Income-tax Department

Edited by Stephen G. Rusk

An eminent member of our profession has expressed the opinion that federal income taxes will be a decreasing source of practice for accountants during the next few years. Whether or not this is an accurate prophecy time alone will reveal.

In connection with thoughts generated by the said prophecy, our attention has been directed quite forcibly to federal and state taxation of estates and the possibilities there are to the accounting profession in this field. Many of our brethren are alive to this fact at present and have in the usual course of their practice rendered invaluable services to their clients in counseling and advising as to the purport of these laws and as to disposition of their possessions in such form and manner as not to put too great a burden upon the estate of a decedent at the time the tax becomes due and payable.

A very interesting example of the effect the federal and state estate and inheritance taxes have upon an estate is furnished in an article from the Boston News Bureau.

A resident of Massachusetts died recently leaving an estate of $3,055,000 consisting of real estate and personal property in Massachusetts of an aggregate value of $1,576,000 and of stocks and bonds of corporations organized under the laws of other states aggregating a value of $1,479,000. The total tax assessed against the inheritance of this estate amounted to $691,000, or 23 per cent. thereof, made up of federal taxes, $295,240; Massachusetts tax, $340,435 and taxes of seventeen other states of $55,325. Without going further into the very interesting statistics contained in the article from which the above information was extracted, no stretch of the imagination is necessary to visualize the havoc caused to the corpus of the estate by the necessity of disposing of sufficient of the property to pay the taxes.

Very few citizens of wealth are sufficiently cognizant of the far reaching effect these estate and inheritance taxes have upon the fortune that has been amassed during their life time, and it would seem to devolve upon accountants to bring this matter to their attention.

It is possible that the accountant may be trespassing somewhat upon the preserves of the lawyers in this matter and it will behoove them to use great care in accumulating accurate and reliable information before attempting to give counsel upon the subject lest irreparable injury be done to the one to whom advice is given. How important is this is evidenced by the muddle in which a certain very large estate has been involved by a prominent law firm that is handling it. If eminent legal talent can err with respect to these matters, how much easier it would be for a partly informed accountant to fall into error.

SUMMARY OF RECENT RULINGS

A husband and wife domiciled in California may each report one half of the community income in their separate returns. This is the subject matter of treasury decision No. 3568.

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Income received by the members of the five civilized tribes of American Indians from tax exempt land is not taxable (T. D. 3570).

Suit against the government cannot be maintained to recover interest where the appellate court did not provide for such interest in its mandate (T. D. 3575).

Income received by foreign steamship lines from traffic originating in the United States is taxable (T. D. 3576).

The government has no lien on a taxpayer's property for taxes prior to a demand and has no priority before bankruptcy (court decision in re Baltimore Pearl Hominy Co.).

A number of decisions are published this month, all of considerable interest, but the one that seems to have precedence in importance is treasury decision 3556 embodying a court decision wherein it is held that:

"Where stockholders of a corporation organize a new corporation in another state and exchange their stock in the first corporation for stock in the new corporation on basis of one share for five and having obtained all the common stock of the old corporation its assets are transferred to the new corporation and the old corporation dissolved, income is realized by the stockholders to the extent that the stock received in the new corporation was greater in value than the cost of the stock of the old corporation."

To obtain the exact viewpoint of the court in this case it will be necessary to read this most interesting decision in its entirety.

TREASURY RULINGS
(T. D. 3548—February 9, 1924.)

Income tax—Act of October 3, 1913—Decision of Supreme Court.

1. INCOME—RELIGIOUS CORPORATIONS—EXEMPTION.

A religious corporation which receives income from the rent of real property, dividends from stock ownership in private corporations, and interest on money loaned is exempt from income tax under the provisions of section II (G) of the act of October 3, 1913, where all of the income is held and used for carrying on its work.

2. SAME.

Deriving income from the sale of wine, chocolate and other articles does not amount to engaging in trade where profit is a negligible factor, sales are not made to the public or in competition with others, and the articles are bought and supplied for use within the organization, either for religious purposes or incidental to the work carried on.

The following decision of the supreme court of the United States in the case of W. Trinidad, insular collector, v. Sagrada Orden de Predicadores, etc., is published for the information of internal-revenue officers and others concerned.

