Michigan Law Review

Volume 40 | Issue 3

1942

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TAXATION — GIFT TAX — TRANSFER IN PURSUANCE OF AN ANTENUPTIAL AGREEMENT AS A TAXABLE GIFT — Plaintiff entered into an antenuptial agreement with his intended wife whereby she waived all rights which she might acquire by virtue of the marriage in certain stock which he owned. In consideration therefor, he transferred to her two annuities and an interest as tenant by the entirety in two parcels of real estate. Plaintiff contended that such transfers did not constitute taxable gifts, and the Board of Tax Appeals decided in his favor.[1] *Held*, that the transfers were taxable gifts, for a waiver of marriage rights in the property of plaintiff pursuant to an antenuptial agreement did not constitute "adequate and full consideration in money or money's worth." [2] *Commissioner of Internal Revenue v. Bristol*, (C. C. A. 1st, 1941) 121 F. (2d) 129.

Although a waiver of rights to share in the property of a spouse may be sufficient consideration to support an antenuptial contract at common law,[3] it may not be sufficient to prevent the levy of a gift tax upon a transfer of property in consideration of said waiver. The court in the immediate case held that such a waiver did not fulfill the statutory requisite as to consideration, since plaintiff's wife had waived only a future right to share in the stock upon the death of her husband,[4] and plaintiff had received nothing of market value in return for his transfer of property. According to the reasoning of the court it would seem that a release of common-law dower or analogous rights could never constitute consideration for gift tax purposes. While the court relied upon alternative reasons to support its conclusion,[5] the case is significant in reading

[1] Bennet B. Bristol, 42 B. T. A. 263 (1940).

[2] "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year." 47 Stat. L. 247, § 503 (1932), 26 U. S. C. (1934), § 552.

[3] Wellington v. Rugg, 243 Mass. 30, 136 N. E. 831 (1922).

[4] Principal case, 121 F. (2d) 129 at 134.

[5] One of the bases of the decision was the holding in Empire Trust Co. v. Commissioner of Internal Revenue, (C. C. A. 4th, 1938) 94 F. (2d) 307, noted 36 MICH. L. REV. 1420 (1938). In that case under a provision in the estate tax law, 44 Stat. L. 72, § 303(a)(1) (1926), identical with that appearing in the gift tax, the

into the gift tax law the 1932 amendment to the estate tax law which provided that a release of dower and similar rights was not an "adequate and full consideration in money or money's worth" so as to constitute a contract made in reliance upon such release a deductible claim against the gross estate of a decedent.[6] This holding fortifies a tendency to integrate the gift tax and the estate tax by judicial interpretation in order to make each tax part of a unified system of taxation.[7] This prevents transfers which are identical in every respect, save as to the time of transfer, from being treated differently with respect to their status as taxable events.[8] The result is consonant with one of the main objectives of the gift tax—to prevent an avoidance of taxes through an inter vivos transfer [9]—and it appears to accord with Congressional intent, for Congress could hardly have intended to exempt transfers made in consideration of a waiver of marriage rights from the gift tax when it saw fit to impose an

court decided that a release of dower did not constitute sufficient consideration. That case, however, was decided after Congress had amended the estate tax law expressly to prohibit the release of dower and similar rights from being adequate consideration, 47 Stat. L. 280, § 804 (1932), 26 U. S. C. (1934), § 412(b), and the court, although professing to decide the case under the 1926 law (decedent died in 1931), indicated it was influenced greatly by the Congressional declaration of policy under the 1932 amendment.

[6] "For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'" 47 Stat. L. 280, § 804 (1932), 26 U. S. C. (1934), § 412(b). This amendment applies not only to claims against the estate of a decedent but also to completed inter vivos transfers which are in contemplation of death; transfers intended to take effect in possession or enjoyment at or after death; transfers where the donor retains the possession of property or the income from property; transfers where he reserves the right to designate the persons who shall possess the property or its income; and revocable transfers in trust. 47 Stat. L. 279, § 803 (1932), and 48 Stat. L. 752, § 401 (1934), 26 U.S.C. (1934), § 411(c), (d).

[7] "The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together." Sanford's Estate v. Commissioner of Internal Revenue, 308 U. S. 39 at 44, 60 S. Ct. 51 (1939).

[8] Thus, for example, in Lyman v. Commissioner of Internal Revenue, 23 B. T. A. 540 (1931), petition to review dismissed, (C. C. A. 9th, 1932) 55 F. (2d) 1077, the Board of Tax Appeals held that the law taxing gifts of property "wherever situated," Revenue Act of 1924, 43 Stat. L. 313, § 319, did not apply to gifts of foreign realty, solely on the strength of the holding in Guaranty Trust Co. of New York v. Commissioner of Internal Revenue, 21 B. T. A. 330 (1930). The latter case held that the provisions of the estate tax law providing that the value of the gross estate of decedent should be determined by including all property, real or personal, Revenue Act of 1924, 43 Stat. L. 304, § 302, did not apply to foreign realty.

[9] "An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death." Sanford's Estate v. Commissioner of Internal Revenue, 208 U. S. 39 at 44, 60 S. Ct. 51 (1939). The element of tax avoidance would not seem present in the principal case in respect of the entireties interest transferred by plaintiff. This would be taxed on plaintiff's death as part of his gross estate.

estate tax on identical transfers at death.[10] The absence of the 1932 estate tax amendment from the gift tax is not decisive of the question,[11] for it may be that Congress depended on the courts to construe the gift tax with reference to the provision in the estate tax, in line with a policy of integration of the estate and gift taxes.[12] Any other interpretation would lead to a perplexing situation where under identical definitions of consideration in the estate and gift tax contradictory results are reached.[13]

[10] The 1932 estate tax amendment excluding dower and analogous rights from constituting adequate consideration itself applies to a number of inter vivos transfers of property. See note 6, supra.

[11] "Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." Helvering v. Hallock, 309 U. S. 106 at 121, 60 S. Ct. 444 (1940).

[12] Sanford's Estate v. Commissioner of Internal Revenue, 308 U. S. 39, 60 S. Ct. 51 (1939).

[13] Assuming, of course, that the release of dower and analogous rights was regarded as sufficient consideration prior to the 1932 amendment of the estate tax law. Empire Trust Co. v. Commissioner of Internal Revenue, (C. C. A. 4th, 1938) 94 F. (2d) 307, was the only case passing on the question, and for the reasons suggested in note 5, supra, it cannot be regarded as decisive of the matter.