retroactive where his death follows the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States*, supra, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

It is argued by respondent that section 402 by its terms does not impose any tax on the transfers involved in the five trusts and that, even if subject to the provisions of that section, they antedated the passage of the 1921 Act, and the section as to them is retroactive and void, although they were created after the enactment of the corresponding sections of the 1918 Act. The Government argues that section 402 applies to all these transfers and is not retroactive as to them because of the reserved powers to manage and to modify the trusts, which did not terminate until the death of the decedent after the passage of the statute, and that even without such reserved powers the transfers of the remainder interests were all subject to the tax because, within the language of section 402, they were "intended to take effect in possession or enjoyment at or after his death."

As the tax can not be supported unless the statute applies in one of the two ways suggested by the Government, we must necessarily determine the effect of the reserved powers and the meaning and application of the phrase quoted from section 402. If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax.

But the question much pressed upon us remains whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provisions. That question, not necessarily involved, was left unanswered in *Shukert* v. *Allen* (273 U. S., 545 [T. D. 4071, C. B. VI–2, 349]). There the gift of a remainder interest, having been made without reference to the donor's death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor's death, and for that reason not to be subject to the tax. But here the gift was intended to so take effect, although the transfer which effected it preceded the death of the settlor and was itself

not subject to the tax unless made so by the circumstance that the possession or enjoyment passed as indicated.

In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. (Cf. *Y. M. C. A.* v. *Davis*, 264 U. S., 47, 50; *Edwards* v. *Slocum*, 264 U. S., 61, 62 [T. D. 3584, C. B. III–1, 479]; *N. Y. Trust Co.* v. *Eisner*, 256 U. S., 345, 349.) It is not a gift tax and the tax on gifts once imposed by the Revenue Act of 1924 (ch. 234, 43 Stat., 313) has been repealed (44 Stat., 126). One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

It is of significance, although not conclusive, that the only section imposing the tax, section 401, does so on the net estate of decedents and that the miscellaneous items of property required by section 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession, or enjoyment of the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections read together indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession, or enjoyment. In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402(c), "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment, or control of the donor at his death and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer. (*Gould* v. *Gould*, 245 U. S., 151, 153; *United States* v. *Merriam*, 263 U. S., 179, 187 [T. D. 3535, C. B. II–2, 87].) Doubts of the constitutionality of the statute, if construed as contended by the Government, would require us to adopt the construction, at least reasonably possible here, which would uphold the Act. (*United States* v. *Delaware & Hudson Co.*, 213 U. S., 366, 407; *United States* v. *Standard Brewery*, 251 U. S., 210, 220; *United States* v. *Jin Fuey Moy*, 241 U. S., 394, 401, 402; *Panama Railroad Co.* v. *Johnson*, 264 U. S., 375, 390.)

The judgment below as to the two trusts, Nos. 1831, 3048, reversed. As to the five trusts, Nos. 4477, 4478, 4479, 4480, and 4481, affirmed.

INSURANCE.

REGULATIONS 63(1922), ARTICLE 27: Taxable insurance. VIII–7–4108 Ct. D. 40

ESTATE TAX—REVENUE ACT OF 1921—DECISION OF SUPREME COURT.

GROSS ESTATE—PROCEEDS OF INSURANCE PAID TO DESIGNATED BENEFICIARIES—CONSTITUTIONALITY.

Subdivision (f) of section 402 of the Revenue Act of 1921, in so far as it requires the inclusion in the value of the gross estate of proceeds of policies of insurance taken out by the decedent upon his own life in which designated beneficiaries are named and the power to change them reserved to the insured, is constitutional.

SUPREME COURT OF THE UNITED STATES.

The Chase National Bank of the City of New York, James K. Symmers, Grace B. Drake, et al., etc., v. *The United States.*

On certificate from the Court of Claims.

[January 2, 1929.]

OPINION.

Mr. Justice STONE delivered the opinion of the court.

This case comes here from the Court of Claims, under section 288, Title 28, United States Code (43 Stat., 939), on certified questions of law concerning which instructions are desired for the proper disposition of the cause. The facts certified are:

On September 13, 1922, after the effective date of the Revenue Act of 1921, Herbert W. Brown procured three insurance policies on his life aggregating $200,000, each naming his wife as beneficiary. Each policy reserved to the insured the right to change the beneficiary. All premiums on the policies were paid by the insured. On April 10, 1924, he died testate, leaving the plaintiff below his executor and an estate subject to the estate tax imposed by the Revenue Act of 1921 (ch. 136, 42 Stat., 227). The tax as assessed by the Commissioner included $9,146.76 imposed by reason of the inclusion in the estate of the proceeds of the three insurance policies, less $40,000 exemption authorized by the statute. The executor paid the tax and upon denial of a claim for refund brought the present suit in the Court of Claims to recover the tax as illegally assessed.

The questions certified are:

Question I: Whether the tax imposed by the final clause of section 402(f), Revenue Act of 1921 (42 Stat., 278), on life insurance policies payable in terms to beneficiaries "other than the decedent or his estate" is a direct tax on property and void because not apportioned.

Question II: Whether the $9,146.76 tax imposed bears such an unreasonable relation to the subject matter of the tax as to render it void.

Similar questions were mooted by counsel but not decided in *Lewellyn* v. *Frick* (268 U. S., 238, 251 [T. D. 3715, C. B. IV-1, 322]).

Section 401 of the Revenue Act of 1921 imposes a tax upon "the transfer of the net estate of every decedent" dying after the passage of the Act, and section 402 provides:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * * tangible or intangible * * * (f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

By section 406 the executor is required to pay the tax but if so paid he is given by section 408 the right to recover from the beneficiaries a part of the tax and by section 409 they are made personally liable for a share of if not so paid.

In the present case there is no question of the construction of the statute. The tax is plainly imposed by the explicit language of sections 401 and 402(f) if those sections are constitutionally applied. Plaintiff challenges the validity of the tax on the ground that it is not an excise or privilege tax but a direct tax on property, the insurance policies or their proceeds, and so is invalid because not apportioned as required by Article I, sections 2, 9, of the Federal Constitution, and that in any case the measure of the tax and the methods of securing its payment are so arbitrary and capricious as to violate the due process clause of the fifth amendment.

The statute in terms taxes transfers. Like provisions in earlier Acts have been generally upheld as imposing a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death. (Cf. *Y. M. C. A.* v. *Davis*, 264 U. S., 47, 50; *Edwards* v. *Slocum*, 264 U. S., 61, 62 [T. D. 3584, C. B. III-1, 479]; *New York Trust Co.* v. *Eisner*, 256 U. S., 345, 349; *Nichols* v. *Coolidge*, 274 U. S., 531 [T. D. 4072, C. B. VI-2, 351].)

It is true, as emphasized by plaintiff, that the interest of the beneficiaries in the insurance policies effected by decedent "vested" in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination of [by] death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.

A power in the decedent to surrender and cancel the policies, to pledge them as security for loans, and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (*Cohen* v. *Samuels*, 245 U. S., 50; see *Burlingham* v. *Crouse*, 228 U. S., 459), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts (N. Y. Domestic Relations Law, ch. 14, Consol. Laws, sec. 52; *Kittel* v. *Domeyer*, 175 N. Y., 205; *Guardian Trust Co.* v. *Straus*, 139 App. Div., 884, aff'd 201 N. Y., 546), is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death.

In *Saltonstall* v. *Saltonstall* (276 U. S., 260), a tax had been imposed by State statute on the succession to a remainder interest which had vested under a trust created before the enactment of the taxing Act. It was objected that the tax was void as retroactive and hence in conflict with the fourteenth amendment of the Federal Constitution under the ruling in *Nichols* v. *Coolidge*, supra, later applied in *Untermyer* v. *Anderson* (276 U. S., 440 [T. D. 4157, C. B. VII–1, 326]). But by the provisions of the trust indenture a power of disposition of the remainder had been reserved to the settlor to be exercised by him at any time during his life, with the concurrence of one trustee, and we held that the freeing of the remainder of the possibility of the exercise of that power, through its termination by the death of the settlor, effected a transfer which was the appropriate subject of a succession tax and that the tax was not retroactive since the termination of the power which was prerequisite to the complete succession did not occur until after the enactment of the statute. The court said (p. 271):

"So long as the privilege of succession has not been fully exercised it may be reached by the tax. See *Cahen* v. *Brewster* (203 U. S., 543); *Orr* v. *Gilman* (183 U. S., 278); *Chanler* v. *Kelsey*, supra; *Moffitt* v. *Kelly*, supra; *Nickel* v. *Cole*, supra. And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices. A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. (*Bullen* v. *Wisconsin*, 240 U. S., 625.) The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another."

