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REALIZATION OF INCOME THROUGH CANCELLATIONS, MODIFICATIONS, AND BARGAIN PURCHASES OF INDEBTEDNESS: II*

L. Hart Wright†

Significance of Matters Involving the Particular Consideration Received on Incurring the Obligation

Introductory note. That some matters relating to the particular consideration received by a debtor on incurring an obligation would affect the applicability of the *Kirby* case[135] to a saving derived by him from a subsequent cancellation or other bargain discharge was one of the first propositions settled by the Supreme Court. For the *Kirby* case itself justified the earlier immunity which had been granted the apparently solvent Kerbaugh-Empire Company[136] on the ground that the funds which the latter had borrowed were lost in the venture for which its loan had been procured.

Subsequent inquiry into the significance of matters relating to the consideration which was received by the debtor has centered on three different questions. The first of these involved the kind and amount of consideration which must have been received by him at the time the obligation was incurred if the *Kirby* doctrine was to apply to the entire saving achieved from his subsequent discharge of the debt. The second involved the significance of the fact that the consideration received was of a type which justified the debtor, if on the accrual basis, in taking an immediate deduction for the amount of the obligation. Contrasted with these two matters, attention in the case of the third question was centered on events which occurred after the obligation had been incurred; to what extent, for example, should application of the *Kirby* doctrine be affected by the debtor's continued retention of, or the realized or unrealized decline in the value of, the asset which was received by him when the debt was created? Discussion of these three questions follows.

Significance of the kind and amount of consideration received on incurring the obligation. Judgments suffered in connection with various kinds of tort liability adequately demonstrate that binding obliga-

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135 284 U.S. 1, 52 S.Ct. 4 (1931).

136 Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 46 S.Ct. 449 (1926).

tions are not always supported by consideration. It is equally well known that even a contractual liability incurred by a debtor may be supported by a detriment suffered by the creditor as well as by a benefit running to the debtor. In view of the historical notion that income involved the receipt of something of value, it is not surprising that the question should arise: of what significance is the fact that a debt which was subsequently discharged at a saving was not originally supported in full by consideration actually running to the debtor in money or money's worth?

The earliest regulations providing for a tax on gains derived from the discharge of obligations attached significance to the original consideration received by the debtor only in the instance where bonds were issued at a discount.[137] The gain in such case was to be determined, according to the regulations, by computing the amount by which the original *issue* price plus previously amortized discount exceeded the retirement price. The fact that the face amount of the obligation in this particular instance was a neutral factor was not construed by the commissioner, however, to mean that the value of the consideration actually received at the time an obligation was assumed would in other instances be substituted in the calculations for the face amount of the obligation.[138] In other words, he took the position that a gain under the *Kirby* doctrine was generally determined by subtracting the discharge price from the amount then owing. The anomalous character claimed for the situation where bonds were issued at a discount was presumably attributable to the theory that the unamortized discount was simply one form of promised but as yet unearned interest.[139] Reasoning logically from that appraisal, the face amount—to the extent of the unearned, unamortized discount—would not be really owing when a bond is prematurely retired. Accordingly, there is no real saving which could be subjected to the doctrine in question if the discharge figure is less than the face amount only by the amount of the unamortized discount.

The commissioner's assumption in other cases, that the value of the consideration originally received was a neutral factor, was first attacked before the Board of Tax Appeals in *Rail Joint Co.*[140] There a corpo-

[137] Only two articles, numbers 51 and 544, in U.S. Treas. Reg. 45 concerned such savings. The latter of these dealt with bonds issued at a discount.

[138] See the government's argument in Rail Joint Co., 22 B.T.A. 1277 (1931).

[139] American Smelting & Refining Co. v. United States, (3d Cir. 1942) 130 F. (2d) 883.

[140] 22 B.T.A. 1277 (1931).

ration re-appraised its assets at $3,000,000 over their previous book value and issued bonds in that amount as a dividend. These were later re-acquired at less than par. At the time of its decision the board was of the opinion that the *Kerbaugh-Empire Co.* case generally precluded the taxation of gains solely attributable to bargain discharges.[141] Consequently, it was not surprising that it upset the deficiency which the government had assessed on the alleged gain in this case. But in so doing, the board did state that a like result would have been reached even if it had held a different view with respect to those instances in which an asset had been received at the time the obligation was incurred. Its reasons for this latter view corresponded with those which led the Court of Appeals for the Second Circuit to affirm—even though the *Kirby* case had been decided in the interim.[142]

Neither court thought that the mere discharge of a liability for a sum less than that owed constituted in itself a realization of income. The Second Circuit, for example, did not believe that the *Kirby* case had wholly eliminated one of the requirements which was thought to have been established by *Eisner v. Macomber*,[143] namely, the notion that income involved the receipt of an asset. While the *Kirby* case clearly demonstrated that income could be realized even though an asset was not received at the exact time realization occurred, the quotation below reveals that the Second Circuit thought that the receipt of an asset sometime in the course of the transaction was indispensable to the realization of a gain at its termination:

> "Hence it is apparent that the corporation received no asset which it did not possess prior to the opening and closing of the bond transaction, and it is impossible to see wherein it has realized any taxable income. In such circumstances the Kirby Case cannot be regarded as controlling."[144]

While no decision contrary to that in the *Rail Joint Co.* case has yet appeared, and though its principle has been approved in other cases,[145] the opposite result would have been at least equally satisfactory. In the first place, as another author has said, this particular situation could have been treated as though a cash dividend had been paid, the same then being considered as returned by the stockholders to the cor-

[141] See discussion in Part I of this article, 49 MICH. L. REV. 459 at 461 (1951).
[142] Commissioner v. Rail Joint Co., (2d Cir. 1932) 61 F. (2d) 751.
[143] 252 U.S. 189, 40 S.Ct. 189 (1920).
[144] Commissioner v. Rail Joint Co., (2d Cir. 1932) 61 F. (2d) 751 at 752.
[145] C. Ludwig Baumann & Co., 2 T.C.M. 188 (1943). Cf. Ruben v. Commissioner, (8th Cir. 1938) 97 F. (2d) 926.

poration in exchange for the bonds in question.[146] Secondly, and even more important, there was no evidence whatever that the general philosophy of the *Kirby* case actually depended on the original receipt of an asset by the debtor. In fact, its author, Justice Holmes, culminated in that opinion his ten-year-old attack on the confining principles of *Eisner v. Macomber* by dismissing the authority of the latter case with the statement, "We see nothing to be gained by the discussion of judicial definitions."[147] This is not to say, however, that the lower courts would be warranted in taking the position that the saving involved in every bargain discharge could be taxed without regard to the character of the original transaction out of which the obligation arose. Consider, for example, the case first mentioned—the debtor who discharged at a saving a judgment suffered as a consequence of his own negligence. The philosophy of the *Kerbaugh-Empire Co.* case would clearly seem to immunize the saving in question. For it would be wholly illogical to attach significance to a loss of the asset after its receipt if a loss which gave rise to the obligation in the first instance is to be treated as a neutral factor. This reasoning would not, of course, support the result in the *Rail Joint Co.* case, for there no such loss appeared.

Even if the principle of the *Rail Joint Co.* case is eventually confirmed, there is still a real possibility, though dry logic might point to the contrary, that its doctrine will be limited to those cases involving a complete absence of consideration in money's worth. In other words, it is quite possible that it will be so construed as to preclude admission of proof offered by a debtor in connection with the original arms-length transaction to the effect that the consideration in money's worth which he actually received on incurring the obligation was at that time worth less than the face amount of the debt. While there is some slight authority to the contrary,[148] the Supreme Court has on occasion at least shown

[146] Surrey, "The Revenue Act of 1939 and the Income Tax Treatment of Cancellation of Indebtedness," 49 YALE L.J. 1153 at 1175 (1940).

[147] 284 U.S. 1 at 3, 52 S.Ct. 4 (1931). Justice Holmes followed his dissent in Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189 (1920), by joining with Justice Brandeis and new appointees to the Court in the so-called Reorganization Cases. It was in these decisions that the implications of the Macomber decision were first read down. Marr v. United States, 268 U.S. 536, 45 S.Ct. 575 (1925); Weiss v. Stearn, 265 U.S. 242, 44 S.Ct. 490 (1924); Cullinan v. Walker, 262 U.S. 134, 43 S.Ct. 495 (1923); Rockefeller v. United States, 257 U.S. 176, 42 S.Ct. 68 (1921); United States v. Phellis, 257 U.S. 156, 42 S.Ct. 63 (1921).

[148] See Corporacion de Ventas de Salitre y Yoda de Chile v. Commissioner, (2d Cir. 1942) 130 F. (2d) 141; Kramon Development Co., 3 T.C. 342 (1944). *Contra,* Sacramento Medico Dental Building Co., 47 B.T.A. 314 (1942). Cf. American Smelting & Refining Co. v. United States, (2d Cir. 1942) 130 F. (2d) 883. It should be noted that each one of these cases involved the issuance of corporate bonds for property. In view of the frequency with which such bonds are issued at a discount, a stronger argument can be

a reluctance to impose on the government the exceedingly burdensome task of checking valuations.[149] But again, the matter must be spoken of in terms of possibilities, for the high Court's attitude on the valuation problem has actually vascillated over the years.[150]

Significance of the fact that the consideration received was a deductible expense. At first blush it would seem that the original receipt by the debtor of valuable benefits other than non-deductible assets would also satisfy the requirements imposed by the *Rail Joint Co.* decision, thus leaving any saving effected by a bargain discharge of the debt fully taxable under the *Kirby* doctrine. For example, obligations incurred by an accrual taxpayer for services of one kind or another, whether personal or involving the use of a building or money, have, in common with the bonds which were issued for cash in the *Kirby* case, the characteristic of being supported by consideration running to the debtor in money's worth. In spite of this similarity, however, the full force of the *Kirby* doctrine has not been brought to bear on bargain discharges of indebtedness in those instances where the debt had previously given rise to a deduction. This difference in treatment is due at least in part to the fact that the gains derived from the bargain discharge of such obligations have always been taxed under a doctrine which was quite independent of the *Kirby* case.