SUPREME COURT OF THE UNITED STATES. No. 53. October Term, 1923.

W. Trinidad, insular collector, v. Sagrada Orden de Predicadores, etc.

Writ of certiorari to the Supreme Court of the Philippine Islands.

(January 14, 1924.)

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action to recover money paid under protest as a tax on income. The plaintiff prevailed in the Philippine courts, both trial and appellate (42 Phil. 397), and the case is here on certiorari (260 U. S. 711).

The tax was levied under paragraphs G (a) and M of section II of the act of October 3, 1913 (ch. 16, 38 Stat. 172, 180), requiring every corporation, not within defined exceptions, to pay an annual tax, computed at a specified rate, on its entire net income from all sources. The exceptions covered, among others, any corporation "organized and operated exclusively for religious,
The plaintiff insisted it was within this exception, and the Philippine courts so ruled. The case was heard on a stipulation stating:

That the plaintiff is a corporation so constituted under sections 154 to 164 of act No. 1459 of the Philippine commission, and is organized and operated for religious, benevolent, scientific and educational purposes in these islands and in its missions in China, Cochinchina and Japan, and that neither its net income nor part of its rents from whatever source it may come is applied to the benefit of any particular stockholder or individual, or of any of its members, and that no part of the whole or of some of its temporal properties belong to any of its members, who have no rights to the same, even in case of dissolution of the corporation.

That the dividends and interests or profits and expenses which appear in exhibit 1 of the defendant as the income of the plaintiff constitute the income derived from the investments of the capital of the plaintiff corporation, which was invested in the year 1913 nearly in the manner and form specified in exhibit 2 of the defendant, and that the rents appearing in exhibit 1 were derived from the properties which together with their valuations appear in exhibit 3 of the defendant.

The second paragraph of the stipulation is rather obscure, and the exhibits are in a very condensed form, but all are elucidated by the opinions below and the briefs here. They mean, when read with these aids, that the plaintiff has large properties in the Philippines, consisting of real estate, stocks in private corporations, and money loaned at interest, all of which are held and used as sources from which to obtain funds or revenue for carrying on its religious, charitable, and educational work; that the bulk of its income consists of rents, dividends, and interest derived from these properties; that the rest of its income is relatively small and comes from alms for mass, profits from occasional sales of some of its stocks, and sums received, in excess of cost, for wine, chocolate, and other articles purchased and supplied for use in its churches, missions, parsonages, schools, and other subordinate agencies. The proportions in which these several items contributed to its income for the year covered by the tax in question are shown in the margin.\(^1\)

The defendant concedes that the plaintiff is organized and operated for religious, charitable, and educational purposes and that no part of its net income inures to the benefit of any stockholder or individual, but contends that it is not "operated exclusively" for those purposes, and therefore is not within the exception in the taxing act. Stated in another way, the contention is that the plaintiff is operated also for business and commercial purposes in that it uses its properties to produce income, and trades in wine, chocolate, and other articles. In effect, the contention puts aside as immaterial the fact that the income from the properties is devoted exclusively to religious, charitable, and educational purposes, and also the fact that the limited trading, if it can be called such, is purely incidental to the pursuit of those purposes and is in no sense a distinct or external venture.

Whether the contention is well taken turns primarily on the meaning of the excepting clause, before quoted from the taxing act. Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes, and yet have a net income.

\[^1\]Rents ................................................................. 90,092.70
Dividends ............................................................... 95,406.54
Interest ................................................................. 4,239.19
Sale of stocks .......................................................... 230.50
Sale of wine ............................................................ 3,711.15
Sale of chocolate ........................................................ 3,219.21
Sale of other articles ................................................. 1,249.10

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Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption. A

Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit. This is particularly true of many charitable, scientific and educational corporations and is measurably true of some religious corporations. Making such properties productive to the end that the income may be thus used does not alter or enlarge the purposes for which the corporation is created and conducted. This is recognized in University v. People (99 U. S. 309, 324) where this court said: "The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes, in the fullest and clearest sense." To the same effect is Methodist Episcopal Church, South v. Hinton (92 Tenn. 188, 200). And in our opinion the excepting clause, taken according to its letter and spirit, proceeds on this view of the subject.

