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More and more misdemeanors are being created yearly, the bulk of which are *mala prohibita.* As the greatest number of misdemeanors qualify under misdemeanor-manslaughter, fewer manage to avoid the more severe punishment for manslaughter in the first degree by coming within manslaughter in the second degree, culpable negligence-manslaughter. Cases of accidents and misfortunes or omissions, devoid of criminal intent, rise to the level of misdemeanor-manslaughter when the legislature so deems. This imposes greater sanctions on crimes which require a lesser degree of culpability than offenses within a lesser degree of manslaughter. Misdemeanor-manslaughter could be established with proof of ordinary negligence, where culpable negligence must be shown to convict for manslaughter in the second degree.

To make the situation more harmonious with the concept of having the punishment befit the crime, either legislative revision to specifically enumerate the qualifying misdemeanors or judicial reshaping to limit the offenses to those *mala in se* appears necessary. Knowledge and intent should be two important determinants in any consideration of this kind. Perhaps Mr. Justice Van Voorhis' statement in his dissent in *People v. Nelson* would serve as a good guide:

> Death caused by a person "engaged in committing a misdemeanor" was designed to mean by a person *consciously* engaged in committing the misdemeanor.[110]

Proposed Section 735 of the Internal Revenue Code: An Implication Contrary to Established Principles of Gratuitous Assignment of Income?

A revision of Section 735 of the Internal Revenue Code in the recently proposed "Trust and Partnership Income Tax Revision Bill of 1960"[1] was intended to clarify the treatment of distributed part-

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but the indictment tacitly recognized the validity of the misdemeanor-manslaughter charge. The case is somewhat contradictory, however, in that the conviction of the misdemeanor alone under the indictment for misdemeanor-manslaughter is an example of the language used by the Court of Appeals in describing merger in regard to felony-murder. Felonies that are "convictable under" a charge of the homicide resulting from them have been held to merge and not support a felony-murder indictment. People v. Hüter, 184 N.Y. 237, 77 N.E. 6 (1906).

110 309 N.Y. 231, 241, 128 N.E.2d 391, 396 (1955) (emphasis added).

1 H.R. 9662, 86th Cong., 2d Sess. § 201 (1960) [hereinafter cited as Proposed § 735]. See H.R. Rep. No. 1231, 86th Cong., 2d Sess. § 14 (1960).

nership property as either ordinary income or capital gain. The new bill affects both a distributee partner and any donee of a distributee partner. Although it was not passed by the recent Congress, it will probably become law next year.[2]

The present section 735 provides for ordinary income treatment of a sale or exchange by a distributee partner of unrealized receivables or inventory items which have been held by him for less than five years.[3] The new bill dispenses with the five year limitation. Thus, any sale or exchange of such assets by the distributee partner would result in ordinary income regardless of how long the assets were held.[4]

The present section 735, however, makes no provision for the character of the asset in the hands of a donee of the distributee partner. This may leave the distributee partner free to make a gift of these assets to a person in whose hands they would be capital assets. In order to eliminate this possibility, the proposed revision provides ordinary income treatment of the sale or exchange of such assets "by a person whose basis for any property received from such distributee partner is determined in whole or in part by reference to the basis of such property in the hands of such distributee partner."[5] This language includes a donee,[6] and would seem to imply that the distributee partner can shift the income inherent in the asset to another person, subject only to the limitation that its character remain the same.

Assuming that an item of receipt constitutes income, it then becomes necessary to (1) decide whose income it is, (2) place it in the correct year, and (3) correctly characterize it as ordinary income or capital gain. These three difficult problems are often interrelated. In some cases the Code explicitly provides the answer, in some it merely suggests an answer, and in others it leaves the problem entirely to the courts, with neither suggestion nor guidance. As will be seen, the implication in the proposed section 735 that a distributee partner can shift the income inherent in an asset is apparently inconsistent with many sections of the Internal Revenue Code and the decided cases determining to whom the income is attributable. The significance of the entire problem of gratuitous assignments of income is due to the fact that our tax laws apply progressive rates. The individual with high income often finds it advantageous to rid himself of some of this income by assigning it to a person having less

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[2] *1960 Tax Law Changes*, 40 CCH STAND. FED. TAX. REP. 78 (extra ed. Sept. 19, 1960).

