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TAXATION - POWER OF APPOINTMENT - EFFECT OF REFUSAL BY APPOINTEE WHO IS GIVEN SAME SHARE IN DEFAULT OF APPOINTMENT

TAXATION — POWER OF APPOINTMENT — EFFECT OF REFUSAL BY APPOINTEE WHO IS GIVEN SAME SHARE IN DEFAULT OF APPOINTMENT — The donee of a power of appointment exercised it by will in favor of the persons who would have taken exactly the same interests in default of appointment, and who declared their election to decline the appointment and take by the provision in default of appointment in the will of the donor. Suit was brought for additional federal estate taxes covering the property to which the power applied, under a statute levying such a tax upon "any property passing under a general power of appointment exercised by the decedent . . . by will. . . ." [1] *Held*, that the property subject to the power had not passed under the appointments made, since the assent of the appointee was necessary to make the transfer under the power complete, and the appointees had here seasonably refused to take under the appointment and elected to take directly from the donor. *Helvering v. Grinnell*, 294 U. S. 153, 55 Sup. Ct. 354 (1935).

Taxation of property subject to a general power of appointment, as a part of the donee's estate, caused the courts some difficulty, largely due to the general holding that the appointee takes by the instrument which creates the power, and

[1] Revenue Act 1926, sec. 302 (f), 44 Stat. 70, U. S. C. tit. 26, sec. 1094 (f).

from the donor, rather than by the appointment and from the donee.[2] But the estate tax was held to be upon the right given by the state to direct the disposition of property upon one's death, and hence to apply to property passing under a general power of appointment as part of the donee's estate.[3] It would seem to follow from that holding that the act of exercising a general power of appointment by the donee could be taxed; but that problem was not before the court in the principal case because the statute only purported to tax "any property passing under a general power of appointment. . . ." [4] The New York courts have held that nothing passes under a power even though the donee attempts to exercise it, if the appointee declines the appointment and elects to take directly from the donor by the provision in default of appointment.[5] A similar view was taken in Pennsylvania.[6] Two Circuit Court of Appeals decisions prior to that in the principal case held such property a taxable part of the donee's estate.[7] Those courts met the objection that the property did not actually pass under the power of appointment, in the terms of the statute, by saying that the death of the donee without having appointed the property to others was the event which lodged an indefeasible interest in the property in the recipients.[8] But, as was pointed out in the Circuit Court of Appeals decision affirmed by the principal case, that argument would apply equally well if no attempt were made to exercise the power;[9]

[2] On this basis there were decisions that such property was not taxable as a part of the donee's estate; Commonwealth v. Duffield, 12 Pa. St. 277 (1849); Shattuck v. Burrage, 229 Mass. 448, 118 N. E. 889 (1918).

[3] Chanler v. Kelsey, 205 U. S. 466, 27 Sup. Ct. 550 (1907), holds the property taxable by a state. As to the right of the federal government to levy such a tax, see Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747 (1900); Snyder v. Bettman, 190 U. S. 249, 23 Sup. Ct. 803 (1903).

[4] Revenue Act 1926, sec. 302 (f), 44 Stat. 70, U. S. C. tit. 26, sec. 1094 (f).

[5] Matter of Lansing, 182 N. Y. 238 at 245, 74 N. E. 882 at 884 (1905). This case relies upon the analogy of consent to a contract, or acceptance of a deed, as required for the completed transaction. See also Jackson ex dem. McCrea v. Dunlap, 1 Johns. Cas. (N. Y.) 114 at 116, 1 Am. Dec. 100 (1799); Jackson ex dem. Eames v. Phipps, 12 Johns. (N. Y.) 418 (1815); Matter of Chapman, 133 App. Div. 337, 117 N. Y. S. 679 (1909), aff'd 196 N. Y. 561, 90 N. E. 1157 (1909); Matter of Haggerty, 128 App. Div. 479, 112 N. Y. S. 1017 (1908), aff'd 194 N. Y. 550, 87 N. E. 1120 (1909). Holding that the election must be *in toto*, In re Delano's Estate, 176 N. Y. 486, 68 N. E. 871, 64 L. R. A. 279 (1903).

[6] Freeman's Estate (No. 1), 35 Pa. Super. Ct. 185 (1908); Crolius v. Kramer, 279 Pa. 275, 123 Atl. 808 (1924); Potter's Estate, 13 Pa. Dist. & Co. R. 667 (1930); also Pennsylvania Co. for Insurances v. Lederer, (D. C. E. D. Pa. 1921) 292 Fed. 629, noted in 37 HARV. L. REV. 628 (1924).

[7] Lee v. Commissioner, 61 App. D. C. 33, 57 F. (2d) 399 (1932), cert. denied, Lee v. Burnet, 286 U. S. 563, 52 Sup. Ct. 645 (1932); Wear v. Commissioner, (C. C. A. 3d, 1933) 65 F. (2d) 665, noted in 2 GEO. WASH. L. REV. 120 (1933). Compare the Circuit Court of Appeals decision which is affirmed in the principal case. Grinnell v. Com'r of Internal Revenue, (C. C. A. 2d, 1934) 70 F. (2d) 705.

[8] Lee v. Commissioner, 61 App. D. C. 33, 57 F. (2d) 399 at 402 (1932); Wear v. Commissioner, (C. C. A. 3d, 1933) 65 F. (2d) 665 at 667.

[9] Grinnell v. Com'r of Internal Revenue, (C. C. A. 2d, 1934) 70 F. (2d) 705 at 708 (1934). An Illinois statute, since repealed, included in the tax upon the donee's

and in that event, the property could scarcely be said to pass under the power of appointment. The cases relied on by the Circuit Court of Appeals decisions contrary to (and expressly overruled by) the principal case involved insurance [10] and estates by entirety [11] under the estate tax, both of which are plainly within the express terms of the taxing statute, so that only the power to tax was there involved.[12] Simply as a matter of statutory construction, it seems hard to escape the conclusion that the property involved in the principal case did not pass "under a general power of appointment exercised by the decedent." [13]

J. E. G.

estate such property held under a general power of appointment, although no attempt should be made to exercise the power. Ill. Laws 1909, p. 312, sec. 4. See Bentley, "Inheritance Taxation on Powers of Appointment," 23 ILL. L. REV. 446 (1929).

[10] Chase Nat. Bank v. United States, 278 U. S. 327, 49 Sup. Ct. 126, 63 A. L. R. 388 (1929).

[11] Tyler v. United States, 281 U. S. 497, 50 Sup. Ct. 356, 69 A. L. R. 388 (1930).

[12] Insurance, U. S. C. tit. 26, sec. 1094 (g). Estates by entirety, U. S. C. tit. 26, sec. 1094 (e).

[13] Principal case, 294 U. S. 153 at 156, 55 Sup. Ct. 354 at 355.