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Taxation of "Income in Respect of a Decedent"

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NOTES

TAXATION OF "INCOME IN RESPECT OF A DECEDENT"

As a general rule the basis of property acquired from a decedent is the market value of the property at the date of the decendent's death. Section 691 of the Internal Revenue Code of 1954 establishes an exception to this rule by providing that items of income in respect of a decedent will be taxed in the hands of the receiver in the same manner as if the decedent had lived to receive the income. It is the purpose of this note to examine this concept in the light of its history and judicial treatment.

THE HISTORICAL DEVELOPMENT OF THE CONCEPT

The Period Prior to 1928

Taxation of "income in respect of a decedent" is a concept that has been in the process of development throughout most of the history of our federal income tax. Prior to 1928, the basis of property received from a decedent was the value at date of "acquisition." Whether "acquisition" was at the date the property was acquired by the taxpayer or the date it was acquired by the decedent was the source of much confusion to the courts. Also there were no special statutory provisions dealing with the treatment of the right to receive sums which the decedent had not collected. As one commentator stated:

> If the decedent had been an accrual-basis taxpayer, and the amounts had been properly accruable prior to death, a tax would have been imposed before his death at the time of accrual. Where the amount had not been accruable, or where the decedent had been on a cash basis, decedent would not have reported the amount and there was a possibility that no tax would be imposed when the successor collected it. Some courts might have taxed the successor as the decedent would have been taxed. Others regarded the claim as part of the corpus of the estate; its collection was either considered a mere conversion of the corpus into cash without further tax consequence, or was treated like the sale or exchange of a tangible asset, being taxed only to the extent that realization exceeded a basis attributed to the right.[1]

The Period 1928 to 1934

Because of the difficulty experienced by the courts in determining what basis should be attributed to the property, Congress provided in 1928, that the fair market value at date of death, that is, the valuation for estate tax purposes, should be the basis of property transferred by death.[2] A por-

[1]Note, 65 HARV. L. REV. 1024 (1952).

[2]Revenue Act of 1928, § 113, 45 STAT. 818:

"(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

(5) Property Transmitted at Death—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair

tion of the House Committee report dealing with this change reads: "Under existing law, the basis in such a case is the value at the date of 'acquisition,' which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determinable basis."[3]

This provision, in so far as the concept of income in respect of a decedent is concerned, either created vast inequities between different taxpayers or gave legislative approval to them. For example, if *X*, a lawyer, kept his books on a cash basis, the income he earned during his life which at the date of his death was reflected in accounts receivable was not subject to income tax on his returns. When he died, these receivables were assets of his estate and their fair market value became their basis for income tax purposes in the hands of whoever received them, that is, his estate, heirs, devisees or legatees. When they were subsequently collected, they would not be reflected as income since this would merely be the conversion of corpus into cash. However, if *X* had been an accrual basis taxpayer, this income would have been reportable by him for income tax purposes when earned.

The inequities thus created between different classes of taxpayers, plus the substantial amount of income that was escaping income taxation motivated the next change in the statutes dealing with this problem.

The Revenue Act of 1934

In 1934 Congress made an attempt to eliminate this discrimination and loss of tax revenue by providing that all income of a decedent, no matter what method of accounting had been used during his life, should be accrued as of the date of his death and reported in his final return. The report of the House Committee concerning this change reads:

> The courts have held that accrued income of a decedent on the cash basis prior to his death is not income to the estate, and under the present law, unless such income is taxable to the decedent, it escapes income tax altogether. By the same reasoning, expenses accrued prior to death cannot be deducted by the estate. Section 42 has been drawn to require the inclusion in the income of a decedent of all amounts accrued up to the date of his death regardless of the fact that he may have kept his books on a cash basis. Section 43 has also been changed so that expenses accrued prior to the death of the decedent may be deducted.[4]

The report of the Senate Committee is substantially the same.

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market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. . . ."

