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Comments: The Estate Tax Marital Deduction for a "Specific Portion" of an Interest in Trust: A Problem of Definition

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THE ESTATE TAX MARITAL DEDUCTION FOR A "SPECIFIC PORTION" OF AN INTEREST IN TRUST: A PROBLEM OF DEFINITION

I. INTRODUCTION

An important measure of relief from the federal estate and gift tax is granted to married couples by the marital deduction provisions of section 2056 of the Internal Revenue Code (the "Code").[1] Since passage of the Economic Recovery Tax Act of 1981 ("ERTA"),[2] bequests to a surviving spouse are generally deductible in full from the gross estate of the decedent,[3] and thus pass to the surviving spouse unburdened by estate taxation. Prior to 1981, the marital deduction was available only for amounts left to a surviving spouse which did not exceed one-half of the decedent's adjusted gross estate.[4] While removing the dollar limit on the marital deduction has reduced a significant source of estate tax disputes, the question of whether a bequest qualifies initially for the marital deduction is a persistent issue in the post-ERTA period.

Any bequest left outright to a surviving spouse, with no strings attached, qualifies for the marital deduction.[5] If a bequest is made to a trust for the benefit of the surviving spouse, it will qualify for the marital deduction only if the surviving spouse has the right to receive the income from her interest in the trust and to designate by will the recipient of her interest in any trust corpus remaining on her death.[6] When the marital deduction statute was first enacted, however, a bequest in trust would fail to qualify unless the surviving spouse had the right to *all* of the trust income and a power of appointment over the *entire* corpus.[7] As a consequence, testators who wanted to make bequests in trust for the benefit of both the surviving spouse and other beneficiaries had to establish two trusts. Critics of this provision argued that it imposed unnecessary costs and administrative burdens on decedents' estates,[8] and as part of the 1954 revision of the Code,[9] the marital deduction was extended to bequests to a single trust which provided that a "specific portion" of the income was to be paid to the surviving spouse or that the power of ap-

1. I.R.C. § 2056 (1982).
2. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.
3. I.R.C. § 2056(a) (1982).
4. I.R.C. § 2056(c) (1954) (repealed 1981).
5. I.R.C. § 2056(a) (1982). To facilitate discussion, it will be assumed that the surviving spouse is the wife.
6. I.R.C. § 2056(b)(5) (1982). Section 2056(b)(5) also requires that there must be "no power in any other person to appoint any part of the interest . . . to any person other than the surviving spouse." *Id.* For the qualified terminable interest property exception to this rule, see *infra*, text accompanying notes 90-103.
7. *See* I.R.C. § 812(e)(1)(F) (1939).
8. *See* S. REP. NO. 1983, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 4891 (legislative history of Technical Amendments Act of 1958, Pub. L. No. 85-866, 72 Stat. 1668).
9. Internal Revenue Act of 1954, Pub. L. No. 591, Ch. 736, 68A Stat. 392 (1954).

pointment extended to a "specific portion" of the trust.[10]

The application of this provision is explained in Treasury Regulation section 20.2056(b)-5(c), which requires that a specific portion must "constitute a fractional or percentile share" of the property interest to which the term applies.[11] The validity of the regulation was at issue in *Northeastern Pennsylvania Nat'l Bank & Trust Co. v. United States*,[12] where the IRS denied the marital deduction to an estate because the testator failed to use the language required by the regulation in making a bequest to his wife of a partial interest in trust income. The Supreme Court found that the regulation imposed unwarranted restrictions on the marital deduction and ruled that the statute did not require a "specific portion" to be expressed by the testator in terms of a fractional or percentile share of the trust corpus.[13]

This comment considers whether *Northeastern* was correctly decided and reviews the impact that the case has had upon the subsequent administration of the estate tax marital deduction.

II. THE EVOLUTION OF THE MARITAL DEDUCTION

The marital deduction was added to the Internal Revenue Code of 1939[14] by section 361 of the Revenue Act of 1948.[15] The primary purpose of the marital deduction provisions was to provide uniformity in the tax treatment of estates in community property and in common law jurisdictions.[16] In community property states, each spouse is deemed to own one-half of the marital property outright, whereas in common law states property accumulated in the course of a marriage traditionally was considered to belong to the wage-earner.[17] An important consequence of this distinction was that in community property states the marital property of the surviving spouse was not included in the estate of the first spouse to die.[18] In common law states, however, if the wage-earner died

10. I.R.C. § 2056(b)(5) (1982). For the text of Code section 2056(b)(5), see *infra* text accompanying note 30.
11. Treas. Reg. § 2056(b)-5(c) (1958). For the text of this regulation, see *infra* text accompanying note 31.
12. 387 U.S. 213 (1967).
13. *Id.* at 218-22.
14. I.R.C. § 812(e) (1939) (current version at I.R.C. § 2056 (1982)). At the same time that Code section 812(e) was enacted, Code section 811(e)(2) was repealed. The repealed provision had determined the extent to which community property held by the decedent and his spouse at the death of the decedent was includible in his gross estate. After repeal, that determination was controlled by section 812(e). S. REP. NO. 1013, 80th Cong., 2d Sess., pt. 2, at 1-2, *reprinted in* 1948 U.S. CODE CONG. SERV. 1163, 1223 [hereinafter 1948 SENATE REPORT].
15. Revenue Act of 1948, Pub. L. No. 471, ch. 168, § 361, 62 Stat. 117 (1948).
16. 1948 SENATE REPORT, *supra* note 14, pt. 1, at 1, 1948 U.S. CODE CONG. SERV. at 1163.
17. *Id.*, pt. 1, at 26, 1948 U.S. CODE CONG. SERV. at 1188.
18. 1948 SENATE REPORT, *supra* note 14, pt. 1, at 26, 1948 U.S. CODE CONG. SERV. at 1188; *see also Northeastern Pa. Nat'l Bank & Trust v. United States*, 387 U.S. 213, 219 (1967).

before his spouse, it was possible for the marital property to be included in his estate, with the result that it was taxed twice: first in the wage-earner's estate, and then, to the extent that it had not been consumed, in his spouse's estate upon her death.[19] In 1948, Congress eliminated this jurisdictional imbalance by granting estates in common law states a deduction for interests passing to the surviving spouse that did not exceed one-half of the adjusted gross estate.[20]

Congress viewed this marital deduction measure as a tax deferral rather than a tax relief provision: tax would ultimately be imposed upon the assets subject to the deduction upon the death of the surviving spouse.[21] As the Supreme Court observed in *United States v. Stapf*,[22]

> The purpose . . . is only to permit a married couple's property to be taxed in two stages and not to allow a tax-exempt transfer of wealth into succeeding generations. Thus the marital deduction is generally restricted to the transfer of property interests that will be includable in the surviving spouse's gross estate.[23]

The possibility was acknowledged that the surviving spouse might consume the assets during her lifetime and that they therefore would never be taxed.[24] This possibility also existed in community property states, however, and thus the provision was consistent with the intent of Congress to eliminate jurisdictional advantages from the administration of the estate tax.