[3] INT. REV. CODE OF 1954, § 735 [hereinafter cited as CODE].

[4] See note 1 *supra*.

[5] *Ibid.*

[6] See CODE § 1015(a). Since the proposed § 735 determines the character of the asset in the hands of one with a carryover basis, it would also apply to contributions to a corporation or a partnership. See CODE §§ 351, 721.

income, but so related to him that there is no real loss of income within the family group. The lower rates for the donee would permit a significant tax saving.

In the ordinary case, a gift of appreciated property is not a taxable event.[7] The donor's basis for the property is retained by the donee, and upon the occurence of some taxable event (*e.g.*, a sale), the donee is taxed on the full amount of income inhering in the gift, measured by the difference between the donor's basis and the amount realized by the donee.[8] Income which, from the economist's point of view, has been earned but never realized by the donor, has thus been effectively transferred.[9] In addition, the character of the asset and the income inherent in it may have been changed by the transferral. This follows from the fact that the "capital" nature of an asset, as defined by the Code, is not a characteristic of the asset itself, but rather arises from its relation to its owner (here, the vendor).[10] An asset which is held for sale in the ordinary course of trade or business is not a capital asset. But when transferred to one who does not so hold it, it becomes a capital asset. Thus, when a dealer in stocks makes a bona fide gift of stock to his son, who is not a stock dealer, the asset changes character.[11]

Another situation arises when the donor contracts to sell the asset and makes a gift of his contract right. He has progressed one step further towards realizing the income. If he is an accrual basis taxpayer, the income is realized on sale,[12] but if he is on a cash basis, it is not realized until he receives money or its equivalent.[13] Nonetheless, the cases indicate that a contract to sell will convert the income inherent in an appreciated asset into that type of property which cannot be effectively transferred for tax purposes.[14]

Assignment of Income

In the case of *Lucas v. Earl*,[15] there was an outright assignment of income as yet unearned. In 1901, respondent contracted with his wife that all property either one might thereafter acquire would be re-

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[7] See Taft v. Powers, 278 U.S. 470 (1929).

[8] CODE § 1015. Other rules apply if the gift was made before January 1, 1921. *Ibid.*

[9] See Bishop v. Shaughnessy, 195 F.2d 683 (2d Cir. 1952).

[10] See CODE §§ 1221, 1231.

[11] See Greenspon v. Commissioner, 229 F.2d 947 (8th Cir. 1956).

[12] Helvering v. Nibley-Mimnaugh Lumber Co., 70 F.2d 843 (D.C. Cir. 1934).

[13] Willhoit v. Commissioner, 17 CCH Tax Ct. Mem. 1024 (1958).

[14] See Commissioner v. Court Holding Co., 324 U.S. 331 (1945); United States v. Cumberland Pub. Serv. Co., 338 U.S. 451 (1950) (dictum). *Compare* Wodehouse v. Commissioner, 177 F.2d 881, 884 (2d Cir. 1949) (dictum), *with* Wodehouse v. Commissioner, 178 F.2d 987 (4th Cir. 1949). See Rohmer v. Commissioner, 14 T.C. 1467 (1950).

[15] 281 U.S. 111 (1930).

ceived and held in joint tenancy. Despite the contract, the Court, speaking through Mr. Justice Holmes, taxed the respondent on all of the income earned by his own efforts, refusing to attribute the fruits "to a different tree from that on which they grew." [16] The same result was reached in *Helvering v. Eubank*,[17] where the attempted assignment concerned fees of an insurance agent already earned, but as yet uncollected. The Court did not make clear the precise grounds for imposing the tax on the donor, but based their decision solely on *Helvering v. Horst*.[18] Thus, the Court has committed itself to the general proposition that income will be taxed to the one who earns it. As previously noted, the proposed section 735 may lead to contrary results.