[3]H. R. REP. No. 2, 70th Cong., 1st Sess. (1927); 1939 1 CUM. BULL. 396.

[4]H. R. REP. No. 704, 73d Cong., 2d Sess. (1934); 1939 1 CUM. BULL. 572; Revenue Act of 1934, §§ 42, 43; 48 STAT. 680, 694 (1934).

"Sec. 42. Period in which Items of Gross Income Included. . . . In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period."

"Sec. 43. Period for which Deduction and Credits taken. . . . In the case of the death of a taxpayer there shall be allowed as deduction and credits for the taxable period in which falls the date of his death (except deductions under Section 23 (O)) if not otherwise properly allowable in respect of such period or a prior period." 48 STAT. 680, 694.

The result of this section of the code was the marshalling of income into the decedent's final return which resulted in inequities due to surtax rates. Whereas the law during the period from 1928 to 1934 had allowed income to escape taxation, after 1934 this income was subject to tax in the higher brackets, since it was taxed as an additional sum in the year of the decedent's death.

THE PERIOD BEGINNING IN 1942

The pyramiding of income by the 1934 Code prompted Congress again in 1942 to attempt to equalize the tax burden. This change made the income of the decedent which he normally would not report in his return, due to accounting system, taxable to the person who actually received the income. In most cases, the tax would fall on the decedent's estate, but if the estate did not receive this income it would fall on an heir, next of kin, legatee or devisee who inherited or was bequeathed such right. The House Committee report states that the object of this section was to eliminate the hardship of the marshalling of this income. The result was to tax this income to the persons who actually received it.[5] The report of the Senate goes into this section in detail, but makes few changes. This section also provides for the deduction of that portion of the estate tax which is attributable to the inclusion of the fair market value of these items of income in the decedent's estate.[6]

This section has been incorporated into the 1954 Code with no major changes. The only significant change is that the provision is applicable to income received from a prior decedent as well as a decedent.

WHAT IS CONSIDERED "INCOME OF A DECEDENT"

Income of a decedent has been subject to federal income taxation since Congress adopted the 1934 Revenue Act. Congress has not, however, seen fit to define the concept. The following definition has been suggested:

[5] INT. REV. CODE OF 1939, § 126(a), as amended, 56 STAT. 831 (1942):
"Sec. 126. INCOME IN RESPECT OF DECEDENTS
(a) Inclusion in Gross Income.—
(1) General Rule—The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period shall be included in the gross income for the taxable year when received, of:
(A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;
(B) the person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or
(C) the person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right."

[6] INT. REV. CODE OF 1939, § 126(c), as amended, 56 STAT. 8322 (1942):
"(c) Deduction for Estate Tax.—
(1) Allowance of Deduction—A person who includes an amount in gross income under subsection (a) shall be allowed, for the same taxable year, as a deduction an amount which bears the same ratio to the estate tax attributable to the net value for estate tax purposes of all the items described in subsection (a)(1) as the value for estate tax purposes of the items of gross income or portions thereof in respect of which such person included the amount in gross income (or the amount included in gross income, whichever is lower) bears to the value for estate tax purposes of all the items described in subsection (a)(1)."

> In terms which are approximate only, "income in respect of a decedent" might be defined as the receipt of an amount which would have been reportable as income by the decedent had he lived to receive it, which the decedent had neither actually nor constructively received before his death if he reported his income on the cash basis, or which had not accrued as income to him under normal accounting concepts if he reported his income on the accrual basis, and concerning the ultimate realization of which no further affirmative action remains to be taken.[7]

In order to comprehend the scope of this definition, an examination of the cases distinguishing items that are considered corpus of the estate from items that are considered "income of a decedent" should be helpful.

Cases Decided Under the 1934 Code Provision

As was pointed out above, under the 1934 act all income of a decedent was accrued as of the date of his death and reported in his final return.

