

## Constructive Receipt of Dividends

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CONSTRUCTIVE RECEIPT OF DIVIDENDS.—The legal battle is still raging as to the time for reporting dividends declared at the close of one year, checks for which were not actually received by stockholders reporting on cash receipts and disbursements basis until the following year.

In the matter of *Shearman v. Commissioner*<sup>1</sup> the petitioner, by resolution of the board of directors of a corporation, became entitled to dividends on her stock, payable on December 31, 1928. Dividend checks were mailed on December 31, but were not actually received by her until January 2, 1929, on which day the checks were credited to her account in her bank and were paid in due course. She did not include these dividends in her return for 1928. The Court, in passing upon the perennial problem, has in affirming the decision of the B. T. A. stated in substance that dividends so declared are taxable and are to be included in the return for the year in which the taxpayer is entitled to receive the dividends as fixed by the resolution of the board of directors. We believe the principles of the conclusions reached by the Court to be sound; but the statement of the facts and the application of the law, we think, were not carefully analyzed by the Court. In arriving at the above conclusion, the Court based its decision upon the provisions of the statute and regulations<sup>2</sup> that such dividends as these should be included in gross income by the distributees<sup>3</sup> "as of the date when the cash or other property is unqualifiedly made subject to their demands." Mr. Justice Chase, writing for the court, states,<sup>4</sup> "in deciding whether Congress meant after the 1924 act: that only dividends actually received were to be included in any taxable period or whether it was intended that the theory of *constructive receipt* was thereafter to prevail, the retention in subsequent acts without material change of the provisions construed by the administrative department to mean constructive receipt, persuasively indicates that Congress approved the interpretation \* \* \*."<sup>5</sup> In support of its holding, the Court cites the case of *Bingham v. Commissioner*<sup>6</sup> as presenting an analogous situation. The holding in the *Bingham* case we believe to have been not well considered by the Court, for the two cases *do not* present a similar statement of fact.

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<sup>1</sup> 66 F. (2d) 256 (C. C. A. 2d, 1933).

<sup>2</sup> REVENUE ACT OF 1924 (26 U. S. C. A. §954); REVENUE ACT OF 1926 (26 U. S. C. A. §954); REVENUE ACT OF 1928 (26 U. S. C. A. §2042).

<sup>3</sup> *Supra* note 1, at 257.

<sup>4</sup> *Ibid.* at 257.

<sup>5</sup> *Brewster v. Gage*, 280 U. S. 327, 50 Sup. Ct. 115, 74 L. ed. 457 (1930); *Burnet v. Thompson Oil and Gas Co.*, 283 U. S. 301, 307, 308, 51 Sup. Ct. 418, 75 L. ed. 1049 (1931); *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 307, 53 Sup. Ct. 161, 77 L. ed. 318 (1932); *Burnet v. Brooks*, 288 U. S. 378, 392, 393, 53 Sup. Ct. 457, 77 L. ed. 844 (1933); *United States v. Dakota-Montana Oil Co.*, 288 U. S. 459, 466, 53 Sup. Ct. 435, 77 L. ed. 893 (1933).

<sup>6</sup> 35 F. (2d) 503 (1929).

In the *Matter of Bingham*<sup>7</sup> the fact was first established that the taxpayer, on the day the dividend was declared,<sup>8</sup> " \* \* \* could have gotten his money if he had wanted it \* \* \*." There appears to be no such findings in the *Shearman* case.<sup>9</sup> It is true that the B. T. A., in its opinion (not finding of fact) of the *Shearman* case, did state<sup>10</sup> "that the petitioner could have made a personal demand for, and received, her dividend payments from the corporation at the close of business on December 31, 1928. However, the Appellate Court record does not disclose that the checks were "good." Obviously, the Court did not base its decision on this all-important fact. In the absence of a reference to such fact, the decision is not intelligible. In the matter of *Tod v. Commissioner*,<sup>11</sup> in which the same situation was involved, the Board, after first having found that<sup>12</sup> "on December 31st, the Youngstown Sheet and Tube Company had funds available for the payment of said dividends \* \* \*," decided similarly. In a recent decision of the Board of Tax Appeals, *The Hamilton National Bank of Chattanooga, etc. v. Commissioner*,<sup>13</sup> wherein *A* sold a franchise to *B* and tendered his note due on or before July, 1930, in payment, *B* thereupon attempted a resale to a profit to *C*, who refused to accept until *B*'s indebtedness to *A* was cancelled. *A* refused to accept prepayment of the note he held. *B*, in order to consummate the sale to *C*, deposited the amount in a savings bank in his own name as trustee, and delivered to the bank the pass book and check for the full amount, drawn to the order of *A*, with instructions to deliver the check and pass book to *A* in January, 1930. The Court, applying the principle of constructive receipt, held the amount taxable for the year 1929, here again stating:<sup>14</sup> "thus it seems clear that had he [*A*] changed his mind at any time during the latter part of 1929 and asked for the cash, he could have had it." We find that a taxpayer may not deliberately turn his back upon income and thus select the year for which he will report it. Apparently in every case decided in favor of the principle of *constructive receipt*, the fact that the funds are immediately available presents the basis for the decision. Yet the *Shearman* case<sup>15</sup> bears no indication of having been decided on that point. In the matter of *Braunstein v. Commissioner*,<sup>16</sup> dividends were similarly declared on December 26, 1923, check was

