Brief for Respondent, William Goldman Theatres...

IN THE

Supreme Court of the United States

October Term, 1954.

No. 199.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

GLENSHAW GLASS COMPANY,

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM GOLDMAN THEATRES, INC.

BRIEF FOR RESPONDENT, WILLIAM GOLDMAN THEATRES, INC.

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STATUTORY PROVISIONS.

Clayton Act:

"Sec. 15. Suits by Persons Injured; Amount of Recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731." (15 U.S.C. 1951 Ed., § 15.)

INTERNAL REVENUE CODE OF 1954:

"SEC. 61. GROSS INCOME DEFINED.

"(a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust."

QUESTION PRESENTED.

Did respondent's receipt of punitive damages pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15) constitute income under Section 22(a) of the Internal Revenue Code of 1939?

SUMMARY OF ARGUMENT.

A penalty, however else it may be characterized, is not income within the ordinary contemplation of the term or within the accepted interpretations of Section 22(a). It is not a gain derived from capital or labor, the familiar touchstone of statutory income.

The Government, in asking that Section 22(a) be construed to apply to any gain, is urging the Court to accomplish by a changed judicial interpretation what Congress has never done. Congress has not chosen to tax penalties specifically, nor to define income as every increase in resources, despite a long history of opportunity to do so if it wished, and despite the essentially legislative nature of the problem. In particular, the revised phraseology of Section 22(a) in the new 1954 Code both eliminates the verbal basis for the Government's argument and underscores the absence of Congressional support for the Government's interpretation.

Argument.

THE PENALTY RECEIVED BY THE TAXPAYER UNDER SECTION 4 OF THE CLAYTON ACT IS NOT TAXABLE UNDER SECTION 22(a) OF THE INTERNAL REVENUE CODE OF 1939.

We fully agree that Congress has the power to tax the receipt of a penalty.

The question is: Has Congress done so?

The answer depends on whether Section 22(a) of the Internal Revenue Code of 1939 is properly construed to include a payment of this character.

Congress has never expressly stated an intention to tax penalties. It did not include the term "penalties" among the items specifically listed in the earliest counterpart of Section 22(a), and it has never added the term to the statute during the more than forty years that the income tax laws have been in effect.

Congressional silence may not always have significance. But here there has been inaction over a period of many years; there have been occasion and opportunity for Congress to act if it wished to do so; and the problem involves essentially legislative considerations.

We think that in these circumstances the Congressional silence is impressive evidence against the Government's position which would impose the tax through a new judicial construction of Section 22(a)—a construction that is based on particular words which no longer even appear in the 1954 codification of the law, and that would extend the meaning of Section 22(a) beyond all prior interpretations.

1. Opportunities for Congressional Action.

These penalties are not some new or novel development which Congress could not have specifically foreseen. The antitrust laws had been on the books for many years when the first modern income tax law was adopted in 1913.[1] They were obviously known to Congress, both then and since.

In 1917 this Court put Congress and the executive branch on specific notice that the income tax statute did not reach every realized gain. *Gould v. Gould*, 245 U.S. 151 (1917). The Court held there that the receipt of alimony, absent an express reference, was not included in the generalized language of Section II, B of the 1913 Act.[2] A year later the Court reminded Congress and the executive branch that "all receipts—everything that comes in—" are not "income within the proper definition of the term 'gross income' . . . ." *Southern Pacific Co. v. Lowe*, 247 U.S. 330, 335 (1918).

Then, within the next two years, the Court construed the general language of Section II, B of the 1913 Act as the expression of an intention to tax whatever constituted "income" within the meaning of the Sixteenth Amendment, and in *Eisner v. Macomber*, 252 U.S. 189, 206 (1920), the Court restated its prior definition of what was meant by income—the familiar "gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets." Distinguish or explain the statement as the Government may, it did become common parlance in tax practice and administration, and it was reiterated again and again in judicial decision.

