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TAXATION-CAPITAL STOCK TAX-WHAT CONSTITUTES "DOING BUSINESS"

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TAXATION — CAPITAL STOCK TAX — WHAT CONSTITUTES "DOING BUSINESS"—The capital stock tax is an excise tax levied not on the business itself but on the exercise of the privilege of doing business in a corporate capacity; hence the determination of tax liability involves a decision in each case as to whether the corporation is carrying on or doing business within the meaning of the tax statutes.[1]

The concept of "doing business," with respect to liability for the capital stock tax, stems from the federal corporation excise tax of 1909,[2] which imposed upon corporations organized for profit and having a capital stock represented by shares "a special excise tax with respect to the carrying on or doing business."[3] The federal income tax of 1913[4] superseded the corporation excise tax of 1909; but the concept of "doing business" reappeared in the capital stock tax of 1916,[5] in which form it has continued to the present time with the exception of the period from 1926 to 1933.[6] The question whether a corporation

[1] The tax concept of "doing business" should not be confused with the concept of "carrying out charter purposes." The latter will be discussed, infra, in subdivision "3".

[2] 36 Stat. L. 112 (1909).

[3] The corporation excise tax of 1909 was attacked as being a direct tax imposed without apportionment and therefore in contravention of Art. 1, § 2, cl. 3 and Art. 1, § 9, cl. 4 of the Constitution, as well as the uniformity provision of Art. 1, § 8, cl. 1. The Supreme Court upheld the tax in Flint v. Stone Tracy Co., 220 U.S. 107, 31 S. Ct. 342 (1911). In the course of the opinion the Court stated that "the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof." 220 U. S. 107 at 145. The Court adopted Bouvier's definition of "business" as "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." 220 U.S. 107 at 171.

[4] 38 Stat. L. 172 (1913).

[5] 39 Stat. L. 789 (1916).

[6] 40 Stat. L. 1126 (1919); 42 Stat. L. 294 (1921); 43 Stat. L. 325 (1924); 48 Stat. L. 207 (1933); 48 Stat. L. 769 (1934); 49 Stat. L. 1017 (1935); 49 Stat.

is carrying on or doing business so as to incur tax liability is the same under the corporation excise tax of 1909 and the capital stock taxes imposed subsequently;[7] therefore the determination of what constitutes "doing business" involves a consideration of cases arising under both the excise and capital stock taxes.

Federal and state[8] courts have found it impossible to lay down any single formula for determining whether a corporation is carrying on or doing business because of the great variety of fact situations growing out of the conduct of modern business enterprises.[9] In many instances the fact situation is such that there can be little doubt whether the corporation is doing business or not. At the one extreme is the corporation which, during the taxable period, has been engaged actively in carrying out for profit all the purposes for which it was created; at the other extreme is the corporation which has remained in a state of complete quietude either because it has abandoned its business, or because properties have proved worthless, or because it has completed its business, as where a real estate subdivision has been developed and sold.[10] "But the nuances of facts between the two extremes have produced a nebulous field of confusion which has been recognized by courts striving to fit close cases into one category or the other."[11]

Although no all-inclusive formula has emerged from the numerous decisions involving the concept of "doing business," certain factors have been stressed by the courts. Among these are (1) the presence or absence of a profit motive; (2) the extent of the corporation's activities; (3) the purpose for which the corporation is organized; and (4) the effect of affiliation.

I.

The term "business" embraces "that which occupies the time, attention, and labor of men for the purpose of livelihood or profit."[12]

L. 1733 (1936); 52 Stat. L. 565 (1938); 55 Stat. L. 703 (1941); Pub. L. 753, c. 619, § 301 (a), 77th Cong., 2d sess. (1942). The provision is now incorporated in § 1200 (a) of the Internal Revenue Code. 53 Stat. L. 169 (1939), 26 U.S.C. (1940), § 1200(a).

