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A notable feature of the contemporary tax scene is a commendable desire for improvements in the law. In some areas, however, the reformist zeal seems wedded to an unconcern for, if not unawareness of, the obstacles to be overcome. An example in point[1] is the current concern for the divorced wife who receives a settlement (nobody, of course, is bothered about the divorced wife who gets nothing), which is particularly noteworthy in view of the Internal Revenue Commissioner's chivalrous action in championing her cause. It is unlikely, of course, that divorced wives will complain about this solicitude. But we should not therefore overlook the general undesirability of the Commissioner taking it upon himself to exempt from tax one of the parties to a certain type of transaction without any apparent authority other than his "say so." Since the Commissioner's ruling has been applauded by Professor Schwartz, at least so far as common law jurisdictions are concerned,[2] I shall use his arguments as a basis for demonstrating the dubious nature of the ruling.

In *United States v. Davis*,[3] the Supreme Court held, *inter alia*, that a transfer of property by a former husband to his former wife pursuant to a pre-divorce settlement incorporated in the divorce decree was a realization of gain to the husband in the amount by which the fair market value of the property exceeded his basis; that the "property received" by the husband was the release of the wife's inchoate marital rights; and that the marital rights released should be deemed to be of the same value as the property transferred. By way of dictum, the Court added that the wife's basis for the property received would be its fair market value. The Commissioner then generously announced in Rev. Rul. 67-221[4] that the wife in the *Davis* situation realized no gain or loss.

The marital rights involved in *Davis* included (1) a right of intestate succession, (2) a right upon divorce to a reasonable share of the husband's property, and (3) a dower right in the hubsand's realty.[5] Rev. Rul 67-221, on the other hand, mentions only dower. Since nothing of any significance for present purposes turns on the substantive distinctions between dower and (1) and (2) I shall speak only of dower or marital property rights, treating the two expressions as synonyms.

If we assume that the divorced (or about-to-be-divorced) wife (hereafter *W*) can be a separate taxpayer and that the receipt of property of

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1. Another is discussed in Mullock, *The Constitutional Problem of Taxing Gifts as Income*, 53 MINN. L. REV. 247 (1968).

2. Schwartz, *Divorce and Taxes: New Aspects of the Davis Denouement*, 15 U.C.L.A. L. REV. 176 (1967) [hereinafter cited as Schwartz].

3. 370 U.S. 65 (1962).

4. 1967-2 CUM. BULL. 63.

5. 370 U.S. 65, 70 (1962).

itself is a realized gain,[6] then the relevant alternatives in the case of *W* are as follows:

(i) she should not be taxed at all;
(ii) she should be taxed on the entire market value of the property received;
(iii) she should be taxed on something less than the entire market value.

If (i), the position of Rev. Rul. 67-221 and Professor Schwartz, is to be accepted then it must be shown either

(a) that the receipt by *W* of property itself is not a realized gain; or
(b) that the transaction is, for tax purposes, no more than a non-taxable division of property; or
(c) that the value of what *W* received is merely a recoupment of capital; or
(d) that *W* received a gift or the equivalent of an inheritance; or
(e) though neither (a), (b), (c) nor (d) applied, that there are policy reasons having nothing to do with (a), (b), (c), or (d) which justify not levying a tax on *W*.[7]

6. The doctrine of realization refers to what has been called the economic objectivity of income [*see* Lowndes, *Current Conceptions of Taxable Income*, 25 OHIO ST. L.J. 151 (1965)] which denotes an event or transaction measurably changing the taxpayer's economic position in a way that can be routinely handled by officials. Eisner v. Macomber, 252 U.S. 189 (1920); Helvering v. Bruun, 309 U.S. 461 (1940); Helvering v. Horst, 311 U.S. 112 (1940). Basically the doctrine is concerned with whether there is an adequate gain to sustain the tax sought to be levied. This seems to be recognized by the Court in *Davis* when it states: "We now turn to the threshold question of whether the transfer in issue was an appropriate occasion for taxing the accretion to the stock. There can be no doubt that Congress . . . [in section 61(a) INT. REV. CODE OF 1954, hereinafter referred to only by section] intended that the economic growth of this stock be taxed." 370 U.S., at 68. The Court then continued: "The problem confronting us is simply *when* is such accretion to be taxed. Should the economic gain be presently assessed against [the husband] or should this assessment await a subsequent transfer of the property by the wife?" 370 U.S., at 68. The word "when" usually signifies a mere timing or tax accounting problem. What the Court means here, however, is that it must decide whether the transaction should be treated

