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## CURRENT DEVELOPMENTS IN TAXATION

BY ALBERT J. GOULD AND KENNETH L. SMITH

*of the Denver Bar*

### EXCESS PROFIT TAX DISTRIBUTIONS

No distribution of capital nor of earnings by a corporation subject to excess profit taxes should be made within the first sixty days of the taxable year because such distribution may affect the computation of the increase or decrease in equity capital.

### DEPRECIATION—WHEN DEDUCTIBLE

Section 23 (1) was amended by the 1942 Act to allow a deduction for depreciation of property held by the taxpayer for the production of income, regardless of whether the property is actually used in the trade or business of the taxpayer.

Although the former law, restricting the deduction to "property used in the trade or business" has always been interpreted by the Bureau to allow depreciation on any building from which the taxpayer-owner received rent, the amended law makes it clear that all property "held for the production of income" is depreciable, even before actual use *and the deduction is not conditional upon receipt or accrual of income from the property in the taxable year.*

The above provision is important as to investment property. The capital gain period of six months clearly starts to run from the time the property becomes subject to depreciation. See *Dougherty Co. v. Commissioner*, 159 F. (2d) 269, 35 A.F.T.R. 669, and cases cited therein.

### STOCKHOLDERS' ADDITIONAL CORPORATE TAX

If a corporation has been liquidated in full, all assets have been distributed, and stockholders, as transferees, are required to pay corporation tax deficiencies, the payment by each stockholder is deductible *in full*. *Switlik*, 13 T.C. 121, affirmed. The foregoing applies only if the corporate tax liability was unknown at liquidation. In liquidating a corporation therefore, it can be desirable to distribute all assets rather than to withhold some assets for the purpose of paying taxes until the statute of limitations has run. The determination of this question will depend upon the responsibility of all stockholders.

**REAL PROPERTY CAPITAL GAIN**

Because there seems to be confusion as to when the sale of real property is a capital gain, we restate a few rules:

1. Property held for sale to customers in the ordinary course of business is an ordinary asset and the gain is taxable in full. The danger in this rule lies in the fact that one not primarily in the business of buying and selling real estate can find himself in the position of holding property primarily for sale to customers within the above rule, if he buys and sells several parcels within a short period of time, or if he buys unimproved property merely for the purpose of resale at a profit, or if he subdivides unimproved property and sells the same in lots from time to time, or if he buys and sells apartment houses or any other definite class of real property as a side line but more or less frequently over a period of years.

The determination of the above controversial proposition approaches a twilight zone and lawyers should be careful to caution clients regarding the foregoing, particularly those who are purchasing tracts of land for resale at a profit in the current real estate boom.

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