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United States Trust Co. v. I.R.S.

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UNITED STATES TRUST CO. v. I.R.S.

During the course of its administration, an estate may receive income that is subject to federal income tax. When, and if, an estate receives such income the executor is faced with the task of filing the estate's income tax return[1] along with a number of related considerations.[2] One of the more important considerations is the allocation of the burden of such tax between the beneficiaries of the estate and the estate itself.

Subchapter J of the Internal Revenue Code provides the mechanism to allocate that burden between the beneficiaries and the estate.[3] Generally, Subchapter J attempts to allocate the tax liability according to the amount of income the estate retains and the amount of income which it distributes to beneficiaries.[4] It does so, generally, by providing the estate an income tax deduction for amounts of income distributed to beneficiaries.[5]

United States Trust Co. v. I.R.S.[6] involved this precise issue. The estate sought to deduct income it had distributed to a charitable beneficiary[7] so that it would not be subject to any income tax liability with respect to this income. The government challenged the validity of this deduction. The government contended that the tax liability relating to such income was totally eliminated, rather than being allocated, because the charitable beneficiary was exempt from federal income tax.[8] In holding for the estate, the court rested its decision on a literal reading of the statutory framework of Subchapter J.[9]

FACTS

Alexander F. Chisholm (decedent) died on March 12, 1974.[10] His last will and testament provided for a specific bequest of ten percent of his gross testamentary estate to the Chisholm Foundation, but it did not specify that the be-

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[1] I.R.C. § 6012(a)(3) states: "(e)very estate the gross income of which for the taxable year is $600 or more" shall file an income tax return. Estates are required to file U.S. Fiduciary Income Tax Return (Form 1041).

[2] DODGE, FEDERAL TAXATION OF ESTATES, TRUSTS AND GIFT PRINCIPLES AND PLANNING 524 (1981). The author states: "the opportunities for income tax savings in the context of estates are considerable." Other considerations include the estate's tax year end, the election to take certain expenses on the estate tax return as opposed to the income tax return of the estate.

[3] The statutory distribution rules are contained in I.R.C. §§ 661-663 (1985); *see also* FERGUSON, FREELAND & STEPHENS, FEDERAL INCOME TAXATION OF ESTATES AND BENEFICIARIES 381-458 (1970) [hereinafter cited as FEDERAL INCOME TAXATION].

[4] FEDERAL INCOME TAXATION, *supra* note 3, at 381.

[5] I.R.C. § 661(a) (1985); *see generally* Fremont-Smith, *Techniques for Controlling Income Tax Consequences of Trusts and Estates and Their Beneficiaries*, 25 N.Y.U. INST. FED. TAX 1019 (1967).

[6] 617 F. Supp. 575 (D.C. Miss. 1985).

[7] *Id.* at 577.

[8] *Id.*

[9] *Id.* at 582-83.

[10] *Id.* at 576.

quest come from income of the estate.[11] The estate filed a Federal Estate Tax Return and claimed a charitable deduction for the amount of the bequest.[12] During 1975, the estate distributed cash and securities to the Chisholm Foundation in partial satisfaction of the bequest.[13] The estate's executor distributed the cash from the estate's current income.[14] Thereafter, the estate filed an income tax return for the estate's tax year ending December 31, 1975, and claimed a distribution deduction for the amounts distributed in satisfaction of the specific bequest.[15] The distributions did not qualify as a charitable deduction because the decedent's will did not specify that the monies come from the estate's income.[16] Thus, with respect to the charitable bequest, the estate claimed both an estate tax deduction (for the bequest itself) and an income tax deduction (for the distribution in satisfaction of the bequest).[17]

The estate claimed the distribution deduction based on the authority of I.R.C. § 661(a).[18] Such section states: "In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate . . . amounts properly paid or credited" to the beneficiaries of the estate.[19] Further, I.R.C. § 642(c) provides: "In the case of an estate . . . there shall be allowed as a deduction . . . for charitable contributions and gifts any amount of gross income, without limitation, which pursuant to the terms of the governing instrument is (paid) during the taxable year . . ."[20] The Chisholm Foundation was both a charitable organization[21] and a beneficiary of the estate. Thus, based on a reading of the above statutes, an estate distribution paid to the foundation could potentially qualify for both a distribution deduction under I.R.C. § 661(a)(2) and a charitable contribution deduction under I.R.C. § 642(c).

I.R.C. § 642(g) prohibits the estate from claiming an income tax deduction for expenses, indebtedness, taxes and losses which were allowable deductions in computing the taxable estate of a decedent, although such items may

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[11] *Id.* at 577.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] I.R.C. § 661(a) (1985).