That, it is true, was said of a succession tax, and we are here concerned with a transfer tax. The distinction was there important, for it was at least doubtful whether upon the death of the settlor there was any such termination, as to him, of a power of control over the remainder such as would have been subject to a tax levied exclusively on transfers, since the power was not vested in him alone, but in him and another. See *Reinecke* v. *Northern Trust Co.* (— U. S., —), decided this day. But we think that the rule applied in *Saltonstall* v. *Saltonstall*, supra, to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferor for his own benefit. Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers.

But the plaintiff says that the tax here must be deemed to be a tax on property because the beneficiaries' interests in the policies were not transferred to them from the decedent, but from the insurer, and hence there was nothing to which a transfer or privilege tax could apply. Obviously, the word "transfer" in the statute, or the privilege which may constitutionally be taxed, can not be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another. Section 402(c) taxes transfers made in contemplation of death. It would not, we assume, be seriously argued that its provisions could be evaded by the purchase by a decedent from a third person of property, a savings bank book, for example, and its delivery by the seller directly to the intended beneficiary on the purchaser's death, or that the measure of the tax would be the cost and not the value or proceeds at the time of death. It is of some significance also that by the local law applicable to the insurer and the insured in this case, a beneficiary's rights in the policy and its proceeds are deemed to be the proceeds of the premiums expended by the insured and as such recoverable in full by one having an equitable claim attaching to the premiums. (*Holmes* v. *Gilman*, 138 N. Y., 369.)

The petitioner points to no requirement, constitutional or statutory, that the termination of the power of disposition of property by death whereby the transfer of property is completed, which we have said is here the subject of the tax, must be preceded by a transfer directly from the decedent to the recipient of his bounty, of the property subject to the power. And we see no necessity to debate the question whether the policies themselves were so transferred, for we think the power to tax the privilege of transfer at death can not be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, or of the particular methods by which his purpose is effected, so long as he retains control over those benefits with power to direct their future enjoyment until his death. Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax. (*Chanler* v. *Kelsey*, 205 U. S., 466.) "To make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." (Sugden. Powers (8th Ed.), 396; see Gray, Perpetuities (3d Ed., 1915), sec. 526 (b).) And the nonexercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death. (*Bullen* v. *Wisconsin*, 240 U. S., 625; cf. *United States* v. *Robbins*, 269 U. S., 315, 327 [T. D. 3817, C. B. V-1, 188]; *Cohen* v. *Samuels*, supra.)

The objection urged by plaintiff under the second question, that the statutory method of fixing the tax and securing its payments infringes the fifth amendment, need not detain us. It is said that both the tax on those who share in the decedent's estate and that paid by the beneficiaries is larger than it otherwise would be if the proceeds of the insurance had not been included in the decedent's gross estate. But the increase in the tax to both is a consequence of including the amount of the policies in the gross estate in determining the net which is made the measure of the graduated transfer tax. The objection amounts to no more than saying that if the transfer of the policies or their proceeds be taxed, they should not be included with the other property of the estate in determining the rate of the tax. As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. (*Stebbins* v. *Riley*, 268 U. S., 137.) The inclusion in the gross estate of gifts made in contemplation of death under section 402(c) has a like effect.

Other objections to the operation of the statute are not discussed either because they are not of weight or are not presented by the certified facts.

The questions propounded by the Court of Claims in form suggest that the tax is one imposed by the statute upon the policies. This we have shown is not the case. It is the transfer, which is a concomitant of the criteria laid down

by the statute for imposing the tax, which is the subject of the tax. The tax is not on the policies, but we answer the questions as if inquiring about the true subject of the tax.

Both questions are answered, No.

Mr. Justice McReynolds concurs in the result.

Mr. Justice Sutherland and Mr. Justice Butler dissent.

DEDUCTIONS—TRANSFERS FOR PUBLIC, CHARITABLE, ETC., USES.

REGULATIONS 63, ARTICLE 47: Transfers for public, charitable, religious, etc., uses. VIII–19–4201 Ct. D. 59

ESTATE TAX—REVENUE ACT OF 1921—DECISION OF COURT.

DEDUCTION—CHARITABLE BEQUEST—INHERITANCE TAXES.

Where, by the terms of a will, inheritance taxes are payable out of a fund given for charitable uses which is deductible from the value of the gross estate under section 403(a)3 of the Revenue Act of 1921, the amount of the deduction under that subsection is the amount of the charitable gift without reduction by the amount of such taxes.

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS.

B. Preston Clark, Executor, v. *United States of America.*

[July 31, 1928.]

OPINION.

MORTON, J.: The provisions of the Revenue Act of 1921, section 403, under which this case arises are substantially the same as those of the Act of 1918, under which *Edwards* v. *Slocum* (264 U. S., 61 [T. D. 3584, C. B. III–1, 479]) was decided. And the essential question is how far this case is governed by that decision. In *Edwards* v. *Slocum*, the testatrix made certain personal legacies and certain specific bequests to charity. As to some of the legacies she provided that they should be paid free of inheritance taxes. She gave the rest and residue to charity. The will contained no other provisions regarding the payment of inheritance taxes. By the law of New York, the State of domicile, they were under such circumstances payable from the rest and residue. The collector contended that so much of the rest and residue as was required to pay the Federal inheritance taxes was not given to charity and was not therefore an allowable exemption in computing the taxable estate. It was held that this was not the correct view and that the entire rest and residue was exempt, even though part of it might be required and used to pay taxes.

In the present case the testator gave a certain fund to charity and certain other funds and property to individuals; and he expressly directed that inheritance taxes should be paid in equal portions from the fund given to charity and from the funds not so given. Apparently the amount of the tax was about $60,000, for about $30,000 appears to have been payable from the gift to charity. The Commissioner held that this amount was not given to charity; and he accordingly allowed an exemption, not of the whole charity fund, but only of that fund less the $30,000 used to pay the tax. Upon this $30,000 the additional tax in question was levied.

The Government undertakes to distinguish *Edwards* v. *Slocum*, because there the will contained no express provision charging the taxes on the residuary gift to charity, that result being brought about by operation of law, while here the will itself makes one-half the taxes chargeable on the charity fund. This position is said to be supported by a dictum of Judge A. N. Hand, who decided *Edwards* v. *Slocum* in the lower court. In *Edwards* v. *Slocum* the court was plainly of opinion that the incidence of the tax should not be considered in the levying of it. "It (the statute) manifestly assumes that the net estate will be ascertained *before the tax is computed.*" [Italics mine.] (Holmes, J., 264 U. S., at 63.) "As further remarked below, the (Government's) theory departs from the long-established practice of the law not to regard the incidence of a tax in the levying of a tax." (Ibid, p. 63.)

These principles seem to me to have been disregarded in the assessment of this additional tax. Here, as in *Edwards* v. *Slocum*, in order to compute the exemption accurately according to the Government's contention, an algebraic formula would have to be used, involving as there pointed out "two mutually dependent indeterminates" (p. 63)—a construction of the statute which was rejected both by the court of appeals (287 F. R., 651) and by the Supreme Court. It is quite true, as argued, that a slight change in the wording of the will would make the amount of the tax not exempt; but we are dealing with the will as it stands. In *Y. M. C. A.* v. *Davis* (264 U. S., 47) the tax appears to have been assessed on the principle for which the plaintiff contends. In the Revenue Act of 1924 the corresponding section was changed in line with the Government's contention—a slight indication perhaps that as it previously stood the section was not understood by Congress to have that meaning. (Revenue Act of 1924, sec. 303(a)3.)

Judgment for plaintiff.

TITLE IV.—ESTATE TAX. (1918)

DEDUCTIONS—CHARITABLE AND SIMILAR BEQUESTS.

REGULATIONS 37, ARTICLE 53: Public, charitable, and similar bequests. VIII-21-4214 Ct. D. 61

ESTATE TAX—REVENUE ACT OF 1918—DECISION OF SUPREME COURT.

1. DEDUCTION—REMAINDER TO CHARITY UPON A LIFE INTEREST—LIFE TENANT'S POWER TO USE PRINCIPAL.

Where a testator gives the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys" and after her death bequeaths the principal for charitable corporations, and where the income from the residuary estate is sufficient to maintain the widow as required, the provision for her maintenance does not make the gifts to charity so uncertain as to preclude the deduction thereof under section 403(a)3 of the Revenue Act of 1918.

