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Comment

ESTATE TAX:

THE REQUIREMENT OF CERTAINTY FOR CHARITABLE DEDUCTIONS

In determining the net taxable estate under the Estate Tax Act one may deduct from the gross estate amounts given to charity.¹ There are some exceptions to this rule on the face of the statute.² The courts have added the further exception that if a gift is too uncertain it is not deductible. This is not an unreasonable conclusion. A contingent gift may in fact be no gift at all.³ But in evolving this concept the courts have created some confusion.

¹ I. R. C. §812(d).

² *Ibid.*

³ The following Treasury Regulations apply. "If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

"If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is so subject to such power, not deductible that had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." U.S. Treas. Reg. 80 (1938) art. 47. These regulations are seldom cited and seem to exercise very little influence on the attitude taken by the courts.

SITUATIONS COVERED UNDER REQUIREMENT OF CERTAINTY

Usually no deduction is permitted for a legacy which is conditioned on affirmative action by the charity. Thus, no deduction was allowed for the bequest of the income of a trust to a church where it was to receive the gift only if it obtained a large sum from its parishioners and continued to perform certain services.⁴ And no deduction was allowed for a legacy for the maintenance of a vicar, which was to terminate if the church discontinued or decreased his salary.⁵ On the other hand a deduction was allowed for the full value of a house and lot, though the property was given only for so long as the donee continued in possession.⁶ This suggests the conclusion that a deduction will be allowed if the condition is not onerous and will probably be performed. But there is nothing in the language of these opinions to indicate that any such theory is followed.

A gift dependent on action by a third party is probably even less certain than one conditioned on action by the donee and is also non-deductible. No deduction was allowed for a gift of income terminable when in the opinion of the trustee the charity had accomplished its purpose.⁷ In the case of a gift to such charities as *A* and *B* should designate, the gift to lapse if the designation was not made, the same result obtained.⁸ Likewise no deduction was permitted for a legacy giving a trustee power to appoint one of three beneficiaries where one of the three was not a proper charity under the Estate Tax Act.⁹ This also was the rule applied when the will stated that his son had been told of the testator's wishes but was to have absolute discretion.¹⁰

The courts reach a contrary conclusion in the case of charitable gifts subject to a life estate and allow the deduction. This result is surprising. The value of the remainder is as unpredictable as the duration of life itself because that is what it depends upon. Never-

⁴ *St. Louis Union Trust Co. v. Burnet* (C. C. A. 8th, 1932) 59 F. (2d) 922.

⁵ *Delaware Trust Co. v. Handy* (D. Del. 1931) 53 F. (2d) 1042.

⁶ *Estate of Carolyn G. Caughey* (1941) 44 B. T. A. 385.

⁷ *Schoenheit v. Lucas* (C. C. A. 4th, 1930) 44 F. (2d) 475. This seems to have been the ground the court rested on, though it also seemed to doubt that the beneficiary was in fact a charity.

⁸ *Burdick v. Commissioner* (C. C. A. 2d, 1941) 117 F. (2d) 972.

⁹ *Estate of Ida Simpson* (1940) 41 B. T. A. 157. It was held that a gift to a board of temperance was not deductible as a charitable bequest, hence the fact that decedent's sister might elect to appoint the board as entire beneficiary prevented any deduction. The case was reversed in the circuit court because it was found that the Methodist board was a proper charity. This would not affect the soundness of the holding cited. *Girard Trust Co. v. Commissioner* (C. C. A. 3d, 1941) 122 F. (2d) 108.

¹⁰ *Mississippi Valley Trust Co. v. Commissioner* (C. C. A. 8th, 1934) 72 F. (2d) 197. The fact that the son used his discretion to make a gift of \$1,000,000 to St. Louis University was held not to affect the result.

theless the courts willingly venture into the realms of prophetic inquiry, and proceed to assign a fictitious value to the remainder on the basis of life expectancy tables.¹¹

This procedure has been followed although the life tenant had the power to invade the principal as well as to use the income of the estate,¹² but not if the power could be exercised with no restraint except the discretion of a trustee or of the tenant himself.¹³ If the principal may be invaded only for the support of the life tenant or other persons and it appears likely the income will be sufficient for the purpose, a deduction will be allowed.¹⁴ In this respect the habits