Thus Congress early had before it pronouncements by this Court marking both limitations and content for Section 22(a). In view of those limitations the Court of Ap-

1. Tariff Act of Oct. 3, 1913, 38 Stat. 114, 166, c. 16.

2. Section II, B was the counterpart of Section 22(a) of the Internal Revenue Code of 1939, 26 U.S.C. Sec. 22(a).

peals for the Third Circuit in 1935 held that a penalty came neither within the constitutional nor the statutory concept of income. *Central Railroad Co. of New Jersey v. Commissioner*, 79 F. 2d 697 (C.A. 3rd, 1935). Five years later the Board of Tax Appeals held expressly that punitive damages did not come within the meaning of Section 22(a). *Highland Farms Corp. v. Commissioner*, 42 B.T.A. 1314 (1940).

Over the twenty-year period since the *Central Railroad* decision we have witnessed a ~~great~~ volume of litigation involving the enforcement of the anti-trust laws. They have also been the subject of much political debate. During the same period of time there have been almost annual revisions of the income tax laws, but no move was made to provide for the taxation of penalties. The Bureau of Internal Revenue had noted its non-acquiescence in the *Highland Farms* case, but it did not appeal and the Treasury Department proposed no legislative action despite the weight which this Court had held must attend the decisions of the Board of Tax Appeals.[3]

Finally, less than six months ago Congress adopted the Internal Revenue Code of 1954,[4] the most comprehensive revision of the Internal Revenue laws at least since 1913.[5] This occurred after the unanimous decision of the court below sitting *en banc* in the instant case, and before the grant of certiorari. Although Section 61(a) (the successor to Section 22(a)) lists fifteen specific items within the definition of "gross income," Congress has yet to include penalties.

3. See, e.g., *Dobson v. Comm'r*, 320 U.S. 489 (1943), reh. den. 321 U.S. 231 (1944); *Comm'r. v. Sunnen*, 333 U.S. 591, 607-608 (1948). See also *Arrowsmith v. Comm'r.*, 344 U.S. 6, 12 (1952) (dissenting opinion), reh. den. 344 U.S. 900 (1952).

4. H.R. 8300, c. 736, P.L. 591, 68 A. Stat., Approved August 16, 1954.

5. See H. Rep. No. 1337, p. 1, 83d Congress, 2d Sess

2. The Legislative Nature of the Problem.

As we have stated, the significance of the fact that Congress has never specifically included penalties among the Section 22(a) items is emphasized by the distinctly legislative character of the problem. Whether, how, or to what extent penalties should be taxed involves questions which, we submit, can be effectively explored and answered only through the legislative process.

For example, what would the effect be on the administration of the anti-trust laws? The treble damage provisions obviously evolved from considerations affecting the enforcement of these statutes. Congress has required a monopolist or conspirator who has injured another party to make that party whole, and then, as a penalty, he must also give that party an amount of capital equal to twice the actual damages.[6] Will that policy be served, defeated or impaired if, through the imposition of a tax, a portion of the payment must be turned over to the Government? If there is a tax, should it be at the ordinary rates or at capital gain rates?[7] If the payment should be taxed as ordinary income, should it be treated as having been received over a number of years—the years of the conspiracy for example—in order to alleviate the effect of a receipt in a single year?[8]

Considerations such as these affect both the public and the individual taxpayer. They cannot be resolved effec-

6. See Clayton Act, Section 4; 38 Stat. 731, 15 U.S.C. Sec. 15. It provides that the injured plaintiff "shall recover threefold the damages by him sustained, ..."

7. If it is taxable to the recipient and is not deductible by the payor, as the Government has claimed, the Government would collect a sum equal to 76% of any penalty under the 38% tax rate in effect in 1948. Under the current rates of 52% the Government would recover 104%.

8. Cf. Section 107 of the 1939 Code which provides that lump sum compensation for services, artistic compositions, copyrights, etc., produced over a period of 36 months or more, is to be taxed as if received during the period in which the work was done. See, to the same effect, Internal Revenue Code of 1954, Section 1301, et seq.

tively through litigation because of the limitations inherent in the judicial process. Sound Government and fair Government require that they be analyzed and resolved through normal legislative procedures before a tax is imposed, especially where the receipt in question itself results from a legislative mandate.

