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Book Review. Federal Estate and Gift Taxation by Randolph E. Paul

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The book under review is the first complete and detailed treatise upon the important subject of the federal estate and gift taxes. Like the author's previous work of several years ago (with Jacob Mertens, Jr.) on the federal income tax, it has the disadvantage of subjection to very rapid obsolescence; but also like that previous work it contains valuable discussion of principles which are unlikely to entirely lose their importance and value, no matter how many changes are made in the statutes.

We have learned to expect from the author a thorough, profound but practical study of any tax problem to which he addresses himself. And the present work is no exception to that rule; it is complete and scholarly, and yet discusses every problem in a way which is very helpful and adequate from the standpoint of the practicing lawyer. Perhaps there is a somewhat greater tendency than previously to emphasize the Treasury standpoint. This is hardly surprising since the author is now one of the most important Treasury officials—indeed probably the most important from the standpoint of tax policy. But he was still in private practice when he wrote the book, and he has certainly not neglected the point of view of the taxpayer and his counsel.

The order of presentation of the topics is perhaps a bit unusual for a treatise. One might naturally expect a discussion of the substantive provisions of the estate tax law, then the similar provisions of the gift tax law, and finally a discussion of the procedural matters, most of which are applicable to the administration of both laws. In fact, the book commences this way, most of the first volume dealing with the substantive provisions of the estate tax. But then the author immediately discusses the procedural matters, and only after they are completed does he go into the substantive problems of the gift tax. The final chapter deals with problems of valuation.

As already said, this order of presentation seems a little peculiar, but it probably will not cause any real inconvenience in the use of the book. At any rate, there is a thorough and adequate index, as well as tables of cases and secondary authorities, and tables showing the numbering of the provisions in various revenue acts in relation to the present Code.

The author expresses himself as very much disturbed by the undue complexity of the statutory provisions for both of these taxes, especially the estate tax. But he points out other complicating factors, especially the problems of community property, which are almost as disturbing here as with respect to the income tax.

One of the greatest causes for complication in the estate tax is the distinction between the "basic tax," and the additional tax. The reason for retaining this distinction is of course that the credit for state inheritance taxes and the like is granted in computing the basic tax but not in computing the much heavier additional tax. The author suggests some methods for simplifying these provisions, but somewhat surprisingly does not suggest the total abolition of the credit for state inheritance taxes. Since the original purpose of that credit—namely to compel all states to impose an inheritance tax or the like—has been accomplished, it is at least arguable that the whole credit might well be wiped out.

An even more potent cause of complexity with respect to the statutory provisions and administrative rulings is the relation of these two taxes between themselves and to other federal taxes, especially the income tax. Perhaps the whole problem could be
solved by adopting the suggestion somewhat dubiously advanced by the author in the early part of the book of treating inheritances as income to the beneficiaries. But he himself apparently recognizes the improbability of the acceptance of this suggestion by Congress, at least in the near future.

The estate tax and the gift tax fit together fairly well, though Mr. Paul admits, as many others have previously pointed out, that the credit in the estate tax for gift taxes previously paid with respect to the same property is very limited and really inadequate. But neither tax fits so well with the income tax. This is partly because of unfortunate discrepancies between the treatment of similar problems in the income and estate tax provisions. An example is trusts revocable with the consent of other persons than the settlor, where the estate tax provisions are more rigid than those included in the income tax law. The author properly points out that the gift tax "flounders" between the estate and the income tax, seeking consistency with both and ending up with complete consistency with neither. For this unfortunate situation he seems inclined to blame the Treasury slightly and the courts much more; but it would seem that the main cause is the inconsistency in the statutory provisions. Undoubtedly, as the author says, the gift tax was intended to "rescue" both the estate tax and the income tax from the partial futility into which they seemed to be falling; but the rescue was primarily of the estate tax, as the author impliesly admits by treating these two taxes together in his book. It is submitted that the Supreme Court is probably correct in insisting primarily upon reasonable consistency of treatment with respect to these two taxes, even at the expense of consistency with the income tax situation, as it did in the Sanford case.2

