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FEDERAL ESTATE AND GIFT TAXATION: A REVIEW

Paul G. Kauper *

TODAY'S tax-encumbered citizen is not only aware that death and taxes are certain but also realizes that they walk hand-in-hand. At the most he may experience a sense of nostalgic grief over Pliny the Younger's argument that an inheritance tax "is an 'unnatural' tax, since it augments the grief and sorrow of the bereaved." He knows that as a matter of history Pliny's argument, however touching and delicate, has not deterred ways and means committees, intent on meeting revenue needs.

But while our modern taxpayer is acquainted with excises by the score, and indeed assumes them as commonplaces in his life, he knows very little about the law of taxation. On the contrary, the intricacies and subleties of tax law are a favorite subject of discussion. To the average layman the whole matter is unintelligible, and even a practicing attorney without experience in this field finds the subject matter a repelling one. He prefers to leave these questions to the specialists—tax lawyers and tax accountants.

On the surface there is much to warrant this distaste for tax law. An inquiry into the subject reveals at the threshold a jumbled state of authority. Take a question arising under the federal estate tax law. The statute furnishes the first point of reference. Here is language which because of its generality may admit of a variety of interpretations. Accordingly the first job is to trace the legislative history of this section. The pre-enactment materials are examined for such illumination as they may yield. Then the administrative interpretations must be checked. What do the official regulations have to say? Nor can we stop here with the latest official edition of the regulations. Article so-and-so may have been amended by a later Treasury Decision which now states the official interpretation. Moreover, in considering the relevant statutory and administrative guides, it must be ascertained which regulation and which statute in point of time govern the transaction in question. Brushing these aside, we now take a close look at the authoritative regulation. What is its meaning? It raises problems of construction. Or if its meaning seems clear, is it a valid interpretation of the statute? How answer these questions? We take a look at

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1 48 Yale L. J. 358 (1938).
the decisions of the United States Board of Tax Appeals. Perhaps it has not had occasion to pass upon the regulation. To some lawyers who think of law in terms solely of judicial or quasi-judicial decisions, this means that an impasse has been reached. A blind alley has been struck. Passing this difficulty, suppose we find relevant determinations by the Board of Tax Appeals. But even the board’s decisions may indicate some uncertainty as to the proper construction of the regulation. They suggest fine shadings of meaning. But one of the board’s determinations does cover your precise case and indicates the answer. Yet may you rely upon it with a sense of security? You would feel more comfortable if the board’s decision were buttressed by judicial authority. Research uncovers one case in point decided by the Court of Appeals for the Second Circuit. In finding for the taxpayer it held that the regulation was valid but that the board erred in its interpretation. The commissioner petitioned for a writ of certiorari to review this decision but the Supreme Court denied the writ. There stand the authorities!

It is this constant interplay of legislative, administrative and judicial forces, coupled with the technical nature of the subject matter, which imparts to tax law its fluidity and complexity. To attain technical competence in the field in the sense of ability to wind one’s way through the labyrinth of authority is in itself an accomplishment, to say nothing of growth in critical understanding of the problems and in capacity to see them in their larger relationships. Indeed, the question may well be asked whether it is possible for an orderly statement of tax law to emerge from this confusion of ideas and authorities. Are not the practicing attorney and the student of tax law limited in their means of study to the commercial tax services which each week bring up to date every bit of relevant authority? Does not the subject bar critical textbook treatment? Fortunately this is not the case. To be sure much that passes as literature in the field of tax law is chaff. However, a wealth of helpful studies has appeared in the law reviews and other periodicals. Even more valuable is the emergence of an occasional important text on tax law. Undeniably pre-eminent in this field are the writings of Randolph Paul. His work in collaboration with Mertens on income taxation is a standby among practitioners. His three series of studies in federal taxation have shed penetrating light on the subjects there explored. Contributions to law reviews have been no less significant.

Not content to rest on laurels already gained, Mr. Paul has recently published his two-volume work on *Federal Estate and Gift Taxation*. This is an authoritative work based on thorough scholarship and mature understanding and in itself is sufficient to establish the author's name as a scholar and writer of the first order. Adjectives of encomium should be charily used, but one need not be niggardly in estimating the worth of Mr. Paul's latest contribution. It is indeed superlative. The volumes portray a careful scholarship. The documentation reaches into all relevant authority. The history of statutory sections and regulations is traced with meticulous care. A thorough index, a table of cases, a bibliography of selected texts and articles, and table collating sections of the various revenue acts with the Internal Revenue Code and the United States Code combine to make these books prodigiously useful.