[20] I.R.C. § 642(c) (1985).

[21] The opinion did not address the tax status of the Chisholm Foundation. It appeared that the charitable purpose of the foundation was never at issue. It is assumed that the Chisholm Foundation qualified as a private foundation in accordance with I.R.C. § 509(a). I.R.C. § 509(a) requires that such an organization be organized and operated exclusively "for religious, charitable, scientific, testing for public safety, literary or educational purposes or to foster . . . amateur sports, competition . . . or for the prevention of cruelty to children or animals" provided no part of the activities are attempting to influence legislation or participate in any political campaign. I.R.C. § 642(c) requires that a distribution from an estate or trust be used for one of the above purposes in order for such distribution to qualify as a charitable contribution deduction under that section.

nonetheless qualify as income tax deductions.[22] However, there is no statutory guidance for whether a distribution deduction may be claimed where an estate's charitable bequest does not qualify (for one reason or another)[23] as a charitable contribution deduction. Based on a literal reading of I.R.C. § 661(a)(2), it would appear that the distribution would qualify as a distribution deduction. Accordingly, with respect to the distribution to the Chisholm Foundation, the estate claimed a distribution deduction.

The Internal Revenue Service took exception to this treatment, and argued that a single bequest should not give rise to both an estate tax deduction and an income tax deduction.[24] Having previously allowed the estate tax deduction, the government could only question the validity of the income tax deduction in order to preclude a double benefit. The government argued that based on Income Tax Regulation § 1.663(a)-2 and Revenue Ruling 68-667, amounts paid for charitable purposes are deductible by estates only as a charitable contribution deduction.[25] Income Tax Regulation § 1.663(a)-2 states that "amounts paid, . . . for charitable, etc., purposes are deductible by estates or trusts *only as provided in section 642(c)*" (emphasis added).[26] Thus, the government maintained that no income tax deduction would be allowed because the distribution in question did not meet the requirements of I.R.C. § 642(c).[27]

Revenue Ruling 68-667 is similar. It states that an estate's bequest to a charity, which is paid out of corpus rather than income, does not qualify for the charitable contribution deduction, and is not allowable as a distribution deduction to beneficiaries under § 661(a)(2) of the Code.[28] Thus, the govern-

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[22] I.R.C. § 642(g) provides as follows:

> Amounts allowable under section 2053 (relating to expenses, taxes and indebtedness of the estate) or section 2054 (relating to losses of the estate) as a deduction in computing the taxable estate of a decedent shall not be allowed as a deduction . . . in computing the taxable income of the estate . . . unless there is filed . . . a statement that the amounts have not been allowed as deductions under sections 2053 and 2054 and a waiver of the right to have such amounts allowed at any time as deductions under section 2053 or 2054.

I.R.C. § 642(g) (1985).

[23] Some of the requirements of I.R.C. § 642(c) relating to charitable contributions for estate distributions are: 1) the charitable bequest must be paid out of the *gross income* of the estate; 2) the charitable bequest must be paid *pursuant to* the terms of a governing instrument; and 3) the charitable bequest must be paid for a purpose specified in I.R.C. § 170(c). The purposes specified in I.R.C. § 170(c)(2)(B) are religious, charitable, scientific, literary, educational, to foster amateur sports competition and prevention of cruelty to children or animals.

[24] *United States Trust Co.*, 617 F. Supp. at 582-83.

[25] The government's arguments are not clearly stated in the court's opinion. However, based on the arguments made by the government in Mott v. United States, 462 F.2d 512 (Ct. Cl. 1972), Estate of O'Connor v. Commissioner, 69 T.C. 165 (1977) and Pullen v. United States, 45 A.F.T.R.2d 80-381 (D.C. Neb. 1979), it is entirely reasonable to state that the government's argument(s) centered around Treas. Reg. § 1.663(a)-2 and Rev. Rul. 68-667 1968-2 C.B. 289.

[26] Treas. Reg. § 1.663(a)-2 (1956).

[27] *See* Mott v. United States, 462 F.2d 512 (Ct. Cl. 1972); Estate of O'Connor v. Commissioner, 69 T.C. 165 (1977); Pullen v. United States, 45 A.F.T.R.2d 80-381 (D.C. Neb. 1979).