At the same time that Congress enacted the marital deduction provisions, it took the further step of extending the deduction to certain life estates in trust for the surviving spouse, in recognition of the fact that this estate management technique was widely used.[25] To qualify for the deduction, the bequest had to give the surviving spouse, at a minimum, both a life estate and a general power to appoint the property by will,[26] making her the "virtual owner" of the interest in trust.[27] The value of the assets controlled by the power given to the surviving spouse, whether exercised or not, would subsequently be included in her estate.[28]

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19. 1948 SENATE REPORT, *supra* note 14, pt. 1, at 26, 1948 U.S. CODE CONG. SERV. at 1188.
20. *Compare* 1948 SENATE REPORT, *supra* note 14, pt. 1, at 1, 1948 U.S. CODE CONG. & ADMIN. SERV. at 1163 (objectives of 1948 marital deduction provisions) *with* GENERAL AND TECHNICAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, 97th Cong., 1st Sess. 39 (June 23, 1981) (objectives of the 1981 amendments to the marital deduction provisions). *See also infra* note 88.
21. *Id.*, pt. 2, at 16, 1948 U.S. CODE CONG. SERV. at 1238.
22. 375 U.S. 118 (1963), *reh'g denied*, 375 U.S. 981 (1964).
23. *Id.* at 128.
24. 1948 SENATE REPORT, *supra* note 14, pt. 2, at 16, 1948 U. S. CODE CONG. SERV. at 1238.
25. *Id.*, pt. 1, at 28, 1948 U.S. CODE CONG. SERV. at 1190.
26. I.R.C. § 812(e)(1)(F) (1939) (current version at I.R.C. § 2056(b)(5) (1982)).
27. 1948 SENATE REPORT, *supra* note 14, pt. 2, at 16, 1948 U.S. CODE CONG. SERV. at 1238.
28. I.R.C. § 811(f) (1939) (recodified as amended at I.R.C. § 2041 (1982)).

In 1954, Congress amended the marital deduction provisions by making the deduction available for bequests to a trust where only a portion of the income was to be paid to the surviving spouse and the power of appointment extended only to that portion of the trust.[29] Code section 2056(b)(5) now reads in pertinent part:

> (5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income *from a specific portion thereof*, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, *or such specific portion* (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse . . .), and with no power in any other person to appoint any part of the interest, *or such specific portion*, to any person other than the surviving spouse—
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> (A) the interest *or such portion thereof* so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse . . . .[30]

Treasury Regulation section 20.2056(b)-5(c) defines the term "specific portion" from section 2056(b)(5) as follows:

> A partial interest in property is not treated as a specific portion of the entire interest unless the rights of the surviving spouse in income and as to the power constitute a *fractional or percentile share* of a property interest *so that such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate.* Thus if the right of the spouse to income and the power extend to one-half or a specified percentage of the property, or the equivalent, the interest is considered as a specific portion. On the other hand, if the annual income of the spouse is limited to a specific sum, or if she has a power to appoint only a specific sum out of a larger fund, the interest is not a deductible interest. . . .[31]

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29. Several lower courts had disqualified these bequests on the grounds that they failed to give the surviving spouse "all the income" from the trust and to grant a power to appoint the "entire corpus," as required by section 812(e)(1)(F) of the 1939 Code. *See, e.g.*, Estate of Shedd v. Commissioner, 237 F.2d 345 (9th Cir. 1956), *cert. denied*, 352 U.S. 1024 (1957); Estate of Sweet v. Commissioner, 234 F.2d 401 (10th Cir.), *cert. denied*, 352 U.S. 878 (1956). *See also supra* text accompanying note 8.
30. I.R.C. § 2056(b)(5) (1982) (emphasis added).
31. Treas. Reg. § 20.2056(b)-5(c) (1958) (emphasis added).

III. *NORTHEASTERN PENNSYLVANIA NATIONAL BANK & TRUST CO. V. UNITED STATES*

The validity of the requirement of Treasury Regulation section 20.2056(b)-5(c) that a specific portion be expressed as a fractional or percentile share was challenged by the taxpayer in *Northeastern Pennsylvania National Bank & Trust Co. v. United States.*[32] In *Northeastern*, an executor claimed the maximum marital deduction available under the estate tax provisions applicable at that time on the grounds that qualified interests passing to the wife, either outright or in a marital deduction trust, exceeded one half of the gross estate.[33] The will directed the trustee of the marital deduction trust:

> (a) . . . to pay out of the said income and corpus of the said estate unto my wife . . . the sum of Three Hundred Dollars ($300.00) per month for and during the period until my youngest child reaches the age of eighteen years, and thereafter I direct my Trustee to pay to my wife . . . the sum of Three Hundred Fifty Dollars ($350.00) per month for and during the rest of her natural life.
>
> (b) If my wife survives me, she shall have the power, exercisable by Will, to appoint to her estate, or to others, any or all of the principal remaining at the time of her death.[34]

The Commissioner determined that the trust failed to qualify for the marital deduction because the widow's right to the income of the trust was not expressed as a "fractional or percentile share" of the total trust income, as required by Treasury Regulation section 20.2056(b)-5(c).[35] The Supreme Court granted *certiorari* after the United States District Court for the Middle District of Pennsylvania had given summary judgment for the executor and the Court of Appeals for the Third Circuit had reversed and remanded.[36]

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32. 235 F. Supp. 941 (M.D. Pa. 1964), *rev'd*, 363 F.2d 476 (3d Cir. 1966), *rev'd and remanded*, 387 U.S. 213 (1967).
33. The decedent's estate tax return showed an adjusted gross estate of $199,750. $41,751 of the decedent's assets passed to the widow by operation of law. Distributions to other beneficiaries amounted to $19,507, leaving a residual estate of $138,492. Half of this ($69,246) was left to a trust for the benefit of the wife. Consequently, the wife's interest in the estate amounted to $110,997, but the marital deduction covered only one-half of the adjusted gross estate, or $99,875. *Northeastern*, 387 U.S. at 215-16.
34. *Id.* at 216 n.2.
35. *Id.* at 216; *see also supra* text accompanying note 31.
36. The Supreme Court noted the need to resolve a conflict among the circuits. *Northeastern*, 387 U.S. at 217. In Citizens Nat'l Bank v. United States, 359 F.2d 817 (7th Cir. 1966), *cert. denied*, 387 U.S. 941 (1967), the Court of Appeals for the Seventh Circuit permitted the marital deduction under circumstances quite similar to those present in *Northeastern*. Furthermore, in Gelb v. Commissioner, 298 F.2d 544 (2d Cir. 1962), the Court of Appeals for the Second Circuit allowed the deduction for an estate where the decedent authorized certain invasions of principal for beneficiaries other than the spouse. *See also infra* note 56.

