DOES A CORPORATION REALIZE GAIN OR LOSS ON A LIQUIDATING DISTRIBUTION IN KIND?

By CHARLES S. CORK*

IN VIEW of the thousands of corporations which have been liquidated over the last three decades, it is surprising that there should have been so little judicial consideration and analysis of whether a corporation realizes gain or loss recognizable for Federal income tax purposes on the distribution of its property in partial or complete liquidation.

No doubt this is due to the fact that the Treasury Department regulations since 1918 have contained a provision similar to the following sentence quoted from Regulations 111, Section 29.22 (a) -20:

> "No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition."[1]

The frequency of such liquidations, invariably involving substantial amounts of tax, prompts this discussion of the validity of the quoted rule as an interpretation of the Internal Revenue Code, particularly Section 22 (a), and its judicial acceptance in the light of ever-changing views as to the binding effect of administrative interpretation of substantive law.

Perhaps because the rule could work in the interests of the Government where the corporate assets have decreased in value since acquisition, thus appearing on its face to be a give and take proposition, "the administrative mind, represented by the Commissioner and his lawyers," has not been "bent on whittling it away"[2] with that same determination devoted to the often successful attacks upon other regulations. Whether for this reason or not, the Commissioner's principal efforts to tax appreciation in value of corporate property on liquida-

*Member of the Macon, Georgia, Bar.

1. See Article 547 of Regulations 45 (1918); Article 548 of Regulations 62 (1921), Regulations 65 (1924), and Regulations 69 (1926); Article 71 of Regulations 74 (1928) and Regulations 77 (1932); Section 22(a)-21 of Regulations 86 (1934), Regulations 94 (1936), Regulations 101 (1938), and Regulations 103 (the first regulations under the Internal Revenue Code). The words "in dissolution" were used in Regulations 69 and earlier regulations where the words "in partial or complete liquidation" appears in all subsequent regulations, including present Regulations 111.
2. The quoted words are Judge Sibley's in F.H.E. Oil Company v. Commissioner, 147 F. 2d 1002, 1003 (C.C.A. 5th 1945). The Court was discussing the attack upon the option (which, in Judge Sibley's words, "The legislative mind of the Treasury Department seems determined to maintain.") given in regulations since 1918 to deduct as expense or to capitalize drilling and development costs of oil wells.

tion have been exercised in cases, such as *Commissioner v. Court Holding Company*[3] and *Meurer Steel Barrel Co. v. Commissioner*,[4] where he contended that what appeared to be a sale by stockholders shortly after liquidation was in substance a sale by the corporation, or cases such as *Taylor Oil & Gas Co. v. Commissioner*,[5] *Hellebush v. Commissioner*,[6] and *Fairfield Steamship Corp. v. Commissioner*,[7] where he urged that sales shortly after liquidation were by agents or trustees acting for the corporation in dissolution rather than by agents or trustees representing the stockholders. As a result, corporate taxpayers have seldom been forced to defend the validity of the rule under discussion. In no case does the Commissioner appear to have attacked it in an appellate court.

Conversely, corporate taxpayers have seldom pressed to the point of litigation the deduction of losses due to depreciation in value of assets distributed in liquidation. A sale of such assets prior to liquidation would usually accomplish the purpose of establishing a loss by the corporation.[8] Accordingly, if the assets of the corporation are in any event to be sold to non-stockholders, it is within the power of the stockholders to cause their sale by the corporation before, or by themselves after, liquidation. For this reason it seems, instead of the rule's operating evenly as between the Treasury and the taxpayers, it would in the long run favor the latter.

For whatever reason, the validity of this rule has been the subject of infrequent frontal attack, all of which seem to have been more or less half-hearted. Certainly the reported decisions exhibit no thorough inquiry into the basic underlying considerations. Above the level of the United States Tax Court, no opinion discusses the correctness of the rule. The Tax Court (and its predecessor Board of Tax Appeals) has, in the majority of its opinions dealing with the subject, merely assumed the correctness of the rule without analysis.