2. SAME—VALUATION OF LIFE INTEREST.

Where a remainder upon a life interest is given to charitable corporations, the value of the life interest at the death of the testator, for the purpose of determining the amount of the deduction for charitable gifts under section 403(a)3 of the Revenue Act of 1918, must be estimated by the use of mortuary tables notwithstanding the accident of the life tenant's death within the year granted for filing the return.

SUPREME COURT OF THE UNITED STATES.

Ithaca Trust Co., Executor, and Trustee Under the Will of Edwin C. Stewart, petitioner, v. *The United States.*

On writ of certiorari to the Court of Claims.

[April 8, 1929.]

OPINION.

Mr. Justice HOLMES delivered the opinion of the court.

This is a suit to recover the amount of taxes alleged to have been illegally collected under the Revenue Act of 1918, February 24, 1919 (ch. 18; 40 Stat., 1057), in view of the deductions allowed by section 403(a)3 (40 Stat., 1098). The Court of Claims denied the claim (64 C. Cls., 686), and a writ of certiorari was granted by this court.

One June 15, 1921, Edwin C. Stewart died, appointing his wife and the Ithaca Trust Co. executors and the Ithaca Trust Co. trustee of the trusts created by his

will. He gave the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." After the death of the wife there were bequests in trust for admitted charities. The case presents two questions, the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under section 403(a)3, supra, in order to ascertain the estate tax, can not be allowed. (*Humes* v. *United States*, 276 U. S., 487, 494 [T. D. 4185, C. B. VII–2, 378].) This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs.

The second question is raised by the accident of the widow having died within the year granted by the statute, section 404, and regulations, for filing the return showing the deductions allowed by section 403, the value of the net estate and the tax paid or payable thereon. By section 403(a)3 the net estate taxed is ascertained by deducting among other things gifts to charity such as were made in this case. But as those gifts were subject to the life estate of the widow, of course their value was diminished by the postponement that would last while the widow lived. The question is whether the amount of the diminution, that is, the length of the postponement, is to be determined by the event as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. See *Hooper* v. *Bradford* (178 Mass., 95, 97). The tax is on the act of the testator, not on the receipt of property by the legatees. (*Young Men's Christian Association* v. *Davis*, 264 U. S., 47, 50; *Knowlton* v. *Moore*, 178 U. S., 41, 49, and passim; *New York Trust Co.* v. *Eisner*, 256 U. S., 345, 348, 349; *Edwards* v. *Slocum*, 264 U. S., 61 [T. D. 3584, C. B. III–1, 479].) Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. See *International Harvester Co.* v. *Kentucky* (234 U. S., 216, 222). Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future, and the value is no less real at that time if later the prophecy turns out false than when it comes out true. See *Lewellyn* v. *Electric Reduction Co.* (275 U. S., 243, 247); *New York* v. *Sage* (239 U. S., 57, 61). Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it can not be done, but that the value of the wife's life interest must be estimated by the mortuary tables. Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act.

Judgment reversed.

GROSS ESTATE—INSURANCE.

REGULATIONS 70, ARTICLE 26: Insurance in favor of the estate. VIII–25–4248 Ct. D. 72

ESTATE TAX—REVENUE ACT OF 1918—DECISION OF COURT.

GROSS ESTATE—PROCEEDS OF INSURANCE—POLICIES ISSUED BEFORE ANY ESTATE TAX ACT.

The amount received by an executor as insurance under policies taken out by the decedent upon his own life before the enactment of any Federal Estate Tax Act should be included in determining the value of the gross estate under section 402(f) of the Revenue Act of 1918.

COURT OF CLAIMS OF THE UNITED STATES.

John L. Mimnaugh, jr., Executor of the Will of John L. Mimnaugh, deceased, v. *The United States.*

[December 3, 1928.]

OPINION.

Moss, Judge, delivered the opinion of the court.

Plaintiff, John L. Mimnaugh, jr., executor of the will of John L. Mimnaugh, deceased, filed an estate-tax return for the estate of decedent and paid on the net value of said estate the tax shown to be due thereon the sum of $65,994.45. Thereafter the Commissioner of Internal Revenue assessed against said estate an additional tax of $44,077.36, which was paid. Plaintiff filed a claim for refund in the sum of $41,257.36, which was rejected. This action is for the recovery of said amount.

The basis of plaintiff's claim is the alleged error of the Commissioner in the valuation placed upon three certain parcels of real estate and upon the value of certain miscellaneous property, and also upon the value of 350 shares of stock in the Palmetto National Bank; and upon the further ground that the Commissioner erroneously included in the gross estate the amount of the proceeds of life insurance paid on policies taken out by plaintiff's decedent on his own life.

The parcel of real estate located on the northwest corner of Main and Hampton Streets, Columbia, S. C., known as the store property, was valued by the executor in his return at $157,500, and by the Commissioner at $300,000; the property located at the southeast corner of said streets, known as the hotel property, was valued by the executor at $157,500, and was increased by the Commissioner to $250,000; and the parcel located at the southwest corner of Blanding and Barnwell Streets was valued by the executor at $15,000, and was increased by the Commissioner to $20,000.

The executor returned the shares of stock in the Palmetto National Bank as of no value, and the Commissioner determined its value to be $59,500. The miscellaneous property referred to, consisting of stock of merchandise, fixtures in storeroom, accounts due, delivery trucks, and other personal property, was valued by the executor at $105,186.25, and was increased by the Commissioner to $225,000.

In computing the value of the gross estate the Commissioner included the proceeds of certain life insurance policies aggregating $50,000, which plaintiff contends was error.

At the recent hearing of this case, the question having arisen as to the jurisdiction of this court to inquire into the action of the Commissioner in determining the value of property for the purpose of computing the estate tax, counsel for the parties hereto were requested by the court to file briefs on that subject, and they have done so. Whatever doubt may have existed on this point, it seems now from an examination of the authorities cited by counsel on both sides to be a settled principle that the courts have jurisdiction to review the determination of the Commissioner on the question of the value of property for purposes of taxation. The Department of Justice has consistently followed the rule that the Commissioner's findings in this respect are only prima facie correct and are not conclusive on the courts. Inasmuch as the parties are in agreement on this point, no further discussion of the question will be indulged.

The two larger parcels of property, known as the store property and the hotel property, were each valued in the return at $157,500. Plaintiff's own evidence establishes a value for the store property of not less than $262,500 and for the hotel property not less than $210,000. As to all three parcels of real estate, and as to the miscellaneous personal property, the evidence amply sustains the values determined by the Commissioner.

The Commissioner determined the value of the Palmetto National Bank stock to be $170 per share. Plaintiff contends that said stock had no value as of the date of the death of the testator, January 9, 1921. The Palmetto National Bank failed in July, 1923, some two and one-half years after the death of plaintiff's decedent, and its assets and liabilities were taken over by the Columbia National Bank, and its entire surplus and capital, amounting to $1,256,000,

were at once charged off. There was much worthless paper in the assets of the bank. Stockholders of the Columbia National Bank contributed $250,000 to cover the losses of the defunct bank. Later a further assessment of $500,000 was made against said stockholders. From these facts concerning the condition of its affairs in July, 1923, it was the conclusion of plaintiff's chief witness on that subject that the stock had no value in January, 1921. It appears, however, that the appraisers appointed by the probate court of the county of decedent's residence valued said stock at $52,500 for the 350 shares as of February 28, 1921, and other evidence shows that sales of such stock were made at $170 on or about January 9, 1921. Said stock was not listed on any stock exchange. In computing the gross value of decedent's estate the Commissioner determined the value of said stock to be $59,500. It is the contention of plaintiff that it had no value. The burden is on plaintiff to prove its contention. The evidence does not establish plaintiff's claim that it had no value, nor is it satisfactorily shown that it had a less value than that determined by the Commissioner.

The remaining question for consideration is the contention of plaintiff that the proceeds of certain policies of life insurance on the life of plaintiff's decedent, amounting to $50,000, should not have been included in the gross estate by the Commissioner in computing the value of said gross estate. In support of this contention plaintiff relies wholly upon the decision of the United States Supreme Court in the case of *Lucellyn v. Frick* (268 U. S., 238 [T. D. 3715, C. B. IV-1, 322]), plaintiff's contention being that the court in that case held that life insurance taken out before the passage of any estate tax law may not properly be included in the gross estate. The question in this case is clearly distinguishable from that involved in the Frick case. In that case there were outstanding at the time of the death of the testator, Henry C. Frick, 11 policies of insurance upon his life, 4 of which were payable to his wife and 7 to his daughter. The following facts with reference to said policies were agreed:

"Henry C. Frick died on December 2, 1919, and his will was admitted to probate on December 6. There were outstanding policies upon his life, four payable to his wife and seven to his daughter. The total amount received under them was $474,629.52, and as his estate apart from this was more than $10,000,000, an additional tax of $108,657.88, or 25 per cent of the sum received less the statutory deduction of $40,000, was required to be paid. All the policies were taken out before the Revenue Act was passed. The largest one, for $114,000, was a paid-up policy issued in 1901, payable to Mrs. Frick without power in Mr. Frick to change the beneficiary. Another, similar so far as material, was for $50,000. Others were assigned or the beneficiary named (Frick's estate) was changed to Frick's wife or daughter before the date of the statute. All premiums were paid by Mr. Frick, and some seem to have been paid after the statute went into force."

