RECENT CASES

Income Taxation—Surrender of Life Interest in Trust—Consideration Received Treated as Return of Capital—Loss Deduction Allowed—[Federal].—The taxpayer was the income beneficiary for life of a testamentary spendthrift trust. Three years after acquiring this interest she surrendered it for $55,000 to the remainderman who thereby obtained an unqualified title to the property which had formed the corpus of the trust. In her federal income-tax return the taxpayer treated the surrender as a sale of a capital asset and reported a long term capital loss arising out of the surrender. The loss was computed by subtracting the $55,000 from the lump-sum value of a hypothetical annuity returning a yearly income equal to 4 per cent of the trust corpus for a period equivalent to the life expectancy of the taxpayer at the time of surrendering her life interest.[1] The Commissioner of Internal Revenue disallowed the claim of loss, maintaining that the whole $55,000 was ordinary income taxable in full to the taxpayer. The Tax Court sustained this position.[2] On appeal to the Circuit Court of Appeals, *held*, that the surrender of a life income interest in a trust for consideration is a sale of a capital asset and, accordingly, the taxpayer is entitled to a capital-loss deduction for the loss arising out of the transaction. Judgment reversed, one judge dissenting. *McAllister v. Com'r of Int. Rev.*[3]

This case presents, in a comparatively unfamiliar setting, the recurring problem of distinguishing for purposes of federal income taxation between income and capital or, more narrowly, receipt of income and return or conversion[4] of capital. The importance of this distinction in the existing income-tax structure is indicated by the wide divergence between the results reached by the majority and minority opinions in the Circuit Court: the majority treats the consideration received for surrender as tax-free and as giving rise to a capital loss deduction, while the minority regards the consideration as fully taxable income.

Economists have recognized that income and capital are not completely separable concepts but are two interrelated aspects of the same economic values. Capital is the value of revenue producing property or of property which can be exchanged for that which produces revenue; while income is the value of the revenue produced by property. In this relationship, capital is the value of anticipated future revenue, and the revenue itself is income when it is produced. The federal tax statutes have not expressly incorporated this view of income

[1] This procedure is authorized by the Internal Revenue Bureau. I.T. 2076, C.B. III-2, p. 18 (1924).

[2] Beulah Eaton McAllister, 5 T.C. 714 (1945).

[3] 157 F. 2d 235 (C.C.A. 2d, 1946).

[4] "Conversion of capital" is used in the text in the sense of changing the form of a capital investment, e.g., from ownership of land to ownership of cash or stocks.

and capital; the fact is that the tax acts have never attempted to delineate between these two correlative terms in a direct or categorical fashion. In dealing with income-tax problems the courts have had to work out the line between receipt of income and return or conversion of capital in particular situations. To a large extent the courts in performing this function have been guided by both the views of economists and popular conceptions about income and capital.

The majority opinion in the *McAllister* case agrees with two other circuit court decisions in classifying the disposal for consideration of a life-income interest in a trust as a sale or exchange of a capital asset.[5] This classification was made largely on the basis of several Supreme Court cases, which were viewed as precedents. In *Blair v. Com'r of Int. Rev.*[6] the Supreme Court treated the gratuitous assignment of a life income interest in a trust as an assignment of "present property, alienable like any other, in the absence of a valid restraint upon alienation."[7] Later in *Harrison v. Schaffner*[8] the Supreme Court reaffirmed the *Blair* doctrine, but refused to treat a gratuitous assignment of income for a term of years out of a life interest as a transfer of property, since the trust beneficiary in the long run retained substantial control over the disposition of income. Both of these cases were concerned with whether trust income produced after the transfer of a beneficial income interest was to be taxed to the donor or the donee; in this context the conclusion that a life-income interest in a trust is property (or capital) signifies that the income is to be taxed to the donee. Neither case presented the issue, involved in the *McAllister* situation, of whether any taxable income arises out of the transfer itself since both dealt with gratuitous assignments.[9]

The problem of classifying consideration received upon a sale of a right to income was treated in *Hort v. Com'r of Int. Rev.*,[10] the Supreme Court holding

[5] Allen v. First National Bank and Trust Co., 157 F. 2d 592 (C.C.A. 5th, 1946); Estate of Bell v. Com'r of Int. Rev., 137 F. 2d 454 (C.C.A. 8th, 1943).