The plaintiff, being a corporation sole, has no stockholders. It is the legal representative of an ancient religious order the members of which have, among other vows, that of poverty. According to the Philippine law under which it is created, all of its properties are held for religious, charitable and educational purposes; and according to the facts stipulated it devotes and applies to those purposes all of the income—rents, dividends and interest—from such properties. In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit.

As respects the transactions in wine, chocolate and other articles, we think they do not amount to engaging in trade in any proper sense of the term. It is not claimed that there is any selling to the public or in competition with others. The articles are merely bought and supplied for use within the plaintiff's own organization and agencies—some of them for strictly religious use and the others for uses which are purely incidental to the work which the plaintiff is carrying on. That the transactions yield some profit is in the circumstances a negligible factor. Financial gain is not the end to which they are directed.

Our conclusion is that the plaintiff is organized and operated exclusively for religious, charitable and educational purposes within the meaning of the excepting clause.

Judgment affirmed.

INTERNAL REVENUE

(T. D. 3550—February 13, 1924.)

Income tax—Time extensions for domestic corporations.

Extension of time until June 15, 1924, of the final date for filing returns of domestic corporations, form 1120 for the calendar year 1923, and form 1120 A. for the fiscal year ended January 31, 1924, and the fiscal year ending February 29, 1924.

Under the authority of section 227 of the revenue act of 1921, a general extension of time is hereby granted domestic corporations up to and including June 15, 1924, for completing returns of income for the calendar year 1923, the fiscal year ended January 31, 1924, and the fiscal year ending February 29, 1924, conditional upon the filing of tentative returns with the proper collector of internal revenue on or before March 15, April 15, and May 15, 1924, respectively, accompanied with at least one-fourth of the estimated amount of tax due together with a statement setting forth the reason why the return can not be completed within the prescribed time, and a formal request for the extension. Tentative returns submitted in accordance with the foregoing should be on form 1120 for the calendar year, and on form 1120 A. for a fiscal year, on which should be written plainly across the face "Tentative return." Only the name

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and address of the corporation and the estimated amount, if any, of the tax due need be stated.

Any deficiency in the first installment as determined upon submission of the final return will bear interest at the rate of 6 per cent. per annum from March 15, April 15, or May 15, 1924, respectively.

(T. D. 3552—February 18, 1924.)

Income tax—Suit to restrain collection of tax—Decision of court.

1. Injunction—Distraint—Section 3224, R. S.

Under the provisions of section 3224, revised statutes, injunction will not lie to restrain a collector from the collection by distraint of a federal tax.

2. Same—Remedy at Law.

An allegation that distraint is a "suit or proceeding" and is barred after five years from the filing of a return by section 250 (d) of the revenue act of 1921 does not give a federal court jurisdiction to restrain a collector, there being an adequate remedy at law by paying the tax and suing for its recovery.

3. Case Followed.


The appended decision of the United States circuit court of appeals for the fifth circuit in the case of M. J. Bashara v. Geo. C. Hopkins, collector, is published for the information of internal-revenue officers and others concerned.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.


Appeal from the District Court of the United States for the Northern District of Texas.

(December 6, 1923.)

The appellant filed his bill in equity to enjoin the appellee, individually and as collector of internal revenue, from levying a distraint to collect the sum of $2,522.64, assessed against the appellant by the commissioner of internal revenue.

The bill avers that on April 1, 1918, the appellant filed with the collector of internal revenue an income-tax return for the year 1917 showing a total tax liability of $6,904.81, which he promptly paid; that on March 17, 1923, the commissioner of internal revenue notified the appellant that his total tax liability for the year 1917 was $2,522.64 in excess of his return, and that an assessment for taxes in the additional amount would be made; that such assessment was made, and thereafter, on April 2, 1923, the appellee made a written demand for payment; that the appellant is possessed of valuable property consisting chiefly of real estate, and also has on deposit in various banks the money necessary for the conduct of his business, for the maintenance of himself and family, and for the payment of his obligations; and that the appellee, unless enjoined, would seize the said bank accounts and appropriate the same to the satisfaction of the assessment for taxes.

The district court denied the application for an injunction, and upon appellee's motion dismissed the bill of complaint.