[7] Rose v. Nunnally Inv. Co., (C.C.A. 5th, 1927) 22 F. (2d) 102 at 103, cert. denied 276 U.S. 628, 48 S. Ct. 321 (1928).

[8] For compilations of decisions with respect to state franchise and excise taxes involving carrying on or doing business, see 18 A.L.R. 700 (1922); 124 A.L.R. 1109 (1940).

[9] Von Baumbach v. Sargent Land Co., 242 U. S. 503 at 516, 37 S. Ct. 201 (1917).

[10] See TREAS. REG. 64 (1938 ed.), art. 43 (b).

[11] Magruder v. Washington, B. & A. Realty Corp., 316 U. S. 69 at 73-74, 62 S. Ct. 922 (1942).

[12] BOUVIER, LAW DICTIONARY, adopted by the Supreme Court in Flint v. Stone Tracy Co., 220 U.S. 107 at 171, 31 S. Ct. 342 (1911), and it has been cited in

Without a profit motive, there can be no carrying on or doing business within the meaning of the tax law; [13] but, the profit motive being present, actual realization of profit is not essential.[14] Conversely, profit may be realized without the essential motive, in which case the tax is inapplicable.[15]

Since the success of the business venture is immaterial, providing the profit motive is present, it might seem to follow that a corporation would be liable for the tax whether it was solvent or in the hands of a receiver. A majority of state courts have so held in cases involving state statutes imposing franchise or excise taxes on corporations for the privilege of doing business.[16] But the Supreme Court has held that it is the receiver and not the corporation who is conducting the business during bankruptcy; and since the tax is imposed on the corporation for the privilege of doing business in a corporate capacity, the tax has no application when the corporation is ousted from the management and control of its business and no longer exercises its normal functions as a corporation.[17] This reasoning, however, appears to have been restricted to receivership cases.[18]

2.

If it is clear that the profit motive is absent, tax liability does not arise; but in many of the fact situations presented to the courts it is difficult to distinguish between the profit motive and those motives which do not give rise to tax liability. Courts have differentiated between activities which further business ventures and those which are

numerous subsequent opinions. See Sloan v. Commissioner, (C.C.A. 9th, 1933) 63 F. (2d) 666 at 669; Wilson v. Eisner, (C.C.A. 2d, 1922) 282 F. 38 at 41.

[13] Von Baumbach v. Sargent Land Co., 242 U. S. 503, 37 S. Ct. 201 (1917); Ambergris Consol. Mining Co. v. United States, (D.C. Idaho, 1939) 27 F. Supp. 968; Automatic Fire Alarm Co. v. Bowers, (D.C.N.Y. 1931) 51 F. (2d) 118.

[14] United States v. Hercules Mining Co., (C.C.A. 9th, 1941) 119 F. (2d) 288, cert. denied 314 U.S. 658, 62 S. Ct. 111 (1941); Lyon Lumber Co. v. Harrison, (C.C.A. 7th, 1940) 113 F. (2d) 443.

[15] Eaton v. Phoenix Securities Co., (C.C.A. 2d, 1927) 22 F. (2d) 497; Del Norte Co. v. Wilkinson, (D.C. Wis. 1928) 28 F. (2d) 876.

[16] State v. Bradley, 207 Ala. 677, 93 So. 595 (1922); Armstrong v. Emmerson, 300 Ill. 54, 132 N.E. 768 (1921); Central Trust Co. v. New York City & N. R. R., 110 N.Y. 250, 18 N.E. 92 (1888). See also annotation, 18 A.L.R. 700 (1922).

[17] United States v. Whitridge, 231 U.S. 144, 34 S. Ct. 24 (1913).