At a very early date, indeed, at the time it was believed by lower courts that the *Kerbaugh-Empire Co.* case immunized savings from bargain discharges, the *Maryland Casualty Co.*[151] doctrine was sometimes relied upon to justify a tax on such a saving if the deduction which was taken when the obligation was incurred had offset other income.[152] In a sense it could be said that the debtor was merely being required to restore in the year of the discharge the earlier income which was offset "in order that the returns for both years might truly reflect

made in such cases for a rule which would require the use of the value of the property received instead of the face amount than could be made in the situation where an ordinary obligation is incurred by an ordinary debtor.

149 Helvering v. Midland Mutual Life Insurance Co., 300 U.S. 216, 57 S.Ct. 423 (1937).

150 Ibid. Cf. Helvering v. Bruun, 309 U.S. 461, 60 S.Ct. 631 (1940).

151 Maryland Casualty Co. v. United States, 251 U.S. 342, 40 S.Ct. 155 (1920).

152 Chicago, Rock Island & Pacific Railway Co., 13 B.T.A. 988 (1928), affd. (7th Cir. 1931) 47 F. (2d) 990, cert. den. 284 U.S. 618, 52 S.Ct. 7 (1931). Other decisions of this period, however, thought the Kerbaugh-Empire Co. case immunized the gain from a cancellation even though the earlier deduction involved a tax benefit. John F. Campbell Co., 15 B.T.A. 458 (1929), affd. (D.C. Cir. 1931) 50 F. (2d) 487; National Sugar Manufacturing Co., 7 B.T.A. 577 (1927). Those who dissented in the former case were alone in recognizing that the doctrine which sprang from the Maryland Casualty Co. case was quite independent of the Kerbaugh-Empire Co. decision.

the effect of the whole transaction upon the net income."[153] Then when the *Kirby* case did finally authorize the taxation of savings from bargain discharges in general, the notion developed that this simply furnished an additional reason for the particular tax which had been previously sanctioned by the *Maryland Casualty Co.* doctrine.[154] In other words, the *Kirby* case was not interpreted, as it might have been, so as to render foreign to the matter of taxability the question of whether or not the deduction taken in an earlier return had involved a tax benefit. In accordance then with the negative implications of the *Maryland Casualty Co.* doctrine,[155] even though the service received by an accrual taxpayer on incurring an obligation was of value, any saving on the subsequent discharge of that obligation was considered immune by the lower courts unless the earlier deduction for the expense had actually offset taxable income.[156]

Piecemeal acceptance by the Congress of the foregoing rule was followed by an even more sweeping capitulation on the part of the Treasury. The earliest statutory authority approving this limitation on the applicability of the *Kirby* case was section 270 and its counterparts in the Bankruptcy Act.[157]

It will be recalled that under the original language of these sections, any corporation which secured temporary immunity from the *Kirby* doctrine by virtue of a pending Chapter X reorganization was required to reduce the basis of its property by the amount of the saving which it effected from the discharge or modification of its indebtedness. This tax deferment formula gave way to complete tax immunity, however, to the extent the obligation involved "accrued interest unpaid and not resulting in a tax benefit on any income tax return." Subsequent revision of this section has not affected this limitation.

[153] Commissioner v. Rail Joint Co., (2d Cir. 1932) 61 F. (2d) 751 at 752.

[154] For example, in Consolidated Gas Co. of Pittsburgh, 24 B.T.A. 901 (1931), the Board of Tax Appeals, after relying on the Kirby case to justify the exaction, stated at p. 905: "Furthermore, since it had previously deducted the full amount of the interest, it should restore to income the difference between that amount and the amount which it actually had to pay."

[155] The negative side of the tax benefit doctrine was as a general proposition formally launched in Central Loan and Investment Co., 39 B.T.A. 981 (1939). But that case said that it had always been implicit in the Maryland Casualty Co. doctrine that an item which was recouped was immune if the earlier deduction was of no tax benefit. This conclusion was first carried over into cancellation cases in Barnhart-Morrow Consolidated, 47 B.T.A. 590 (1942), amended in 2 T.C.M. 635 (1943), affd. (9th Cir. 1945) 150 F. (2d) 285.

[156] Warner Co., 11 T.C. 419 (1948), affd. (3d Cir. 1950) 181 F. (2d) 599; C. Ludwig Baumann & Co., 2 T.C.M. 188 (1943); Chenango Textile Corporation, 1 T.C. 147 (1942), revd., in part on other grounds (2d Cir. 1945) 148 F. (2d) 296; Barnhart-Morrow Consolidated, 47 B.T.A. 590 (1942), amended in 2 T.C.M. 635 (1943), affd. (9th Cir. 1945) 150 F. (2d) 285.

[157] See discussion in Part I of this article, 49 MICH. L. REV. 459 at 485 (1951).

This provision in the Bankruptcy Act was followed in 1942 by the codification in the Internal Revenue Code of the tax benefit rule to the extent, according to section 22(b)(12), that it concerned the "recovery" of bad debts, prior taxes, and delinquency amounts.[158] This was followed in 1943 by *Dobson v. Commissioner*,[159] a decision of the Supreme Court which, to say the least, did not disapprove of the Tax Court's application of this equitable principle on an even more widespread basis than that provided in the code. This action was in turn followed in 1945 by a sweeping amendment[160] of the regulation which had been issued in connection with section 22(b)(12).[161] This provided that "the rule of exclusion so prescribed by statute applies equally with respect to all other losses, expenditures, and accruals made the basis of deductions from gross income for prior taxable years . . . but not including deductions with respect to depreciation, depletion, amortization, or amortizable bond premiums." The fact that "recovery" is defined to include cancellation perhaps explains why reference is made in so many recent cases to the fact that the commissioner concedes that a cancellation of a matter which was previously deductible involves income only to the extent there was tax benefit from the earlier deduction.[162]

This limitation on the theory of the *Kirby* case is something in the nature of a judicial counterpart on a transaction basis of the statutory net loss carry-over provision. The philosophy underlying the latter, that it is inequitable to compute income taxes solely by reference to the transactions occurring in any one year, also furnishes a rationale for the former. Any evaluation of this judicially imposed limitation must recognize, however, that it does provide the same treatment taxwise for those debtors whose previous deduction was without tax benefit whether they secure a partial cancellation or pay their obligations in full. Moreover, such debtors who do secure a partial cancellation enjoy a tax advantage over those whose obligations arise out of the purchase of assets which were not deductible in the first instance. While these comparisons might argue against the validity of this notion, there is a competing analogy which is based on the implications of this same thesis of like treatment for economically similar situations. If one should be taxed for a bargain discharge, though an earlier deduction

[158] Act of Oct. 21, 1942, c. 619, §116(a), 56 Stat. L. 798, 26 U.S.C. (1946) §22(b)(12).

[159] 320 U.S. 489, 64 S.Ct. 239 (1943).

[160] T.D. 5454, 1945-1 Cum. Bul. 68.

[161] Treas. Reg. 111, §29.22(b)(12)-1(a).

[162] Securities Co. v. United States, (D.C. N.Y. 1948) 85 F. Supp. 532; Warner Co., 11 T.C. 419 (1948), affd. (3d Cir. 1950) 181 F. (2d) 599.

did not actually offset income, then should not a debtor whose deduction was of tax benefit be taxed twice on a subsequent bargain discharge? In other words, should the latter debtor be taxed once for the income previously offset which is now restored, and taxed again on the difference between the issue price and the cost of discharge? The fact that there is actually but one economic gain in such a situation is some proof that the rule which developed out of the *Maryland Casualty Co.* case is quite satisfactory.

Significance of those matters, involving the consideration, which arose after the obligation was incurred. Any number of things can happen to the valuable consideration which a debtor received on incurring an obligation. However, examination of the more frequently recurring possibilities will suffice to point up the extent to which, and the rationale by which, such matters have been linked to savings from bargain discharges of the original indebtedness, the whole being considered one indivisible transaction for tax purposes.

The first of these possibilities has already been mentioned. It concerns the case where cash received by the debtor was subsequently lost in the particular venture for which the money was borrowed. While the conclusion in the *Kerbaugh-Empire Co.* case, that this loss left the subsequent saving immune, can hardly be reconciled with the combined effects of the *Sanford & Brooks Co.*[163] and *Kirby* decisions, its result, nevertheless, seems to have survived[164] with the Supreme Court effecting a reconciliation more or less *vi et armis*.[165]

It might seem to follow from the *Kerbaugh-Empire Co.* case that, where the consideration consists of property of unliquidated value which is still held by the debtor at the time he effects a saving by a bargain discharge of the debt, the tax on such saving should be postponed until such time as it can be determined whether the transaction as a whole will result in a gain or in a loss. This question, insofar as it related to purchase-money mortgage situations, first came before the Board of Tax Appeals in *American Chicle Co.*,[166] a case disposed of by the board during the period when it thought the *Kerbaugh-Empire Co.* case completely freed from tax all savings from bargain discharges.[167]

[163] Burnet v. Sanford & Brooks Co., 282 U.S. 359, 51 S.Ct. 150 (1931).

