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Taxation-Estate Tax-Gift in Contemplation of Death

TAXATION—ESTATE TAX—GIFT IN CONTEMPLATION OF DEATH.—In 1927, two years after making a will by which at death all his property was to be transferred to a trust and the income paid to his daughter, deceased irrevocably conveyed in trust nearly half this property. The deed of trust provided that the income during his life should be added to the principal. After his death the income was to be paid to his daughter during her life but no interest therein should be anticipated until actual distribution. His stated purpose was to transfer assets so that losses from future speculations could not affect them and whatever happened to his financial affairs his daughter and her heirs would be provided for. Taxpayer died in 1932 and Commissioner ruled that the transfer was made "in contemplation of death". The Board of Tax Appeals held that it was not[1] but the Circuit Court of Appeals reversed it.[2] On appeal, held: Judgment of the Circuit Court of Appeals reversed, and decision of the Board of Tax Appeals approved. *Colorado National Bank of Denver v. Commissioner of Internal Revenue* (1938), 59 S. Ct. 48.[3]

Transfers "made to take effect in possession or enjoyment at or after death" and transfers "made in contemplation of death" are taxed under nearly all the state inheritance tax laws[4] and have been taxed under the federal estate tax since the revenue act of 1916.[5] Legislative bodies adopt these measures to prevent avoidance of tax laws[6] and the courts apply them where the transfer was intended as a substitute for testamentary disposition.[7]

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[1] 34 B. T. A. 1315. Memorandum opinion.

[2] Colorado National Bank of Denver v. Commissioner of Internal Revenue (C. C. A. 10th, 1938), 95 F. (2d) 160.

[3] Mr. Justice Black, dissenting (1938), 59 S. Ct. 48 at 49.

[4] Bradford, Evolution of the Meaning of the Words "Gift Made in Contemplation of Death" (1923), 9 Va. L. Rev. 267.

[5] Sept. 8, 1916, c. 463, § 202 (b), 39 Stat. 777. For the present act see: Feb. 26, 1926, c. 27, § 302 (c), 44 Stat. 70 as amended by March 3, 1931, c. 454, 46 Stat. 1516 and June 6, 1932, c. 209, § 803 (a), 47 Stat. 279; 26 U. S. C. A. § 411 (c).

[6] Helvering v. City Bank Farmer's Trust Co. (1935), 296 U. S. 85, 56 S. Ct. 70.

[7] Falck v. Holtegel (1937), 93 F. (2d) 512; "Contemplation of Death" in Inheritance Taxation (1925), 34 Mich. L. Rev. 461. The justification for

As the state and federal courts have made similar definitions of transfers "made in contemplation of death",[8] it would appear that the same construction would be given to the other phrase. Under the present federal estate tax, however, a transfer inter vivos, by which every vestige of ownership has left the decedent prior to death, is not taxed as a transfer intended to take effect in possession or enjoyment at or after his death.[9] And this is true even though, as in the principal case, the intended beneficiary receives no benefits from the gift until the donor's death.[10] On the same facts and same statutory language collection of the tax has been sustained under a state inheritance tax.[11] This result is reached because the estate tax is on the privilege to transmit property by will or the laws of intestacy whereas the inheritance tax is paid by the donee on the privilege of receiving benefits at the death of the grantor even though the grantor made the transfer prior to death.[12] Under this state of the law the only problem before the court in the principal case was whether the gift was taxable as being made "in contemplation of death".

To be taxable as a gift made "in contemplation of death" the motive which induces the transfer must be of the sort that leads to testamentary disposition.[13] "It cannot be said that the determinative motive is lacking merely because of the absence of consciousness that death is imminent. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for disposition of property although death is not thought to be close".[14] Deceased in the principal case provided for his daughter only after his death. This is a factor but not a determinative one.[15] The condition of decedent's body and mind and advanced age may be facts indicating the motive was of the sort that leads to testamentary disposition

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taxing some gifts inter vivos under estate taxes is their testamentary character. The transfer is subjected to rates of taxation which do not relate to the value of the gift but are determined by the value of a decedent's property properly subjected to inheritance taxation. Kroeger, Inheritance Taxation of Transfers Not Taking Place at Death (1930), 15 St. Louis L. Rev. 113.

[8] United States v. Wells (1931), 283 U. S. 102, 51 S. Ct. 446; Armstrong v. State of Indiana (1919), 72 Ind. App. 303, 120 N. E. 717; Matter of Seaman (1895), 147 N. Y. 69, 41 N. E. 401.