a) as the satisfaction by the husband, with appreciated property, of a legal claim of the wife, which would result in the accretion being taxed to the husband now; or
b) as a gift to the wife which, by reason of section 1015, would result in the accretion being taxed if at all on a subsequent (taxable) disposition of the property by the wife; or
c) as some sort of non-taxable division of property.

A realized gain is taxable *unless* there are reasons having nothing to do with the problem of realization which justify not taxing the gain. *See* Mullock, *Current Conceptions of Taxable Income*, 26 OHIO ST. L.J. 43 (1965).

7. Since the Supreme Court has told us that the word "incomes" in the Sixteenth Amendment is used in its ordinary language sense, Eisner v. Macomber, 252 U.S. 189, 206-07 (1920), and since Congress has stated that the word "income" in section 61(a) is used in the Sixteenth Amendment sense, S. Rep. No. 1622, 83d Cong. 2d Sess. 168 (1953), one valid ground for excluding a realized gain from section 61(a) would be that it did not come within the ordinary language meaning of the word "income." But in view of the fact that the wife in *Davis* could not be said to have received either a gift or an inheritance (*see* text at note 50 *infra*), there does not seem to be much of a case for arguing that what she received did not come within the ordinary meaning of income. Regarding the ordinary language aspects of income, *see* note 1, *supra*.

Rev. Rul. 67-221 adopts (i) without giving any reasons therefor. Professor Schwartz adopts (i) for reasons essentially falling under (b). And though his reasons are put forward as fundamentals of the tax law, it seems as though he also believes (e) to be the case, almost self-evidently. His argument in favor of (i) (b), for common law jurisdictions, is as follows:

> 1. Assume that the family's assets consist of the following, all of which, under state law, are deemed to be the property of the husband with respect to which his wife has certain marital property rights:
>
> | | Value | Basis |
> |---|---|---|
> | Cash | $10,000 | $10,000 |
> | 1,000 shares XYZ Corp | 80,000 | 50,000 |
> | Other assets | 90,000 | 20,000 |
> | Total | $180,000 | $80,000 |
>
> It is agreed by the parties that, in satisfaction of the wife's marital property rights, she will receive the $10,000 cash and the *XYZ* stock, worth $80 per share and having a basis to the husband of $50 per share.[8]
>
> 2. According to Revenue Ruling 67-221, the wife has neither gain nor loss as a result of the division in the *Davis* type of case, and she obtains a basis for the property received equal to its fair market value as of the date of transfer. These conclusions confirm what the Supreme Court in *Davis* assumed (without deciding) would be the consequences to her. Moreover, on close analysis, they are the inevitable results flowing from the Court's decision in that case and the rationale underlying it.[9]
>
> 3. Some have suggested that, in terms of the facts [above] assumed, the wife ought to have a taxable gain of $90,000 when she relinquishes marital property with a zero (or at least no provable) basis in return for $10,000 cash and property worth $80,000. The fallacy of such a suggestion is apparent when one bears in mind the context in which the alleged "gain" arises —the mere division of the family's wealth—and reflects upon certain fundamentals concerning the federal income tax.[10]
>
> 4. In the first place, the marital property rights relinquished are rights which are disregarded for income tax purposes—the property to which they relate is treated as solely the property of the husband. Hence, if any gain or loss is to be realized with respect to that property at the time of the division, under familiar tax principles he (as the owner of the property)—not she —should realize it. Moreover, to tax the wife upon her receipt of a part of the property would have the anomalous effect of