Nevertheless, the author is correct in deploving many of these inconsistencies. He points out that they are often quite unfair to taxpayers—probably more so than to the Treasury—though he properly insists that inconsistency of Treasury rulings is not necessarily a proof of error. The real difficulty is not merely that the estate tax, the gift tax, and the income tax have inconsistent provisions. Even worse is the substantial failure to integrate these three taxes, even when the provisions are formally consistent. The author insists that the interrelation of these taxes needs congressional attention, though he candidly admits practical difficulties in fitting them together perfectly. It is believed that the general position of the author will be fervently echoed by the Treasury and taxpayers alike.

This is one of the most important reforms which the author urges. In addition, he constantly advocates the doing away entirely with the special provisions with respect to community property. As already pointed out, this system is almost as troublesome for the estate tax and the gift tax as with respect to the income tax, though the former taxes do not involve the problems of joint returns. In addition, he suggests some considerable tightening up of the estate tax provisions with respect to gifts in contemplation of death, where he correctly points out that the courts have on the whole been quite unfavorable to the Government. He expresses the opinion that the present Court would sustain a statutory provision making the presumption conclusive that a gift of any substantial part of property within a limited period before death was in contemplation of death. The reviewer is inclined to concur; but it is still true that there would be large room for dispute as to what is a "substantial" gift for this purpose. Would it not be better to integrate completely the estate and gift taxes, by including in the taxable estate all gifts (beyond the exemption) made during the decedent's life, computing the estate tax on this basis, and then crediting the tax so computed with gift taxes actually paid during

1p. 7
life? This would completely wipe out the dispute as to whether gifts were in contemplation of death, since this problem would have no significance for tax purposes. Mr. Paul does suggest this solution but without much enthusiasm.5 Perhaps he feels that there is little chance of its being adopted by Congress.

What has been said already affords some hint of the author's tax philosophy. However, this should be more definitely referred to, not only because of its effect on the discussion in the book, but also because it is likely to have considerable influence on Treasury practices.

At times, it appears to reflect the worst of Treasury bureaucracy. For example, the author appears to be horrified at the statement attributed to Mr. J. P. Morgan that he saw no reason for paying any more taxes than the law calls for. The reviewer is compelled to confess that he entirely approves this point of view, but his embarrassment is minimized by his reasonable confidence that it is shared by practically all taxpayers, including taxing officials when they happen themselves to be in the position of taxpayers. Furthermore, the author urges that no lawyer should lend himself to any schemes for avoiding taxes, since such schemes will probably be defeated by subsequent enactment or—a cynic might add—by the courts writing into the statute something they think Congress unjustifiably omitted. Undoubtedly this advice is largely sound and practical; but it is buttressed by the theory that a lawyer should be a "social thinker." The trouble with this is that there is no sure way of telling just how a lawyer or anybody else should think on social questions, and there is certainly no assurance that he should never resist the Government's position on tax questions. Sometimes, though it must be confessed that recently it is rare, such resistance is successful.

Another point on which the reviewer finds his own philosophy inconsistent with that of the author is with regard to the question of using the taxing power for supposed social ends, particularly for regulation. It is submitted that the taxing power is to raise revenue, and that to use it for regulatory purposes is not only theoretically unsound but practically undesirable. Regulatory taxes are likely to flounder between regulation and revenue just as the author points out that the gift tax flounders between supplementing the estate tax and the income tax; and using such taxes is apt to end up with ineffective and unjust regulation, and little revenue. It must be confessed of course that all taxes have regulatory effects, which should not be overlooked; and this is perhaps more true of the federal estate tax than almost any other. But to use the taxing power primarily for regulation is in the reviewer's opinion to misuse it both theoretically and practically.