But these two volumes are not to be confused with an encyclopedia of estate and gift tax law. The text is a critical discussion of the significant problems in this field. Years of tax practice and study have led to clarity of perception and insight. Moreover, these volumes profit from the author's literary artistry. Mr. Paul writes well. His sentences are lucid and smooth, enlivened by occasional quips and satire, and punctuated frequently by apt quotation. In a field as fluid as tax law, crystal clear concepts are out of reach. But meaning must be achieved, and the opaqueness of words and rules must be diffused with light. Mr. Paul's gift of expression, harnessed to his maturity of understanding, does much to dispel the blurred greyness of familiar concepts. In his legal philosophy generally the author is a modernist. The late Justice Holmes and Jerome (now Judge) Frank are among his favorite authors, if one may judge by frequent footnote references. The documentation reveals a range of thought and scope of scholarship which far transcend the field of tax law. In one of the footnotes the reader trips over Schopenhauer and going a little further he stumbles upon Becker's *The Heavenly City of the Eighteenth Century Philosophers*. It is possible that the more prosaic among readers will feel that the footnotes are occasionally bloated with an excess of erudition. But much may be forgiven when one views the judicious use of broad ideas in furnishing a context of thought for the incisive discussion of particular-

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6. *Id.*, § 1.10, note 43.
ized questions. One more matter to be noted here is that the author does not suffer from paralysis of judgment. He is critical, thorough, and free of dogmatism, but he does reach conclusions and he does make suggestions for improvement. Making the revenue laws intelligible and workable is one of his major concerns.

Those acquainted with the federal estate and gift tax problems appreciate the extraordinary difficulties facing one attempting an orderly and coherent presentation. The federal statutes imposing estate and gift taxes are monuments to disorder and disjointedness. What could be more confusing than the system of a dual estate tax computation—one founded on the so-called basic law of 1926 with its schedule of rates and credits, the other based on the 1932 Revenue Act as amended, with its separate schedule of rates and credits? But this kind of complexity is innocuous contrasted to the further problem of the relation between the estate and gift taxes. Is the gift tax law to be viewed as an independent monolithic structure in the tax field? Or, if a shift in metaphor is permitted, is the gift tax law to be viewed as a secondary defense in catching the property transfers that have wormed their way through the estate tax's first line of defense? But the income tax cannot be left out of the picture. Are not the estate and income taxes to be viewed as the principal parties in a conspiracy against the taxpayer, while the gift tax plays the minor role of accessory to both? But can the gift tax be fitted into this straddling position in the present state of incoherent and inconsistent federal tax legislation? The thinking involved in the attempt to trace all these relationships in their full implications marks subtle torture of the type the human mind is prone to inflict upon itself. Yet Mr. Paul carefully and patiently explores these larger questions and tunnels his way through. Because he sees problems in their fullness and whole he frequently introduces into the text pivotal developments in the income tax field. Helvering v. Clifford and Helvering v. Horst imply a significance that transcends income tax law. Here too the law is a seamless whole.

The author has some words about the persistently troublesome matter of tax avoidance. As tax rates mount and property owners become concerned over the increasingly big bites that taxes eat out of estates, resort is had to anticipatory arrangements which will insulate against death tax liability. Trusts, life insurance, powers of appointment, innumerable types of inter vivos transfers are exploited for their

\[7\text{309 U. S. 331, 60 S. Ct. 554 (1940).}\]

\[8\text{311 U. S. 112, 61 S. Ct. 144 (1940).}\]
full worth in achieving tax economies. But the halcyon days of tax avoidance are over. To be sure, Congress, through the exemptions it allows, still invites property owners to leave part of their property in the general estate, part in insurance, and to dispose of part by inter vivos gifts. Substantial tax savings may still be achieved through a judicious disposition of property. However, anyone conversant with recent court decisions will agree with the author's conclusions that in increasing measure courts are adopting an attitude of hostility to tax avoidance schemes "as they are confronted with repeated examples of flank attacks upon the estate tax, abounding in mental fertility and subtlety."\(^9\) Tax lawyers must keep open a weather eye not only to acquaint themselves with the latest decisions that spell the end of cherished methods of tax avoidance, but also to sense the general change in the climate of judicial opinion on tax avoidance issues. Insurance trusts, trusts with reversionary interests retained, insurance policies with annuity features, to name but a few among one-time favorite devices for circumventing death taxes, may now prove to be cracked cisterns. It is very probable that achievement of tax economies will in the future be a less controlling consideration in determining a property owner's choice of the time and method for disposition of his estate.