[164] See e.g. William H. Coverdale, 4 T.C.M. 713 (1945).

[165] See discussion in Part I of this article, 49 MICH. L. REV. 459 at 464 (1951). See also Helvering v. American Chicle Co., 291 U.S. 426, 54 S.Ct. 460 (1934). In Commissioner v. Jacobson, 336 U.S. 28, 69 S.Ct. 358 (1949), the point was clearly established that the burden was on the taxpayer to show the actual loss incurred.

[166] 23 B.T.A. 221 (1931).

[167] See discussion in Part I of this article, 49 MICH. L. REV. 459 at 461 (1951).

A decision which at the very least called for deferment of assessment on the saving effected by the discharge of the mortgage was not, therefore, surprising. The Court of Appeals for the Second Circuit, however, reached a like result on appeal though the spell of the *Kerbaugh-Empire Co.* case had in the meantime been partly broken by the Supreme Court's intervening decision in the *Kirby* case.[168]

The circuit court, by treating the retention of the consideration as an integral part of the bond transaction, concluded in the language which follows that the saving operated only to reduce the purchase price of the property:

> "But if he buys property by an obligation in the form of a bond, note or the like, and if it remains in kind after the debt is paid, there can be no 'gain'. The cost has indeed been definitely settled, but that is only one term of the equation; as long as the other remains at large, there is no 'realized' gain."[169]

The Supreme Court reversed, stating that the record did not actually disclose whether or not the debtor had retained the property, and, accordingly, whether or not he had "lost or gained by the transaction."[170] Another of its statements is of equal importance in evaluating the decision. In distinguishing the *Kerbaugh-Empire Co.* case, the Court concluded:

> "The final outcome of the dealings [there] was revealed—the taxpayer suffered a loss. Here, for aught we know, there was substantial profit—certainly, the record does not show the contrary."[171]

It was not wholly clear from this analysis which of three general propositions the Court was prepared to sustain. It might have meant that the loss in the *Kerbaugh-Empire Co.* case was "revealed" in the sense that it had been fully realized, and that only in such event would losses in value of the property purchased be taken into account. Or, at the other extreme, the Court might yet say that *proof* of continued retention of the original property was alone enough to require a deferment, the amount of the saving being treated in such case as a reduction in the purchase price. Finally, intermediate positions of various types were left open; these had in common the fact that deferment would be called for only where the retained property had decreased in value.

168 Commissioner v. American Chicle Co., (2d Cir. 1933) 65 F. (2d) 454.
169 Id. at 455.
170 Helvering v. American Chicle Co., 291 U.S. 426 at 430, 54 S.Ct. 460 (1934).
171 Ibid.

The Court of Appeals for the First Circuit in *Commissioner v. Coastwise Transportation Corporation*[172] split over the proper construction to be imputed to the *American Chicle Co.* decision, a majority siding either with the first or perhaps with one shade of the third of the three previously mentioned interpretations. In any event it concluded, in contradiction to the second of those interpretations, that a debtor could be taxed even though at the time the debt was discharged he still retained the property which had been subject to the purchase money mortgage.

The Seventh Circuit, on the other hand, reached the opposite result on the slightly different facts presented by *Hirsch v. Commissioner*.[173] Its opinion concluded somewhat ambiguously—either in accordance with the second or with the third possible interpretation of the *Chicle Co.* decision—that the taxpayer's "gain or loss cannot be determined until liquidation of his capital investment."[174]

The failure of these two possibly conflicting opinions to define precisely the exact basis upon which they rested left the way open for reconciliation of their opposing results on the basis of two possible factual distinctions. The first of these concerned possible differences in the subject matter of the negotiations which were conducted by the parties. In the *Coastwise* case, where the debtor had been held taxable, "the parties dealt solely about the notes and their value and not about the ships or their value."[175] Consequently, the court refused to treat the saving as one intended to reflect an adjustment of the original purchase price of the ships. In the *Hirsch* case, however, while the conclusion that the negotiations resulted in a reduction in the purchase price was not compelled by any fair appraisal of the facts, neither was that conclusion wholly unrealistic since the creditor, after turning down an offer to accept the property itself in final settlement, did accept in cash an amount exactly equal to its value. In view of these differences, it was possible to reconcile the two cases by attributing their decisions to the differences in the intent of the respective parties. The question of whether the negotiations were addressed to a revision of the original purchase price would under this view furnish the controlling principle.

The second factual difference between the two cases involved their financial aspects. While the unrealized loss in the *Coastwise Transportation Corporation* case was more than the saving effected by

[172] 71 F. (2d) 104 (1934), cert. den. 293 U.S. 595, 55 S.Ct. 110 (1934).
[173] 115 F. (2d) 656 (1940).
[174] Id. at 658.
[175] Commissioner v. Coastwise Transportation Corp., (1st Cir. 1934) 71 F. (2d) 104 at 105.

the bargain discharge, the value of the property still remained more than equal to the unadjusted balance owing immediately before the discharge. On the other hand, while the unrealized loss in the *Hirsch* decision was also more than the subsequent saving, the property involved had decreased in value to a point where it was worth less than the balance owing, its value being exactly equal to the balance of the debt *as adjusted*. Though it was not possible to reconcile the two cases on what might be described as an "offset" theory, since the unrealized losses in both cases would more than offset the respective savings, the cases could be reconciled by a rule which applied a "reduction in purchase price" theory either in those cases where the property was worth less than the unadjusted balance owing, or, of course, where its value was no more than the balance owing after adjustment.

The differences between these two cases have given rise to several views. The Court of Appeals for the Second Circuit, while characterizing the reduction in purchase price theory as "irrational," concluded that it applied only where the debtor and his vendor dealt specifically with respect to the purchase price.[176] It was not applicable therefore to those cases where the negotiations involved only the debt, or to those situations where the bargain purchase of the obligation was made on the open market. Other lower courts, however, have applied the reduction theory "regardless of whether the minds of the parties met upon the exact nature of the transaction,"[177] a decrease in the value of the property below a certain fixed standard being treated instead as the criterion.[178] But in those instances where this tendency was reflected, it has not always been clear exactly how much decrease was required in order to bring the rule into operation.

On occasion the rule providing for reduction in basis rather than immediate taxability is so stated as to call for its application whenever the property has decreased in value "to a point where it does not exceed the unpaid balance of the purchase price."[179] Presumably this

[176] Fifth Avenue-Fourteenth Street Corp. v. Commissioner, (2d Cir. 1944) 147 F. (2d) 453.

[177] Commissioner v. Sherman, (6th Cir. 1943) 135 F. (2d) 68 at 70, affirming 44 B.T.A. 853 (1941).

[178] Some courts, while not requiring that the minds of the parties meet on the exact nature of the transaction, have stressed the fact that the cancellation was effected by direct negotiations, thus distinguishing the Coastwise Transportation case where the negotiations were conducted through an intermediary. Helvering v. A. L. Killian Co., (8th Cir. 1942) 128 F. (2d) 433; Gehring Publishing Co., 1 T.C. 345 (1942).

[179] Fifth Avenue-Fourteenth Street Corporation, 2 T.C. 516 (1943), remanded in (2d Cir. 1944) 147 F. (2d) 453. See also Commissioner v. Sherman, (6th Cir. 1943) 135 F. (2d) 68.

had reference to the balance owing before adjustment. There is nothing in the *Hirsch* case which would contradict this. In one instance, however, the Tax Court specifically concluded that the balance owing after adjustment furnished one side of the equation.[180]

On the whole the criteria which have evolved from the differences in the *Coastwise Transportation Corporation* and *Hirsch* cases seem to be quite unsatisfactory. Why should the intention of the parties or the language which they use in effecting the settlement govern the selection of the point at which income is realized?[181] Of greater importance is the fact that the connection between the modification of a purchase money mortgage and the original purchase price is as intimate as was the connection between the loss and the saving which were involved in the *Kerbaugh-Empire Co.* case.[182] The fact that the Supreme Court treated the two matters in the latter case as one indivisible transaction without inquiring into the matter of intention suggests that the same practice should be followed in the purchase money mortgage situation under discussion.[183]

Nor is there any justification for turning the application of the reduction in purchase price theory on the question of whether the property has decreased in value to a point below either the adjusted or the unadjusted balance owing. Apart from the fact that both of these matters are wholly foreign to the basic question of whether the saving on the debt retirement and the original purchase are so related as to constitute one indivisible transaction, is the further fact that the first of these standards, the adjusted basis, bears no relationship whatever to the amount of the gain, i.e., to the amount cancelled.[184] And the second is capable of requiring tax deferment in situations where the debtor presently has an overall unrealized gain as well as where he has an overall

180 Ralph W. Gwinn, 3 T.C.M. 548 (1944).

181 There is greater justification for attaching controlling significance to intention when the adjustment is made in accordance with an agreement entered into at the time of the purchase. Main Properties, Inc., 4 T.C. 364 (1944); Pinkney Packing Co., 42 B.T.A. 823 (1940).

182 And in any event, wouldn't the facts of life suggest that a mortgagee would usually have one eye on the present value of his security though negotiations toward a settlement may be couched in terms of a reduction of the indebtedness.

183 According to this thesis, the depreciation deductions which the debtor may have been taking will be reduced by virtue of the reduction in adjusted basis.