[18] See Boston Elevated Ry. v. Malley, (D.C. Mass. 1928) 24 F. (2d) 758. In an attempt to limit the exemption as much as possible, the Bureau of Internal Revenue has argued that the reasoning of the Whitridge case does not apply to a corporation operated by its own officers pursuant to a court order entered in proceedings for reorganization under § 77B of the Federal Bankruptcy Act, since in such cases the control of the business never shifts. 1939-1 CUM. BUL. 343.

merely incidental to ownership;[19] but the mere fact that the activity is for gain does not necessarily preclude it from the latter classification.[20] "The mere hope or expectation that a capital investment *may*, through increment, produce profit, is not the equivalent of 'carrying on or doing business'."[21] Thus, a corporation which is a dry holder of property leased to others, serving merely as a conduit to carry income to those entitled to it, is not conducting a business but only realizing the fruits of ownership;[22] while a corporation which owns property and is actively engaged in attempting to realize profit through the leasing of such property is doing business.[23]

Whether ownership is incidental to the profit motive or the profit motive incidental to ownership depends primarily upon the owner's intent, which has few objective manifestations; and in an attempt to discover some overt indication of such intent, courts seem to have laid stress upon the degree of activity. Besides requiring a profit motive, "doing business" implies at least some activity which "occupies the time, attention, and labor of men;"[24] and since "doing business" normally demands more activity than does mere ownership, it might be argued that the greater the extent of activity, the stronger the presumption that the corporation is carrying on or doing business and that ownership is merely incidental to the profit motive.

But any test grounded on the degree of activity at most can only serve as a weak presumption of a corporation's purpose.[25] While complete inertness negates "doing business," there is nothing in the definition of the term which requires any particular amount of activity. It would seem that such a test should be disregarded when the nature of

[19] United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28 at 32, 35 S. Ct. 499 (1915); Rose v. Nunnally Inv. Co., (C.C.A. 5th, 1927) 22 F. (2d) 102 at 103, cert. denied 276 U.S. 628, 48 S. Ct. 321 (1928); Public Service Ry. v. Herold, (D.C.N.J. 1915) 227 F. 500.

[20] Cannon v. Elk Creek Lumber Co., (C.C.A. 7th, 1925) 8 F. (2d) 996; Clallam Lumber Co. v. United States, (D.C. Mich. 1937) 34 F. (2d) 944.

[21] Del Norte Co. v. Wilkinson, (D.C. Wis. 1928) 28 F. (2d) 876 at 877.

[22] United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 35 S. Ct. 499 (1915); McCoach v. Minehill & S. H. R. R., 228 U.S. 295, 33 S. Ct. 419 (1913); Zonne v. Minneapolis Syndicate, 220 U.S. 187, 31 S. Ct. 361 (1911).

[23] Hecht v. Malley, 265 U. S. 144, 44 S. Ct. 462 (1924); Flint v. Stone Tracy Co., 220 U. S 107, 31 S. Ct 342 (1911); Sloan v. Commissioner, (C.C.A. 9th, 1933) 63 F. (2d) 666.

[24] See supra, note 12.

[25] A business may be relatively inactive [Argonaut Consol. Mining Co. v. Anderson, (C.C.A. 2d, 1931) 52 F. (2d) 55, cert. denied 284 U.S. 682, 52 S.Ct. 200 (1932); Harmar Coal Co. v. Heiner, (C.C.A. 3d, 1929) 34 F. (2d) 725, cert. denied 280 U.S. 610, 50 S.Ct. 159 (1930)] and ownership relatively active [Lyon Lumber Co. v. Harrison, (C.C.A. 7th, 1940) 113 F. (2d) 443; Sears v. Hassett, (C.C.A. 1st, 1940) 111 F. (2d) 961; Traction Cos. v. Collectors, (C.C.A. 6th, 1915) 223 F. 984].

the activities can be analyzed and shown to have nothing to do with a profit motive.[26] Where the type of activity indicates whether the profit motive or ownership is the incidental factor, any contrary presumptions raised by the degree of activity would seem to be rebutted.