Mr. Paul probes into the psychology of tax avoidance, recites the reasons often given by taxpayers in justifying their attempts to find a route that will by-pass the main highway of tax liability, and emerges with this conclusion:

"It is safe to say that most of these rationalizations hardly rise to the dignity of argument. On the conscious level they are, of course, frequently sincere and well-meaning. But they serve to reveal a lack of maturity which obstructs the achievement of a sound workable tax system. No one can study the story of tax avoidance in its relation to the federal estate tax, as well as the gift tax and the income tax, without developing profound misgivings as to the future, not only of our tax system, but also of the entire American economy. The concept that we are the products of our civilization, and not a wonderful self-made job, is little developed in our taxpayers, who have as a result little sense of debt to society and little intelligent interest in the continuation of the conditions which enable satisfactory living conditions. A continuation of these conditions has its inevitable tax cost; for everything we have we give up something else, and if we balanced the advantage we gain in civilization against the other advantage

\(^9\) Paul, § 1.08, p. 42.
we lose in tax contribution, much of our objection to taxes would disappear."

In short Mr. Paul is asking taxpayers to be mindful of their obligations as citizens of a democratic society. A commendable ethical exhortation, indeed, but once the problem is so viewed and stated, it is seen to be far more than a problem of tax avoidance. It is but a facet of the larger question, crucially raised in these days of war, whether democracy calls upon men to a faith and loyalty that rise above the assertion of individual rights and self-interest.

In our federal tax system the community-property-law states stick out like sore thumbs. This situation receives its deserved criticism at Mr. Paul's hands. Where community property law prevails, an unjust advantage arises in the present application of the federal estate tax as well as the income tax. The author points out that community ownership, "regarded as an alien intruder which somehow or other must be naturalized, has been accorded a position of privilege in the very process of naturalization." The desired policy of national uniformity in the operation of the federal tax system is defeated. Congress should not defer the remedying of this inequality. In this connection an even larger question is raised, and that is as to the impact generally of local law upon the federal estate tax. In the construction of provisions in the federal law such as those relating to powers of appointment, trusts, etc., should local law play a controlling part? Clearly state law determines the substantive rights created and their scope. But the characterization of the rights under state law need not be controlling upon the federal authorities. Furthermore, even in the determination of the rights created under local law, the federal tax authorities should be controlled by a state adjudication only if it represents an adversary proceeding. Consent decrees may be collusive and serve to defeat tax liability. The author’s remarks on these matters are penetrating and sensible.

Many lawyers will be disturbed by Mr. Paul’s suggestion that subdivision (a) of section 811 of the Internal Revenue Code states a concept of "substantial ownership" for estate tax purposes. Thus transfers not strictly testamentary in character but indicating continuation of "substantial ownership" in the decedent until his death would be brought under subdivision (a) even though excluded by the technical wording or interpretation of the particularized subsections that follow.

10 Id., § 1.08, pp. 48-49.
11 Id., § 1.09.
12 Id., § 1.09, p. 57.
13 Id., §§ 1.10, 1.11.
14 Id., § 4.12.
where Congress has attempted to capture specified types of inter vivos transfers for death tax purposes. Precedent for this kind of unorthodox statutory construction is found in *Helvering v. Clifford,* where the Court relied upon a theory of "substantial ownership" under section 22a of the income tax law in taxing income to the settlor of an irrevocable short-term trust even though such income was not found to be taxable under sections 166 and 167, which specify the tax treatment of trust income. Mr. Paul admits that legislative history is not friendly to the theory of a broadened interpretation of subsection (a), but points out that a similar obstacle was overcome in the *Clifford* case.

Whether courts should legislate with such freedom in an attempt to implement legislative action is a constantly recurring question. A Court which has become painfully conscious of its limitations as a judicial tribunal in dealing with constitutional questions may well feel that self-restraint is equally becoming in dealing with questions of statutory construction. It may be deemed the path of wisdom to let Congress rectify through new legislation the past errors of both Congress and Court. Whatever opinions one may have on this question, he must agree with the author that the question relating to possible overlapping of subdivision (a) and later subsections of section 811 is now one of the most important questions facing the courts.

