

# Estate Taxes--Inter Vivos Transfer with Possibility of Reversion

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that adduced on the first trial.<sup>10</sup> However, precedent lays down the practical rule that where two different juries have found a verdict for the same party on the same evidence the second finding should not be disregarded and lightly cast aside merely because the trial court may not agree with it. In the absence of unusual or extraordinary circumstances, the verdict should be sustained so that there may be an end to the litigation.

WILLIAM F. MCGINN.

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ESTATE TAXES—INTER VIVOS TRANSFER WITH POSSIBILITY OF REVERSION

Where the decedent during his lifetime made a transfer of an interest in real or personal property either by deed, trust, insurance contract<sup>1</sup> or any other instrument by the terms of which he reserved the power to revoke any part thereof, the estate tax laws, both federal and New York State, hold such property to be taxable as a part of the decedent's gross estate.<sup>2</sup>

Where the transfer is irrevocable, but the possibility of reversion nevertheless exists dependent upon some condition set forth in the instrument, the question of taxability is not as settled. In recent years the subject of *inter vivos* transfers has been litigated more than any other estate tax question.

When the leading Supreme Court case of *Klein v. United States*<sup>3</sup> was decided in 1930 the Commissioner of Internal Revenue attempted to extract from the decision the rule that all transfers subject to the possibility of reversion are taxable. The court in that case held that a deed containing a provision that title was to revert to the grantor in the event the grantee were to predecease him was a transfer merely of a life estate; the transfer of the remainder could not be complete until the death of the grantor. While the lower courts in cases following the *Klein* case often adhered to the rule of that case,<sup>4</sup> many decisions

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<sup>10</sup> *McCann v. N. Y. & Q. County R. R. Co.*, 73 App. Div. 305, 306-8, 76 N. Y. Supp. 684 (1902), *appeal dismissed*, 172 N. Y. 599, 64 N. E. 1123 (1902); *Gutman v. Weisbarth*, 194 App. Div. 351, 354-5, 185 N. Y. Supp. 261 (1920); *Lyman v. Village of Potsdam*, 204 App. Div. 528, 529, 198 N. Y. Supp. 526 (1923); *Gnecco v. Pederson*, 154 N. Y. Supp. 12, 14-15 (1915).

<sup>1</sup> *Goldstone v. United States*, 325 U. S. 687, 65 Sup. Ct. 398 (1945).

<sup>2</sup> INT. REV. CODE § 811(c), (d); N. Y. TAX LAW § 249-r(4).

<sup>3</sup> *Klein v. United States*, 282 U. S. 828, 51 Sup. Ct. 78 (1930); *Klein v. United States*, 283 U. S. 231, 51 Sup. Ct. 398 (1930).

<sup>4</sup> *Union Trust Co. of Detroit v. United States*, 54 F. (2d) 152, 52 Sup. Ct. 500 (1931); *Estate of Morris Schinasi*, 25 B. T. A. 1153 (1932); *Estate of Alfred J. Reach*, 27 B. T. A. 972 (1933); *Estate of Waldo C. Bryant*, 36 B. T. A. 669 (1937); *Estate of John S. Conant*, 41 B. T. A. 739 (1940); *Central Nat. Bank of Cleveland v. United States*, 41 F. Supp. 239 (D. C. Md. 1941).

purported to hold that no such rule was intended in instances where the possibility of reverter was extremely remote.<sup>5</sup>

The Supreme Court reaffirmed *Klein v. United States* in the leading case of *Helvering v. Hallock*.<sup>6</sup> The transfer in this case was by means of a trust instrument where a life estate was vested in the beneficiary but the remainder was subjected to the possibility of reverting to the donor. The court here held the transfer, less the value of the life estate, subject to tax. But here again the lower courts, in subsequent decisions, in overruling the Commissioner of Internal Revenue, refused to tax transfers where the facts showed the possibility of reverter to be extremely remote.<sup>7</sup>

Thus, in the *Biddle* case,<sup>8</sup> the Federal Tax Court found the facts showed "the possibility of any reversion to the transferor so remote as to be practically nil."<sup>9</sup> In the *Allen* case<sup>10</sup> the facts showed that the decedent was survived by at least ten persons all younger than himself who would have had to have predeceased him in order for the corpus of the irrevocable trust involved to have reverted to him. Technically the possibility of reversion existed in both these cases. Actually such a possibility was an absurdity. Judgment in the *Biddle* and the *Allen* cases were thus rendered for the taxpayer and against the Commissioner.

No case where the possibility of reversion was so remote as to be practically nil has, at this writing, been decided by the Supreme Court. The *Klein* and *Hallock* decisions, not having touched upon the subject of *extent* of possibility, it has been argued by the government that extent is immaterial.<sup>11</sup> Yet in the light of the many lower court decisions taking cognizance of remoteness, the Commissioner of Internal Revenue, after declaring a transfer taxable and being reversed in the Tax Court, has in recent years followed a policy of pressing the matter no further. In many instances, after appealing from an adverse decision to the Circuit Court of Appeals, the Commissioner consented to the dismissal of the appeal.<sup>12</sup>

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<sup>5</sup> *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48, 56 Sup. Ct. 78 (1935); *Estate of Anna S. Taft*, 33 B. T. A. 671 (1935); *Estate of Frederick W. Van Sicklen*, 35 B. T. A. 306 (1937); *Estate of Anna Davis Terry*, 38 B. T. A. 593 (1938); *Estate of Harriet M. Casey*, 39 B. T. A. 13 (1939).