It would be profitless to analyse and discuss the many appellate decisions where the rule was recognized or necessarily involved. Those cases which hold that the property in question was sold by or for the corporation and was not, for tax purposes, distributed to the stockholders, clearly do not, in the absence of express rulings by the courts, indicate approval or disapproval of the rule. Thus the

3. 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981 (1945).
4. 144 F. 2d 282 (C.C.A. 3rd 1944).
5. 47 F. 2d 108 (C.C.A. 5th 1931).
6. 65 F. 2d 902 (C.C.A. 6th 1933).
7. 157 F. 2d 321 (C.C.A. 2d 1946) cert. denied 329 U. S. 774, 67 S. Ct. 193, 91 L. Ed. 665 (1946).
8. An illustration of failure to accomplish the purpose is Gaunt & Harris v. United States, 110 F. 2d 651 (C.C.A. 6th 1940). A sale in 1932 to controlling stockholders, apparently after decision to dissolve, was held to be a distribution in liquidation which did not result in loss to the corporation. In 1932, there was no provision corresponding to I.R.C. Section 24(b) which prohibits the deduction of losses from sales and exchanges between parties occupying certain special relationships such as that of a corporation and an individual owning, directly or indirectly, more than fifty per centum in value of its outstanding stock.

mere fact that it is stated in footnote 3 to the opinion in *Commissioner v. Court Holding Company* that Treasury Regulations "have long provided . . . that a corporation realizes no taxable gain by a mere distribution of its assets in kind, in partial or in complete liquidation"[9] can hardly be taken to indicate what the court would hold if the validity of the regulation were in issue. The same must be said of such cases as *Gaunt & Harris v. United States,*[10] where neither the appellate nor the district court[11] referred to the regulation, but held the corporation taxable.

On the other hand, those cases which hold there was a liquidation followed by a sale by the stockholders[12] or by someone acting on their behalf[13] seem, by necessary implication, to uphold the principle that no gain is realized by the distribution in liquidation, at least where the liquidation and sale occur during the same taxable year of the corporation. However, where the truth of a proposition is conceded by the party who alone would gain by its denial the courts seldom go behind the concession to see if it is in fact justified.[14] In none of the appellate decisions so holding do we find our question raised or discussed, so that it would seem they afford little comfort beyond that afforded by the regulations itself.

Indeed, we find one case, *Fairfield Steamship Corp. v. Commissioner,*[15] where the court held that a transfer by a subsidiary in liquidation to its parent corporation resulted in gain to the subsidiary because the transaction was not within I.R.C. Section 112(b) (6) providing for non-recognition of gain or loss to a corporation receiving property distributed on complete liquidation of another. Of course this basis for the decision was unsound because Section 112(b) (6) is applicable only to gain or loss of the parent and not of the subsidiary, as was recognized by Judge L. Hand in an addendum to the opinion placing it on the ground that the parent occupied the position of trustee or receiver in dissolution of the subsidiary at the time the parent sold the asset received in liquidation. But it shows that Judge Hand must have instinctively felt that gain was realized by the subsidiary on the liquidation, taxable unless covered by a non-recognition provision of the law.

9. 324 U. S. at 332, 65 S. Ct. at 707, 89 L. Ed. at 984 (1944).
10. *Supra*, note 8. The case is cited as supporting the rule by 1 RABKIN AND JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION, 1312.
11. 23 A.F.T.R. 1141 (D. C. Ky. 1938).
12. For example, Cumberland Public Service Co. v. United States, 83 F. Supp. 843 (Ct. Cl. 1949); Howell Turpentine Co. v. Commissioner, 162 F. 2d 319 (C.C.A. 5th 1947); *Cf.* Kaufmann v. Commissioner, 174 F. 2d .... (C.C.A. 3rd 1949).
13. United States v. Cummins Distilleries Corp., 166 F. 2d 17 (C.C.A. 6th 1948).
14. Compare the following quotation from F.H.E. Oil Co. v. Commissioner, 147 F. 2d 1002, 1003 (C.C.A. 5th 1945): "The question of its validity has seldom been raised, the taxpayers not wishing to attack it because it favors them, and the Commissioner not being in position to repudiate the regulation of his own department. The judges have not thought it their business to raise the question; but if the option be in truth contrary to the revenue statutes, it is void, and it is the duty of the judges to declare and uphold the law, and disregard the regulation."
15. 157 F. 2d 321 (C.C.A. 2d 1946) cert. denied 329 U. S. 774, 67 S. Ct. 193, 91 L. Ed. 665 (1946).