The Supreme Court relied upon the legislative history of the marital deduction to find that the intent of Congress in enacting section 2056(b)(5) was "to afford a liberal 'estate-splitting' possibility to married couples."[37] It saw no indication

> that Congress—in using the words "all the income from a specific portion" in the statute, or the equivalent words "a right to income . . . over . . . an undivided part" in the committee reports—intended that the deduction afforded would be defeated merely because the "specific portion" or the "undivided part" was not expressed by the testator in terms of a "fractional or percentile share" of the whole corpus.[38]

According to the Court, such an interpretation would "impose unwarranted restrictions upon the availability of the deduction."[39]

In addition, the Court specifically rejected the Commissioner's interpretation of the term "virtual owner" that Congress had used in its commentary on the marital deduction legislation.[40] The IRS argued that by using such a term, Congress meant to ensure that the corpus of a marital deduction trust would be taxed upon the death of a surviving spouse to the same extent as assets owned outright; and that only by expressing a specific portion as a fractional or percentile share could that result be achieved.[41] In the Court's view, the words "virtual owner" were used in the Senate Report chiefly to explain the requirement of section 2056(b)(5) that there be "no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse."[42] It found no indication that Congress intended the deduction to be available only when the surviving spouse received an interest equivalent to outright ownership; if that is what Congress had intended, the Court reasoned, it would not have permitted any trust to qualify.[43]

The Court also addressed the question of how the value of the specific portion qualifying for the marital deduction was to be determined. It rejected the idea that the deduction be limited to its annuity value.[44] Instead, the Court determined that the annual stipend the decedent had provided for the surviving spouse was to be divided by the current actuarial interest rate in order to ascertain the principal required to produce

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37. *Northeastern*, 387 U.S. at 221.
38. *Id.* at 220-21 (ellipses in original) (footnote omitted).
39. *Id.* at 221.
40. *See supra* notes 26-27 and accompanying text; *see also infra* note 62.
41. *Northeastern*, 387 U.S. at 222.
42. *Id.*; *see also supra* text accompanying note 30.
43. *Northeastern*, 387 U.S. at 222.
44. *Id.* at 225. As an example, assuming a 6% interest rate and a surviving spouse with a life expectancy of 20 years, the present value of an annuity paying $300 per month would be $41,874. The corpus would be consumed over the 20-year payout period. *See also infra* note 46.

the income.[45] This principal sum would then qualify for the marital deduction.[46]

Under the facts of *Northeastern*, the majority's ruling seems at first glance to be entirely reasonable. As the Court observed, and as the IRS conceded, no unjust tax avoidance would occur if the deduction were allowed on a dollar amount of the corpus of this trust, since the full value of the trust would ultimately be taxable in the wife's estate.[47] The ruling also avoided the harsh all-or-nothing application of the regulation on an estate where it is likely that the testator had intended to take advantage of the marital deduction but would lose it because of poor draftsmanship.[48]

Justice Stewart, in an emphatic dissent, saw the matter differently.[49] He warned that permitting "specific portion" to be defined as a fixed dollar amount would "lead to the ironic and unjustified result of giving common-law jurisdictions more favorable tax treatment than community property States."[50] He illustrated the potential ramifications of the majority opinion with the following example:

> Assume a trust estate of $200,000, with the widow receiving the right to the income from $100,000 of its corpus and a power of appointment over that $100,000, and the children of

45. *Northeastern*, 387 U.S. at 224 (citing Gelb v. Commissioner, 298 F.2d 544, 551-52 (2d. Cir. 1962)). The Court also took exception to the method of computation discussed by the lower court. *Id.* at 223. The appellate court had considered applying "investment factors" to compute the *maximum* income that could ever be produced by the entire trust corpus, and then determining what fraction of that maximum income the required distribution represented, so that the fraction could be applied to the entire trust corpus to determine the "specific portion" for marital deduction purposes. The appellate court concluded, however, that this computation could not be made because "the market conditions for purposes of investment are unknown." Northeastern Pa. Nat'l Bank & Trust Co. v. United States, 363 F.2d 476, 484 (3d Cir. 1966). Although the appellate court's reasoning is awkward, the decision has the merit of considering the likelihood that trust income would grow because trust corpus would increase in value. This consideration was ignored by the Supreme Court.

46. If the current actuarial interest rate were 6%, it could be determined that $60,000 was needed to produce income of $300 per month: $300 \times 12 = 3600 \div .06 = 60{,}000$. In *Northeastern*, $60,000 of the $69,246 bequest in trust would qualify for the marital deduction if a 6% interest rate applied. *Cf. supra* note 44.

47. *Northeastern*, 387 U.S. at 224-25.

48. *Cf.* Estate of Mittleman v. Commissioner, 522 F.2d 132 (D.C. Cir. 1975). In *Mittleman*, the court held that "[i]n light of the all-pervasive influence of the tax laws on estate planning, it seems entirely reasonable for courts to presume, absent contrary language, that testamentary provisions in favor of spouses are designed to qualify for the marital deduction." *Id.* at 139. The trust in question directed that income be payable "to provide for the proper support, maintenance, welfare and comfort" of the testator's wife "for her entire lifetime." *Id.* at 133 n.1. Although this is boilerplate language, the IRS argued that it constituted a limit on the wife's right to receive income. The court, citing *Northeastern*, opted for a more liberal reading of the language. *Id.* at 140.

49. *Northeastern*, 387 U.S. at 225 (Stewart, J., dissenting).

50. *Id.* at 226 (Stewart, J., dissenting).

> the testator receiving income from the balance of the corpus during the widow's life, their remainders to vest when she dies. Now suppose that when the widow dies the trust corpus has doubled in value to $400,000. The wife's power of appointment over $100,000 applies only to make $100,000 taxable to her estate. The remaining $300,000 passes tax free to the children. Contrast the situation in a community property State. The wife's 50% interest in the community property places $200,000 of the expanded assets in her estate and taxable as such; only $200,000, therefore, passes directly to the children. Thus the Court's interpretation of "specific portion" affords common-law estates a significant tax advantage that community property dispositions cannot obtain.[51]

Justice Stewart, like the majority, relied on the legislative history of the marital deduction provisions. He observed, however, that instead of the generous intent the majority found, the history manifested a clear intent to prevent tax avoidance.[52] He also noted that in *United States v. Stapf*,[53] decided only four years earlier, the Court had reached the same conclusion.[54] In his view, the only way to prevent tax avoidance in the second estate was to retain the ten-year-old definition of specific portion contained in the regulation. By requiring the testator to express the surviving spouse's power as a fractional or percentile share of a property interest in a trust, the regulation insured that the partial interest would reflect its proportionate share of the increment or decline in the entire trust.[55]

