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A STATUTORY APPROACH TO THE TAX PROBLEMS OF THE MORTGAGOR CONSEQUENT UPON REDUCTION OF THE MORTGAGE DEBT

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SHOULD the less sanguine of our economists be correct and a business recession of substantial magnitude and duration terminate the current era of high productivity, the recent commitment of so much of our inflated wealth into real estate of equally inflated value will perforce result in widespread compromise of mortgage indebtedness with concomitant multiplication of tax problems arising from such cancellation. Unfortunate for both taxpayer and attorney is the fact that few areas in the tax field reveal greater uncertainty or a greater diversity of theory and solution than does that relating to the realization of income through reduction of mortgage indebtedness. Much has been written on the subject in an effort to analyse, to reconcile and to distinguish. A fair historical appraisal, however, cannot but lead to a conviction that a quarter century of case law has not only failed to establish a uniform and consistent approach to the problems involved but rather has left the field basically unsettled and marked by judicial controversy and contradiction.

One factor contributing to this confusion and discord has, undoubtedly, been the absence of specific statutory directive. Apart from a few minor provisions of limited scope, the Internal Revenue Code is silent on the subject. The notion that income is derived from cancellation of indebtedness emerged in the case law and that law has constituted the medium of its development. And that development has too often reflected the sympathies and prejudices, taxwise, of the jurist rather than thoughtful consideration of basic principles.

The American Law Institute in its Income Tax Project has undertaken to develop improved technical provisions for income tax statutory law and in connection therewith has proposed a codification of the law relating to cancellation of indebtedness.[1] So far as mortgage indebtedness is concerned, it in general proposes to find taxable income from reduction of indebtedness in all instances where a mortgagee compromises his debt with a solvent mortgagor, whether or not the latter be personally liable on the bond. In adopting such a rule the Institute was necessarily compelled, at various points, to adopt positions opposed

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1. A.L.I., FEDERAL INCOME TAX STATUTE, *Tentative Draft No. 4* (1951). Hereinafter referred to as *Tentative Draft No. 4*. See Webster, *Some Comments on the Income Tax Project of the American Law Institute*, 12 FED. BAR J. 59 (1951).

to certain of the decided cases. In this paper it is proposed to examine the case law pertinent to the realization of income through such cancellation of mortgage indebtedness in an effort to determine the extent to which this action of the Institute has been arbitrary and to what extent, despite the apparent conflict, it is actually reflecting more recent trends evident in the decisions.

"Section X116—(a) . . . Income shall result from a cancellation of a taxpayer's indebtedness whenever and to the extent that the face amount of such indebtedness exceeds the amount of the consideration for such cancellation. . . ."[2]

That taxable income results from a reduction of mortgage indebtedness incurred as a loan or for the acquisition of property was not a fact easily recognized nor readily accepted by jurists before whom such matters first appeared and prior to 1931 the Commissioner's contention that gain was thereby realized was not favorably received.[3] Since the *Kirby Lumber Co.*[4] and *American Chicle Co.*[5] cases, however, there has been no serious attempt to dispute the fact that as a general proposition the compromise of a debt for less than its face value does produce income to the debtor. While these decisions continue to be unpopular with some of the lower courts which have accordingly "been astute to avoid"[6] the application of the doctrine, sizeable segments of the problem have, therefore, been, albeit reluctantly, recognized as immune from further attack.

So where the mortgaged property has either retained its original value, or, despite a decrease therein, has retained a value at the time of the compromise at least equal to the debt remaining before the compromise,[7] it is now beyond controversy that a solvent mortgagor, unconditionally liable on the bond, who retains the property and settles the mortgage debt for less than the face thereof, realizes income in the amount of the difference. Within these factual limitations, then, the proposed statute reflects the case law so far, at least, as the taxable event is concerned.

"Comment 2, to Section X116 (a):—The proposed provision is intended to extinguish any vitality that may remain to the Kerbaugh-Empire rule,

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2. *Tentative Draft No. 4* at 23.

3. See American Tobacco Co., 20 B.T.A. 586 (1930); Eastern Steamship Lines, 17 B.T.A. 787 (1929); Independent Brewing Co. of Pittsburgh, 4 B.T.A. 870 (1926).

4. United States v. Kirby Lumber Co., 284 U.S. 1 (1931). Here taxpayer was held to have realized taxable income when it purchased its own bonds at a discount.

5. Helvering v. American Chicle Co., 291 U. S. 426 (1934).

6. Helvering v. American Dental Co., 318 U.S. 322, 327 (1943).

7. Commissioner v. Coastwise Transportation Corp., 71 F. 2d 104 (1st Cir.), *cert. denied*, 293 U.S. 595 (1934).

271 U.S. 170 (1926), that cancellation of an indebtedness does not result where the consideration for it had been lost. . . ."[8]

A point of apparent conflict between the proposed law and the decisions appears, however, when we consider the case of reduction of the mortgage debt at a time when the value of the property has decreased to an extent that it is not in excess of the amount for which the debt is settled. Certain cases, never overruled, have held that under such circumstances a compromise of indebtedness is not within the *Kirby* rule and results, accordingly, in no taxable income. The proposed statute, on the contrary, would hold that taxable gain is realized in this as in the previously mentioned situations. An appraisal of the suggested law necessitates, therefore, a consideration of the extent to which the mentioned decisions rest on sound principles and so reflect the weight of considered judicial opinion that serious question may arise as to whether the proposed enactment may tend toward injustice.

The theory that a mortgagor who settles his debt for less than the face amount does not realize taxable income to the extent of the difference if the diminution in value of the property at the time of compromise is equal to the amount of the debt cancelled has become associated primarily with two cases, *Hextell v. Huston*[9] and *Hirsch. v. Commissioner.*[10] In the former case the taxpayer in 1928 purchased real estate for $20,000, borrowing therefor $10,000 from an insurance company to which he gave a bond and mortgage. In 1935, when the debt amounted to $10,500, it was compromised for $6,500—apparently also the then value of the property. The district court in 1939 found no taxable gain. It recognized that losses from depreciation should be postponed until disposal of the property and conceded that unless in the transaction a loss could be determined with certainty and apart from depreciation the taxpayer would be subject to tax under the previously decided cases of *Commissioner v. Coastwise Transportation Corp.*[11] and *L. D. Coddon and Bros., Inc.*[12] It held, however, that in the scaling down of the debt there was a determination of loss and that this loss offset the gain. It seems quite clear that in reaching its conclusion the court was attempting to apply what it believed to be the philosophy of *Bowers v. Kerbaugh-Empire Co.*,[13] the rule of which the proposed statute intends to expunge from the law.

