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Federal, Estate and Gift Taxation (Book Review)

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fied for purposes of franchise taxation and state and national banks are taxed separately under Article 9B. Throughout the book the author points out the reasons underlying the basis for special taxes on different classes of corporation. The tax on banks resembles the personal income tax more closely than any of the other franchise taxes. In fact, it is a franchise tax only in name and this probably for the purpose of subjecting to tax interest on federal and state obligations that otherwise would be exempt. The author does not include in his book a discussion of the franchise tax on banks, although it could properly be considered in any discussion of corporate taxes. The discussion of consolidations seemed meagre although the analysis of the leading cases and the discussions of the experience of Wisconsin and Pennsylvania in dealing with affiliated companies is helpful. It seems that New York has leaned heavily on Pennsylvania for much of its own franchise tax laws.

In addition to a clarification of the franchise tax laws themselves, the author devotes several chapters to administrative aspects, the collection of the tax, remedial procedures before the commission and in the courts and the powers of the tax commission. A complete set of forms adds to the practical value of the book. There is also a valuable table of cases and a good general index. The latter is a topical arrangement with references not only to the text but to the tax law as well.

Not much has been written in this field of taxation perhaps because of the difficulties in presenting the uninviting material into something the tax practitioner can understand. The author has succeeded amply in writing a text book on the subject of franchise taxes that will prove of immeasurable help to the lawyer, student and even the layman.

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FEDERAL, ESTATE AND GIFT TAXATION. By Randolph E. Paul. Little, Brown and Co., two volumes, pp. 1 to 1615, v to x, v to xx.

When Congress in 1916 imposed the first of the current series of estate tax laws, lawyers had a field day in circumventing the full impact of this law and succeeding laws through varied plans of tax avoidance, often obvious and always based upon valid legal concepts traditionally proper and sanctioned by time and precedent. Until a transfer of property by gift was made subject to a special gift tax in 1932,[1] it was obviously possible to avoid an estate tax at death by means of completed gifts during life. Where for one reason or another a completed *inter vivos* gift was not expedient, recourse could be had to the ingenious device of a transfer in trust with strings retained by the grantor, as numerous as the harp, on which the grantor could continue playing with his property as his democratic heart desired.

To be at all effective a death tax had to encompass *inter vivos* transfers of a testamentary nature; hence the inclusion in the gross estate of transfers defi-

[1] A gift tax law was passed in 1925 but repealed by the Revenue Act of 1926.

nitely made in contemplation of death (although hardly necessary today in the light of the gift tax) and transfers to take effect at death. The inclusion of the latter type of transfer was aimed to batter down the efficacy of the trust device in avoiding the death tax. In the running fight between the taxpayer and the Treasury Department, sometimes Congress and sometimes the Courts have enlarged the number and type of transfers that are now embraced in the phrase "to take effect at death". When in 1931, the United States Supreme Court held [2] that an irrevocable transfer in trust with a retention by the grantor of the income for life was not a transfer to take effect at death, Congress on the same day [3] by a Joint Resolution unmistakably disagreed with the opinion and said that such a transfer very definitely was one that did not take effect in possession or enjoyment until death and hence was subject to a death tax. The question of whether this Joint Resolution would be applied retroactively to all transfers made prior to March 3, 1931 was settled by the Supreme Court in 1938 [4] when it held that only transfers made subsequent to the Joint Resolution would be taxable. However, in the field of estate taxation questions like these are not settled permanently. In January 1940 the Supreme Court shocked the legal fraternity in a precedent-shattering opinion in the case of *Helvering v. Hallock*.[5] The Court held that an *inter vivos* transfer in trust made in 1919 with the retention by the grantor of a right to have the property revert to him should he survive his wife, the beneficiary of the trust, was a transfer to take effect at death and hence taxable upon the death of the grantor. Just five years earlier the Court had held otherwise.[6] No case in two decades has provoked so much discussion as this one. The opinion leaves in considerable doubt the relationship of the gift tax to the estate tax and surely these taxes should supplement each other, so that any transfer of property subject to a gift tax should not again be subject to an estate tax. Furthermore, the Tax Court [7] saw in this opinion the overruling of *May v. Heiner* [8] and with it *Hassett v. Welch*.[9]