Also Mr. Paul is much better satisfied with what the judiciary has done on tax problems than would be very general outside of governmental circles. He quotes with apparent seriousness from the New Republic to the effect that the Supreme Court has made a "simple clean-cut consistent body of judicial utterances"4 with respect to taxes. He has already rather frankly distinguished judicial action for and against the revenue, indicating that the former is to be preferred.5 A pure outsider would think that judicial action should be evenly balanced for and against the revenue, and that judicial legislation on either side is thoroughly unjustified. The author properly points out that judicial statements that "substance not form" is the criteria for solving tax problems, usually are unintelligible, and are repeated ad nauseam;6 but the truth appears to be that, at least recently, this phrase has been much more often used to attempt to justify doubtful or clearly unjust decisions against taxpayers, than vice versa. Furthermore, the author's scoff-

5 P. 89.
ing at any necessity for a conservative dividend policy by corporations, as he does in his chapter on valuation, would hardly be applauded by the S.E.C. or those who have to practice before it.

Fortunately these rather extreme positions are not adhered to with respect to the author's discussion of many of the more specific problems. Indeed, as will appear, he sometimes takes positions which seem almost as unfavorable to the Government, especially with respect to certain deductions. No doubt his philosophy inevitably colors his thinking throughout the book; but his practical sense, his experience, and his innate sense of justice often prevent him from going too far.

The foregoing substantially covers what it seems necessary to say with respect to the first six chapters of the book, which deal with general principles of the estate tax and also with the special subjects of property subject to dower and curtesy, and transfers in contemplation of death. However, some acute comments in the first chapter with respect to the effect of local court decrees on the estate tax should be noted. It is pointed out that property rights are conclusively determined by such decrees, at least if they are the result of a real adversary proceeding; but that such a decree does not necessarily determine that there has not been a substantial transfer by death, which is subject to federal estate tax.

The eighth chapter deals with transfers taking effect on death. Here, as might be expected, a great deal of space is given to a discussion of the Hallock case. It is pointed out that the case has not settled all of the problems; in particular it has not determined whether the ending of the reserved right of reverter is to be taxed on the basis of its own value, which is usually trifling, or at the whole value of the property. The Treasury has to date taken a somewhat compromise position, deducting only the value of the life interest of the present holder. However, the author properly points out that even this concession may not be necessary under the Hallock opinion. He concedes that it seems rather absurd to tax the transfer of this remote right of reverter on the basis of the entire value of the property; but the possibility of this cannot be safely neglected. This is especially menacing, since there is invariably a possibility of reverter to the settlor unless it is explicitly done away with by the creation of a final remainder which could not possibly fail for lack of heirs, which transfer would also be taxable, with the same problem as to valuation. It is suggested that this can be avoided by creating a final remainder to some charity. This seems sound enough, though it would lead to the absurdity of numerous bequests to charity, not one in a thousand of which would ever come into effect. It seems that this problem should be given Congressional attention.

The next chapter dealing with property held jointly or by the entirety needs no further comment; but the chapter on powers of appointment is worthy of notice. This is a matter of great difficulty, for which Congress is partly to blame; for the author's criticism of the very narrow limits with respect to taxability in this category seems entirely justified. His criticism of the occasional tendency of the courts to use "donor's hand" theory with respect to appointments for tax cases is also quite justified; though this theory has been fairly well repudiated, at least with respect to the federal estate tax. But he suggests that the passing of property by special as well as general powers of appointment should be subjected to tax, with the limitation that exemption should be given when the power is restricted toappointment to descendants of either the donor or the donee of the power. This seems like a sensible suggestion, though it is of course a problem of policy for the exclusive determination of Congress.

