

## Taxation--Internal Revenue--Interpretation and Application of Section 302(d) of Revenue Act of 1926

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TAXATION—INTERNAL REVENUE—INTERPRETATION AND APPLICATION OF SECTION 302(d) OF REVENUE ACT OF 1926.—On October 18, 1918, and again on February 1, 1919, decedent transferred to the Bankers Trust Company certain bonds for the benefit of his daughter and her son. Contemporaneously he made similar transfers of bonds to the same trustee for the benefit of his son and his son's daughter. Thereafter, November 27, 1926, in order to make provision for two children of his daughter born after the creation of these trusts, he sent the trust company letters purporting to revoke the trusts of which she was a beneficiary, to terminate the interest of all persons therein and to direct it to deliver the principal and income to itself as trustee according to a new deed then delivered. Each of the five trust agreements included provisions governing the management, investment and disposition of the principal and income, and contained a paragraph reserving to the donor power, at any time, to alter or modify the indenture and any or all of the trusts in any manner, but expressly excepting any change in favor of himself or his estate. Decedent died November 30, 1926. The Commissioner of Internal Revenue included in the gross estate the value of the property described in the last deed and the petitioners sought redetermination. *Held*, affirming Board of Tax Appeals, 23 B. T. A. 1016, and Circuit Court of Appeals, 60 F. (2d) 73, that because of the reserved power to alter and amend, §302(d) applied and included the corpus of all the trusts in the gross estate. *Porter, et al. v. Commissioner of Internal Revenue*, 288 U. S. 436, 53 Sup. Ct. 451 (1933).

The Revenue Act of 1926, §302, provides that the value of decedent's gross estate shall be determined by computing the value, at the time of his death, of all property, real or personal, tangible or intangible, wherever situated \* \* \* (a) To the extent of the interest therein of the decedent at the time of his death, \* \* \* (d) To the extent of the interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person to alter, amend, or revoke.<sup>1</sup> Subdivision (a) does not in any way refer to or purport to modify (d), as was held in *White v. Erskine*.<sup>2</sup> And in view of the familiar rule that tax laws are to be construed liberally in favor of taxpayers,<sup>3</sup> it cannot be said that if it

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<sup>1</sup> 26 U. S. C. §1094 (a), (d).

<sup>2</sup> 47 F. (2d) 1014, 1016 (C. C. A. 1st, 1931). The Court, in this case, seemed to be of the opinion that no new form of tax was intended by the Revenue Act of 1926, §302(d), but that it was only "to the extent of the interest" of decedent in the trust fund, and, at his death, that subdivision (d) added anything to the value of the gross estate.

<sup>3</sup> *Shwab v. Doyle*, 258 U. S. 529, 536, 42 Sup. Ct. 391 (1922) *McKenna, J.*, " \* \* \* it is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it"; *Crocker v. Malley*, 260 U. S. 717, 43 Sup. Ct. 95 (1922); *Malley v. Howard*, 281 Fed. 363 (C. C.

stood alone, (a) would extend to the transfer brought into the gross estate by (d).<sup>4</sup> Moreover, Congress has progressively expanded the basis for such taxation.<sup>5</sup> Comparison of §302<sup>6</sup> with corresponding provisions of earlier acts warrants the conclusion that (d) is not a mere specification of something covered by (a) but that it covers something not included therein.<sup>7</sup> The transfers under consideration are undoubtedly covered by subdivision (d) in view of the fact that the words "alter," "modify" and "amend" are disjunctively, not conjunctively, used. "Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect to the creation of the trusts even to the extent of taking property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others."<sup>8</sup> So far as concerns the tax here involved, the Court held,<sup>9</sup> there is no difference in principle between a transfer subject to such changes and one that is revocable, and that, so construed, §302(d) is not repugnant to the due process clauses of the Fifth Amendment.

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A. 1st, 1922); *Empire Fuel Company v. Hays*, 295 Fed. 704 (N. D. W. Va. 1924); *Commissioner of Internal Revenue v. Northern Coal Company*, 62 F. (2d) 742 (C. C. A. 1st, 1933) Doubt or ambiguity as to construction of statutes levying taxes should be resolved in taxpayer's favor.

<sup>4</sup> *United States v. Fields*, 255 U. S. 257, 264, 41 Sup. Ct. 256 (1921). Application of Section 202 a, b, of Revenue Act of 1916. It was here held that property passing under a testamentary execution of a general power of appointment created prior to the Revenue Act of 1916 was not taxable either under Section 202, subdivision a, as property in which decedent had an interest and which was subject to the payment of debts and expenses of administration and subject to distribution as part of his estate or, under subdivision b, as property in which the decedent had an interest and which was transferred by him in contemplation of death.

<sup>5</sup> *Chase National Bank v. United States*, 278 U. S. 327, 49 Sup. Ct. 126 (1929).

<sup>6</sup> REVENUE ACT OF 1926, 26 U. S. C. §1094.

<sup>7</sup> Cf. *Chase National Bank v. United States*, *supra* note 5; *Tyler v. United States*, 281 U. S. 497, 50 Sup. Ct. 356 (1930); *Gwin v. Commissioner of Internal Revenue*, 287 U. S. 224, 53 Sup. Ct. 157 (1932).

<sup>8</sup> Instant case; *Porter v. Commissioner of Internal Revenue*, 288 U. S. 436, 53 Sup. Ct. 451, 453 (1933).

<sup>9</sup> *Ibid.*