This is but one of a vast number of situations admirably discussed in the author's chapter on *Transfers Taking Effect at Death*. In the two volumes comprising this present study of federal and gift taxation, the author presents a legal commentary of the law and adjudications under it. The discussions of the law, of the regulations and of the cases are complete, thorough and well documented. The personal touch of the author is evident throughout in the frequent lapses into humor, in his own characterizations of decisions, and the clear and finished style of writing. All these are familiar to those who know

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[2] May v. Heiner, 281 U. S. 238 (1931).
[3] March 3, 1931.
[4] Hassett v. Welch, 303 U. S. 303.
[5] 309 U. S. 106.
[6] Helvering v. St. Louis Union Trust Co., 296 U. S. 39.
[7] Estate of Mary H. Hughes, 44 B. T. A. 1196, since overruled in Estate of Edward E. Bradley, deceased (Docket No. 109069, T. C. No. 69); *see also* United States v. Austin G. Brown, and Marianne B. Keenan, executors of the estate of F. L. Brown, decided 2/12/43 by the U. S. Circuit Court of Appeals, 9th Circuit, No. 10185.
[8] See note 2 *supra*.
[9] See note 4 *supra*.

the author's periodic studies in federal taxation and his contributions to Paul & Mertens' *Law of Federal Income Taxation.*

An introductory chapter gives the reader a historical background of the study of estate and gift taxation, taking the reader into the constitutional and economic aspects of the tax, as well as the all important avoidance problem. A chapter on estates subject to tax is concerned with questions of *situs* and jurisdiction. In a series of chapters the author considers carefully the various types of property included in the purview of gross estate. In addition to the chapters on transfers in contemplation of death and transfers to take effect at death, there are chapters on joint tenancy, powers of appointment and life insurance. So swift are the changes in the law effected by Congress and Court decisions that already the latter chapters require annotations to bring the material down to date. The amendments to the Internal Revenue Code made by the Revenue Act of 1942 have again altered the law with respect to the taxability of life insurance [10] and powers of appointment.[11] Perhaps a more extended discussion would be desirable in the chapter on life insurance, particularly on the problem of joint and survivorship annuities. It would appear from the nature of annuities that the generating source of the rights of a surviving annuitant lies in an irrevocable contract and not in the death of the first annuitant. To tax such an annuity upon the death of the annuitant who purchased the annuity as a transfer to take effect at death stretches legal concepts to a point where law in its traditional sense becomes unrecognizable. Some enlightenment is needed on this point.

The author devotes two lengthy chapters to practice and procedure. It is rather surprising that the author should have omitted from an otherwise complete and full discussion any reference to the right of an equitable set off against a claim for refund made by a taxpayer. Where a taxpayer claims to have overpaid a tax and files a claim for refund, the Treasury Department may attempt to offset against the claim, but only to the extent of such claim, any claim it may have for a possible additional tax due and this offset may be urged by the government, even in cases where it is normally barred from assessing an additional deficiency by reason of the Statute of Limitations.[12]

Three chapters on the gift tax and one on the valuation of property complete a timely, well organized and extremely complete and satisfactory presentation of the estate and gift taxes. It is unfortunate that volume 2 is marred by a duplication in the printing of pages 819 to 832 which appear first in the regular place and again suddenly between pages 1248 and 1249.

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[10] REVENUE ACT OF 1942 § 404.

[11] *Id.* § 403.

[12] Lewis v. Reynolds, 284 U. S. 281; *see also* St. Louis Union Trust Co. v. United States, U. S. Dist. Court, Eastern Division of the Eastern Judicial District of Missouri, No. 8328, at Law, Dec. 15, 1932.