[6] 300 U.S. 5 (1937).

[7] Ibid., at 13. As used by the court, the term "property" may be taken as synonymous with the term "capital" as defined in the text.

[8] 312 U.S. 579 (1941); cf. Helvering v. Horst, 311 U.S. 112 (1940), where the owner of a negotiable bond was held taxable on interest coupons detached shortly before their due date and given to his son.

[9] Judge Frank in his dissenting opinion in the McAllister case relies on the fact that the legislative history and policy behind the capital gain and loss provisions (§ 117) are distinct from those pertaining to the section defining gross income (§ 22). The capital asset provisions were intended to encourage the disposition of certain capital investments by exempting a percentage of the gain upon sale from taxation. Therefore the classification of a life income interest as "property" in the Blair case did not determine whether an identical classification would be consistent with the legislative purpose when § 117 was in question. While this argument may distinguish the Blair and McAllister cases, it should be noted that a determination that a life income interest is not a capital asset still leaves unanswered the basic problem of whether consideration received upon the sale of such an interest should be treated as return of capital plus gain from the sale of property not subject to the benefits of the capital gain provisions or as accelerated receipt of ordinary income.

[10] 313 U.S. 28 (1941).

that a lump-sum payment received by the lessor in return for surrender of his right to enforce a long-term lease was taxable income. The Court stressed the fact that the lessor retained his income-producing property and that the lease-surrender payment represented the difference between the rental that would have been received under the lease and that which reasonably could be anticipated for the remainder of the lease period. In effect, the lump sum was part of the income that otherwise would have been received as rentals under the original lease. Since the lessor retained the income-producing property, the tax had to be levied upon the lump sum if that "accelerated" portion of the rentals were ever to be taxed as income rather than as gain or conversion of capital. In the *McAllister* case, the life beneficiary possessed only the right to future income, and she surrendered her entire source of income. Unlike the *Hort* situation, there remained after the surrender an undiminished income from the trust corpus upon which a tax could be imposed.

When right to income is separated from ownership of income-producing property, that right by itself has an immediate capital value based upon the present value of the anticipated revenue, and the immediate capital value of the income-producing property is correspondingly decreased. For example, the immediate capital value of a long-term coupon bond is exactly equal to the present value of the face amount of the bond at maturity plus the present value of the aggregate of future interest payments represented by the coupons. If the coupons are detached from the bond and assigned, a large portion of the immediate capital value is transferred with them and the immediate value of the bond is decreased by the identical amount. In other words the detached interest coupons have a capital value separate from that of the parent bond. If an assignment of future income from property is for a term of only a few years, the portion of the capital value affected by the income assignment may be insignificant; but it becomes a substantial factor in a transfer of income from property for a term measured by a relatively long life expectancy. The remainderman in the *McAllister* case obtained by the surrender the full interest in an asset worth about $100,000 where previously he had a partial interest valued at approximately $37,000. Applying the foregoing analysis to the entire transaction, it might be said that the life beneficiary of the testamentary trust received at the time of the testator's death a legacy equal to the then present value of the anticipated income payments, while the remainderman received a legacy equal to the then present value of the right to obtain the corpus at the end of the life estate.

Under a tax system which fully recognized the capital aspect of a right to income, the life-income beneficiary of a trust might be given the privilege of deducting a return of capital from the income received each year and be required to treat as income only those receipts in excess of the initial capitalized value of his interest. The remainderman might then be considered as realizing taxable gain or income based on the difference between the capital value of his interest at the time of acquisition and the value of the corpus at the end of the life estate.[11] If the income interest in a trust is thought of as being a legacy or gift consisting of the capitalized value of anticipated future payments, it assumes the characteristics of an annuity. Both are capable of being capitalized by an identical method as funds from which a steady periodic flow of income will result while the fund is depleted. The income tax in effect now treats the annuitant as receiving a return of capital until the aggregate amount received exceeds the original investment.[12] The Treasury regulations find little difficulty in regarding the sale of an annuitant's right to income as a sale of capital, since the seller merely changes the form of his income-producing source and becomes able to reinvest elsewhere.[13] If a life estate were treated as a capitalized legacy or gift, the same results would follow when the life tenant in the *McAllister* case surrendered her interest, exchanging her right to income in the trust for a cash sum which could be reinvested elsewhere. In comparing a life interest and an annuity it is to be noted that, unlike the situation in the *Hort* case, neither the sale of an annuity or the surrender of a life interest affects the total amount of income produced by the annuity or the trust corpus.