The bill does not aver that the assessment is incorrect, and it is a fair inference from the averments it does contain that the appellant is amply able to pay the amount which the government is seeking to collect. We are of opinion that the appellant has an adequate remedy at law, in that he may, after paying the amount of the assessment, sue the collector for its return. We take judicial notice that April 1, 1923, fell on Sunday. The list containing the assessment against the appellant was in the hands of the collector in Texas on Monday, April 2, 1923, and must, therefore, have been signed by the commissioner of internal revenue and mailed from Washington before the first day of that month. It thus appears that the assessment was made within the
statutory period of five years from the date of appellant's return which was
filed April 1, 1918.

The bill is sought to be maintained upon the theory that under section 250
(d) of the revenue act of 1921 (42 Stat. 227) any proceeding for the collection
of taxes for the year 1917 is barred because five years had elapsed since the
appellant filed his return, and that revised statutes section 3224, which
provides that "no suit for the purpose of restraining the assessment or collection
of any tax shall be maintained in any court," is inapplicable. The supreme
court has ruled directly against this position in Graham v. du Pont (262 U. S.
234). In that case the assessment was made after the expiration of the statu-
tory period, but it was held nevertheless that injunction would not lie, because
of section 3224. It is true in this case, as it was in the cited case, that under
the act of March 4, 1923 (42 Stat. 1504), the complainant has two years after
payment of the tax to bring suit to recover it back, in which suit he can raise
any question affecting the validity of the assessment.

The order of the district court is affirmed.

(T. D. 3555—February 20, 1924.)

Income tax—Distribution from depletion or depreciation reserves.

Article 1546 of Regulations 62 amended.

Article 1546 of regulations 62 is hereby amended to read as follows:

Art. 1546. Distribution from depletion or depreciation reserves.—A reserve
set up out of gross income by a corporation and maintained for the purpose of
making good any loss of capital assets on account of depletion or depreciation
is not a part of surplus out of which ordinary dividends may be paid. A dis-
tribution made from a depletion or depreciation reserve based upon the cost of
the property will not be considered as having been paid out of earnings or
profits, but the amount thereof shall be applied against and reduce the cost, or
other basis, of the stock upon which declared for the purpose of determining the
gain or loss from the subsequent sale of the stock. A distribution made from
that portion of a depletion reserve based upon a valuation as of March 1, 1913,
which is in excess of the depletion reserve based upon cost, will not be consid-
ered as having been paid out of earnings or profits, but the distributee shall not
be allowed as a deduction from gross income any loss sustained from the sale
or other disposition of his stock or shares unless, and then only to the extent
that, the basis provided in section 262 exceeds the sum of (1) the amount
realized from the sale or other disposition of such stock or shares, and (2) the
aggregate amount of such distributions received by him thereon. No distribu-
tion, however, can be made from such a reserve until all the earnings or profits
of the corporation have first been distributed. Dividends declared out of a
deployment reserve based upon discovery value to the extent that such reserve
represents the excess of the discovery value over cost or March 1, 1913, value,
are, when received by the stockholders, taxable as ordinary dividends.

(T. D. 3556—February 20, 1924.)

Income tax Revenue act of 1916 Decision of court.

1. Income Stock Distribution Exchange of Stock for Stock.

Where stockholders of a corporation organize a new corporation in another
state and exchange their stock in the first corporation for stock in the new
corporation on the basis of one share for five, and having obtained all the
common stock of the old corporation its assets are transferred to the new cor-
poration and the old corporation dissolved, income is realized by the stock-
holders to the extent that the stock received in the new corporation was greater
in value than the cost of the stock of the old corporation.

2. Corporations Reorganization Separate Entity.

Where a new corporation was formed by the stockholders of an old corpo-
ration, under the laws of another state and with a larger authorized capitalization,
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to take over the entire business and assets of the old corporation, held that the new corporation was not identical with the old, but was a separate and distinct corporate entity.

3. Cases Followed.


The following decision of the United States court of claims, in the case of Walter L. Marr v. United States, is published for the information of internal-revenue officers and others concerned:

COURT OF CLAIMS OF THE UNITED STATES. No. C-12.

Walter L. Marr v. United States.

(Decided November 21, 1923.)