But despite the limitations of the extent of a corporation's activities as a test for determining the applicability of the tax, federal courts have placed considerable reliance upon it.[27] Its original adoption seems to have been the result of an unfortunate interpretation of a Supreme Court decision. In 1911 the Court held, following Bouvier's definition, that the term "business" includes that which occupies the time, attention and labor of men.[28] On the same day it held that a corporation which had parted with control and management of its property and had disqualified itself from doing any other business was not a corporation doing business within the meaning of provisions of the corporation excise tax of 1909.[29] In two later cases the Court concluded that the mere receiving and distributing to stockholders of the proceeds from leases of corporate property was not such activity as to give rise to tax liability.[30]

After considering these cases, the Court, speaking through Justice Day, stated in *Von Baumbach v. Sargent Land Co.*[31] that

> ". . . The fair test . . . is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."[32]

This statement has been cited frequently, both by the Supreme Court and by other federal courts, as authority for the fact that inert-

[26] This has at least been intimated in a few cases. See Ittleson v. Anderson, (C.C.A. 2d, 1933) 67 F. (2d) 323 at 326; Monroe Timber Co. v. Poe, (D. C. Wash. 1927) 21 F. (2d) 766 at 767.

[27] Magruder v. Washington B. & A. Realty Corp., 316 U.S. 69, 62 S. Ct. 922 (1942); Argonaut Consol. Mining Co. v. Anderson, (C.C.A. 2d, 1931) 52 F. (2d) 55, cert. denied 284 U.S. 682, 52 S. Ct. 200 (1932); Hastings Pavement Co. v. Hoey, (D.C.N.Y. 1939) 28 F. Supp. 897. Compare Lane Timber Co. v. Hynson, (C.C.A. 5th, 1925) 4 F. (2d) 666.

[28] Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342 (1911).

[29] Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 S. Ct. 361 (1911).

[30] United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28, 35 S. Ct. 499 (1915); McCoach v. Minehill & S.H.R.R., 228 U.S. 295, 33 S.Ct. 419 (1913).

[31] 242 U.S. 503, 37 S. Ct. 201 (1917).

[32] Id., 242 U.S. 503 at 516. This language was reproduced almost verbatim in TREAS. REG. 38 (1918 ed.), art. 4.

ness is essential if the corporation is to escape tax liability.[33] Without considering the authorities upon which the test was based, this might seem a reasonable interpretation; but none of the cases which Justice Day analyzed said any more than that inertness would allow a corporation to escape the tax, and it is doubtful whether Justice Day's test was intended to extend this narrow principle. Courts are now generally agreed, however, that it is only in the exceptional case that an active corporation can escape tax liability.[34] This rule has the advantage of obviating any consideration of the nature of the corporation's activities; and theoretically the problem resolves itself to a large extent into distinguishing between activity and inactivity.

But the courts recognized from the outset that absolute inertness could not be required of a corporation. Statutory provisions, if nothing else, force a corporation to maintain some degree of activity merely to exist. Retaining a franchise and the power of doing business does not in itself make a corporation liable for the tax; [35] likewise, merely continued existence of the corporate organization does not constitute doing business.[36] Uncertainty arises, however, with respect to the extent to which the organization may be utilized; [37] and the test of Justice Day, apparently easy of application on its face, in practice becomes uncertain, leaving the courts in confusion as to precisely what quantum of activity will constitute carrying on business.[38]

[33] Magruder v. Washington B. & A. Realty Corp., 316 U.S. 69, 62 S. Ct. 922 (1942); United States v. Atlantic Coast Line Co., (C.C.A. 4th, 1938) 99 F. (2d) 6, cert. denied 306 U.S. 645, 59 S. Ct. 584 (1939); Hastings Pavement Co. v. Hoey, (D.C.N.Y. 1939) 28 F. Supp. 897; Stanley Securities Co. v. United States, (Ct. Cl. 1930) 38 F. (2d) 907, cert. denied 282 U.S. 845, 51 S. Ct. 25 (1930).