Nothing need be said of the many "whodunit" cases decided by the Board of Tax Appeals and the Tax Court and nothing will be gained by discussing their decisions which merely state the rule or cite the regulation.[16]

This brings us to the few cases which have gone beyond reliance upon the regulation itself. They will be critically discussed in their chronological order.

Stock Yards Bank of Cincinnati.[17]

Petitioner's stockholders sold their stock to a competitor bank who then took over petitioner's assets in complete liquidation of its affairs, this occurring in 1926. In overruling the Commissioner's determination that petitioner realized a gain, the Board referred to Section 201(c) of the Revenue Act of 1926 as providing in part that "Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock" and that "the gain or loss to the distributee resulting from such exchange shall be determined under Section 202 . . . ." The Board refused to apply this Section to the petitioner, stating: "We are not concerned here with the gain or loss, if any, to the distributee resulting from such complete liquidation, or with the gain or loss realized to the old stockholders of petitioner upon the sale of their stock to the nominee of the Trust Company. We are only concerned now with the question whether petitioner realized a gain or loss when it distributed its assets, etc., to its sole stockholder in complete liquidation of its affairs. We believe that the respondent has correctly answered this question in Article 548 of his Regulations 69," providing that no gain or loss is realized by a corporation from the mere distribution of its assets in kind upon dissolution.

This is the first and apparently the only time the statute corresponding to Section 201(c) of the Revenue Act of 1926 has been discussed in a published decision as having any possible bearing on the question under consideration. The Court summarily dismissed it as dealing only with the liability of the distributee in spite of the unqualified language requiring amounts distributed to be treated as full payment "in exchange for the stock." There is nothing in this language to indicate it should be so treated only from the standpoint of the distributee. The mere fact that a subsequent sentence provides how the distributee's gain or loss should be determined would not seem to pre-

16. Among the latter are Chicago Binder & File Co., 4 B.T.A. 1002 (1926); Cosby-Wirth Sales Book Co., 19 B.T.A. 1074 (1930) (Acq. IX-2 CB 13); J.T.S. Brown's Son Co., 10 T.C. 840 (1948) (Acq. 1948-2 CB 1).
17. 25 B.T.A. 964 (1932) (Acq. XI-2 CB 9).

vent the requirement that the distribution be treated as a payment in exchange for the stock from being applicable to the corporation.[18]

Admittedly some support may be gained for the view that Congress had in mind only the tax treatment of the distributee from a consideration of the legislative history of the section of the Revenue Acts corresponding to Section 201 (c) of the Revenue Act of 1926.[19] Section 201(c) of the 1918 Act contained the following sentence: "Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits." Under this Act the Treasury ruled that liquidating dividends did not enjoy the exemption from normal tax then granted ordinary dividends.[20] No corresponding sentence was contained in the 1921 Act,[21] which had for the first time, in Section 206, introduced the concept of capital gains and losses and provided a limitation on their taxability. The House Ways and Means Committee report on the Revenue Bill of 1924[22] and the Senate Finance Committee Report[23] stated that "the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates." The Congress thought such dividends should be treated as capital gains to the distributees and apparently had only this end in mind in enacting Section 201 (c) into law. However, the following significant language, which seems applicable as well to the corporation as to the stockholder, is used in the Ways and Means Committee report:

> "The proposed bill, as did the 1918 Act, treats a liquidating dividend as a sale of the stock to the corporation and *recognizes the true effect* of such a distribution." (Emphasis supplied.)

The Senate Finance Committee Report also contains the following significant statement:

> "A liquidating dividend is, in effect, a sale by the stockholder

18. Compare the following language in Burton-Sutton Oil Co. v. Commissioner, 328 U. S. 25, 27, 66 S. Ct. 861, 863, 90 L. Ed. 1062, 1064 (1946): "A decision on the category of expenditures to which these 50% disbursements belong affects both the operators who make them and the owners, lessors, vendors, grantors, however they may be classed, who receive them. If they are capital investments to one, they are capital sales to the other. If they are rents or royalties paid out to one, they are rents or royalties received by the other."