The Court did not respond directly to Justice Stewart's criticisms. It did acknowledge that there might be merit to the tax-avoidance argument if it were applied to a significantly different fact pattern, but concluded that "nothing we hold in this opinion has reference to that quite different problem, which is not before us."[56] The thrust of the opinion is

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51. *Id.* at 227 (Stewart, J., dissenting). Under current estate tax law, the unified credit shelters up to $600,000 of an estate from taxation. I.R.C. § 2010 (1982). If Justice Stewart's figures were multiplied by ten and it was assumed that the surviving spouse had no other assets, the tax on the second community property estate of $2,000,000 under the current code would amount to $588,000, while the tax on the second common-law estate of $1,000,000 would amount to only $153,000. I.R.C. §§ 2001, 2010 (1982).
52. *Northeastern*, 387 U.S. at 228.
53. 375 U.S. 118 (1963), *reh'g denied*, 375 U.S. 981 (1964).
54. *Northeastern*, 387 U.S. at 228.
55. *Id.*
56. *Id.* at 225. The Court was alluding to the facts of Gelb v. Commissioner, 298 F.2d 544 (2d Cir. 1962), which earlier it had distinguished but not criticized. *See supra* note 45. In *Gelb*, the wife was given a power of appointment over the entire residual trust remaining upon her death, but the trustees, one of whom was the wife, had a power to expend $5000 per year of trust funds for the benefit of the decedent's youngest daughter. *Gelb*, 298 F.2d at 545-47. The Court of Appeals for the Second Circuit found that this power to invade corpus violated the requirement that no other person may have power to appoint any part of the corpus to any person other

that an intent to liberalize the application of the marital deduction rules could be discerned in the legislative history of section 2056(b)(5), and therefore that intent should not be thwarted merely because certain terms of art are missing. Because the tax avoidance which Justice Stewart postulated could not occur in the estate being reviewed, the tax avoidance question was largely ignored.

Could the Court have meant to give its blessing to the tax loophole that Justice Stewart identified? This possibility has not been examined rigorously in subsequent cases. Prior to 1982, the few cases that cited *Northeastern* usually did so in dictum, and the issues under consideration were generally different from those in *Northeastern*.[57] One case, *Stewart v. Usry*,[58] touched upon the same issues, but the Court of Appeals for the Fifth Circuit interpreted *Northeastern* as applying only to trusts where the surviving spouse could appoint the entire corpus.[59]

It is difficult to read *Northeastern* in the limited fashion that the fifth circuit suggests. First, if the Supreme Court had meant to say that a surviving spouse must have a power over the entire interest in order to obtain a marital deduction, it would have rendered redundant the phrase "or such specific portion" in the statute. Second, if the Court had meant to rule out the marital deduction where the surviving spouse has a power of appointment over a specific dollar amount of corpus, it would in effect have assigned different meanings to the term "specific portion" as applied to income and principal interests: that is, it would mean "ascertainable dollar amount"[60] when applied to income interests, but "fractional or percentile share" when applied to powers of appointment over corpus. The deliberateness of the language of the statute makes it unlikely that

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than the surviving spouse. *Id.* at 547. Nevertheless, the appellate court rejected the argument that the entire marital deduction should be lost, and found that the term "specific portion" could relate to a dollar amount rather than a fractional or percentile share of the corpus. *Id.* at 549-51. Actuarial methods were to be applied to determine the amount of corpus which could not be invaded and which thus qualified for the deduction. *Id.* at 550-51. No similar power of invasion was at issue in *Northeastern*.

57. *See, e.g.*, Alperstein v. Commissioner, 613 F.2d 1213 (2d Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); Pennsylvania Bank and Trust Co. v. United States, 597 F.2d 382 (3d Cir. 1979), *cert. denied*, 444 U.S. 980 (1979); Estate of Smith v. Commissioner, 565 F.2d 455 (7th Cir. 1977); Estate of Neugass v. Commissioner, 555 F.2d 322 (2d Cir. 1977); Estate of Fiedler v. Commissioner, 67 T.C. 239 (1976); Estate of Smith v. Commissioner, 66 T.C. 415 (1976), *aff'd*, 565 F.2d 455 (7th Cir. 1977); *see also supra* note 48.

58. 399 F.2d 50 (5th Cir. 1968).

59. *Id.* at 57 n.13. In *Stewart*, the surviving spouse held an imperfect usufruct under Louisiana law, and the court determined that it was a terminable interest that failed to satisfy the requirements of section 2056(b)(5). *Id.*

60. *Northeastern*, 387 U.S. at 229. An "ascertainable dollar amount" would be a pecuniary amount to be ascertained by dividing the specified income payment by an actuarially determined interest rate. *See also* Estate of Alexander v. Commissioner, 82 T.C. 34, 45 (1984) (Chabot, J., concurring), *aff'd*, 760 F.2d 264 (4th Cir. 1985) (mem.).

Congress intended the term to have two definitions.[61] Third, the Court's interpretation of the "virtual ownership" language in the legislative history of section 2056(b)(5) dismisses the idea that Congress intended the marital deduction to be available only when the marital deduction trust assets reflect the proportionate increase or decrease in the market value of those assets that occurred during the surviving spouse's life tenancy.[62] Finally, the Court adopted the actuarial computation methods of the second circuit in *Gelb v. Commissioner*,[63] notwithstanding the fact that *Gelb* permitted a deduction based upon a specific dollar amount of corpus.[64] These considerations all lead to the conclusion that the Supreme Court interpreted section 2056(b)(5) as permitting a "specific portion" to be expressed as a dollar amount rather than as a fraction or percent, whether applied to interests in income or in corpus.

IV. THE AFTERMATH OF *NORTHEASTERN*

A. Estate of Alexander v. Commissioner

It was not until seventeen years after *Northeastern* that a court relied on that case to allow a marital deduction for the bequest of a power to appoint a specific dollar amount of trust corpus. In *Estate of Alexander v. Commissioner*,[65] the decedent's will directed that his residuary estate be placed in trust and that a specific portion be designated the "wife's share." The amount of this share was to equal the maximum federal estate tax marital deduction available in determining the husband's taxable estate.[66] The wife was to receive all the income from the entire residuary trust and was given the power to appoint the "wife's share" upon her death. The IRS disallowed the marital deduction because the bequest left the wife with a power to appoint only a specific sum, not a fractional or percentile share of the trust.[67]

The Tax Court explicitly stated that the issue for decision was "whether a bequest left to a residuary trust, which . . . granted [the widow] a testamentary power of appointment over a specific dollar