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<sup>7</sup> Apparently the Supreme Court has never decisively passed upon this question, as the petition for a writ of certiorari in the *Bingham* case was denied (281 U. S. 729), and we can find no other instance in which the Supreme Court has specifically passed upon the problem.

<sup>8</sup> *Supra* note 6, at 504.

<sup>9</sup> *Supra* note 1.

<sup>10</sup> 26 B. T. A. 716, 719 (1932).

<sup>11</sup> 19 B. T. A. 1027 (1930).

<sup>12</sup> *Id.* at 1028.

<sup>13</sup> 29 B. T. A. 16 (1933).

<sup>14</sup> *Supra* note 13.

<sup>15</sup> *Supra* note 1.

<sup>16</sup> 16 B. T. A. 1330 (1929).

mailed December 31, 1923, and was not received until January, 1924. The Court found,<sup>17</sup> "the corporation did not have sufficient funds in its general checking account to pay the dividends on December 31, 1923" and because of that fact held that the dividend was income to petitioner in 1924.

In the *Shearman* case,<sup>18</sup> the Court attempts to reconcile its decision therein rendered with the decision in the case of *Commissioner v. Adams*.<sup>19</sup> In the *Adams* case, a resolution declared a dividend payable by checks, to be mailed on December 31st, on which day funds were available. The checks were received the following year and the income was held to be taxable in the following year. The Court, in its labored attempt to distinguish the *Shearman* case from the *Adams* case, declared,<sup>20</sup> "perhaps that case [*Adams* case] differs from this [*Shearman* case] in that the taxpayer was there entitled to receive the dividends only at such time as checks mailed were delivered." (In the *Shearman* case) "the time in which the taxpayer was entitled to receive the dividends was definitely fixed by resolution to be within the preceding year." This appears to be a futile attempt to distinguish the facts in two cases, between which we can find no difference. The Court, in the light of the *Bingham* decision,<sup>21</sup> should have regarded the holding of the *Adams* case as being erroneous, instead of drawing a distinction without a difference. It would seem that the decision in the *Shearman* case is sound, but the analysis of the precedents and the theory underlying the decision apparently was not clearly understood by the Court.

SEYMOUR SALS.

FEDERAL TAXATION OF STATE INSTRUMENTALITIES—CONSTITUTIONAL LAW.—The University of Illinois, an institution of higher learning maintained by the state of Illinois, imported certain laboratory equipment. Duties were levied under the appropriate paragraph of the Tariff Act of 1922 and were paid under protest. The university brought suit to recover them, claiming that, as an instrumentality of the state government, it was exempt from federal taxation. On appeal from decisions<sup>1</sup> affirming the action of the collector, *held*, affirmed. Customs duties may be levied under the power of Congress to regulate foreign commerce, and the fact that they are incidentally taxes will not render the levy invalid. *Board of Trustees of the*

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<sup>17</sup> *Id.* at 1331.

<sup>18</sup> *Supra* note 1.

<sup>19</sup> 54 F. (2d) 228 (C. C. A. 1st, 1931).

<sup>20</sup> *Supra* note 1, at 258.

<sup>21</sup> *Supra* note 6.

<sup>1</sup> 59 TREAS. DEC. 747 (1931); 61 TREAS. DEC. 1334 (1932).