19. There was no corresponding provision in the 1921 and 1934 Acts or in Acts prior to 1918. The corresponding section was numbered 201(c) in the 1918, 1924 and 1926 Acts. Beginning with the 1928 Act the corresponding provision has been Section 115(c). The pertinent portion of present I.R.C. Section 115(c) reads as follows: "Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under Section 111, but shall be recognized only to the extent provided in Section 112."

20. Regulations 45, Article 1548. The ruling was upheld in Hellmich v. Hellman, 276 U. S. 233, 48 S. Ct. 244, 72 L. Ed. 544 (1928).

21. The omission was held to bring liquidating dividends under Section 201(a), along with ordinary dividends, and to exempt them from normal tax. Frank D. Darrow, 8 B.T.A. 276 (1927) (Acq. VII-1 CB 8).

22. CB 1939-1 (part 2), page 249.

23. CB 1939-1 (part 2), page 274.

of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof."

If such is the "true effect" of a distribution in liquidation,[24] and no reason to the contrary has suggested itself to the author,[25] then is it necessary for the Congress specifically to provide for the tax treatment of the corporation or would not the corporation be taxable under the broad sweep of Section 22(a)?[26] Where a corporation purchases its stock with property it has long been held that it realizes gain or loss.[27] What is the difference between, on the one hand, a purchase of stock with assets and, on the other hand, a distribution of assets in partial or complete liquidation if the "true effect" of a liquidating dividend is the sale of the stock to the corporation, or conversely the purchase of its stock by the corporation?

In its consideration of Stock Yards Bank of Cincinnati, the Board did not have before it, or available, further legislative history of any significance in this connection and it might be well to conclude the discussion of this case at this point. On the other hand, it seems more orderly here to present the subsequent legislative history for such light as it throws upon the correctness of the Board's decision that Section 201(c) has no application to the corporation.

The treatment of distributions in liquidation as payments in exchange for stock was continued in the Revenue Acts from 1924 through the 1932 Act. In the 1934 Act this treatment was discontinued, the following reason being assigned by both the House and Senate Committees:[28] "Under existing law a distribution in liquidation of a corporation is treated in the same manner as a sale of stock. This rule has serious objections, as it permits wealthy stockholders to escape surtax upon corporate earnings or profits distributed in the form of liquidating dividends . . . Your committee recognizes that liquidating dividends do contain some of the elements of a sale in that the shareholder is relinquishing in whole or in part his invest-

24. Compare the following language (quoted approvingly in Hellmich v. Hellman, 276 U. S. at 235, 48 S. Ct. at 245, 72 L. Ed. at 546) of Regulations 45, Article 1548: "So-called liquidation or dissolution dividends . . . are to be regarded as payments for the stock of the dissolved corporation. . . . A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock."

25. See 16 FLETCHER CYCLOPEDIA CORPORATION 871-3 (1942) and 19 C.J.S. Section 1693 (1940), keeping in mind the distinction between complete liquidation and dissolution before complete liquidation.

26. Compare Helvering v. Clifford, 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940) holding failure of the Congress to make provision for short term trusts in Section 166, which deals specifically with trusts whose income is taxable to the settlor, though urged to do so by the Treasury, "cannot be said to have subtracted from Section 22(a) what was already there."

27. Commissioner v. Boca Ceiga Development Co., 66 F. 2d 1004 (C.C.A. 3rd 1933); Commissioner v. S. A. Woods Mach. Co., 57 F. 2d 635 (C.C.A. 1st 1932); Allyne-Zerk Co. v. Commissioner, 83 F. 2d 525 (C.C.A. 6th 1936); Hammond Iron Co. v. Commissioner, 122 F. 2d 4 (C.C.A. 5th 1941). The vacillation of the Board of Tax Appeals on the question, pointed out in the Boca Ceiga and Hammond cases, was ended in Trinity Corporation, 44 B.T.A. 1219 (1941), affirmed 127 F. 2d 604 (C.C.A. 5th 1942).

28. CB 1939-1 (part 2), pages 576-614.

ment in the corporation. On the other hand, they also contain some of the elements of an ordinary dividend insofar as they represent a distribution of corporate earnings or profits."