In taxing the revenue produced by the corpus of a trust the tax laws, however, have not treated the payments to a life-income beneficiary as including a return of capital.[14] The refusal to treat the income beneficiary like an annuitant apparently finds its basis in tax policy. Unlike an annuity, which is a contract right for certain payments, the interests of the income beneficiary and remainderman are traditionally viewed as property derived through a division of the complete bundle of rights which constitute the trust property. Administration of the tax laws is simplified by requiring that the tax upon the income produced by the corpus be chargeable to only one such divided property interest, and the income beneficiary seems to be the most practical choice. It is at least doubtful whether a typical testator would feel that he is giving a life tenant capital as distinguished from pure income. The presumed understanding of the testator may be important since the courts have given weight to popular concepts of income.[15] The income beneficiary, moreover, will be able to pay the tax out of

[11] Maguire, Income Taxes on the Realization of Future Interests, 31 Yale L. J. 367 (1922). While the income beneficiary is not allowed to treat any portion of trust income as a return of capital the Bureau of Internal Revenue in the past has given one-sided recognition to the income and capital relationship set forth in the text by attempting to tax the remainderman on the appreciation in value of his interest due to the erosion of the life income interest.

[12] Internal Revenue Code, § 22(b)(2), 53 Stat. 10 (1939), 26 U.S.C.A. § 22(b)(2) (1940).

[13] Treas. Reg. 111, § 29.22(b)(2)-3 (1946); cf. Alcy Sivyer Hocker, 36 B.T.A. 659 (1937).

[14] The Internal Revenue Code charges the full tax upon trust income to the income beneficiary with certain exceptions where the trust is revocable or the income is for the benefit of the grantor. Internal Revenue Code, § 161(b), 53 Stat. 66 (1939), 26 U.S.C.A. § 161(b) (1945). It further prohibits any deduction for a decrease in the value of a life or terminable interest due to shrinkage through lapse of time. Internal Revenue Code, § 24(d), 53 Stat. 17 (1939), 26 U.S.C.A. § 24 (d) (1940).

[15] See Irwin v. Gavit, 268 U.S. 161, 166 (1925); United States v. Oregon-Washington R. & Nav. Co., 251 F. 211, 212 (C.C.A. 2d, 1918).

the income received. The remainderman, on the other hand, might not possess sufficient funds to pay a large tax upon realizing the appreciation in value of his interest or even the information necessary to make a return. The problem would be especially magnified where the remainder interest was contingent. These considerations support the present system of imposing the full income-tax burden upon the income beneficiary during the continuance of his estate.

When the life-income interest is assigned for a consideration, however, the foregoing factors are not relevant in determining whether the life tenant should be treated as receiving income or as converting his capital; but they remain pertinent in respect to apportioning the tax on trust income between the purchaser and remainderman.

Upon buying a life income interest, the purchaser might be thought of as putting himself in the position that the vendor life income beneficiary formerly occupied and accordingly be held to the tax liabilities that go with that position. The tax position of the purchaser is similar to that of a person who buys stock with dividend on. When the dividend is paid, the price of the stock in a frictionless and otherwise stable market decreases by the amount of the dividend. But a purchaser of stock with dividend on must treat the dividend as income when it is received even though the value of his stock drops and, from an economic standpoint, receipt of the dividend is a return of capital to such a purchaser.[16] The treatment of the dividend as income is justifiable in that the dividend is commonly thought of as being income to somebody, and it is administratively inexpedient to charge the tax on that income to anyone but the immediate recipient. The purchaser of a life income interest stands in a similar position and for the same reason might be charged with the full income and not be allowed any deduction for a return of capital.[17] No hardship is placed upon the purchaser by taxing trust income to him in full provided he enters into the transaction knowing that such would be the tax consequences of his action.[18]

It must be conceded that the above argument is an expression of a minority view. The prevailing view permits the purchaser of a life income interest to obtain a return of capital out of income. Original life beneficiaries are not permitted such a return of capital since they have not acquired a cost basis as has the purchaser of such an interest. The basis of the trust corpus has been transferred to the trustees or to the remainderman and one of them will gain the

[16] See note, 14 Univ. Chi. L. Rev. 281 (1947).

