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# Estate Tax--Marital Deduction--Specific Portion

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## Recent Decisions

### ESTATE TAX — MARITAL DEDUCTION — SPECIFIC PORTION

#### *Gelb v. Commissioner, 298 F.2d 544 (2d Cir. 1962)*

Decedent created a testamentary residuary trust for the life benefit of his wife. Significant provisions of the residuary clause provided: (1) in the event the net income payable to his wife during any year was less than \$10,000, the trustees<sup>1</sup> were to invade the corpus of the trust to the extent of such a deficit and pay the difference to her; (2) the decedent's widow was to have a general testamentary power of appointment; (3) the individual trustees in their sole discretion were to pay to decedent's widow amounts, not to exceed \$5,000 a year, for the support and education of her youngest daughter; and (4) decedent's widow could in her sole discretion demand that the trustees pay \$3,000 from the trust corpus as a wedding gift to each daughter of the decedent that might marry after his death. The executors of the decedent's estate filed a federal estate tax return. The Commissioner assessed a deficiency on the ground that the residuary trust did not qualify for the marital deduction, because of the trustees' power to invade the trust corpus for the support and education of the decedent's youngest daughter. On the executor's petition for redetermination the Tax Court affirmed the Commissioner's determination.<sup>2</sup>

On appeal, the Court of Appeals for the Second Circuit affirmed the Tax Court in part and reversed and remanded in part to determine how much of the residuary trust qualified for the marital deduction under the "specific portion" provisions of the Internal Revenue Code.<sup>3</sup> In allowing the marital deduction, the court expressly invalidated the Treasury's Regulation<sup>4</sup> insofar as it would limit a "specific portion" of a trust to a "fractional or percentile share."

1. The decedent appointed his wife, son, and the Manufacturers Trust Company of New York as trustees.

2. Estate of Harry Gelb, 29 P-H Tax Ct. Mem. 1100 (1960).

3. *Gelb v. Commissioner*, 298 F.2d 544 (2d Cir. 1962). The court affirmed the Tax Court's holding that the trust in its entirety did not qualify for the marital deduction in that there was a power in a person other than the surviving spouse to appoint a part of the corpus. See note 7 *infra*.

The court refused to accept the executors' contention that since the decedent's wife was one of the two individual trustees and her discretion was unlimited, no person other than the surviving spouse could appoint a part of the corpus to any person other than the surviving spouse. Two reasons for this refusal were advanced by the court: (1) the will did not make it certain that the decedent's wife would be a trustee throughout her life, as she might become incompetent and then her power to appoint sums to the daughter would cease and be held by her successor, see *Starrett v. Commissioner*, 223 F.2d 163 (1st Cir. 1955); 1 SCOTT, TRUSTS § 107 (2d ed. 1956); and (2) equity would not permit her as trustee to veto, for her individual interest, payments to the daughter required to carry out the decedent's stated purpose.

4. Treas. Reg. 105 § 81.47 a(c) (3) (1961), added by, T.D. 6529, 1961-1 CUM. BULL. 768 (now Treas. Reg. § 20.2056(b)-5(c)).

The Internal Revenue Code provides for a marital deduction in computing a decedent's taxable estate for estate tax purposes.<sup>5</sup> However, the marital deduction is not allowed automatically and is available only if certain conditions are met.<sup>6</sup>

One of the interests which qualifies for the marital deduction is property passing from the decedent in trust in which the surviving spouse has a life income interest and a general power to appoint the remainder.<sup>7</sup> Under the 1939 Code, unless a trust qualified in its entirety for the marital deduction, no part of it qualified.<sup>8</sup> However, the 1954 Code introduced a new concept which allowed the marital deduction for a life income interest and a general power of appointment as to a "specific portion" of the trust.<sup>9</sup>

It is significant to note that section 2056(b)(5) of the 1954 Code does not undertake to define the expression "specific portion." In *Gelb v. Commissioner*<sup>10</sup> the Commissioner contended that "specific portion," as it is defined in the Regulations,<sup>11</sup> is limited to a "fractional or percentile share" of a larger fund. However, the court expressly disapproved the regulation insofar as it would limit a "specific portion" to a "fractional or percentile share." The court relied substantially on its failure

5. Int. Rev. Code of 1939, ch. 3, § 812(e)(1), as amended, Revenue Act of 1948, § 361(a) ch. 168, 62 Stat. 110 (now INT. REV. CODE OF 1954, § 2056).

6. There are six requisites for the marital deduction: (1) the decedent must have died after December 31, 1947; (2) at the date of death, the decedent must have been a citizen or a resident of the United States, (3) and have been married and survived by a spouse; (4) an interest in property must have passed from the decedent to the surviving spouse; (5) such interest must be included in the gross estate of the decedent, and (6) must not be a terminable interest. LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 379 (1956). As to the terminable interest rule, see generally LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 387 (1956); 4 MERTENS, LAW OF FEDERAL GIFT AND ESTATE TAXATION § 29.19 (1959).

7. Further requirements for the trust to qualify for the marital deduction are (1) the income must be payable annually or at more frequent intervals, and (2) there must be no power in any other person to appoint any part of the corpus to any person other than the surviving spouse. Int. Rev. Code of 1939, ch. 3, § 812(e)(1)(F), as amended, Revenue Act of 1948, § 361(a), ch. 168, 62 Stat. 110 (now INT. REV. CODE OF 1954, § 2056(b)(5)).

8. Estate of Allen L. Weisberger, 29 T.C. 217 (1957); Estate of Raymond Parks Wheeler, 26 T.C. 466 (1956).

9. INT. REV. CODE OF 1954, § 2056(b)(5). The Technical Amendments Act of 1958, section 93(b), 72 Stat. 1606, amending section 812(e)(1)(F) of the 1939 Code, made the new dispensation applicable retroactively to estates of decedents who had died after April 1, 1948, and before August 17, 1954, the date the provisions of the 1954 Code took effect. Although the Technical Amendments Act of 1958 was enacted prior to the rendering of the decision in the Tax Court, but subsequent to the filing of the petition to the court, the provisions of the Act were not considered by the Tax Court.

10. 298 F.2d 544 (2d Cir. 1962).

11. Treas. Reg. 105 § 81.47a(c)(3) (1961), added by, T.D. 6529, 1961-1 CUM. BULL. 768 (now Treas. Reg. § 20.2056(b)-5(c)). It has been suggested that "specific portion" means, a "designation of the amount of the surviving spouse's interest which makes it feasible to compute the amount of the marital deduction." LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 407 (1956).