[28] Rev. Rul. 68-667 1968-2 C.B. 289.

ment maintained the position that an estate may not claim a distribution deduction for monies distributed to a charitable beneficiary.[29]

CASE LAW

Few cases have addressed the validity of Regulation § 1.663(a)-2 and Revenue Ruling 68-667. The first case to do so was *Mott v. United States.*[30] In *Mott,* the estate sought to deduct distributions of corpus as distribution deductions to beneficiaries under I.R.C. § 661(a)(2).[31] In resolving the matter, the court relied on the congressional intent of sections 661(a) and 662(a).[32] The court stated that these sections intended to combine the conduit principle of taxation with a conclusive presumption that distributions subject to the operation of these sections are distributions of income.[33] The court also noted that "when Congress enacted the present distribution rules its primary purpose was to eliminate the necessity for tracing the source of distributions."[34] Thus, according to the court, Congress did not intend that sections 661(a) and 662(a) apply to all distributions.[35]

More specifically, the court stated that the conclusive presumption of income distribution was inapplicable to charitable distributions because section 642(c) maintained the prior law scheme of tracing distributions to gross income.[36] Thus, the court held that the distribution scheme advanced in sections 661(a) and 662(a) permits a deduction under section 661(a) only for distributions to taxable beneficiaries.[37] The court denied the distribution deduction because the charitable beneficiary was exempt from tax.[38] The court held, that under the facts of this case,[39] the distribution rules referred to above were "in accord with what we believe to be an implied congressional intent to prevent *all* (emphasis added) charitable distributions . . . from entering into the operation of the distribution rules."[40] It should be stressed that the court limited the above reasoning to the facts of *Mott.*[41]

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[29] *United States Trust Co.*, 617 F. Supp. at 577.

[30] 462 F.2d 512 (Ct. Cl. 1972).

[31] *Id.* at 513-14.

[32] *Id.* at 518-19.

[33] *Id.*

[34] *Id.* at 518. *See also* FEDERAL INCOME TAXATION, *supra* note 3, at 383. The authors concur in this reasoning. They further state that the present distribution rules achieve both a quantitative as well as a qualitative approach to income taxation of estates.

[35] *Mott*, 462 F.2d at 518-19.

[36] *Id.*

[37] *Id.* at 518.

[38] *Id.*

[39] The court was aware that it was breaking new ground in this decision and was careful to limit its decision to the facts of the case. *Id.*

[40] *Id.*

In a broader context, by way of dictum, the court stated: "to the extent that a charitable distribution is not paid out of *gross income* . . . we think that Congress intended that *no deduction* is allowable (emphasis added)."[42] Thus, it appeared that the court had left open the opportunity for charitable distributions to enter into the distribution rules if paid out of gross income but otherwise not qualifying for a charitable contribution deduction. It was just this scenario that was involved in *Estate of O'Connor v. Commissioner,*[43] which was the next decision to involve the validity of Regulation § 1.663(a)-2.

In *O'Connor,* the estate sought to deduct distributions of both income and corpus as distribution deductions under I.R.C. § 661(a).[44] The decedent's last will and testament granted his widow, Mrs. O'Connor, a general testamentary power of appointment over corpus of approximately one half of the entire net estate.[45] Shortly after the decedent's death, Mrs. O'Connor assigned all her "right, title and interest" of the estate corpus and income to a charitable foundation.[46] The estate sought to deduct such amounts as either charitable contribution deductions pursuant to I.R.C. § 642(c) or as distribution deductions pursuant to I.R.C. § 661(a).[47]

The court first addressed the charitable contribution deduction. The court stated that one of "the critical requirements" of I.R.C. § 642(c) is that the distribution be paid "pursuant to the terms of the governing instrument."[48] The estate argued that the general testamentary power granted to Mrs. O'Connor satisfied this requirement.[49] The court rejected this argument, stating that the governing instrument (the will) must contain a manifestation of charitable intent.[50] The court concluded that the distributions simply did not meet the requirements of I.R.C. § 642(c) as no such charitable intent was present.[51]

The court next considered the distribution deduction issue. The estate made arguments similar to those made by the estate in *Mott.* Essentially, the estate argued that nothing in the statutes precluded it from claiming a distribution deduction for a charitable bequest which failed to qualify as a charitable contribution deduction.[52] The estate argued that Regulation § 1.663(a)-2 was

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[42] *Id.* at 519 (dictum).

[43] 69 T.C. 165 (1977).

[44] *Id.* at 171.

[45] *Id.* at 168.

