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# Taxation--Gain or Loss on Securities Held in Margin Account

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tion exist.[18] It is obvious that a taxpayer and transferee cannot co-exist, as such status would presuppose two juristic persons, one being primarily liable and the latter secondarily liable.[19]

Generally where a waiver purports to be executed for a dissolved corporation it is ineffective,[20] unless such power is given by statute of the state of incorporation.[21] But the court will look at the substance rather than the form of the transaction,[22] and it has held that a waiver signed by the *transferee* acting for the dissolved transferror was valid,[23] although the Statute of Limitations had expired;[24] though in the instant case the court strictly construed the waiver.[25] And so the court has held that a notice of assessment naming the party as "taxpayer" instead of "transferee" was valid[26] and that such notice need not be signed by the Commissioner[27] nor have any definite or special form.[28]

I. D.

TAXATION—GAIN OR LOSS ON SECURITIES HELD IN MARGIN ACCOUNT.—Early in 1926, petitioner purchased on marginal account a block of United Gas Improvement Company stock. In 1928, he purchased additional stock of the same company and in subsequent transactions he sold an amount equal to the number of shares he

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[18] Union Pacific Ry. Co. v. Board of Commissioners of Weld County, Colorado, 222 Fed. 651 (C. C. A. 8th, 1915).

[19] Western Union Telegraph Co. v. Commissioner of Internal Revenue, 68 F. (2d) 16 (C. C. A. 2d, 1933).

[20] Commissioner of Internal Revenue v. Newport Co., 65 F. (2d) 925 (C. C. A. 7th, 1933), *rev'd on other grounds,* 291 U. S. —, 54 Sup. Ct. 481 (1934); *cf.* Wonder Bakeries Co., Inc. v. United States, *supra* note 7. "There is a conflict in the decisions as to whether an officer and stockholders of a dissolved corporation can file a waiver for it under any circumstances," but such a party can file a waiver for the dissolved corporation that would be binding on himself. Instant case.

[21] Helvering v. South Penn Oil Co., 68 F. (2d) 420 (App. D. C. 1933).

[22] Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass'n, 247 U. S. 490, 38 Sup. Ct. 553 (1918).

[23] Helvering v. Newport Co., 291 U. S. —, 54 Sup. Ct. 481 (1934). The court, without discussion, dismisses the contra proposition as without merit.

[24] Commissioner of Internal Revenue v. Wolf Co., 69 F. (2d) 1001 (C. C. A. 3d, 1934).

[25] The court ruled that all waivers, except the one for the year 1921, were ineffective, and thus, it of necessity included the waiver executed by the taxpayer as "transferee."

[26] Burnet v. San Joaquin Fruit & Investment Co., 52 F. (2d) 123 (C. C. A. 9th, 1931). But in this case the liability of the transferee was that of a taxpayer.

[27] Riggs v. Commissioner of Internal Revenue, 50 F. (2d) 1082 (C. C. A. 3d, 1931); Helvering v. Continental Oil Co., 68 F. (2d) 750 (App. D. C. 1933).

[28] Tameling v. Commissioner of Internal Revenue, 43 F. (2d) 814 (C. C. A. 2d, 1930); Noyes v. United States, 55 F. (2d) 870 (C. C. A. 9th, 1932); Ventura Consolidated Oil Fields v. Welch, 6 F. Supp. 327 (S. D. Cal. 1934).

had bought in 1928, together with a stock dividend received in 1926. At the end of 1928, he had the same number of shares which had been purchased in 1926. He had kept his books on a basis which indicated that stock purchased in 1926 was to be held for investment, and had related to his broker his intention to hold such shares. The Commissioner of Internal Revenue assessed a deficiency tax against the petitioner for the tax year 1928. On appeal from decision[1] affirming the action of the commissioner, *held,* reversed. "First in, first out" rule does not apply to sales of stock in margin account where taxpayer instructed broker to exclude shares first purchased. *James L. Rankin, Executor of the Estate of Richard B. Turner, Deceased* v. *Commissioner of Internal Revenue,* — F. (2d) —, C. C. A. 3d, September 18, 1934.