184 For example, it is conceivable that the debtor might be immediately taxable on $100,000 simply because the value of the property exceeds the adjusted balance owing by $1,000. There was no indication in the Gwinn case, 3 T.C.M. 548 (1944), that the value of the property established a ceiling on the amount of taxable income. Such a ceiling is established, of course, where the unadjusted balance owing furnishes one side of the equation.

unrealized loss.[185] Under these circumstances why should a borderline shift of $5 in the value of the property be responsible for a finding of immediate taxability of a very large gain or, in the alternative, deferment which in the end might under some circumstances amount to complete forgiveness?

If *any* of these purchase money mortgage situations are to be treated as one transaction, all should be. That would mean, of course, that the *Coastwise Transportation Corporation* case was wrongly decided.

It would be equally fair, as an alternative to the foregoing suggestion, to utilize an offset theory, i.e., compare the unrealized loss, if any, with the realized gain from the debt retirement, taxing any excess gain. The philosophy behind the legislative solution to the doctrine of *Helvering v. Bruun*[186] would, however, favor the first of these methods, for by it the burdensome valuation question is avoided.

The Supreme Court has not gone beyond tacitly approving some form of the reduction in purchase price theory. It referred to this general doctrine and its supporting decisions in the *American Dental Co.* case while relating the adjustment of a debtor's back rent and interest to a gift:

> "The release of interest or the complete satisfaction of an indebtedness by partial payment by the voluntary act of the creditor is more akin to a reduction of sale price than to financial betterment through the purchase . . . of its bonds in an arms-length transaction."[187]

The effect of the *American Dental Co.* decision on the matter under discussion was not limited, of course, to this passing reference. Adjustments of indebtedness which would have otherwise called for a reduction in purchase price would now, if subject to this decision, be treated as gifts which are free of the reduction in basis burden.[188] But the *Jacobson* decision,[189] as previously explained,[190] has, of course, cut down on the number of situations which are likely to be subsumed under the *American Dental Co.* principle.

The question naturally arises—if some reduction in purchase price theory is to be used, how far is it to be carried? Should it be confined, for

[185] This may occur when the unadjusted balance owing is reduced from a point in excess of the value of the property to a point below that value, the reduction exceeding the amount previously paid.

[186] 309 U.S. 461, 60 S.Ct. 631 (1940). See I.R.C. §22(b)(11).

[187] 318 U.S. 322 at 330, 63 S.Ct. 577 (1943).

[188] Chenango Textile Corporation v. Commissioner, (2d Cir. 1945) 148 F. (2d) 296.

[189] 336 U.S. 28, 69 S.Ct. 358 (1949).

[190] Part I of this article, 49 MICH. L. REV. 459 at 472 (1951).

example, to purchase money mortgage situations? If the doctrine depends upon the philosophy of the *Kerbaugh-Empire Co.* case, then it should apply not only to the purchase money mortgage situations properly so-called, but also to those cases where money is borrowed from *X* to buy property from *Y*, since that situation would roughly parallel the facts of that Supreme Court decision.[191] It should not apply, however, to that property already held by the debtor which is used by him for collateral in securing a loan which is subsequently adjusted, the borrowed money still being retained. For to embrace the latter situation would subsume three matters (the mortgaged property, the cancellation, and the retained cash) within one transaction rather than the two previously approved by the *Kerbaugh-Empire Co.* case. The latter would authorize immunity for the saving only to the extent the borrowed money itself has been lost. But the underpinnings of that case will not, in the light of the *Sanford & Brooks Co.* decision, support the extension which would be required if account is to be taken of both the borrowed money and the mortgaged property. The limitation suggested seems to be supported by the trend of authorities.[192]

Significance of the Nature of the Debtor's Obligation

The lower courts have been rather slow in applying the principle of the *Kirby* decision to obligations lacking in any one of the three qualities of the debt discharged there. That claim involved the *undisputed, unconditional, personal* liability of the Kirby Lumber Company. This reluctance was fully justified with respect to disputed or contingent liabilities, and perhaps even with respect to obligations lacking personal liability; but the further requirement that the personal liability also be of a particular type is in certain instances open to serious question.

The *Kirby* doctrine could not, of course, be applied to *cash* settlements of disputed claims unless the court reviewing the tax question were willing to determine what the actual rights of the parties would have been in the absence of the compromise. From the beginning, the Board of Tax Appeals has very wisely avoided this task, seeming to recognize that a test of good faith was an adequate safeguard against self-serving declarations which might have been designed to avoid

191 Charles L. Nutter, 7 T.C. 480 (1946). The Third Circuit has, however, refused to apply the Hirsch formula to a mortgage which had simply replaced the original purchase money mortgage. Frank v. United States, (3d Cir. 1942) 131 F. (2d) 864. This is directly contrary to the Hirsch case which actually involved just such a situation. (7th Cir. 1940) 115 F. (2d) 656.

192 Frank v. United States, (3d Cir. 1942) 131 F. (2d) 864. Cf. Lutz & Schramm Co., 1 T.C. 682 (1943).

subjection of a given situation to the *Kirby* principle.[193] But a different tax consequence should be applied to settlements of disputed claims effected by the transfer of property which carries with it an adjusted basis under section 113(b). Where the transfer is not preceded by a liquidation of the disputed claim the debtor should be taxable on the difference between the adjusted basis and the market value of the property, since he is deriving full benefit from that difference in effecting the discharge.[194] It is not likely, however, that this result will be reached so long as *General Utilities & Operating Co. v. Helvering,*[195] a case discussed below, stands unreversed.[196]

Much more difficult valuation problems than those which would be encountered in the foregoing situation have been quite properly avoided in those cases decided to date where the conclusion has been reached that the *Kirby* principle will not be applied to the settlement of contingent claims by payments in cash.[197] It should be noted, however, that the relevant decided cases actually involved contingencies, the likelihood of which admittedly could not be measured. This suggests that there is still room, sweeping dicta to the contrary notwithstanding, for the opposite conclusion in cases where, for example, experience tables will furnish a sufficiently accurate valuation of the claim.

The discussion above with reference to transfers of property other than cash in discharge of a disputed claim is equally applicable where the transfer is in discharge of a contingent claim.

The third feature of the obligation involved in the *Kirby* case, the matter of personal liability, has been the separate subject of two basic types of controversies. The first of these involved taxpayers who were not personally liable but whose property was subject to the debt. Contrasted with this, in the second, the taxpayer disclaimed tax liability though personally liable for the obligation, charging that his economic benefit was immune from tax since it was derived from a discharge effected in the precise manner permitted or called for by the terms of the obligation. In other words, whereas the first of the two taxpayers claimed immunity from tax by reason of the complete absence of per-

[193] N. Sobel, Inc., 40 B.T.A. 1263 (1939); Iceland, Inc., 23 B.T.A. 15 (1931); but cf. Pacific Magnesium, Inc. v. Westover, (D.C. Cal. 1949) 86 F. Supp. 644. It was in the first of these cases that the board emphasized the bona fide character of the dispute.

[194] The discussion infra p. 686 et seq., suggests that this gain would be taxed, if at all, on the theory that it was derived from the disposition of property rather than from the cancellation or bargain discharge of a debt.

[195] 296 U.S. 200, 56 S.Ct. 185 (1935).

[196] Cf. Commissioner v. Sherman, (6th Cir. 1943) 135 F. (2d) 68.

[197] Corporacion de Ventas de Salitre y Yoda de Chile v. Commissioner, (2d Cir. 1942) 130 F. (2d) 141; Terminal Investment Co., 2 T.C. 1004 (1943).

sonal liability on his part, the second relied on the peculiar quality of his admitted personal liability.

While the first cases coming before the Board of Tax Appeals involved the first of the two situations, one aspect of the second was also present. Taxpayers who had purchased property *subject* to a mortgage secured its release, as they were authorized to do, by turning in to the mortgagee at face value the latter's own certificates of indebtedness which the taxpayer-mortgagor had purchased at a discount.[198] Some of the mortgagees' certificates were actually secured by the particular mortgage on the mortgagor-debtors' properties[199] and some apparently were not.[200]

The board might have sustained the government's position in these cases, with respect to the theoretical gain represented by the difference between the purchase price of the certificates (adjusted basis) and the amount of debt retired, on the theory that to the extent indicated specific property previously offset by an obligation was now released to the debtor's uses without cost, thus rendering the gain subject to the basic philosophy of the *Kirby* case. Or it could have, as it later did in cases where the mortgaged property itself was transferred in discharge of the debt,[201] characterized the gain as one realized from the disposition of property, the property in this case, however, being the mortgagee's certificates. Or finally, recognizing that the taxpayer was not personally liable for the debt and that, as a consequence, a conveyance of the mortgaged property itself (perhaps through foreclosure) would have satisfied all that the law required of a lienor, the board might have coupled with one of the above two theories a ceiling to be called into operation whenever the value of the mortgaged property had fallen below the amount owing on the mortgage.

Instead of these theories, however, the absence of personal liability on the part of the debtor led the board to conclude that the *Kirby* principle was inapplicable and that the purchase price of the certificates was simply to be added to the actual consideration previously paid for the property, thus establishing its unadjusted basis. Underlying this conclusion was the notion that the taxpayer had first purchased only an equity in the property, and that the cost of the remaining interest could not be determined until he had completed negotiations for it. Conse-

198 Hotel Astoria, Inc., 42 B.T.A. 759 (1940); P. J. Hiatt, 35 B.T.A. 292 (1937); Fulton Gold Corp., 31 B.T.A. 519 (1934); American Seating Co., 14 B.T.A. 328 (1928), revd. in part on other grounds (7th Cir. 1931) 50 F. (2d) 681.

