

TOWNE v. EISNER, 245 U.S. 418 (1918)

38 S.Ct. 158

TOWNE v. EISNER, COLLECTOR OF UNITED STATES INTERNAL
REVENUE FOR THE THIRD

DISTRICT OF THE STATE OF NEW YORK.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT

OF NEW YORK.

No. 563.

Argued December 12, 1917.

Decided January 7, 1918.

In an action to recover back money collected and retained by the Government, over plaintiff's protest, as a tax on income under the Income Tax Law of 1913, plaintiff alleged that that upon which the tax was levied, a stock dividend based on accumulated profits, was not "income" within the true intent of the statute, and that if the statute so intended it was so far unconstitutional, because in the Sixteenth Amendment, upon which its validity depended, the term "income" could not be construed to embrace such dividends. *Held*, that there was thus presented, not merely a question whether the statute

had been wrongly understood and applied, but also a question of the scope of the Amendment, which afforded jurisdiction to review both questions by direct writ of error to the District Court.

The value of new shares, issued as a stock dividend and representing merely surplus profits transferred to the capital account of the corporation, is not taxable to the share holders as income within the meaning of the Income Tax Law of 1913. So *held* where the profits were earned before January 1, 1913, and the transfer and dividend were voted December 17, 1913, and the distribution, ratably to shareholders of record on the 26th of that month, took place on January 2, 1914.

242 F. 702, reversed.

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THE case is stated in the opinion.

[*ARGUMENTS OMITTED*]

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover the amount of a tax paid under duress in respect of a stock dividend alleged by the Government to be income. A demurrer to the declaration was sustained by the District Court and judgment was entered for the defendant. 242 F. 702. The facts alleged are that the corporation voted on December 17, 1913, to transfer \$1,500,000 surplus, being profits earned before January 1, 1913, to its capital account, and to issue fifteen thousand shares of stock representing the same to its stockholders of record on December 26; that the distribution took place on January 2, 1914, and that the plaintiff received as his due proportion four thousand one hundred and seventy-four and a half shares. The defendant compelled the plaintiff to pay an income tax upon this stock as equivalent to \$417,450 income in cash. The District Court held that the stock was income

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within the meaning of the Income Tax of October 3, 1913, c. 16, Section II; A, subdivisions 1 and 2; and B. 38 Stat. 114, 166, 167. It also held that the act so construed was constitutional, whereas the declaration set up that so far as the act purported to confer power to make this levy it was unconstitutional and void.

The Government in the first place moves to dismiss the case for want of jurisdiction, on the ground that the only question here is the construction of the statute not its constitutionality. It argues that if such a stock dividend is not income within the meaning of the Constitution it is not income within the intent of the statute, and hence that the meaning of the Sixteenth Amendment is not an immediate issue, and is important only as throwing light on the construction of the act.

But it is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. *Lamar v. United States*, [240 U.S. 60](#), [65](#). **Whatever the meaning of the Constitution, the Government had applied its force to the plaintiff, on the assertion that the statute authorized it to do so, before the suit was brought, and the court below has sanctioned its course. The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this court should think that the construction would make the act unconstitutional.** While it keeps the money it opens the question whether the act construed as it has construed it can be maintained. The motion to dismiss is overruled. *Billings v. United States*, [232 U.S. 261](#), [276](#). *Altman & Co. v. United States*, [224 U.S. 583](#), [596](#), [597](#).

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The case being properly here, however, the construction of the act is open, as well as its constitutionality if construed as the Government has construed it by its conduct. *Billings v. United States, ubi supra*. Notwithstanding the thoughtful discussion

that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former. **"A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. . . ."** The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones." *Gibbons v. Mahon*, [136 U.S. 549](#), [559](#), [560](#). In short, the corporation is no poorer and the stockholder is no richer than they were before. *Logan County v. United States*, [169 U.S. 255](#), [261](#). If the plaintiff gained any small advantage by the change, it certainly was not an advantage of \$417,450, the sum upon which he was taxed. It is alleged and admitted that he receives no more in the way of dividends and that his old and new certificates together are worth only what the old ones were worth before. If the sum had been carried from surplus to capital account without a corresponding issue of stock certificates, which there was nothing in the nature of things to prevent, we do not suppose that any one would contend that the plaintiff had received an accession to his income. Presumably his certificate would have the same value as before. Again, if certificates for \$1,000 par were split up into ten certificates each, for \$100, we presume that no

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one would call the new certificates income. What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.

Judgment reversed.

MR. JUSTICE McKENNA concurs in the result.
