after the death of the debtor;[18] those cases may indicate an attempt to limit priority as much as possible.

On the other hand, several lower federal court cases expressly reject the argument that the National Housing Act should be construed as denying priority, and hold that the FHA is a "government instrumentality" entitled to priority.[19] Reliance for this point of view may be placed upon the lack of the corporate form,[20] upon the fact that at least under the mortgage insurance provisions of the National Housing Act, the United States itself guarantees payment of the debentures issued,[21] and upon the fact that if the FHA is granted priority, its insurance premiums may be cheaper.[22] Indeed, it may be urged that there should be no question raised as to whether the FHA is a "government instrumentality;" that every act done by the Federal Government within its delegated powers is "governmental," since no powers thought to be non-governmental would have been delegated. Moreover, it would seem that Congress, in declaring that claims of "the United States" should have priority, could hardly have meant to exclude that large class of instances in which the claim of the United States is something other than a tax claim.

Taxation—Accrual of Real Property Taxes—Deduction of Property Taxes by Purchaser in Federal Income Tax Return—[Federal].—Taxes assessed against certain realty in the District of Columbia as of July 1, 1935, for the fiscal year then beginning, were payable in two equal installments in September 1935 and March 1936. On September 17, the taxpayer purchased the property and was credited on the price with the taxes allocable to the period between July 1 and the date of purchase. The taxpayer paid the two installments of taxes in September 1935 and March 1936 and then claimed a deduction for the second installment in his federal income tax return for the year 1936. The Commissioner of Internal Revenue disallowed the deduction on the ground that the taxes for the current year were already assessed at the time of purchase, that assessed taxes constituted a capital item, and that the payment of them by the purchaser was merely payment of part of the purchase price of the property; but the Board of Tax Appeals allowed the deduction. On appeal to the Circuit Court of Appeals for the Fourth Circuit, *held*, that the assessment of real estate taxes in the District of Columbia creates only a charge upon the land, and that a lien does not arise until a delinquency occurs. Since the general rule is that real property taxes accrue for the purpose of federal income tax returns when the lien for taxes attaches to the property, the fact that the taxpayer was the owner when the taxes fell due rendered him, rather than the previous owner, liable for the taxes and justified him in deducting the second installment in his federal income tax return. Decision affirmed, one judge dissenting. *Com'r of Internal Revenue v. Rust's Estate.*[1]

[18] In re Wood's Estate, 171 Misc. 542, 12 N.Y.S. (2d) 816 (S. Ct. 1939).

[19] Korman v. Federal Housing Adm'r, 113 F. (2d) 743 (App. D.C. 1940); Wagner v. McDonald, 96 F. (2d) 273 (C.C.A. 8th 1938); In re T. N. Wilson, Inc., 24 F. Supp. 651 (N.Y. 1938).

[20] In re Wilson, 23 F. Supp. 236 (Tex. 1938).

[21] As amended, 53 Stat. 806 (1939), 12 U.S.C.A. § 1710(d) (Supp. 1940).

[22] As amended, 53 Stat. 805 (1939), 12 U.S.C.A. § 1709(c) (Supp. 1940).

[1] 116 F. (2d) 636 (C.C.A. 4th 1940).

The present case raises the question as to when real property taxes accrue within the meaning of Section 23(c)[2] of the Federal Revenue Act, which allows a deduction from gross income in federal income tax returns of "taxes paid or accrued within the taxable year." The date of accrual of property taxes is significant when real property is sold with unpaid taxes on it, since real property taxes are deductible only by the owner of the property at the time the taxes accrue,[3] and thus the payment of the taxes by another person does not permit the latter to deduct the taxes from gross income in his federal income tax return.[4] The federal courts and the Board of Tax Appeals have, in general, ruled that the date of accrual of real property taxes for the purpose of federal income tax returns is the time when the lien for taxes attaches to the property under state law.[5] The state courts' interpretation of the statutes is controlling as to when the lien attaches.[6]

The property tax statutes of the District of Columbia make no mention of a lien for taxes except in connection with the enforcement of a lien by the district for delinquent taxes.[7] Because of this fact, the court argued, "it is a reasonable interpretation that the lien does not arise prior to the occurrence of a delinquency."[8] It was pointed out by the dissenting judge, however, that this lien for delinquent taxes does not indicate the date of attachment, but merely shows the existence of a lien necessary to authorize a sale of land.[9] Furthermore, the Court of Appeals for the District of Columbia has held that, under the statutes controlling the assessment of property in the district, real property taxes constitute a "charge" on the property.[10] With respect to the rule for accruing taxes in federal income tax returns, the majority in the instant case distinguished between such a "charge" on realty for assessed taxes and a lien for delinquent taxes, on the ground that the latter is a real burden on the taxpayer because it is enforcible by a sale of the land.[11] The dissenting judge, on the other hand, said that there was no real difference between a charge and a lien,[12] so that the lien on the property arose upon assessment in accordance with the interpretation of the statute by the Court of Appeals of the District of Columbia.