In the Revenue Act of 1936 complete liquidations coming within a specified definition were again treated as payments in exchange for stock. The Ways and Means Committee said, with reference to this change: "The present rule which requires the taxpayer in such a case to be taxed on 100% of the gain is preventing liquidation of many corporations. Thus, we are getting very little tax under the strict rule now provided. It is believed that the result of this modification in the method of taxing gains arising from complete liquidation will bring about a substantial increase in the revenue. In the opinion of your committee that change will result in about $40,000,000.00 in additional revenue."[29]

In 1942, Section 115 (c) was amended to afford distributions in partial liquidation the same treatment as distributions in complete liquidation. The Committee reports indicate that both the House and Senate were concerned only with the inequity between complete and partial liquidations and point out that proper application of Section 115 (g) will prove adequate to prevent taxable dividends disguised as partial liquidations from receiving capital gain treatment.[30] It is obvious that the Congress was thinking only of the tax treatment of the distributee.

The first express recognition we find on the part of either house of the Congress of the fact that a corporation is not taxed on distributions in liquidation appears in the House Ways and Means Committee report dealing with Section 129 of H.R. 6712 which was submitted to the 80th Congress.[31] It thus appears that the House of Representatives, at least, recognizes that neither Section 115 (c) nor any other provision of the Internal Revenue Code has been interpreted as permitting the recognition of gain or loss to a corporation on liquidating distributions and that the House approves of this treatment of such distributions. Dealing with Section 129 of the bill, the Committee report said:

> "Under existing law it has been held that (where) a corporation is liquidated by distributing its assets to its stockholders, no tax is imposed on the corporation on any appreciation in the value of the assets over their adjusted basis (or cost) to the corporation. As far as the stockholders are concerned, any excess

29. CB 1939-1 (part 2), page 674.
30. See comment of House Ways and Means Committee on Section 133 of H.R. 7378 (77th Congress) and of the Senate Finance Committee on Section 149 of the Bill as submitted to the Senate.
31. The bill (commonly known as the Revenue Revision Bill of 1948) passed the House but was not acted upon by the Senate. A similar bill is now pending before the 81st Congress as H.R. 990. The question dealt with in this article would be foreclosed by the enactment of this section.

of the value of such assets over the cost or other basis of the stock is taxed as capital gains.

"On the other hand, if the corporation sells its assets just prior to liquidation, a tax is imposed on the corporation, and when the proceeds are distributed to the stockholders another tax may be imposed on them. In a great many cases disputes have arisen between the Government and the taxpayer as to whether a sale was made by a corporation or its shareholders. The problem went to the Supreme Court in the Court Holding Company case (324 U. S. 331 (1945)).

"The two methods of liquidation are essentially the same, and your committee believes there is no justification for subjecting the second method to discriminatory tax treatment, particularly since this method represents, in most cases, the more efficient form of liquidation. Moreover, there often is considerable uncertainty as to whether the sale of the assets was effected by the corporation before liquidation or by the stockholders after the distribution. As a result there has been much litigation."

Summarizing this legislative history, it would seem that the Board was correct in deciding that Section 201 (c) of the Revenue Act of 1926 was not intended to apply to the corporation in liquidation, but that in its enactment the Congress was concerned only with the tax effect upon the distributee; however, there is nothing in the legislative history prior to 1948 which indicates Congressional approval of the regulation under consideration or to indicate its awareness of the problem at all. In view of what the Ways and Means Committee so clearly stated to be the "true effect" of a liquidation in its report on the Revenue Act of 1924, it is highly debatable whether the Board was correct in ruling that the corporation was not taxable simply because Section 201 (c) was not enacted for the purpose of making it taxable.

Dill Manufacturing Company.[32]

The case arose under the 1932 Act. Because of dissension between its majority and minority stockholders, petitioner acquired the stockholdings of the latter, immediately retiring the stock and reducing the stated capital. As part of the consideration for the stock, petitioner transferred United States Bonds which had decreased in value and sought to deduct the amount of the decrease as a loss. The Commissioner disallowed the deduction and was upheld by the Board.