8. Schwartz, note 2 *supra*, at 177.
9. *Id.* at 181.
10. *Id.*

subjecting to tax more than the *total* amount of gain to be taxed with respect to the *entire estate*. For example, under the facts which have been assumed, the total amount of gain which ought ever to be taxed is $100,000 (the difference between the estate's total value and the basis of the various assets). The husband, according to *Davis*, realizes $30,000 of that $100,000 when he transfers the *XYZ* stock to the wife. The remaining $70,000 will eventually be realized by him or by his gratuitous transferee (unless basis is stepped-up at death under section 1014). Thus, to tax the wife *at all* would be *improper*.[11]

5. Finally, to contend that, unrelated to the accretion in the value of the estate, the wife has $90,000 "income" is to neglect taking cognizance of what the income tax is all about. In general, it is a tax on the net increase in one's wealth as the result of his or her commercial, profit-seeking ventures. Neither marriage nor the division of the family's property is such. The mere fact that, in terms of the "ownership" of the property, the wife is "richer" by $90,000 after the division than before is no more a taxable gain by her than is the same degree to which the husband is "poorer" a deductible loss by him. The $90,000-worth of changed ownership is a matter beyond the proper scope of the income tax, which, traditionally, has been held inapplicable to the economic benefits shifted to the wife by reason of the dissolution of the marriage.[12]

The argument, it will be noted, purports to be a "close analysis" based upon "certain fundamentals concerning the federal income tax law" designed to show that Rev. Rul. 67-221 is "the inevitable result of the Court's decision in *Davis* and the rationale underlying it."[13]

If Professor Schwartz's first point that "the marital property rights relinquished . . . are disregarded for income tax purposes"[14] is intended as a general proposition of the tax law, it is just not true. Consider, *e.g.*, *Farid-el-Sultaneh v. Commissioner*[15] (which one commentator has stated was cited with approval in *Davis*.)[16] There the issue was *W*'s basis for

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11. *Id.*

12. *Id.* at 182.

13. Note 9 *supra* and accompanying text.

14. Note 11 *supra* and accompanying text. As authority Prof. Schwartz cites a passage in *Davis* wherein the Court points out that the wife's marital property rights were merely an encumbrance on the husband's property, and that while the satisfaction of her claim "may ultimately result in the ownership of some of the husband's property . . . this happenstance does not equate the transaction with a division of property by co-owners." 370 U.S. at 70-71. He also cites sections 2034 and 2043(b) of the estate tax statute. Just how these citations support the proposition that "the marital property rights [of *W*] . . . are disregarded for income tax purposes" is not clear. And as pointed out in the text accompanying this note, the fact that the property which *W*'s rights encumber is treated solely as the property of the husband (because he owns it) is hardly a good reason for arguing that therefore *W*'s rights are disregarded for income tax purposes.

15. 160 F.2d 812 (2d Cir. 1947).

16. *See* H. RUDICK, TAX CONSEQUENCES OF MARRIAGE AND ITS TERMINATION 22, 142-43 (1967) [hereinafter cited as RUDICK].

computing gain on the sale of property acquired under an ante-nuptial contract, and was seen to turn on whether *W* took the property as donee or purchaser. Although the question of whether *W* had an income tax basis for the claim rights used to "purchase" the property did not arise, it can hardly be said that her rights were "disregarded." What Professor Schwartz may mean is that any disposition of family property owned entirely by the husband can produce tax consequences for him only, and in a footnote Professor Schwartz adds that this clearly would be the case if during marriage the property were sold and the husband and wife filed separate returns.[17]

Now it is, of course, true that *W*'s dower rights (which is what Rev. Rul. 67-221 deals with) are parasitic upon the husband's real estate. But the fact that only the husband is or should be taxed upon a disposition of his underlying real estate is quite irrelevant to the question dealt with in Rev. Rul. 67-221, *i.e.*, what are (not "ought to be") the income tax consequences to *W* when she releases her dower rights in that property. That a claim—any claim—against the husband's estate must of necessity be satisfied out of that estate in no way requires that the claimant cannot for income tax purposes realize gain or loss on the satisfaction of the claim. Nothing in the income tax law is designed to put pre and post divorce arms-length dealings between spouses and former spouses in a privileged position, though this is *not* to say that they should *not* be so treated. In fact, when dealings between spouses are singled out for special attention under the tax law, it is because their arms-length credentials are suspect;[18] but in *Davis* the Court emphasized that the parties had dealt at arms-length.[19] Professor Schwartz's first "fundamental" clearly offers no good *income tax law* reason why only the husband should realize a gain (or loss) when a claim of *W* against the husband is settled in an arms-length transaction. Moreover, the fact that *W* in the *Davis* situation is deemed to take the property as purchaser is inconsistent with labeling the transaction as a mere division of family property. And even though *W* does take the property as purchaser,[20] this does not require that she should be treated as a purchaser for cash, *i.e.*, the detriment to *W* (relinquishment of a claim with no or a zero basis) should not be treated as equivalent to a cash payment to the husband. No doubt, so far as the tax consequences to the husband are concerned, we can say it is *as if* he had sold the property and paid the proceeds over to *W*, but surely not as if he had sold the property to *W* for cash.

