retired employee was compensation;[16] the same result has been reached where the payment is a lump sum.[17] Also somewhat troublesome are cases in which a technical employment relation never existed between payor and recipient. In the case of tips, the person making the payment is certainly not the employer; yet this is clearly compensation. Again where, as here, the services were rendered to the stockholders as *A* corporation and the payment made by the same stockholders as *B* corporation, the fact that the *B* corporation had never employed the recipients is hardly significant.[18] It is clear then that for these purposes, "employer" should mean no more than the person to whom the services are rendered. Conceivably, even where the services are not rendered to the payor, the payment might be regarded as compensation. For example, the payment by a son of the medical expenses of his mother would be compensation to the doctor, although a gift to the mother.[19]

Even where the payment is completely incommensurate with the value of the services rendered it should be treated as compensation for tax purposes. But calling it compensation does not foreclose the possibility that the same payment might be regarded as an unjustified gift when there is a question not of taxation but of protecting the rights of minority stockholders.[20]

Income Tax—Stock Dividends—Cost of Zero—Statute Drafted under Mistake— [Federal].—A corporation having both common and preferred stock outstanding, declared a dividend on its common stock payable in preferred. Later the corporation purchased the dividend shares. The Board of Tax Appeals decided that there had not been such redemption of the shares by the corporation as to constitute a dividend taxable under section 115(g), but that the receipt of the dividend by the stockholder was income. The Circuit Court of Appeals held that the receipt of the dividend was constitutionally income, but was exempt under section 115(f) which provided "a stock dividend shall not be subject to tax";[1] and further that no part of the sale proceeds could be taxed since, applying the rule used for the sale of gifts, the fair market value of the stock at the date of receipt and the date of sale were the same. On *certiorari* to the Supreme Court, *held* reversed. Although the receipt of the dividend was not taxable because of the statutory exemption, the entire proceeds from the sale were taxable since the cost of the dividend was zero. *Helvering v. Gowran.*[2]

This case completes the pattern begun by *Eisner v. Macomber*[3] and left unfinished by the *Koshland* case.[4] In holding a dividend of preferred on common, where both are outstanding, within the Sixteenth Amendment the Court fulfilled the expectation

[16] Beatty v. Comm'r., 7 B.T.A. 726 (1927).

[17] Fisher v. Comm'r., 59 F. (2d) 192 (C.C.A. 2d 1932).

[18] Bass v. Hawley, 62 F. (2d) 721 (C.C.A. 5th 1933).

[19] Consequently, even such payments as the Nobel Prize might seem to be payments for services rendered to the public and their tax exemption attributed to the policy of encouraging such services. C.C.H. Tax Service (1938) Vol. 1, ¶99.05; cf. ¶ 52.36.

[20] See Rogers v. Hill, 289 U.S. 582 (1933); Stevens, Handbook of the Law on Private Corporations 217–22, 628–33 (1936).

[1] 45 Stat. 791, 822 (1928), 26 U.S.C.A. § 115(f) (Supp. 1936).

[2] 58 S. Ct. 154 (1937). [3] 252 U.S. 189 (1920). [4] 298 U.S. 441 (1936).

of most commentators.[5] The decision indicates that *any* change in the stockholders' interest as a result of a stock dividend will now be sufficient for the realization of income since a dividend of preferred on common does not give rise to a new interest totally separate from the stock on which the dividend was declared but actually tends to dilute the value of the original stock by subordinating it to additional preferences in dividends and on liquidation.[6]

Apart from its significance to the stock dividend question,[7] the case presents an interesting problem of construction. It seems quite clear that Congress drafted section 115(f) under a misapprehension as to the extent of *Eisner v. Macomber*.[8] The intent of Congress therefore, as is so frequent in cases of mistake,[9] was two-fold: (1) to exempt all stock dividends; (2) to exempt only that which was not constitutionally income. Unless then the tax-payer was to escape tax altogether some sort of judicial reformation of the statute was required. And given this initial situation, any construction of the statute must perforce be somewhat artificial.

The Court could perhaps have reached its result by finding section 115(f) ambiguous. On several occasions the Court has found some ambiguity here, distinguishing (1) a dividend declared by a corporation in its own stock; (2) a dividend declared in the stock of another corporation.[10] Hence, the provision is not, as the Court said it was, "so clearly expressed as to leave no room for construction."[11] Since "stock dividend" is susceptible to the further ambiguity of meaning (1) stock dividends generally; (2) stock dividends which are *not* constitutionally income, it could well have been restricted to the latter meaning.

In employing the cost of zero approach, the Court seems at first to have created future difficulties for the sake of the particular case. Since the cost of a dividend cannot be said to vary with whether the government taxes it or not, a dividend taxable

[5] Shulman, Undistributed Profits Tax Avoidance after the Koshland Case, 14 Tax Mag. 703, 704 (1936); Seligman, Implications and Effects of the Stock Dividend Decision, 21 Col. L. Rev. 313, 331 (1921); Peper, Corporate Policy under the Surtax on Undistributed Profits, 22 Wash. U.L.Q. 1, 14 (1936); Magill, Taxable Income 47 (1936).