[2] 49 Stat. 1659 (1936), 26 U.S.C.A. § 23(c) (1940).

[3] Treas. Reg. 94, art. 34(c)–1 provides that in general taxes are deductible only by the person upon whom they are imposed.

[4] Lifson v. Com'r, 98 F. (2d) 508, 510 (C.C.A. 8th 1938); California Sanitary Co. v. Com'r 32 B.T.A. 122 (1935).

[5] Com'r v. Plestcheeff, 100 F. (2d) 62, 63 (C.C.A. 9th 1938); Com'r v. Patrick Cudahy Family Co., 102 F. (2d) 930, 932 (C.C.A. 7th 1939); Lifson v. Com'r, 98 F. (2d) 508, 510 (C.C.A. 8th 1938); Kohlsaat v. Com'r, 40 B.T.A. 528, 535 (1939).

[6] The lien might be held to attach when the assessment is made, or when the tax rate is set and the amount of the taxes known, or when the tax rolls are delivered to the tax collector and the taxes are due, or when the taxes are unpaid and delinquent. See 3 Paul and Mertens, Federal Income Taxation § 25.33 (1934); 3 Cooley, Taxation § 1232 (4th ed. 1924).

[7] D.C. Code (1929) tit. 20, §§ 793, 800.

[8] 116 F. (2d) 636, 638 (C.C.A. 4th 1940).

[9] Ibid., at 641. See 3 Cooley, Taxation § 1230 (4th ed. 1924).

[10] Tumulty v. District of Columbia, 102 F. (2d) 254, 259 (App. D.C. 1939)

[11] 116 F. (2d) 636, 638 (C.C.A. 4th 1940).

[12] Ibid., at 640.

In support of its decision, the court in the principal case contended that an agreement between parties to a sale of real property that the taxes should be prorated to the date of sale was typical, and that to hold that the taxes constituted a capital item to be added to the purchase price would violate the reasonable expectation of each party to bear "a part of the burden proportionate to the period during which he possessed the property and enjoyed the income."[13] But the practice of prorating real property taxes between parties to a sale is incompatible with any rule that property taxes accrue instantaneously. Thus, under the court's view that the lien for taxes attached when the taxes became payable, the vendor in the principal case could not have deducted in his federal income tax return the portion of the first installment of taxes which fell to him under the prorating scheme, since no lien attached to the property during the vendor's period of ownership.

Even when there is a statutory provision making the seller of real property liable for a proportionate share of the taxes allocable to his period of ownership,[14] the ruling of the Bureau of Internal Revenue is that the general rule for the instantaneous accrual of taxes is not thereby affected.[15] Thus the seller of property subject to a tax lien could deduct the full tax in his federal income tax return, whereas the purchaser could deduct nothing. In *Com'r v. Coward*,[16] on the other hand, the Circuit Court of Appeals for the Third Circuit, in construing the same statutory provision, held that the purchaser could deduct his proportionate share of the taxes, and pointed out that the contrary result is reached by mistakenly emphasizing the word "accrued" and the time when the taxes are listed on the taxpayer's account books. The contribution deductible by the purchaser, the court said, is properly a tax in the legal sense of being a forced contribution to the expense of government, rather than a voluntary expenditure.

It would seem that if the rule for accruing taxes for the purpose of federal income tax returns is to be consistent with legislative prorating of taxes and common accounting practice, the real property taxpayer's liability should accrue ratably.[18] The court's view in the principal case is a step in the direction of allowing prorating only because the court makes the date when the taxes become payable the date of accrual of taxes, and in this case there were two such dates, rather than one, per year.[19] Furthermore, if real property taxes are made to accrue ratably, there is no compelling reason why

[13] Ibid., at 638.

[14] N.J. Comp. Stat. (Supp. 1925) tit. 208, § 66d(514).

[15] Cum. Bull. of Treas. Dept. Rul. XIV-2 at 80 (1935). See also Cum. Bull. of Treas. Dept. Rul. 1938–1 at 129.