[46] *Id.*

[47] The opinion stated that initially the estate sought to deduct such amounts as distribution deductions. The estate claimed such deductions on its income tax return (form 1041). *Id.* at 171. During the course of the Tax Court proceeding the estate additionally argued that the distributions qualified for the charitable deduction provided for in I.R.C. § 642(c). *Id.* at 173.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 176-77.

without statutory support and therefore invalid.[53] The court cited *Mott* in its decision and stated that a literal reading of I.R.C. § 661(a) would be inconsistent with the "statutory framework and overall legislature objectives of subchapter J."[54] Again, as in *Mott*, the court concluded that *as applied to the circumstances of the case* Regulation § 1.663(a)-2 should be sustained.[55]

Despite the limiting language of *Mott* and *O'Connor*, certain points seem to have emerged from these two cases. It appears that the courts will not permit charitable distributions to enter into the present distribution scheme regardless of why they are defective under I.R.C. § 642(c).[56] Also, it appears that the courts will defer to the reasoning of *Mott*, which upheld the validity of Regulation § 1.663(a)-2. In this regard, the *O'Connor* court stated that the factual distinctions between the cases did not warrant invalidating the regulation that *Mott* had upheld.[57]

Pullen v. United States[58] was the third decision which involved the validity of Regulation § 1.663(a)-2. The facts of this case are essentially identical to those of *Mott*. Here, the estate sought to deduct under I.R.C. § 661(a)(2) a charitable bequest paid out of the estate's corpus.[59] The significance of the *Pullen* decision was that it reaffirmed one of the points that emerged from *Mott* and *O'Connor*: that Congress clearly intended to prevent charitable distributions, whether or not deductible under I.R.C. § 642(c), from being claimed as distribution deductions under I.R.C. § 661(a).[60] The *Pullen* court stated that *Mott* was controlling and denied the deduction claimed under I.R.C. 661(a)(2).[61]

COURT'S REASONING

The court in *United States Trust Co.* reviewed the above three decisions in its opinion,[62] but did not appear to grant any deference to them. The facts in *United States Trust Co.* were remarkably similar to those of *Mott*, *O'Connor* and *Pullen*, however, the court made no attempt to distinguish those cases.[63]

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[53] *Id.*

[54] *Id.* at 177-78.

[55] *Id.* at 178 n. 23.

[56] This analysis finds support in Hevener, *Trust Distributions To Charity: The O'Connor Case*, 1978-6 EST., GIFTS & TR. J. 5 (1978). Here, the author recognized that *O'Connor* went further than *Mott* by applying Reg. § 1.663(a)-2 "to any situation where a section 642(c) deduction has been denied." As the author states, it appears that the court in *O'Connor* intentionally "forged ahead" and expanded the application of Reg. § 1.663(a)-2.

[57] *O'Connor*, 69 T.C. at 178.

[58] 45 A.F.T.R.2d 80-381 (D.C. Neb. 1979).

[59] *Id.* at 382.

[60] *Id.* at 384.

[61] *Id.* at 384-85.

[62] *United States Trust Co.*, 617 F. Supp. at 581-82.

[63] The court's opinion contained a separate section entitled "Case Law Interpreting Treas. Reg. § 1.663(a)-2."

The decision in *United States Trust Co.* invalidated regulation § 1.663(a)-2 and permitted a distribution deduction under I.R.C. § 661(a)(2) for a defective charitable bequest.[64] The court appeared to have done so without concern for the prior line of cases which came to opposite results. The lack of concern for prior case history implies that the *United States Trust Co.* court found the reasoning in the prior decisions faulty. The opinion failed to indicate why. The court stated that it had "reviewed the relevant *statutes, regulations* and *statutory history* . . ."[65] (emphasis added). The influence of prior case history was noticeably absent.

The court explained its holding with two basic lines of reasoning. First, the court stated that there was no statute which prohibited the claiming of the double deduction which was sought in the instant case.[66] In short, this was the argument made by the estate in *Mott, O'Connor* and *Pullen.* By making such a statement, the court must have been saying that the estate's distribution qualified as a distribution deduction under I.R.C. § 661(a) (income tax deduction) and as a charitable deduction under I.R.C. § 2055 (estate tax deduction).[67] Thus, to reach such a conclusion, the court must have read I.R.C. § 663(a)(2) literally.[68] I.R.C. § 663(a) states: "there shall not be included as amounts falling within section 661(a) . . . any amount paid or permanently set aside or otherwise qualifying for the deduction provided in section 642(c) . . ."[69] The distributions in question did not qualify for the deduction provided in section 642(c).[70] Therefore, the court must have interpreted I.R.C. § 663(a) literally. The court did not expressly state that it relied on a literal interpretation of I.R.C. § 663(a), yet this is the only plausible conclusion based on the result of the decision.