This case having been heard and submitted upon stipulation of facts signed by Assistant Attorney General Robert H. Lovett on behalf of the United States, and by Messrs. Williams and Frierson, attorneys for the plaintiff, on behalf of the plaintiff, the court, upon the said stipulation, makes the following

FINDINGS OF FACT

I

During the year 1916 the plaintiff, W. L. Marr, and his wife were residents of the state of Michigan. At the proper time they made a joint income-tax return and paid the taxes shown by said return to be due to the collector of internal revenue at Detroit.

II

On March 19, 1921, the plaintiff was notified that the commissioner of internal revenue had made an additional assessment against him for the year 1916 of $23,098.40 and payment of the same was demanded. The plaintiff filed with the commissioner of internal revenue a claim in abatement. On December 29, 1921, he was notified that this claim had been rejected and disallowed. The plaintiff having then become a resident of Tennessee, the assessment was sent to the collector of internal revenue at Nashville for collection and demand was made of plaintiff for the payment of said assessment with interest, aggregating $24,944.12, which amount he paid, under protest, on January 7, 1922.

Plaintiff then made his appeal to the commissioner of internal revenue according to the provisions of the law and the regulations of the secretary of the treasury by filing a claim for the refund of said taxes and interest upon the grounds set out in the petition in this case. This claim, after consideration by the commissioner, has been refused and disallowed.

III

Said assessments were arrived at by adding to the net income shown by the original return the sum of $324,466.57, upon the ground that that much income had been derived when, in 1916, plaintiff and his wife received 451 shares of the preferred and 2,125 shares of the common stock of General Motors Corporation, a corporation organized under the laws of Delaware and hereinafter called the Delaware corporation, and $100 in cash in exchange for 339 shares of the preferred and 425 shares of the common stock of the General Motors Co., a corporation existing under the laws of New Jersey and hereinafter called the New Jersey corporation. The market value of the stock of the Delaware corporation so received was preferred $94,687.5 and common $168.50 per share, making the total market value of the shares received $400,766.57, and adding the $100 received in cash makes the total value received $400,866.57. The shares of the New Jersey corporation had been acquired at par, or a total cost of $76,400. The difference between these amounts was treated as income, and this resulted in the assessment as made.

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The transaction culminating in said exchange of stock was as follows:

(1) The New Jersey corporation had outstanding $15,000,000 of 7 per cent. preferred stock and $15,000,000 of common stock of the par value of $100 per share. It had accumulated a large surplus, and the actual value of its common stock was, at the date of the exchange, $842.50 per share.

(2) In 1916 the officers of the New Jersey corporation caused the Delaware corporation to be organized for the purpose of taking over and continuing the business of the New Jersey corporation. The authorized capital of the Delaware corporation was $62,600,000 of common and $20,000,000 of nonvoting preferred stock.

(3) The plan by which the Delaware corporation proposed to take over and continue the business of the New Jersey corporation was set forth in a letter addressed by 11 of the directors of the New Jersey corporation to its stockholders, which letter was as follows:

**General Motors Company,**

To the Stockholders of General Motors Co.:
The undersigned members of the board of directors of your company, pursuant to the request of their associate directors and of shareholders representing upwards of 70 per cent. of the outstanding stock of the company present for your favorable consideration the following plan, the adoption of which in their opinion will afford the present stockholders of the company a more liquid and satisfactory investment and eventually will lead to economies in administration to the benefit of all shareholders.

General Motors Corporation has been organized under the laws of Delaware, with an authorized capital stock of $102,600,000, of which $82,600,000 is common stock and $20,000,000 is nonvoting preferred stock. The shares are of the par value of $100 each. The preferred stock is entitled to receive cumulative dividends at the rate of 6 per cent. per annum, and is subject to redemption, at the option of the company, at $110 a share on November 1, 1918, or on any subsequent dividend-paying date. In the event of dissolution the preferred stock is preferred as to assets to the extent of its par value and accrued dividends.

General Motors Corporation of Delaware offers to the shareholders of General Motors Co. of New Jersey the privilege of exchanging their shares of stock for shares of the Delaware corporation on the following basis:

(a) One and one-third (1 1/3) shares of preferred stock of the Delaware corporation for one (1) share of preferred stock of the New Jersey company.