<sup>6</sup> *Helvering v. Hallock*, 309 U. S. 106, 60 Sup. Ct. 444 (1940).

<sup>7</sup> *Lloyd's Estate v. Commissioner*, 141 F. (2d) 758 (C. C. A. 3d, 1944); *Estate of Joseph K. Cass*, 3 T. C. 71 (1944); *Estate of Harris Fahnstock*, 4 T. C. 1096 (1945); *Fifth Ave. Bank of N. Y. v. Nunan*, 59 F. Supp. 753 (E. D. N. Y. 1945); *Estate of Mary B. Hunnewell*, 4 T. C. 1128 (1945); *Estate of Nina Camparani*, 5 T. C. 488 (1945).

<sup>8</sup> *Estate of Frances Biddle*, 3 T. C. 832 (1944).

<sup>9</sup> *Id.* at 836.

<sup>10</sup> *Estate of Benjamin L. Allen*, 3 T. C. 844 (1944).

<sup>11</sup> *Commissioner v. Kellogg*, 119 F. (2d) 54 (C. C. A. 3d, 1941); *Lloyd's Estate v. Commissioner*, 141 F. (2d) 758 (C. C. A. 3d, 1944).

<sup>12</sup> *Estate of Frances Biddle*, 3 T. C. 832 (1944); *Estate of H. T. Sloane*, Memo, T. C., 6/8/44.

The New York State Tax Law, in its efforts to achieve as much uniformity as possible with the federal laws in matters of estate taxes, has followed the federal courts on this question.<sup>13</sup> Prior to September 1, 1930, however, this type of transfer was not subject to tax under New York law.<sup>14</sup>

How remote must the possibility of reversion be in order to constitute the transfer an absolute and complete gift during the lifetime of the transferor and hence not subject to the Estate Tax? Attempts have been made to draw a fine line between what constitutes a possibility so remote as to be equivalent to no possibility at all, and what constitutes a reasonable possibility.<sup>15</sup> Even if a hard and fast line were set by statute or by the courts, it would still be exceedingly difficult to place many such trusts or other transfers on one side of the line or the other. The facts will differ in each case as they have in the past. The laws applicable to trusts will still, as they do now, vary from state to state. The Federal Government, in interpreting any trust agreement is bound, in most instances, to take into account the laws of the state in which the agreement was drawn.<sup>16</sup>

More than three quarters of an estate may be eaten up by estate taxes alone where the estate is big enough<sup>17</sup> and it is in the larger estates that *inter vivos* transfers are most common. The stakes being high, litigation ensues only too frequently.

The question as yet unresolved is certain to appear in the courts again and again.

NEWCOMB B. PINES.

#### ADEMPMENT BY A COMMITTEE OF AN INSANE TESTATOR

The conflict in the United States concerning the correct rule in ademption by a committee of an insane testator was manifested by the Illinois case of *Lewis v. Hill*, decided in 1944.<sup>1</sup> This case affirmed what is considered to be the majority ruling in such actions.<sup>2</sup>

<sup>13</sup> *Matter of Cregan*, 275 N. Y. 337, 9 N. E. (2d) 953 (1937).

<sup>14</sup> *Estate of Isabelle C. Kirby v. State Tax Commission*, 228 App. Div. 171, 239 N. Y. Supp. 390 (1930); *Matter of Schweinert*, 133 Misc. 762, 234 N. Y. Supp. 307 (1929).

<sup>15</sup> *Becker v. St. Louis Trust Co.*, 296 U. S. 48, 56 Sup. Ct. 78 (1935); *Commissioner v. Kellogg*, 119 F. (2d) 54 (C. C. A. 3d, 1941).

<sup>16</sup> *Sharpe's Estate v. Commissioner*, 148 F. (2d) 179 (C. C. A. 3d, 1945); *Vaccaro v. United States*, 149 F. (2d) 1014 (C. C. A. 5th, 1945); *Commissioner v. Porter*, 148 F. (2d) 566 (C. C. A. 5th, 1945).

<sup>17</sup> Federal Estate Tax rates range as high as 20% *basic tax* and 77% *additional tax*. The New York Estate Tax ranges as high as 20%. (See INT. REV. CODE §§ 810 and 935; N. Y. TAX LAW § 249n.)

<sup>1</sup> *Lewis v. Hill*, 387 Ill. 542, 56 N. E. (2d) 619 (1944).

<sup>2</sup> *Wilmerton v. Wilmerton*, 176 Fed. 896, 28 L. R. A. (N. S.) 401 (1910);