¹¹ *Ithaca Trust Co. v. United States* (1929) 279 U. S. 151. In this case, although the life tenant had died, actuarial tables on her life expectancy at the time of the death of the testator were used in valuing the remainder given to charity. An earlier case was *contra*. *Boston Safe Deposit & Trust Co. v. Nichols* (D. Mass. 1927) 18 F. (2d) 660. In *Hidden v. Durey* (N. D. N. Y. 1929) 34 F. (2d) 174, the following situation existed. Property was left in trust to certain beneficiaries for life, remainder to charity. As each life tenant died, the corpus of the trust left him was added to the corpus of the trusts left the other beneficiaries, until each of them amounted to a certain sum. Then, as each of the surviving tenants died the corpus of his trust went to charity. The life expectancies of each tenant were calculated from tables, and the path of the corpus of each trust determined on that basis, the remainder to charity was then valued on the basis of the life expectancies of the ultimate life tenants. The rule of perpetuities was also involved. In *Humes v. United States* (1928) 276 U. S. 487, the Court refused to sanction the use of actuarial tables in determining the probability of death without issue.

¹² *Ithaca Trust Co. v. United States*, *supra* note 11.

¹³ *Gammons v. Hassett* (C. C. A. 1st, 1941) 121 F. (2d) 229. In this case the life tenant had an absolute discretion in invasion of the corpus—could invade it when she needed "or desired", therefore the deduction was not allowed although she was a woman of 92, had always lived frugally, and the income was large. Similarly, no deduction was allowed in *Knoerschild v. Commissioner* (C. C. A. 7th, 1938) 97 F. (2d) 213, 214, in which a daughter had the power to direct trustees to pay from the fund any part of the income or principal, "... as my daughter may in her judgment see fit for the purpose of providing for her mother or any of her brothers or sisters in case they are in need of financial assistance." However, on the whole the cases have been quite liberal in deciding that there was a limit on the discretion to invade. Apparently the fact that the corpus has been left in trust may be regarded as implying a limitation on what seems to be an absolute discretion. *Lucas v. Mercantile Trust Co.* (C. C. A. 8th, 1930) 43 F. (2d) 39, 40. In that case the will provided that "A request, in writing, to my trustee, made by my wife, stating that the sum requested by her is needed for her comfort, maintenance and support, shall be authority to my trustee to pay unto her any sum so requested, out of the corpus . . ." The discretion was not regarded as absolute. *Accord*: *First Nat. Bank v. Snead* (C. C. A. 5th, 1928) 24 F. (2d) 186, 187, in which the words of the will were, "If at any time in the opinion of said trustees the net income from said trust estate shall not be sufficient for the proper support and comfort of my said wife, the trustees shall pay over . . . such additional sum or sums of the principal of said trust estate as to them may seem necessary or desirable for such purposes." *Cf.* *Benjamin B. Sanderson, Executor* (1929) 18 B. T. A. 221.

¹⁴ *Ithaca Trust Co. v. United States*, *supra* note 11. The power was given to keep decedent's widow in such comfort as she now enjoys. *Accord*: *Herron v. Heiner* (W. D. Pa. 1927) 24 F. (2d) 745; and cases cited in note 13, *supra*. The line between cases in which the discretion is found to be absolute and those in which this restraint is found to be present is a difficult one to draw.

and private resources of the life tenant are considered.¹⁵

After some hesitation the courts have concluded that in some circumstances a deduction is permissible for a gift to charity conditioned on the death without issue of the life tenant. The first circuit court of appeals raised a doubt on this score by holding that there was an irrebuttable presumption that a woman of any age may give birth to child, and hence that such condition must always make a gift unduly uncertain.¹⁶ The Supreme Court, however, overruled this decision in a case where an operation had been performed on the life tenant which clearly removed such a possibility.¹⁷ The same rule was applied where the life tenant was a very old woman.¹⁸ The courts have tended to be a little strict, however, and refused a deduction although the life tenant was so ill that recovery was unlikely, and childbirth would have verged on the miraculous.¹⁹

The courts are not consistent in approaching these situations. As indicated, a charitable legacy subject to a power of invasion for the support of the life tenant is not too uncertain if the exercise of the power is unlikely. Yet in other cases previously considered the court did not advert to the possibility that the significant contingency might or might not occur. When the courts deal with the valuation and the deduction of bequests in remainder they likewise forget their talk of certainty.

