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Income--Residuary Legatees--Accretion in Value of Legacies (*Brewster v. Gage*, 280 U.S. ___ (1930))

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Subdivision 7 of the Revenue Act of 1918. *Haberle Crystal Spring Brewing Co. v. Clark*, 280 U. S. —, 50 Sup. Ct. Rep. —. Decided Jan. 27, 1930.

Good will,¹ although property, is not such property as can be segregated from the capital assets and has no existence except as an incident of a going business.² This intangible property,³ not being subject to depreciation, cannot be classed with other intangibles as patents, copyrights, licenses and franchises,⁴ and is not an assignable asset apart from the business. Upon the sale of a business the price received would reflect the loss or gain of good will and any such loss would be a basis for a deduction under the statute 234a.⁵ The section⁶ under which the plaintiff claims the deduction has been construed to refer to the obsolescence only of property used in trade or business as is subject to exhaustion, wear and tear.⁷

The Supreme Court, in upholding the decision of the collector, held that when a business is extinguished as noxious under the Constitution the owners cannot demand a partial compensation from the government in the form of an abatement of taxes otherwise due. Further the Court held that obsolescence as intended by Congress in the Revenue Act of 1918 was not meant to include extinguishment of business, caused by operation of law.

E. S.

INCOME—RESIDUARY LEGATEES—ACCRETION IN VALUE OF LEGACIES.—The father of the petitioner died testate, May 20, 1918. Under a final decree of the Surrogate's Court entered on April 19, 1920 certain stocks were distributed to the petitioner as one of the residuary legatees. He sold some of the stocks in 1920, 1921 and 1922. In computing the amount of his income tax, he used as a basis for arriving at the profit or loss on each sale, the selling price

¹ "Goodwill is the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity or even from ancient partialities or prejudices." *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 446.

² *Joseph Garneau Co., Inc. v. Commissioner of Internal Revenue*, 8 B. T. A. 1041 (1927); *Kaufmann v. Kaufmann*, 239 Pa. 42, 86 Atl. 634 (1913).

³ "Goodwill is property of an intangible nature and the term property includes goodwill." *Metropolitan Bank v. St. Louis Dispatch Co.*, *supra* Note 1.

⁴ *Red Wing Malting Co. v. Willcuts*, 15 F. (2nd) 626 (C. C. A. 8th, 1926).

⁵ *Supra* Note 4, *supra* Note 2.

⁶ Rev. Act of 1918, Sec. 234a, Subd. 7 (Act of Feb. 25, 1919). C18, 40 Stat. 1057, 1078.

⁷ *Supra* Note 4.

of the stock and its value on the date of distribution. The Commissioner of Internal Revenue held that the value at the date of the testator's death should be taken for the calculation of income. The petitioner paid the additional tax under protest. He brought this action in the District Court to recover the amount exacted, and the judgment in his favor has been reversed by the Circuit Court of Appeals. *Held*, judgment affirmed. The title acquired by the petitioner to the stocks on the date of distribution related back to the date of the testator's death, the latter date thus becoming the date of acquisition within the meaning of the acts governing the taxes in question. *Brewster v. Gage*, 280 U. S. —, 50 Sup. Ct. Rep. 115 (1930).

The Revenue Acts in question are those enacted in 1918 and 1921.¹ The language of the acts, although not expressly stating that residuary legatees shall be taxed upon the income derived from legacies from the date of the decedent's death, has been construed by the Treasury Department to have that effect, and the regulations promulgated to enforce the acts have been accordingly drafted.² The generality of the words used in both acts indicates intention that the date of death of the decedent was to be taken as the basis in all cases.

Upon the death of the owner of personal property, title does not vest at once in his next of kin or legatees.³ But there does vest immediately in each of them the right to his distributive share of so much as shall remain after proper administration; and the right to have it delivered after entry of the decree of distribution.⁴ There vests in the executor or administrator, upon acceptance of the trust, title to all the personal property. This title is held for the beneficiaries. The decree of distribution confers no new right; it merely identifies the remaining property, evidences the right of possession in the next of kin or legatees, and requires delivery by the executor or administrator.⁵ The petitioner's right to have his share vested immediately upon the decedent's death. Undoubtedly the basis for the ascertainment of gain or loss on the sale of real property by an heir or devisee is its value at the time of the death of the decedent. That is the time of acquisition. Specific legacies are handed over to the legatees generally soon after the testator's death, and before the entry of the decree for final distribution. In such cases the gain or loss is calculated under these acts on the value at the time of death. There is nothing in either of the acts to indicate a purpose for establishing

¹ Rev. Act of 1918, 40 Stat. 1057, 1060, 1065; Rev. Act of 1921, 42 Stat. 227, 229, 237.

² Reg. 45, Art. 1562; Reg. 62, Art. 1563.

³ U. S. v. Jones, 236 U. S. 106, 112; 35 Sup. Ct. Rep. 261 (1915).

⁴ *Sanders v. Soutter*, 136 N. Y. 97, 32 N. E. 638 (1892); *Vail v. Vail*, 49 Conn. 52 (1881).

⁵ *Wager v. Wager*, 89 N. Y. 161, 166 (1882); *Thompson v. Thomas*, 30 Miss. 152, 158 (1855).

two bases, (1) value of real property and specific bequests at the time of death, and (2) value of other property at the date of decree.

The Revenue Act of 1928 expressly established value at the time of death of the decedent as the basis of calculation in respect to sales of personal property acquired by specific bequest and of real estate acquired by general or specific bequest or by intestacy, and in all other cases fixed fair market value at the time of distribution to the tax-payer as the basis.⁶ The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future and they will not be applied retroactively unless that purpose plainly appears.⁷

B. E. D.

INCOME—SALE OF TRUST ASSETS.—This case arose from a demurrer to a complaint at law instituted by the plaintiff to recover income taxes paid under protest. A resident of the state of Connecticut, Sumner, by his will named the plaintiff as trustee of the residue of his estate to pay the income to his wife during her life, remainder to certain charities. There was a clause in the will empowering the trustee to pay over to, or for the benefit of, the wife any part of the principal of the trust fund which it might deem necessary or advisable for her comfortable maintenance and support. In 1926 some of the securities forming part of the trust fund were sold by the plaintiff and a profit realized. The question before the Court was whether this profit should be considered as income of the estate during the widow's life. *Held*, judgment affirmed. *Hartford-Connecticut Trust Company et al. v. Easton, etc.*, 36 F. (2nd) (C. C. A. 2nd, 1930).

The power granted to the trustee under the will was limited, the limitation being that the widow was to receive no part of the principal of the trust fund unless, in the opinion of the plaintiff, it should be deemed necessary for her comfortable maintenance and support. The evidence showed that the widow lived in a modest way considering the income from her husband's estate and her own resources. Her standard of living, her tastes, and her character were such that at no time was there any reasonable possibility that the plaintiff, as trustee, would deem it necessary or advisable to use any part of the principal for her comfortable maintenance and support. It has been held by the courts of Connecticut that where the income from property is given to a husband for life, and the necessary power "if he should want for his support, to sell any part or the whole of it for his maintenance," that the word "want" is to be construed as meaning "need" and the test is whether the husband is

⁶ Rev. Act of 1928, Sec. 113 (a), Subd. 5.

⁷ U. S. v. *Magnolia Co.*, 276 U. S. 160, 162 (1928).