The leading case dealing with the 1934 Code provision, and the first case to reach the Supreme Court was *Helvering v. Enright.*[8] The Supreme Court heard this case to resolve a conflict in the decisions of the Second Circuit in *Pfaff v. Commissioner*[9] and the Third Circuit in the *Enright* case.[10] The problem in this case was whether uncollected accounts receivable and unfinished work should be treated as income to the decedent, a member of a law firm which kept its books on a cash basis. The Circuit Court of Appeals held that "it was the right to receive payment which made an earning accrue and that, as Mr. Enright under the partnership agreement had no right to receive anything from the firm except his proportionate share of the cash receipts, these cash receipts were all that 'accrued' to him before his death."[11] The Supreme Court had to determine what Congress intended in saying the taxpayer should include in his final return "amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.[12] The Supreme Court held: "Accruals here are to be construed in furtherance of the intent of Congress to cover [sic] into income the assets of decedents, earned during their life and unreported as income, which on a cash return would appear in the estate returns. . . . Accrued income under § 42 for uncompleted operations includes the value of the services rendered by the decedent, capable of approximate valuation, whether based on the agreed compensation or on quantum meruit. The requirement of valuation comprehends the elements of collectibility."[13]

In so far as income derived from partnership activities is concerned, this case holds that accrued income shall include income received from unfinished work as well as income which would have been reported by an ac-

[7]Kennedy, *Income Tax Problems of Decedents and Their Estates*, 48 N.W. U. L. REV. 36, 42 (1953).

[8]312 U.S. 636 (1941).

[9]113 F.2d 114 (2d Cir. 1940), *aff'd*, 312 U.S. 646 (1941).

[10]Enright's Estate v. Commissioner, 112 F.2d 919 (3d Cir. 1940).

[11]312 U.S. 636, 639 (1941).

[12]Revenue Act of 1934, § 42; 48 STAT. 694.

[13]312 U.S. 636, 644 (1941).

crual basis taxpayer. It has been held in other cases that in determining the valuation of the unfinished work, the same figure should be used as is used for estate tax purposes.[14] The Board of Tax Appeals has also held that the portion of fees earned during the deceased partner's life would be included, but amounts earned after his death and subsequently paid to his estate would not be includible when paid only as a moral obligation.[15]

If income had been constructively received by the taxpayer in a period prior to his death but had not been reported as taxable income by him, the Commissioner could not include this amount as accrued income in his final return. In *Estate of George H. Letz, Sr.*,[16] the taxpayer had received part of his salary in negotiable promissory notes. As the employer was solvent and the notes were worth their face amount, they should have been included as income in the year received. The Board of Tax Appeals held that the statute refers to "amounts accrued" and obviously these amounts were not accrued, but were received in a prior period and were thus not includible. Likewise, where deceased at the time of his death had no interest in a trust fund his employer created but was designated an interest two months later, the Board held that he had no interest at the date of his death and there was nothing to accrue.[17] In another case concerning employers' trusts, upon an employee's death his administratrix had a right to demand of the corporation that it pay her under the trust agreement, the corporation not being required to pay until and unless within one year she transferred deceased's shares of beneficial interest. The court held that this amount did not accrue to the decedent before his death and was not includible in his income.[18]

The case of *Lynch's Estate v. Commissioner*[19] held that amounts which had been awarded taxpayer by a court, the case being up on appeal at the time of his death, were not income of a decedent and therefore not subject to inclusion in his final return. Likewise, where a decedent had a claim which at his death had been denied and which was based on an oral promise outside the statute of limitations, so that counsel had advised against suit, the court held that its receipt was not income of a decedent, saying that something more than a disputed claim was needed to constitute accrued income.[20]

In *Estate of Tom L. Burnett*,[21] the decedent was a cattle rancher who reported on the cash receipts and disbursements basis. At the time of his death he owned livestock and feed which had been raised on his ranch, the expenses incurred in the production having been deducted, but no part of their value ever having been reported as income. The Tax Court, in dis-

[14]Estate of George W. Wickersham, 44 B.T.A. 619 (1941); Estate of Lewis Cass Ledyard, Jr., 44 B.T.A. 1056 (1941).

