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TAXATION-FEDERAL ESTATE TAX-CHARITABLE DEDUCTION-CERTAINITY OF AMOUNT OF GIFT IN REMAINDER TO CHARITY WHEN CORPUS MAY BE INVADED FOR LIFE TENANT

Frank L. Adamson S. Ed.
University of Michigan Law School

TAXATION—FEDERAL ESTATE TAX—CHARITABLE DEDUCTION—CERTAINTY OF AMOUNT OF GIFT IN REMAINDER TO CHARITY WHEN CORPUS MAY BE INVADED FOR LIFE TENANT—Testator left his estate in trust for the life of his mother, giving her a life income of $750 per month. The trustees were authorized to use the rest of the income and the principal for her "pleasure, comfort and welfare" and were instructed to care and provide for her as she might desire. A deduction for a gift to charity of a portion of the remainder was disallowed by the commissioner. The executor sued to recover the tax paid, alleging that the annual income from the estate exceeded the mother's fixed share by $6000, that she had independent investments, earning $300 per month, that she was a woman of moderate needs, without dependents, living on substantially less than $750 per month, and that she was eighty-five years old at the death of the testator. The district court dismissed the complaint for failure to state a cause of action.[1] The circuit court of appeals reversed,[2] holding that despite the provisions of the power, there was an issue of fact whether the corpus was threatened with invasion. On certiorari to the United States Supreme Court, *held,* reversed. The amount of the charitable gift was not "presently ascertainable,"[3] as the trustees' disbursements were not limited by any ready standard. *Henslee v. Union Planters National Bank & Trust Co.,* (U.S. 1949) 69 S.Ct. 290.

The provisions of section 812(d) of the Internal Revenue Code[4] applicable to the problem of the principal case have remained substantially unchanged since the Revenue Act of 1919,[5] as have the pertinent parts of the Treasury regulations interpreting that act.[6] In only two other cases has the Supreme Court considered whether a gift of a remainder interest to charity might be deducted when that gift is subject to depletion for the benefit of the life tenant. In *Ithaca Trust Co. v. United States,*[7] the power was given to use any sums "'that may be necessary to suitably maintain her in as much comfort as she now enjoys'."[8] The Court held the deduction could be taken, stating "The standard was fixed in fact and capable

[1] Union Planters Natl. Bk. v. Henslee, (D.C. Tenn. 1947) 74 F. Supp. 113.

[2] Union Planters Natl. Bk. v. Henslee, (C.C.A. 6th, 1948) 166 F. (2d) 993.

[3] TREAS. REG. 105, §81.44, note 6, infra.

[4] "... [T]he value of the net estate shall be determined ... by deducting from the value of the gross estate—(d) The amount of all bequests ... to or for the use of any corporation organized and operated exclusively for ... charitable ... purposes ...." 26 U.S.C. (1946) §812(d).

[5] 40 Stat. 1098, §403(a) (3) (1919).

[6] "If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use." T.R. 105, §81.44; and T.R. 63, Art. 47, promulgated July 27, 1922. "If the ... trustee is empowered to divert the property or fund ... to a use or purpose which would have rendered it ... not deductible had it been directly so bequeathed ... deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." T.R. 105, §81.46; and T.R. 63, Art. 50, promulgated July 27, 1922.

[7] 279 U.S. 151, 49 S.Ct. 291 (1929).

[8] Id. at 154.

of being stated in definite terms of money. . . . The income of the estate at the death of the testator . . . was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."[9] From this opinion it was inferred that the standard was adequately fixed when, considering the circumstances of the particular case as well as the extent of the power, the probabililty of invasion was remote.[10] *Merchants National Bank of Boston v. Commissioner*[11] involved a power to invade "'for the comfort, support, maintenance, and/or happiness'"[12] of the widow, and the trustee was enjoined to be liberal in the matter. The deduction was denied because the widow's "happiness," coupled with the instruction of liberality, was held too vague to establish a standard, although the widow was sixty-seven years old, had no dependents, had modest modes of life and had a substantial independent income. The Court demanded a standard fixed "by reference to some readily ascertainable and reliably predictable facts,"[13] stating ". . . the relatively accurate valuations on which the market place might be willing to act are not sufficient."[14] Though requiring greater certainty, the decision did not clearly reject the probability of invasion test,[15] and the lower courts continued to apply it.[16] In the principal case, the provisions of the will were comparable to those in the *Merchants Bank* case, held by the court to be controlling. However, the probability of invasion was much more remote, and the Court stated ". . . though there may have been little chance [of invasion] . . . that chance remained. What common experience might regard as remote in the generality of cases may nonetheless be beyond the realm of precise prediction in the single instance."[17] It appears that the Court has rejected the probability test, and that a standard limiting the extent to which the remainder interest to charity may be invaded is not fixed unless, in the particular circumstances, there is no possibility of invasion. Unless this is found, the interest is not "presently ascertainable" and, therefore, not deductible.[18]

Frank L. Adamson, S. Ed.

[9] Ibid.

[10] Boston Safe Deposit & Trust Co. v. Comm., 21 B.T.A. 394 (1930); Millard v. Humphrey, (D.C. N.Y 1934) 8 F. Supp. 784; Comm. v. Bank of America Nat. Trust & Sav. Assn., (C.C.A. 9th, 1943) 133 F. (2d) 753.

[11] 320 U.S. 256, 64 S.Ct. 108 (1943).

[12] Id. at 258.

[13] Id. at 261.

[14] Ibid.

[15] During the four and one-half years after the death of the testator, the expenditures of the widow amounted to $48,682.04, while her total income, from the trust estate and her own property, was $87,362.66. Id. at 262, n. 9.

[16] Estate of Jack v. Comm., 6 T.C. 241 (1946); Estate of Lucius H. Elmer v. Comm., 6 T.C. 944 (1946); Berry v. Kuhl, (D.C. Wis. 1948) 77 F. Supp. 581.

[17] Principal case at 292.

[18] See 169 A.L.R. 149 (1947); PAUL, FEDERAL ESTATE AND GIFT TAXATION, (1946 Supp.) §12.26; 29 IOWA L. REV. 611 (1944).