199 P. J. Hiatt, 35 B.T.A. 292 (1937); American Seating Co., 14 B.T.A. 328 (1928).

200 Hotel Astoria, Inc., 42 B.T.A. 759 (1940).

201 Mendham Corp., 9 T.C. 320 (1947); Lutz & Schramm Co., 1 T.C. 682 (1943).

quently, the tax effect on each of the debtors was deferred in much the same manner, though on a more sweeping basis than it would have been under the doctrine of *Hirsch v. Commissioner*.[202]

This result, while quite satisfactory in the instance where the lien was roughly akin to a purchase money mortgage, is less tenable in the case where the debtor received cash to do with as he pleased in exchange for the mortgage. For there the net gain in cash would be fully realized on the bargain discharge of the debt.[203] While the above cases were not required to draw the distinction in question, recent results in related situations furnish some reason to believe that debtors of this sort will be said to have realized income on the bargain discharge of liens for which they were not personally liable.[204] Indeed a recent decision by one of the circuits was basically contrary to the results which the board reached in the cases discussed in the preceding paragraph.[205] The circuit court apparently thought that the *Kirby* case was applicable in all such cases simply because of the consequent release of specific property previously offset by an obligation.

As previously indicated, the second major type of controversy concerning the importance of personal liability involved situations where personal liability of one sort was actually present. Difficulty was encountered in applying the *Kirby* principle only because of an option in the debtor, arising out of the original terms of the obligation, to pay in cash or in certificates of indebtedness running against the creditor. In the first such case, one involving a purchase money mortgage, the board initially indicated that the *Kirby* principle was inapplicable because the taxpayer, though permitted to discharge the debt with bonds of the creditor which the former had purchased at a discount, had done all that he was obliged to do.[206] Present immunity was attributed then to the fact that the debtor had not actually compromised or adjusted his obligation with the creditor. Presumably, as in the situation first dis-

202 See discussion supra p. 676 et seq.

203 This does not mean that the doctrine under discussion would be inapplicable to all cases involving liens which attached after the property was first acquired. For that doctrine has been applied to such a case where the lien arose out of a special assessment by a local unit of government. P. J. Hiatt, 35 B.T.A. 292 (1937). *Contra,* John Clauss, 1936 P-H B.T.A. Memo. Op. 36,030. Instances of that type are quite properly assimilated since the expense involved does increase the adjusted basis of the property, and the lien, therefore, is roughly akin to a purchase money mortgage.

204 Mendham Corp., 9 T.C. 320 (1947); Lutz & Schramm Co., 1 T.C. 682 (1943).

205 Central Paper Co. v. Commissioner, (6th Cir. 1946) 158 F. (2d) 131. Those cases were also recently approved by way of dictum in Fifth Avenue-Fourteenth Street Corp., (2d Cir. 1944) 147 F. (2d) 453.

206 Cherokee Co., 41 B.T.A. 1212 (1940); cf. Pinkney Packing Co., 42 B.T.A. 823 (1940).

cussed, the adjusted basis of the debtor's property would now include, aside from previous cash payments, only the amount actually expended for the bonds and not the face amount of the debt which was retired by them.[207]

By an alternative line of reasoning, the board evolved a second formula which will produce in many cases results quite different from those which would have followed from the foregoing analysis. The transaction was also said to resemble sufficiently an exchange to warrant its classification as such. The original cash payments and the bonds were said in effect to have been exchanged for the mortgaged property. Accordingly, a debtor will be immediately subject to tax if the value of the mortgaged property at the time of its original acquisition exceeded his cash payments plus the cost price of the creditor's bonds which were turned in. In other words, if at the time of its acquisition the property was actually worth the cash payment plus the face amount of the mortgage, the difference between the cost of the creditor's certificates and the amount of debt retired by them would, while immune under the *Kirby* doctrine, in effect represent the amount of gain to be taxed on the theory of an exchange. Subsequent confirmation of the exchange theory by way of dictum indicates that it is likely to supplant the rationale first mentioned.[208] At the same time, however, the Tax Court held that neither of the above theories applied to personal liability cases involving optional methods of retirement if the mortgage was not on the property at the time it was acquired. The Second Circuit confirmed the Tax Court's view that in the latter circumstances the *Kirby* case was applicable.[209] This result seems sound enough, for the exchange theory could not accurately characterize the transaction.

The suggestion that the exchange theory seems in the one instance to have supplanted the notion that a debtor was free of tax liability where he had done all that he was obliged to do should not be understood to mean that all vitality has been sapped from the latter reasoning. Indeed, the results in two other types of situations have been greatly influenced by this notion and debtors as a consequence have been freed from tax though they actually enjoyed some sort of gain.

The first of these situations concerns the case where a corporation declares a dividend in kind of appreciated property which carries an adjusted basis under section 113(b). Where that distribution was not

[207] However, if the courts should apply the doctrine of General Utilities & Operating Co. v. Helvering, 296 U.S. 200, 56 S.Ct. 185 (1935), a reduction in basis might not be required.

[208] Fifth Avenue-Fourteenth Street Corporation, 2 T.C. 516 (1943).

[209] (2d Cir. 1944) 147 F. (2d) 453.

in discharge of a previously declared liquidated dividend, the Board of Tax Appeals,[210] and later the Supreme Court,[211] held the corporation immune with respect to the appreciation. The fact that the actual distribution was not in the form of a sale or was not actually in discharge of an obligation of a greater amount was thought to be enough to justify the immunity.

While it is not likely that the lower courts will tamper with the result in this exact situation so long as the Supreme Court's decision in *General Utilities & Operating Co. v. Helvering* stands unreversed, one circuit has recently sustained the Treasury in a case where the distribution was made of property which carried a zero basis.[212] There, however, the circuit court did utilize a formula which would postpone the tax against the corporation until such time as the stockholders disposed of the property. Because the entire proceeds from their disposition would have been income had the sale been consummated by the corporation itself, the situation was related to the so-called "taxable person" cases, particularly to *Helvering v. Horst*,[213] rather than to the *Kirby* line of decisions. Consequently, the corporation was held taxable on the theory that, by the distribution to its stockholders and their subsequent sale, it had derived or realized full enjoyment of the economic gain. Eventually, perhaps the notion which has been developed most fully in the taxable person cases, that when not received in "money or property realization may occur when the last step is taken by which one obtains the fruition of the economic gain,"[214] will be called upon by the Supreme Court to justify a reversal of its *General Utilities* decision.

There are equally good reasons for reversing the result reached in the second of the two situations which have escaped all tax consequence by reason of the notion that the taxpayer satisfied the obligation exactly according to its terms. That situation, one where a debtor derives a gain, after obtaining a loan in foreign money, by repaying it in kind with coin purchased under a more favorable exchange rate, is so similar in its economic consequence to a tax-producing short sale that immunity from tax is without any justification whatever.[215] While

[210] General Utilities & Operating Co., 29 B.T.A. 934 (1934).

[211] General Utilities & Operating Co. v. Helvering, 296 U.S. 200, 56 S.Ct. 185 (1935).

[212] First State Bank of Stratford v. Commissioner, (5th Cir. 1948) 168 F. (2d) 1004, cert. den. 335 U.S. 867, 69 S.Ct. 137 (1948).

[213] 311 U.S. 112, 61 S.Ct. 144 (1940).

[214] Id. at 115.

[215] Cf. William H. Coverdale, 4 T.C.M. 713 (1945); B.F. Goodrich Co., 1 T.C. 1098 (1943); General Motors Corp., 35 B.T.A. 523 (1937), revd. by stipulation of parties (6th Cir. 1939) 106 F. (2d) 995.

there is no adjustment of the obligation with the creditor, and no appreciation in the purchased foreign funds which might be said to have been realized on its disposition, there is no earthly reason why the underlying philosophy of the *Kirby* case should not be extended to cover it.

Significance of the Kind of Property Used in Effecting the Discharge

Introductory note. The decided cases reflect two frequently recurring types of bargain discharges which, contrasted with the situation in the *Kirby* case, are accompanied by transfers of property other than partial payments in cash. The first of these involves a transfer by the debtor of a non-cash asset which carries an adjusted basis under section 113(b) of the code. The property transferred in the second of the two situations, while also clearly an asset from the creditor's point of view, cannot be so characterized, at least in the economic sense, from the debtor's viewpoint. Illustrative of this second type of transfer is the case where a corporation issues its own stocks or bonds in discharge of a pre-existing obligation. These two situations, involving difficulties slightly different from those encountered in the *Kirby* case itself, are discussed below.

Significance of the use of the debtor's non-cash "assets" in effecting the discharge. Even in the period when the *Kerbaugh-Empire Co.* case[216] was thought to preclude the taxation of gains solely attributable to the bargain discharge of an obligation the Treasury asserted,[217] and the Board of Tax Appeals agreed,[218] that where an asset other than cash was transferred in discharge of a debt, income was realized by the debtor to the extent of the difference between the adjusted basis of the property conveyed and the amount of the obligation. That the market value of the property, a figure which necessarily constituted one side of the equation if account was to be taken of a possible bargain discharge, was considered a neutral factor suggested that such transactions were really being treated as sales. The possibility then of a bargain discharge, or of a transfer coupled with a partial forgiveness of the indebtedness, was disregarded.