8. *Tentative Draft No. 4* at 171.
9. 28 F. Supp. 521 (S.D. Iowa), *appeal dismissed,* 107 F.2d 1016 (8th Cir. 1939).
10. 115 F.2d 656 (7th Cir. 1940).
11. 71 F.2d 104 (1st Cir.), *cert. denied,* 293 U.S. 595 (1934).
12. 37 B.T.A. 393 (1938).
13. 271 U.S. 170 (1926).

In *Kerbaugh-Empire Co.* the taxpayer borrowed money in the years 1911-1913, repayable in German marks or their equivalent in United States gold coin, and, having lost the money in the years 1913-1918, repaid the debt in 1921 in dollars, at a time when marks were greatly depreciated. The Supreme Court in 1926 found no taxable income, ostensibly on two grounds. The first was that the transaction did not produce benefit to the taxpayer within the definition of income as gain derived from capital or from labor. The second is best expressed in the words of the court: "The contention that the item in question is cash gain disregards the fact that the borrowed money was lost and that the excess of such loss over income was more than the amount borrowed. . . ."[14]

While superficial consideration of the two cases might well suggest that the second ground of *Kerbaugh-Empire* established a rule properly applicable in the *Hextell* situation, one favorably disposed to such a solution is confronted immediately by the thwarting implications of the intervening decision of *Burnet v. Sanford & Brooks Co.*[15] There the taxpayer attempted to offset against income received in 1920 losses suffered on the same contract in the years 1913-1916. The Court of Appeals sustained the taxpayer's contention that the income of 1920 was merely a return of the losses of the previous years. The Supreme Court, however, reversed and held that the money the taxpayer received in 1920 was taxable income. It rejected the contention that, since the transaction from which the income in 1920 was derived did not result in net gain or profit, no taxable income was realized, and took the position that income must be determined by the result of the transactions within the taxable year without reference to losses or events of other years. While it nodded an acknowledgment of the existence of *Kerbaugh-Empire Co.*, its apparent approval of that decision rested not on the ground that the loss offset the gain but on the theory that there the taxpayer had neither made a profit on the transaction, nor received any money or property which could have been made subject to the tax.

Appealing though the proposition may be that in determining gain or loss for income tax purposes one should, in cases of compromises of indebtedness, look to the entire transaction and not find taxable income if the property has markedly decreased in value, the decision relied upon as authority for that principle would itself seem, therefore, to have been rejected and discredited by the court which announced it.[16] The first

14. *Id.* at 175.

15. 282 U. S. 359 (1931).

16. See Darrell, *Discharge of Indebtedness and the Federal Income Tax*, 53 HARV. L. REV. 977, 985 (1940); MAGILL, TAXABLE INCOME 254 (2d ed. 1945); Wright, *Realization of Income Through Cancellations, Modifications and Bargain Purchases of Indebtedness II*,

mentioned ground given in the *Kerbaugh* opinion has, of course, since been effectively disposed of by *Kirby* and since it would be the rare instance indeed, in which devaluation of mortgaged property occurred all in the taxable year, the *Sanford & Brooks* limitation would appear to preclude the solution of the mortgagor's problems through the *Kerbaugh* doctrine.

An equally troubling weakness in *Hextell* lies in its finding that the loss was definitely determined.[17] Even had the decline in market value occurred in the year of compromise, the *Kerbaugh* theory would still require for its application a determination that "The result of the whole transaction was a loss."[18] It will be remembered that in the latter case the taxpayer no longer had the borrowed money—he had lost it. Not only did the Supreme Court later[19] emphasize the fact that in *Kerbaugh* the final outcome of the transaction was revealed, but in two cases, antecedent to *Hextell,* the exact argument relied upon therein had been made and rejected.

The first of these was *Commissioner v. Coastwise Transportation Corp.*[20] There the mortgagor of a fleet of ships compromised its debt for less than the face value of its notes. Although the value of the ships was at the time of settlement greater than the amount of the compromise, the ships had, nevertheless, depreciated in value more than the gain from the purchase of the notes. The Court of Appeals for the First Circuit, however, refused to apply the doctrine of *Kerbaugh-Empire Co.* on the ground that the taxpayer still owned and operated the ships. In *L. D. Coddon and Bros. Inc.,*[21] property purchased for \$80,000 had declined in value to \$20,000 and the mortgagor settled the remaining \$19,500 due on notes for \$12,000. The Board of Tax Appeals, holding that *Kerbaugh* did not control, said that the doctrine of that case "is limited to completed transactions. . . . Since the property mortgaged to secure the obligation . . . in this case was still held by the petitioner . . . the doctrine of that case is not applicable. . . . Therefore, the fact that the

49 MICH. L. REV. 667, 674 (1951). Compare, however, 2 MERTENS, LAW OF FEDERAL INCOME TAXATION § 11.20 (1942), and Lynch, *Some Tax Effects of Cancellation of Indebtedness,* 13 FORD. L. REV. 145, 152 (1944).

17. See Surrey, *The Revenue Act of 1939 and the Income Tax Treatment of Cancellation of Indebtedness,* 49 YALE L. J. 1153, 1169 (1940).

18. Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 175 (1926).

19. "But the transaction [in Kerbaugh-Empire Co.] as a whole was a loss and the contention was denied." United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931). "Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, is not applicable. The final outcome of the dealings was revealed—the taxpayer suffered a loss." Helvering v. American Chicle Co., 291 U.S. 426, 430 (1934).

20. 71 F.2d 104 (1st. Cir.), *cert. denied,* 293 U.S. 595 (1934).

21. 37 B.T.A. 393 (1938).

market value of the real estate of petitioner was considerably less in the taxable year than the original price paid for it is immaterial."[22]

Finally to be noted is the conclusion of the district court in *Frank v. United States*,[23] decided in 1942. In the course of its analysis the court characterizes as a "novel theory" the proposition advanced in *Hextell v. Huston* that the "loss" in capital value offset the gain on adjustment of the mortgage, and states that the *Hextell* case did not come within the doctrine of *Kerbaugh-Empire Co.* because there was no final outcome disclosing loss; that the owner had not "disposed of his property so as to come within the scope of the *Bowers* decision."