Plaintiff's contention is obviously based upon what we conceive to be a misconception of the meaning of certain language appearing in the opinion of the court in that case, to wit:

"Not only are such doubts avoided by construing the statute as referring only to *transactions taking place after it was passed*, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." [Our italics.]

The "*transactions taking place after it was passed*" obviously refer to transactions with respect to the policies after they were taken out. In that case it was sought to impose the estate tax upon life insurance on the life of the testator, payable, either by original contract or by assignment, to the wife and daughter. The testator, prior to the enactment of any Estate Tax Act, had divested himself and his estate of every vestige of interest in said policies or the proceeds thereof, and these are the *transactions* which the court was considering when it used the language quoted above. In the present case the policies were all payable to the estate of the decedent, and the proceeds thereof in the hands of his executor were, under the provisions of section 402(a) of the Revenue Act of 1918 (40 Stat., 1057), "subject to the payment of the charges against his estate, and the expenses of its administration, and * * * subject to distribution as part of his estate." The principle that the proceeds of life insurance payable to a decedent or his estate constitute assets of the estate seems to be well settled. It has been held that even when the policy is

payable to a beneficiary, the proceeds of such policy are still assets of the estate if the decedent has reserved the power to change the beneficiary. (*Cohen* v. *Samuels*, 245 U. S., 50; *Gaither* v. *Miles*, 268 Fed., 692; Knoedler's Estate, 140 N. Y., 377, 35 N. E., 601; Voorhees' Estate, 193 N. Y. Supp., 168). Other cases to the same effect are cited in defendant's brief. We are of the opinion that the proceeds of the insurance policies involved herein were properly included by the Commissioner in the gross estate of plaintiff's decedent. It follows, from the views hereinabove expressed, that the plaintiff's petition must be dismissed. It is so adjudged and ordered.

TITLE II.—ESTATE TAX. (1916)

THE GROSS ESTATE.

REGULATIONS 37 (1917), ARTICLE VII. VIII–18–4194
Ct. D. 57

ESTATE TAX—REVENUE ACT OF 1916—DECISION OF COURT.

GROSS ESTATE—DEVISE IN LIEU OF DOWER.

Where, under the laws of Kentucky and Ohio, there has been an election to take property devised in lieu of dower, the value of the property so taken should be included in the gross estate under section 202(a) of the Revenue Act of 1916.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Florence S. Schuette, as Executrix of the Estate of Harry S. Harkness, Deceased, plaintiff, v. *Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, defendant.*

Action at law for refund of alleged excess of Federal estate tax. Trial without a jury upon stipulation of facts.

[January 29, 1929.]

OPINION.

COLEMAN, District Judge: The sole question presented is whether the Federal estate tax should have been reduced because of the existence of the widow's dower rights. The testator, Harry S. Harkness, died on January 23, 1919, leaving a will in which, after directing the payment of his debts, he gave his entire estate, real and personal, to his widow, who has since qualified as executrix and is the present plaintiff. A part of the real estate valued at $218,333 was located in Kentucky, and another part valued at $13,065 was located in Ohio. Under the statutes of both these States the widow had a dower right for which the Treasury Department refused to make any deduction in fixing the amount of the tax. It was stipulated that if an allowance should have been made for these dower interests, the tax paid was $10,396.73 in excess of what it should have been and judgment should be granted to the plaintiff in that sum.

Under the present law as embodied in the Revenue Act of 1919, which became effective on February 24, 1919, about a month after the testator's death, this question could not arise, because that Act expressly provides that there shall be no deduction on account of the existence of dower rights. The statute in effect at the time of this testator's death, Revenue Act of 1916, which governs this decision, made no mention of dower rights, but provided in section 202—

"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."

This provision has been held to require a deduction from the value of the real property equal to the value of the widow's dower because the latter does not pass by succession at the husband's death. (*Randolph* v. *Craig*, 267 Fed., 993.) It has, however, been held by Judge A. N. Hand, sitting as a district judge, that even though there may have been dower rights at the time of the testator's death, if the widow thereafter waives them no deduction from the value of the property is proper under this section. (*Title Guarantee & Trust Co.* v. *Edwards*, 290 Fed., 617; appeal dismissed 263 U. S., 672.)

In the present case there was no admeasurement of dower, but the widow taking all the real property has sold the parts here involved. Two points are argued: (1) Did she elect to waive her dower, and (2) if she did, does that prevent the deduction which would otherwise be proper under *Randolph* v. *Craig*, supra?

(1) The Kentucky statutes provide:

"After the death of either the husband or wife, the survivor shall have an estate for his or her life in one-third of all the real estate of which he or she, or anyone for his or her use, was seized of an estate in fee simple during the coverture, unless the right to such dower or interest shall have been barred, forfeited, or relinquished." (Carroll's Kentucky Statutes, 1922, sec. 2132.)

"When a widow claims her dowable and distributable share of her husband's estate, she shall be charged with the value of any devise or bequest to her by his will; or she may, though under full age, relinquish what is given her by the will, and thereupon receive her dower and distributable share as if no will had been made; but such relinquishment must be made within 12 months after the probable. etc. * * * *Nothing herein shall preclude the widow from receiving her dowable and distributable share, in addition to any devise or bequest made to her by the will, if such is the intention of the testator, plainly expressed in the will, or necessarily inferable therefrom.*" (Carroll's Kentucky Statutes, 1922, sec. 1404.)

The Ohio statutes provide:

"A widow or widower who has not relinquished or been barred of it, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage." (Throckmorton's Ohio General Code, 1926, sec. 8606.)

"If provision be made for a widow or widower in the will of the deceased consort, after the probate of such will the probate court forthwith shall issue a citation to such widow or widower to appear and elect whether to take such provision or to be endowed of the lands of the deceased consort and take the distributive share of the personal estate." (Throckmorton's Ohio General Code, 1926, sec. 10566.)

"Such election must be made within one year from the date of the service of such citation." (Id., sec. 10567.)

"No widow or widower shall be entitled both to dower and the provisions of the will in her or his favor, *unless it plainly shows that such provision was intended to be in addition to dower and a distributive share of the estate.*" (Id., sec. 10569.)

"* * * If the widow or widower fails to make such election * * * then it shall be deemed that she or he has elected to take under the will and persons may deal with property of the decedent in accordance therewith * * *." (Sec. 10571.)

"If the widow or widower elects to take under the will, she or he shall be thereby barred of dower and such share or personalty and shall take under the will alone unless as provided in section 10569 * * *." (Sec. 10572.)

It is thus seen that under the statutes of Kentucky the widow can not accept a gift under her husband's will and retain her dower rights unless his intention that she have both be "plainly expressed in the will or necessarily inferable therefrom"; and under the Ohio statutes this is likewise true, unless the will "plainly shows" the testator's intention that she have both. In both States where an election on her part is necessary if she fails to make one expressly, she is presumed to take under the will and to have waived her dower.

Counsel for plaintiff ably and incisively argues that under these statutes a widow is not put to election between the provisions of the will and her dower rights where a testator has given her his entire estate after the payment of his debts. Unfortunately, however, the weight of authority in those States is

against his contention. (*Carpenter's Executors* v. *Kearns*, 4 Ky. Law (Part 2), 825; *Harrison* v. *Taylor's Adm.*, 51 S. W., 193; *Schnabel* v. *Schnabel's Executor*, 108 Ky., 536; *Watson* v. *Christian*, 12 Bush, 524; *Grider* v. *Eubanks*, 75 Ky., 517; Opinions of Attorney General of Ohio, 1920, vol. 1, page 8834.) This is more true of Kentucky than of Ohio, but counsel for both sides seem to agree that the same rule should be applied and the stipulation of facts does not make it possible to direct judgment based on any distinction between the two States. On a question of this sort we ought to be guided by the decisions in the courts of the State which has enacted the law involved, rather than by our own construction. I therefore hold that the plaintiff was required to elect and did actually elect to take under the will and to waive her dower rights.