On the facts of our hypothet, however, it would be both anomalous and improper, argues Professor Schwartz, to tax *W* on *anything*.[21] This is merely an inference Professor Schwartz draws from his point that since

17. Schwartz, *supra* note 2, at 181 n.32.
18. *See, e.g.*, INT. REV. CODE OF 1954, §§ 267, 1239.
19. *See* 370 U.S. at 72.
20. *See* RUDICK, *supra* note 16.
21. *See* point 4 of Prof. Schwartz's argument, *supra* note 11 and accompanying text.

the husband owns all the property only he should be taxed on the gain realized on its disposition. Since an inference is false if its premise is true and its conclusion false, if we can falsify Professor Schwartz's conclusion while granting his premise, we shall have falsified his inference.

As long as the marriage continues it is true that any gain realized on a disposition of the family property will be realized (in our hypothet) by the husband, regardless of whether joint or separate returns are filed. Divorce will not change this; any gain realized on a disposition of the family property will still be realized by the husband. But once the parties are divorced it is no longer true that there is just one (family) estate totaling $180,000 in value, because there is now an ex-husband with an estate of $90,000 net and an ex-wife with an estate of $90,000. The fact that *W*'s $90,000 is still parasitic on the husband's $180,000 of assets is no longer a relevant factor, for she now has a full-fledged legal claim based on the settlement which is worth $90,000; if she dies before the settlement is effected, her estate will surely include as an asset the claim against the husband's estate. It is true that any gain realized on a taxable disposition of property owned by the husband will be taxed to the husband. But, as a matter of tax law, it is false that it would be improper to also tax *W* when that disposition satisfies a legal claim of *W* against the husband[22] simply because the husband is taxed.

The second fundamental offered by Professor Schwartz goes to "what the income tax is all about."[23] "In general, he says, "it is a tax on the net increase in one's wealth as the result of his or her commercial, profit-seeking ventures."[24] Although this will, of course, pass as a broad and rough generalization, it is singularly inapt in what is put forward as a "close analysis."[25] Yet it is used by Professor Schwartz as the major premise in support of a conclusion that the (divorce-induced) division of the family's property is not a taxable event, the minor premise of the argument being that the division of the family's property is not a commercial, profit-seeking venture. Here the argument obviously is vitiated by the falsity (through over-generalization) of its major premise; though a commercial, profit-seeking venture is often sufficient, it is not a necessary condition for taxability. Moreover, if the divorce-induced division of the family's property is not to be a taxable event, it is difficult to see why only the wife should benefit from such a rule. Yet it is nowhere suggested by Professor Schwartz that the husband should not be taxed in the *Davis* situation; rather, he believes that when the husband owns all the family

22. Indeed, if *W* released her marital rights in consideration for the husband's funded promise to transfer property to *W* in the future, a case could be made for taxing *W* before the property was transferred to her. And if the husband then died one second before the agreed time of transfer, the appreciation in value of the property transferred would not be taxed to him at all.

23. Note 12 *supra* and accompanying text.

24. *Id.*

25. *See* note 9 *supra* and accompanying text.

property, taxability of the husband requires non-taxability of the wife, and probably the converse as well.