In addition to citing the case of Stock Yards Bank of Cincinnati, *supra,* as well as several other cases which throw no light on the

32. 39 B.T.A. 1023 (1939) (Non-acq. 1939-2 CB 47).

question under consideration, the Board cited as authority *General Utilities & Operating Co. v. Helvering.*[33] This decision involved a dividend in kind, unaccompanied by any surrender of stock to the corporation. It cannot therefore be authority for the proposition that a partial or complete liquidation, in which property is exchanged for stock, involves no gain or loss to the corporation. As a matter of fact, the Supreme Court based its decision on the following terse statement: "This was no sale; assets were not used to discharge indebtedness." The main burden of the argument in the lower courts involved whether a cash dividend had been declared creating an indebtedness on the part of the corporation which was satisfied by the dividend in kind. No consideration was given to whether taxable income is realized by a corporation which exchanges assets for its stock.[34]

The Board also relied upon *Hellebush v. Commissioner*[35] which had upheld the validity of Article 71 of Regulations 77. The Court in the Hellebush case was dealing, however, with that portion of Article 71 providing that sales of property by trustees in dissolution be treated as if made by the corporation. Finding the sale to be by such trustees, the Court held the corporation taxable. The Sixth Circuit Court was therefore not passing directly upon that portion of the regulation dealing with distributions in liquidation. However the Court quoted the entire regulation and said that due to repeated re-enactment of Section 213(a),[36] the regulation having been in force as an interpretation of this Section since 1918, without change by the Congress, the regulation "should now be given effect."[37] If this principle cannot be disputed, clearly our search is at an end—we now have thirty years of re-enactment instead of fifteen at the time of Hellebush. The principle can best be examined in connection with the next Board decision.

Lencard Corporation.[38]

Petitioner had outstanding preferred shares redeemable upon notice at $100 per share, all owned by one shareholder. The common stock was owned by different shareholders. The preferred stock was redeemed by delivering to the preferred shareholder stock of other corporations, the fair market value of which, together with a small

33. 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 154 (1935).
34. Even as to what was actually decided in the General Utilities case, it is stated in 1 MERTENS, LAW OF FEDERAL INCOME TAXATION 515 (........), that authority exists holding it still an open question. See also Commissioner v. First State Bank of Stratford, 168 F. 2d 1004 (C.C.A. 5th 1948), reversing 8 T.C. 831 (1947), and holding a corporation taxable on collections by its stockholders on notes distributed as a dividend in kind after having been previously charged off.
35. 65 F. 2d 902 (C.C.A. 6th 1933).
36. Corresponding to present Section 22(a).
37. To the same effect is First National Bank of Greely v. United States, 86 F. 2d 938 (C.C.A. 10th 1936). Also holding a corporation taxable on sales by its trustee in dissolution, the Court recognized that repeated re-enactment of a statute would not validate a regulation clearly inconsistent with it.
38. 47 B.T.A. 58 (1942) (Acq. 1942-2 CB 12).

amount of cash, equalled the redemption price of the preferred. This was then retired and cancelled and the certificate of incorporation was amended to eliminate the preferred stock from the capitalization. The value of the stock delivered to the preferred shareholder exceeded its basis, no gain was reported by petitioner, and the Commissioner determined deficiencies by including the appreciation in value as part of petitioner's gross income.

The Board stated that if the transaction was in essence the sale of petitioner's assets in consideration of its own shares, a gain was realized, but that if the transaction was essentially the liquidation of petitioner's outstanding stock, it realized no gain, citing for the latter proposition the regulation, *Meurer Steel Barrel Co.,*[39] and *Dill Manufacturing Co.,* just discussed herein.

Concluding that the transaction was essentially one in liquidation, the Board proceeded to say: "Article 22(a)-21 of Regulations 86, cited above, provides that: . . . No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition . . . This regulation has appeared in all regulations since Regulation 74 (1928 Act). It has been carried forth in regulation applicable to the Revenue Acts of 1928, 1932, 1934, 1936, and 1938. As stated by the Supreme Court in *Helvering v. Reynolds Tobacco Co.,* 306 U. S. 110, 115, 'Congress must be taken to have approved the administrative construction and thereby to have given it the force of law'."

Here again we have the same reasoning as that used in *Dill Manufacturing Co.* in relying upon *Hellebush v. Commissioner.*[40] The fact that the authority here cited is our highest court, and a more recent pronouncement,[41] prompts the discussion at this point as to whether we can now rely with assurance upon Congressional failure to deal specifically with the regulation in re-enacting Section 22(a) of the Code and corresponding provisions of prior Revenue Acts. Has the Congress "given it the force of law"?