[6] 4 Univ. Chi. L. Rev. 311, 316–21 (1937). See also 51 Harv. L. Rev. 702, 704–5 (1938); 38 Col. L. Rev. 363, 366 (1938).

[7] On the relevance of the decision to the corporate surtax, see 4 Univ. Chi. L. Rev. 311 (1937).

[8] Following the decision in the Macomber case, the Treasury Department revoked existing regulations and issued amended orders to exempt all such dividends. Later Congress enacted § 201 (d) of the Revenue Act of 1921 providing: "A stock dividend shall not be subject to tax." 42 Stat. 227 (1921). See H.R. 350, 67th Cong., 1st Sess., 8 (1921). This provision was repeated in § 115 (f) of the Acts of 1928, 1932, and 1934. Following the Koshland case the section was modified to read that a stock dividend "shall not be treated as a dividend to the extent that it does not constitute income . . . . within the meaning of the Sixteenth Amendment." 49 Stat. 1688 (1936), 26 U.S.C.A. §115 (h) (Supp. 1936).

[9] Compare the contract situation where one deals with the party before him, thinking he is another. Phelps v. McQuade, 220 N.Y. 232, 115 N.E. 441 (1917); Martin v. Green, 117 Me. 138, 102 Atl. 977 (1918).

[10] Rockefeller v. United States, 257 U.S. 176 (1921); Cullinan v. Walker, 262 U.S. 134 (1923); United States v. Phellis, 257 U.S. 156 (1921); Marr v. United States, 268 U.S. 536 (1925).

[11] P. 156.

upon receipt must also have a zero cost. Consequently when such a dividend is sold, the entire proceeds would again be susceptible to tax. And such a result would seem to be a *reducto ad absurdum* of the construction.[12] But it should be remembered that such a case could not arise under the statute the Court was construing since under it no stock dividend was taxable on receipt. Further, such a dilemma can be avoided even under the present statute which taxes dividends on receipt by distinguishing between *cost* and other *bases* for computing gain from sale. Within limits the government can add up a series of realized gains at whatever point it finds most convenient. Thus, the gain arising from the purchase below market value is not taxed until resale.[13] On the other hand, since the gain is taxed upon receipt, the value at the time of receipt and not cost is the basis for computing gain from the sale of property acquired through gift[14] or death.[15] Thus, although it would be impossible for a court in future cases to vary the *cost* figure with the incidence of taxation, it would not be impossible for it to interpolate into the statute a new *basis* for computing gains from the sale of dividends taxable on receipt.

By not taxing the dividend until sale the Court delayed the tax. It is quite possible that the statute of limitations[16] has run in similar cases since the receipt of dividends but not since their sale, and because of the exemption in section 115(f) the government has not attempted to tax these dividends on receipt. Conceivably the Court may have adopted the cost of zero approach to enable the government to tax the transaction at the latest possible date and thus avoid the statute of limitations.

Labor Law—Anti-injunction Act—Picketing of Company-unionized Plant by National Union—[Federal].—The plaintiff's employees, over 1,300 in number, organized an independent labor union, found by the court to be neither company inspired nor company dominated, and negotiated an agreement providing for wages, hours, terms, and conditions of employment. Subsequently, the defendant union, an affiliate of the C.I.O., began a unionization campaign to supplant the independent union as the sole representative of all employees, though the employees were satisfied, none belonged to the defendant union, and they had expressed their opposition to that affiliation. In an effort to compel recognition by the plaintiff, the defendant had publicized many false charges, had endeavored to intimidate the plaintiff's customers, and had contemplated using physical violence. The plaintiff alleged that the conduct complained of was a conspiracy violative of the Federal Anti-Trust Acts,[1] and sought an injunction restraining the alleged conspiracy. *Held* (one judge dissenting), temporary injunction granted. The Norris-LaGuardia Act[2] is inapplicable, for the definition of a

[12] It is not of course suggested that the government would actually attempt to tax twice here. But see 51 Harv. L. Rev. 744, 745 (1938).

[13] Magill, Taxable Income 119, 120 (1936); see also Comm'r. v. Van Vorst, 59 F. (2d) 677, (1932).

[14] 45 Stat. 818 (1928), 26 U.S.C.A. § 113a (2) (Supp. 1936).

[15] § 113a (5).

[16] 45 Stat. § 275 (1928), 26 U.S.C.A. § 275 (Supp. 1936).

[1] Sherman Act, 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1–8 (1927); Clayton Act, 38 Stat. 730 (1914), 15 U.S.C.A. §§ 12–27 (1927).

[2] 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101–115 (1937).