This would appear to be the sound view. The recognition of taxable gain or loss in mere appreciation or shrinkage in value has not found favor in the tax field generally. Quite apart from the valuation problem, there is the equally serious question whether the depressed value does in fact represent the final outcome. While it may have appeared to an economically discouraged court in 1939 that the then depression level of real estate values was fixed for all time and that a loss was actually and finally determined, the recent recoupment of such values within a few years has demonstrated the wisdom of the reluctance to recognize value decline as a criterion of loss, absent a disposition of the property.

What, if any, force is presently exerted by the *Kerbaugh* doctrine would seem then to be of such limited application as not to affect the reduction of the real estate mortgage debt in instances where the mortgagor retains the property. This seems to have been generally recognized *sub silentio* by the lower courts for, despite an occasional reference to the doctrine,[24] there has been no decision since *Hextell* which has attempted to solve the problem of such a compromise of a mortgage debt solely by application of the doctrine.

The foregoing notwithstanding, it would still appear rash indeed to intimate, as does the quoted comment of the Institute, that the *Kerbaugh* doctrine is moribund. Such a conclusion becomes tenable only by ignoring relevant and significant implications contained in the opinion of the Supreme Court in the case of *Commissioner v. Jacobson*.[25] There the respondent in 1922 and 1923 acquired a 99 year lease with improvements. In 1925 he borrowed $90,000 secured by a mortgage on the property. The money was in large part expended to reduce the existing encumbrance, to pay for an addition to a building, and for expenses incurred in connection with the loan. In 1925 the leasehold and improvements had a cost of $116,589. The Tax Court found that in 1938 they

22. *Id.* at 399.

23. 44 F. Supp. 729 (E. D. Pa.), *aff'd*, 131 F. 2d 864 (3d Cir. 1942).

24. See Commissioner v. Sherman, 135 F.2d 68 (6th Cir. 1943).

25. 336 U.S. 28 (1949).

had a value of $80,000. In the years 1938-1940 respondent repurchased then outstanding bonds below their face value, and the Supreme Court, in 1949, decided that he had realized taxable income in the difference between the face of the bonds and the amount for which they were repurchased. In the opinion, however, Mr. Justice Burton, speaking for the court, referred three times to the doctrine which we have come to associate with *Kerbaugh-Empire Co.*

The first observation occurs in his introductory remarks where he states that the money borrowed by the respondent was not traced "into identifiable losses offsetting the debtor's realized gains from the discharge of these obligations."[26] Again, in the first footnote we find the statement that there was not a sufficient and clear ascertainment of either the total amount of the borrowed funds expended on the property or in discharge of existing encumbrances thereon or of the shrinkage in value thereof "to permit consideration of its use as an offset to the respondent's gains in 1938, 1939 or 1940. See 2 Mertens, Law of Federal Income Taxation, sec. 11.20 and n. 99 (1942)."[27] Finally, in the fourth footnote, he again refers to the varied uses to which the money was applied and says that "it is not practical in this case to determine his losses from his resulting investments, and much less to offset them against his gains now in issue. His tax benefits from those losses are thus postponed until some such occasion as the sale of the properties reflecting them makes it possible to ascertain the losses clearly."[28]

While it may be possible summarily to dismiss the references to *Kerbaugh* found in the *Kirby* and *American Chicle Co.* cases[29] as made not for the purpose of approving the *Kerbaugh* doctrine but rather to show why in any event the doctrine was inapplicable to the facts of those cases, the mentioned comments in *Jacobson* merit more serious consideration. They seem to intimate that clear establishment of the precise amount of the borrowed money which was used to purchase or refinance property together with a certain ascertainment of the shrinkage in the value of that property might well have resulted in the application of the *Kerbaugh* rule, despite the fact that the losses in value seem to have occurred prior to the taxable years and even though there was no final disposition of the property.

That this is the meaning of the court seems clearly indicated by its reference to the particular section and footnote of Mertens' work on income taxation. Mr. Mertens is a strong admirer of the *Kerbaugh* doctrine and has been vigorous and eloquent in his condemnation of the

26. *Id.* at 30.
27. *Id.* at 35.
28. *Id.* at 39.
29. See note 19 *supra.*

arbitrary application of the annual taxing method so as to effect the practical destruction of that doctrine.[30] And it is in the particular section to which reference is made by the court that he presents his arguments favoring the continued application of the *Kerbaugh* rule, while conceding in the cited footnote, that there may be cases where it becomes impossible to allocate the funds cancelled to any particular property, in which event it would not be unreasonable to hold that the taxpayer must wait until the year of disposition to realize for tax purposes the diminution in value of the property.

"Comment 2, to Section X116 (a) . . . The provision also overrules the corollary evolved in recent cases that cancellation of part of a debt, incurred in the purchase of property which has shrunken in value as much or more than the amount cancelled, is merely a readjustment of original purchase price and not income."[31]

An alternative approach to the tax problem of the mortgagor who compromises his debt at a time when the property has declined to a point where its market value does not exceed the adjusted debt[32] is linked with the case of *Hirsch v. Commissioner*,[33] born also of the depression years and decided just one year after *Hextell*. In *Hirsch* the petitioner in 1928 purchased real estate at a cost of $29,000, assuming mortgages of $19,000. In 1929, when the mortgages were due he procured a loan from a bank which he used to pay off the encumbrances. A new mortgage given to the bank at the time of the loan was assigned and in 1936 the petitioner settled the debt of $18,000 with the assignee for $8,000. At the time of the compromise the value of the property had declined to $8,000. The Board of Tax Appeals found taxable income in the difference of $10,000. The Court of Appeals for the Seventh Circuit, however, while recognizing that the question whether the taxpayer had gain or loss could be determined only when he sold the property, found no taxable income on the theory that while the transaction was a forgiveness of indebtedness, it was in its essence a reduction in purchase price.

30. See Lynch, *supra* note 16, at 152. Professor Magill's suggestion that the doctrines of Kerbaugh-Empire Co. and Sanford & Brooks Co. have probably been modified by Dobson v. Commissioner, 320 U.S. 489 (1943), would also seem necessarily to be predicated upon a belief in the continued vitality of the former case. MAGILL, TAXABLE INCOME (2d ed. 1945).

31. *Tentative Draft No. 4* at 171.

32. On the question of the required relation between the decline in value and the adjusted or unadjusted debt, see Lynch, *supra* note 16, at 154; Wright, *supra* note 16, at 677; Ralph W. Gwinn, T. C. Memo. op. Dkt. No. 108, 144 (June 9, 1944).