(2) The effect of plaintiff's waiver of her dower upon the right of the estate to claim a deduction under the Revenue Act has been established by Judge A. N. Hand's decision in *Title Guarantee & Trust Co.* v. *Edwards*, supra. Here also counsel for plaintiff advances cogent reasons for permitting the deduction even after the waiver of the dower rights, but I feel that the law is settled so far as this district is concerned by the above decision. While it is true that in that case there was an express provision in the will requiring an election, that is no ground for distinguishing the case, because if my conclusions above are correct, there was an election in the present case brought about by provisions of the statutes rather than of the will. Judge Hand's decision has been followed by the United States Board of Tax Appeals (*Jacobs* v. *The Commissioner of Internal Revenue*, B. T. A. decision No. 3196), and is supported by a decision of the United States District Court for the Eastern District of Tennessee (*Briscoe* v. *Craig*, decided June 20, 1927 [T. D. 4074, C. B. VI–2, 369]).

Judgment will therefore be directed for the defendant. There having been no jury sworn, it will be necessary to make findings, which will be the same as the stipulation of facts, and I direct they be settled on notice.

I feel constrained to express appreciation of the exceptional merit of the briefs submitted by counsel for the plaintiff and by the assistant district attorney.

CAPITAL STOCK TAX RULINGS.

TITLE VII.—SPECIAL TAXES. (1924)

REGULATIONS 64 (1924), ARTICLE 11: Basis of the tax: "Carrying on or doing business." VIII-24-4236 Ct. D. 67

CAPITAL STOCK TAX—REVENUE ACT OF 1924—DECISION OF COURT.

"DOING BUSINESS"—HOLDING CORPORATION.

A holding corporation which assumes the management, directs the policies, and actively participates in the everyday affairs of its subsidiary is "doing business" and is subject to the capital stock tax imposed by the Revenue Act of 1924.

COURT OF CLAIMS OF THE UNITED STATES.

Ward Baking Corporation v. *The United States.*

[December 3, 1928.]

OPINION.

BOOTH, Chief Justice, delivered the opinion of the court.

In this tax case the plaintiff, a Maryland corporation, sues to recover $59,085 assessed and paid by it upon the capital stock of the corporation for the years ending June 30, 1925, and June 30, 1926. The applicable section of the Revenue Act of 1924, under which the taxes were collected (43 Stat., 325), reads as follows:

"SEC. 700. (a) On and after July 1, 1924, in lieu of the tax imposed by section 1000 of the Revenue Act of 1921—

"(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * *

"(b) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or, in the case of a foreign corporation, not engaged in business in the United States) during the preceding year ending June 30. * * *."

The plaintiff's right of recovery is predicated upon an allegation that it was not engaged in business during the taxable years in question. The record involves two corporations, the Ward Baking Co. and the Ward Baking Corporation, the latter, i. e., the plaintiff, coming into existence, as plaintiff contends, as a holding company, limiting its activities substantially to the single purpose of receiving and disbursing dividends from its stock holdings in the Ward Baking Co.

On December 6, 1923, William B. Ward transmitted to George S. Ward, president of the Ward Baking Co., a written offer to purchase not less than 51 per cent of the stock of his company. The price was fixed at $100 per share for preferred and $200 per share for common stock. The usual guarantees for the performance of the contract were written into the offer and the same was to expire on December 31, 1923, with an express reservation to accept stock on the same terms subsequent to that date. Acceptance of the offer was also conditioned upon the resignation of the directors and officers of the baking com-

pany, as well as the right to verify the stated value of the stock as of November 19, 1923.

Without repetition of tedious details and figures indicating value, it is sufficient to say that Mr. Ward by the offer desired to secure a majority of the baking company's stock in order to organize a new corporation, through which he anticipated financing the transaction, and set up a holding company. The offer was accepted and the transaction carried out as per agreement. The plaintiff corporation was duly organized and incorporated under the laws of Maryland. It is now and has been since its organization the owner of practically all the outstanding stock of the Ward Baking Co.

The issue in this case is not a new one. Contentions identical in all respects have been many times before the courts, and we think the precedents are ample and point out with a degree of exactness the established rules for determining the fact whether the corporation claiming exemption from taxation was or was not "engaged in business." If the activities of the corporation were of a passive character, restricted to the management and control of its own peculiar affairs, and do not extend to the affairs of the parent corporation in such a way as to make the latter in fact more of a subsidiary and dependent organization than an independent organization, it may not escape the classification of one engaged in business. The charter of the plaintiff corporation was comprehensive; it authorized a broad field of corporate activity, and if it so employed its corporate powers as to assume the management of, direct the policies, and actively participate in the everyday affairs of the parent company, the corporation was obviously doing more than collecting and disbursing dividends received upon the stock which it owned. If such be the case the holding company is, as a matter of fact, the dominant factor in the mutual interests of the two companies, and upon its activities the course pursued depends. As the Supreme Court said in the Chile Copper Co. case (270 U. S., 452, 455 [T. D. 3857, C. B. V–1, 410]): "The activities and situation must be judged as a whole. Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Co. It was its brain or at least the efferent nerve without which that company could not move." In the Von Baumbach case (242 U. S., 503, 516), the Supreme Court said: "The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes." This court had a case somewhat similar in principle before it in the *Chevrolet Motor Co.* v. *The United States* (64 C. Cls., 211 [T. D. 4123, C. B. VII–1, 329]), wherein one corporation was active not only in its own affairs, but loaned and employed its corporate powers in promoting the affairs of another corporation, a case where mutuality of interest induced reciprocal activities, and in that case, as we believe in this, the plaintiff company was engaged in and doing business.

The record herein discloses that the plaintiff company was, as claimed, organized to acquire the stock of the Ward Baking Co. To accomplish the purchase thereof the plaintiff borrowed from the Ward Baking Co. and from banks large sums of money, and projected itself into the active management of its subsidiary. If real estate was acquired by the Ward Baking Co. to expand its business, the plaintiff company first passed upon the wisdom and necessity for so doing. Patent rights were purchased by the Ward Baking Co. upon the recommendation of the plaintiff. The extent and policy of advertising campaigns were reviewed by the plaintiff, and throughout all the years involved the plaintiff continued to participate and take a lively and directing interest in practically every step taken by the baking company. These transactions, involving sometimes sums in excess of a million dollars, everyone of which, from the standpoint of importance, required the exercise of business activity, the employment of much more effort than attention to its stock holdings, are convincing proof that the plaintiff not only did engage in business, but had in mind as the one purpose of its organization the direction and control of the Ward Baking Co. As a matter of fact, we think the record warrants an inference that, following the organization of the plaintiff corporation, the Ward Baking Co. limited its activities to baking bread, and the plaintiff directed and controlled its fiscal and general business policies in all their aspects without interference from the company. "The cases," as said by the Supreme Court,

"must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes."

Plaintiff, we think, misconceives the applicability of many of the cases cited to sustain its contention—too many to justify detailed review. The mere fact that one corporation did this and another that is not alone decisive of the issue. The courts, we think, establish the principle that a corporation may not escape taxation upon this ground, when it is manifest from the record that it is actively engaged in expanding the trade, increasing the assets and dividends of the corporation whose stock is its only asset, by assuming management and control of its subsidiary. It was not alone advice given by the plaintiff that determined policies the plaintiff assumed, but it continuously busied itself with the baking company's affairs, and took advantage of its corporate powers to maintain a corporate organization for the sole purpose of doing the identical thing it did do. It is not the volume of business done, but rather the doing of business, the act of engaging continuously in business activities which are not merely incidental but substantial and redound in increased profits by reason of their performance.

It would be difficult to read the record herein and come to any other conclusion than the one which seems to establish the fact that the plaintiff herein was an active, aggressive organization, lending all its energy and business acumen to the expansion of the baking business and reaching out for increased volume of receipts in every legitimate way, for the sole purpose of augmenting by its own activities the value of the great amount of baking company stock it held.

The petition will be dismissed. It is so ordered.

MISCELLANEOUS TAX RULINGS.

TITLE VIII.—STAMP TAXES. (1924)

REGULATIONS 71, ARTICLE 39: Returns by clearing houses. VIII-25-4246 T. D. 4268

STAMP TAXES—TRANSFERS OF STOCK.

Regulations 71, article 39, amended.

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

To Collectors of Internal Revenue and Others Concerned:

Article 39 of Regulations 71 is hereby amended by adding thereto the following:

(g) Where the methods provided by either subdivision (a) or (b) of this article are followed, an indorsement should be attached to, or stamped on, all certificates of stock presented to the transfer agent covering transfers which are to be made on the books of any corporation, reading as follows:

"It is hereby certified that requisite Federal stamps on the transfer of —— shares of this certificate have been affixed to clearing house sheet dated ——— filed with the ——— Stock Exchange Clearing House.

