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Taxation - Federal Estate Tax - Deductibility of Contingent Bequests to Charity

Jack G. Armstrong S.Ed.
University of Michigan Law School

TAXATION — FEDERAL ESTATE TAX — DEDUCTIBILITY OF CONTINGENT BEQUESTS TO CHARITY — Testator bequeathed a remainder interest to charitable organizations which was contingent upon her sister, age eighty-two, predeceasing two other women, ages sixty-seven and sixty-eight. The Commissioner disallowed a deduction for this bequest on the ground that it was not certain that charity would receive any benefit. In the district court the parties stipulated that there was an eleven to one chance that charity would receive the bequest. On the basis of this stipulation the district court found for the taxpayer.[1] On appeal, *held,* reversed. In order for a deduction to be allowed the possibility that charity will not take must be "so remote as to be negligible," and a one in eleven chance does not qualify as "negligible." *United States v. Dean,* (1st Cir. 1955) 224 F. (2d) 26.

[1] Dean v. United States, (D.C. Mass. 1953) 53-2 CCH U.S.T.C. ¶10,923. In reaching this result the court mechanically applied the "so remote as to be negligible test" set forth in Treas. Reg. 105, §81.46.

The Internal Revenue Code contains very general language on the subject of charitable deductions under the federal estate tax.[2] As a result, specific problems are usually answered by reference to the Treasury Regulations and the applicable case law. The key regulations in this area are 81.44 and 81.46.[3] The former allows a deduction for "assured" bequests, i.e., where it is certain that charity will take and the only questions relate to the time or the amount that charity will receive.[4] The latter disallows a deduction when the bequest to charity is "conditional," unless the chance that charity will not take is "so remote as to be negligible." If these regulations were a part of the statute, the result in the principal case would merely be an indication of where the "so remote as to be negligible" line should be drawn. However, these regulations are not the law and are not binding upon the courts.[5] Moreover, the Internal Revenue Code does not draw a distinction between "assured" and "conditional" bequests to charity and the writer has been unable to find any preenactment material which would indicate that Congress intended to make such a distinction.[6]

The important question, however, is to determine whether the court in the principal case was bound by the decision in *Commissioner v. Sternberger*.[7] The majority decision in that case, written by Justice Burton, admits of two possible interpretations: first, that the "so remote as to be negligible" test in 81.46 is a valid interpretation of the statute and must be followed,[8] or second, that no deduction was allowable on the facts of the case because the element of volition was present and rendered the actuarial tables unreliable.[9] The court in the principal case found that the *Sternberger* decision rested upon the second ground.[10] This is certainly a plausi-

2 I.R.C. (1939), §812(d), now I.R.C. (1954), §2055(a).

3 Treas. Reg. 105, §§81.44 and 81.46.

4 The simplest example of this type of bequest is the case where *T* leaves a life estate to *A*, remainder to charity. Life expectancy tables will be used to determine the present value of the gift to charity. See Treas. Reg. 105, §§81.10(i) and 81.10(j).

5 In Commissioner v. Sternberger, 348 U.S. 187, 75 S.Ct. 229 (1955), both the majority and dissent discussed the weight to be accorded these regulations. See Justice Burton's views at 190 and Justice Reed's views at 202 and 206.

6 The only support for this distinction is the judicial assumption that Congress approved the regulations when it subsequently reenacted the pertinent section, presumably knowing that this judicial gloss had been superimposed upon the code. While this is a valid canon of construction, it is not controlling. See Justice Reed's dissent in Commissioner v. Sternberger, note 5 supra, at 206.

7 Note 5 supra. In this case the testator bequeathed a contingent remainder to charity. The remainder was contingent upon his twenty-seven year old childless daughter, a divorcee, dying without descendants surviving her and her sixty-two year old mother. The Supreme Court, reversing the lower court holdings, denied the deduction.

8 Commissioner v. Sternberger, note 5 supra, at 190 et seq. See also 55 COL. L. REV. 924 at 925 (1955).

9 Commissioner v. Sternberger, note 5 supra, at 195 et seq.

10 Principal case at 28, where the court, referring to the Sternberger decision, stated: "It [the Supreme Court] rested its reversal on the ground that the actuarial art was unable to cope with the contingency of that particular case."

ble interpretation.[11] Accepting it, a court would be free to allow a deduction for a contingent bequest where the value to charity could be ascertained. Despite this, the court in the principal case gave decisive weight to the language used in the part of Justice Burton's opinion concerned with the validity of the "so remote as to be negligible" test.[12] It is submitted that a better result would have been reached by allowing the deduction. By disallowing it, the court has created an illogical distinction in the law. For example, it is now possible for an estate to get a deduction where a trustee is to hold for the benefit of a private person for life with a limited power of invasion, remainder to charity.[13] From a purely practical standpoint, a contingent remainder such as the one involved in the principal case could be more valuable to a charity than a so-called "assured" gift with a power of invasion. In order to remedy this anomaly it is recommended that the test in 81.46 be replaced with an "ascertainable value" test which would operate in the same manner as the test now applied in 81.44.[14] Such a test would be more in line with the policy of Congress to encourage testators to leave portions of their estates to charity.[15]

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[11] If the Supreme Court had been willing to rest its decision on the regulations alone then it is submitted that it should have overruled the case of Meierhof v. Higgins, (2d Cir. 1942) 129 F. (2d) 1002, for that decision is clearly inconsistent with the strict application of the "so remote as to be negligible" test. The fact that the Meierhof case was not expressly overruled lends some weight to the conclusion of the court in the principal case that the Sternberger decision rested on the unreliability of the actuarial tables due to the element of volition.

[12] The court was not pleased with this result and felt that a test allowing a statistically determined deduction would have been more equitable. "Off hand it would seem eminently fair and administratively simple to allow such a deduction in cases such as this where the chance that charity will take can be accurately computed actuarially. But the Supreme Court in the Sternberger case rejected the argument that the applicable regulations permit proportional deduction." Principal case at 29.

[13] Rev. Rul. 54-285, Int. Rev. Bul. No. 29 (1954) provides for a deduction where, "(2) the probability of invasion is remote *or the extent of invasion is calculable in accordance with some ascertainable standard.*" Italics added. See also Ithaca Trust Co. v. United States, 279 U.S. 151, 49 S.Ct. 291 (1929); Lincoln Rochester Trust Co. v. Commissioner, (2d Cir. 1950) 181 F. (2d) 424; Estate of Horace G. Wetherill, 4 T.C. 678 (1945), app. dismissed (9th Cir. 1945) 150 F. (2d) 1019; Estate of Hellen S. Duker, 18 T.C. 887 (1952). Cf. Gilfillan v. Kelm, (D.C. Minn. 1955) 128 F. Supp. 291.

[14] Such a test would allow a deduction whenever the remainder, whether conditional or assured, could be evaluated with reasonable certainty by accepted actuarial methods. Justice Reed in his dissenting opinion in Commissioner v. Sternberger, note 5 supra, at 202, argued that this test was available under the present language of Treas. Reg. 81.44. See Meierhof v. Higgins, note 11 supra.

[15] If the Treasury Department and the courts were to apply an "ascertainable value" test then, in the long run, charity would receive an amount equal to the total deductions allowed even though there would be individual cases where a deduction was allowed and charity did not take anything. This is exactly what is now being done in the area of "assured" bequests covered by Treas. Reg. 81.44. See Rev. Rul. 54-285, Int. Rev. Bul. No. 29 (1954).