33. 115 F.2d 656 (7th Cir. 1940).

The "reduction of cost" theory as a means of shielding the mortgagor from tax liability at the time of reducing his indebtedness did not originate with the *Hirsch* decision. It had, for example, previously been utilized by the Board of Tax Appeals in the *American Chicle Co.*[34] and *Coastwise Transportation Corp.*[35] cases. In the first of these the Supreme Court merely noted and then ignored the contention, and in the latter case the Court of Appeals for the First Circuit soundly rejected it. Nor, as these cases clearly show, did the theory emerge as something peculiar to the instance where the value of the property had declined below that of the debt. In *American Chicle Co.* the Board saw a reduction of purchase price although there was no evidence of change in the value of the property, and in *Coastwise Transportation Corp.* the shrinkage in value had not brought it below the remaining debt. This consistency on the part of the Board has much to commend it, for if the notion that a compromise of mortgage indebtedness constituted a reduction of purchase price were valid at all, its validity should be unaffected by the subsequent history of the property or at least by the relative amount of diminution in value.[36] Yet, since the rejection of the theory in the last named case, no serious attempt has been made to apply it except where the property has declined in value below the amount of the mortgage debt due. As such it assumes the character of an artifice, or as one court has put it, ". . . a formula for lifting certain types of debt adjustment out of the Kirby rule. . . ."[37]

Although the theory of reduction of purchase price was thereafter applied in mortgage cases decided in the Eighth[38] and Sixth[39] Circuits and in a limited number of non-mortgage cases, there is little, except sympathy for the taxpayer, to recommend it. True, an occasional case may be found where the transaction does in fact amount to a reduction of purchase price. Such a result may obtain for example where the contract provides for renegotiation[40] or even where a new contract supplants the old and provides for cash rather than installment or deferred payments.[41] But to find in a simple reduction of indebtedness transaction, without more, a reduction of purchase price merely because

34. Helvering v. American Chicle Co., 291 U.S. 426 (1934).

35. Commissioner v. Coastwise Transportation Corp., 71 F. 2d 104 (1st. Cir.), *cert. denied*, 293 U.S. 595 (1934).

36. See Wright, *supra* note 16, at 677.

37. Claridge Apartments Co., 1 T.C. 163 (1942), *rev'd in part*, 138 F. 2d 962 (7th Cir. 1943), *rev'd*, 323 U.S. 141 (1944).

38. Helvering v. Killian Co., 128 F. 2d 433 (8th Cir. 1942).

39. Commissioner v. Sherman, 135 F. 2d 68 (6th Cir. 1943).

40. See Pinkney Packing Co., 42 B.T.A. 823 (1940).

41. See Desmoines Improvement Co., 7 B.T.A. 279 (1927).

of a decline in value seems completely gratuitous. This was clearly recognized by the Court of Appeals for the First Circuit when in rejecting the contention of the Board of Tax Appeals that the cancellation in *Coastwise Transportation Corp.*[42] was a reduction of purchase price, it observed that there was no evidence that the transactions had anything to do with the purchase price of the vessels. "The parties dealt solely about the notes and their value and not about the ships or their value. The offer . . . and the acceptance . . . were for the purchase of the notes at a reduced price and not an agreement that the latter should reduce the purchase price of the ships. The gains came about from the reduction in the value of the notes."[43]

To the same effect is the reaction of the Court of Appeals for the Second Circuit when in 1944 it decided *Fifth Avenue-Fourteenth Street Corp. v. Commissioner.*[44] In the course of its opinion it virtually rejects the *Hirsch* theory and says: "At any rate, the distinction, if valid, is limited to a purchase money obligation where the vendor-mortgagee, *in negotiations directly relating to the purchase price,* agrees to a reduction. . . ."[45]

The theory of reduction of purchase price appears even more clearly fictitious where the mortgagee is not the vendor but merely one who has made a loan to the mortgagor, and whose only relation to the property at any time has been that of one having a security interest therein. Such a mortgagee never had the power to determine the price of the property, and once the vendor is fully paid, the sale transaction is forever closed, and there remains but a loan to be repaid. Yet in the *Hirsch* case itself, the mortgagee who reduced the remaining debt was not the vendor. The court dismissed this fact as unimportant.[46] That it is not unimportant was recognized in *Frank v. United States,*[47] a case similar in its facts to *Hirsch.* The petitioner had borrowed money part of which he used to pay off a purchase money mortgage. In connection with the loan he gave a mortgage represented by bonds which he repurchased at a discount. In holding that taxable income resulted the court said: "It must be kept in mind that those who lent the $110,000 to the plaintiffs in 1927 were

42. Commissioner v. Coastwise Transportation Corp., 71 F. 2d 104 (1st Cir.), *cert. denied,* 293 U.S. 595 (1934).

43. 71 F. 2d at 105.

44. 147 F. 2d 453 (2d Cir. 1944).

45. *Id.* at 457 (italics supplied). See Gehring Publishing Co., 1 T.C. 345 (1942), in which the negotiations did relate directly to a readjustment of the purchase price.

46. Hirsch v. Commissioner, 115 F. 2d 656, 658 (7th Cir. 1940).

47. 44 F. Supp. 729 (E.D. Pa.), *aff'd,* 131 F. 2d 864 (3d Cir. 1942). At the time the bonds were repurchased the value of the property was less than either the adjusted basis or the amount of the debt.

not those who sold the property to them in 1926."[48] As noted above, in *Fifth Avenue-Fourteenth Street Corp.*, the court pointed out that if the theory had any validity this could be so only where the negotiations were with the vendee. And finally in *Commissioner v. Jacobson*,[49] although again part of the loan had been used to refinance a purchase money mortgage and to build an addition to the property, the court observed that: "These were not purchase money bonds. The gains from their cancellation were not akin to reductions in balances due on the prices of previously acquired property. The respective sellers of the bonds bore no relation to the respondent other than that of creditors."[50]

That the doctrine is not yet dead, however, is seen in the recent case of *Charles L. Nutter*.[51] There the taxpayer borrowed money from a bank to purchase securities and in connection with the loan pledged the securities with the bank. When the securities had decreased in value below the amount of the loan the taxpayer transferred them to the bank in full discharge of the debt. Disregarding the fact that the bank was not the vendor, the Tax Court in 1946 held that no taxable income resulted. While the opinion is so disorganized and enigmatic as to defy complete understanding, it has generally been interpreted as holding that the transaction was in the nature of a purchase money borrowing and a reduction of sale price.