1P. 1295.
2P. 80 ff.
3309 U. S. 106 (1940).
The next chapter deals with the subject of life insurance. Here the problems are especially perplexing. The author comments extensively with respect to the Le Gierse case,\(^\text{10}\) denying the special insurance deduction where an annuity is obtained simultaneously with the insurance policy. He interprets this decision as meaning a denial of life insurance exemption "in any case where the same company issues an annuity large enough so that the premium paid for it, when added to the insurance premium, will equal or exceed the face value of the insurance policy."\(^\text{11}\) If, however, the insurance policy is for a substantially larger amount, and even more clearly if it is issued by a different company, it seems clear that there is an insurance risk, and that the additional exemption may be obtained.

There is another serious problem with respect to the definition and effect of "incidence of ownership," as litigated in the Bailey case,\(^\text{12}\) with its multiple appeals. The author's defense of the Treasury's regulation making different interpretations of the statute depend upon the time when the policy was taken out in relation to the various Bailey decisions will, as he says, probably not shock experienced tax lawyers, though they will find it rather hard to explain to less experienced persons, who may perhaps understand that the apparent meaning of a statute may be changed by judicial decision, but who are likely to have difficulty in the idea that the old meaning remains in effect as to transactions before the decision.

Most, though not quite all, of the federal courts, have held that where an insolvent estate has insurance policies which are not subject to claims, the claims must nevertheless be deducted in full, resulting in no tax. The reviewer shares the author's inability to justify this conclusion as a matter of statutory construction or common sense. But since this is the prevailing law, it should be corrected by express amendment.

With all these and numerous other problems in this life insurance chapter, the reader is not surprised at the first sentence of the concluding section which reads "This picture of life insurance and the estate tax is not a happy one." This rather lengthy section is itself somewhat confused but perhaps excusably so. The author's apparent opinion that the additional life insurance exemption should be wholly given up, is certainly somewhat questionable; but in any event, the still seething problems should and can largely be solved by carefully drafted amendments.

Now come the two chapters with regard to estate tax deductions. The first of these deals with all deductions except transfers for charitable purposes and the like, which are considered in the next chapter.

As previously indicated, the author shows in this discussion of deductions, leniency toward the taxpayer somewhat surprising in one who has already expressed a tax philosophy such as has been indicated. For instance, he favors the deduction of anticipated trustees' commissions, and criticizes the Treasury regulations which deny this. More surprising still, he severely criticizes the decision of the Supreme Court in the Taft case,\(^\text{13}\) which indicates that no deduction will be allowed for contracts made by a decedent for charitable or religious contributions, even though such contracts are binding on his estate and paid by his executor. The reviewer concurs in the author's opinion that this is a rather illiberal statutory provision, but he is unable to understand how, under the stringent language of the statute, the deduction can possibly be allowed. It is true that promises by other contributors may be just as binding as money; but they are not money or money's worth, and that is what the statute prescribes.

But here too, the author does not let his liberality to taxpayers carry him

\(^{10}\)312 U. S. 551 (1941).
\(^{11}\)P. 304.
\(^{12}\)31 F. Supp. 778 (1940), cert. dim. 311 U. S. 721 (1940).
\(^{13}\)304 U. S. 351 (1938).
far beyond all bounds. He points out that the Government itself is the greatest of charitable functionaries. Perhaps a cynic would doubt whether governmental activities are quite so completely motivated by pure devotion to the public weal as is here indicated. But, on the other hand, it must be confessed that the only justification for this entire class of deductions is that the beneficiaries do things which must, or at least should, otherwise be done by the Government, and so their activities reduce the governmental burden.

Now we come to the procedural chapters. The first deals with the procedure within the Bureau. Here there is not quite so much statutory material; but there is an enormous mass of administrative rulings, which are thoroughly digested, with many practical hints. In discussing the apportionment of the tax, the author prophesies, but without approval, the possible invalidation of the New York statute providing for the apportionment of the tax to the beneficiaries of the estate—a result which has since unfortunately occurred.