(b) Five (5) shares of common stock of the Delaware corporation for one (1) share of common stock of the New Jersey company.

(Certificates for fractional shares will not be issued, but, in place thereof, the Delaware corporation will pay in cash at the rate of $100 a share for its preferred stock and $150 a share for its common stock.)

Every stockholder of General Motors Co. is extended the same privilege of exchange and on the same basis as has already been accepted by shareholders representing upward of 70 per cent. of the outstanding stock of General Motors Co.

The plan is to become effective as of November 1, 1916, and all exchanges of stock under this offer will be made as of that date. Stockholders of the New Jersey company of record at the close of business October 14, 1916, will thus receive the dividend payable thereon by that company November 1, 1916. Dividends upon the preferred and common stock of the Delaware corporation will be computed from November 1, 1916, upon all of its stock issued and exchanged within the period hereinafter fixed for effecting such exchange.

Deposits for exchange are to be made with the Guaranty Trust Co. of New York, No. 140 Broadway, New York City, between October 16, 1916, and December 15, 1916, both dates inclusive. Upon the deposit of your certificates of stock of General Motors Co. of New Jersey, duly indorsed in blank (with New
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York State stock transfer tax stamps attached at the rate of 2 cents per share, or accompanied by an equivalent amount of cash) the Guaranty Trust Co. will immediately cause to be issued and forwarded to you temporary certificates (pending the engraving of permanent certificates) for shares of stock of General Motors Corporation of Delaware, in accordance with the foregoing offer.

A form of acceptance of this offer to accompany your certificate of stock and to be signed by you is herewith inclosed, together with a stamped envelope addressed to the Guaranty Trust Co. of New York.

Yours truly,
A. H. Wiggin, J. H. McClement,
C. H. Sabin, J. J. Raskob,
L. G. Kaufman, F. L. Belin,
P. S. duPont, A. G. Bishop,
W. S. Leland, W. C. Durant.
C. S. Mott,

(4) This offer was accepted by all the holders of common stock, and $75,-000,000 of the authorized $82,500,000 common stock of the Delaware corporation was issued in exchange for the $15,000,000 of outstanding stock of the New Jersey corporation.

The holders of all the preferred stock of the New Jersey corporation, except the holders of a few shares, also accepted the offer. The few shares mentioned were paid off or redeemed in cash and retired. In exchange for the shares of those who accepted the offer the Delaware corporation issued its own 6 per cent. preferred stock at the rate of one and a third shares for one. But all fractional shares to which stockholders were thus entitled were paid in cash as provided in offer above set out.

The remaining $7,600,000 of the authorized common stock of the Delaware corporation and such parts of its authorized $20,000,000 of preferred stock as was not thus issued in exchange for preferred stock of the New Jersey corporation, were either sold or held for sale as additional capital should be desired.

(5) The Delaware corporation having thus become the owner of all the outstanding stock of the New Jersey corporation caused the latter to be dissolved and all its assets and liabilities to be transferred to the Delaware corporation.

(6) The Delaware corporation continued the business of the New Jersey corporation. It had no assets except those transferred from the New Jersey corporation and such cash as had been realized by the sale of its own stock not used in acquiring the stock of the New Jersey corporation. And its liabilities were only those which had been the liabilities of the New Jersey corporation.

V

The plaintiff and his wife accepted the offer.

He had 15 shares of common and 11 shares of preferred stock of the New Jersey corporation. He received in exchange 75 shares of the common and 14 shares of the preferred stock of the Delaware corporation and $66.67 in cash.

His wife had 410 shares of the common and 328 shares of the preferred stock of the New Jersey corporation. She received in exchange 2,050 shares of the common and 437 shares of the preferred stock of the Delaware corporation, and $33.33 in cash.

VI

The plaintiff is a citizen of the United States and resides in Hamilton county in the state of Tennessee, has at all times borne true allegiance to the government and has not aided, abetted, or given comfort to any enemy of the United States. He has not transferred or assigned the claim sued on or any part of it and no action has been taken on it except as stated in the petition.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.
Judgment is rendered against plaintiff for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

MEMORANDUM

The plaintiff exchanged stock in the New Jersey corporation for stock in the Delaware corporation on the basis of five shares for one. Preferred stock was exchanged on a different basis, but all of the preferred stock was not exchanged, and holders of that kind who declined to make the proposed exchange were paid in cash for their preferred stock. Having acquired all of the stock in the New Jersey corporation, the Delaware corporation caused all of the former's assets and liabilities to be transferred to itself and the New Jersey corporation to be dissolved.