There is much to suggest, however, that, absent a Supreme Court decision to the contrary, the *Nutter* case may prove to be the final expression of the theory. The signs of revolt are evident. In *Frank v. United States*[52] the district court voiced the opinion that the *Hirsch* case cannot be reconciled with the rule enunciated by the Supreme Court in *Kirby* and *American Chicle Co.* In *Fifth Avenue-Fourteenth Street Corp.* the Court of Appeals for the Second Circuit considered irrational the theory that the *Kirby* case is inapplicable where the reduced indebtedness is a purchase money obligation.[53] And finally, in *Nutter* itself four judges dissented, three joining in a vigorous rejection of the notion that the compromise amounted to a scaling down of the purchase price.

The possibility of a surprise decision by the Supreme Court cannot, of course, be ruled out. In the *American Dental Co.*[54] case, Mr. Justice

48. 44 F. Supp. at 733.
49. 336 U.S. 28 (1949).
50. *Id.* at 39.
51. 7 T. C. 480 (1946).
52. 44 F. Supp. 729, 732 (E. D. Pa.), *aff'd*, 131 F. 2d 864 (3d Cir. 1942).
53. 147 F. 2d 453, 457 (2d Cir. 944).
54. Helvering v. American Dental Co., 318 U.S. 322, 327 (1943). In the Fifth Avenue—Fourteenth Street Corp. case, the Court of Appeals expressed doubt that the Supreme Court by its passing mention, intended to approve the case.

Reed noted in passing the fact that in *Hirsch* a forgiveness of a purchase money indebtedness had been treated as a readjustment of the contract rather than a gain. While reading into such a passing comment an approval of the decisions is unwarranted, there was, nevertheless, no disapproval. Even more provocative is the reference to the problem in *Commissioner v. Jacobson,* where in the opening words of the opinion appears the observation: "The debtor's obligations were not unpaid balances of purchase prices which could be readjusted by the discharge of obligations."[55]

In the *Jacobson* case itself, however, one finds assurance that the *Hirsch* doctrine, at least in its present form, will not be given "top level" approval. Such assurance results from the fact that in its broader aspect the *Jacobson* opinion has reaffirmed the principle that in tax matters as elsewhere the courts should look to the realities of the situation and call a transaction what it is and nothing more. Under the impact of such a philosophy the *Hirsch* doctrine will be more widely recognized for the device that it is—and discarded. This is not to say that legitimate reductions of purchase price will no longer be given the tax treatment they deserve. Despite *Jacobson* there will continue to be compromises of debts in the nature of bona fide gifts. So too there will continue to be bona fide tax free reductions in purchase price. But there will also be taxable reductions of debts relating to purchase price. They should not, and, as time moves on, are less likely to be confused.

"Section X119 (a) . . . There may be excluded from gross income all or part of the amount of any income from cancellation of indebtedness . . . if the taxpayer files a consent to the reduction of the basis of any property held by the taxpayer. . . ."[56]

To say that, absent a bona fide gift or a true reduction of purchase price resulting from negotiations between vendor and vendee directly related to the price, a satisfaction of a mortgage debt for an amount less than its face value results in taxable income to the mortgagor-debtor is not, however, to answer the practical problem that the taxable event may and often does occur at a time when the mortgagor is least able to pay the tax. Congress has, of course, long since supplied a solution in the case of corporate taxpayers where the indebtedness is represented by securities: the taxpayer may elect not to pay the tax realized on the compromise of indebtedness but instead may elect to reduce by the amount of the compromise the basis of its property.[57] The proposed

55. 336 U.S. 28, 30 (1949).
56. *Tentative Draft No. 4* at 27.
57. INT. REV. CODE §§ 22 (B)(9), (10) and 113(a)(3).

statute would extend this privilege to the non-corporate taxpayer and in the case of the corporation eliminate the securities limitation.

While Congress has not yet so extended such a relief provision, the fact that in the Revenue Act of 1951, it has converted its present provision from a temporary to a permanent status[58] indicates a recognition of merit therein. There is, of course, much to be said for the proposed extension so far as it affects the mortgagor who compromises his debt for cash while retaining his property.[59] It results, at the option of the taxpayer, in the same practical effect (laying aside for the moment the question of the character of the gain on which the tax is ultimately paid) sought by and attained through the *Hirsch* doctrine since under the latter theory a "reduction in purchase price" would be reflected in a reduced basis—and it achieves this result without doing violence to either reality or principle.

In this connection, however, one fact must be borne in mind: that the sole purpose of such an option is the postponement of the tax. This should, therefore, be its only effect. Where the taxpayer realizes gain through payment of a mortgage debt at less than its face value it is ordinary gain.[60] Yet if the property mortgaged is a capital asset or if it is used in the taxpayer's trade or business and on disposition there is net gain, the gain will receive capital gain treatment.[61] If the exercise of the option involved nothing more than a reduction of the basis of the property by the amount of the debt compromised, the taxpayer could at will convert an ordinary gain on cancellation into a capital gain on disposition.

The proposed statute would meet this problem in part by varying the amount of reduction and in part by providing that where the debt was incurred in connection with the purchase of a capital asset or was secured throughout its entire existence by a capital asset, the gain from reduction of indebtedness should be considered a capital gain.[62] Such treatment

58. Revenue Act of 1951, § 304(a).

59. The proposed statute would permit exercising the option to defer payment of the tax even where the debt cancellation involved a disposition of the property, and indeed, even though the taxpayer has no other property the basis of which might be reduced. Such an extension would appear to be unnecessary to the goal of uniformity in tax treatment of the more common transactions resulting in the reduction of mortgage indebtedness.

60. I. T. 4018, I. R. B. 1950-15.

61. Int. Rev. Code § 117j.

62. Section X117 states: "Income from cancellation of indebtedness resulting under section X116 shall be treated as capital gain wherever such indebtedness was incurred or assumed under any of the following circumstances: (a) On the acquisition of a capital asset; or (b) For money—(1) which is used to acquire a capital asset which becomes security for such indebtedness, or (2) where the full amount of the indebtedness is secured at its inception by a capital asset owned by the taxpayer, and such an asset continues

of the gain, however, is not suggested because of the nature of the gain nor because of basic principles, tax or otherwise. It is proposed primarily because it produces a desirable mathematical effect where the transaction resulting in cancellation involves the disposition of a capital asset.[63] No other reason is offered for its application in the case of a cash settlement of the debt than that of uniformity.