[15]Loe M. Randolph Peyton, 44 B.T.A. 1246 (1941).

[16] 45 B.T.A. 1011 (1941).

[17]Estate of Frederick C. Kirchner, 46 B.T.A. 578 (1942).

[18]Commissioner v. Alldis' Estate, 140 F.2d 885 (6th Cir. 1944).

[19]150 F.2d 747 (2d Cir. 1945).

[20]Estate of Frank M. Archer, 47 B.T.A. 228 (1942). The opinion in United States v. Archer, 174 F.2d 353 (1st Cir. 1944), finds this claim to be income to the decedent when received.

[21]2 T.C. 897 (1943).

allowing the Commissioner's contention that these items of income should be included in taxpayers final return, stated:

> We have here simply the ownership of certain livestock and farm products which had been produced by the decedent on his ranches during his lifetime. This property had not been sold or exchanged by the decedent at the time of his death. It was simply owned. No one was indebted to him for its fair market value or any part thereof. We do not think that the mere ownership of this property by decedent at the time of his death, even though it had been produced on his ranches during his lifetime, caused it to be gross income accrued to him up to the date of his death within the meaning of Section 42 of the Revenue Act of 1938.

These cases, all decided under the 1934 Code provision, seem to limit income of a decedent to amounts which the decedent had some legal right to receive. The fact that there was a moral obligation that he be paid, or even that a claim had been asserted in which judgment in his favor was up on appeal did not bring these assets within this classification. Neither did the fact that the decedent had done all he could, short of actual receipt, satisfy the requirement for inclusion. Although the definition and holding given in the *Enright* case was broad, its interpretation had consistently required either a contract right or the performance of services that made the receipt due at the taxpayer's death. Of course, such items as interest, accounts receivable, and other items that should be reflected as income for an accrual basis taxpayer would be treated as income.

Court Treatment of the 1942 Code Provision

The Code was changed in 1942 to eliminate the marshalling of assets caused by the 1934 Act. This was done by providing that income of a decedent be taxed in the hands of the person who actually received it. Some items which the Commissioner had tried unsucessfully to bring under the 1934 provision, such as disputed claims subsequently liquidated, were considered income to the person who actually received them prior to 1942. Such things as dividends that had been declared prior to decedent's death, but which were not payable until after his death, were taxable to his estate under the 1934 Code when the declaration did not identify the distributee.[22] These dividends would still be taxable to the estate, or to whoever received them, under the 1942 Code.

In 1949 the Second Circuit had before it the *O'Daniel* case[23] in which the taxpayer died November 4, 1943. His employer had an employee bonus plan in which he had participated for years. Under this plan, no employee had any enforceable right to any share in the bonus until that share was designated by the proper officer. The taxpayer's share was designated March 19, 1944, four months after his death, and was paid to his estate during 1944. The court held:

> The result of the view adopted by the Commissioner and the Tax Court, with which we are in accord, is to impose income taxes upon a bonus paid for the services of the decedent during the year

[22]Estate of Putnam v. Commissioner, 324 U.S. 393 (1945).
[23]O'Daniel's Estate v. Commissioner, 173 F.2d 966 (2d Cir. 1949).

in which it was received. The bonus was derived through rights he had acquired, which even if not fixed at the time of his death were then expectancies which later bore fruit. It seems apparent from what we have already said that "the right * * * acquired by the decedent's estate from the decedent" which is referred to in Section 126(a) (1)(A) is not necessarily a legally enforceable right but merely any right derived through his services rendered while living.[24]