In the case of marginal transactions, the general rule is that stock sold shall be applied against earliest purchases to determine gain or loss.[2] While identification of actual shares sold is preferable, a margin account is of a nature that makes it difficult, if not impossible, to identify the lot sold, and therefore the general rule of first acquired, first sold, usually applied.[3] Evidence of intention of the owner of shares in the transaction while not conclusive of the question of identification has, nevertheless, a bearing on their disposition.[4] In the instant case, the petitioner's communication to his broker of his intention to exclude from sale the shares first purchased were in effect an identification of the shares later sold as those last purchased. The Commissioner erred in the theory that the United Gas Improvement Company stock which from time to time was purchased on margin, and later sold, could be identified only by certificates, and that as no certificates for shares were ever in the petitioner's name, the shares sold could not be identified as

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[1] 26 B. T. A. 1204 (1932).

[2] REV. ACT 1928 §113 (a). 45 Stat. 818, 26 U. S. C. 2113. Article 58 of Regulation 74, "When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock * * *."

[3] Towne v. McElligott, 274 Fed. 960 (S. D. N. Y. 1921); Skinner v. Eaton, 45 F. (2d) 568 (C. C. A. 2d, 1930), *aff'g,* 34 F. (2d) 575 (D. Conn. 1929), *cert. denied,* 283 U. S. 837, 51 Sup. Ct. 486 (1931). Wherein court stated that cost of stock purchased may not be averaged or merged. Snyder v. Commissioner, 54 F. (2d) 57 (C. C. A. 3d, 1931), *aff'g,* 20 B. T. A. 778 (1930). Where broker's testimony that in keeping up taxpayer's margin he sold shares last purchased, *held,* insufficient identification to render inapplicable regulation that stock sold shall be charged against earliest purchases. Homer v. Commissioner, — F. (2d) — (C. C. A. 3d, 1934); Commissioner v. Merchants and Manufacturers Fire Insurance Co., — F. (2d) — (C. C. A. 3d, 1934); Stryker, 21 B. T. A. 561 (1930); Jenks, 22 B. T. A. 910 (1931); Hendrick, 24 B. T. A. 444 (1931).

[4] Howbert v. Penrose, 38 F. (2d) 577 (C. C. A. 10th, 1930). This is the only reported court decision, besides the instant case, in which the evidence was held to support the taxpayer's contention that he sold specific shares of stock and not those first acquired.

shares purchased in any particular lot or at any particular time or price. What was bought and sold were shares and not certificates. Shares, as distinguished from certificates, are property capable of identification.[5]

Apparently, the decision renders more indistinct a present perplexing situation. If identification is to be of "shares" rather than of "certificates," anomalous situations will arise where stock certificates owned outright may be delivered against sales but the identity of these certificates will be disregarded since the taxpayer has delivered "shares." Likewise, by a mere instruction to the broker of their intention, taxpayers may retain the certificate held outright and "deliver" the "share" by an actual delivery of the certificate held in their margin account. In view of the Revenue Act of 1934, a final determination by the Supreme Court appears to be particularly necessary at this time.[6]

B. K.

INCOME TAX—SECTION 211(c) OF THE REVENUE ACT OF 1928 CONSTRUED—MARKET VALUE.—A corporation in filing its income tax return placed a trading value of $117 a share on stock which it received in exchange for part of the corporate property. This valuation was accepted by the Commissioner of Internal Revenue and the gain accruing to the corporation from the exchange was taxed in accordance with the statute.[1] Petitioner (corporation) seeks a redetermination claiming that the valuation of $117 a share reported in its return was due to an error and that the stock only had a market value of $16 a share within the meaning of the statute.[2] At a hearing before the Board of Tax Appeals the only evidence adduced by the corporation to support this valuation was the opinion of two experts, whose testimony was not directly contradicted, although it also was found as a fact that the stock had not been sold in twenty-eight years. Petitioner appeals from a decision of the Board of Tax Appeals denying the claim. *Held,* affirming decision of Board of Tax Appeals—that where it appears that stock has not been sold for twenty-eight years and as a result has no market whereby its price can be established, the market value in such case is the fair and reasonable value of the stock and evidence of the assets, earning capacity,

[5] Snyder v. Commissioner, — F. (2d) — (C. C. A. —, 1934); MEYER, THE LAW OF STOCK BROKERS AND STOCK EXCHANGES §42.

[6] REV. ACT OF 1934 §117 provides for determination of gain or loss depending upon the length of time a capital asset is held. 48 Stat. 714, 26 U. S. C. 5117.

[1] REV. ACT OF 1928 §211 a, c; 45 STAT. 815, 818, 26 U. S. C. A. §2111 (a, c), 2113.

[2] REV. ACT OF 1928 §211 c; 45 STAT. 818, 26 U. S. C. A. §2111 (c).