The history of the taxation of alimony payments provides an illustration. As we have pointed out, in 1917 this Court held that alimony was not "income" within the meaning of the then counterpart of Section 22(a). In 1942, however, Congress re-examined the situation. The result was the addition of new provisions to the Code providing that alimony would be taxed, but only in certain prescribed situations, subject to specified limitations.[9] Except to the limited extent that Congress has specifically taxed alimony, the *Gould* decision is operative. The situation is directly analogous to the case at bar because alimony, like a penalty, is not derived from capital or labor, and therefore is not "income" within the ordinary comprehension of the term.

The Treasury Department, if it thought penalties should be taxed (for reasons of symmetry or otherwise), has had every opportunity to present the issue to the legislative branch for its consideration. Not only has Congress failed to consider the matter on its own initiative, but also, to the best of our knowledge, the Treasury Department has never asked it to do so. It has chosen instead to ask the courts to accomplish that result by a new, broadened interpretation of the general language of Section 22(a).

3. The Government's Argument.

The Government bottoms its case on the proposition that Section 22(a) should be construed to include "all gains received by the taxpayer (not including return of capital)" (*Pet. Br.*, p. 15). It ascribes this meaning to the words "gains, or profits and income derived from any source

9. Internal Revenue Code of 1939, Sec. 22(k); cf. Internal Revenue Code of 1954, Sec. 71.

whatever" contained at the end of the section. It argues that by use of the word "gains," Section 22(a) reaches not merely "income" within the normal meaning of that term, but also any type of increase in net worth which is *not* included within the meaning of the term "income."[10]

Section 22(a) is a strange mixture of specification and generality. It deals specifically with "gains, profits and income" derived (1) from personal service; (2) from businesses of all sorts; and (3) from the investment of capital. This enumeration is then followed by the tail-end reference to "gains or profits and income derived from any source whatever."

The meaning of Section 22(a) is not to be found in verbal or grammatical niceties. Rather, the section has been accepted as an attempt to describe in the statute the general understanding of what is "income." Separate content has not been given to the three words, "gains," "profits," and "income." Necessarily the concluding phrase is no more than a generalized reference to the content supplied the term "income" by the enumeration of items which precede it.

All of this finds expression in the so-called *Macomber* definition of "income." Well before that decision the Court had defined income as "the gain derived from capital, labor or from both combined."[11] That definition carries through to the modern income tax laws an understanding of income, as the term was used in income tax statutes prior to 1913, in

10. In the court below the Government's argument would have brought *all receipts* within Section 22(a). Because it was pointed out that this definition would encompass even a return of capital, the Government now has qualified its position to include all receipts *except* those constituting a return of capital.

11. The Court employed this definition in its interpretation of "income," as that term was used in the Corporation Excise Tax Act of August 5, 1909, c. 6, sec. 38, 36 Stat. 11, 112. *Stratton's Independence v. Howbert*, 231 U.S. 399, 415 (1913). Later, interpreting the same act, the Court reiterated that definition of income. *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179 (1918).

the Amendment itself, and in the acts adopted after the Amendment.[12] *Eisner v. Macomber* simply noted the inclusion in the definition of "profit gained through a sale or conversion of capital assets." As the Court said in *Merchants Loan and Trust Co. v. Smietanka*, 255 U.S. 509, 519 (1921), ". . . this Court . . . has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the terms which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution . . . [and] we continue entirely satisfied with that definition . . ." It is clear, as the court below held, that penalties do not come within it.

The phraseology of Section 22(a) itself indicates why the words "gains" and "profits" were used together with the word "income." One normally speaks of "income" from personal service or from property. On the other hand, if property is sold it is customary to speak of the "profit" or the "gain" on the transaction, rather than the "income" from it. The words were apparently intended for facility of expression, but in fact they are entirely repetitious.

The new Internal Revenue Code of 1954 shows that the Government's argument reaches far beyond the Congressional understanding of the scope of Section 22(a). As we have noted, Section 22(a) has been replaced by Section 61(a).[13] The report of the House Ways and Means Committee states as follows:

> "This section corresponds to section 22 (a) of the 1939 Code. While the language in existing section 22 (a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61 (a) is as broad in scope as section 22 (a).