After the Supreme Court decided the *Kirby* case, the board added in substantiation of its "sale" theory with respect to the kind of situation under discussion the concept which the Supreme Court developed

[216] 271 U.S. 170, 46 S.Ct. 449 (1926).
[217] S.M. 3748, IV-2 Cum. Bul. 17 (1925).
[218] Hagan Corporation, 21 B.T.A. 41 (1930).

there.[219] That the measure of the gain continued, however, to be the difference between the adjusted basis and the amount of the debt and that the market value of the property remained a neutral factor demonstrated that the basic theory in such cases actually remained one of sale.[220]

There were some situations which might have forced the courts to choose one or the other of the two competing theories or, in a given case, to allocate the gain between them. The first of these involved the case where the debtor was insolvent after as well as before the transfer. It has been previously noted that debtors so situated were completely immune from the *Kirby* doctrine.[221] That a debtor so situated might have forced a selection or allocation between the two theories stemmed from the fact that an additional difficulty is encountered in justifying such immunity where "the transaction is treated as if the transferor had sold the asset for cash equivalent to the amount of the debt and had applied the cash to the payment of the debt."[222] The difficulty referred to is fairly obvious; in the case of an ordinary sale, the transferor's net worth has always been considered a neutral factor in determining whether the appreciation in the value of the property, realized by sale, constituted taxable income.

Interestingly enough, however, the immunity from the *Kirby* doctrine presently accorded insolvent debtors can be traced to a circuit court decision which freed from tax a debtor who had actually transferred appreciated property in discharge of an indebtedness the amount of which exceeded the market value of the asset transferred as well as its adjusted basis.[223] Equally interesting is the fact that the court there omitted any reference to the "sale" theory to which the board subscribed above, the assumption being made that except for the insolvency of the debtor the *Kirby* case would have justified a result favorable to the government. While the board later conformed to that decision,[224] it

[219] Carlisle Packing Co., 29 B.T.A. 514 (1933); E. F. Simms, 28 B.T.A. 988 (1933), Commissioner's appeal dismissed March 25, 1939.

[220] Ibid.

[221] See discussion in Part I, 49 MICH. L. REV. 459 at 478 et seq. (1951).

[222] The quoted statement appears in Unique Art Manufacturing Co., 8 T.C. 1341 (1947).

[223] Dallas Transfer & Terminal Warehouse Co. v. Commissioner, (5th Cir. 1934) 70 F. (2d) 95.

[224] Main Properties, Inc., 4 T.C. 364 (1944); Texas Gas Distributing Co., 3 T.C. 57 (1944); Springfield Industrial Building Co., 38 B.T.A. 1445 (1938). Cf. J. K. McAlpine Land & Development Co., 43 B.T.A. 520 (1941), affd. (9th Cir. 1942) 126 F. (2d) 163; Estate of W. W. Turney, 1940 P-H B.T.A. Memo. Dec. 40,474, revd. (5th Cir. 1942) 126 F. (2d) 712.

continued to emphasize the theory of sale in the case of solvent debtors.[225]

The mission which an insolvent debtor might have accomplished but did not was eventually performed by a debtor interested in securing the favorable treatment accorded capital gains. In *Peninsula Properties Co. Ltd.*,[226] the debtor transferred a capital asset having a market value and an adjusted basis of $100,000 in discharge of an obligation amounting to $182,188.06. The government insisted that the situation really involved two transactions, a sale in which gain or loss might have been realized but was not, and the gratuitous cancellation of a debt of $82,-188.06 which, according to the *Kirby* doctrine, involved the realization of ordinary income. The Board of Tax Appeals refused, however, to apply the *Kirby* doctrine, concluding, for practical purposes, that the transfer of the property was to be exclusively equated in such instances with a sale "regardless of the fair market value of the stock,"[227] and that, as a consequence, the realized benefit was a capital gain and not ordinary income.[228]

This result, while relieving the government of the burden of checking market values, is not only inconsistent with the philosophy underlying the consequence attached to a showing of insolvency in such cases but it is at the same time wholly incompatible with the original philosophy out of which grew a demand for the establishment of the category of capital gains. That category was created primarily for the purpose of cushioning the harsh impact of the realization doctrine on appreciations in value which accrued over a period stretching beyond the taxable year. If like economic circumstances are to be treated alike, appreciations in value realized by a transfer effected in discharging an obligation should get the benefit of the effective rate structure provided for capital gains, but any difference between the market value of the property transferred and the amount of the debt should by the same token be considered ordinary income.[229]

There will be cases, of course, where there is only a slight variance between the court's notion of market value and the amount of the indebtedness. But the fact that allocation in such instances will hardly

[225] International Freighting Corp. v. Commissioner, (2d Cir. 1943) 135 F. (2d) 310; Lutz & Schramm Co., 1 T.C. 682 (1943); Peninsula Properties Co. Ltd., 47 B.T.A. 84 (1942).

[226] 47 B.T.A. 84 (1942).

[227] Id. at 92.

[228] *Accord,* Unique Art Manufacturing Co., 8 T.C. 1341 (1947).

[229] That there is some chance that the Tax Court may come around to this view, see Liberty Mirror Works, 3 T.C. 1018 (1944); Claire D. Reason, 1942 P-H B.T.A.-TC Memo Dec. 42,552.

be worth the costs involved should not serve to exclude allocation in those instances where the parties are aware of substantial differences in the amounts.

The rule which the lower courts have developed, treating the gain as one arising entirely out of the disposition of property, has been applied to involuntary[230] as well as voluntary transfers[231] and to those involving mortgaged[232] as well as unencumbered assets. Only one such situation has not been equated with a sale. It will be recalled that where a debtor pays cash in effecting a bargain discharge of a purchase money mortgage the courts have in certain instances freed the gain from the *Kirby* doctrine by treating the transaction as one involving a reduction of the original purchase price.[233] In *Charles L. Nutter*,[234] the property itself was transferred to the creditor in discharge of the purchase money obligation. A majority of the Tax Court concluded that this "face to face" transaction was also closely akin to, and would be treated as, a reduction in the original price, thus freeing from tax the difference between the adjusted basis and the unpaid balance.[235] The court has not been inclined, however, to extend this immunity beyond purchase money mortgage situations properly so-called.[236]

Significance of the use of property other than assets in effecting the discharge. Litigation concerning the effect of transfers of something other than an asset in effecting bargain discharges of existing indebtedness has dealt almost exclusively with cases involving refunding or recapitalization programs of corporations, i.e., with instances where corporate debts are retired through the issuance of the corporation's own bonds and stocks. The difference in the characteristics of these two forms of property has given rise to differences in the tax consequence of cancellations effected by them.

Assets are clearly freed from an offsetting liability in the instance where the cash proceeds of a new bond issue are used to secure the bargain discharge of an existing obligation. Consequently, the *Kirby* case would sustain a tax imposed in the year in which the gain was real-

[230] R. O'Dell & Sons Co. v. Commissioner, (3d Cir. 1948) 169 F. (2d) 247, affirming 8 T.C. 1165 (1947); Mendham Corp., 9 T.C. 320 (1947).

[231] Lutz & Schramm Co., 1 T.C. 682 (1943).

[232] Notes 230 and 231 supra.

[233] See discussion supra p. 674 et seq.

[234] 7 T.C. 480 (1946).

[235] Four dissenting judges argued that the integrity of the sale theory should be maintained, thus excluding exceptions which had developed in connection with the Kirby doctrine. Certainly the philosophy of Helvering v. Midland Mutual Life Insurance Co., 300 U.S. 216, 57 S.Ct. 423 (1937) served to reinforce their contention.

[236] Mendham Corp., 9 T.C. 320 (1947); Liberty Mirror Works, 3 T.C. 1018 (1944).

ized by the discharge. At first blush one might equate with that situation one of those with which we are presently concerned, namely, the case where bonds having a par value, for example, of $5,000 are issued directly to a creditor in cancellation of previously outstanding bonds having a face value of $10,000. At least that analogy was sufficiently attractive to the Court of Appeals for the First Circuit that it was led in *Commissioner v. Coastwise Transportation Corp.* to sustain a tax imposed against such a debtor in the year of the cancellation without any mention of an almost equally attractive competing method of accounting.[237] The competing analogy referred to has its roots in the doctrine developed for the case where a cash premium is paid by the debtor to a bondholder on substituting one series of bonds for another. In such a case the Supreme Court, in accordance with the usual notion that premiums and discounts operate to increase or decrease interest charges, upheld the Treasury's position that the deduction for the premium could only be taken on an allocated basis over the life of the new bonds.[238] One would suppose from this that a cash premium received (as distinguished from being paid) by debtors on such occasions would be allocated in a similar manner.[239] And the argument might then be made that the premium received by the Coastwise Transportation Corporation in the release of assets on the occasion of a bargain substitution of evidences of indebtedness should be accorded like treatment.

While it may yet be decided that the *Coastwise Transportation* case did not really consider, and was not therefore definitive on the accounting aspects of such a gain,[240] the arguments would, except for the problem of administrative convenience, actually preponderate on its particular facts in favor of the result which it did reach. The truth of the matter is that the substantial difference in the face value of the two series of bonds involved there suggest that the transaction was more closely akin to forgiveness of a part of the principal than it was to an adjustment of interest rates. To that extent, though the matter is admittedly one of those tough questions of degree, the analogy to the *Kirby* doctrine was actually more proximate. However, should any such transactions eventually be equated with the cash premium situation, it may as a matter of administrative convenience be desirable to treat even instances such as that involved in the *Coastwise Transportation* case on the same basis.[241]

[237] (1st Cir. 1934) 71 F. (2d) 104, cert. den. 293 U.S. 595, 55 S.Ct. 110 (1934).

[238] Great Western Power Co. of California v. Commissioner, 297 U.S. 543, 56 S.Ct. 576 (1936).

[239] Cf. Treas. Reg. 111, §29.22(a)-17.

