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Income Tax--Deductibility of Loss to Sole Stockholder on Transfer to Controlled Corporation (Higgins v. Smith, 308 U.S. 473 (1940))

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decease of the donor."[10] Thus the weight of authority[11] seems to follow the instant case in treating a gift *causa mortis* as a testamentary disposition and, consequently, subject to the statutory rights of a widow. New York, by way of a surrogate's decision,[12] has fallen out of line with said view when the court said, "The courts in the past have confirmed the right of a spouse to transfer property, free from the claim of a husband or wife, in many ways, among others by gift *inter vivos,* or gift *causa mortis* * * * and the rights of a surviving spouse are not increased * * * to include a right to an interest in property transfered other than by will, it follows that any such transfer, either effective in life, or at the instant of death, other than by will can still be made, free from any right of a surviving spouse to any interest transferred."[13]

The power of revocation only, being reserved in a gift *causa mortis,* it is believed that the test of good faith as laid down by the court in *Newman* v. *Dore*[14] is not violated and that such gifts should be considered as a mode of alienation *inter vivos* and not as a testamentary disposition. The legislature has been quick to regulate the formalities requisite to any form of testamentary disposition and the fact that a gift *causa mortis* can be created without the slightest formality is strong evidence that the legislature never intended that they be treated as such.

B. L.

INCOME TAX—DEDUCTIBILITY OF LOSS TO SOLE STOCKHOLDER ON TRANSFER TO CONTROLLED CORPORATION.—On December 29, 1932, the plaintiff, sole shareholder, who dominated and controlled the Innisfail Corporation through his subordinates, the directors and officers, sold certain securities at market value to the corporation causing himself to suffer a loss with the intent of deducting this loss in the computation of his taxable net income for that year. The plaintiff, thereafter, carried out his plan. On March 11, 1935, the

[10] *Ibid.*

[11] See Note (1929) 64 A. L. R. 485.

[12] *In re* Clark's Estate, 149 Misc. 374, 268 N. Y. Supp. 253 (1933). See *In re* Schurer's Estate, 157 Misc. 573, 284 N. Y. Supp. 28 (1935), *aff'd,* 248 App. Div. 697, 289 N. Y. Supp. 818 (1st Dept. 1936).

[13] *In re* Clark's Estate, 149 Misc. 374, 376, 268 N. Y. Supp. 253, 255 (1933).

[14] 275 N. Y. 371, 9 N. E. (2d) 966 (1937); Krause v. Krause, 171 Misc. 355, 358, 13 N. Y. S. (2d) 812, 813 (1939) ("Since § 18 of the Decedent Estate Law went into effect (1930) and since the decision in Newman v. Dore (1937) I believe it to be now the general rule in New York State that a husband in his lifetime may lawfully dispose of his property, real or personal, by sale, transfer, trust agreement or gift—with or without an intent to deprive his wife of property rights after his death—if the husband's interest in the property which is transferred be transferred, *inter vivos, eo instanti* and fully").

collector of internal revenue notified him that such a loss was not deductible; accordingly, he paid the amount requested and, subsequently, commenced this action to recover it. The plaintiff contended, among other averments, that the case of *Burnet* v. *Commonwealth Improvement Company*[1] was a construction of the statute in his favor and urged that the enactment of Section 24(a)(6) of the Revenue Act of 1934[2] which expressly forbids such a deduction, showed that the law was different in 1932. *Held,* two judges dissenting, that under the provisions of Section 23(a) of the Revenue Act of 1932,[3] the plaintiff was not legally entitled to the deduction. *Higgins* v. *Smith,* 308 U. S. 473, 60 Sup. Ct. 355 (1940).

In the *Burnet* case a decedent had established a corporation and transferred securities to it to avoid multiple death duties and to insure the payment of a charitable endowment, and the court held that the profit made by the corporation resulting from a sale of part of these securities to the decedent's estate, although the decedent's estate wholly owned the corporation, was taxable; for the corporation and the estate were to be regarded as separate entities. The court pointed out that the plaintiff could not rely upon the *Burnet* case because it was factually different from the instant case, for in the *Burnet* case a corporation was the seller, and its corporate profit was held to be taxable. The court said, moreover, that Section 24(a)(6) of the Revenue Act of 1934 did not change the law governing a transaction like the transaction in question—it merely restated the existing rule in a clearer fashion. The logic of these arguments of the plaintiff has been applied by the courts.[4] One, who is inclined to agree with the dissenting opinion in the view that the plaintiff ought to be protected by the doctrine of precedents, *stare decisis et non quieta movere,* should remember that it is not unusual for courts in the process of deciding tax cases to apply a converse precept.[5] This somewhat contrary theory found in decisions concerning taxation[6] might be stated succinctly as follows: since overruled judicial decisions are erroneous

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[1] 287 U. S. 415, 533 Sup. Ct. 198 (1932).

