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TRUSTS - APPORTIONMENT OF ANNUAL TAXES BETWEEN LIFE TENANT AND REMAINDERMAN

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TRUSTS — APPORTIONMENT OF ANNUAL TAXES BETWEEN LIFE TENANT AND REMAINDERMAN — Annual taxes on real estate in Massachusetts were assessed on January 1 of each year, and were payable on July and October 1. The will set up a trust to pay income to the tenant for life, and to pay the principal to the remainderman. The trustees sought to retain sufficient funds out of income to meet the next year's taxes, fearing that the tenant might not live long enough after January 1 to accumulate sufficient income to meet the taxes, and they brought this bill for instructions. The probate court entered a decree sustaining the trustees' contentions. On appeal, *held*, that although the trustees could retain the funds for a reasonable reserve, the amount of the entire year's taxes need not be retained, because upon the death of the tenant before the end of the year, there would be an apportionment of the tax burden between principal and income. *Taylor v. Bentinck-Smith*, (Mass. 1939) 24 N. E. (2d) 146.

Absent express provision by the creator of the interests, ordinary current expenses, including regularly recurring taxes, are chargeable to income.¹ The problem of apportionment *vel non* arises in connection with cases where the life interest commences or terminates during the period for which an expense is incurred.² There is little difficulty in apportionment of per diem expenses,³ but courts are in conflict upon apportionment of such a charge as taxes that is considered to be a single instantaneous event rather than an obligation accruing from day to day.⁴ There is a distinction drawn between the date of assessment, date of levy, and due date, in the cases involving liability for the tax as between tenant and remainderman; the date upon which the tax becomes a lien or charge

¹ 2 SCOTT, TRUSTS, § 233.2 (1939); 4 BOGERT, TRUSTS AND TRUSTEES, § 804 (1935). And see cases collected in these authorities and in 17 A. L. R. 1385 (1922), and 94 A. L. R. 311 (1935).

² This note is concerned only with the problem of apportionment arising upon the termination of the life estate. Professor Scott states that the courts have had more difficulty with the companion problem arising upon the commencement of the trust. For collections of cases on this problem, see 2 SCOTT, TRUSTS, § 237 (1939); 17 A. L. R. 1385 at 1397 (1922); 94 A. L. R. 311 at 320 (1935).

³ 2 SCOTT, TRUSTS, § 237 (1939).

⁴ Professor Scott says, "It would seem fair that where the tax payment covers a period which is only partly within the period of the trust, the tax should be apportioned between income and principal." 2 SCOTT, TRUSTS, § 237, p. 1326 (1939). He cites, in support of this view, *Safe Deposit & Trust Co. of Baltimore v. White*, (Baltimore City Cir. Ct., 1939) BALTIMORE DAILY RECORD, Jan. 13, 1939, p. 3; *Matter of Schulz*, 133 Misc. 168, 231 N. Y. S. 677 (1928); *Matter of Hone's Estate*, 152 Misc. 221, 274 N. Y. S. 101 (1934); *Fest's Estate*, (Pa. 1891) 28 W. N. Cas. 415; *Crump's Estate*, 13 Pa. Co. Ct. 286, 2 Pa. Dist. 478 (1893); *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408, 39 A. 750 (1898). *Contra*, *Cummins v. Cummins*, 21 Hawaii 742 (1913); *Brodie v. Parsons*, 23 Ky. L. Rep. 831, 64 S. W. 426 (1901); *Holmes v. Taber*, 9 Allen (91 Mass.) 246 (1864); *Patterson v. Old Dominion Trust Co.*, 149 Va. 597, 140 S. E. 810, 141 S. E. 759 (1928). Professor Bogert says, "If the tax is assessed and become a charge on the property during the life of the life cestui, it should be paid out of income, even though collected for a year subsequent thereto and even though the life cestui dies before the end of that year. No apportionment of the burden between income and capital is permitted." 4 BOGERT, TRUSTS AND TRUSTEES, § 804 (1935).

upon the property is the important one for this purpose.⁵ If the life estate and remainder are legal interests, there is authority indicating that apportionment will be denied,⁶ the principle being that the tax is a single charge, payable by the person having the possessory interest upon the date that the tax becomes a charge upon the property, and, being a single charge rather than the sum of payments for each day of the tax period, cannot be divided. This thought apparently was carried over into the cases involving equitable estates, and the earlier cases held that the taxes could not be apportioned.⁷ It is submitted that the principal case is indicative of a modern trend toward apportionment, and that this is a more equitable imposition of the burden of taxes than the older rule. The tax may still be considered as a single charge, but the charge is against the trust, so far as the state is concerned. The problem of the trustee's accounting, however, is another question, and it seems fairer to distribute the burden upon his accounting in such a way that the tax is paid by the beneficiaries in accordance with the benefits received.⁸

Charles F. Dugan

⁵ *Gates v. Wirth*, 181 Iowa 19, 163 N. W. 215 (1917); *O'Donnell v. Mathews*, 221 Mo. App. 657, 284 S. W. 204 (1926); *Sutton v. Chaplin*, 10 Ves. Jr. 66, 32 Eng. Rep. 768 (1804). And see cases cited in note 4, *supra*.

⁶ *Lantz's Estate v. McDaniel*, 99 Ind. App. 233, 190 N. E. 130 (1934); *Gates v. Wirth*, 181 Iowa 19, 163 N. W. 215 (1917); *Penn's Exr. v. Penn's Exr.*, 120 Ky. 557, 87 S. W. 306 (1905).

But see 1 PROPERTY RESTATEMENT, § 129, comment (g) (1936), where it is stated that annual taxes are apportionable in legal estates. However, the Institute's decision, according to a special note to § 174, comment (g), in the Tentative Draft No. 3 (1931), appear to be based on the following cases: *Crump's Estate*, 13 Pa. Co. Ct. 286, 2 Pa. Dist. 478 (1893); *Fest's Estate*, (Pa. 1891) 28 W. N. Cas. 415; *Matter of Schulz's Estate*, 133 Misc. 168, 231 N. Y. S. 677 (1928).

⁷ See cases cited in note 4, *supra*. It will be noted that one Massachusetts case, *Holmes v. Taber*, 9 Allen (91 Mass.) 246 (1864), was cited by Professor Scott in favor of the non-apportionment rule. The trustees in the principal case apparently gave this construction to the case, for it was their fears in connection with that case which motivated the bringing of this bill. However, the court in the principal case distinguished *Holmes v. Taber* on the grounds that the statutes at the time of the earlier decision indicated an assessment directly against the life tenant, and that there was at that time thought to be a closer analogy between an assessment upon a legal owner and an accounting charge against an equitable life interest.

⁸ The various tax theories can be put to work for either the apportionment or non-apportionment rule. Bogert, e.g., says that taxes "are the price of governmental protection and the various services necessary to make the trust property secure and productive." 4 BOGERT, TRUSTS AND TRUSTEES, § 804 (1935). The principal case suggests that there should be apportionment so that the burden "will fall equitably upon those for whose benefit the property is to be rescued from sale." 24 N. E. (2d) 146 at 148-149.

The American Law Institute has accepted the position stated in the principal case. 1 TRUSTS RESTATEMENT, § 237 (1935).