61. *See supra* text accompanying note 30.
62. In *Northeastern*, the Commissioner argued that the deduction was available only in cases where the equivalent of the outright ownership of community property states was granted, and that this was what the Senate Report meant by the words "virtual owner." *Northeastern*, 387 U.S. at 222. The Court disagreed, finding instead that the words were meant to apply to facts like those in *Gelb*. *Id.*; *see also supra* note 56. The Court also found "irrelevant" the Government's argument that only a grant of the income from a fractional or percentile share would subject the surviving spouse to the same fluctuations in the value of the corpus as an outright owner. *Northeastern*, 387 U.S. at 222.
63. 298 F.2d 544 (2d Cir. 1962); *see also supra* note 56.
64. *Northeastern*, 387 U.S. at 222-24.
65. 82 T.C. 34 (1984), *aff'd*, 760 F.2d 264 (4th Cir. 1985) (mem.).
66. The decedent's adjusted gross estate amounted to $1,078,608.54, and the executor sought to qualify one-half of it, or $539,304.27, for the marital deduction. *Id.* at 36 n.2.
67. *Id.* at 38.

amount, qualifie[d] for the Federal estate tax marital deduction."[68] Relying primarily on *Northeastern* and *Gelb*, the court sustained the taxpayer's deduction.[69] In particular, it found that

> Congress used the same words 'specific portion,' which we find to be unambiguous, in stating the requirements with respect to both income and corpus to qualify for the marital deduction. Under the circumstances, we cannot say that Congress intended a different meaning to apply to the two categories.[70]

The Tax Court squarely confronted the tax avoidance possibilities that the IRS identified, but stated that it would have more sympathy for the government's position had there not been "so much judicial water over the dam" invalidating that position.[71] The court then observed that if Congress wanted "specific portion" to be construed as it had been by the regulation, Congress could change the language of the statute.[72]

The *Alexander* court did not address the fact that the will offered an alternative method of finding that the testator had satisfied the requirements of the regulation. The testator had used a saving clause in his will which provided that if the marital deduction was denied for the bequest as originally stated, the power of appointment was to be extended to "all of the trust principal constituting my Wife's Share as it exists *upon the*

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68. *Id.* at 37.

69. *Id.* at 44. The court also relied on Estate of Meeske v. Commissioner, 72 T.C. 73 (1979), *aff'd sub nom.* Estate of Laurin v. Commissioner, 645 F.2d 8 (6th Cir. 1981). In *Meeske*, the will provided that the decedent's estate be divided into two portions, a marital portion and a residual portion, and the surviving spouse was given a power of appointment over the entire corpus of the marital portion. *Meeske*, 72 T.C. at 74-75. The Commissioner denied the deduction because the amount of the marital portion was to be determined by an equalization clause designed to result in the lowest estate tax possible on the combined estates, and thus it did not state the marital portion as a fraction or percentage of the total residue. *Id.* at 79-80. The *Meeske* court found for the taxpayer because the wife's rights were in the entire specific portion of both the income and corpus. *Id.*

70. *Alexander*, 82 T.C. at 43.

71. *Id.* at 39. The court recognized the potential for tax avoidance, observing that:

> [I]f the surviving spouse can appoint only the dollar amount of the interest given to her under her deceased spouse's will, only that amount will be taxable in her estate under section 2041 and any increment in value of that interest between her death and the death of her husband will escape estate taxation.

Id. (footnote omitted).

72. *Id.* Despite the tax court's forceful words, some uneasiness with the decision is evidenced by the fact that six judges, in concurring opinions, stated that they joined the majority only because the consistent application of *Northeastern* required them to do so. *Id.* at 45-46. Three other judges dissented on the grounds that Treasury Regulation section 20.2056(b)-5(c) was a reasonable means of implementing the statute, and that *Northeastern* did not invalidate the regulation as applied to a power of appointment over corpus. *Id.* at 47, 49 (Simpson, Dawson, & Parker, JJ., dissenting). Even the majority opinion appears to concede that *Northeastern* might establish poor tax policy. *Id.* at 39; *see also supra* note 71.

death of my wife."[73] The court might have found that both the regulation and the testator's intent could be satisfied by dividing the current dollar amount of the wife's share by the total value of the residuary trust, thus arriving at the fractional share of the trust to which the marital deduction applied and which would eventually be included in her estate.[74] The Tax Court chose instead to rely on prior case law and to insist that the term "specific portion" be consistently defined within the statute. As a result, a specific dollar amount of either income or corpus was found to satisfy the "specific portion" terminology of the statute.[75]

B. The Commissioner's Response to Northeastern and Alexander.

In spite of the Supreme Court's clear statement that it found "no warrant . . . in common sense or in the statute and its history" for the Commissioner's argument that "specific portion" must be expressed as a fractional or percentile share of the entire corpus of a marital deduction trust,[76] the IRS has tenaciously clung to the language of its regulation. To the extent that the Service has recognized *Northeastern*, it has limited the application of the holding to bequests of dollar-denominated interests in trust income.[77] No attempt was made to acknowledge the Court's modification of the definition of "specific portion" until the passage of the Economic Recovery Tax Act of 1981 prompted a review of all regulations under Code section 2056.[78]

Proposed Treasury Regulation section 20.2056(b)-5(c)[79] purports to define the term "specific portion" in a manner that would conform to the definition established by *Northeastern*.[80] Nevertheless, the amended regulation contains the familiar requirement that a specific portion must constitute a fractional or percentile share of a property interest "so that

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73. *Alexander*, 82 T.C. at 36 (emphasis added). Without the saving clause, there would be a danger that the court would modify the bequest in a manner not intended by the testator, *i.e.*, by granting the surviving spouse a power to appoint either more or less, depending on the market value of the trust on the date of her death, than the dollar equivalent of the maximum federal estate tax marital deduction available to the estate.
74. For a similar computation under I.R.C. section 2056(b)(7), see *infra* text accompanying note 100.
75. *Alexander*, 82 T.C. at 40-44.
76. *Northeastern*, 387 U.S. at 221-22.
77. *See* Tech. Adv. Mem. 8528009 (April 5, 1985). This memorandum provides in pertinent part:

> Although this regulation was held to be invalid as it pertains to a right to receive the income from a specific portion of an entire interest in *Northeastern* . . ., the Service has argued that the regulation continues to be valid as it pertains to a power to appoint a specific portion of the entire interest.

Id.; *see also Estate of Alexander v. Commissioner*, 82 T.C. 34 (1984). Note that this memorandum was issued shortly before the fourth circuit's affirmation of *Alexander*.
78. Notice of Proposed Rulemaking, 49 Fed. Reg. 21,350 (May 17, 1984).
79. Prop. Treas. Reg. § 20.2056(b)-5(c), 49 Fed. Reg. 21,355 (to be codified at 26 C.F.R. § 20.2056(b)-5(c)) (proposed May 17, 1984).
80. 49 Fed. Reg. 21,350, 21,352 (May 17, 1984).

such interest or share in the surviving spouse reflects its proportionate share of the increment or decline in the whole of the property interest to which the income rights and the power relate."[81] Even though the Supreme Court dismissed the Service's argument that Congress intended the interest of the surviving spouse to be subject to the same fluctuations in the value of the corpus as an outright owner,[82] the IRS persists in reiterating that language as the rationale for the "fractional or percentile share" requirement.