Professor Schwartz's position, then, is that *W* should not be taxed because the transaction is a mere (divorce-induced) division of family property, and he states (above) that Rev. Rul. 67-221 "confirm[s] what the Supreme Court assumed (without deciding) would be the tax consequences to [*W*]."[26] But the Court does state, in a footnote on the page referred to by Professor Schwartz, that "[u]nder present administrative practice, the release of marital rights in exchange for property . . . is not considered a taxable event [so far as *W* is concerned]."[27] This statement is presumably made, in view of the references there given,[28] because of the problem of determining an income tax basis for the claim released by *W*. It cannot be said, however, that the Court assumed that *W* should not be taxed because the transaction was a mere division of family property. In fact, the Court stated that while it would not be "completely illogical to consider the shearing off of the wife's rights in her husband's property as a division of that property . . . we believe the contrary to be the case."[29] As the footnote indicates, it is *W*'s basis problem that is regarded by the Court as the justification for not taxing her,[30] a fact which brings us to (i)(c) (*W* not taxed as she receives merely a recoupment of capital) and (ii) (*W* taxed on the entire market value).

Professor Schwartz seems to concede that *W* has either no or a zero basis for her marital property rights.[31] Furthermore, in the introduction to his paper he observes that "[i]n the context of divisions of property upon divorce or separation, the central issue . . . whether gain or loss has been 'realized' "within the meaning of section 1001(a) was resolved, in *Davis*, in the affirmative, 'the amount realized' by the husband for purposes of section 1001(a) in common law jurisdictions being the fair market value of the property he transferred."[32] From the cases cited by the Court[33] and its rejection of the division of property theory in favor of regarding the transaction as the settlement by a debtor of an obligation or claim, it is reasonable to assume that for income tax purposes it is *as if* the husband in *Davis* had sold the property for its fair market value and then transferred the proceeds to the wife,[34] which, as already observed, is to say neither that he sold the property to the wife nor that she trans-

26. *Id.*

27. 370 U.S. at 73 n.7.

28. The court cites Taylor & Schwartz, *Tax Aspects of Marital Property Agreements*, 7 TAX L. REV. 19, 30 (1951); Comment, *The Lump Sum Divorce Settlement as a Taxable Exchange*, 8 U.C.L.A. L. REV. 593, 601-02 (1961).

29. 370 U.S. at 70.

30. *See* note 28 *supra*.

31. Note 10 *supra* and accompanying text.

32. Schwartz, *supra* note 2, at 176.

33. United States v. General Shoe Corp., 282 F.2d 9 (6th Cir. 1960); International Freighting Corp. v. Commissioner, 135 F.2d 310 (2d Cir. 1943), *cited in* 370 U.S. 65 at 72; Philadelphia Park Amusement Co. v. United States, 126 F. Supp. 184 (1954).

34. *Cf.*, Kenan v. Commissioner, 114 F.2d 217 (2d Cir. 1940).

ferred to the husband property having a basis equal to the fair market value of what she received. Rather than spell out this "as if" construction of the facts, the Court preferred, unfortunately, to start from the meaningless proposition that "the 'property received' [by the husband] was the release of the wife's inchoate marital rights."[35] An uncritical acceptance of this "proposition" leads quite naturally to the misconception that an exchange of two properties took place, the value of what *W* received then being assumed to equal the value of what she transferred, suggesting that no more was involved than the conversion of one asset into another of equal value producing no change in her net worth and thus no taxable consequences. From a simple economic standpoint this has an obvious appeal, particularly if we can label *W* a purchaser.[36] And if we liken her to a purchaser for cash then, of course, she would realize neither gain nor loss by virtue of the purchase. But, as we have noted, she did not purchase for cash, the consideration for the husband's transfer being the relinquishment by *W* of her claim against the husband. To say that the husband transferred property to *W* *in consideration* for the release of her marital rights is not to say that he transferred the property to *W* *in exchange* for the release of her marital rights. We know the value of the claim she relinquished; what we want to know is whether it had an income tax basis.