12. In *Southern Pacific Co. v. Lowe*, 247 U.S. 330, 335 (1918), the Court said "Certainly the term 'income' has no broader meaning in the 1913 Act than in that of 1909." See also *Merchant's Loan and Trust Co. v. Smietanka* 255 U.S. 509, 518-519 (1921).

13. See *supra* p. 2 where Section 61(a) has been set out *in extenso*.

> "Section 61 (a) provides that gross income includes 'all income from whatever source derived.' This definition is based upon the 16th Amendment and the word 'income' is used in its constitutional sense."[14]

The report of the Senate Finance Committee is the same, with the further statement:

> "It is not intended to change the content of income that obtains under Section 22 (a)."[15]

Section 61(a) has *not* defined income to mean all realized gain. It could have done so just that simply if this is what Congress understood Section 22(a) to mean. On the contrary, it *eliminated* those words in Section 22(a) upon which the Government has based its case, and yet intended no change in substance. First, instead of the awkward reference to "gains or profits and income," it provides that "gross income shall mean all income from whatever source derived (including but not limited to) the following items . . ."—thus using only the word "income" as a general term. Second, the specific items listed include "gains derived from dealings in property" (Subsection (3)), and *at no other place* is the word "gains" used.

Thus, the entire verbal basis for the Government's position in this case is no longer to be found in the present counterpart of Section 22(a). Since the reports of both the House Ways and Means Committee and the Senate Finance Committee state that no change in the content of Section 22(a) was intended, the inference is clear that Congress regarded the words "gains" and "profits" in Section 22(a) as adding nothing to its overall meaning.

4. The Judicial Decisions.

We disagree with the Government's contention that this Court has held gains subject to tax which do not come

14. H. Rep. 1337, p. A 18, 83d Cong., 2d Sess.
15. Sen. Rep. 1622, p. 168, 83d Cong., 2d Sess.

within the *Eisner v. Macomber* definition. We think that every case cited deals with a situation where a taxpayer had increased his wealth either through his own activity (labor) or through the use or disposition of property (capital).

In the *Kirby Lumber Company* case the taxpayer had borrowed money, evidencing the debt by its bonds. Later it bought in the bonds at a discount. The Court held merely that as a result of these dealings in bonds the taxpayer had made a profit which was income. *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931). *Commissioner v. Jacobson*, 336 U.S. 28 (1949) was decided on the same basis—wholly consistent with the *Macomber* definition which requires the use of capital (here the borrowed money and bonds) or labor as the source of taxable gain.

In the *Bruun* case, the owner of leased real estate on which the lessee had erected improvements was held to have realized gain equivalent to the value of the improvements, upon termination of the lease resulting from the lessee's default. Here clearly was a gain derived from use of the taxpayer's property. In fact, the only issue in the case was whether there could be a *realization* prior to severance or disposition of the improvements, not whether there was income. *Helvering v. Bruun*, 309 U.S. 461 (1940).

In the *Rutkin* case the taxpayer was taxed on money obtained through extortion. The money had come to the taxpayer as a result of his efforts and business dealings, although they were illegal, and the only question was whether illegality affected taxability. *Rutkin v. United States*, 343 U.S. 130 (1952).

In the *Robertson* case the taxpayer had composed the winning symphony in a prize contest; the only question was whether the prize was a *quid pro quo* for services rendered or a gift. The court found that it was the former, and therefore taxable. *Robertson v. United States*, 343 U.S. 711 (1952).

In *Irwin v. Gavit*, 268 U.S. 161 (1925), the question was whether the income from bequeathed property was exempt from tax under the statutory exemption for bequests. There was no question but that the income from the property as such was within Section 22(a).