[17] If the remainderman purchases the life income interest he may be fully taxable upon the income received from the property, acquiring a basis equal to his original remainder basis plus the purchase price for the income interest.

[18] The Supreme Court reversed a lower court decision holding that a widow was entitled to deduct the value of her dower interest, surrendered in exchange for the life income interest in a testamentary trust created by her husband, before being taxed upon receipt of trust income. The Court held her taxable in full upon the trust income, stating, "For reasons satisfactory to herself, she expresses a desire to occupy the position of a beneficiary and we think she should be so treated." Helvering v. Butterworth, 290 U.S. 365, 370 (1933).

advantage of that basis and be permitted to recover tax free the amount of capital represented by it.[19]

Tax-avoidance possibilities in connection with the trust income in the *McAllister* situation are not present if the tax is to be charged to whoever is the actual recipient of the income. The only serious tax-avoidance problem appears to lie in the creation of artificial capital losses through intra-family dealings. But the courts have held that losses in family dealings are not entitled to full recognition without some proof of their bona fide character.[20] Where a life estate in a family trust is surrendered the proof required might be a demonstration that there has been an economic decrease in the value of the life interest apart from that diminution resulting from the passage of time. There can be such an economic decrease only when the prevailing interest rates, hence capitalization rates, increase or when there is a shrinkage in the anticipated income from the trust corpus. In the absence of this kind of proof a court might conclude that the difference between the sale price and the basis (after reflecting the passage of time) represented a gift rather than a loss. But where the transaction is at arm's length, as apparently it was in the *McAllister* case,[21] there seems no more reason to question the claim of a loss than in any other situation where the sale of property reflects an adverse difference between basis and sale price.

Even though computing the basis of a life income interest by capitalization can be justified on the economic theory previously considered, the question remains whether it is authorized under Section 113(a)(5) of the Internal Revenue Code. This section provides that the basis of property in the hands of a devisee shall be the fair market value at the death of the testator.[22] Basis of an undivided property interest, once established, never changes so long as the property remains in the hands of the same person.[23] The Treasury regulations establish a formula for allocating to remainders and other divided property interests a proportionate share of the basis of the undivided interest, the proportion being dependent upon the value of the divided interest, which in the case of a life estate turns on the life expectancy of the beneficiary.[24] But in no place does the statute specifically authorize any apportionment of the basis of the undivided interest. It may be argued that in the absence of a specific statutory

[19] See Estate of F. S. Bell, 46 B.T.A. 484, 489 (1942), rev'd on other grounds, 137 F. 2d 454 (C.C.A. 8th, 1943); cf. Edward Wolfe, 7 T. C. 715 (1946); Floyd Shoemaker, 16 B.T.A. 1145 (1929); Elmer J. Keitel, 15 B.T.A. 903 (1929).

[20] Treas. Reg. 111, § 29.23(e)–1 (1946); Evans v. Rothensies, 114 F. 2d 958 (C.C.A. 3d, 1940).

[21] The taxpayer had obtained a decree surcharging the remainderman, who was also a trustee. The parties were engaged in litigation concerning the trust at the time of the surrender.

[22] "Acquisition" as used by the Internal Revenue Code refers to the death of the testator. Helvering v. Reynolds, 313 U.S. 428 (1941).

[23] The adjusted basis will be affected by depreciation, depletion, and amortization provisions of the Internal Revenue Code.