There is in the tax law a well-known distinction between "income" and "capital" which is fairly intelligible, and the tax concept of "basis" can readily (for present purposes) be identified with invested cost capital. Rev. Rul. 67-221[37] involves a problem similar to that which faced the courts in the *Farmers' & Merchants' Bank*[38] and *Raytheon*[39] cases dealing with damages received as compensation for the destruction of business goodwill having no income tax basis. The former case held the damages not to be taxable but the latter held them to be taxable. Though goodwill may be a most valuable "asset" as the "premium value" attaching to the assets of a business, it does not represent, though it may indirectly reflect, an investment of cost capital in the ordinary sense. Therefore, it will have no income tax basis (invested cost capital). Underlying the income tax treatment of damages for tortious injury to property— even goodwill in the sense described (hereafter "premium value" or "created" goodwill) seems to be regarded as property for this purpose —is the principle that to the extent of the basis of what is lost due to the injury the receipt of damages constitutes no more than the recoupment of invested capital (tax basis), which is not considered to come within the meaning of either the word "income" as used in section 61(a) or the word

35. 370 U.S. at 72.
36. 370 U.S. at 69 n.6; RUDICK, *supra* note 16.
37. 1967-2 CUM. BULL. 63.
38. Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912 (6th Cir. 1932).
39. Raytheon Production Corp. v. Commissioner, 144 F.2d 110 (1st Cir. 1944), *cert. denied*, 323 U.S. 779 (1944). The discussion in the text is based on Mullock, *Basis and "Created" Goodwill*, 47 TAXES 164 (1969).

"incomes" as used in the Sixteenth Amendment.[40] In most cases dealing with injury to property other than created goodwill, "capital" and income tax basis coincide with invested cost.[41] Hence the relevant choice facing the courts in the *Famers' & Merchants' Bank* and *Raytheon* cases was whether to extend the notion of capital as employed in the recoupment of capital doctrine to cover created goodwill or to limit it to invested cost capital.

In support of the first alternative a court could, with some plausibility, point to the rule excluding damages for personal injury from gross income, which, in view of the emphasis on the compensatory aspect, can be justified taxwise only by a metaphorical extension of the recoupment of capital doctrine. Since its application is most obvious and natural in the business area it could be argued that it requires far less strain on the doctrine to extend it to business goodwill of the "premium value" kind. However, no such argument was offered in the *Farmers' & Merchants' Bank* case, the court in effect being content with the mere unsupported assertion that damages for tortious injury to created goodwill were not taxable. In the *Raytheon* case, on the other hand, the damages were held taxable because no basis had been proved for the goodwill destroyed. *Farmers'* was distinguished on the ground that there the goodwill was only partially destroyed, whereas in *Raytheon* it was totally destroyed.[42] But if damages for injury to created goodwill are to be taxed, it should not be because of failure to prove a basis therefor but rather because such goodwill cannot have a basis. If this had been clearly perceived, the court could have rejected the tort compensatory damages theory of *Farmers'* and taken the position that the recoupment of capital doctrine should be limited to "invested cost" capital (income tax basis) thus giving a rational basis for its decision that the entire damages received were taxable. There is no good reason for extending the recoupment of capital doctrine to created goodwill.

No doubt the justification for the metaphorical extension of the recoupment of capital doctrine to damages for personal injury is to be found in a humanitarian policy not to add further to the burdens of those already injured. But this is *not* to say there is *no* realization of gain. Indeed, the receipt of damages for personal injury is an obvious realized gain. So if we do not tax those damages (and we do not) it must be because policy reasons having nothing to do with the problem of realization, justify the metaphorical extension of the recoupment of capital doctrine.[43] Similarly, although it may be argued that in *Davis* the wife's economic position did not change, the fact remains that whatever "capi-

40. Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 519 (1921); Eisner v. Macomber, 252 U.S. 189, 205 (1920); Doyle v. Mitchell Bros. Co., 247 U.S. 179 (1918).

41. Subject, of course, to depreciation or other cost recovery.

42. 144 F.2d 110, 114.

43. *See generally* Mullock, *Current Conceptions of Taxable Income—A Comment*, 26 OHIO ST. L.J. 43 (1965).

tal" she may have had invested in what she gave up hardly constituted an income tax basis as that concept is used in section 1001(a) and section 1012. To justify Rev. Rul. 67-221[44] we have to say first, that in this situation the notion of capital as used in the recoupment of capital doctrine should be extended beyond just "invested cost" capital, and secondly, that this extension is to be justified by policy considerations having nothing to do with the problem of realization of gain and which take precedence over the basis technicalities of section 1001(a) and section 1012. The problem then becomes one of finding policy reasons strong enough to outweigh the fact that the wife realized a gain when a claim for which she had no income tax basis was satisfied.