I.R.C. § 663(a) read literally, is at odds with Regulation § 1.663(a)-2.[71] I.R.C. § 663(a) is silent as to whether an estate can deduct bequests to charity as distribution deductions. Regulation § 1.663(a)-2 specifically addresses the point. That regulation states that charitable bequests can be deducted only as charitable contributions pursuant to I.R.C. § 642(c).[72] In the conclusion of its opinion, the court indicated that the Internal Revenue Service overstepped its

Id. at 581. However, this section merely reviewed the above cited decisions. *Id.* at 581-82. Aside from such, the court made no further reference to the decisions.

[64] *Id.* at 583.

[65] *Id.* at 582.

[66] *Id.*

[67] Had the court not followed such reasoning there would be no statutory bases for claiming a deduction for such distribution. It appeared that at no time did the estate argue that the distribution qualified as a charitable contribution deduction under I.R.C. § 642(c).

[68] A literal interpretation of I.R.C. § 663(a)(2) seemed to only address the instance when a distribution qualified for both a distribution deduction and a charitable contribution deduction.

[69] I.R.C. § 663 (1985).

[70] *United States Trust Co.*, 617 F. Supp. at 577.

[71] Mott v. United States, 462 F.2d at 517.

[72] Treas. Reg. § 1.663(a)-2 (1956).

bounds by issuing Regulation § 1.663(a)-2.[73] The court stated that I.R.C. § 663(a):

> quite clearly and simply creates a loophole by which income accumulated by the Estate and distributed to a charity is never taxed, when the same distribution qualifies for an estate tax deduction. Treas. Reg. § 1.663(a)-2 is an attempt by the I.R.S. to close this loophole. It is up to Congress, however, and not the I.R.S. or this court to close this loophole.[74]

Each of the prior decisions found a way around this issue. In *Mott*, the court recognized that there was no statutory provision which supported the regulation insofar as it provided that charitable bequests were only deductible under I.R.C. § 642(c).[75] However, based on its concern that an estate could distribute its taxable income to a tax exempt organization and then distribute tax-free corpus to taxable beneficiaries,[76] the *Mott* court read an implied congressional intent into I.R.C. § 663 to preclude the application of I.R.C. § 661 to distributions to charities.[77] Thus, according to the *Mott* court, the statutory support for regulation § 1.663(a)-2 was implied in I.R.C. § 663(a).[78] The court in *Mott* relied on *Commissioner v. South Texas Lumber*,[79] which held that the validity of an I.R.S. regulation must be sustained unless it is unreasonable and plainly inconsistent with the statute.[80] The *Mott* court concluded that the regulation was in accord with the implied congressional intent of the statute.[81]

With *Mott* as precedent, the *O'Connor* court had an easier time of it. The *O'Connor* court stated that *Mott* was not sufficiently distinguishable to part from the test of *South Texas Lumber*,[82] and that the regulation should be sustained because a literal reading of I.R.C. § 661(a) would be inconsistent with the overall legislature objective of subchapter J.[83] This reasoning appeared to be quite similar to the "implied congressional intent" rationale of *Mott*. The courts in both *Mott* and *O'Connor* attempted to close an apparent loophole by interpreting revenue status broadly. Upon finding statutory support for regula-

[73] *United States Trust Co.*, 617 F. Supp at 583.

[74] *Id.*

[75] *Mott*, 462 F.2d at 517.

[76] This scheme would preclude (or greatly reduce) any tax on the estate's income. Upon distributing income to the tax-exempt organization, the estate would claim a distribution deduction which would reduce its taxable income to zero. The tax-exempt organization would not incur any tax liability on such income for obvious reasons. The estate could then distribute corpus (in lieu of income) to the individual beneficiaries. Such individuals would incur no tax liability on the corpus distribution because all of the estate's taxable income had been distributed previously. *Id.* at 519.

[77] *Id.* at 518.

[78] *Id.*

[79] 333 U.S. 496 (1948).

[80] *Mott*, 462 F.2d at 517 (citing Commissioner v. South Texas Lumber, 333 U.S. 496, 501 (1948)).

[81] *Id.*

[82] *O'Connor*, 69 T.C. at 177.