———————————,
Member ——— Stock Exchange."

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

Approved June 17, 1929.

OGDEN L. MILLS,
Acting Secretary of the Treasury.

TOBACCO.

REGULATIONS 8(1928), ARTICLE 54: Cancellation of tobacco and snuff stamps. VIII-11-4143 T. D. 4263

CANCELLATION OF TOBACCO AND SNUFF STAMPS.

Tobacco and snuff stamps of denomination 4 ounces and smaller so affixed as to seal the packages and as to be broken before contents are removed, need not be further canceled. Regulations No. 8, revised, 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 54 of Regulations No. 8, revised April 24, 1926, is amended to read as follows:

(a) Except as provided in subdivision (d) of this article in respect to stamps affixed to such packages of tobacco and snuff as are specified therein, each stamp affixed to a package of manufactured tobacco or snuff by the manufacturer thereof shall be canceled in the following manner.

At the end of article 54 a new subdivision is added, as follows:

(d) Stamps of the proper denomination and class which are so affixed to packages of tobacco or snuff weighing not more than 4 ounces as effectually to seal the packages and render it impossible to remove the contents without breaking the stamps need not be canceled as provided in subdivision (a).

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved March 8, 1929.

A. W. MELLON,
Secretary of the Treasury.

MISCELLANEOUS RULINGS.

OLEOMARGARINE.

VIII–2–4063
MS. 86

Schedule of oleomargarine produced and materials used during the month of November, 1928, as compared with November, 1927.

	November, 1928.	November, 1927.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	29,126,253	24,552,772
Ingredient schedule for uncolored oleomargarine:		
Butter	234,655	209,524
Cocoanut oil	15,521,515	11,919,347
Corn oil		600
Cottonseed oil	2,347,130	2,101,779
Edible tallow	2,570	2,700
Milk	8,258,095	6,601,169
Mustard oil	1,390	6,455
Neutral lard	1,971,330	1,992,547
Oleo oil	3,562,446	3,571,764
Oleo stearine	487,370	450,837
Oleo stock	105,437	154,046
Palm oil	95,123	54,792
Palm-kernel oil	1,620	18,302
Peanut oil	654,457	479,724
Salt	2,405,734	2,023,959
Sesame oil		5,350
Soda	10,134	8,160
Vanilla extract		16
Total	35,659,006	29,601,071
Total production of colored oleomargarine	1,442,957	1,360,665
Ingredient schedule for colored oleomargarine:		
Butter	2,376	1,554
Cocoanut oil	504,578	453,569
Color	1,647	1,715
Cottonseed oil	273,472	158,351
Milk	672,513	432,577
Mustard oil		140
Neutral lard	274,708	154,725
Oleo oil	514,645	308,776
Oleo stearine	16,100	8,410
Oleo stock	7,468	13,217
Palm oil	24,075	20,486
Palm-kernel oil		5,468
Peanut oil	32,655	29,805
Salt	141,045	111,786
Soda	148	119
Total	2,465,430	1,700,698

VIII–5–4093
MS. 87

Schedule of oleomargarine produced and materials used during the month of December, 1928, as compared with December, 1927.

	December, 1928.	December, 1927.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	27,324,690	26,035,869
Ingredient schedule for uncolored oleomargarine:		
Butter	222,810	222,227
Cocoanut oil	14,340,625	13,063,320
Corn oil		9,600
Cottonseed oil	2,205,202	1,999,389
Edible tallow	1,417	6,800
Milk	7,865,147	6,874,898
Mustard oil	1,000	5,092
Neutral lard	2,110,445	2,149,642
Oleo oil	3,495,261	3,486,720
Oleo stearine	469,953	417,024
Oleo stock	92,172	124,935
Palm oil	79,952	32,974
Palm-kernel oil	620	23,507
Peanut oil	596,251	544,220
Salt	2,152,464	2,169,769
Sesame oil		14,963
Soda	9,612	8,880
Vanilla extract		23
Total	33,642,931	31,153,983
Total production of colored oleomargarine	1,574,700	1,425,082
Ingredient schedule for colored oleomargarine:		
Butter	1,492	1,643
Cocoanut oil	498,054	485,821
Color	1,764	1,897
Cottonseed oil	316,469	154,777
Milk	758,475	488,297
Neutral lard	324,471	153,798
Oleo oil	577,811	321,621
Oleo stearine	17,790	28,580
Oleo stock	6,990	14,110
Palm oil	30,540	24,218
Palm-kernel oil		4,222
Peanut oil	32,777	32,105
Salt	155,321	110,083
Soda	146	154
Total	2,722,100	1,821,326

VIII–11–4144
MS. 88

Schedule of oleomargarine produced and materials used during the month of January, 1929, as compared with January, 1928.

	January, 1929.	January, 1928.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	28, 029, 386	24, 818, 463
Ingredient schedule for uncolored oleomargarine:		
Butter	231, 736	202, 922
Cocoanut oil	15, 004, 322	12, 707, 811
Corn oil		2, 700
Cottonseed oil	2, 120, 946	2, 003, 415
Edible tallow	2, 070	5, 100
Milk	7, 558, 571	6, 719, 671
Mustard oil	790	4, 260
Neutral lard	2, 022, 740	2, 135, 362
Oleo oil	3, 358, 916	3, 157, 702
Oleo stearine	380, 801	433, 535
Oleo stock	83, 397	110, 194
Palm oil	106, 237	80, 630
Palm-kernel oil	850	19, 785
Peanut oil	635, 896	509, 354
Salt	2, 202, 250	2, 107, 846
Sesame oil		1, 050
Soda	8, 894	8, 032
Vanilla extract		22
Total	33, 718, 416	30, 209, 391
Total production of colored oleomargarine	1, 444, 230	1, 386, 231
Ingredient schedule for colored oleomargarine:		
Butter	1, 120	2, 432
Cocoanut oil	450, 993	482, 983
Color	27, 799	1, 882
Cottonseed oil	161, 948	158, 339
Milk	477, 533	470, 484
Neutral lard	164, 702	153, 652
Oleo oil	327, 899	296, 622
Oleo stearine	6, 665	35, 375
Oleo stock	11, 390	11, 427
Palm oil	35, 395	24, 104
Palm-kernel oil	283	3, 586
Peanut oil	34, 186	34, 740
Salt	116, 388	111, 401
Soda	103	123
Total	1, 816, 404	1, 787, 160

VIII–14–4164
MS. 89

Schedule of oleomargarine produced and materials used during the month of February, 1929, as compared with February, 1928.

	February, 1929.	February, 1928.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	27, 578, 790	26, 223, 558
Ingredient schedule for uncolored oleomargarine:		
Butter	227, 437	211, 095
Cocoanut oil	14, 789, 335	13, 543, 340
Corn oil		8, 550
Cottonseed oil	2, 139, 674	1, 927, 622
Edible tallow	2, 545	11, 889
Milk	7, 368, 419	7, 645, 689
Mustard oil	915	3, 185
Neutral lard	1, 889, 787	2, 142, 143
Oleo oil	3, 364, 405	3, 239, 093
Oleo stearine	421, 139	393, 473
Oleo stock	77, 524	100, 455
Palm oil	107, 812	79, 266
Palm-kernel oil		26, 424
Peanut oil	604, 381	588, 105
Salt	2, 286, 351	2, 120, 385
Soda	9, 927	9, 001
Vanilla extract		19
Total	33, 289, 650	32, 049, 734
Total production of colored oleomargarine	1, 364, 593	1, 400, 752
Ingredient schedule for colored oleomargarine:		
Butter	2, 644	505
Cocoanut oil	431, 806	465, 956
Color	2, 036	1, 657
Cottonseed oil	174, 370	186, 252
Milk	466, 392	470, 865
Neutral lard	161, 325	188, 501
Oleo oil	349, 007	309, 033
Oleo stearine	11, 890	15, 010
Oleo stock	8, 378	7, 246
Palm oil	2, 689	24, 302
Palm-kernel oil		2, 802
Peanut oil	28, 368	33, 135
Salt	107, 939	111, 341
Soda	86	143
Total	1, 746, 930	1, 816, 748

VIII–18–4191
MS. 90

Schedule of oleomargarine produced and materials used during the month of March, 1929, as compared with March, 1928.