The author's discussion of gifts in contemplation of death proceeds along conventional lines. The *Wells* case is cited as the leading authority. "The test is always to be found in motive." It seems to the reviewer that to state the matter in this way is misleading. In the first place, the statute speaks of gifts "in contemplation of death." Does this not mean that the decedent at time of transfer must have been thinking of death in more than a casual or general way? To be sure, as the *Wells* case points out, it is not necessary that there be a fear of imminent death or a condition of *in extremis.* Yet it must be a real apprehension of death in the not distant future. Otherwise, why all the concern in the cases about the decedent's health and the state of his mind and his age? Motivation of a gift is a relevant item because it may shed light on whether the decedent was seriously thinking of death, but not because it is the test or the "touchstone." There has been a good deal of confusing discussion of motive in the contemplation of

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16 309 U. S. 331, 60 S. Ct. 554 (1940).
17 I *Paul,* §§ 6.01-6.26.
18 *United States v. Wells,* 283 U. S. 102, 51 S. Ct. 446 (1931).
18 I *Paul,* § 6.02, p. 243.
19 Id., § 6.03, p. 248.
death cases. Was the motive associated with death or with life? In case of mixed motives, which was the dominant motive? Often ignored is the fact that the most substantial motive behind all gifts is the desire to confer a benefit on the donee. The crucial question is not why did the decedent make this inter vivos gift but rather what were the reasons that induced him to exercise his bounty at that particular time? This question is relevant not because it states a test in any way, but because the answer thereto, together with evidence as to health, age and size of gift, furnish a basis for judgment in deciding whether the decedent had an awareness that his life was soon to run its course. Accordingly it seems clear that a gift made inter vivos for the purpose of avoiding the estate tax is not for this reason alone a gift in contemplation of death, a conclusion Mr. Paul seems ready to admit. But on the theory that motivation is a "touchstone," we should have to say that such a gift is conclusively in contemplation of death, or, to restate it, that a person automatically incurs tax liability when he consciously takes a step to avoid it—an unusual proposition.

Admittedly the government is under a heavy handicap in proving a transfer to be in contemplation of death. There is much merit to the author's suggestion that "a statute be enacted providing for a conclusive two-year presumption with respect to a decedent of a minimum specified age, let us say sixty-five years, who has made a transfer by trust or otherwise of a substantial part of his property in the nature of a final disposition to his heirs-at-law or other natural objects of his bounty." Even if Heiner v. Donnan is still authoritative—which one may readily doubt—the conclusive presumption as limited by these conditions would hardly be found arbitrary and capricious under the due process clause of the Fifth Amendment.

No one will disagree with the author in his judgment that the estate tax provisions dealing with "transfers intended to take effect at death and inter vivos trusts are probably the most esoteric provisions of the federal revenue laws." No small part of the confusion is attributable to shifts in judicial interpretation. A wide gulf of thought intervenes between earlier decisions such as May v. Heiner and Helvering v. St. Louis Union Trust Co. and later decided cases like

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20 Id., § 6.15.
21 Id., § 6.26, p. 281.
23 1 PAUL, § 7.01, pp. 282-283.
24 281 U. S. 238, 50 S. Ct. 286 (1930).
Helvering v. Bullard and Helvering v. Hallock. In the former class of cases traditional concepts of property law were engrafted into the estate tax structure with the effect of limiting its reach. In the latter group of cases reflecting the Court's present thinking, it has sought to effectuate the legislative policy of preventing estate tax avoidance. The author feels that the objective of subdivisions (c) and (d) of section 811 of the Internal Revenue Code should be stated in even wider terms, namely, to reach all inter vivos transfers that may serve as substitutes for testamentary disposition. It would occasion no surprise if the Court adopted this enlarged criterion of interpretation in its future decisions.