In 1951 the Second Circuit followed this decision by holding that payments made to the executors of deceased founders of a corporation in the year following death, which were voluntary and could not have been enforced by action, were income under section 126 and not gifts within the statutory exemption from income taxation.[25]

In 1954, the case of *Commissioner v. Linde*[26] was reviewed by the Ninth Circuit. In this case the decedent owned and operated vineyards in California. His procedure in marketing grapes was to deliver them to a cooperative marketing association where they were commingled into a common wine pool in which each member received a percentage of interest. Ultimately the proceeds of sales from the wine pools were returned to the owners in the percentage of their interests. In 1945, decedent's widow received $38,484.12 from these wine pools, which the Commissioner claimed were taxable as income under section 126. The Tax Court had determined that there was no sale to the association, the relationship between the association and members being one of trust. Therefore, the Tax Court determined that since there was no sale during the decedent's lifetime there were no distributable proceeds due him when he died and consequently no right to income arose during the decedent's lifetime.

The Ninth Circuit reversed this decision, stating:

> If the decedent had lived until the day when these crop pool proceeds were paid to him the payments so received would have been ordinary income. Sec. 126 itself contains strong evidence of Congressional intent to see to it that the tax upon income which would have been derived had the decedent lived should not be lost to the treasury in consequence of his death. . . . The payments which the taxpayer received in 1945 were realized under and in consequence of contracts and deals made by the decedent in his lifetime. No act or thing taken or performed by the taxpayer operated to procure or give rise to this payment. Such payments had their source exclusively in the decedent's contract and arrangement with the cooperative associations.[27]

This court adopted the reasoning employed by the Second Circuit in the *O'Daniel* case.

In commenting upon the *Burnett* decision, wherein the Tax Court held that livestock and farm products produced by decedent on his land were not income under section 42 of the 1934 Code, the court said: "It is our

[24]*Id.* at 968.
[25]Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951).
[26]213 F.2d 1 (9th Cir. 1954).
[27]*Id.* at 4.

view that section 126 was but an improved method adopted by Congress in aid of its continuing effort to avoid the loss of tax upon income merely because of the death of the decedent who would have paid a tax upon the same economic returns had he lived to receive them."[28] In other words, this court was saying that the purpose of the 1942 amendment was twofold: first, to prevent the marshalling of income and, second, to reach items properly classified as income which otherwise might escape income tax.

Although this court does not say the *Burnett* case was incorrectly decided, it is submitted that there is little doubt that a different result would be reached under the amended Code. Although stating that he is not required to express any opinion on it, Judge Pope goes on to say: "In the *Burnett* case there was a question whether there had been a realization of income at the date of death. The improved mechanics of section 126 avoids any such problem, and any inconvenience and inequity arising from attaching a value to such farm proceeds prior to actual realization thereof, for under section 126 the tax is not imposed until the amount is received by the successor."[29]

It is the writer's opinion that these cases show an extension of the concept developed under the 1934 Code. That is, an enforceable right to receive the sum in the hands of the decedent is no longer required. Instead, these cases seem to substitute the requirement that at the time of the decedent's death, no affirmative action will be required by him in order for the expectancy to ripen into income. The justification for this principle lies in the fact that no tax is imposed until the amount is received by the successor. The problem now is what will be considered "affirmative action"?

The Implications of the Linde Decision

The holding of the *Linde* case appears to be sound in principle. In determining what income should be taxable there appears to be little justification for requiring that the income be reduced to an enforceable right prior to death of the decedent. Where an employee has participated in a bonus plan of his employer for years, and where only some formality has prevented his being designated as a recipient of the current installment, failure to require inclusion of this amount as income would amount to exalting form over substance. The same is true of the wine pools in the *Linde* case. There, before his death, the decedent had done all that was necessary for him to do personally in order to reduce his grapes to income. All that remained for him was to await the sale, at which time he would receive his share of the receipts. If the form of this particular transaction proved to be a successful avoidance of income tax, the effect would be to penalize the farmer who marketed his products through any channel in which he had a completed sale prior to the actual receipt of the sales price in cash.