[24] Treas. Reg. 111, § 29.113(a)(5)–1 (f) (1946).

provision, any apportionment is unauthorized. Such a conclusion might indicate that Congress, by failing to provide a basis for a life income interest, regarded the proceeds received from the sale of such an interest as income which is taxable in full. In view, however, of the continued existence of the Treasury regulation without Congressional objection, the apportionment procedure appears to be authorized by implication.[25]

Assuming the validity of the Treasury regulation establishing a proportionate share of the basis of the undivided property interest as the proper basis for divided interests, there may remain a controversy over proper application of the formula. In the *McAllister* case the taxpayer contended that the proportion of the whole basis allocable to her should be computed by using her life expectancy either at the time her interest was acquired or at the time of its surrender.[26] The commissioner concurred with the latter view in the event that the transaction was regarded as involving the sale of a capital asset. It is apparent that while the basis of the undivided property interest remained fixed, the taxpayer's interest in fact decreased in value as her life expectancy diminished. If the proportion of the whole basis assignable to the divided interest is computed from the time of its acquisition, there would be an inevitable loss upon disposition due to the lapse of time, which would obscure ascertaining the gain or loss resulting from the fluctuations in the economic value of the income interest. Such a result would defeat the purpose of Section 113(a)(5) of the Code, which does not recognize changes in value caused merely by exhaustion through the passage of time.[27]

Even if it is agreed that the surrender of a life income interest in trust property is a sale of a capital asset, it does not necessarily follow that a loss or surrender is deductible as a capital loss. Under Section 22(a) of the Code all income, from whatever source, is included in computing taxable income unless the taxpayer can point to a specific exemption or qualification.[28] The provisions of Section 117 of the Code limit the percentage of capital gain that is included in arriving at taxable income. As a result of the combined force of Sections 22

[25] See Helvering v. Hallock, 309 U.S. 106, 120 (1940); Augustus v. Com'r of Int. Rev., 118 F. 2d 38, 43 (C.C.A. 6th, 1941), cert. den. 313 U.S. 585 (1941); Com'r of Int. Rev. v. Laguna Land and Water Co., 118 F. 2d 112, 114 (C.C.A. 9th, 1941). An additional argument may be made that while Congress has impliedly authorized the Treasury regulation, it applies only to those divided interests which will eventually ripen into full title to the whole property. Since the purpose of § 113 of the Internal Revenue Code is to prevent recognition of gain or loss realized as a result of postponed possession of full title or control of the property, it might be argued that the section does not apply to an interest, such as an income beneficiary's, which never can eventually give possession of the whole property. Treas. Reg. 111, § 29.113(a)(5)-1(b)(1) (1946).

[26] The Court adopted the former method, using the life expectancy of the taxpayer at the time of acquisition in First National Bank and Trust Co. v. Allen, 65 F. Supp. 128 (Ga., 1946), aff'd 157 F. 2d 592 (C.C.A. 5th, 1946).

[27] Treas. Reg. 111, § 29.113(a)(5)-1(b)(1) (1946).

[28] See Helvering v. Clifford, 309 U.S. 331, 337 (1940); Helvering v. Midland Mutual Life Ins. Co., 300 U.S. 216, 224 (1937).

and 117, all capital gains are included in whole or part in computing taxable income. On the other hand, deductions from income rest on legislative grace and are not allowed unless the taxpayer can find specific statutory authorization.[29] Authority for various loss deductions is found in Section 23 of the Code. When a loss falls within both Sections 23 and 117, the express cross-reference in Section 23(g)(1) indicates that a deduction will be allowed under Section 23 as limited by Section 117. No authority for loss deductions is contained in Section 117,[30] so that a loss falling within that section alone is not allowed.[31]

In the *McAllister* situation it appears that no authority exists for claiming a loss deduction unless the surrender of a life income interest falls within the terms of Section 23(e)(2) which permits deduction of losses incurred in "any transaction entered into for profit." In general, this provision has been construed to mean that a transaction involving the sale of property is one entered into for profit if the property had been acquired[32] and held[33] for the business purpose of producing revenue[34] and was sold at a reasonable price under circumstances not indicating a gift.[35] This construction was developed in cases in which the taxpayer owned and disposed of an undivided interest in assets of a type commonly regarded as ordinary business investment property. In the absence of any evidence pointing in another direction, a profit motive is the only motive that

[29] See Helvering v. Inter-Mountain Life Ins. Co., 294 U.S. 686, 689 (1935); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Charles Ilfeld v. Hernandez, 292 U.S. 62, 66 (1934).