[16] 110 F. (2d) 725 (C.C.A. 3d 1940). In Cum. Bull. of Treas. Dept. Rul. 1940–1 at 123, qualifying Cum. Bull. of Treas. Dept. Rul. XIV-2 at 80 (1935), the bureau ruling was that the decision of the Coward case would be confined to New Jersey since it was based on statutes peculiar to New Jersey.

[17] 110 F. (2d) 725, 727, 728 (C.C.A. 3d 1940).

[18] At common law, rent and interest accrued instantaneously at the time they became payable. 1 Paul and Mertens, Federal Income Taxation 588 n. 99 (1934). Nowadays, by statute, they accrue ratably. Ibid., § 11.96; Jemison v. Com'r, 18 B.T.A. 399, 404 (1929); Higginbotham-Bailey-Logan Co. v. Com'r, 8 B.T.A. 566, 577 (1927). In Carondelet Bldg. Co. v. Fontenot, 111 F. (2d) 267 (C.C.A. 5th 1940), a taxpayer was allowed to apportion real property taxes among the months of the year in making his income tax return.

[19] The court in the principal case also argued, in effect, that the treatment of the deduction of property taxes as a capital item violated the purpose of the federal income tax statutes to

the period of accrual should commence with the day the tax lien attaches under state law. The fact that the parties in the principal case prorated the taxes with reference to the period beginning with the date of assessment[20] and that such appears to be the common accounting practice[21] lends support to a rule that the period of ratable accrual shall begin with the date of assessment.

Taxation—Property Subject to Taxation—Validity of State Tax on Dividends Declared by Foreign Corporations—[Federal].—The plaintiff, a Delaware corporation doing a nation-wide business, declared a dividend payable at its main office in New York out of general corporate funds. The state of Wisconsin assessed a tax on the corporation pursuant to a state statute imposing a tax on all corporations "for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the state."[1] The tax of $2\frac{1}{2}$ per cent was to be deducted by the corporation from dividends payable to both resident and non-resident stockholders.[2] The plaintiff filed objections to the assessment claiming the statute was unconstitutional. On an appeal from a judgment of the trial court sustaining the assessment, the Wisconsin Supreme Court held the tax invalid, one judge dissenting.[3] On certiorari, to the United States Supreme Court, *held*, that the statute is to be construed as levying a supplementary income tax on the income of the corporation paid out in dividends, and is justified in view of the benefits conferred by the state on the corporation. Reversed and remanded. *Wisconsin v. J. C. Penney Co.*[4]

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exempt only income items. However, the characteristic difference between capital and income items is that the former is computed as of a given instant, the latter with reference to a period of time. 1 Paul and Mertens, Federal Income Taxation § 5.06 (1934). The court's theory makes the taxes less of a capital item only in that it makes the taxes accrue twice rather than once a year.

[20] It appears that in Cum. Bull. of Treas. Dept. Rul. 1939–1 at 168, the taxpayer-purchaser there involved also prorated the taxes from the date of assessment to the date of purchase. Whether the date of assessment shall be taken to mean the date as of which the value of the property is determined and the taxpayer lists his property or the date when the state tax commissioners fix the final values is of secondary importance. The former date is at present chosen by the Commissioner of Internal Revenue for determining when the taxpayer's liability for the tax of the fiscal year then beginning accrues. Cum. Bull of Treas. Dept. Rul. 1939–2, at 82; 1938–1, at 132; X-2, at 142 (1931).

[21] 1 Paul and Mertens, Federal Income Taxation § 11.74 (1934); United States v. Anderson, 269 U.S. 422 (1926).

[1] Wis. Stat. (1939) c. 71.60, § 3(1). The amount of corporate income attributable to Wisconsin is determined in the same manner as under the provisions of the Wisconsin income tax law. Ibid., § 3(4). See Wis. Stat. (1937) c. 71.02(3)(d).

[2] Wis. Stat. (1937) c. 71.60, § 3(1). The rate has since been raised to 3 per cent. Wis. Stat. (1939) c. 71.60, § 3(1).

[3] J. C. Penney Co. v. Wisconsin, 233 Wis. 286, 289 N.W. 677 (1940), noted in 24 Minn. L. Rev. 711 (1940).

[4] 61 S. Ct. 246 (1940). Four justices dissented. The court similarly disposed of two companion cases. Wisconsin v. Minnesota Mining & Mfg. Co., 61 S. Ct. 253 (1940); Wisconsin v. F. W. Woolworth Co., 61 S. Ct. 395 (1940). Petitions for rehearing were denied in all three cases, 61 S. Ct. 444 (1940).