Recognition of the *Northeastern* rule appears in a newly-added paragraph[83] that is consistent with the Service's narrow interpretation of *Northeastern*. The focus of the new material is on the rule that the deductible interest is computed by applying the then-applicable annuity interest rate to the amount of income payable to the surviving spouse. While the language of the proposed regulation is reasonably straightforward, the examples explaining the application of the regulation are based on a curiously unlikely fact pattern that invites the argument that the regulation is to be narrowly applied.[84] No example directly confronts the question that *Northeastern* left unanswered, that is, whether the marital deduction is to be allowed where the surviving spouse is given a right to

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81. Prop. Treas. Reg. § 20.2056(b)-5(c)(2).

82. *See Northeastern*, 387 U.S. at 222. *See also supra* note 62 and accompanying text.

83. Prop. Treas. Reg. § 20.2056(b)-5(c)(3) provides:

> A specific sum payable annually . . . that is not limited by the income of the property will be treated as a right to the income of a specific portion of the property. However, no deduction will be allowable under section 2056(b)(5) except to the extent that the surviving spouse has the required power of appointment over a fractional or a percentile share of the property. The deductible interest . . . is the specific portion of the property that, assuming the interest rate generally applicable for the valuation of annuities at the time of the decedent's death, would produce income equal to such specific annual payment. . . .

84. Prop. Treas. Reg. § 20.2056(b)-5(c)(5), 49 Fed. Reg. 21,355 (published May 17, 1984), examples 1-3. These examples were based on the facts that the decedent transferred to a trustee "500 identical shares of X company stock," and that the surviving spouse was given an interest in one-half of the trust income or $6,000, whichever amount was larger. In examples (1) and (2), the power of appointment extended to a fractional share of the trust corpus and thus the marital deduction was permitted to the extent of the smaller interest. In example (3) the marital deduction is disallowed, as follows:

> Assume that the facts are the same as the example (1) except that S's testamentary general power of appointment is exercisable over the sum of $160,000 . . . . Inasmuch as there is no certainty as to what portion of the stock will be valued at $160,000 on S's death, the power of appointment over $160,000 is not considered a power of appointment over a specific portion of the entire interest.

Id., example 3. The significance of the fact that the testamentary transfer was of "500 identical shares of X company stock" is not explained. The unnecessary specificity of the testamentary transfer combined with the complexity of the income interest given to the surviving spouse establishes the rule that the marital deduction may be denied for a power to appoint a specific sum from a larger trust by means of an example which is unlikely to apply to any specific estate.

all the income from a specific dollar amount of corpus. It is difficult to understand why the IRS sidesteped the issue.

The IRS cannot be faulted for failing to take cognizance of the Tax Court decision in *Alexander* that was handed down just five months before the regulation was promulgated,[85] especially in light of the Service's subsequent appeal. With the affirmance of *Alexander* by the Court of Appeals for the Fourth Circuit, however, it is clear that the difference in interpretation of the term "specific portion" by the IRS and the courts cannot be ignored. Despite the announced attempt to conform the regulations to the statute as the statute was interpreted in *Northeastern*, the IRS would face considerable litigation risk in arguing that the statute requires a specific portion to be expressed as a fraction or percent of a larger interest.[86]

C. *"Specific Portion" and the Qualified Terminable Interest Property Rules*

Congress had an opportunity to shed some light on the meaning of "specific portion" when it amended Code section 2056 in the Economic Recovery Tax Act of 1981 ("ERTA").[87] The amendment repealed the limitations on the marital deduction under former law and introduced new rules applicable to life interests granted to the surviving spouse.[88] Congress used the same "specific portion" terminology in newly-added Code section 2056(b)(7) as occurs in Code section 2056(b)(5).[89] Unfortunately, Congress did not define the term either in the statute or in its legislative history.

ERTA not only provided for the unlimited tax-free transfer of assets

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85. The *Alexander* decision was filed on January 5, 1984. 82 T.C. 34.

86. Despite the divided opinion of the tax court in *Alexander*, the majority expressed considerable irritation with the Commissioner's "rigid" definition of specific portion and quoted with satisfaction its ruling on a different matter in an earlier case:

> It appears that the respondent, after losing in the courts and after failing to persuade Congress to adopt [his] approach, enshrined his litigating position as a regulation. We cannot now sanction a position which has already been so thoroughly repudiated.

Alexander, 82 T.C. 34, 44 (citing Edward L. Stephenson Trust v. Commissioner, 81 T.C. 283, 299 (1983)).

87. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(d)(1), 95 Stat. 172, 302 (codified as amended at I.R.C. § 2056(b)(7) (1982 & West. Supp. 1988).

88. The purposes of the amendment were to enable couples in common law states to obtain a tax-free inter vivos division of their property; to eliminate the problem of determining the includable portion of jointly-held property, particularly a couple's home, when both spouses may have provided consideration for it; and to eliminate the need for smaller estates to engage in complex estate planning in order to minimize taxes. The overriding objective of the change was to treat the husband and wife as a single economic unit and to ensure that only one transfer tax was imposed on family wealth passing to the next generation. GENERAL AND TECHNICAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, 97th Cong., 1st Sess. 39 (June 23, 1981).

89. *Compare* I.R.C. § 2056(b)(7) (1982 & West Supp. 1988) *with* I.R.C. § 2056(b)(5) (1982).

between spouses, it also introduced rules allowing testators who want to control the disposition of assets upon the death of the surviving spouse to obtain a marital deduction for certain life interests in trust even when the surviving spouse is given no power to appoint the corpus during her lifetime or at death.[90] If the trust qualifies as Qualified Terminable Interest Property ("QTIP"),[91] estate taxes are not imposed until the death of the surviving spouse, when the property is taxed as if it were an asset of her estate.[92] QTIP tax treatment is also available to testators in community property states, who can obtain a marital deduction on non-community property in which the surviving spouse is given a qualifying life interest.[93]

The QTIP rules, like the standard marital deduction rules, allow testators to establish a single residual trust permitting a partial QTIP election, rather than separate QTIP and residual trusts.[94] This provision

90. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(d)(1), 95 Stat. 172, 302 (codified as amended at I.R.C. § 2056(b)(7) (1982 & West Supp. 1988)).