	March, 1929.	March, 1928.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	28, 191, 553	25, 830, 799
Ingredient schedule for uncolored oleomargarine:		
Butter	240, 561	215, 427
Cocoanut oil	15, 075, 628	12, 897, 215
Corn oil		5, 400
Cottonseed oil	2, 185, 451	2, 035, 586
Edible tallow	1, 765	8, 705
Milk	7, 611, 506	7, 284, 857
Mustard oil		3, 480
Neutral lard	1, 772, 550	2, 136, 579
Oleo oil	3, 612, 217	3, 342, 194
Oleo stearine	465, 961	474, 502
Oleo stock	79, 585	104, 743
Palm oil	100, 798	74, 549
Palm-kernel oil		10, 048
Peanut oil	569, 143	543, 793
Salt	2, 305, 363	2, 135, 018
Soda	6, 692	7, 072
Vanilla extract		20
Total	34, 030, 220	31, 279, 188
Total production of colored oleomargarine	1, 526, 729	1, 456, 741
Ingredient schedule for colored oleomargarine:		
Butter	1, 260	287
Cocoanut oil	511, 306	483, 565
Color	2, 185	1, 479
Cottonseed oil	201, 474	178, 262
Milk	521, 330	477, 149
Neutral lard	172, 965	183, 055
Oleo oil	385, 779	299, 588
Oleo stearine	13, 922	23, 210
Oleo stock	13, 820	8, 529
Palm oil	45, 670	24, 160
Palm-kernel oil		1, 871
Peanut oil	27, 547	31, 234
Salt	118, 127	116, 316
Soda	168	251
Soya-bean oil		150
Total	2, 015, 553	1, 829, 106

VIII–23–4228
MS. 91

Schedule of oleomargarine produced and materials used during the month of April, 1929, as compared with April, 1928.

	April, 1929.	April, 1928.
	Pounds.	*Pounds.*
Total production of uncolored oleomargarine	27, 237, 173	22, 989, 710
Ingredient schedule for uncolored oleomargarine:		
Butter	229, 932	185, 627
Cocoanut oil	14, 472, 411	11, 838, 107
Corn oil		3, 900
Cottonseed oil	2, 189, 680	1, 856, 396
Edible tallow	1, 580	6, 780
Milk	7, 395, 456	6, 607, 980
Mustard oil	1, 500	3, 300
Neutral lard	1, 651, 987	1, 707, 630
Oleo oil	3, 638, 191	2, 889, 640
Oleo stearine	480, 861	433, 102
Oleo stock	73, 114	107, 341
Palm oil	103, 216	84, 463
Palm-kernel oil		2, 832
Peanut oil	499, 770	443, 645
Salt	2, 199, 979	2, 119, 840
Soda	8, 961	7, 879
Vanilla extract		19
Total	32, 946, 638	28, 298, 481
Total production of colored oleomargarine	1, 466, 441	1, 300, 807
Ingredient schedule for colored oleomargarine:		
Butter	840	316
Cocoanut oil	459, 699	445, 649
Color	1, 885	1, 244
Cottonseed oil	171, 846	156, 647
Milk	451, 148	426, 954
Neutral lard	174, 848	179, 026
Oleo oil	369, 417	282, 686
Oleo stearine	14, 667	10, 410
Oleo stock	12, 587	10, 887
Palm oil	43, 893	26, 600
Palm-kernel oil		644
Peanut oil	26, 035	27, 537
Salt	113, 546	105, 559
Soda	121	207
Total	1, 840, 532	1, 674, 366

MISCELLANEOUS.

VIII-2-4066
T. D. 4254

INCOME AND PROFITS TAXES.

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

To Collectors of Internal Revenue and Others Concerned:

The last sentence of subdivision (b) of Article VI, Treasury Decision 4168 (Treasury Decisions, Vol. 53, No. 26, p. 65 [C. B. VII-2, 413]), is hereby amended to read as follows:

Except where the tax has already been paid, the owner will be required in each case to furnish a bond as provided in subdivision (f) of this article.

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

Approved January 7, 1929.

A. W. MELLON,
Secretary of the Treasury.

VIII-14-4166

[H. R. 15848. PUBLIC, NO. 1034. SEVENTIETH CONGRESS.]

An Act making appropriations to supply urgent deficiencies in certain appropriations for the fiscal year ending June 30, 1929, and prior fiscal years, to provide urgent supplemental appropriations for the fiscal year ending June 30, 1929, and for other purposes.

* * * * * * *

TREASURY DEPARTMENT.

BUREAU OF INTERNAL REVENUE.

Refunding taxes illegally collected: For an additional amount for refunding taxes illegally or erroneously collected, as provided by law, including the payment of claims for the fiscal year 1929 and prior years, $75,000,000: *Provided*, That a report shall be made to Congress by internal-revenue districts, and alphabetically arranged, of all disbursements hereunder in excess of $500 as required by section 3 of the Act of May 29, 1928 (45 Stat., p. 996), including the names of all persons and corporations to whom such payments are made, together with the amount paid to each: *Provided*, That no part of the foregoing appropriation shall be used to pay any refund of an income or profits tax pursuant to a claim allowed after the enactment of this Act in excess of $20,000 (other than payments in cases in which a suit in court or a proceeding before the Board of Tax Appeals has been or shall be instituted or payments in cases determined upon precedents established in decisions of courts or the Board of Tax Appeals) unless a hearing has been held before a committee or official of the Bureau of Internal Revenue; and the

decision of the Commissioner of Internal Revenue in any such refund allowance in excess of $20,000 shall be a public record.

* * * * * * *

Approved March 4, 1929.

VIII–18–4190
Mim. 3724

Amendments to the conference and practice requirements of the Bureau of Internal Revenue.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 16, 1929.

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

The first sentence of Paragraph IV of the Conference and Practice Requirements of the Bureau of Internal Revenue, revision of July 1, 1925, published in pamphlet form and in Cumulative Bulletin IV–2, page 320, is hereby amended to read as follows:

POWER OF ATTORNEY REQUIREMENTS.

IV. Any power of attorney offered in evidence in any case will be accepted only if it is in regular form, and only one power of attorney shall be in effect in any case for a designated taxable year or years, and in such power shall be included the names of all attorneys or agents to whom the taxpayer has delegated authority to represent him.

Paragraph VI is amended to read as follows:

NEW POWER OF ATTORNEY REQUIRED WHEN NEW OR ADDITIONAL ATTORNEYS OR AGENTS RETAINED.

VI. In any case in which a power of attorney has been filed for a given taxable year or years and the taxpayer subsequently desires to authorize other or additional attorneys or agents to represent him before the Bureau with respect to the same taxable year or years, a new power of attorney must be filed, which shall include the names of all attorneys or agents who are authorized to act for such taxpayer. Such new power of attorney shall contain a clause specifically revoking any and all powers of attorney previously filed with respect to the taxable year or years designated therein. However, the revocation by a principal or his legal representatives of authority to prosecute a matter will not be effective, so far as this Bureau is concerned, without the assent of the head of the office before which the matter is pending. Where a matter has been suspended pending the furnishing of evidence for which a call has been made on an attorney or agent, failure on his part to take action thereon within three months from the date of suspension may be deemed by the administrative officer before whom the case is pending cause for refusal to further recognize the authority of the attorney or agent, without notice to him. (See also title "Checks in payment of refunds" in supplement hereof.)

D. H. BLAIR, *Commissioner.*

VIII–19–4199
Mim. 3726

Procedure with respect to submitting inquiries to the Bureau of Internal Revenue regarding tax liability.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., April 25, 1929.

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

Requests are being received daily for rulings and advice upon abstract cases or prospective transactions involving questions of income tax and profits tax liability. These requests are so numerous and the insistence on prompt action so great that it is deemed advisable at this time not to make a ruling in respect to any inquiry except under the following circumstances:

(*a*) The transactions must be completed and not merely proposed or planned.

(*b*) The complete facts relative to the transaction, together with abstracts from contracts, or other documents, necessary to present the complete facts, must be given.

(*c*) The names of all the real parties interested (not "dummies" used in the transaction) must be stated, regardless of who presents the question, whether attorney, accountant, tax service, or other representative.

(*d*) A request for a ruling must be signed by the taxpayer, or, in case he is represented by an attorney or agent, the request must be accompanied by properly executed power of attorney. Banks, however, will not be required to furnish powers of attorney with respect to inquiries affecting their depositors.

(*e*) A copy of a ruling addressed to a taxpayer will not be furnished to his attorney or agent unless the Bureau is specifically authorized to do so by the taxpayer.

D. H. BLAIR, *Commissioner.*

VIII–21–4213
Mim. 3730

Recording of powers of attorney.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 6, 1929.