REQUIREMENT THAT DEDUCTION BE DETERMINED AS OF THE TIME OF THE TESTATOR'S DEATH

A testator may leave a contingent gift to charity. That contingency may be such as would prevent a deduction for the gift. But

¹⁵ In *First Nat. Bank v. Snead*, *supra* note 13, the life tenant had a separate estate worth in excess of \$300,000, and the income left was that from a corpus of over \$800,000. It was held that there was little chance of the development of a need for invasion. In the case of *Herron v. Heiner*, *supra* note 14, while the income of the trust was not so large, the life tenants were incurably insane and the cost of supporting them was very slight. In the case of *Boston Safe Deposit & Trust Co. v. Executors* (1930) 21 B. T. A. 394, the life tenant had a large income of her own. In the case of *Benjamin B. Sander-son, Executor*, *supra* note 13, the court seems to have gone a long way to find some limits to the power to invade. It may have been influenced by the fact the life tenant had a \$500,000 separate estate.

In *Michigan Trust Co., Executors* (1933) 27 B. T. A. 556, the income amounted to about \$6,000 and the life tenant's husband was prosperous. On the other hand, in *McDonald v. Welch* (D. Mass. 1936) 17 Fed. Supp. 549, the likelihood of invasion was held to be great in view of the fact that it depended on the need of five children of the deceased, one of whom had always been sick and another shiftless.

¹⁶ *Farrington v. Commissioner* (C. C. A. 1st, 1929) 30 F. (2d) 915. The woman in question was 52 years old, and had been married for 27 years without bearing child.

¹⁷ *United States v. Provident Trust Co.* (1934) 291 U. S. 272.

¹⁸ *City Bank Farmers' Trust Co. v. United States* (C. C. A. 2d, 1935) 74 F. (2d) 692.

¹⁹ *Hoagland v. Kavanaugh* (E. D. Mich, 1941) 36 Fed. Supp. 875.

before the estate tax return is filed the event may happen or may become impossible of occurrence. The courts very frequently say that no such event will be considered in determining deductibility.²⁰

So, in the case of a gift dependent on the death without issue of the life tenant no deduction was allowed though the tenant had died a sufficiently lonely death.²¹ The fact that a gift was subject to a power of appointment likewise prevented a deduction despite the renunciation of the power.²² On the other hand a deduction was allowed for a gift subject to a power of invasion for the support of the life tenant, on the usual theory that an actual invasion was unlikely, and the court ignored the fact that such an invasion had taken place.²³ It has been held that actuarial tables will be used in computing the value of a gift in remainder though the life tenant is dead and the actual values of the interests are known.²⁴

Several states have statutes which permit the heirs to defeat disproportionately large gifts to charity and gifts made within given periods before death.²⁵ If the heirs have waived this power the deduction has been allowed.²⁶ This result contrasts sharply with the rule applied where a testamentary power of appointment has been waived. In that case, as we have noted, the waiver is without effect on the disallowance of the deduction.²⁷

These situations are technically distinguishable. In the first a third party has a statutory power to defeat the gift, in the second he has a power deriving from the will. The power is in fact the same throughout, for in each case its exercise means that the charity receives nothing. It is hard to understand this difference in tax consequence.

If a will is successfully contested, obviously no deduction will be allowed for a gift under it. A similar situation is reached in part when the charity compromises the contest, and the courts refuse to allow a deduction for more than the amount received by the charity.²⁸

²⁰ *Ithaca Trust Co. v. United States*, *supra* note 11.

²¹ *Hoagland v. Kavanaugh*, *supra* note 19.

²² *Davison v. Commissioner* (C. C. A. 2d, 1936) 81 F. (2d) 16.

²³ *Humphrey v. Millard* (C. C. A. 2d, 1935) 79 F. (2d) 107.

²⁴ *Ithaca Trust Co. v. United States*, *supra* note 11. This result is criticized in a note in (1930) 47 YALE L. J. 1354.

²⁵ Section 41 of the California Probate Code is an example.

²⁶ *Mead v. Welch* (C. C. A. 9th, 1938) 95 F. (2d) 617; *Humphrey v. Millard*, *supra* note 23; *Commissioner v. First Nat. Bank* (C. C. A. 5th, 1939) 102 F. (2d) 129. *Dimmock v. Corwin* (C. C. A. 2d, 1938) 99 F. (2d) 799, was taken to the Supreme Court as *United States v. Jacobs* (1939) 306 U. S. 363, but this point was not there dealt with.