Gift of Property Representing Income

The *Horst* case involved a gift of negotiable interest coupons detached from a bearer bond and transferred by respondent before their maturity. Respondent retained ownership of the bond. The Commissioner ruled that the interest payments were taxable to the donor.[19] The Court, in supporting the Commissioner, placed much emphasis on the fact that the donor, when making the gift, enjoyed the same satisfaction he would have enjoyed spending the interest on goods for himself.[20] If this theory of satisfaction were really the basis of the decision, it should follow that the income was realized when the gift was made, and not, as the Commissioner had ruled, when the interest payments were received.[21] However, the "satisfaction theory" appealed, at least for a time, to the Internal Revenue Service.[22] The theory, however, is open to criticism. All gifts cause a certain satisfaction to the donor and the donee. If then, the test is whether or not the donor has enjoyed income by the mere act of donation, all cases should be decided in the same way.[23]

While the person who gives away the coupon is giving away property just the same as the person who gives away the whole bond, it would seem that, for purposes of the tax laws, two different kinds of property are involved. Reference may be had to Mr. Holmes'

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[16] *Id.* at 115.
[17] 311 U.S. 122 (1940).
[18] 311 U.S. 112 (1940).
[19] *Id.* at 114.
[20] *Id.* at 116-18.
[21] Miller, *Gifts of Income and of Property: What the Horst Case Decides*, 5 TAX L. REV. 1, 5-10 (1949).
[22] See I.T. 3910, 1948-1 CUM. BULL. 15; I.T. 3932, 1948-2 CUM. BULL. 7. Rev. Rul. 55-138, 1955-1 CUM. BULL. 223, and Rev. Rul. 55-531, 1955-2 CUM. BULL. 520, revoked these Income Tax Rulings.
[23] See Rice, *Judicial Trends in Gratuitous Assignments to Avoid Taxes*, 64 YALE L.J. 991, 993-95 (1955).

"fruit trees." [24] As a starting point, it may be said that one cannot give away the fruit and retain the tree. This analogy is offered as a statement of the problem rather than a solution, for it makes the point that not all property will be treated in the same manner. The question is what kind of property is only "fruit"? The apparent implication in the proposed section 735 obviates the necessity of distinguishing between "fruit" and "tree" when the gift is made by the distributee partner.

Patents and Copyrights

The creation of an inventor or an author is the result of personal efforts, and at least to this extent, is similar to the fees earned by an insurance agent. Nonetheless, the property he has created seems likely to be treated, in his hands, as property which can be effectively transferred.[25]

Where a transfer is made, it is important for the author or inventor to completely relinquish control over the transferred asset. As in other facets of the problem, the retention of a certain degree of control is one factor which will compel the courts to overlook the gift and tax the donor.[26] In *Commissioner v. Sunnen,*[27] the Supreme Court found that the assignments of license contracts there involved were a transfer of a right to receive income rather than a complete disposition of all the donor's interest. The taxpayer had given non-exclusive licenses on a patent owned by him to a corporation which he controlled. The licenses could be cancelled by either party on written notice. The corporation agreed to pay a royalty based on gross sales. The taxpayer assigned all his rights in the contract to his wife. In holding him taxable on the royalties, the Court relied on his power to cancel the contract, control the corporation's production, and grant licenses to other persons.[28] The Court also considered his economic condition, which was in reality unchanged.[29]

A further consideration is that there must be a patent or copyright to give away. In *Strauss v. Commissioner,*[30] the taxpayer assigned to his wife all his "right, title and interest in Kodachrome. . . ." [31] His right, title and interest had been acquired by

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[24] "This metaphor has been substituted for rational analysis by courts and commentators to the point where a critic in this area frequently cannot see the forest for the fruit trees." *Id.* at 991.

[25] Commissioner v. Reece, 233 F.2d 30 (1st Cir. 1956). See Lockhart v. Commissioner, 258 F.2d 343 (3d Cir. 1958); Rev. Rul. 54-599, 1954-2 CUM. BULL. 52; Rev. Rul. 54-409, 1954-2 CUM. BULL. 174.

[26] See Washington v. Commissioner, 80 F.2d 829 (2d Cir. 1936) (dictum), *cert. denied,* 298 U.S. 689 (1936).

[27] 333 U.S. 591 (1948).

[28] *Id.* at 608-10.

[29] *Id.* at 609-10.

[30] 168 F.2d 441 (2d Cir. 1948).