[30] The section refers to "recognized" capital losses. Recognition of losses is dealt with in § 23. G.C.M. 16793, C.B. XV-2, p. 162 (1936) (discussing the legislative history and purpose in the use of the term "recognized" in the Revenue Acts of 1936 and 1934); Juliet B. Hamilton, 25 B.T.A. 1317 (1932). Section 117 further defines capital losses as those taken into account in computing net income, while § 21 defines net income as gross income minus the deductions allowed under § 23. Eli Winkler, 2 T.C. 735 (1943), aff'd sub nom. Winkler v. Nunan, 143 F. 2d 483 (C.C.A. 2d, 1944).

[31] Morgan v. Com'r of Int. Rev., 76 F. 2d 390 (C.C.A. 5th, 1935); S.M. 3024, C.B. IV-1, p. 12 (1925); G.C.M. 16793, C.B. XV-2, p. 162 (1936) (residential homes). Juliet B. Hamilton, 25 B.T.A. 1317 (1932) (paintings). Lihme v. Anderson, 18 F. Supp. 566 (N.Y., 1936) (yacht). DuPont v. United States, 28 F. Supp. 122 (Del., 1939) (stallion). Industrial Trust Co. v. Broderick, 94 F. 2d 927 (C.C.A. 5th, 1938), cert. den. 304 U.S. 572 (1938) (annuity). S.M. 4941, C.B. V-1, p. 61 (1926) (automobile). A per-curiam decision with Judge Frank sitting said, "Section 22 remains the section which tells us what shall go into gross income; § 23, that which tells us what deductions are permissible. . . . . [There is] the argument that § 23(e) is not the only section which allows the deduction of losses. We think that it is." Winkler v. Nunan, 143 F. 2d 483 (C.C.A. 2d, 1944).

[32] Heiner v. Tindle, 276 U.S. 582 (1928); Weir v. Com'r of Int. Rev., 109 F. 2d 96 (1940); Plant v. Walsh, 43 F. 2d 256 (D.C. Conn., 1930).

[33] Lloyd Jones, 39 B.T.A. 531 (1939); W. H. Moses, 21 B.T.A. 226 (1930).

[34] This rule is modified when a taxpayer converts non-business property into property devoted to the production of revenue. He is then entitled to treat the transaction as one entered into for profit from the time of the conversion, despite an original acquisition of the property for non-profit motives. Heiner v. Tindle, 276 U.S. 582 (1928); cf. Leland Hazard, 7 T.C. 372 (1946).

[35] Evans v. Rothensies, 114 F. 2d 958 (C.C.A. 3d, 1940); Com'r of Int. Rev. v. Ehrhart, 82 F. 2d 338 (C.C.A. 5th, 1936).

reasonably can be inferred from acquisition of such property. It is doubtful, however, whether the transaction in the *McAllister* case falls within this category. The life income interest, unlike the underlying asset out of which it was derived, was not ordinary investment property. The trust instrument is evidence that this interest, rather than being created for business purposes, was designed to provide the income beneficiary with an assurance of regularity in income payments and freedom from business and investment responsibilities.[36]

The Section 23(e)(2) provision regarding losses in transactions entered into for profit has also been construed to apply where property sold at a loss was acquired by the seller with an intent to dispose of it at a profit. The acquisition of property which is as non-commercial and generally unsalable as the income interest in a trust is inconsistent with any resale profit motive. Loss deductions claimed upon sales of annuities are not allowed, since the non-commercial nature of a sale of an annuity precludes, in the absence of contrary evidence, an inference that ownership was for profit reasons.[37] If the owner of an annuity acquired through investment of his capital is not treated as having a profit motive, it is improbable that the owner of a life income interest, acquired through inheritance, will be accorded the benefit of such a motive. In the *McAllister* case the trust instrument expressly made the taxpayer's interest inalienable. It is improbable that the testator created, or the taxpayer accepted, that interest with the intent that the taxpayer should profit by a future alienation. Even if surrender to the remainderman were contemplated, it is neither likely that the testator would have intended the income beneficiary to profit at the remainderman's expense, nor reasonable for the beneficiary to claim that she accepted benefits under the trust for the purpose of later destroying the testator's plan of distribution.