The other procedure chapter is concerned primarily with the Board of Tax Appeals and court reviews of its decisions, though also including court actions for the recovery of alleged overpayments. The author seems to admit that the Board, though insistently called an administrative body, is essentially a court. His chief criticism made is that the Board has statutory jurisdiction only when a deficiency is asserted. It is pointed out that this quite naturally leads to the original understating of the tax liability—so that the Commissioner is compelled to assert a deficiency, and then the taxpayer can take the case to the Board, which has jurisdiction to give a refund. To give the Board original jurisdiction over claims for refund would seem highly desirable from the standpoint of the Treasury as well as that of the taxpayer.

The author finds other unfairnesses in the procedural provisions, especially from the standpoint of the taxpayer. He is especially critical of what he regards as ungenerous rules as to the amendments of refund claims—again a situation where there is undoubtedly something to be said from the standpoint of the Treasury—and still more critical of the extremely stringent rules with respect to suits against the Government. The latter point was extensively and vigorously commented on in the recent Hammond-Knowlton case, and seems certainly a situation where Congress should liberalize the rules.

Finally, the author urges that suits against Collectors of Internal Revenue be abolished. The reviewer himself concurs in this recommendation, though he does so with some trepidation, in view of the very strong objections to this proposal which usually arise from practical tax lawyers.

This completes the procedural problems for both taxes; and now, following the order already referred to, we come to the discussion of the substantive provisions of the gift tax. Here there is somewhat less complication, though there are certainly complications enough. The whole matter is lucidly explained in the general chapter on this subject. Two comments with respect to matters treated in this chapter seem worth while. The first is the suggestion of some limitation of the statutory amendment to the effect that there is no personal exemption for gifts to trusts. The purpose of this rule, as appears in the fuller discussion in a later chapter on trusts, was to avoid the possibility that the courts would hold the trust itself to be the donee, and the tax thereby be subject to avoidance by setting up a number of different trusts for the same beneficiary. Since the courts have clearly held that the beneficiaries rather than the trust are the donees, there seems to the reviewer little excuse for this rigid rule, and it is believed that the personal exemption for gifts to trusts should be reinstated.

14See In re Del Grago, 287 N. Y. 61, 38 N. E. (2d) 131 (1941).

15121 F. (2d) 192 (C. C. A. 2d, 1941).
The author also suggests restricting the exemption to gifts to members of the donor's own family. Undoubtedly there is more justification for such a restriction than for the purely arbitrary one with respect to trusts. On the other hand, a rather curious result would follow where a person had used up his basic exemption. He would then have to carefully list and pay a tax on every box of cigars and similar items which he gave to his friends or business associates at Christmas. Perhaps the solution is to reduce personal exemptions as to gifts outside the family below those granted for those within the family; but it seems hardly practical to wipe them out altogether.

The chapter on taxable gifts is a further development of the many problems, most of them rather technical, relating to the application of the tax. Curiously enough, the most troublesome points seem to relate to corporations. The author properly points out that the broad Treasury regulations that gifts by a corporation are gifts by its stockholders, are rather too broad, but suggests that they can stand if properly limited by construction. It is submitted that, by the plain terms of the statute, a gift by a corporation is not taxable. This does not mean that under certain circumstances a corporation may act as a mere agent of its stockholders, and the gift really be by them. But this is not likely to happen except in a closely held and more or less fraudulent corporation; though, on the other hand, corporations of other descriptions are not likely to make gifts.

The other difficulty is when the corporation is the recipient of a gift. The author considers that the effect of the Treasury rulings is that the gift is to the corporation or to the stockholders whichever will give the greater tax. Here again we have a canon of construction which seems to be on a heads I win, tails you lose basis. However, it is probably not so bad as it sounds, since if the corporation is religious, charitable, or the like, the gift is not taxable; and if the corporation is not within these categories, it is hard to imagine that there has been a real gift.