[31] *Id.* at 442.

performance of personal services and financing. He did not receive any part of the process itself, nor any control over it, but merely "the enforceable promise of the owners of the process that he would be paid for his services. . . ." [32] The court stated that the taxpayer's rights were indistinguishable from those in the *Eubank* case, and that the real issue was "who earned the income." [33] The taxpayer was defeated because all he ever had was a mere chose in action. The chose in action ultimately represented personal services rendered for another. It was, in effect, a wage and, unlike other kinds of property interests, was not capable of being transferred. If, on the other hand, the donor's invention is transferred to a manufacturer in return for a royalty, the courts will recognize a subsequent assignment of the royalty by the inventor as an effective shift of the inherent income.[34] The distinction seems to lie in the nature of the interest held by the donor. In the *Strauss* situation, the interest constituted wages, and this was not capable of being transformed into another kind of interest.

It is interesting to note that the Code excludes from capital gains treatment copyrights and literary, musical or artistic compositions in the hands of the one who creates them *and in the hands of one who has a carryover basis.*[35] This is substantially the same language as is used in the proposed section 735 and leads to the same implication, namely, that income will be taxed to the donee. This conclusion is consonant with the cases in the area.[36]

Mineral Rights

Income from an oil well in the form of a royalty is ordinary income.[37] No little effort has been exerted by taxpayers to convert it into capital gain and to shunt it over to a low-bracket relative.

A great number of interests in minerals in the ground has been developed.[38] In the area of gratuitous assignments, as well as capital gains, the fundamental problem is to distinguish between transfers of property and transfers of a mere right to income. In this area, the rules for capital gains and gratuitous assignments overlap to such

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[32] *Ibid.*

[33] *Id.* at 443.

[34] Commissioner v. Reece, 233 F.2d 30 (1st Cir. 1956); Nelson v. Ferguson, 56 F.2d 121 (3d Cir.), *cert. denied,* 286 U.S. 565 (1932); Fox v. Commissioner, 37 B.T.A. 271 (1938); Lilienfeld v. Commissioner, 35 B.T.A. 391 (1937). See Heim v. Fitzpatrick, 262 F.2d 887 (2d Cir. 1959).

[35] CODE § 1221(3).

[36] See cases cited note 25 *supra.*

[37] See Anderson v. Helvering, 310 U.S. 404 (1940); Burnet v. Harmel, 287 U.S. 103 (1932).

[38] See Ray & Hammonds, *Federal Income Tax on Assignments of Interests in Oil and Gas,* in THE ENCYCLOPEDIA OF TAX PROCEDURES 1299 (1956).

a degree that, at least in broad outline, the decisions in one type of case are authority in the other.[39]

In *Commissioner v. P. G. Lake, Inc.*,[40] the Supreme Court held that transfers of oil payments[41] carved out of larger interests were not capital transactions. The Court proceeded on the assumption that, according to state law, economic interests in minerals in the ground had been transferred,[42] but concluded that the consideration was essentially a substitute for what would otherwise have been received, in time, as ordinary income. In doing so, the Court relied on the fact that if such interests were transferred as gifts, the income would be taxable to the donor.[43] Another point mentioned in the Court's opinion was that none of the assignments was so substantial that the assignee assumed a significant proportion of the assignor's risk.[44] The Court did not expressly hold that all oil payments carved out of interests of a greater duration would result in ordinary income, but on the other hand it did not limit its language.[45] The result, considering that one interest was of ten years duration, would seem to be that the rule is absolute that the sale of carved-out oil payments results in ordinary income.[46]

The doctrine of the *Lake* case had been previously developed by the Commissioner in a series of rulings, despite significant opposition in the lower courts.[47] In 1946, the Commissioner, in the area of capital gains, distinguished between long and short-lived interests.[48] In 1949, the same distinction was applied to the question of who was to be taxed after a gratuitous assignment,[49] and in 1950 the distinction was abandoned altogether, the Commissioner ruling that for both purposes:

> . . . the assignment of any in-oil payment right (not pledged for development), which extends over a period less than the life of the depletable property in-

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[39] *Compare* Commissioner v. P. G. Lake, Inc., 356 U.S. 260 (1958), *with* Flewellen v. Commissioner, 32 T.C. 317 (1959). See *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 112-15 (1958).