A possible related contention is that the testator originally acquired the trust corpus as part of a transaction entered into for profit, and the taxpayer is entitled to the benefit of that profit motive in order to come under Section 23(e)(2). A similar argument was made in the *Laurence Arnold Tanzer* case,[38] which involved the sale of stock acquired by the seller as a gift. The court in that case reasoned that since a donee acquires the basis of his donor for the purpose of computing gain or loss upon a sale, Congress must have intended all other tax aspects of the sale to refer back to the time of the donor's acquisition. Thus a profit motive attending the donor's acquisition of the property was imputed to the donee even though the donee could not establish that a similar motive accompanied his acquisition of the property. Although the case involved the gift and subsequent sale of an undivided property interest, it might be

[36] Industrial Trust Co. v. Broderick, 94 F. 2d 927 (C.C.A. 5th, 1938), cert. den. 304 U.S. 572 (1938); See Evans v. Rothensies, 114 F. 2d 958, 961 (C.C.A. 3d, 1940).

[37] Evans v. Rothensies, 114 F. 2d 958 (C.C.A. 3d, 1940); Industrial Trust Co. v. Broderick, 94 F. 2d 927 (C.C.A. 5th, 1938), cert. den. 304 U.S. 572 (1938); Helvering v. Louis, 77 F. 2d 386 (App. D.C., 1935).

[38] 37 B.T.A. 244 (1938).

argued that the same reasoning should enable the life beneficiary of a trust acquired by gift to take advantage of his donor's profit motive. But if Congress, by requiring a donee to use the basis of his donor, intended the donee to have the benefit of the donor's profit motive, then it can as well be urged that a beneficiary under a will, who acquires a new basis for computing gain and loss, cannot relate any tax consequences back to the testator's acquisition of the property, since Congress by requiring a new basis also required a new profit motive.

It appears that the taxpayer in the *McCallister* case would have difficulty in demonstrating that the surrender of her life income interest was part of a transaction entered into for profit. The court did not consider this aspect of the problem. Had it done so, there is at least good reason to doubt whether the taxpayer would have been entitled to a loss deduction as a result of the surrender of her interest.

Labor Law—Injunctions—Picketing That Prevents Performance of Statutory Duty Owed Stranger to Dispute Non-Enjoinable—[New York].—A nonunion builder was in the process of constructing homes on a tract of land to which there was only one entrance from the public highway. The defendant, a building and construction union, called a strike of the union men employed on the project when the builder refused to recognize or bargain with the union. One month after picketing had begun at the only public entrance, the plaintiff purchased one of the homes which had been completed except for the installation of gas and electricity. The co-defendant, a lighting company, in compliance with a statutory duty,[1] sent some men to install these services in the plaintiff's home among others. However, these employees, members of a sister union, refused to cross the defendant union's picket line. The plaintiff sought an order to compel the lighting company to perform its statutory duty and to enjoin the union from picketing in such a way as to prevent the performance of the statutory duty. The New York lower court granted a temporary injunction which was reversed by the Appellate Division. On appeal to the New York Court of Appeals, *held*, the New York little Norris La-Guardia Act[2] prohibits the issuance of any injunction "in any case involving or growing out of a labor dispute" in the absence of findings of fact which are not present in this case. Judgment affirmed, three justices dissenting. *Schivera v. Long Island Lighting Co.*[3]

May a third party who has suffered an injury arising out of a labor dispute to which he was not a disputant obtain an injunction when the injury stems from the violation of an express statutory duty?

The plaintiff contended that he was not a party to a labor dispute within the

[1] N.Y. Transportation Corporation Law (McKinney, 1943) c. 63, § 12.

[2] N.Y. Civ. Prac. Ann. (Cahill, 1946), § 876-a.

[3] 296 N.Y. 26, 69 N.E. 2d 233 (1946).