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Income-tax Department

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"Demurrer to petition sustained, the plaintiff having failed to show that the commissioner acted arbitrarily in computing invested capital under section 207 of the 1917 act."

The decision, above quoted, in the case of *The Feilbach Company* v. *Frank B. Niles, collector*, was rendered by the United States district court, N. D., Ohio, W. D., and the quoted somewhat vague language involves an interpretation of section 210, which is interesting in that it is contrary to the generally accepted interpretation of the language of that section. This section, it will be remembered, was the one that provided for the determination of the amount of excess profits in cases where the invested capital could not be determined. In such cases the amount of the deduction (7% or 9% of invested capital) "shall be" the same as the proportion of the average deduction of representative corporations engaged in a like or similar trade or business.

The foregoing is not a literal quotation, but conveys the idea with fair accuracy.

The language of section 210 will probably stand as a model of ambiguity, but after careful analysis, almost everyone concerned reached the conclusion that its intention was to relieve certain taxpayers from an abnormally high excess-profits tax, where, for various reasons, the invested capital could not be determined.

The judge in this decision states it as his opinion that:

"The section under consideration, 210, is one whose provisions are to be invoked primarily and most generally by the commissioner alone. Very, very rarely, and under quite extraordinary circumstances, it would seem, can the action be resorted to as a mode of relief by the taxpayer. The statute limits resort to it, too, only when the commissioner finds that he cannot 'satisfactorily' ascertain invested capital for the computation of excess-profits tax under section 207. It would follow that, if the commissioner or his agents actually computes capital under section 207, his action should be presumed to exclude any application of section 210, the burden then being upon the claimant to relief under the provisions of the latter section to show that the commissioner acted arbitrarily and without justification. It would be a rare case indeed wherein a court would be justified in concluding that the commissioner could not 'satisfactorily' apply the provisions of section 207 . . ."

We believe we are not different from most of those having contact with the acts and opinions of the commissioner, in our disbelief that congress intended that the provisions of section 210 "are to be invoked primarily and most generally by the commissioner alone." Having had many experiences wherein the commissioner, through his subordinates, has made some strange decisions in "satisfactorily" determining invested capital under the provisions of section 207, where no abnormal conditions were present, we believe that it was never intended that the commissioner's satisfaction with his computation of invested capital precluded a dissatisfied taxpayer from invoking the provisions of section 210.

We know that at the time the act of 1917 was made law, section 210 was regarded as a relief measure to be invoked by such taxpayers as would have been placed at a serious disadvantage in the payment of excess-profits taxes out of all proportion to amounts paid by those engaged in a like or similar business. We know, too, that it was not rarely, nor in extraordinary cases, that many taxpayers invoked section 210, and with success, when their taxes computed under section 210 were abnormally high. We believe the word "satisfactorily" did not imply that the computation if satisfactory to the commissioner must necessarily be final.

In view of the foregoing reasons and many others, which will undoubtedly occur to our readers, we find ourselves heartily disagreeing with the opinion of the court. As to the decision in the case under review, we have no knowledge of the facts and merits. It is only with his interpretation of the meaning of the language of section 210 that we are in disaccord.

SUMMARY OF RECENT RULINGS

Distraint is a "proceeding" and collection thereby of income tax for 1917 is barred by section 250 (d) of the 1921 act five years from the time the return was filed, and taxpayer may recover payments so enforced. (United States district court of Massachusetts, *Ehrlich et al., Excrs.*, v. *Nichols, collector.*)

A trust created was held "intended to take effect in possession or enjoyment" at or after settlor's death, when by its terms the settlor reserved a qualified right to alter, amend or terminate the trust. (United States district court of Massachusetts, *Hill, Excr.* v. *Nichols, collector.*)

The loss from sale in 1920 of property originally acquired for residential purposes, which, from the time the owner abandoned it as his residence prior to March 1, 1913, until the sale was used for renting purposes, in the nature of a business venture, should be allowed in computing net income. (Circuit court of appeals, third circuit, *Co-executors of Philander C. Knox*, v. *Heiner, collector.*)

Section 280 of the 1926 act, which provides that the commissioner, in the same manner as in a case of a deficiency in a tax, shall determine, assess and collect the liability at law and in equity of a transferee of property of a taxpayer for a tax imposed upon the taxpayer, was held unconstitutional, as a denial of due process of law, and as violative of the constitutional provisions vesting judicial powers only to the courts.

An injunction will lie to enjoin the collection by distraint of taxes assessed against a transferee of property of a taxpayer, as the liability, if any, of such transferee is not a tax within the meaning of section 3224 of the revised statutes. (United States district court, W. D. Kentucky, *Owensboro Ditcher and Grader Co.* v. *Lucas, collector.*)

Invested capital may not be reduced by arbitrary adjustments of depreciation for prior years where the evidence did not establish that depreciation actually sustained was not charged off. (United States district court, W. D. Pennsylvania, *Maugh & Keenan Storage & Transfer Co.*, v. *Heiner, collector.*)

Cost or statutory basis of real estate should be adjusted for depreciation sustained in computing gain or loss from the sale thereof, under the 1918 and 1921 acts.

Premiums paid by the insured on life insurance policies payable to his estate, taken out and assigned to a creditor at its request as collateral for a loan, are not deductible under the 1918 and 1921 acts, from gross income of the insured, since he is directly or indirectly a beneficiary under the policy. (United States district court, W. D. Pennsylvania, *Edward E. Reick* v. *Heiner, collector.*)

No taxable income was realized upon sale or exchange of properties under the acts of 1916 and 1917, where that received in the exchange had no actual

market value. (United States district court, N. D. California, S. D., *William B. Bourn*, v. *John P. McLaughlin, collector.*)

Where the actual of an equitable life estate is determinable from definite facts known at the time of the computation of the tax, mortuary tables based on probabilities may not be used to ascertain the value of such future interest. (United States district court of Massachusetts, *Boston Safe Deposit & Trust Co.* v. *Nichols, collector.*)