It has been said[45] that in *Davis* the Supreme Court cited *Farid-el-Sultaneh*[46] with approval; and, so far as one can tell, the bride-to-be in that case was not taxed when she received property in consideration for relinquishing her prospective marital rights.[47] There are far fewer grounds, if any at all, for arguing that a bride-to-be has a basis for prospective marital rights relinquished than there are when the relinquishment occurs after marriage. In the latter case such grounds usually are reduced to the proposition that in performing services during the marriage the wife is building up a basis in her marital rights equal to the value of those services, a rationalization finding little support in the history and development of such notions as dower and curtesy.[48] But even if one is inclined to accept it, there is the further problem that if services performed are to build up a basis for the marital rights thereby acquired in an amount equal to the value of those services, the value of the rights acquired should be taxable to the wife; and of course they are not. Unless this fundamental feature of the tax law is changed and since there is no investment of capital in the conventional sense and the analogy with damages for personal injury in tenuous, we must conclude that the wife cannot have an income tax basis for her marital rights.

The writer has examined in detail Professor Schwartz's subdivisions headed (i)(b) (*W* not taxed as the transaction amounts to a non-taxable division of property), (i)(c) (*W* not taxed as she received merely a recoupment of capital), and (ii) (*W* taxed on entire market value);[49] and since (i) (c) and (ii) dispose of (iii) (*W* taxed on less than entire market value) and (i)(a) (*W* not taxed as she realized no gain) obviously cannot be accepted, there remain for consideration (i)(d) (*W* not taxed for she received a gift) and (e) (*W* not taxed for policy reasons). So far as (i)(d) is concerned, it suffices to note that

44. 1967-2 Cum. Bull. 63.
45. Rudick, *supra* note 16.
46. Faridh-el-Sultaneh v. Commissioner, 160 F.2d 812 (2d Cir. 1947).
47. Note that there is no exclusion when the wife receives alimony in the form of an annuity.
48. 370 U.S. 65, 69 n.6.
49. Note 7 *supra* and accompanying text.

1. the Court in Davis stated "[a]ny suggestion that the transaction . . . was a gift is completely unrealistic";[50] and
2. rather than an inheritance, the wife's dower has always been regarded as an encumbrance on the husband's estate.

Remaining for consideration is (i)(e), the question of non-tax considerations, which could justify not taxing *W* on what she receives for the relinquishment of her marital property rights. In the case of damages for personal injury we surmount the basis difficulty and so justify the exclusion by involving humanitarian policy considerations which, *pace* Schwartz, are by no means obviously applicable in the *Davis* situation. Professor Schwartz's position seems to be that divorce or separation are (almost self-evidently) inappropriate occasions for the imposition of an additional burden on *W* in the form of an income tax, though it is perfectly all right to tax the husband; that the division of the family's property on divorce should not be treated as a taxable event so far as *W* is concerned. But this, of course, is no more than a judgment reflecting non-tax values, and is just another way of saying we ought not to tax *W*.[51] Such an evaluative use of ought, however, means that there are *good reasons* for not taxing *W*. What we still require is an account of those reasons and the evidence that supports them; until this is forthcoming, Rev. Rul. 67-221 has little to commend it.[52] If acceptable reasons can be put forward they should be addressed to Congress rather than the Commissioner; if a realized gain is not to be taxed, Congress, rather than the Commissioner, should say so.

50. 370 U.S. at 65 n.6.

51. On the distinction between evaluative and prescriptive uses of the word "ought," *see* P. TAYLOR, NORMATIVE DISCOURSE (1961).

52. The A.B.A. Section of Taxation, Committee on Domestic Relations Tax Problems, recommends that no gain or loss be recognized by husband or wife in the *Davis* situation and that the husband's basis carry over to the wife. However, the "arguments in favor of the proposition" amount to little more than a catalogue of unsupported assertions. *See* 19 A.B.A. SECTION OF TAXATION BULL. 62-68 (July, 1966).