[34] This is reflected in TREAS. REG. 64 (1938 ed.), art. 42.

[35] McCoach v. Minehill & S.H. R.R., 228 U.S. 295, 33 S.Ct. 419 (1913); Flint v. Stone Tracy Co., 220 U.S. 107, 31 S. Ct. 342 (1911).

[36] Fink Coal & Coke Co. v. Heiner, (D.C. Pa. 1928) 26 F. (2d) 136. Compare Harmar Coal Co. v. Heiner, (C.C.A. 3d, 1929) 34 F. (2d) 725, cert. denied 280 U.S. 610, 50 S. Ct. 159 (1930).

[37] Anderson v. Morris & E.R.R., (C.C.A. 2d, 1914) 216 F. 83. Compare Federal Coke Corp. v. Driscoll, (D.C. Pa. 1939) 27 F. Supp. 224.

[38] Courts have encountered considerable difficulty with respect to acquisition of stock of another corporation. It has been held that such acquisition constitutes doing business when it is effected by issuing stock in exchange and is done for the purpose of procuring control. Orpheum Circuit v. Reinecke, (D.C. Ill. 1930) 41 F. (2d) 524; Associated Furniture Corp. v. United States (Ct. Cl. 1930) 44 F. (2d) 78, cert. denied 283 U.S. 830, 51 S. Ct. 364 (1931). On the other hand, acquisition of the stock of an old corporation in exchange for that of a new corporation, where such acquisition was merely preparatory to ultimate absorption of the old company, has been held not taxable on the ground that the new corporation was but a dry holding company until it did some overt act to carry the plan into effect. General Ribbon Mills v. Higgins, (C.C.A. 2d, 1940) 115 F. (2d) 472; Eaton v. Phoenix Securities Co., (C.C.A. 2d, 1927) 22 F. (2d) 497; United States v. Three Forks Coal Co.,

3.

As corporations are ordinarily organized to do business with the expectation of realizing profit, it may be presumed that a corporation following the purposes of its charter is doing business until proof to the contrary is submitted.[39] Such a presumption may simplify considerably the task of the courts: if the activities in which the concern actually is engaged coincide with those originally contemplated in the charter, the corporation is liable for the tax. Unfortunately, however, the test is not infallible;[40] but its simplicity has led courts to place considerable reliance upon it. This may be attributed in part to the wording of the corporation excise tax of 1909 which made the tax applicable only to corporations "organized for profit."[41] In cases arising under the 1909 act, the courts regarded it as essential to consider the purpose of incorporation.[42] In the Revenue Act of 1918 all reference to the

13 F. (2d) 631; Mode O'Day Corp. v. Rogan, (D.C. Cal. 1940) 32 F. Supp. 571; Mason v. United States, (D.C. Mass. 1928) 27 F. (2d) 1013. Like difficulties are encountered with respect to holding companies. It has been held by some courts that such an organization, being merely an owner of property, is not normally doing business, its operations being merely incidental to ownership. Eaton v. Phoenix Securities Co., (C.C.A. 2d, 1927) 22 F. (2d) 497; United States v. Nipissing Mines Co., (C.C.A. 2d, 1913) 206 F. 431, cert. denied 234 U.S. 765, 34 S. Ct. 673 (1914); Del Norte Co. v. Wilkinson, (D.C. Wis. 1928) 28 F. (2d) 876. Paying taxes and voting stock in addition to collecting and distributing dividends presumably would not create liability. Furthermore, a corporation can make accommodation loans to subsidiaries, if such loans are not made for profit. Rose v. Nunnally Inv. Co., (C.C.A. 5th, 1927) 22 F. (2d) 102, cert. denied 276 U.S. 628, 48 S. Ct. 321 (1928); Automatic Fire Alarm Co. v. Bowers, (D.C.N.Y. 1931) 51 F. (2d) 118. Some courts have permitted the parent company to sell stock held by it and reinvest the proceeds. United States v. Hotchkiss Redwood Co., (C.C.A. 9th, 1928) 25 F. (2d) 958; Rose v. Nunnally Inv. Co., supra; Automatic Fire Alarm Co. v. Bowers, supra. But substantial attention to such investments apparently will give rise to tax liability. "Everyone who has any property puts it out at profitable investment, if he can; but if he can learn of its prospects from others and need not give it his continuous supervision, he may go about his other affairs; unless he devotes much time to it he can scarcely be said to be in business. Not so, when he chooses ventures whose possibilities he must learn for himself, which he must follow up and as to which he has no ready means of information. Any substantial concern with such things is pro tanto a business; its amount is immaterial here." Argonaut Consol. Mining Co. v. Anderson, (C.C.A. 2d, 1931) 52 F. (2d) 55 at 57, cert. denied 284 U.S. 682, 52 S. Ct. 200 (1932).

