SUPREME COURT OF THE UNITED STATES. No. 563. OCTOBER TERM, 1917.

APPEAL from the District Court of the United States for the Southern District of New York.

Henry R. Towne, appellant, v. *Mark Eisner, collector.*

(Jan. 7, 1918.)

Mr. Justice HOLMES delivered the opinion of the court:

This is a suit to recover the amount of a tax paid under duress in respect of a stock dividend alleged by the Government to be income. A demurrer to the declaration was sustained by the District Court and judgment was entered for the defendant. (242 Fed., 702.)

The facts alleged are that the corporation voted on December 17, 1913, to transfer $1,500,000 surplus, being profits earned before January 1, 1913, to its capital account, and to issue 15,000 shares of stock representing the same to its stockholders of record on December 26; that the distribution took place on January 2, 1914; and that the plaintiff received as his due proportion 4,174½ shares. The defendant compelled the plaintiff to pay an income tax upon this stock as equivalent to $417,450 income in cash. The District Court held that the stock was income within the meaning of the income tax of October 3, 1913 (c. 16, sec. 2; A, subdivisions 1 and 2; and B, 38 Stat., 114, 166, 167). It also held that the act so construed was constitutional, whereas the declaration set up that so far as the act purported to confer power to make this levy it was unconstitutional and void.

The Government in the first place moves to dismiss the case for want of jurisdiction, on the ground that the only question here is the construction of the statute, not its constitutionality. It argues that if such a stock dividend is not income within the meaning of the Constitution it is not income within the intent of the statute, and hence that the meaning of the sixteenth amendment is not an immediate issue, and is important only as throwing light on the construction of the act. But it is not necessarily true that income means the same thing in the constitution and the act. A word is not a crystal, transparent and unchanged—it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. Lamar *v.* United States (240 U. S., 60, 65). Whatever the meaning of the Constitution, the Government had applied its force to the plaintiff on the assertion that the statute authorized it to do so, before the suit was brought, and the court below has sanctioned its course. The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this court should think that the construction would make the act unconstitutional. While it keeps the money it opens the question whether the act construed as it has construed it can be maintained. The motion to dismiss is overruled. Billings *v.* United States (232 U. S., 261, 276); B. Altman Co. *v.* United States (224 U. S., 583, 596, 597).

The case being properly here, however, the construction of the act is open, as well as its constitutionality, if construed as the Government has construed it by its conduct. (Billings *v.* United States, ubi supra.) Notwithstanding the thoughtful discussion that the case received below, we can not doubt that the dividend was capital as well for the purposes of the income-tax law as for the distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former.

A stock dividend really takes nothing from the property of the corporation and adds nothing to the interest of the shareholders. Its property is not diminished and their interests are not increased. * * * The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones. Gibbons *v.* Mahon (136 U. S., 549, 559, 560).

In short, the corporation is no poorer and the stockholder is no richer than they were before. Logan County *v.* United States (169 U. S., 255, 261). If the plaintiff gained any small advantage by the change it certainly was not an advantage of $417,450, the sum upon which he was taxed. It is alleged and admitted that he receives no more in the way of dividends and that his old and new certificates together are worth only what the old ones were worth before. If the sum had been carried from surplus to capital account without a corresponding issue of stock certificates, which there was nothing in the nature of things to prevent, we do not suppose that any one would contend that the plaintiff had received an accession to his income. Presumably his certificate would have the same value as before. Again, if certificates for $1,000 par value were split up in 10 certificates, each for $100, we presume that no one would call the new certificates income. What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.

Judgment reversed.

Mr. Justice MCKENNA concurs in the result.

(T. D. 2635.)

Income tax.

Release, under the provisions of section 1212, war-revenue act of October 3, 1917, of tax withheld at source in cases where substitute certificates (Form 1059) were used.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 24, 1918.

To collectors of internal revenue and others concerned:

Under the provisions of section 1212 of the war-revenue act of October 3, 1917, any withholding agent who, during the year 1917, deducted and withheld at the source any amount of normal tax from income paid to a citizen or resident of the United States, other than interest on corporate obligations containing a so-called "tax-free" or "no-deduction" clause, is required to release and pay over the amount so withheld to the person entitled to receive the same.

