

TANNENWALD, J., dissenting.

I think the majority fails to recognize the basic issue involved in this case. We are not called upon to decide to whom a conceded dividend should be taxable as such but rather whether there was any dividend at all.

Concededly, the distinctions drawn in determining the tax effects of corporate distributions are "shadowy." See *Waltham Netoco Theatres, Inc.*, 49 T.C. 399, 404 (1968), on appeal (C.A. 1, Apr. 24, 1968). But this difficult fact does not require us to blind ourselves to the realities of a situation and exalt form over substance.

The plain unadulterated fact is that no dividend was declared or paid by Pan-Atlantic to Waterman or anyone else. The note issued by Pan-Atlantic was merely a piece of paper, which served only a temporary purpose and disappeared. Cf. *Gregory v. Helvering*, 293 U.S. 465 (1935). The funds with which ultimate payment was made by Pan-Atlantic were supplied by McLean and were not received by Waterman until after the sale was completed. McLean offered to pay \$3,500,000 as the purchase price and that is precisely the amount it finally paid. When the transaction was completed, Pan-Atlantic was no richer and no poorer than it had been at the start. Only a portion of its accumulated earnings and profits had been converted into capital.

In *Steel Improvement Forge Co. v. Commissioner*, 314 F.2d 96 (C.A. 6, 1963), reversing 36 T.C. 265 (1961), both this Court and the Court of Appeals dealt with the issue involved upon the assumption that a dividend had been paid and that it was necessary to decide to whom the dividend was taxable. The case is therefore inapposite. Moreover, I note a distinguishing fact that in *Steel Improvement Forge Co.*, the dividend was actually paid in cash before the sale was closed.