[39] This presumption was adopted early in the history of the capital stock tax. TREAS. REG. 38 (1918 ed.), art. 4, provided that "As corporations are organized to do business, every existing corporation will be presumed to be subject to the tax unless it submits proof . . . that it is not doing business."

[40] Organizations may still be conducting activities contemplated in their charters but may have abandoned any profit motive, and there may be others never incorporated to do business in the first place.

[41] 36 Stat. L. 112 (1909).

[42] Von Baumbach v. Sargent Land Co., 242 U.S. 503, 37 S. Ct. 201 (1917); United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 35 S.Ct. 499 (1915).

purpose of organization was dropped;[43] and it might have been expected that thereafter courts would lay less emphasis on this feature. This has not been the case, however. In 1925, the Supreme Court, in holding the Chile Copper Company liable for the capital stock tax, said:

> ". . . It [the corporation] was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit."[44]

In spite of the fact that this statement was made with reference to a peculiar fact situation, making its applicability to other cases questionable,[45] it has been widely cited.

The first sentence in the quoted statement applies only when a corporation is acting "in order to realize profit," which fact in itself should create tax liability. Likewise, the second sentence, in referring to "such activities" restricts its application to cases which definitely involve operations for profit. It is primarily the last sentence, however, that has been misleading. If it means that a corporation which carries on activities for profit according to the purposes of its charter is doing business, it is in effect only paraphrasing the Bouvier definition of business. But it appears that the lower courts have interpreted it to mean that when the ultimate purpose of the incorporation is profit, a corporation is doing business as long as it continues to exercise powers granted by the charter even though it has no profit motive during the taxable period.[46]

This interpretation gives the case a peculiar significance. Except for the fact that the purpose of incorporation is not made controlling where the degree of activity is easily ascertainable, it would mean that

[43] 40 Stat. L. 1126, § 1000 (a) (1919).

[44] Edwards v. Chile Copper Co., 270 U.S. 452 at 455, 46 S. Ct. 345 (1926).

[45] This was recognized by the Court [270 U.S. 452 at 453] and has been considered in a few cases. See United States v. Three Forks Coal Co., (C.C.A. 3d, 1926) 13 F. (2d) 631; Fink Coal & Coke Co. v. Heiner, (D.C. Pa. 1928) 26 F. (2d) 136. In the majority of cases where the statement is quoted, however, no reference is made to the peculiar fact situation of the Chile Copper Co. case.

[46] "While it [the corporation] never mined and sold coal, it held coal lands, a thing it originally did within its corporate powers and the specific thing it evidently was organized to do." Harmar Coal Co. v. Heiner, (C.C.A. 3d, 1929) 34 F. (2d) 725 at 729, cert. denied 280 U.S. 610, 50 S.Ct. 159 (1930). See also American Inv. Securities Co. v. United States, (D.C. Mass. 1939) 27 F. Supp. 494 at 498, affd. (C.C.A. 1st, 1940) 112 F. (2d) 231.

every corporation organized for profit would either have to cease all activities or change its charter in order to avoid tax liability. While undoubtedly the case was meant to limit the rules as to exemptions,[47] it may be questioned whether there was any intention that such a narrow view should be taken.[48]

Nevertheless, the courts have tended to limit the exemptions even further, citing the *Chile Copper Company* case as precedent for giving significance to the fact that a corporation is pursuing the purpose of organization even in instances when that purpose is not profit.[49] In a recent case the Supreme Court took the same position, pointing out as a significant indication of doing business the fact that a corporation organized to liquidate a defunct railway was following exactly the purpose of its creation.[50]

4.