91. To be qualified terminable interest property, the trust must give the surviving spouse an interest for life to all the income from the property, payable annually or at more frequent intervals, and provide that no person, including the surviving spouse, may have a power to appoint any part of the property to any person other than the surviving spouse during his or her lifetime. I.R.C. § 2056(b)(7)(B)(ii) (West Supp. 1988). The statute applies to annuities as well, stating that "[t]o the extent provided in the regulations, an annuity shall be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified)." *Id.* (flush language); *see also* Prop. Treas. Reg. § 20.2056(b)-7(c)(2) and (e), example 12, 49 Fed. Reg. 21,356 (proposed May 17, 1984); Priv. Ltr. Rul. 8446006 (no date given).

92. *See* I.R.C. § 2044 (1982). The decedent's estate is entitled to recover the taxes paid by the estate from the recipient of the property. I.R.C. § 2207A (1982).

93. Subject to the limitations of Code section 2056(b) pertaining to life estates or other terminable interests, the marital deduction is applicable to any interest in property which passes to the surviving spouse. I.R.C. § 2056(a) (1982).

The QTIP rules have given testators great flexibility in arranging testamentary transfers in order to limit the impact of the estate tax. The rules permit a personal representative to make a post-mortem election to treat certain property as "passing to the surviving spouse" in order to achieve the optimum disposition of estate assets for tax purposes. *See* I.R.C. § 2056(b)(7)(A) (1982). Consequently it is no longer necessary for a testator to fine-tune instructions in his will as to the balance between restricted and unrestricted gifts to his spouse. The personal representative may base his decision about QTIP election on such factors as the change in asset values since the time the will was made, the other assets which will be taxable in the estate of the surviving spouse, the likelihood of change in value while the assets are held in trust, and the probable longevity of the surviving spouse. The first objective is to ensure that good use is made of the unified credit, which for decedents dying after 1986 effectively exempts $600,000 of the assets of each estate from taxation. *See* I.R.C. § 2010 (1982 & West Supp. 1988). Where the combined estates of the decedent and the surviving spouse are worth more than $1,200,000, the personal representative may attempt to equalize the estates so that together they are taxed in the lowest possible brackets. He then makes an irrevocable election on the estate tax return to claim the marital deduction for all or a portion of the trust assets. *See* I.R.C. § 2056 (b)(7)(B)(v) (1982); Temp. Treas. Reg. § 22.2056-1 (1982).

94. I.R.C. § 2056(b)(7)(B)(iv) (1982); Prop. Treas. Reg. § 20.2056(b)-7(b), 49 Fed. Reg. 21,356 (proposed May 17, 1984).

is attractive from an administrative point of view. For testators who take advantage of the provision, the interpretation of the "specific portion" terminology of the statute and regulations will continue to have significant tax consequences.[95]

When Proposed Treasury Regulation section 20.2056(b)-7 was promulgated as part of the 1984 revision of the section 2056 regulations, it echoed the requirement of the old regulations that a specific portion "relate to a fractional or percentile share of the property so that [it] will reflect its proportionate share of the increment or decline in the whole of the property . . . ."[96] The validity of the requirement is as questionable in the new regulation is as it was in the earlier one. To date, however, no litigation has tested whether the interpretation of "specific portion" that developed in *Northeastern* and *Alexander* is to be extended to QTIP trusts.

If the *Northeastern/Alexander* interpretation prevails, executors may conclude that they have a duty to minimize estate taxes by stating the terms of a QTIP election in a manner that is consistent with those cases. Imagine, for example, an adjusted gross estate of $1,200,000, all to go to a residual trust for the benefit of a surviving spouse. Applying *Northeastern* and *Alexander*, the executor would choose QTIP treatment of the specific sum of $600,000 rather than of one-half of the residual trust. The marital deduction and unified credit would shelter the decedent's estate from taxes. If the value of the trust were to grow to $2,400,000 by the time of the surviving spouse's death, then according to *Alexander*, only the $600,000 on which the marital deduction was based would be includable in her estate. If she had no other assets, the unified credit would shelter her $600,000 estate from taxes. Thus, $2,400,000 would pass to their legatees undiminished by taxes. In contrast, had the executor elected QTIP treatment for "one-half" of the $1,200,000 trust rather than for the specific dollar sum of $600,000, the full $1,200,000 would be includable in the surviving spouse's estate and only $600,000 of that amount would be sheltered by the unified credit. The estate tax due on the top $600,000 would be $235,000.[97]

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95. Proposed Treasury Regulation section 20.2056(b)-7 goes to even greater lengths than does Treasury Regulation section 20.2056(b)-5 to make clear that a "specific portion" must bear its share of the increment or decline in value of a larger residual trust. *Compare* Prop. Treas. Reg. § 20.2056(b)-7, 49 Fed. Reg. 21,355 (proposed May 17, 1984) *with* Treas. Reg. § 20.2056(b)-5 (1958). Proposed section 20.2056(b)-7 requires that if the marital deduction portion of the trust is severed, it must be clear "by virtue of the duties imposed on the fiduciary either by applicable state law or by the express or implied provisions of the instrument governing the trust" that the fiduciary must divide the trust according to the fair market value of the trust assets at the time of division. The state law issue usually is whether the surviving spouse's power of appointment would extend to shares of stock distributed in a stock split. *See* Treas. Reg. § 20.2056(b)-5(c), example 2 (1958).

96. Prop. Treas. Reg. § 20.2056(b)-7, 49 Fed. Reg. 21,356 (proposed May 17, 1984) (to be codified at 26 C.F.R. § 20.2056(b)-7).

97. The tentative tax on an estate of $1,200,000 is $427,800. I.R.C. § 2001 (1982). The

Private Letter Ruling 8301050 indicates the approach the IRS is likely to take toward QTIP elections for partial interest in a residual trust.[98] The executor to whom the ruling was addressed sought to qualify the amount of residual trust property which would reduce the tax on the testator's estate to zero, after taking into account the unified credit and other allowable deductions. The executor requested a ruling that "the fractional share of the proposed election will constitute qualified terminable property." The IRS ruled that the partial election was valid under Temporary Treasury Regulation section 22.2056-1[99] and instructed the executor on the method of determining the fractional share: the numerator was to be the smallest amount that would, after taking into account all credits and deductions, result in no federal estate tax being imposed on the decedent's estate, while the denominator would be the value of the trust corpus as finally determined for federal estate tax purposes, less any items such as specific bequests, taxes, and debts that the testator instructed be paid out of the trust fund.[100] It further stated that the same fractional share of the residual trust would be taxable to the surviving spouse or the surviving spouse's estate under Code section 2044.[101]

In this private letter ruling, the executor complied with both the spirit and the letter of the regulation by expressing the "specific portion" as a fraction. What remains unclear is whether an election which expressed the specific portion simply as a dollar amount, as *Alexander* subsequently permitted in 1984, would qualify for the marital deduction, and if it did qualify, whether such an election would limit the amount eventually taxable in the estate of the surviving spouse to that dollar amount.

