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TAXATION - ESTATE TAX - TRUST WITH RESERVATION OF LIFE ESTATE

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TAXATION — ESTATE TAX — TRUST WITH RESERVATION OF LIFE ESTATE — In 1923 decedent created an irrevocable trust, reserving to herself the income for life with remainders over. Upon decedent's death, it was held that the corpus of the trust was properly a part of decedent's gross estate for Federal Estate Tax purposes. *Helvering v. Bullard*, (U. S. 1938) 58 S. Ct. 565.

The Federal Revenue Acts since 1916 have uniformly provided that any property transferred by a decedent during his lifetime, whether in trust or otherwise, if "intended to take effect in possession or enjoyment at or after death," shall be included in such decedent's gross estate.[1] This statutory provision has given rise to some interesting decisions concerning both its meaning and its validity. Thus, in *May v. Heiner*,[2] in which the decedent had created a trust reserving a life estate with remainders over, it was held that the trust corpus was not to be included in the decedent's gross estate. Though the opinion is somewhat ambiguous, it seems clear that the decision turns merely upon the construction of the statute and not upon its constitutional validity. At any rate, *Guarantee Trust Co. v. Blodgett*,[3] decided less than three years later, without mentioning the *May* case expressly holds valid a state succession tax upon the same type of transaction. And certainly the "due process" clause of the Fourteenth Amendment is not less restraining upon the state governments than is the "due process" clause of the Fifth Amendment upon the federal govern-

[1] Revenue Act of 1916, § 202 (b), 39 Stat. L. 756; Revenue Act of 1918, § 402 (c), 40 Stat. L. 1057; Revenue Act of 1921, § 402 (c), 42 Stat. L. 227; Revenue Act of 1924, § 302 (c), 43 Stat. L. 253; Revenue Act of 1926, § 302 (c), 44 Stat. L. 9, as amended by 46 Stat. L. 1516 (1931); Revenue Act of 1932, § 803 (a), 47 Stat. L. 169.

[2] 281 U. S. 238, 50 S. Ct. 286 (1930).

[3] 287 U. S. 509, 53 S. Ct. 244 (1933).

[4] The fact that the Blodgett case dealt with a succession tax and the May case

ment.[4] Congress, at least, was of this opinion, for the statute was amended by the Joint Resolution of March 31, 1931, which added the following to the above quoted phrase:

> "including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property. . . ." [5]

This amendment left no doubt as to the meaning of the statute, at least in respect to the problem here discussed, but there still remained the question of its constitutional validity. The latter was decided adversely to the government by the Circuit Court of Appeals for the Seventh Circuit.[6] The rationale of that decision may be summarized by the following quotation from the opinion:

> "We conclude, therefore, that as the trust was an irrevocable completed inter-vivos gift, that, as the interests of the beneficiaries vested at the time of its creation, the estate of the deceased was thereafter deprived of this property passing to the trust estate and could not thereafter exercise control over the same; that under the decisions quoted, such is not a testamentary transfer." [7]

The decision in the principal case, reversing the decision of the Circuit Court of Appeals, is based on two independent propositions. First, "since Congress may lay an excise tax on gifts, it is of no significance that the exaction is denominated an estate tax or is found in a statute purporting to levy an estate tax. Moreover, Congress having the right to classify gifts of different sorts might impose an excise at one rate upon a gift without reservation of a life estate and at another rate upon a gift with such reservation." [8] Second, the purpose of the Joint Resolution, above referred to, was to prevent a common type of estate tax avoidance, namely, the conveyance of one's property to one's "heirs" subject to a life estate in one's self, and was reasonably calculated to that end. As to the first proposition, it might be said that whether the tax be denominated a "gift tax" or an "estate tax," apparently it is in any case in the Court's view an excise tax upon the privilege of transferring property.[9] If that be so, it seems strange that such a tax, i.e. one upon the transfer of property, should be imposed not at the time of the transfer, but rather at the time of the transferor's death. Stranger still is it that such a tax should be based upon the value of the property, not at the time of transfer, but at a time which may be many years subsequent thereto—namely again, the transferor's death. By the latter time the property may have a greatly altered value, in which case the

with a transfer tax would not seem to furnish a basis for distinguishing those cases. Nor would there seem to be any constitutional restriction other than the "due process" clause of the Fifth Amendment to urge against the tax dealt with in the May case.

[5] 46 Stat. L. 1516 (1931).

[6] Bullard v. Commissioner, (C. C. A. 7th, 1937) 90 F. (2d) 144.

[7] Ibid. at p. 149.

[8] 58 S. Ct. 565 at 567.

[9] Cf. dissent of Justice Roberts in Coolidge v. Long, 282 U. S. 582 at 608-609, 51 S. Ct. 306 (1931).

taxpayer is required to pay a tax the amount of which is dependent upon occurrences subsequent to the event which gave rise to the tax liability. The second proposition in support of the decision seems to be vitiated by the fact that any particular transfer of the type here considered which actually was made for the purpose of avoiding the estate tax would have been a transfer "in contemplation of death" and as such would be subject to the estate tax.[10] A more comprehensive and realistic basis upon which to predicate the validity of the tax here in question, it is submitted, might be that since the benefits of property in the economic sense do not pass to the "donees," i.e. remaindermen, until the death of the "donor," from a realistic point of view (apart from the legalistic nicities of the form of conveyance) the transfer is in effect testamentary and so should be treated as such for taxation purposes.[11]

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[10] Farmers Loan & Trust Co. v. Bowers, (C. C. A. 2d, 1934) 68 F. (2d) 916, cert. denied 292 U. S. 565, 55 S. Ct. 76 (1934), 296 U. S. 649, 56 S. Ct. 306 (1935), 299 U. S. 582, 57 S. Ct. 47 (1936).

Under the court's view in the principal case, does not the said Joint Resolution in effect create an irrebutable presumption concerning gifts "in contemplation of death" similar to that which was held invalid in Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358 (1932)?

[11] Cf. dissent of Justice Stone in Helvering v. St. Louis Union Trust Co., 296 U. S. 39 at 46, 56 S. Ct. 74 (1935).

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