Where a decedent retained a life estate in property transferred during his life, it seems clear that this transfer should have been considered as one to take effect at death. Yet May v. Heiner and the per curiam decisions that followed in its wake held otherwise. To repair this breach in the revenue walls, Congress hastily enacted the famous Joint Resolution of March 3, 1931, requiring the inclusion in the gross estate of all property passing by inter vivos transfers in which the decedent retained a life estate. But this has been interpreted to be prospective in operation only and not to apply to transfers before March 3, 1931. However, the Hallock case, decided in 1940, in finding that an inter vivos transfer under which the decedent retained a possibility of reverter was a gift to take effect at death, marked a radical departure from the mode of thought that dictated the result in May v. Heiner. Already the Board of Tax Appeals has suggested that May v. Heiner is no longer authoritative as to transfers before March 3, 1931. But where does this leave the Joint Resolution? It is of no significance as to transfers occurring before the date of its enactment. The taxability of these transfers depends upon the judicial construction of the earlier legislation. Mr. Paul says that what the Supreme Court gave it may take away. But should not a distinction be made between inter vivos transfers preceding the decision in May v. Heiner and those

28 1 Paul, § 7.05.
29 281 U. S. 238, 50 S. Ct. 286 (1930).
34 Estate of Mary H. Hughes, 44 B. T. A. 1196, No. 184 (1941).
35 1 Paul, § 7.16, p. 342.
made in reliance on this case and before March 3, 1931? In so far as the Treasury adopts the board's view that the Hallock case reduces May v. Heiner to judicial scrap and feels obliged therefore to include taxable transfers before March 3, 1931, where a life estate was reserved, should it not exclude the transfers made in reliance on May v. Heiner where a showing is made that reliance was justified? The amendment of the regulations following the Hallock decision furnishes ample precedent for action of this kind.

Still unanswered are the valuation problems raised by the Hallock case. Where decedent by inter vivos transfer retains a reversionary interest, whether called reversion or possibility of reverter, according to the Hallock case the gift is incomplete and hence the transfer is taxable under subdivision (c) of section 811 of the Internal Revenue Code. But what is the interest in the estate and how is its value measured? Obviously there is really nothing in the estate, since by hypothesis the reversionary interest is extinguished. Yet the inter vivos transfer is not deemed fully consummated until death, since the decedent's last possibility of beneficial interest is liquidated at this time. Despite Mr. Everett's argument, it seems futile to determine value on the basis of what passes at death. Mr. Paul appears to be on sound ground in his view that it is the market value of the corpus at date of death which is to be included in the estate under the view of the Hallock case, since decedent at date of death had a chance of getting it all back. It would be surprising for the Supreme Court to take any other view. But on one detail of this problem one may well agree with the Treasury Department and disagree with Mr. Paul. The Department in its amended regulations recognizes that where the reversion hinges on the decedent's surviving life tenant X, the value to be included in the decedent's estate upon his prior death is the market value of the corpus less the present value of the unexpired portion of X's life estate. The author seems to view this as a needless concession to the taxpayer. Since death extinguished the decedent's chance of recapturing the entire estate in the property, by hypothesis no deduction should be allowed for the life estate, according to Mr. Paul. Despite the mathematical logic

37 "Valuation of a 'Possibility of Reverter' under the Hallock Case," 18 Taxes 611 (1940).
38 I Paul, §§ 7.24-7.29.
40 I Paul, § 7.29.
of the author's argument, the result seems unnatural. And even as a logical proposition, his judgment is correct only if it is assumed that the decedent during his life made a single gift when he created more than one interest. But is this assumption correct? According to the views of the Supreme Court under the gift tax law, there are as many transfers involved in the setting up of a trust as there are gifts of beneficial interests. Accordingly when the settlor creates a life estate in X plus remainder over to Y but with a reversionary interest in the settlor in case he survives X, there are two inter vivos transfers: (1) a transfer of a life estate to X and (2) the transfer of a remainder to Y darkened by the cloud of the settlor's contingent reversionary interest. It is this second transfer which is a gift to take effect at death. In no way can the first transfer be considered incomplete or subject to any further strings of control. Therefore, should it not be only the present value of Y's remainder interest at date of the settlor-decedent's death which is to be included in the taxable estate? The Treasury's views on this question seem to stand on solid ground.