In *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88 (1936), lost profits had been recovered in settlement of a patent infringement suit. The recovery was taxed because it had the same character as the funds which it replaced—*just as there has been no question in the instant case as to the taxability of the taxpayer's recovery of damages for its lost profits.*

Dobson v. Commissioner, 320 U.S. 489 (1943), reh. den. 321 U.S. 231 (1944) involved a reaffirmation of the tax benefit rule. The recoveries which were taxed had their foundation in a capital transaction, and it makes no difference whether the capital is regarded as the securities which the taxpayer had sold or the income tax payments saved as a result of the loss deductions—capital in either event.

Section 22(a), as the Court has often stated, is broad in its scope and is intended to tax *income* comprehensively. However, the Court has never said, nor held, that Section 22(a) includes as income an item of gain which is not derived from capital or from labor.[16]

The Government has suggested that since the penalty was obtained as a result of litigation, it could be said to be derived from labor or capital. This argument fails to take into account the fact that the payment of the penalty derives entirely from an Act of Congress designed to punish wrongdoers. Litigation is but the means by which it can be collected.

Whenever a recovery in litigation is involved, the question always to be asked in determining taxability is, "In

16. On the contrary, the *Macomber* definition was reiterated by this Court only a few years ago in *Commissioner v. Culbertson* 337 U.S. 733, 740 (1949).

lieu of what were the damages awarded?"[17] If the donee of a promissory note, enforceable only because it is under seal, is required to bring suit against the maker, payment of the judgment is nevertheless a gift. If a legatee under a will must prosecute his claim against the executor of the decedent's estate for recovery of his bequest, the award of the Probate Court is nevertheless a bequest.

If the anti-trust defendants had admitted their wrong, computed and volunteered to taxpayer its actual damages, and then trebled that sum in order to arrive at the statutory penalty, the latter would not be a receipt derived from capital or labor, but solely from a congressional mandate. The mere fact that the tapayer had to bring suit to recover the penal award cannot translate the source into capital or labor.

In *Mathey v. Commissioner*, 177 F. 2d 259 (C.A. 1st, 1949), aff'g. 10 T.C. 1099 (1948), cert. den. 339 U.S. 943 (1950), the inquiry of the courts was directed to the question whether the award was compensatory or penal. On a finding, based on the taxpayer's own admissions in the patent infringement suit, that the award was compensatory in its entirety and not penal, the entire award was taxed. Implicit in the decision of both the Tax Court and the First Circuit was the view that a penalty is not a gain from capital or labor, and therefore not income in the accepted sense.[18]

Again in *E. Liebes & Co. v. Commissioner*, 90 F. 2d 932 (C.A. 9th, 1937), a recovery of lost profits was taxed. It

17. *Raytheon Production Corp. v. Commissioner*, 144 F. 2d 110 (C.A. 1st, 1944), cert. denied 323 U.S. 779 (1944).

18. The patent infringement statutes (Rev. Stat., Sec. 4919, 1946 ed. 35 U.S.C. 1946 ed., Sec. 67; Rev. Stat. Sec. 4921, 1946 ed. 35 U.S.C. 1946 ed., Sec. 70) are not penal. They merely authorize a court, in order more accurately to determine the *actual* damages sustained, to increase the *probable* loss "according to the circumstances of the case, not exceeding three times the amount of such a verdict . . . ." See the opinion of the Court of Appeals in the *Mathey* case at p. 264 and the opinion of the Tax Court at p. 1104

was clear from the Court's opinion that it was not including a penalty within its concept of income.[19]

The decision of the Court of Appeals for the Third Circuit in *Central Railroad Co. v. New Jersey* may be subject to criticism with respect to the *factual conclusion* that the taxpayer had recovered a penalty. It is only on this ground that the earlier decisions of the Second Circuit in *Sterling v. Commissioner*, 93 F. 2d 304 (1937), cert. den. 303 U.S. 663 (1938), and *Lyeth v. Hoey*, 96 F. 2d 141 (1938), rev'd. on other grounds 305 U.S. 188 (1938) criticized the *Central Railroad* decision. Similarly *Arcadia Refining Co. v. Commissioner*, 118 F. 2d 1010 (C.A. 5th, 1941) differs from the *Central Railroad* decision only because of a contrary *factual* interpretation. But nothing in the court's opinion leads to the conclusion that a true penalty is to be treated as income.