[240] That the Coastwise Transportation case has not been thought to be conclusive on the accounting aspects, see Virginia Electric & Power Co. v. Early, (D.C. Va. 1943) 52 F. Supp. 835.

[241] Note that Treas. Reg. 111, §29.22(a)-17 dealing with premiums and discounts on

Such a solution would serve to avoid the "degree" aspects of the problem.

The conclusion that income is realized in the foregoing situation on either a telescoped or amortized basis leaves open the possible applicability of the non-recognition provisions of the code. In this connection, only one such provision will be considered here. Some might erroneously conclude that the realized gain in question is actually freed of tax by virtue of that provision which calls for non-recognition where an exchange is effected in the course of a corporate reorganization. The section referred to provides as follows:

> "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."[242]

It is true that recapitalization is one of the six approved methods of reorganization.[243] The regulations, for example, expressly provide that the issuance of stock in exchange for outstanding bonds satisfies the prerequisites of that characterization.[244] And while the commissioner insists on the other hand that an exchange of bonds for bonds falls short of the mark—constituting a refinancing of indebtedness rather than a recapitalization[245]—the courts have held otherwise.[246]

In the first cases to consider the foregoing matters, the Board of Tax Appeals was led by the sweeping language of the statute quoted above to conclude that a corporation was free of tax on an exchange of issues if it had proceeded according to a plan of reorganization.[247] There is every reason to believe, however, that the section in question was not actually intended to have that effect. The history of that section indicates that it was not intended to cover the corporation at all. Indeed its first statutory antecedent, dating back to 1918, provided that "when in connection with the reorganization . . . of a corporation *a person* receives in place of stock or securities owned by him new stock or securities . . ., no gain or loss shall be deemed to occur from the exchange."[248]

the original issue of bonds does not draw a line between those which are and those which are not substantial in amount.

242 I.R.C. §112(b)(3).

243 I.R.C. §112(g)(1).

244 Treas. Reg. 111, §29.112(g)-2.

245 I.T. 2035, III-1 Cum. Bul. 55 (1924).

246 Commissioner v. Neustadt's Trust, (2d Cir. 1942) 131 F. (2d) 528.

247 Capento Securities Corporation, 47 B.T.A. 691 (1942). See Hummell-Ross Fibre Corporation, 40 B.T.A. 821 (1939).

248 Revenue Act of 1918, §202(b). (Italics added).

Immunity, therefore, was provided only for the stockholder or bondholder.[249] When this language was reshaped in 1924 into what is now its present form, the responsible congressional committee indicated that the revision involved nothing more than "minor changes in phraseology."[250] This all important history was apparently rescued from oblivion when one of the board's decisions supra was brought on appeal before the First Circuit; at least the latter court rested its decision on a ground wholly apart from the reorganization provisions, asserting that the applicability of those provisions remained an open question.[251] The foregoing discussion should indicate the shape which any definitive answer must eventually take.

The consequence which should attach where a bargain discharge is effected by an original issue of a debtor-corporation's stock should, like the bond-for-bond situation discussed above, turn on the validity of an analogy to the receipt of cash premiums on the sale of stock issues. The Treasury normally considers the receipt of a subscription price as a capital transaction giving rise to neither gain nor loss whether or not the shares are sold at a premium or discount.[252] The notion that the entire price is a contribution of capital even serves to free the premium from the amortization requirement imposed with respect to bond premiums.

The absence of definitive authority until 1942 with respect to the case where stock with a stated par was issued in the first instance in cancellation of an even greater debt suggests that the Treasury had been treating such a gain as it would have treated an ordinary cash premium. However, a different rule evolved with respect to treasury stock. Even where such was used to discharge an equal amount of indebtedness, the government with the agreement of the Board of Tax Appeals insisted that gain was realized to the extent of the difference between the cost basis of the shares and the amount of the indebtedness.[253] The analogy to the cash premium situation was maintained, however, for the same result would have attached had such been involved since the corporation would be dealing "in its own shares as it might in the shares of another corporation."[254]

An obvious attempt by the Raytheon Production Corporation to

[249] The inference drawn from the original language of the statute is supported by the illustrations which the manager of the bill developed on the Senate Floor. 57 CONG. REC. 828 (1918).

[250] H.R. 179, 68th Cong., 1st sess., p. 13 (1924).

[251] Commissioner v. Capento Securities Corp., (1st Cir. 1944) 140 F. (2d) 382.

[252] Treas. Reg. 111, §29.22(a)-16; Finance Corporation of New England, 16 B.T.A. 763 (1929).

[253] A. R. Purdy Co., 3 T.C.M. 1059 (1944).

[254] Treas. Reg. 111, §29.22(a)-15.

avoid the impact of the *Kirby* doctrine by having an affiliated corporation acquire Raytheon bonds from outsiders at a discount, the acquisition being followed by an exchange between the affiliates of the bonds for *newly* issued stock of Raytheon, led the Bureau in 1942 to challenge for the first time the immunity claimed for a corporation with respect to new issues. The government in that case maintained that gain was realized by Raytheon to the extent of the claim for accrued and previously deducted interest which had been cancelled somehow in the course of the exchange, and to the extent of the difference between the market value of the shares and the face amount of the principal which it owed, *the latter being equal to the par value of the shares.* The Board of Tax Appeals agreed with the first contention; discharge of the back interest had freed assets previously offset by an obligation. But it rejected the second, concluding that the corporate assets were still subject to a liability, though different in form, equivalent to the principal of the debt, and that the latter was simply the subscription price which gave rise to neither gain nor loss under the regulations discussed above.[255]

Subsequent litigation does not clearly disclose whether the Treasury intended as a general proposition to establish the practice of assessing a tax, as it did here with respect to the back interest, whenever it appeared that there was a difference in the face amount of the shares and the total amount of the indebtedness. It could not in any event have anticipated much success, for the board's decision supra quite properly implied that had the newly issued shares actually been treated by the parties as consideration for the cancellation of the back interest, the so-called gain would then have been treated as part of the generally tax immune subscription price.[256] Ordinarily evidence to the contrary, i.e., a showing that the creditor did not actually seek the best price available, would justify characterizing the benefit to the corporation as a gift under the doctrine of the *American Dental Co.* case.[257] It was not so characterized here only because there was no evidence whatever indicating the reason for the cancellation. And the taxpayer's brief simply asserted that the " 'claim to accrued interest disappeared.' "[258] Conceivably it might have been outlawed by the statute of limitations—

[255] Capento Securities Corp., 47 B.T.A. 691 (1942), affd. (1st Cir. 1944) 140 F. (2d) 382.

[256] Alcazar Hotel, Inc., 1 T.C. 872 (1943) is to the same effect.

[257] Cf. Claridge Apartments Co., 1 T.C. 163 (1942), decided on another ground in 323 U.S. 141, 65 S.Ct. 172 (1944). The Tax Court's decision can be distinguished only on the theory that the American Dental Co. case did not apply to situations arising under Chapter X of the Bankruptcy Act.

[258] Capento Securities Corp., 47 B.T.A. 691 at 696 (1942).

a fact which would have taken the case outside the range of the *American Dental Co.* decision. A possibility of this sort presumably furnished the basis for its characterization as income.

Subsequent litigation does show with respect to the second of the two matters decided by the board supra that the Treasury was not content for a period of several years with the neutralization of the significance which it had attached to the market value of the stock. However, the view of the board, that such was a neutral factor was subsequently approved by the First Circuit with respect to out-of-court recapitalizations[259] as well as in the case where the recapitalization was effected by a reorganization under Chapter X of the Bankruptcy Act.[260] The commissioner has now acquiesced in the board's conclusion with respect to the latter type reorganization,[261] one which involved the slightly different but closely related question of whether it was necessary for the corporation to reduce the basis of its property by the amount of debt "cancelled or reduced."

The lower courts' conclusion with respect to the neutral character of the market value of newly issued stock is deceptively attractive. At first blush there seems to be considerable logic in subsuming the situation under the rule which provides that no gain or loss is realized with respect to the subscription price of new stock. In other words, if a corporation would be immune under the "subscription price" rule, as the board assumed, on selling for $500,000 in cash a new issue of stock bearing a market value of but $50,000, why should it not also be free of tax when its own bonds in the amount of $500,000 are received in lieu of the cash?

Complete immunity for the subscription price is indeed quite reasonable in certain settings. There is little justification, for example, in taxing the excess over par which a *new* corporation may have received on the sale for cash of its first issue. Nor is there any reason to attach significance to the market value of the stock in the instance where existing stockholders acquire a new but subsequent issue on a pro rata basis. The reason calling for immunity in these two instances is too obvious to state. While it is not likely as a practical matter that we will encounter many cases like that first mentioned in the preceding paragraph, i.e., the case where individuals without any previous equitable

[259] Commissioner v. Capento Securities Corp., (1st Cir. 1944) 140 F. (2d) 382.

[260] Tower Building Corp., 6 T.C. 125 (1946); Motor Mart Trust, 4 T.C. 931 (1945), affd. (1st Cir. 1946) 156 F .(2d) 122. The tax court first adopted this position in Claridge Apartments Co., 1 T.C. 163 (1942), revd. (7th Cir. 1943) 138 F. (2d) 962. The circuit court was reversed on another ground, 323 U.S. 140, 65 S.Ct. 172 (1944).

