

Income Tax--Section 211(c) of the Revenue Act of 1928 Construed--Market Value

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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 re-determination 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).

location and good will of the corporation is proper to show such value, the testimony of experts standing by itself not being sufficient. *Joseph S. Wells Ass'n v. Helwering*, 71 F. (2d) 977 (App. D. C. 1934).

Section 211(c) of the Revenue Act of 1928 provides: "The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received."³ In *North American Telegraph Company v. Northern Pacific Railway Company*,⁴ a leading case on the subject of market value, the court said, "The term market value as the word fairly imports indicates price established in a market where the article is dealt in by such a multitude of persons, and such a large number of transactions as to standardize the price. The term is, however, frequently used in a figurative sense as meaning the fair or reasonable value of the property—that is, such a value as the property would have if it were dealt in according to the practices of a market overt." That the market value of property may be the fair and reasonable value where there is no established price in a market is generally recognized by the courts⁵ and text writers.⁶ In showing the market value of stock in the figurative sense evidence of the corporate assets,⁷ good will⁸ and earning power⁹ is proper. The fact that stock has not been sold in fifty years will not prevent a fair valuation,¹⁰ evidence being admissible to show the intrinsic value of the shares¹¹ for which purpose corporate accounts and reports of the company's affairs could be examined.¹² Evidence of individual transactions,¹³ opinions of experts,¹⁴ though proper cannot be the sole basis of such value.¹⁵ The valuation of \$117 a share accepted by

³ *Ibid.*

⁴ 254 Fed. 417 (C. C. A. 8th, 1918).

⁵ *Commissioner of Internal Revenue v. Swenson*, 56 F. (2d) 548 (C. C. A. 5th, 1932); *Walls v. Com'r of Internal Revenue*, 60 F. (2d) 349 (C. C. A. 10th, 1932); *Union Electric Light and Power Co. v. Snyder Estate Co.*, 65 F. (2d) 309 (C. C. A. 8th, 1933); *Olson v. United States*, 292 U. S. 259, 54 Sup. Ct. 710 (1934).

⁶ HOLMES, FEDERAL TAXES (1923) 511.

⁷ *Nelson v. First National Bank*, 69 Fed. 798, 803 (C. C. A. 8th, 1895) at 803: "There is no better or safer criterion to determine the value of stock than a comparison of the value of its assets with the amount of its liabilities."

⁸ *Ibid.*

⁹ *Crichfield v. Julia*, 147 Fed. 65, 73 (C. C. A. 2d, 1906); *Industrial Trust, Ltd. v. Tod*, 180 N. Y. 215, 232, 73 N. E. 7 (1905).

¹⁰ *Virginia v. West Virginia*, 238 U. S. 202, 35 Sup. Ct. 795 (1915).

¹¹ *Ibid.*; also *Industrial Trust Ltd., v. Tod*, *supra* note 9, at 232.

¹² *Supra* note 10.

¹³ *Supra* note 4, at 418: "Private dealings in property can never be used to show market value in the primary sense, and when used to show market value in the sense of fair and reasonable value, individual transactions can never be made the sole basis for ascertaining such value."

¹⁴ *Ives v. Com'r of Internal Revenue*, 65 F. (2d) 135 (C. C. A. 5th, 1933); *Stiles v. Com'r of Internal Revenue*, 69 F. (2d) 953 (C. C. A. 5th, 1934).

¹⁵ *Supra* note 4.

the Commissioner of Internal Revenue being deemed *prima facie* correct¹⁶ and since the burden rests on the taxpayer to overcome this presumption by substantial evidence,¹⁷ the evidence in the *instant* case¹⁸ not being of such a nature¹⁹ the affirmance of the decision of the Board was proper.

A. W. G.

¹⁶ Wickwire v. Reinecke, 275 U. S. 101, 48 Sup. Ct. 43 (1927).

¹⁷ Botany Worsted Mills v. United States, 278 U. S. 282, 49 Sup. Ct. 129 (1929).

¹⁸ Joseph S. Wells Ass'n v. Helvering, 71 F. (2d) 977 (App. D. C. 1934).

¹⁹ *Supra* note 14.