Except for the Seventh Circuit's decision in the *Obear-Nester* case (*Commissioner v. Obear-Nester Glass Co.*, — F. 2d—(C.A. 7th, Nov. 15, 1954), Pet. for cert. pending, Oct. Term, 1954, No. 478, no court has permitted the Commissioner to tax a gain not derived from capital or labor. The courts which have considered the question have directed their inquiry to *whether* a receipt is a penalty. When this court was squarely presented with a gain which was not derived from capital or labor, it held that the gain was not within the scope of Section 22(a) (*Gould v. Gould*, *supra*).

The Court below recognized that punitive damages or penalties are *sui generis*, not easily characterized (R. 36). They have no ready synonym. But whether the receipt of the penalty is analogized to a gift from the sovereign or a

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19. The Court indicated that a recovery, to be taxable, must be from capital or labor. It distinguished the *Central Railroad* decision by noting (pp. 936-937) that in that case "a recovery which was neither profits nor for an injury to capital was held not taxable. Such is not the case here."

forced transfer of property or a subsidy,[20] it is clear that a penalty is not derived from anything that the taxpayer or its capital has produced or would have produced if it had not been prevented by the anti-trust defendants. On the contrary, it is a payment exacted by law to penalize a lawbreaker for his infraction.[21]

5. The "Insider Profits" Case.

In the "insider profits" case which is also before the Court the taxpayer has attempted to bring the profits which it has recovered within the concept of a penalty. *General American Investors Company v. Commissioner*, (Oct. Term, 1954, No. 114). If indeed the award under Section 16(b) is viewed primarily as a penalty imposed upon the insider, and if, therefore, the Court concludes that the recovery is not the result of a devotion of capital or labor, then the insider profits are not taxable.

On the other hand, the recovery of insider profits may well be analogized to the recovery of the lost profits which the instant taxpayer received and reported, or which the taxpayer in the *Safety Car Heating & Lighting Co.* case had recovered. If the court finds that Section 16(b) does not provide for punitive damages but rather is intended to restore what the Congress has presumed to be the corporation's profits, then of course the recovery should be taxed.

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20. See, e.g., *Edwards v. Cuba R. R. Co.*, 268 U.S. 628 (1925).

21. The treble damage aspect of the Clayton Act recovery has been recognized consistently as punitive and deterrent in nature and purpose. See Mr. Justice Black in *United States v. Hess*, 317 U.S. 537, 550 (1943) and Mr. Justice Frankfurter's concurring opinion in the same case (p. 556). See also *Bigelow v. RKO Radio Pictures*, 150 F. 2d 877 (C.A. 7th, 1945) rev'd on other grounds, 327 U.S. 251 (1946); *Clark Oil Company v. Phillips Petroleum Company*, 148 F. 2d 580, 582 (C.A. 8th 1945), cert. den. 326 U.S. 734 (1945); Bills and Debates in Congress Relating to Trusts, 1903, Sen. Doc. #147, 57th Cong., 2d Sess.; The History of Bills and Resolutions, 51 Cong. Rec. Index 160, H.R. 15657, 63d Cong., 2d Sess.

The language of Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. 1952 ed. § 78p(b)) expresses a legislative policy which regards an insider who has access to information belonging to the corporation as having traded on that information, and therefore, any profits which he realizes are recoverable by the corporation. The section provides that in order to prevent "the unfair use of information which may have been obtained . . . [by an insider] . . . by reason of his relationship to the issuer, any profit realized . . . shall inure to and be recoverable by the issuer . . ." The profits are presumed to have been derived from the corporation's information and so from its capital. Thus within the *Macomber* definition of income the profits would be taxable to the corporation.

Section 4 of the Clayton Act bears no comparison to Section 16(b) of the Securities Exchange Act of 1934. The latter is intended to enable the corporation to recover what may be derived from its capital and no more. The Clayton Act, however, gives the injured party his lost profits on which he must pay his tax, and, in addition, a penalty imposed on the monopolist as a punishment or deterrent.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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January, 1955.