

The result in individual cases may be harsh. But that may be true in case of any statute of limitations. As we indicated in *J. E. Riley Investment Co. v. Commissioner*, *supra*, such considerations, though a basis for an appeal to Congress for relief in individual cases,⁵ are not appropriate grounds for relief by the courts from the strictness of the statutory demand.

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE v. LERNER STORES CORP. (MD.)

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 248. Argued December 11, 1941.—Decided December 22, 1941.

1. An amended capital stock tax return, to correct an undervaluation of the taxpayer's capital stock declared by mistake in its "first return," can not be filed after the lapse of 30 days from the statutory due date and after the expiration of the period for which an extension might have been allowed by the Commissioner if application for it had been made. *Scaife Company v. Commissioner*, *ante*, p. 459. P. 466.

provided for correction of certain errors or miscalculations in the original returns. Such an example is Art. 43-2 of Treasury Regulations 86 providing for the filing of amended returns for the purpose of deducting losses which were sustained during a prior taxable year.

⁵ Thus Private Act No. 199, c. 440, 50 Stat. 1014, provides that the original declared value of the Jackson Casket & Manufacturing Co., notwithstanding the declaration in its return for the year ending June 30, 1936, should be a value computed on the basis of \$125 per share of its capital stock. From the Committee Reports it appears that, due to a mistake by Western Union Telegraph Co. in transmitting a message from the president of the company to its cashier, the latter filed a return in which the value of the capital stock was declared to be \$175 per share, rather than \$125 per share as the president had directed. H. Rep. No. 777, 75th Cong., 1st Sess.; S. Rep. No. 730, 75th Cong., 1st Sess.

2. In allowing the taxpayer to fix its own valuation of its capital stock, thereby affecting its tax liability under the closely related capital stock and excess profits tax provisions, the Revenue Act of 1935 does not unconstitutionally delegate legislative power. P. 468.
 3. A claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause. P. 468.
 4. The propriety or wisdom of a tax on profits, computed with reference to a specified criterion of value of capital stock, is not open to challenge in the courts. P. 468.
 5. There is no constitutional reason why Congress may not avoid litigious valuation problems by relying on the self-interest of taxpayers to place a fair valuation on their capital stock. P. 468.
- 118 F. 2d 455, reversed.

CERTIORARI, *post*, p. 598, to review a judgment which reversed a decision of the Board of Tax Appeals sustaining an excess profits tax.

Mr. Richard H. Demuth, with whom *Assistant Solicitor General Fahy*, *Assistant Attorney General Clark*, and *Messrs. J. Louis Monarch* and *William L. Cary* were on the brief, for petitioner.

Mr. Andrew B. Trudgian for respondent.

The taxpayer is not bound by the clerical error resulting in the statement of an erroneous value.

The taxpayer may elect to declare any value it sees fit in a timely amended return; and a return before the end of its first income tax year ending after the declaration year is timely.

The capital stock tax under § 105 was an excise tax. The excess profits tax under § 106 was an income tax. Since, under these sections, there were two distinct types of taxes, taxpayers were given the option of imposing on themselves a direct tax or an indirect tax as they desired. A taxpayer might declare no value for capital stock and thus elect the excess profits tax; or it might declare a large capital stock value and avoid imposition of excess

profits tax; or it might by a medium declaration elect to pay both capital stock and excess profits taxes. Congress may not thus delegate its legislative authority. See Black, American Const. Law, 3d Ed. pp. 373 *et seq.*; *Field v. Clark*, 143 U. S. 649, 692; *Panama Refining Co. v. Ryan*, 293 U. S. 388; *United States v. Grimaud*, 220 U. S. 506.

Sections 105 and 106 of the Revenue Act of 1935 are arbitrary and capricious in violation of the Fifth Amendment. The excess profits tax, considered together with its related capital stock tax, places a premium on the good luck or ability of the taxpayer to predict the amount of net income it will earn in the future. The taxpayer with less ability as a guesser, or in some instances, with less business acumen or opportunity, is heavily penalized and must bear a heavier burden than its more fortunate or able rival. *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 24-25; *Tyler v. United States*, 281 U. S. 497, 504.

The statute likewise produces gross inequality in its effect on those businesses which involve more risks, and wider fluctuation in the amount of income.

Moreover, the tax operates unfairly against many taxpayers because of the ending dates of their fiscal years. Solely because the taxpayer herein has a fiscal year ended January 31st, it must bear a greater tax burden than one on the calendar year basis.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to *Scaife Co. v. Commissioner*, *ante*, p. 459. The tax in dispute is respondent's excess profits tax for the fiscal year 1937. Respondent filed a timely capital stock tax return for the first year, ended June 30, 1936, in which the declared value of its capital stock was stated to be \$25,000. This return was filed September 27, 1936, an extension of time until September 29, 1936 having been obtained. The figure of \$25,000 was

erroneous due to a mistake made by an employee of respondent. When the error was discovered, an amended return was tendered in which the declared value of the capital stock was given as \$2,500,000. This was on January 27, 1937, more than sixty days after the statutory due date. The amount of the tax, penalty and interest on the higher amount was tendered. The amended return was not accepted and the amount of the remittance was refunded. Petitioner, in determining respondent's net income subject to the excess profits tax for the fiscal year ended January 31, 1937, used the declared value of \$25,000 appearing in the original return. The order of the Board of Tax Appeals sustaining the Commissioner was reversed by the Circuit Court of Appeals. 118 F. 2d 455.