Only a year earlier, the Supreme Court has said, in *Biddle v. Commissioner*:[42]

"Where the law is plain the subsequent re-enactment of a

39. 11 B.T.A. 584 (1928), affirmed per curiam without opinion, 35 F. 2d 1019 (C.C.A. 2d 1929). The Board did not discuss the correctness of the principle under consideration, but assumed that a corporation would sustain no loss on a distribution in liquidation, denying the deduction taken by the corporation for a claimed loss. The Board discussed only whether there was a sale or a distribution in liquidation.
40. 65 F. 2d 902 (C.C.A. 6th 1933).
41. Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 59 S. Ct. 423, 83 L. Ed. 536 (1939).
42. 302 U. S. 573, 582, 58 S. Ct. 379, 383, 82 L. Ed. 431, 439 (1938). In the quoted phrase the Court was treating "administrative construction" as though it had the force of a regulation, stating that it was "Laying aside the fact that departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute . . ."

statute does not constitute adoption of its administrative construction."

Less than a year later the Supreme Court was saying, in *Helvering v. Wilshire Oil Co.*:[43] "The oft-repeated statement that administrative construction receives legislative approval by re-enactment of a statutory provision, without material change (*United States v. Dakota-Montana Oil Co., supra*) covers the situation where the validity of administrative action standing by itself may be dubious or where ambiguities in a statute or rules are resolved by reference to administrative practice prior to re-enactment of a statute; and where it does not appear that the rule or practice has been changed by the administrative agency through exercise of its continuing rule-making power. It does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by re-enactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers."

And at the next term of court, it was saying, in *Helvering v. Reynolds*:[44] "That rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change. (Citations.) It gives way before changes in the prior rule or practice through exercise by the administrative agency of its continuing rule-making power."

No useful purpose would be served by undertaking to reconcile or to review further the cases on this point in order to determine under what circumstances the various and inconsistent statements of the effect of re-enactment will be applied.[45] No safe conclusion can be drawn even as applied to the regulation under consideration. It seems a fair inference, however, that unless and until *Helvering v. R. J. Reynolds Tobacco Co.* is overruled,[46] it will be cited against recognition of gain or loss to a corporation on the distribution of its assets in kind in liquidation, and will be followed unless the Courts consider the regulation to be clearly erroneous under Section 22(a) or Section 115(c).

No further points are brought out in other Board or Tax Court

43. 308 U. S. 90, 60 S. Ct. 18, 84 L. Ed. 101 (1939).
44. 313 U. S. 428, 61 S. Ct. 971, 85 L. Ed. 1438 (1941).
45. The cases cited in notes 40-43 inclusive, and others, are discussed in footnotes 46 and 47 to the opinion in Helvering v. Griffiths, 318 U. S. 371, 395, 63 S. Ct. 636, 649, 87 L. Ed. 843, 859 (1943), in Busey v. Deshler Hotel Co., 130 F. 2d 187 (C.C.A. 6th 1942), and in other cases too numerous to mention. See 1 MERTENS, LAW OF FEDERAL INCOME TAXATION 91 *et seq.*, where it is concluded that the merits of the case should be the determining factor with rules of construction serving merely as aids.
46. The principle quoted by the Board has been restated and followed in the more recent cases of United States v. Seattle First National Bank, 321 U. S. 583, 64 S. Ct. 713, 88 L. Ed. 944 (1944), and Crane v. Commissioner, 331 U. S. 1, 67 S. Ct. 1047, 91 L. Ed. 1301 (1947).

decisions on the subject and it is necessary further to say concerning them only that they reveal a disposition on the part of the Commissioner to attack the regulation in the Tax Court, where its validity seems to be settled, at frequent intervals without the determination to appeal the issue to the courts. Thus, after losing Stock Yards Bank of Cincinnati, he acquiesced in the result. He maintained the validity of the regulation in Dill Manufacturing Company and prevailed on this issue. In Lencard Corporation he again attacked the regulation, lost, and acquiesced in the result. In *Ramon Corporation*[47] he again attacked it unsuccessfully. His latest acquiescence in *J. T. S. Brown's Son Co.*,[48] is therefore little assurance that he will not again litigate the issue or use the threat of litigation as a lever to promote settlement of some other issue or to exact a tax which his regulation does not authorize.