[9] Reinecke v. Northern Trust Co. (1929), 278 U. S. 339, 49 S. Ct. 123; May v. Heiner (1930), 281 U. S. 238, 50 S. Ct. 283. A 1932 amendment to the estate tax includes as an item of the gross estate transfers where the grantor reserves the income for life. June 6, 1932, c. 209, § 803 (a), 49 Stat. 279; 26 U. S. C. A. § 411 (c). That a transfer reserving the income to a third person for his life and a possibility that the property might revert to grantor is not taxable see Helvering v. St. Louis Union Trust Co. (1935), 296 U. S. 39, 56 S. Ct. 74.

[10] Commissioner of Internal Revenue v. Dunham (1934), 73 F. (2d) 752.

[11] Saltonstall v. Saltonstall (1928), 276 U. S. 260, 48 S. Ct. 225.

[12] Hill v. Nichols (1937), 18 F. (2d) 139.

[13] Updike v. Commissioner of Internal Revenue (1937), 88 F. (2d) 807, cert. den., 301 U. S. 708, 57 S. Ct. 942.

[14] United States v. Wells (1931), 283 U. S. 102, 51 S. Ct. 446. After the opinion in this case was written the lower federal courts have recited the formula and attempted to apply it to fact situations. Willcutts v. Stolze (1934) 73 F. (2d) 868; Internal Revenue Regulations 80 (1937 ed.) p. 51, art. 16.

[15] To so hold would mean that all transfers whereby benefits were received after death would be "in contemplation of death".

while a desire to be relieved of responsibility, a desire to discharge moral obligations, or a purpose to carry out a previously adopted policy of making gifts during his lifetime indicate a purpose predominately associated with life.[16]

A review of the decisions indicates that the federal courts have been extremely reluctant to hold that a gift inter vivos has been made "in contemplation of death". In nearly all cases upholding the tax the court has been aided by the statutory provision that gifts made within two years prior to death are presumed to have been made "in contemplation of death".[17] Where gifts made more than two years prior to death have been taxed, the facts indicating a predominant motive associated with death have been very clear[18] or uncontested.[19]

The principal case held that there was substantial evidence to support the conclusion of the Board of Tax Appeals. While it is in accord with the rules of law stated in prior decisions it shows that the reluctance of the lower courts to hold gifts as being made "in contemplation of death" is shared to a considerable extent by the nation's highest court. If it is desirable to tax all transfers where the donee receives benefits only on the death of the donor as part of his gross estate it appears that an amendment to the statute will be required.[20] E. O. C.

TAXATION—TAX STATUS OF WILL CONTESTANTS—INFLUENCE OF STATE LAW ON THE INTERPRETATION OF FEDERAL TAX STATUTES.—Petitioner, the grandson of testatrix, who bequeathed certain small legacies to her heirs and the entire residuary estate to a trustee for an endowment trust for a charity, began a will contest which ended in a compromise agreement. Suit was brought to recover income tax, assessed on amount obtained by the compromise. Petitioner contended that it was not income under the Sixteenth Amendment, and if income under the amendment was exempt under the exemption of property received by "inheritance." Held: that such property comes under exemption of "inheritance." *Lyeth v. Hoey* (1938), 59 S. Ct. 155.

The Supreme Court after the passage of the Sixteenth Amendment defined taxable income as that "gain derived from capital, from labor, or from both

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[16] Updike v. Commissioner of Internal Revenue (1937), 88 F. (2d) 807; United States v. Wells (1931), 283 U. S. 102, 51 S. Ct. 446.

[17] 26 U. S. C. A. § 411 (c). The statutory presumption was overcome in the Wells case because the motive was to carry out a policy long followed of making liberal gifts to his children during his lifetime. 283 U. S. 102, 119; 51 S. Ct. 446. But where the donor transferred $670,000 in trust and the same day disposed of the remaining $13,000 of his property by will the Supreme Court held that being 78 years old, unusually vigorous and clear minded, and in good health was not enough to overcome the presumption and held that the estate was taxable. McCaughin v. Real Estate Land Title and Trust Co. (1936), 197 U. S. 606, 56 S. Ct. 604.

[18] Oliver v. Bell (1938), 23 F. Supp. 30. Deceased was 99 years, 11 months, 11 days old at his death. He had divided his property among his children two and one-half years before and made his will two days later. The same persons witnessed both the will and the gift instrument. The same persons were beneficiaries and received the same proportions under both instruments.

[19] Milliken v. United States (1931), 283 U. S. 15, 51 S. Ct. 324.

[20] Helvering v. Bullard (1938), 303 U. S. 297, 58 S. Ct. 565, indicates that such a classification would be valid.