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The Federal Death Tax (Book Review)

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power. If, in the grant-in-aid system, the states fail to live up to the requirements as laid down by the federal government the grants are withheld. In the tax credit system, as it relates to inheritance taxes, states which do not pass the desired legislation are required to pay the full amount of the federal tax, but those states having the necessary laws are credited up to eighty per cent of the federal inheritance tax. The net result in the more important types of co-operation is, therefore, that federal legislation or legislation desired by the federal government is passed and executed by the states in return for a reward. The author intimates that this may very well be "The New Federalism" wherein the federal government will "use state agencies for the performance of federal functions under federal control with the help of a state civil service with high standards."

The author makes no attempt in her book to pass judgment upon the governmental trend which she reports. She states clearly what is taking place, backs up her findings with a wealth of sources and lets the reader draw his own conclusions. In her consideration of the constitutional hurdles, both state and federal, which the grant-in-aid system and also the tax-credit system had to clear before they became widely operative, the author is lucid and interesting, especially to the student of law and government. A copious bibliography is appended.

ALFRED J. SELLERS, JR.*

THE FEDERAL DEATH TAX. By John E. Hughes. Chicago: Callaghan & Co., 1938, p. 519.

Up to the present time legal treatises on the Federal Estate Tax have been rare. In fact, the "Federal Death Tax" by John E. Hughes is the first treatise on the law presented to the tax practitioner. To be sure, the legal profession has had some formal treatment of federal estate taxes in a handbook prepared by Montgomery and Magill[1] and in Volume Six of the "Procedure of Law of Surrogates Courts", a volume devoted to New York and federal estate and inheritance taxes, rewritten and enlarged by Albert Handy this year.

Since 1916 when the first Federal Estate Tax Law was enacted, the Treasury Department had been occupied with the administration of the law, the taxpayer has been busily engaged in searching and finding loopholes in the law, and Congress has been constantly changing the law and closing up the loopholes. During all this time the courts have been busy setting limitations on what Congress may or may not include in the determination of the gross estate of a decedent. After twenty years of federal estate tax administration, it is possible for the first time to speak with any definiteness of principles of estate taxation.

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[1] FEDERAL TAXES ON ESTATES, TRUSTS AND GIFTS (1935-6). See Harrow, Book Review (1936) 10 ST. JOHN'S L. REV. 401.

The author's discussion really commences with Chapter Two on the constitutional scope of the federal taxing power. This chapter is a valuable contribution to an understanding of basic principles of taxation, constitutional limitations on the power to tax, the principle of classification, uniformity, jurisdiction, the direct tax, and so forth.

It has been said that the estate tax is an excise upon the transfer of an estate upon the death of the owner. It is a tax on the transfer of the net estate of the decedent. Simple as this may sound, the determination of what constitutes the net estate is the major problem in estate taxation. This is so because the nature of the net estate has been enlarged to include not only property in which the decedent may have an interest at the time of his death, but also transfers made by the decedent during his lifetime, and at whose death no vestige of an interest remains. Generally, it may be said that an *inter vivos* transfer is subject to the estate tax if the transfer is of a testamentary nature. This is obviously true in the case of an *inter vivos* transfer made in contemplation of death and yet the courts have had considerable difficulty in subjecting such *inter vivos* transfers to taxation, in spite of a provision in the law that any *inter vivos* transfer made within two years of the date of death shall be presumed to be in contemplation of death. The courts have held[2] that this presumption is a rebuttable one. Where an *inter vivos* transfer is in the form of an irrevocable trust with a retention of economic benefits in the grantor, or where there is a revocable transfer with a retention in the grantor of a power to alter, amend, or terminate, the courts have frequently found difficulty in finding the testamentary nature of the transfer.

In the case of an estate held in the form of a tenancy by the entirety, the courts have done violence to legal principles in saying that the death of one tenant results in a transfer of a testamentary nature. According to legal principles, as lawyers have understood them for years, the surviving tenant merely receives what was legally his at the time the estate was created. The courts have found refuge in justifying the inclusion of estates by their entirety in the net taxable estate by saying that death was the generating source of valuable rights. The inclusion of general powers of appointment in the net taxable estate requires an expert knowledge on the part of lawyers of the nature of this type of power. The problem of the extent to which insurance left by the decedent should be taxed as part of the net estate has even now left considerable doubt in the minds of tax practitioners as to the degree to which an individual may leave insurance that will escape taxation.

These problems are intelligently discussed in the author's book.

A second major problem in federal estate taxation is the valuation of property for estate tax purposes. This is especially true where a decedent leaves an interest in a business or stock in a close corporation. The value of a going business may be complicated by the determination of a goodwill element. This determination requires an array of expert testimony of accountants and specialized experts and a dissection of all the factors that may have a bearing on the value of a business. In his discussion of the valuation of property, the author has performed an immeasurable service to the tax practitioner by including an

[2] Heiner v. Donnan, 285 U. S. 312, 52 Sup. Ct. 368 (1932).

appendix to Chapter Eight covering sixty-three pages of citations to court cases and Board of Tax Appeals cases that have dealt with the problem of valuation of all kinds of property, including accounts receivable, bonds, contracts, corporation stock, goodwill, inventories, leases, mineral lands and timber lands, patents, real estate, and so forth.

To prevent the dissipation of an estate by means of *bona fide inter vivos* gifts during the lifetime of a decedent, an obvious method of avoiding an estate tax, Congress has attempted to close such a loophole by enacting a gift tax. While the author devotes a chapter to a discussion of the gift tax, the treatment of this law was necessarily meager. The current gift tax law has been in operation only since 1932 and there has not been adequate time to establish sound principles of taxation with relation to the gift tax.

The author devotes several chapters to the duties and liabilities of an executor, the procedure for the determination of deficiencies and to the administrative provisions of the law.

The author of the book states that he has read the briefs in every federal estate tax case presented to the Supreme Court of the United States, many of the briefs of the Circuit Courts of Appeals and Board of Tax Appeals and indicates that he is thoroughly familiar with all aspects of estate taxation. His approach is definitely a practical one. At the same time, the treatment throughout is scholarly and on a high judicial level.

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