In his chapter on powers of appointment the author deals with questions which in measure have already been aired and illuminated through the discussions of Messrs. Griswold, Leach and Angell. The simply worded language of subsection (f) of section 811 referring to property "passing under a general power of appointment exercised by the decedent" has posited for administrative authorities and courts the task of reducing to concrete significance the terms "general," "passing," and "exercised." The author at the outset disposes of reserved powers on the ground that their treatment is determined under subsections (c) and (d). This seems correct, for as Mr. Paul points out it appears more appropriate to treat such a reserved power "as an unexhausted segment of the donor's original power of testamentary disposition." In his thorough treatment of the granted power question the author joins Professor Griswold in his criticism of the present inadequate and inept wording of the statute and in his criticism of the Grinnell case. They agree that no distinction should be made between general and special

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44 I PAUL, §§ 9.03, p. 418.
powers, although Mr. Paul favors an exception with respect to special powers exercisable exclusively for the benefit of either the donor's or the donee's children. They agree that the statute should be reworded so as to eliminate the requirements of an "exercise" of the power and of a "passing" thereunder. The sole test should be whether the property was subject to a power in the hands of the decedent. Possibly the exception indicated with respect to special powers exercisable in favor of a narrowly limited group will overcome the objections stated by Messrs. Leach and Angell.

No chapter better illustrates Mr. Paul's genius for bringing order out of chaos than his chapter on the taxation of life insurance. The history of interpretation of the laconic language found in subsection (g) of section 811, requiring the inclusion in the estate of proceeds payable to beneficiaries under life insurance policies taken out by the decedent indicates that the sparing use of words by the legislative body is not intrinsically virtuous. In following the trail of interpretation, one must take his way through a foreboding thicket of administrative and judicial interpretations which at first make penetration seem futile if not impossible. As the author himself puts it, "Indeed, it has required twenty years of judicial and administrative thinking to arrive at a reconstructed meaning, which is still so obscure that only the most gifted oracles are capable of guiding the insured along paths of safety." Fortunately Mr. Paul himself is one of those "gifted oracles" whose guidance proves most invaluable. As indicated by the author, "The Treasury Department itself has been singularly irresolute as to the meaning of the statutory language of subdivision (g) of Section 811." Starting with the notion that taxation of insurance proceeds depended on payment of premiums by the decedent, the Department then shifted to the view that control over the policy furnished the criterion of taxability. And then through the promulgation of Treasury Decision 5032, effective January 10, 1941, the Treasury made a further shift and this time reverted to its first view that taxability depends upon payment of premiums by the decedent. Thus the Department has done a complete somersault. In defense of these oscillating views, it

46 I Paul, § 9.27.
47 Id., § 10.29, p. 570.
48 Id., § 10.13, p. 511.
must be acknowledged that the intermediate position, accepting retention of control as a test, was undoubtedly influenced by the Department's interpretation of judicial decisions. Moreover, it must be said to the Department's credit that under Treasury Decision 5032 it is carefully attempting to avoid any unjust retroactive consequence. It seems safe to say that a Court which thinks the thoughts and speaks the language of the *Hallock* case will not likely upset the new regulation embodied in Treasury Decision 5032 on either statutory or constitutional grounds. Even though the Department has gone through a perfect somersault, it seems to have landed right side up under the statute. Much more questionable is the first decision of the Court of Claims in the irrepressible *Bailey* case. This case arose under Treasury Regulations 80 when retention of control was still significant, and should have been decided according to that criterion, as Mr. Paul points out. The author also disagrees with the Court of Claims in its third *Bailey* opinion, where the view was expressed that quite apart from payment of premiums mere retention of a reversionary interest is sufficient to make the proceeds taxable. His objections are sound. Not only does the statute in subsection (g) require a taking out by the decedent, but in so far as the proceeds are independently taxable under subsection (a), some showing of active control should be made. In conclusion the author sharply criticizes Congress for failing to pass a statute "that says what it means and means what it says." Concretely and constructively he suggests a statute which would require inclusion in decedent's estate of the "proceeds of all insurance policies taken out upon his life to the extent that he has paid premiums thereon or, at least to the extent of its cash value, where he possessed at the time of death some incidents of ownership over the policies." In connection with cross policies taken out by spouses, he suggests a special excise tax upon the receipt of proceeds by the beneficiary. And finally he questions the desirability of the added $40,000 exemption for life insurance proceeds.