²⁷ *Humphrey v. Millard*, *supra* note 23, and text thereto.

²⁸ *In re Sage's Estate* (C. C. A. 3d, 1941) 122 F. (2d) 480. *Accord*: *Heim v. Nee* (W. D. Mo. 1937) 40 Fed. Supp. 594. It has also been held that income acquired by compromise is inherited hence not subject to income tax. *Lyeth v. Hoey* (1938) 305 U. S. 188, seemingly overruling *Codman v. Commissioner* (C. C. A. 1st, 1931) 50 F. (2d) 763.

It is hard to see in what manner this conclusion is consistent with the idea that the act of the testator alone is considered in allowing a deduction.

If, on the other hand, the charity gains by the compromise, the cases conflict. In one case under local procedure the compromise was approved by the court, written into the will and probated as part of it. A deduction was allowed for the full amount received by the charity.²⁹ More recently a different circuit court found that the addition resulting from the compromise was not given by the testator and hence was not deductible.³⁰ The court refused to consider the local procedure, regarding it as irrelevant.

It can be argued that in any case the compromise is a mere contract between the charity and the contestant and should have no effect on the calculation of the estate tax. The fact that the contestant is in a position to obtain a compromise only because of his status as heir, devisee or legatee, however, is relied on as indicating that if the compromise reduces the net gift to the charity, the charitable deduction should also be reduced.³¹ It is said that a charity receives from the estate no such gift of a bargaining position, hence anything it gains from a compromise is derived not from the deceased but from the other devisees, legatees and the heirs.³² This gives no weight to the fact that it is only as a result of the act of the testator that the charity participates in the compromise.³³

When the courts say that they will not consider events subsequent to the death of the testator they are misstating their general practice in order to rationalize their conclusions in a few cases. There is no such thing in fact as an unconditional testamentary gift. Every gift involves the action or inaction of at least four parties. The testator makes the will, the court must decide whether it is to be allowed, third parties who might contest it either make such an attempt or remain quiescent, and the charity may or may not accept the gift. All except the first of these events happen after the testator's death. One might well conclude that the courts should be guided only by the practical rule that the gift must be certain when the return is to be made and should give up the attempt to distinguish between gifts

²⁹ *Smith v. Commissioner* (C. C. A. 1st, 1935) 78 F. (2d) 897.

³⁰ *Robbins v. Commissioner* (C. C. A. 1st, 1940) 111 F. (2d) 828.

³¹ *In re Sage's Estate*, *supra* note 28.

³² *Robbins v. Commissioner*, *supra* note 30.

³³ In *Robbins v. Commissioner*, *ibid.*, it is intimated that this argument might prevail were this an income tax suit, and for purposes of the income tax money received by the charity as a result of the compromise would be by inheritance, but since the estate tax must be estimated as of the time of death of the testator, and it is his gift which the act seeks to encourage, for estate tax purposes the increase is regarded otherwise.

conditional and gifts unconditional at the time the testator died. Certainly such an attitude would be conducive to greater clarity in the law.

POSSIBLE LEGISLATIVE CHANGES

The policy of the charitable deduction would probably be as well served whether it is the testator alone or the testator in conjunction with someone else who determines the amount of the gift to charity. It is the fact that the assets of the estate pass into the hands of charity that should be important. If the gift was sufficiently certain by the time the return was filed the deduction should be allowed. An amendment of the act would probably be needed to effect this result.

A second revision might be made for cases in which a gift to charity is subject to a divesting contingency which has not occurred at the time the return is filed. The deduction might be allowed subject to the requirement that bond be posted to secure the payment of the additional tax which would become due if the gift is defeated.

Alternatively, the payment of the entire tax might be required at once but a right might be given to recover a refund if the divesting contingency did not happen. This last scheme has been used in the levy of some state inheritance taxes in taxing bequests of uncertain future interests.³⁴ It has had the disadvantage of placing a present tax on a future interest.³⁵ Furthermore, some states have at times failed to make adequate provisions for refunds. Neither argument applies here. The tax would be no larger than is collected today. The federal government has been consistent in making appropriations for tax refunds. This second scheme does have the advantage of placing the burden of claiming the refund on the taxpayer.

Philip K. Verleger.

³⁴ Note (1938) 47 YALE L. J. 1354.

³⁵ *Ibid.*