[40] 356 U.S. 260 (1958).

[41] The Court described an oil payment as "the right to a specified sum of money, payable out of a specified percentage of the oil, or the proceeds received from the sale of such oil, if, as and when produced." *Id.* at 261, n.1, quoting Anderson v. Helvering, 310 U.S. 404, 410 (1940).

[42] Commissioner v. P. G. Lake, Inc., 356 U.S. 260, 264 (1958).

[43] *Id.* at 267.

[44] *Id.* at 265.

[45] See Benjamin & Currier, *The Supreme Court and Taxation of Oil, Gas and Production Payments: The Lake Cases*, 19 LA. L. REV. 579, 596 (1958).

[46] *Id.* at 591.

[47] See Caldwell v. Campbell, 218 F.2d 567 (5th Cir. 1955); Hawn v. Commissioner, 23 T.C. 516 (1954), *rev'd*, 231 F.2d 340 (5th Cir. 1956); Nordan v. Commissioner, 22 T.C. 1132 (1954).

[48] G.C.M. 24849, 1946-1 CUM. BULL. 66.

[49] I.T. 3935, 1949-1 CUM. BULL. 39.

terest from which it is carved, is essentially the assignment of expected income from such property interest.[50]

The Tax Court has recently applied the principle of the *Lake* case in *Flewellen v. Commissioner*[51] without discussion of the duration of the interest involved. From all appearances it would seem that the Commissioner has won the day. Here, as in other areas, the courts have applied the principle that income will be taxed to the one who earns it, either through his personal efforts or his capital.

Disposal of Installment Obligations

The Code expressly recognizes the problems involved in the donation of income in its treatment of installment obligations. A special accounting method is provided for income in certain sales in which payment is to be received over a period of time. The general legislative plan is to consider each payment as representing a certain amount of cost and income, rather than to tax the income as one lump sum.[52] Thus, an installment obligation disposed of before maturity is composed of elements of unrealized income and cost. Section 453(d) of the Code provides that if an installment obligation is given away, the donor will be taxed on the difference between the basis of the obligation and its fair market value at the time of the gift.

The basis of the obligation is "the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full."[53] In effect, the principle that is applied by the Code is one of immediate realization. No matter how the obligation is disposed of, except at death,[54] a taxable event has taken place, and the unrealized income earned by the sale is immediately realized. When a gift of such an obligation is made, income is in effect considered to have been earned by the original sale, and merely to have been deferred for so long as the original owner held the obligation. On the other hand, if the obligation passes at death, the income inherent in it is considered as income in respect of a decedent, and is reported by the one who receives it, in the same manner as would have been done by the decedent.[55]

The treatment of installment obligations raises the issue of how comparable receivables will be handled if the taxpayer does not elect to report them on the installment method. The accrual basis taxpayer generally raises no problems because in most cases he will have real-

[50] I.T. 4003, 1950-1 CUM. BULL. 10, 11.
[51] 32 T.C. 317 (1959).
[52] CODE § 453.
[53] CODE § 453(d). For an example, see Treas. Reg. § 1.453-9 (1958).
[54] CODE § 453(d)3.
[55] CODE § 691(a)4.

ized income at the time of the sale,[56] and therefore, he cannot rid himself of this income by a subsequent gift of the receivables. As to the cash basis taxpayer, the situation seems somewhat less clear. A cash basis taxpayer has no income until he actually receives cash, or its equivalent, in excess of the adjusted basis of the property sold.[57] In such a case, the cash basis taxpayer's situation after a gift of the receivable is comparable to that of a taxpayer who has elected to use the installment method, in that income inherent in the receivables has been assigned. However, if the taxpayer is not using the installment method, there is no specific section of the Code attributing the inherent income in the receivable to the donor. The Commissioner has ruled that accounts receivable, representing compensation for personal services, which have been assigned to an irrevocable trust, are taxable to the assignor upon collection.[58] Apparently there is no ruling or reported decision directly in point as to receivables derived from sales of property. The Tax Court has held that when an individual operating a service business incorporates that business, and, as a part of the assets transferred, transfers receivables, the corporation, and not the individual, becomes the taxable person.[59] On the other hand, courts have taxed a corporation on the income from receivables which had been distributed to shareholders after dissolution.[60]