On the issue of timeliness of the amended return the decision in the *Scaife* case is determinative. The case for disallowance of the amendment is even stronger here, for the amended return was filed beyond the period for which any extension could have been granted by the Commissioner. The hardship resulting from the misplaced decimal point is plain. But Congress, not the courts, is the source of relief.

Respondent in its brief tenders another issue. It contends here, as it did before the Board and the Circuit Court of Appeals, that §§ 105 and 106 of the Revenue Act of 1935 constitute an unlawful delegation of legislative authority, contrary to Art. 1, § 8 of the Constitution; that they violate the Fifth Amendment; and that the capital stock and excess profits taxes, being "based on guesses and wagers," are beyond the delegated powers of Congress. The Board and the Circuit Court of Appeals ruled adversely to respondent on these constitutional issues. Respondent filed no cross-petition for certiorari. Yet a respondent, without filing a cross-petition, may urge in support of the judgment under review grounds rejected

by the court below. *Langnes v. Green*, 282 U. S. 531, 538-539; *Public Service Commission v. Havemeyer*, 296 U. S. 506, 509; *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434.

The constitutional issues, however, are without substance. As we noted in *Haggar Co. v. Helvering*, 308 U. S. 389, 391-392, 394, the capital stock tax and the excess profits tax are closely interrelated. The declared value of the capital stock is the basis of computation of both taxes. The declared value for the first year is the value declared by the corporation in its first return; the declared value for subsequent years¹ is the original declared value as changed by certain specified capital adjustments. Sec. 105 (f), Revenue Act of 1935, 49 Stat. 1014, 1018. The taxpayer is free to declare any value of the capital stock for the first year which it may choose. While a low declaration of value decreases the amount of the capital stock tax, it increases the risk of a high excess profits tax. On the other hand, a high declaration of value, while decreasing the tax on excess profits, increases the capital stock tax. By allowing the taxpayer "to fix for itself the amount of the taxable base" for purposes of computation of these taxes, Congress "avoided the necessity of prescribing a formula for arriving at the actual value of capital"—a problem "which had been found productive of much litigation under earlier taxing acts." *Haggar Co. v. Helvering*, *supra*, p. 394. See 1 Bonbright, Valuation of Property, pp. 577-594. "At the same time it guarded against loss of revenue to the Government through understatement of capital" by providing a formula which would in such circumstances result in an increase in the excess profits tax. *Haggar Co. v. Helvering*, *supra*, p. 394.

¹ There is no limitation of time on the use of the original declared value under the 1935 Act. It should be noted, however, that § 1202 of the Internal Revenue Code (see § 601 (f) of the Revenue Act of 1938, 52 Stat. 447, 566) provides that the "adjusted declared value

There is present no unlawful delegation of power. Congress has prescribed the method by which the taxes are to be computed. The taxpayer here is given a choice as to value. While the decision which it makes has a pronounced effect upon its tax liability, that is not uncommon in the tax field. Congress has fixed the criteria in light of which the choice is to be made. The election which the taxpayer makes cannot affect anyone but itself.

The contention that these provisions of the Act run afoul of the Fifth Amendment is likewise without merit. A claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause. *LaBelle Iron Works v. United States*, 256 U. S. 377; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 401. The propriety or wisdom of a tax on profits, computed in reference to a specified criterion of value of capital stock, is not open to challenge in the courts. *LaBelle Iron Works v. United States*, *supra*, p. 393. That being true, there is no constitutional reason why Congress may not, because of administrative convenience alone (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 511 and cases cited), avoid litigious valuation problems and rely on the self-interest of taxpayers to place a fair valuation on their capital stock. As was stated in *Rochester Gas & Electric Corp. v. McGowan*, 115 F. 2d 953, 955, "To say that Congress could not choose a scheme implemented by such mild sanctions, as an alternative to actually computing an 'excess profits tax' with all the uncertainty and litigation which that had involved, would be most unreason-

shall be determined with respect to three-year periods beginning with the year ending June 30, 1938, and each third year thereafter." That adjusted declared value enters into the computation of the excess profits tax under §§ 600 and 601 of the Internal Revenue Code.

ably to circumscribe its powers to establish a convenient and flexible fiscal system."

Nor do we have here any lack of that territorial uniformity which is required by Art. I, § 8 of the Constitution. *LaBelle Iron Works v. United States*, *supra*, p. 392.

Reversed.

NATIONAL LABOR RELATIONS BOARD v. VIRGINIA ELECTRIC & POWER CO.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 25. Argued November 13, 1941.—Decided December 22, 1941.

1. The National Labor Relations Act does not forbid or penalize expression by an employer to his employees of his views on labor policies. P. 476.
2. Conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. In determining whether an employer actually interfered with, restrained, and coerced its employees, the Board may look at what it said as well as what it did. P. 477.
3. Where the Board specifically found that certain spoken and posted utterances by the employer were unfair labor practices, the adequacy of which finding was doubtful if the utterances were separated from their background, and it was not certain from the Board's decision that its conclusion was based on the whole course of conduct during the period in question, of which the utterances were a part, *held*, that the case must be returned to the Board for a redetermination. P. 479.

115 F. 2d 414, reversed.

CERTIORARI, 312 U. S. 677, to review a judgment setting aside an order of the National Labor Relations Board, 20 N. L. R. B. 911, requiring the above-named power com-

* Together with No. 26, *National Labor Relations Board v. Independent Organization of Employees of the Virginia Electric & Power Co.*, also on writ of certiorari, 312 U. S. 677, to the Circuit Court of Appeals for the Fourth Circuit.