[261] See G.C.M. 25277, 1947-1 Cum. Bul. 44. This memorandum revoked an earlier ruling to the contrary.

interest in an old corporation pay $500,000 in cash for a new but additional stock issue worth but $50,000, we may concede for purposes of the argument that the subscription price rule would also apply there. A bondholder on the other hand whose claim is in the amount of $500,000 will often be quite willing when caught in one circumstance to exchange his bonds for stock having a value of only $50,000. The instance referred to concerns the case, of course, where the bonds are worth but $50,000. A realistic appraisal of this latter situation would lead to the conclusion that the subscription price to the bondholder is really but $50,000; the remaining $450,000 of the claim is in effect forgiven simply because the bondholder knows that it cannot be collected. In other words, the realities of this situation are quite different from those in the preceding case. The analogy which the board drew between them completely disregarded their most essential characteristics. To illustrate further, if the bonds were worth $52,000, that amount should be controlled by the subscription price rule even though a jury might say the stock was worth but $50,000; only the remaining $448,000 would then be governed by the philosophy of the *Kirby* doctrine. According to this analysis, the Treasury should make a slight revision in its approach. It should assess a tax on the difference between the market value of the bonds and their earlier but greater issue price, for it is this amount which is in effect forgiven. This may on occasion lead to the same or to only a slightly different result from that called for by the formula which the Treasury has pressed on the courts, i.e., one which measured the gain by the difference between the market value of the stock and the issue price of the bonds. But the difference between the two formulas will serve to point up that part of a transaction which is really subject to the rationale of the subscription price rule on the one hand, and that portion which ought to be treated as realized income.

Significance of Actual Retirement

Any significance which might be attached to the fact that a bond which was re-purchased by the issuing corporation at a discount was not immediately retired would ultimately depend on the philosophy which also argues for tax deferment in the instance where property subject to a purchase money mortgage is retained after the mortgage is retired at a discount. The question common to these situations is whether or not the transaction has actually been completed for tax purposes.

The question of whether the *Kirby* case is immediately applicable though actual retirement is postponed has arisen most frequently in

connection with one of two situations. The first arose out of the fact that a corporation can acquire its own bonds for investment, and perhaps subsequent re-sale, just as it might deal in what has become known as treasury stock. The second involves the situation where the corporation merely decides to postpone turning re-purchased bonds in to the indenture trustee for cancellation until the next succeeding taxable year.

The argument from the standpoint of authority that taxable income is realized only at the moment of actual retirement can be traced to the first regulations and to certain possibly relevant language in the *Kirby* case itself. Until 1934 the regulations dealing with the tax on savings of this sort provided for an assessment only if a corporation "purchases and retires" its own bonds at a discount.[262] The retirement aspect, while fully satisfied in the *Kirby* case and not, therefore, really in issue, was nevertheless the subject of possible emphasis in that Justice Holmes did refer to the "obligation of bonds now extinct,"[263] and concluded his opinion with the sweeping assertion that the court saw "no reason why the regulations should not be accepted as a correct statement of the law."[264]

The Board of Tax Appeals was not convinced, however, that the above authorities really furnished a compelling reason for treating actual retirement as an indispensable prerequisite. The *sine qua non* of the *Kirby* case was said in *Garland Coal & Mining Co.* to be the withdrawal of the bonds from circulation, the re-purchase having closed a transaction which began with their original sale; "a resale would be an entirely new transaction."[265]

While the actual result which the board reached was affirmed on appeal, the Court of Appeals for the District of Columbia did at the same time reshape the applicable formula. It turned the case on the question of whether or not the debtor actually intended to keep the debt alive with a view, for example, of possible re-sale.[266] The debtor would not, however, have freed itself from an immediate tax according to the court if it had intended only to postpone to a subsequent year the actual surrender to the indenture trustee for purposes of cancellation.

It was at this point that the regulations were changed; all reference

[262] See e.g. Treas. Reg. 45, art. 544, and Treas. Reg. 77, art. 68.

[263] 284 U.S. 1 at 3, 52 S.Ct. 4 (1931).

[264] Ibid.

[265] 28 B.T.A. 348 at 352 (1933). The Board had previously reached the same result without discussion. Woodward Iron Co., 24 B.T.A. 1050 (1931). *Accord,* Montana, Wyoming & Southern Railroad Co., 31 B.T.A. 62 (1934), affd. (3d Cir. 1935) 77 F. (2d) 1007, cert. den. 296 U.S. 604, 56 S.Ct. 120.

[266] Garland Coal & Mining Co. v. Helvering, (D.C. Cir. 1935) 75 F. (2d) 663.

to retirement was deleted.[267] The board continued thereafter to resolve difficulties of the sort under discussion by relying on its own decision in the *Garland Coal & Mining Co.* case.[268] Though it rejected the formula keyed to the debtor's intention,[269] the latter view has found support in the Fourth Circuit.[270] The Sixth Circuit on the other hand seems to have sided with the view developed by the board.[271]

Probably all courts would have agreed, as has the board, to a postponement of tax incidence in the case where there was simply an agreement to cancel a debt in the future, the consummation of the agreement depending on certain important conditions which were not satisfied in the taxable year.[272] But there seems to be little justification for such postponement where the debtor has actually acquired the evidence of his outstanding indebtedness, actual cancellation depending at that point solely on his own whim and caprice. The Supreme Court has very recently—in *Commissioner v. Jacobson*[273]—resolved in favor of the government the conflict which existed on this point. There the Court stated:

> "The respondent realized an immediate financial gain from his purchase of these bonds at a discount. By that acquisition he was enabled, at will, to cancel them and thus discharge himself from liability to pay them. While the record indicates that he held them 'intact,' apparently without crediting released indebtedness on them or otherwise physically cancelling them in whole or in part. . . , his possession of them and control over them is not disputed and the petitioner has properly treated their acquisition as constituting a reduction of the respondent's debts to the extent of their face amount."[274]

Conclusion

The preceding discussion should clearly demonstrate that it is not possible to characterize the results which have been reached by the courts since the decision in the *Kirby* case by a compact rule of thumb.

[267] Treas. Reg. 86, art. 22(a)-18.

[268] Eastern Building Corporation, 45 B.T.A. 188 (1941); Transylvania Railroad Co., 36 B.T.A. 333 (1937), revd., Transylvania Railroad Co. v. Commissioner, (4th Cir. 1938) 99 F. (2d) 69.

[269] Transylvania Railroad Co., 36 B.T.A. 333 (1937), revd. Transylvania Railroad Co. v. Commissioner, (4th Cir. 1938) 99 F. (2d) 69.

[270] Transylvania Railroad Co. v. Commissioner, (4th Cir. 1938) 99 F. (2d) 69.

[271] Central Paper Co. v. Commissioner, (6th Cir. 1946) 158 F. (2d) 131; Tennessee Consolidated Coal Co., (6th Cir. 1944) 145 F. (2d) 631.

[272] Walker v. Commissioner, (5th Cir. 1937) 88 F. (2d) 170, cert. den. 302 U.S. 692, 58 S.Ct. 11 (1937); Reginald Denny, 33 B.T.A. 738 (1935). Cf. Pittsburgh & West Virginia Railway Co., 9 T.C. 268 (1947), revd. (3d Cir. 1949) 172 F. (2d) 1010, cert. den. 337 U.S. 939, 69 S.Ct. 1514 (1949).

[273] 336 U.S. 28, 69 S.Ct. 358 (1949).

[274] Id. at 38.

On the one hand it would be inaccurate to say that taxability turns on a showing that there has been a *bargain reduction of a liability,* for inter alia this rule, emphasizing the right hand side of the balance sheet, is at odds with the results reached in the case of insolvent debtors. Nor is it enough on the other hand to use a *general net assets approach,* i.e., to say that liability turns on whether or not assets are freed for a debtor's personal use and benefit by a bargain reduction of offsetting liabilities. While this takes account of the insolvent debtor's situation, it ignores inter alia the significance which has been attached to the character of the particular consideration which was received by the debtor at the time the original obligation was created as well as that attached to numerous matters, involving that same consideration, which arose after the debt was created. One could go on setting up generalized straw formulas only to illustrate their deficiencies. But the fact that a common denominator in the form of a compact judicial formula cannot be extracted is quite consistent with the philosophy which made the *Kirby*[275] decision possible in the first instance, for there Holmes, its author, had made it constitutionally possible to tax at least some bargain discharges only by ignoring much of what had been said in the earlier decision of *Eisner v. Macomber.*[276] His conclusion that, "We see nothing to be gained by the discussion of judicial definitions,"[277] was simply in recognition of the fact that a notion of income must cut across many different kinds of situations; so that account might be taken of these, he freed the concept from confinement.

The absence of an approved rule of thumb has, of course, resulted in much uncertainty even with respect to some frequently recurring situations, e.g., the uncertainty with respect to the exact consequence following the bargain discharge of a purchase money mortgage. Our judicial experience with cancellation or retirement problems also includes an accumulation of some unfortunate results. A step-child of the *General Utilities*[278] case, viz., the immunity accorded a debtor who derives a gain after obtaining a loan in foreign money by repaying it in kind with coin purchased under a more favorable rate of exchange, is illustrative.

In view of the foregoing, Congress would now do well to re-examine judicial results of the sort mentioned with a view toward corrective legislation; at the same time it should extend the relief presently provided in sections 22(b)(9) and 113(b)(3) for corporations to individual debtors.

[275] 284 U.S. 1, 52 S.Ct. 4 (1931).
[276] 252 U.S. 189, 40 S.Ct. 189 (1920).
[277] Kirby Lumber Co. v. United States, 284 U.S. 1 at 3, 52 S.Ct. 4 (1931).
[278] 296 U.S. 200, 56 S.Ct. 185 (1935).