While the suggested treatment does give the same result where the taxpayer who compromises his debt pays the accruing tax immediately that would obtain if he elected to reduce the basis of the mortgaged property where the latter is a capital asset, such a proposition should be approached with marked caution. Unless we are again to accept the *Hirsch* theory of a reduction in purchase price, there would seem to be little justification, merely because the mortgaged property was a capital asset, in considering gain from reduction of indebtedness as a capital gain. Whatever plausibility may adhere to the idea where the mortgagee is the vendor fades when the mortgagee is a third party lender—and vanishes when the debt has no relation to the purchase of the property. Such a proposal involves discriminatory treatment among mortgagor-taxpayers. If what appears to be a reduction in indebtedness is in fact a reduction of purchase price resulting from negotiations between the vendor and vendee directly relating to the purchase price, (the requirements laid down by the Court of Appeals for the Second Circuit in *Fifth Avenue-Fourteenth Street Corp.*),[64] then no taxable event has occurred and no special treatment is necessary in regard to the reduction of basis or to the character of gain resulting on ultimate disposition. If these requirements are not met and the compromise constitutes a taxable reduction of a debt, then as yet no sound reason has been offered why the income resulting should be ordinary income to one but capital gain to another merely because of the fortuitous fact that the nature of the security differs. It should further be noted that the proposal does not harmonize immediate payment of the tax on accrual with postponement until disposition of the property where the latter, though not a capital asset, is used in trade or business and thus given capital gain treatment under Section 117j of the Internal Revenue Code—the essential provisions of which are included, though reluctantly, in the proposed law as Section X230.

Rather than multiplying fiction by treating as capital gain that which

as security for the indebtedness up to the time of cancellation; or (c) In exchange or substitution for an indebtedness of the type described in (a) or (b) above." *Tentative Draft No. 4* at 26.

63. *Tentative Draft No. 4* at 189.

64. See Fifth Avenue-Fourteenth Street Corp. v. Commissioner, 147 F. 2d 453, 457 (2d Cir. 1944).

is by its nature ordinary gain, consideration might well be given to the possibility of providing that, to the extent that an ordinary gain has been derived from a cancellation of indebtedness, a loss on disposition of the mortgaged property, otherwise recognizable only as a capital loss, shall be recognized as an ordinary loss, and that a gain, although otherwise treated as a capital gain, to the extent that it represents a gain from a cancellation of indebtedness shall be considered as an ordinary gain.

"Introductory Comment 2. . . . Where a debt is settled with property, the provision specifying the amount of cancellation income that is realized limits it to the segment of gain that is true cancellation income, represented by the excess of the face amount of the debt over the fair market value of the property conveyed in settlement. The difference between the basis of the property and its fair market value is left to be treated as gain or loss on the disposition of the property."[65]

Should mortgaged property constituting a capital asset decrease in value below both basis and the debt, and the mortgagor then sell the property and turn the proceeds over to the mortgagee in cancellation of his indebtedness, he would realize a capital loss on the sale and ordinary gain on the cancellation. With real property used in trade or business a similar result would obtain except that the loss would be ordinary as well as the gain. And, of course, the tax consequences are no different if the mortgagor first compromises his debt for cash and later sells the property. Where, however, he has permitted the mortgagee to foreclose or has surrendered the property to the mortgagee in cancellation of the indebtedness the gain has been held to be a capital gain.[66]

It is obvious that where the mortgagee at a foreclosure sale accepts the property, when worth less than the debt and the mortgagor's basis, in full satisfaction of the debt, foregoing to procure a deficiency judgment, the mortgagor has realized taxable gain from the cancellation of his indebtedness just as in the case of a cash compromise. That a different result should obtain merely because of the form of the transaction stems from the fact that in *Helvering v. Hamel*,[67] the Supreme Court in 1941 held that a foreclosure sale is a sale under Section 111 of the Internal

65. *Tentative Draft No. 4* at 162. Section X116 provides in pertinent part that the "amount of the consideration for a cancellation of indebtedness shall be the . . . amount included under section X 203(b) in the amount realized by the taxpayer in computing gain or loss in respect of any other property of the taxpayer as a result of the discharge of . . . the cancelled indebtedness. Such amount is . . . (B) the value of such other property, under section X 203 (b) (1)." *Tentative Draft No. 4* at 24.

66. R. O'Dell & Sons Co. v. Commissioner, 169 F. 2d 247 (3d Cir. 1948); Mendham Corp., 9 T. C. 320 (1947); Woodsam Associates, 16 T. C. 649 (1951).

67. 311 U. S. 504 (1941).

Revenue Code. Lower courts thereafter applied the same reasoning to transfers of the mortgaged property in lieu of foreclosure where the ultimate result of the transaction was a loss.[68] When, in 1943, the first case arose in which the mortgagee accepted the property in cancellation of the remaining indebtedness, the Tax Court in *Lutz & Schramm Co.*[69] found no difficulty in conforming to the theory of these decisions. The court took the position that the market value of the property was immaterial; that the question was not whether the taxpayer realized income from the discharge or forgiveness of indebtedness but rather whether gain was realized from the disposition of property. From this it was necessarily found that the taxpayer realized gain in the difference between his adjusted basis and the amount of the debt. This approach has since been uniformly followed in case of foreclosure in *R. O'Dell & Sons v. Commissioner*,[70] *Mendham Corp.*,[71] and *Woodsam Associates*,[72] as well as in *Parker v. Delaney*,[73] where the property was surrendered.

Such a solution while simple and plausible ignores the fact that we are here dealing with an atypical kind of gain, that the difference between the value of the property at the time of surrender or foreclosure and the amount of the debt is gain from a cancellation of indebtedness. Despite the position adopted in *Lutz & Schramm Co.*, the realistic approach demands the recognition that there is involved both a sale or disposition and a reduction of indebtedness. If we accordingly separate the transaction into its elements, they resolve into a loss equal to the difference between the adjusted basis of the property and its then market value, and a gain equal to the difference between the market value of the property and the amount of the debt. The net gain then would be the difference between the gain on cancellation and the loss on disposition. This is the solution of the proposed statute and there is much to commend it. It more accurately reflects what is happening and it brings into harmony the several methods of satisfying indebtedness for less than face value. There would seem, furthermore, to be no irreconcilable conflict with *Hamel*. The problem of debt cancellation was not before the court in that case and the proposed approach does in fact acknowledge that the foreclosure or surrender is a sale or disposition under

68. Rogers v. Commissioner, 103 F. 2d 790 (9th Cir.), *cert. denied*, 308 U. S. 580 (1939); Wieboldt v. Commissioner, 113 F. 2d 384 (7th Cir. 1940). For a criticism of the Rogers case see Randolph E. Paul, *Federal Income Tax Problems of Mortgagors and Mortgagees*, 48 YALE L. J. 1315, 1324 (1939).