A leading case in this area is *Doyle v. Commissioner.*[61] There, the taxpayer had assigned part of his interest in a judgment against the United States to his wife and children. The assignment occurred before payment but after denial of certiorari by the Supreme Court. The court imposed the tax on the assignor, holding that this was an anticipatory assignment of income and not merely a transfer of property. It is notable, however, that the court considered other factors, including the taxpayer's control over the funds of his wife and children, the amount of income earned in the transaction, as well as the timing of the assignments.[62]

By analogy, it may be noted that unrealized accounts receivable constitute items of income in respect of a decedent, whether the obligation was treated on the installment method, or otherwise.[63]

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[56] Helvering v. Nibley-Mimnaugh Lumber Co., 70 F.2d 843 (D.C. Cir. 1934).

[57] Ennis v. Commissioner, 17 T.C. 465 (1951).

[58] Rev. Rul. 55-2, 1955-1 CUM. BULL. 211.

[59] Briggs v. Commissioner, 15 CCH Tax Ct. Mem. 440 (1956). See also Commissioner v. Montgomery, 144 F.2d 313 (5th Cir. 1944).

[60] Floyd v. Scofield, 193 F.2d 594 (5th Cir. 1952); Carter v. Commissioner, 9 T.C. 364 (1947), *aff'd*, 170 F.2d 911 (1948). *Cf.* J. Ungar, Inc. v. Commissioner, 244 F.2d 90 (2d Cir. 1957).

[61] 147 F.2d 769 (4th Cir. 1945).

[62] *Id.* at 772-73.

[63] Dixon v. United States, 96 F. Supp. 986 (E.D. Ky. 1950), *aff'd per curiam*, 192 F.2d 82 (6th Cir. 1951).

The trend of the cases is to tax the one who earned the income, and as a rule this will be the donor of the receivable.[64] There is presently no provision as to donees of receivables analogous to the treatment of donees of distributee partners in the proposed partnership act.[65] It is a fair conclusion that the treatment of unrealized receivables should not vary between partnership and sole proprietorship, and that the income inherent in them should be attributed to the one who earned it.

Income in Respect of a Decedent

A situation in which problems arise similar to those in the area of gratuitous assignments is that of the disposition of property of a decedent. The general rule is that property acquired from a decedent is given a basis equal to its fair market value at the time of death, or one year after death if the executor so elects.[66] In the ordinary case, if the property has appreciated during the decedent's lifetime, no income tax will be incurred on that appreciation.[67] Of course, the assets will be subject to an estate tax based on their fair market value, but in many cases there will be no tax,[68] or less tax than an income tax on the same amount.[69] This treatment may be justified in the case of the asset which would not essentially represent income, because death is an involuntary transfer. However, such treatment was extended by the courts to all items.[70] In such a situation, the estate of the cash basis decedent was in a superior position to that of one on the accrual basis. The courts had held that income earned but not realized by the decedent who followed a cash basis was not income to the estate, and hence might well escape income taxation. On the other hand, the accrual basis taxpayer would have already realized such income, and it was reportable on his final return.[71] To avoid the inequity of such a situation, Congress provided, in the Revenue Act of 1934, that amounts accrued up to the time of the death of a taxpayer should be included in computing his net income for the taxable year of his death.[72] The difficulty with that solution was that it often caused an undue bunching of income in the final year.[73] In 1942, Congress enacted a section which has

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[64] See Helvering v. Eubank, 311 U.S. 122 (1940).
[65] *But see* Code § 1221(3), dealing with donees of copyrights.
[66] Code § 1014.
[67] Burnett v. Commissioner, 2 T.C. 897 (1943).
[68] See Code § 2052, providing a $60,000 exemption.
[69] See Code § 2001.
[70] Nichols v. United States, 64 Ct. Cl. 241 (1927), *cert. denied,* 277 U.S. 584 (1928).
[71] *Ibid.*
[72] Revenue Act of 1934, ch. 277, § 42, 48 Stat. 694 (1934).
[73] See Commissioner v. Linde, 213 F.2d 1, 5 (9th Cir. 1954).