The federal gift tax is intimately associated with the estate tax, and the author has wisely included a study of gift tax problems in these two volumes. But as he points out, some of the most serious questions in interpretation of the gift tax law depend on whether the gift is

54 I PAUL, § 10.14, p. 521.
56 I PAUL, § 10.20.
57 Id., § 10.29, p. 570.
58 Id., § 10.29, p. 571.
viewed as ancillary to the estate tax or as supplemental to the income tax. If the gift tax simply supplements the estate tax, the taxation of inter vivos transfers under the gift tax law should depend on whether the property continues in the estate for estate tax purposes. But if its purpose is to buttress the income tax, gift tax liability should be imposed in cases of inter vivos transfers of such a character that the transferor is no longer taxable upon the income—the gift tax thus compensating the government for the spreading out and dilution of income taxes. Under a carefully conceived and well-integrated revenue system, a gift tax could usefully serve concurrent purposes in reinforcing both estate and income taxes. But at the present time only a gift tax with a dual personality could hope to bridge both objectives. Congress has created an insoluble problem for the Treasury Department and the courts. As an illustration, if $X$ sets up a trust retaining a power to revoke in conjunction with a beneficiary, the corpus will be taxable as part of his estate upon his death under subsection (d) of section 811 of the Internal Revenue Code. But according to the income tax law, he is no longer taxable upon the income of the trust. Here the gift tax is between the devil and the deep blue sea. If no gift tax is due on the theory that the gift is incomplete for estate tax purposes, income tax reduction is successfully achieved without the deterring cost of gift tax. If the gift tax is required to be paid on the theory that under the income tax law this is viewed as a complete gift, is there not unnecessary duplication of estate and gift tax liability?

The Supreme Court in the *Sanford's Estate* case cast its vote in favor of viewing the gift tax as an adjunct to the estate tax. However, even under the Court's view, only a partial correlation between these two taxes is possible. It is clear that certain completed inter vivos transfers, such as gifts in contemplation of death and transfers retaining a life estate, cannot possibly escape gift taxation even though the property transferred is later included in the taxable estate. There is room for construction of the simple language of the gift tax law but no carte blanche authority to rewrite it. At most then, the *Sanford's Estate* case may mean that estate tax liability predetermines gift tax liability only with respect to the kind of inter vivos transfer where a measure of voluntary control retained by the decedent creates doubt as to the com-

59 2 PAUL, c. 17.
61 I. R. C., § 166.
pleteness of the gift. Apart from the actual holding in the *Sanford's Estate* decision, one may well question along with the author the point of emphasis in the case.\(^6\) If a choice must be made between viewing the gift tax as junior partner of either estate tax or income tax, substantial considerations favor the income tax implementation view. Duplication of gift and estate taxes is not so serious a matter since the credit mechanism points to a fair result. But it is a serious matter for the Treasury if because of attempted correlation of gift and estate taxes, there is no gift tax to compensate the government and discourage the taxpayer from inter vivos transfers resulting in income tax reduction.

Further complicating the picture is the rapidly expanding judicial concept of income under section 22(a) of the income tax law. *Helvering v. Clifford*\(^64\) with its concept of substantial ownership and *Helvering v. Horst*\(^65\) with its concept of psychic satisfaction suggest that the kinds of gifts there involved are not complete for gift tax purposes and that gift tax liability arises each year when the trust beneficiary or the assignee, as the case may be, actually secures enjoyment of income. This suggested impact of newly generated income tax law upon the gift tax structure is naturally not welcomed by the Treasury, and Mr. Paul apparently concludes that in the present state of disunity of the estate, gift and income tax laws, the Treasury need not read the *Clifford* and *Horst* decisions into the gift tax statute.\(^66\)

Mr. Paul's net conclusion is that serious consideration be given to current proposals for complete integration of estate and gift taxes.\(^67\) Under this plan a single cumulative transfer tax at graduated rates would be imposed on inter vivos transfers and those at death. In determining the rate bracket applicable to transfers at death, the inter vivos transfers would be aggregated with those at death. Only one specific exemption of $40,000 would be allowed. But the further integration of this scheme with income taxation is not easily achieved. Yet the problem presses upon Congress for solution.

Space permits no detailed reference to useful discussions in these two volumes of deduction and valuation questions as well as procedural problems and a host of other matters left untouched. There is enough here by way of critical and comprehensive study to delight the connoisseur and expert, but with it all an orderliness of presentation and lucidity of statement and arrangement which should attract the beginner and make his way less arduous.

\(^6\) 2 *Paul*, §§ 17.06, 17.07, 17.20.
\(^64\) 309 U. S. 331, 60 S. Ct. 554 (1940).
\(^65\) 311 U. S. 112, 61 S. Ct. 144 (1940).
\(^66\) 2 *Paul*, § 17.17.
\(^67\) Id., § 17.20.