69. 1 T. C. 682 (1943).

70. 169 F. 2d 247 (3d Cir. 1948).

71. 9 T. C. 320 (1947).

72. 16 T. C. 649 (1951).

73. 186 F. 2d 455 (1st Cir. 1950), *cert. denied*, 341 U.S. 926 (1951).

Section 111. It merely involves the further recognition that in that sale there is no gain but a loss; that the gain results from cancellation of the indebtedness.

There would, of course, be no difference in the end result between the approach of *Lutz & Schramm Co.* and that proposed were it not for the capital loss treatment in the sale of capital assets and the capital gain treatment in the sale of both capital assets and of those coming within the scope of Section 117j. Since the gain from cancellation of indebtedness is and should be considered ordinary gain the present approach therefore results in discriminatory tax treatment in favor of the mortgagor who chooses to let his property go to the mortgagee in either surrender or foreclosure rather than compromising his debt with cash while retaining his property. It is difficult to find justification for this, and as noted previously in the discussion of postponement through reduction of basis, any possible injustice resulting to the mortgagor of a capital asset may be eliminated by appropriate treatment of the loss on disposition.

"Section X115 (a) (1) . . . the term 'indebtedness' applies . . . to an obligation—(B) which constitutes a burden on particular property of the taxpayer to pay a sum certain in money, carrying no personal liability of such taxpayer to pay such sum."[74]

The final question to be considered relates to the extent to which the position of the proposed statute that the existence of personal liability is immaterial to the realization of taxable income through cancellation of indebtedness is in conflict with present case law.

Two early cases are associated with the idea that absent personal liability no income results to an owner of real estate upon compromise of mortgage indebtedness. That conclusion was reached by the Board of Tax Appeals in *American Seating Co.*[75] with a minimum of thought. In *Fulton Gold Corp.*[76] it was held that the lack of personal liability took the case out of the rule of *Kirby* and *American Chicle Co.;* that the mortgagor did not liquidate a personal debt but merely satisfied an encumbrance on property in which it had an equity; that there was no release of assets previously offset by the obligation of the maker of the notes.

In *Fifth Avenue-Fourteenth Street Corp.*, the Court of Appeals for

74. *Tentative Draft No. 4* at 21.

75. 14 B.T.A. 328 (1928), *modified without discussion of this point,* 50 F. 2d 681 (7th Cir. 1931).

76. 31 B.T.A. 519 (1934). See also Hotel Astoria, Inc., 42 B.T.A. 759 (1940); P. J. Hiatt, 35 B.T.A. 292 (1937).

the Second Circuit, in 1944, agreed in dicta[77] that if a taxpayer compromises a mortgage subject to which he purchased the property he realizes no income but merely reduces the purchase price. One year later the same court in the *Crane*[78] decision expressed the opinion that abandonment to the mortgagee in lieu of foreclosure would likewise result in no gain to a mortgagor who had no personal liability.[79] And as late as 1949 the Tax Court reaffirmed its adherence to the proposition.[80]

In 1946, however, the Court of Appeals for the Sixth Circuit, decided the case of *Central Paper Co.*[81] and found taxable income where a taxpayer, not liable on convertible trustee's certificates, but whose property was pledged to secure payment thereof, acquired for less than par value some certificates, exchanged them for its preferred shares held by the trustees at par for par, and cancelled the shares. The court said that for all practical purposes they were the obligations of the taxpayer; it had put in pledge part of its assets and each purchase at a discount resulted in a corresponding increase of avialable assets. It was, therefore, concluded that, irrespective of the absence of an express promise to pay, the case fell within the rule of the *Kirby* decision.

Later cases on sale, abandonment and foreclosure have likewise reflected the development of a judicial concept of the relation between the non-liable mortgagor, the property and the debt which is difficult to harmonize with the position of *Fulton Gold Corp.* So in the *Crane* case, the Court of Appeals for the Second Circuit, despite its dicta on the result of abandonment, expresses the view[82] that the mortgagee is a creditor even though recourse can be had only to the land and that upon making to the vendee an allowance of the amount of the mortgage, the mortgagor secures a release from the charge on the property. In the

77. *See* Fifth Avenue-Fourteenth Street Corp. v. Commissioner, 147 F. 2d 453 (2d Cir. 1944).

78. Commissioner v. Crane, 153 F. 2d 504, 506 (2d Cir. 1945). For a critical analysis of this proposition see Note, 49 COL. L. REV. 845, 850 (1949).

79. Stanley Co. of America v. Commissioner, 12 T.C. 1122 (1949), *rev'd on other grounds*, 185 F. 2d 975 (2d Cir. 1951).

80. A distinction between the liable and non-liable mortgagor in at least one situation involving cancellation of indebtedness is contemplated by the Supreme Court in its 37th footnote to the *Crane* opinion, wherein it states: "Obviously, if the value of the property is less than the amount of the mortgage, a mortgagor who is not personally liable cannot realize a benefit equal to the mortgage. Consequently, a different problem might be encountered where a mortgagor abandoned the property or transferred it subject to the mortgage without receiving boot. That is not this case." *Crane v. Commissioner*, 331 U.S. 1, 14 (1947). Such a distinction had not, however, been recognized in the previously decided case of Lutz & Schramm Co., 1 T. C. 682 (1943), and was rejected in the later case of Woodsam Associates, 16 T. C. 649 (1951).

81. Central Paper Co. v. Commissioner, 158 F. 2d 131 (6th Cir. 1946).

82. Commissioner v. Crane, 153 F. 2d 504, 506 (2d Cir. 1945).

same case the Supreme Court,[83] holding that a non-liable mortgagor realizes, on a sale subject to the mortgage, a benefit in the amount of the mortgage, says that it is concerned with the reality that as owner the mortgagor must and will treat the conditions of the mortgage exactly as if they were his personal obligation; that on a transfer subject to the mortgage, the benefit to him is as real and substantial as if the mortgage were discharged.