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

In order that an authentic record may be maintained of the agents and attorneys who are authorized to represent taxpayers before the Bureau of Internal Revenue, all powers of attorney filed subsequent to the date of this mimeograph will be immediately forwarded by the receiving office to Washington marked for the "Attention of IT:E:Sr."

Prior to the forwarding of powers of attorney by the field offices any necessary record will be made.

Queries regarding this order should be marked for the attention of IT:E:CBA.

D. H. BLAIR, *Commissioner.*

[1] VIII–25–4247

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.
Cleveland, Thomas J.	Oklahoma City, Okla.	Sept. 19, 1928	Charged with misappropriation of funds of his employer, obtaining money by false pretenses, and drunkenness. Charges found proven.
Cordin, Cephas W.	Formerly Sawtelle, Calif., now Los Angeles, Calif.	Sept. 19, 1928	Charged with having been disbarred from practice before the Interior Department for disreputable conduct. Charges found proven.
Drabble, R. King	Newark, N. J.	Mar. 21, 1929	Charged with being interested in and profiting by a fraud perpetrated upon a taxpayer client by a partner of said respondent. Charges found proven.
Frost, Charles	New York, N. Y.	July 2, 1928	Charged with having been accused and convicted of the crime of arson in the State of Connecticut and sentenced to serve a term of from one to three years in jail, and charges found proven.
Gibson, Wm. Patrick.	New York, N. Y.	Jan. 12, 1929	Charged with soliciting employment from taxpayers with whom he had no previous contact, and with preparing false return for a taxpayer, receiving and keeping fees for such work, which was abandoned by taxpayer, who employed another practitioner to prepare a correct return. Charges found proven.
Kaderly, May E.	Chattanooga, Tenn.	Aug. 30, 1928	Charged with preparing and filing false income-tax returns. Charges found proven.
Lindsay, Brent A.	Los Angeles, Calif.	Apr. 26, 1929	Charged with having presented false and misleading evidence in a tax case. Charges found proven.
McNamara, Charles L.	Chicago, Ill.	Dec. 21, 1928	Charged with writing threatening letters to a client in a tax case, demanding an extortionate fee, and falsely stating in such letters that a representative of the Government had to be paid out of such fee, and that such taxpayer would go to jail if such fee were not paid. Charges found proven.
Neu, Edmund H.	Kansas City, Mo.	Apr. 26, 1929	Charged with writing and mailing an anonymous letter to an officer of the Internal Revenue Service which contained false statements that certain taxpayers had failed to make proper returns of their income taxes, thereby causing useless examination of records of such taxpayers; also charged with soliciting employment in Federal tax matters from persons with whom he had no previous contact. Charges found proven.
Overmyer, Charles G.	Wichita, Kans.	Apr. 13, 1929	Charged with preparing and filing false Federal income tax returns for taxpayers. Charges found proven.
Showen, Frank G.	Formerly Kansas City, Mo., now Ottawa, Kans.	July 2, 1928	Charged with having been convicted in the United States District Court for the Western Division of the Western District of Missouri for the violation of section 145, United States Criminal Code, and sentenced to a term of 10 months in jail, and charges found proven.

[1] This ruling (4247) includes also rulings Nos. 4058, 4064, 4073, 4085, 4091, 4102, 4110, 4117, 4125, 4134, 4145, 4153, 4158, 4165, 4172, 4178, 4184, 4192, 4200, 4207, 4216, 4222, 4229, and 4239. These rulings have been thus consolidated because publication of each one separately would be largely duplication.

[2] This list includes all attorneys and agents disbarred from practice during the 12-month period July 1, 1928–June 30, 1929, inclusive, and all suspensions in effect during the 6-month period January 1–June 30, 1929, inclusive. It does not include those barred from practice by reason of disapproval of their application for enrollment.

DISBARMENTS—continued.

Name.	Address.	Date of disbarment.	Cause.
Stern, Isador	Newark, N. J	Apr. 26, 1929	Charged with having been indicted for embezzlement of funds of a client and convicted and sentenced to serve a term in prison on such conviction. Charges found proven.
Sullivan, F. J	Formerly Wilmington, N. C., now Sumter, S. C.	Apr. 29, 1929	Charged with preparing false income tax returns for a client, and mailing letters soliciting employment in tax matters to taxpayers with whom respondent had no previous contact. Charges found proven.
Walton, E. M	Detroit, Mich	Apr. 26, 1929	Charged with misappropriation of clients' money in tax cases. Charges found proven.
Watts, Charles J	Milwaukee, Wis	Aug. 4, 1928	Charged with making false income tax returns for taxpayers; also charged with making false and misleading statements of facts in briefs filed with the Bureau of Internal Revenue in tax cases; also charged with advising the taxpayer to make a false income tax return, who followed such advice and filed a false income tax return. Charges found proven.

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.
Berenter, Philip H	Washington, D. C.	6 months, from Mar. 21, 1929.	Charged with addressing and mailing letters soliciting employment in tax matters to taxpayers with whom respondent had had no previous contact. Charges found proven.
Foster, John C	Washington, D. C.	30 days, from Apr. 27, 1929.	Charged with addressing and mailing circular letters, soliciting employment in Federal tax matters, to taxpayers with whom respondent had no previous contact. Charges found proven.
Levine, Samuel	New York, N. Y	6 months, from Sept. 21, 1928.	Charged with preparing false income tax return for a taxpayer. Charges found proven.
Maguire, John B	Shreveport, La	6 months, from Mar. 11, 1929.	Charged with making false income tax returns for a taxpayer; also with making false statements of facts in a brief of protest in a tax case. Charges found proven.
May, Harry P	Formerly of Washington, D. C., now Los Angeles, Calif.	60 days, from Dec. 6, 1928.	Charged with soliciting employment in Federal tax matters of taxpayers with whom he had no previous business or personal association. Charges found proven.
Scher, Charles H	Baltimore, Md	60 days, from Jan. 3, 1929.	Charged with writing, addressing, and mailing postal cards, soliciting employment in tax matters from taxpayers with whom he had no previous business or personal association. Charges found proven.
Yulsman, Benjamin	Philadelphia, Pa	8 months, from July 20, 1928.	Charged with solicitation of employment in Federal tax matters, preparing and filing brief in a tax case containing false statements of fact, and other misconduct in a tax case. Charges found proven.

DISBARMENTS TERMINATED.

The Secretary of the Treasury has ordered that the order of disbarment entered against the following-named persons be terminated as of the date indicated and that their names be restored to the roll of attorneys and agents eligible to practice before the Treasury Department:

Name.	Address.	Remarks.
Hackney, James H.	St. Petersburg, Fla.	Disbarment ordered Oct. 24, 1927; disbarment terminated and good standing restored May 31, 1929.
Horton, Rodney B.	Formerly Savannah, Ga., now Jacksonville, Fla.	Disbarment ordered July 25, 1923; disbarment terminated and good standing restored Jan. 8, 1929.

Resignations from enrollment to practice before the Treasury Department.

The following-named persons have tendered their resignations from enrollment to practice before the Treasury Department. The Secretary of the Treasury has accepted the resignations and ordered their names stricken from the roll of attorneys and agents enrolled to practice before the Treasury Department. They are therefore no longer entitled to practice before the Treasury Department.

Name.	Address.	Designation.	Date of acceptance.	Remarks.
Belknap, Roscoe H.	Boston, Mass.	Agent	Jan. 3, 1929	Without prejudice.
Carpenter, Winthrop L.	do	do	do	Do.
Carroll, Charles J.	do	do	do	Do.
Daler, David	do	do	do	Do.
Descoteaux, George N.	do	do	do	Do.
Dunham, H. Gardner.	do	do	do	Do.
French, Earle M.	do	do	do	Do.
French, Herbert F.	do	do	do	Do.
Glynn, Raleigh I.	do	do	do	Do.
Jacobs, William Robert.	do	do	do	Do.
Kiplinger, W. M.	Washington, D. C.	do	May 8, 1929	Do.
Porter, George W.	Boston, Mass.	do	Jan. 3, 1929	Do.
Robinson, William F.	Minneapolis, Minn.	do	Apr. 8, 1929	Do.
Saunders, David B.	Formerly St. Louis, Mo., now Boston, Mass.	do	Jan. 3, 1929	Do.
Shute, James I.	Boston, Mass.	do	do	Do.
Thayer, Edward W.	do	do	do	Do.
Williams, Burt	Formerly Milwaukee, Wis., now Madison, Wis.	do	May 31, 1929	Do.
Yulsman, Benjamin.	Philadelphia, Pa.	do	Apr. 15, 1929	Do.

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