With reference to this provision of law, inquiry has arisen as to how a debtor corporation is to release and pay over the amount of tax so withheld in a case where a bank or other collection agency detached the ownership certificate which accompanied an interest coupon and substituted its own certificate (Form 1059), which does not disclose the name and address of the bond owner.

It is held that where substitute certificate (Form 1059) has been used in connection with coupons from bonds which do not contain a "tax-free" or "no-deduction" clause, the withholding agent shall request the bank or collection agency to disclose the name and address of the owner of the bonds, as shown by the original certificate, and it shall be the duty of the bank or collection agency to make such disclosure to the withholding agent. If the owner of the bond is a citizen or resident of the United States, the withholding agent shall refund the amount of tax deducted, as provided by law, and if a non-

resident alien, no refundment shall be made, but the withholding agent shall make return thereof on or before March 1, and on or before the time fixed by law for the payment of the tax shall pay the amount withheld to the officer of the United States Government authorized to receive the same.

DANIEL C. ROPER,
Commissioner of Internal Revenue.

Approved:
W. G. McADOO,
Secretary of the Treasury.

(T. D. 2636.)

Distilled spirits.

Modification of section 3283, Revised Statutes, and authorization of 48-hour fermenting period.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 24, 1918.

To collectors of internal revenue, distillers, and others concerned:

Section 302, act of October 3, 1917, contains, among other things, the following provisions:

Under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, the manufacture, warehousing, withdrawal, and shipment, under the provisions of existing law, of ethyl alcohol for other than (1) beverage purposes or (2) use in the manufacture or production of any article used or intended for use as a beverage, and denatured alcohol, may be exempted from the provisions of section thirty-two hundred and eighty-three, Revised Statutes of the United States.

Under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, manufacturers of ethyl alcohol for other than beverage purposes may be granted permission under the provisions of section thirty-two hundred and eighty-five, Revised Statutes of the United States, to fill fermenting tubs in a sweet-mash distillery not oftener than once in forty-eight hours.

In view of the foregoing, all distillers operating in the production of alcohol exclusively for other than beverage purposes may continue to operate on Sundays the same as on week days, and collectors under authority contained in regulations No. 7 (pp. 40–41) may require storekeeper-gaugers and storekeeper-gaugers in the capacity of gaugers to remain on duty. In such cases it is suggested that a notation be made on the vouchers (Form 107 and Form 150) for the monthly compensation to the effect that the distilleries were in operation under the provisions of section 302, act of October 3, 1917.

Distillers manufacturing ethyl alcohol for other than beverage purposes exclusively may be granted permission to fill fermenting tubs in a sweet-mash distillery not oftener than every 48 hours. Upon receipt of notice on Form 27A from such a distiller, the collector will make survey of the distillery accordingly, utilizing the information already in his office with the new factor of the 48-hour fermenting period for the purpose.

DANIEL C. ROPER,
Commissioner of Internal Revenue.

Approved:
W. G. McADOO,
Secretary of the Treasury.

(T. D. 2637.)

Estate tax.

Condition under which time for filing estate-tax returns may be extended beyond 90 days from the day a year after the death of the decedent.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., January 24, 1918.

To collectors of internal revenue:

It has been found in numerous cases that, at the expiration of the 90-day extension granted by collectors for the filing of estate-tax return, the condition of the estate is such as to preclude the filing of final return upon which the exact tax due can be determined. Accordingly, Article XXIX of regulations 37 is amended to the following extent:

Where the executor has requested and has been granted an extension of not to exceed 90 days for the filing of estate-tax return, and represents to the collector that complete return can not then be filed the collector upon investigation, and if he is satisfied that the cause for further delay is unavoidable, may extend the time for filing until in his judgment the reasonable ground for delay has been removed. In every such case it should be pointed out to the executor that, regardless of the further extension, interest attaches from the close of the original 90-day extension upon all the unpaid tax. This interest s required to be computed from the day of the decedent's death and is at the rate of 6 per cent per annum.

Collectors should note that in every case of overdue estate tax, where the additional extension of time herein provided for has not been granted, the interest rate is 10 per cent instead of 6 per cent per annum, and such interest is also computed from the day of the decedent's death.

Where either an original 90-day extension or the additional extension herein provided for is granted the collector should promptly report all facts to this office. Collectors must also promptly notify this office whenever in their judgment the unavoidable cause for delay in filing return in any case has been removed