It may be argued that to be doing business a corporation should be engaging in profitable activity on its own account. This was the position taken by the district court in the *Chile Copper Company* case.[51] When the Supreme Court reversed the decision below,[52] it seemed to give sanction to a policy on the part of many of the lower courts to hold corporations liable for the tax if their operations were conducted to enable an affiliate to profit.[53] Furthermore, it sanctioned the exaction of

[47] See United States v. Hotchkiss Redwood Co., (C.C.A. 9th, 1928) 25 F. (2d) 958.

[48] In his opinion when the Chile Copper Co. case was in the district court, Judge Learned Hand stated, "It is quite true that this plaintiff has been doing all that it was organized to do, and that this feature constantly runs through the cases, as if it were in some sense a test of whether it was 'doing business' at all. Yet I cannot think that this would be a sound rule, or that it makes any difference whether the chartered powers are fully employed or not. . . ." Chile Copper Co. v. Edwards, (D.C.N.Y. 1923) 294 F. 581 at 582. The fact that the Supreme Court reversed the holding, 270 U.S. 452, 46 S. Ct. 345 (1926), should not be taken to mean that there was disagreement with Judge Hand on this point.

[49] See New Haven Securities Co. v. Bitgood, (C.C.A. 2d, 1937) 87 F. (2d) 759 at 760; Western Pacific R. Corp. v. Bowers, (D.C.N.Y. 1927) 26 F. (2d) 82 at 89. At least one case, however, has held that until a corporation actually begins the business contemplated in the charter, it is not liable for the tax. Mason v. United States, (D.C. Mass. 1928) 27 F. (2d) 1013.

[50] Magruder v. Washington, B. & A. Realty Corp., 316 U.S. 69, 62 S. Ct. 922 (1942).

[51] "The term 'business' means some profitable activity undertaken on its own account." Chile Copper Co. v. Edwards, (D.C.N.Y. 1923) 294 F. 581 at 583.

[52] Edwards v. Chile Copper Co., 270 U.S. 452, 46 S. Ct. 345 (1926).

[53] In the Chile Copper Co. case, the profits of the mining concern did not reach the hands of the plaintiff, a fact which the Supreme Court stressed. However, the financing company was not organized to profit on its own account, but its receipt of income was merely the result of a peculiar but necessary corporate arrangement in

two taxes, one from the parent and one from the subsidiary, where the business could not be carried on without the two corporations.[54]

Wholly-owned subsidiaries have been held liable for the capital stock tax from the outset. The courts' contention was that profit could result to a corporation's stockholders in other ways than through dividends. Thus, when a terminal railway was owned by several railroads, the railroad stockholders received their profit through the services rendered by the terminal company;[55] and a pipe line was doing business in serving the two oil companies which organized it.[56] The reasoning behind these decisions apparently is that benefits to stockholders can be realized only when the corporation is doing business and that a corporation can do business without realizing or intending to realize a profit itself.

There is a definite tendency on the part of the courts to hold a subsidiary liable as doing business when it acts to aid its parent company.[57] Tax liability does not arise, however, where the subsidiary merely aids individual rather than corporate stockholders[58] or where such aid is necessary to keep the parent company in existence.[59] The courts are even more ready to find the parent companies in such associations liable for the tax, as they ultimately realize the profits whether their operations were motivated by thoughts of gain or not.[60] However, absolute inertness is not required and a holding company can be used on behalf of its subsidiaries to a limited extent without incurring liability for the capital stock tax.[61]

view of the difficulty encountered under Chilean law when the operating company attempted to mortgage its mines. 270 U.S. 452 at 453-454.