The Delaware corporation had $82,600,000 of common stock and used $75,000,000 of it in acquiring the outstanding stock in the New Jersey corporation. It sold and realized cash for some of its stock in excess of that involved in the exchange. It thus had after the transfer all of the property the New Jersey corporation owned and some cash, realized, as stated, from its treasury stock.

Plainly the transactions involved two distinct entities, organized under the laws of different states, with different powers, and with different capital. Plaintiff exchanged his stock in one of these entities for stock in the other. This was an exchange of property.

When the exchange became effective we think that the plaintiff "in a legal sense realized his gain."—Cullinan v. Walker (262 U. S. 134) [T. D. 3508]; Phellis case (257 U. S. 156) [T. D. 3270]; Rockefeller case (257 U. S. 176) [T. D. 3271].

(T. D. 3557—February 20, 1924.)

Income tax—Distribution from depletion or depreciation reserves.

Article 1549 of Regulations 45, as amended by T. D. 3206, further amended. Article 1549 of regulations 45 (1920 edition), as amended by T. D. 3206, is hereby further amended to read as follows:

Art. 1549. Distribution from depletion or depreciation reserve.—A reserve set up out of gross income by a corporation and maintained for the purpose of making good any loss of capital assets on account of depletion or depreciation is not a part of its surplus out of which ordinary dividends may be paid. A distribution made from such a reserve will be considered a liquidating dividend and will constitute income to a stockholder to the extent that the amount so received is in excess of the cost of his shares of stock. If such stock were acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost thereof and less than the amount received, the income which is taxable is the excess over such market value of the amount received, but no gain is recognized if the amount received is more than the cost but less than the fair market value of the stock on March 1, 1913. No distribution, however, will be deemed to have been made from such a reserve except to the extent that the amount paid exceeds the surplus and undivided profits of the corporation. In general, any distribution made by the corporation other than out of earnings or profits accumulated since February 28, 1913, is to be regarded as a return to the stockholder of part of the capital represented by his shares of stock, and upon a subsequent sale of such stock his gain will be the excess of the selling price over the cost of the stock after applying on such cost the amount of such capital distribution. However, if such shares were acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost thereof after applying on such cost and value the amount of any such capital distribution, and was less than the sum received in distribution, the amount which is taxable is the excess over such value of the sum received in distribution. But no gain is recognized if the amount received is more than the cost but less than the fair market value of the stock on March 1, 1913, after the amount of any such capital distribution is applied to such cost and value. Dividends declared out of a depletion reserve based upon discovery value to the extent that such reserve
represents the excess of the discovery value over cost or March 1, 1913 value, are, when received by the stockholders, taxable at ordinary dividends.

(T. D. 3558—February 25, 1924.)

Income tax.

Returns of information for calendar year 1923 required with respect to payments of dividends made by corporations to individuals, partnerships, and fiduciaries.

Section 254 of the revenue act of 1921 provides that every corporation subject to income tax and every personal-service corporation shall, when required by the commissioner, render a correct return, duly verified under oath, of its payments of dividends, stating the name and address of each stockholder, the number of shares owned by him, and the amount of dividends paid to him. Article 1060 of regulations 62 provides that when directed by the commissioner, either specially or by general regulation, every domestic or resident foreign corporation and every personal-service corporation shall render a return on form 1097 of its payments of dividends and distributions to stockholders.

In accordance with the foregoing all domestic corporations not specifically exempted from taxation are hereby directed to file returns of information on form 1097 showing the amount of payments of dividends and distributions to stockholders who are individuals, fiduciaries, or partnerships. Returns of information will also be required of resident foreign corporations to the extent that dividend payments and distributions are made to citizens or residents of the United States and domestic partnerships and fiduciaries. These returns shall be filed not later than March 15, 1924, and shall cover all such payments made during the calendar year 1923.