Conclusion

Administrative considerations are perhaps preponderantly in support of the regulation. In those cases where liquidation is not followed by a sale of the corporate assets questions of valuation would be involved to determine whether the assets had appreciated or depreciated relative to their basis. The method of determining gain or loss might itself present a problem—for instance, would the assets be valued, or would their basis be compared with the fair value of the stock surrendered on the date of liquidation,[49] which itself might be affected by the fact of liquidation and might differ greatly from the fair value of the assets?

Certainly a different rule would prevent many liquidations desirable from the standpoint of the economical continuance of the business, whether by the same or different owners, a result which the Congress sought to avoid in 1936 when it again permitted the shareholders to treat their gains as capital gains.

Neither of these considerations would go far in court if the law were clearly contrary, nor would the fact of double taxation on the corporation and its stockholders or the hardship involved in imposing a tax at the very moment of extinction of the corporate life. Both of these incidents were involved in all the cases similar to *Commis-*

47. Prentice-Hall Memo Decisions, Paragraph 47, 179 (1947).
48. 10 T.C. 840 (1948) (Acq. 1948-2 CB 1).
49. Compare Ida I. McKinney, 32 B.T.A. 450 (1935).

sioner v. Court Holding Company.[50] Such appeals would be better addressed to the Congress than to the courts.[51]

In a setting framed by these considerations, however, the long existence of the regulation, the re-enactment since 1918 of Section 22(a) without modification on account of the regulation,[52] and the legislative history of Section 115(c), present a very strong case for applying the doctrine of *Helvering v. R. J. Reynolds Tobacco Company*[53] against any contention that Section 22(a) calls for taxation and for treating Section 115(c) as inapplicable.

50. 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981 (1945). See Helvering v. Enright's Estate, 312 U. S. 636, 61 S. Ct. 777, 85 L. Ed. 1093 (1941), and Pfaff v. Commissioner, 312 U. S. 646, 61 S. Ct. 783, 85 L. Ed. 1099 (1941), requiring the accrual as income in the final return of a decedent who reported on the cash basis of items of income which a living taxpayer reporting on the accrual basis would not be required to accrue. The hardship occasioned by this rule prompted the enactment of Section 134(e) of the Revenue Act of 1942. See I.R.C. Section 126.

51. The question would be settled by the enactment of a provision similar to Section 129 of the Revenue Revision Act of 1948, as submitted to the House.

52. See the opinion denying the first motion for rehearing in F.H.E. Oil Co. v. Commissioner, 149 F. 2d 238 (C.C.A. 5th 1945). The original opinion (147 F. 2d 1002 C.C.A. 5th (1945)) had broadly held invalid the long continued regulation making it optional with the taxpayer to expense or to capitalize drilling and development costs of oil wells. On rehearing the Court withdrew this basis of its decision, saying: "While we see no fault in our previous reasoning, and think the former opinion a right one to have been rendered twenty years ago, we find it unnecessary to consider so broadly the validity of the option, and now confine our decision 'to the applicability of the regulation to the facts of the particular case'." A second opinion on rehearing is reported in 150 F. 2d 857 (C.C.A. 5th 1945).

53. 306 U. S. 110, 59 S. Ct. 423, 83 L. Ed. 536 (1939).

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Contributors of Leading Articles

CHARLES M. CORK—A.B., 1927, LL.B., 1929, Mercer University. Associate in the firm of Jones, Jones & Sparks, Macon, Georgia.

JULIUS R. LUNSFORD, JR.—LL.B., 1936, University of Georgia. Member of the Atlanta, Georgia, Bar.

FRANK E. MALONEY—B.A., 1938, University of Toronto; LL.B., 1942, University of Florida. Member of the Florida Bar. Associate Professor of Law, University of Florida, Gainesville, Florida.

F. HODGE O'NEAL—A.B., 1938, LL.B., 1940, Louisiana State University; J.S.D., 1949, Yale University. Member of the Louisiana Bar. Dean and Professor of Law, Walter F. George School of Law, Mercer University, Macon, Georgia.

JAMES C. QUARLES—B.A., 1942, LL.B., 1945, University of Virginia. Member of the Virginia Bar. Associate Professor of Law, Walter F. George School of Law, Mercer University, Macon, Georgia.