been carried over into the present law.[74] Section 691 of the present Code regards all items of gross income in respect of a decedent which are not properly included in the decedent's own return, as the income of the one entitled to receive it.[75]

Despite the historical background and the language of the cases, this section has been broadly construed to cover more than income which would have been accrued by the deceased at the time of his death. It has been held that where a company had a bonus plan in which a decedent had participated for a number of years, a bonus paid after decedent's death is income in respect of a decedent even though he had no legally enforceable right to the bonus at the time of his death.[76] Where decedent had turned over his crop of grapes to a "wine pool" for sale, all of the resultant income was income in respect of a decedent, even though the sales from which the income was derived were made after the death of the decedent.[77] Accounts receivable, representing consummated sales, result in income in respect of a decedent when sold or collected.[78] On the other hand, the section has not been extended to cover livestock or crops, whether harvested or not.[79]

The Code explicitly provides a treatment for the disposal of the right to a decedent's income. When such a right is transferred to a person other than the one who receives it by reason of the death of the decedent, the estate or person making the transfer is taxed on the disposition.[80] "Disposition" includes a gift.[81] This provision is exactly analogous to section 453(d), which provides that the disposition of installment obligations causes immediate recognition of income to the donor. Both of these areas where the Code expressly provides for selection of the taxable person are in apparent conflict with the implications of the proposed section 735.

Conclusion

Certain concepts have intruded into the area of gratuitous assignments without shedding much light. Merely to state that a transfer of property will be recognized for tax purposes, but that when unearned income is transferred it will not, begs the question; for everything that is transferred in any of the cases is property. It is a certain type of property that must be considered as different, as rep-

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[74] INT. REV. CODE OF 1939, § 126, as amended, 56 Stat. 831 (1942).
[75] CODE § 691(a)1.
[76] O'Daniel's Estate v. Commissioner, 173 F.2d 966 (2d Cir. 1949).
[77] Commissioner v. Linde, *supra* note 73.
[78] Dixon v. United States, 96 F. Supp. 986 (E.D. Ky. 1950), *aff'd per curiam,* 192 F.2d 82 (6th Cir. 1951).
[79] Rev. Rul. 58-436, 1958-2 CUM. BULL. 366.
[80] CODE § 691(a)2.
[81] Treas. Reg. § 1.691(a)(4) (1957).

resenting income, and not capable of being effectively transferred for tax purposes. To rely on satisfaction in making a gift leads to no better results, for it applies to all cases in which any gift is made.

It is certainly valid to say that a transfer must be complete, so that control over what is transferred is given up, and that no substantial interest is retained in what was given away.[82] After a true transfer has been found, the courts will then try, within the confines of the statute, to attribute income to the one who earned it by his efforts or his capital. In certain cases, the Code does not allow such an application of the taxing power, because it provides aberrational treatment for assets transferred by death or gift. This is not to criticize the treatment provided, for it is practical. It is merely to say that it is aberrational, and will interfere with the symmetry of the system within which it is included.

The trend of the courts in the areas of assignment of income, mineral rights, installment obligations, and income in respect of a decedent, has been to attribute and tax the income to the one who earned it. The implication in the proposed section 735 that a distributee partner can effectively transfer receivables to a donee, is inconsistent with this trend. The treatment of unrealized receivables should not vary—the income inherent in them should be attributed to the one who earned it.

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[82] These are the basic issues in dispute in the family partnership and trust cases. Family partnerships may be valid, and where capital is a material income-producing factor they are expressly recognized by § 704(e) of the Code, but it is clear that the transaction on which such a partnership rests must be bona fide, vesting dominion and control of the interest transferred in the donee. See Treas. Reg. § 1.704-1(e)(2) (1956); Finlen v. Healy, CCH 1960 STAND. FED. TAX REP. (60-2 U.S. Tax Cas.) ¶ 9688 (D. Mont. Aug. 23, 1960) (memorandum decision).

A transfer of property to a trust will relieve the donor of subsequent income from it, if such a transfer would be effective if made to a natural person, and if the requirements of the Code as to duration and dominion and control are complied with. See Blair v. Commissioner, 300 U.S. 5 (1937); CODE §§ 671-78; Treas. Reg. §§ 1.671-678 (1956).