The early cases of surrender by a non-liable mortgagor to the mortgagee were instances where the mortgagor suffered a loss and it was held that such a transaction was neither a sale nor exchange since there was no release from personal liability.[84] The problem of gain by a non-liable mortgagor through surrender came squarely before the Tax Court in 1943 in the case of *Lutz & Schramm Co.*[85] There the petitioner had no personal liability on a mortgage given in connection with a loan. At the time of the surrender the debt exceeded the adjusted basis of the property which in turn was greatly in excess of the market value. As noted above the court avoided the entire problem of cancellation of indebtedness and found taxable income resulting from the disposition of property. Since the debt was $300,000, the court reasoned that this was the amount the taxpayer had received in the transaction—even though the property was when surrendered worth but $97,000.

This approach to the problem of the non-liable mortgagor was followed by the Court of Appeals for the First Circuit in deciding the case of *Parker v. Delaney*[86] in 1950. There the taxpayer took title to property subject to existing mortgages—the only consideration involved. Later he quit-claimed the property to the mortgagee. It was held that the taxpayer realized gain from the disposition of property regardless of whether the transaction be considered an abandonment rather than a sale. The court, however, went a step further and stated that by the surrender the property in the hands of the taxpayer was relieved of the mortgage liens and obligations and that so far as he was concerned as owner these were paid, even though he had no personal liability for them.

The question of gain resulting to a non-liable mortgagor where the debt is cancelled in conjunction with foreclosure proceedings was presented to the Tax Court in *Mendham Corp.*[87] and in *Woodsam Associates*,[88] the latter decided in 1951. Taxable income was again found to arise, not as a result of reduction of indebtedness, but in transactions involving a

83. Commissioner v. Crane, 331 U.S. 1, 14 (1947).

84. Polin v. Commissioner, 114 F. 2d 174 (3d Cir. 1940); Stokes v. Commissioner, 124 F. 2d 335 (3d Cir. 1941).

85. 1 T. C. 682 (1943).

86. 186 F. 2d 455 (1st Cir. 1950), *cert. denied*, 341 U. S. 926 (1951).

87. 9 T. C. 320 (1947).

88. 16 T. C. 649 (1951).

disposition of property. The ultimate significance of these decisions is obscured by the fact that in each case the taxpayer had obtained the property in a tax free exchange and the court felt, therefore, free to treat it as though it had itself received and benefited from the loans involved—an assumption of importance in view of the fact that the court conceived the gain to the taxpayer to be the difference between the adjusted basis of the property and the amount the taxpayer acquired in the earlier borrowing.

A broader approach to the tax position of the non-liable mortgagor in foreclosure proceedings, however, appears in the court's reaction to certain contentions of the taxpayer in the *Woodsam* case. There the property had been mortgaged in excess of its value and at the time of foreclosure the value was less than the remaining debt. The court dismissed the argument of the petitioner that mortgaging without personal liability is a sale of but a lien with the result that no debt is created, by referring to the comment of the Court of Appeals for the Second Circuit in the *Crane* case, noted above, that the mortgagee is a creditor even though he has recourse only to the property. Again it rejected petitioner's contention that a non-liable mortgagor cannot on a foreclosure realize a gain in excess of the market value of the property where the latter is less than the debt.[89] True this rejection was predicated on the theory that the entire gain resulted from a disposition of the property in which case the market value is not one of the variables, but it is, nevertheless, a rejection of a concept which would differentiate between mortgage debtors on the basis of personal liability.[90]

Conclusions

The proposed statute, insofar as it would contravene the *Hextell* application of the *Kerbaugh-Empire* doctrine and find taxable income in a cash reduction of mortgage indebtedness notwithstanding an offsetting decline in value of the property involved, would seem to be in accord with the trend of present judicial thought as well as with the sound

89. Concerning the *Crane* footnote quoted in note 80 *supra*, the court here says that it is apparent that the Supreme Court intended to reserve its views on the situation where the mortgage was foreclosed and then states: "If the footnote from the Crane case rise above the status of dictum, we are unable to conclude that it is of any application, at least in circumstances such as those here present where the entire rationale must be dependent upon the concept of basis and realized gain on foreclosure." Woodsam Associates, 16 T. C. 649, (1951).

90. Attention is invited also to the pertinent observation of Professor Surrey on the Fulton gold case: "But as the debt to which the property was subject became part of the purchaser's cost basis, it is not so clear that the case can be distinguished from one involving a personal liability." Surrey, *supra* note 17, at 1169-70.

principle of predicating gain or loss from appreciation or shrinkage on a final disposition. There remains, however, a distinct possibility of the resurgence and revitalization of the *Kerbaugh* theory should an appropriate fact situation come before the Supreme Court as presently constituted.

In rejecting the *Hirsch* formula of viewing a reduction of indebtedness as a tax-free reduction in purchase price where the value of the property at the time of settlement is not in excess of the adjusted debt, the proposed statute would appear not only to reflect a growing body of considered judicial opinion but also to have taken a position essential to the placing of taxation of debt reduction on a uniform, non-discriminatory and realistic basis. Should such a provision become law, however, jurists must be alert to discover and distinguish the rare but true case of reduction of purchase price.

The suggestion that the essential provisions of Sections 22(b)(9) and 113(b) (3) of the Internal Revenue Code be extended to provide that all mortgagor-debtors who compromise their debts while retaining the property may elect in lieu of then paying the tax to have the basis of the property reduced in an amount equal to the gain realized is a wise one. It makes possible the *Hirsch* result without resort to subterfuge and permits the taxpayer to postpone the taxable event until such time as the gain from cancellation may properly be offset by a diminution in value. The advisability of the ancillary proposal, however, that certain gains from reduction of indebtedness be considered capital is not so evident and, in lieu thereof, consideration might be given, in the case of capital assets, of more appropriate and integrated treatment of losses on disposition.

The proposed resolution of the surrender or foreclosure transaction resulting in cancellation of indebtedness into its components of loss on disposition and gain on reduction represents a distinct advance in the development of a realistic and uniform plan of treatment of debt reduction. It should involve the recognition of such gain as ordinary gain in this situation as in the case of a cash compromise and eliminate differences in tax results based purely on the form of transaction. Inequities which would result in the case of capital assets may be avoided, as suggested above, by suitable treatment of losses.

Finally, it would seem that the proposal of the Institute to consider immaterial the personal liability of the mortgagor is a reflection of the more recent judicial attitude toward the non-liable mortgagor and the debt encumbering his property, and would, therefore, appear but to be anticipating the position toward which the case law is presently tending.

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