It is difficult to see how the courts could object to the tax treatment proposed in Private Letter Ruling 8301050 as applied to a QTIP election of a dollar-amount "specific portion." Harsh results are avoided because the marital deduction is permitted. The tax consequences are fair and reasonable, and tax avoidance is prevented when the surviving spouse subsequently dies. The tax determination does not require interpretation of any testamentary language, nor does it in any way affect the ultimate disposition of trust assets, since the surviving spouse has no power to appoint corpus in any event.[102] Nevertheless, application of this ruling

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unified credit of $192,800 reduces the tax imposed to $235,000. I.R.C. § 2010 (1982).

98. Priv. Ltr. Rul. 8301050 (Sept. 30, 1982).

99. Temp. Treas. Reg. § 22.2056-1 (1982).

100. Priv. Ltr. Rul. 8301050 (Sept. 30, 1982).

101. *Id.*

102. *Cf.* Estate of Alexander v. Commissioner, 82 T.C. 34 (1984), *aff'd* 760 F.2d 264 (4th Cir. 1985) (mem.). In *Alexander*, the wife's power of appointment would have been limited, in the absence of the saving clause, to the amount deducted in her husband's estate, regardless of whether there was appreciation in the value of the total trust. It is reasonable to conclude that the testator intended this limitation; otherwise, he could simply have used the language of the saving clause to define the

to an estate seeking the benefits of the *Alexander* holding[103] would conflict with the Tax Court's emphatic dismissal of the IRS's interpretation of the term "specific portion," and would establish the dual definition that the Tax Court sought to avoid.

V. THE FUTURE OF *NORTHEASTERN* AND *ALEXANDER*

If the amount of litigation that has arisen in the wake of *Northeastern* is a guide, the unmistakable loophole opened up by that decision has not led to the tax avoidance that Justice Stewart anticipated. With the notable exception of *Alexander*, no published case has attempted to extend the *Northeastern* rule to a "specific portion" of corpus expressed as a dollar amount rather than as a fractional or percentile share, nor has any published opinion dealt with an effort to avoid taxes in the estate of the surviving spouse by reliance on *Northeastern* or *Alexander*. Although one can only speculate on the meaning of an absence of litigation, there may have been a certain number of estates that have argued the *Northeastern/Alexander* definition of "specific portion" where the IRS concluded that it was unlikely to succeed in insisting upon the validity of the definition set forth in its regulations. Whatever the explanation, the tax-saving possibilities of *Alexander* have not been overlooked.[104] It seems probable that before long a personal representative will argue that only a specific sum is includable in the estate of a surviving spouse, and the resulting tax avoidance will compel a higher court to consider whether *Alexander* was correctly decided by the Tax Court. The inquiry will lead to the question of whether Congress intended that the term "specific portion" be consistently defined, and if so, whether the majority or dissenting view in *Northeastern* best expressed that definition.

Unquestionably the result sought by the IRS in *Northeastern* was a harsh one: merely because a testator failed to employ the precise terminology of a treasury regulation (not a statute) in his will, his estate was faced with having to pay thousands of additional dollars of federal estate

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scope of her power. *See supra* note 73 and accompanying text. It is not difficult to imagine a situation where "wife's share" terminology was used without a similar saving clause, and where the testator's sole intent was to prevent dissipation of trust assets during the surviving spouse's lifetime, not to restrict her power of appointment at death. In such a case, strict application of the marital deduction rules would require the deduction to be denied even though the objectives of the statute were satisfied. As a rule, courts will not inquire into taxpayer intent, but the rule is sometimes overlooked. *See, e.g.*, Estate of Mittleman v. Commissioner, 522 F.2d 132 (D.C. Cir. 1975); *see also supra* at note 37.

103. The dispute with the IRS could arise either when the personal representative of the first estate sought to qualify the bequest for QTIP treatment or when the personal representative of the second estate argued that only the dollar amount on which the QTIP marital deduction was based was includable in that estate.

104. *See, e.g.*, Engel, *Tax Court's Decision in Alexander Creates Significant But Risky Planning Opportunity*, 60 J. TAX'N 270 (1984). Writing before *Alexander* was appealed, the author stated that if the case were upheld, the estate planning technique that it offered would probably become prevalent.

taxes. Testators fortunate enough to have more skillful draftsmen would have avoided the taxes merely by changing the form of a bequest, not its substance. Perhaps it was because no tax avoidance was possible under the facts of the case that the Supreme Court brushed aside the issues Justice Stewart raised. His interpretation of the meaning of "specific portion" is nonetheless compelled by a logical reading of the statute and its legislative history.

There is no principle of statutory construction which would permit a court both to avoid harsh results in situations like *Northeastern* or *Alexander* and to avoid creating a tax loophole. Unless the term "specific portion" is given two different meanings as it is used within a single sentence of a statute, one objective or the other must fail. The proposed amendments to the regulation's definition of the term will prevent tax avoidance, but only by means of an interpretation which the courts reject. Congress must shed some light on the question. *Northeastern*'s definition of "specific portion" could be codified as it applies to partial income interests where the surviving spouse has power to appoint the entire corpus or where the corpus is capable of being expressed as a fractional share of a larger fund,[105] because no tax avoidance will occur in those situations. Furthermore, with QTIP elections Congress should make it clear that the amount of a "specific portion" includable in the estate of the second spouse must be expressed as a fraction or percent of a larger trust, in a manner consistent with Private Letter Ruling 8301050. For the traditional marital trust, however, the Code must require that a specific portion be expressed as a fractional or percentile share of trust corpus.

This treatment of the statute would still lead to harsh results in ordinary marital deduction cases like *Alexander*, where the surviving spouse has a power to appoint less than the entire trust corpus and the draftsman fails to express the "specific portion" as a fraction or percentile share or to provide a saving clause like the one found in *Alexander*. The number of testators who would be affected by a revised rule, however, is probably negligible. The traditional marital trust is still a valuable tool in certain estate plans,[106] but the alternative of the QTIP trust greatly reduces the average testator's need to use it. Codification of the "fractional or percentile share" rules will work a hardship on the few estates where the testator had the misfortune to employ an inept draftsman for a marital trust. Nevertheless, the fair administration of the federal estate

105. *See* Treas. Reg. § 20.2056(b)-6 (1958); Prop. Treas. Reg. § 20.2056(b)-7(c)(2) (proposed May 17, 1984) (to be codified at 20 C.F.R. § 20.2056(b)-7(c)(2)).

106. The traditional marital trust will still be a useful estate planning device where a testator wants to keep certain assets in trust but to give his spouse an unconditional power to appoint all or a portion of the property by will, or where he wants to avoid discretionary determinations by his personal representative.

tax requires recognition of the logic and consistency of the original definition of "specific portion" as it applies to interests in trust corpus.

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