[54] Edwards v. Chile Copper Co., 270 U.S. 452 at 456, 46 S. Ct. 345 (1926). See also New Haven Securities Co. v. Bitgood, (C.C.A. 2d, 1937) 87 F. (2d) 759 at 760; Codman v. United States, (D.C. Mass. 1939) 30 F. Supp. 736 at 738; Wisconsin Central Ry. v. United States, (Ct.Cl. 1930) 41 F. (2d) 870 at 885, cert. denied 283 U.S. 829, 51 S.Ct. 353 (1931). Compare Jasper & E. Ry. v. Walker, (C.C.A. 5th, 1917) 238 F. 533 at 537.

[55] Houston Belt & Terminal Ry v. United States, (C.C.A. 5th, 1918) 250 F. 1.

[56] Associated Pipe Line Co. v. United States, (C.C.A. 9th, 1919) 258 F. 800.

[57] New Haven Securities Co. v. Bitgood, (C.C.A. 2d, 1937) 87 F. (2d) 759; Harmar Coal Co. v. Heiner, (C.C.A. 3d, 1929) 34 F. (2d) 725, cert. denied 280 U.S. 610, 50 S. Ct. 159 (1930).

[58] Koon Kreek Club v. Thomas, (C.C.A. 5th, 1939) 108 F. (2d) 616; Rose v. Nunnally Inv. Co., (C.C.A. 5th, 1927) 22 F. (2d) 102, cert. denied 276 U. S. 628, 48 S. Ct. 321 (1928).

[59] Public Service Ry. v. Herold, (C.C.A. 3d, 1916) 229 F. 902.

[60] Edwards v. Chile Copper Co., 270 U.S. 452, 46 S. Ct. 345 (1926); Barker Bros. Corp. v. Rogan, (C.C.A. 9th, 1942) 126 F. (2d) 917; Orpheum Circuit v. Reinecke, (D.C. Ill. 1930) 41 F. (2d) 524; Associated Furniture Corp. v. United States, (Ct. Cl. 1930) 44 F. (2d) 78, cert. denied 283 U.S. 830, 51 S. Ct. 364 (1931).

[61] Automatic Fire Alarm Co. v. Bowers, (D.C.N.Y. 1931) 51 F. (2d) 118. See

The four factors considered above—the profit motive, the degree of activity, the purpose of organization, and affiliation with other corporations—provide guides for breaking down the complicated fact situations often presented to the courts; but the emphasis to be given to one factor or another will still depend to a large extent upon the peculiar circumstances of each case. This is far from an all-inclusive definition of "doing business," but may well be all that is possible in view of the diversity of patterns of business activity.

A survey of the decisions with respect to what constitutes "doing business" indicates that the courts, aware of the difficulties likely to result from an attempt to apply Bouvier's definition directly to the case at bar, have preferred to base their holdings upon precedent whenever possible. Because of the great variety of fact situations growing out of complicated business structures, exact precedent is often lacking; and "interpretation" of rules to fit inapplicable situations has led to many of the anomalies present in the decisions. If the courts could agree that Bouvier's definition of business is sufficiently concise and that their ultimate objective in each case is to determine whether or not there is some activity carried on for the purpose of a livelihood or profit, it is likely that many of the anomalies growing out of shifting standards might be eliminated.

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also Continental Baking Co. v. Higgins, (C.C.A. 2d, 1942) 130 F. (2d) 164, which denied that interlocking directorates would necessarily make a holding company liable as well as the subsidiary.

*Mr. Dunlap joined the armed services before completing this comment, and the manuscript has been revised by Malcolm M. Davisson.—*Ed.*