[2] 48 STAT. 680, 691, 26 U. S. C. § 24(a)(6) (1934).

[3] 47 STAT. 169, 179, 180 (1932), 26 U. S. C. § 23(e)(1, 2) (1934) (In computing net income there shall be allowed as deductions * * * (e) Losses by individuals. Subject to the limitations provided in subsection (r) of this section, in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise * * * (1) if incurred in trade or business; or (2) if incurred in any transaction entered into for profit though not connected with trade or business).

[4] Commissioner of Internal Revenue v. Eldridge, 79 F. (2d) 629 (C. C. A. 9th, 1935); Commissioner of Internal Revenue v. McCreery, 83 F. (2d) 817 (C. C. A. 9th, 1936); Foster v. Commissioner of Internal Revenue, 96 F. (2d) 130 (C. C. A. 2d, 1938).

[5] 1 BL. COMM. *68.

[6] People *ex rel.* Rice v. Graves, 242 App. Div. 128, 273 N. Y. Supp. 582 (3d Dept. 1934), *aff'd,* 270 N. Y. 498 (1936), *cert. denied,* 298 U. S. 683 (1936); Yazoo and M. V. R. R. v. Adams, 77 Miss. 194, 28 So. 956 (1899), *aff'd,* 180 U. S. 1, 21 Sup. Ct. 240 (1901).

statements of the law that always existed as expressed by only the overruling opinion, the later overruling decisions are retroactive. In the light of this principle, even if the *Burnet* case is considered by a dissenter to be a construction of the statute favorable to the plaintiff's cause, we see that the portion of the *Burnet* case presented by the dissenter to support the plaintiff's position can be overcome. The court might have declared that it was never the law. In other words, in the realm of taxation there exists the precedent that a taxpayer, who makes use of existing judicial interpretations of statutes affecting other taxpayers, does so at his peril.

A. C. H.

INTERNATIONAL LAW—JURISDICTION—FOREIGN GOVERNMENTS—MONEY PAID TO BONDHOLDERS' COMMITTEE BY FOREIGN GOVERNMENT IN LIQUIDATION OF ITS PUBLIC DEBT.—The Mexican Government was in default in the payment of interest on bonds issued at various times and generally classified as: "(a) the Secured Direct Debt; (b) the Unsecured Direct Debt; and (c) the Railways Debt." A committee of foreign bankers was formed for the purpose of negotiating, in behalf of the bondholders, an agreement with the Government of Mexico for the adjustment and liquidation of its public debt. The committee successfully negotiated a satisfactory agreement with the government whereby the government promised to pay to the committee stipulated sums, to be distributed by the committee. The government has paid to the committee large sums of money and the committee now holds a fund of several million dollars which, concededly, it has received from the government for distribution among the holders of government obligations deposited with the committee. Conflicting claims have been made by the holders of the three classes of obligations, and the Mexican Government has claimed that it is entitled to the return of the fund. The plaintiffs, as such committee, brought this action for a voluntary accounting of the moneys so received, and has named the representatives of the holders of the three general classifications as party defendants. The foreign government appeared specially for the purpose of asserting that it owned the fund, and thus was immune from suit here. The problem is whether the Mexican Government is a necessary party because of its claim that it owns the fund, and whether the controversy involves questions upon which the court can pass without invading the sovereign right of immunity of Mexico. The Supreme Court of New York held that Mexico was a necessary party in interest in the fund, and therefore since it had no jurisdiction dismissed the complaint.[1] On appeal,

[1] Lamont v. Travelers Ins. Co., 254 App. Div. 511, 5 N. Y. S. (2d) 295 (1st Dept. 1938). The lower courts have consistently held Mexico to be a