[83] *Id.* at 178.

tion § 1.663(a)-2, the courts sustained the validity of that regulation. The court in *United States Trust Co.* declined to read the revenue status broadly. Accordingly, it found no statutory support for regulation § 1.663(a)-2 and, as a result, gave it no effect.[84]

The second line of reasoning used by the *United States Trust Co.* court is more straightforward. The court based its reasoning on I.R.C. § 642(g) which provides that estate tax deductions for expenses, indebtedness, taxes on losses which were claimed in computing the taxable estate of a decedent, will not be allowed as a deduction in computing the income tax of the estate.[85] The court reasoned that if Congress had intended to disallow an income tax deduction for a charitable contribution which had previously been claimed as an estate tax deduction it would have done so in I.R.C. § 642(g).[86] Although the court did not specifically say so, it utilized a maxim of statutory interpretation: *expressio unius est exclusio alterius* — a latin phrase meaning that the expression of one thing is the exclusion of another.[87] According to the court, had Congress intended to deny double deductions for charitable bequests it would have explicitly said so.[88] In support of this position, the court cited *Commerce Trust Co. v. United States,*[89] which held that if Congress intended "to wipe out all double tax benefits it could have found appropriate language to accomplish that objective."[90] The court in *Commerce Trust Co.* further stated that the legislative history of I.R.C. § 642(g) did not indicate that Congress sought to find such language.[91]

CONCLUSION

It is difficult to reconcile the decision in *United States Trust Co.* with *Mott, O'Connor* and *Pullen.* I.R.C. §§ 661-663 provide a scheme for taxing estate distributions to beneficiaries.[92] Congress enacted the scheme to alleviate the arduous task of tracing estate and trust distributions to particular income of the estate or trust as was required under prior law. That this was the intent of I.R.C. §§ 661-663 cannot be doubted. However, with respect to charitable distributions, I.R.C. § 642(c) maintains the scheme of tracing estate and trust distributions to income of the estate or trust.[93] Thus, the operation of each of

[84] *United States Trust Co.*, 617 F. Supp. at 583.

[85] *Id.* at 583-84.

[86] *Id.*

[87] BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

[88] *United States Trust Co.*, 617 F. Supp. at 583.

[89] 309 F. Supp. 1317 (W.D. Mo. 1969) *aff'd*, 438 F.2d 111 (8th Cir. 1971).

[90] *United States Trust Co.*, 617 F. Supp. at 583 (citing Commerce Trust Co. v. United States, 309 F. Supp. 1317 (W.D. Mo. 1969) *aff'd*, 438 F.2d 111 (8th Cir. 1971).

[91] *Commerce Trust Co.*, 309 F. Supp. at 1321.

[92] *See generally* FEDERAL INCOME TAXATION, *supra* note 3, at 381.

[93] Mott v. United States, 462 F.2d 512 (1972) (citing Riggs National Bank v. United States, 352 F.2d 812 (Ct. Cl. 1965)).

the provisions indicates their independence from one another.

It does not appear that Congress intended I.R.C. §§ 661-663 to apply to charitable bequests.[94] If so, the treatment of an estate's charitable bequest would be inconsistent from one case to another. In some instances, tracing to income would be required and in other instances it would not. The courts in *Mott* and *O'Connor* recognized this. They gave effect to regulation § 1.663(a)-2 which clarified the place for charitable bequests in the distribution scheme of an estate or trust.[95] The court of *United States Trust Co.* failed to look beneath the words of I.R.C. §§ 661-663, and thus failed to address the practical implications of its decision.[96]

SCOTT D. BRACKETT

[94] Comment, *Distribution Deduction Unavailable for Payments of Corpus to a Charitable Beneficiary — Mott v. United States*, 7 SUFFOLK U.L. REV. 687, 698 (1973). The author of this article is in accord with this conclusion. The author states that "corpus payments to a charitable corporation were not intended by Congress to be included in the distribution scheme of sections 661 and 662 of the 1954 Code . . ."

[95] In fact, at least one commentator believes that Regulation § 1.663(a)-2 has been unjustifiably extended by *Mott* and *O'Connor*. Hevener, *Trust Distributions To Charity: The O'Connor Case*, 1978-6 EST., GIFTS & TR. J. 5 (1978). This commentator believes that defective charitable bequests, which were nonetheless paid out of gross income, should be allowed as distribution deductions under I.R.C. § 661(a).

[96] It has been suggested that the interpretation the court in *United States Trust Co.* gave to I.R.C. § 661(a) would make this section an avenue for tax avoidance. Comment, *Distribution Deduction Unavailable for Payments of Corpus to a Charitable Beneficiary — Mott v. United States*, 7 SUFFOLK U.L. REV. 687, 699 (1973).