Finally there is the chapter on valuation, which is of immense importance in the estate tax and the gift tax— even more so than in the income tax. The discussion is pretty general but perhaps the author is hardly to be blamed for this. It is pointed out that the estate tax may apply even though there is no fair market value and that there is also a distinction in the value of notes for income and estate tax purposes. Here a discrepancy between income tax standards on the one side and the estate and to a less degree the gift tax standards on the other side, is not only excusable but seems quite inevitable. There is also some criticism in the book of the Treasury's attempts to partly salvage something from its crushing defeat in *Maas v. Higgins*,¹⁶ which invalidated the Treasury ruling that in case the option to value property one year after death was taken for estate tax purposes, the income during that year must be included in the estate tax. Some sympathy is expressed with the Treasury's feeling that this may under some circumstances result in an improper evasion of estate tax. But serious, and it seems well founded, doubt is expressed whether the Treasury will be successful in saving anything from this particular catastrophe, unless it can persuade Congress to write into the statute what the majority of the Court found has not yet been done.

And so the reader comes to the end of this long, and necessarily complicated, but excellent treatise. The reviewer has the uncomfortable suspicion that most of his criticisms are stated mainly because any reviewer of a book must, under the accepted laws of etiquette governing that activity, cast a few stones at the author. In any event, he is convinced that his stones are very small pebbles, and will not and should not be really felt. This is a good book for any one, and an indispensable book for the federal tax practitioner. Turning from the author to the public, or

¹⁶*312 U. S. 443 (1941).*
at least that part of the public which has just been referred to, the reviewer's advice is to buy the book, read it carefully, and keep it available for constant reference. For every problem within its scope, whether technical or relating to broad policy, the book will be helpful; and it will almost invariably give as nearly a right answer as is humanly possible.

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Both the courts and trial attorneys will welcome this four volume set of Raymond on Missouri Instructions to Juries which is just off the press.

In jury trials, where responsibility is divided between judge and jury, it is highly essential that carefully prepared and properly worded instructions be given to the jury to aid it in reaching a just verdict in accordance with the law and based upon the evidence in the case. In large measure it is through the medium of instructions that our substantive law, procedurally stated, is crystallized into rules to guide those charged with the administration of the law. The giving of instructions is one of the primary essentials of court procedure distinguishing the judicial process from the procedure of administrative tribunals. Instructions—proper instructions—are vital to the efficiency of jury trials.

True it is that many verdicts are set aside and many judgments are reversed on account of errors in instructions. This, however, is but indicative of (1) the lack of careful preparation of instructions by attorneys and (2) the proper protection that the courts afford to litigants in seeing that juries are not misdirected, to the prejudice of the parties, either as to the law or the evidence.

We cannot discontinue the giving of instructions in jury trials. Declarations of law in jury waived cases perform a somewhat similar necessary function. Perhaps the giving of instructions should be supplemented by the submission of specific fact questions so that the court will be advised as to the specific ultimate facts found by the jury. This is now the practice in the federal courts and in many state courts. This procedure is now advocated in Missouri. It is no answer to the problem of giving proper instructions either (1) to ignore errors in instructions prejudicial to the rights of parties on any theory of waiver based upon the oversight or ignorance of counsel, or (2) to eliminate the giving of instructions entirely.

The solution to the vexing problem of instructions is more care in the preparation and giving of instructions. The new work of Raymond on Missouri Instructions to Juries will assist the trial attorney in the proper preparation of his instructions and will aid in the proper administration of trial procedure by helping to avoid errors in instructions, which errors, if prejudicial to the rights of parties, can but cause our courts to set aside verdicts rendered.

Walter A. Raymond, the author of the new work on instructions, has been a practicing attorney for the past nineteen years. He has had a wide experience in both the trial and appellate courts in Missouri. He is an attorney of high legal ability and great perseverance. His legal qualifications are recognized by the courts, other attorneys, many of whom have associated him both in the trial and review of their particular cases, and by opposing counsel. Mr. Raymond has efficiently and painstakingly performed the gigantic task of assembling the instruction material and in clearly stating the instruction rules. Undoubtedly Mr. Raymond's work, as he himself expresses the hope, will lighten the burdens and win the approbation of Missouri lawyers.