THE EFFECT ON THE ECONOMY OF MONTANA

The present problem is of great significance in Montana. Many wheat farmers in Montana store a large portion of their crops in public ware-

[28]*Id.* at 6.
[29]*Id.* at 7.

houses until after the first of January for business as well as tax purposes. Should this inventory be considered as income of a decedent when it is sold after the death of the farmer? At the time of the farmer's death there is no contract of sale, no right at some time in the future to share in the proceeds of a sale, but only a relationship of bailment. However, all that remains to be done in order to convert this inventory into cash is to deliver the warehouse receipts to the elevator and collect the market value. In most cases this is the procedure that the deceased would have followed if he had lived, since he would have no desire to receive the grain in kind. Should it make a difference that instead of entering into a binding sale of his grain, he deposited it in an elevator with the hope that the price would be higher at a later date when he would actually make the sale? Should the heirs of a decedent on a cash receipts basis receive this grain or, as is more likely, receive the cash value of this grain without income tax ever having been paid on the income it represents, while the accrual basis taxpayer's estate has been reduced by the income tax he has paid on the grain which he has deposited in the same warehouse subject to the same regulations?[30] It appears to the writer that this is the situation which the 1934 Act was passed to prevent, and equitable treatment requires inclusion of such proceeds as income of the decedent.

Montana ranchers are also faced with the Linde case as it affects livestock and feed raised by the decedent, which were assets of his estate at the date of his death but upon which at that time no sales agreement had been reached. The *Burnett* case held these items to be mere assets of the estate and not includible as income under section 42 of the 1934 Revenue Act. However, the *Linde* decision seemed to feel that, since under section 126(A)(1) of the 1942 Code the objection to their inclusion is no longer present, they should now be considered income when sold, without the benefits of increased valuation provided under section 113(a)(5) of the 1939 Code.[31] In essence, should we find a difference in the character of livestock or feed and that of grain inventories held by the taxpayer at the date of his death? Although the accrual basis rancher will not have increased his income by the market value of the livestock as he would have done with grain under the farm price method of inventory, he will have increased his income by the valuation he has given his inventory. This will be done by eliminating from his current expenses the cost of acquisition.[32] The cash basis rancher, on the other hand, will have charged the cost of producing his livestock as an expense when incurred. Should both cash basis and ac-

[30]If the farmer were on an accrual basis the value of this inventory would be included in his income in the year produced. The regulations provide that due to the impossibility of a farmers's determining the cost of his inventory, he may value his inventory by use of the farm-price method, that is, market price less cost of disposition. U.S. Treas. Reg. § 39.22 (c)-6 (1939). Regulations under the 1954 Code have not been proposed as yet.

[31]The regulations provide for the Unit Livestock-Price method of valuation whereby animals are classified with respect to age and kind and valued at a standard unit price for each class. When first selected, the classes must bear a relationship to each other that is reasonably proportionate to the cost of producting them. Once established and approved, these classifications can be changed only with the permission of the Treasury. Purchased livestock should be inventoried at cost and if not mature at date of purchase should be increased at the end of each accounting period with the growth established for raised animals. *Ibid.*

[32]INT. REV. CODE OF 1954, § 1014.

crual basis taxpayers' property receive the same bases (*i.e.*, market value at date of death) upon the taxpayer's death without regard to prior tax benefit? If the purpose of the statute is to eliminate the discrimination between cash and accrual basis taxpayers, these assets must be classified as within this concept and not given the benefit of the date of death value basis.

THE BASIC PROBLEM

At the beginning of this note, it was stated that the general rule for determining the basis of property is the fair market value of the property at the date of the prior owner's death.[83] This is the provision that was originally incorporated into the income tax law in 1928 in an attempt to have a readily determinable and equitable basis for the property thus acquired. Section 1014 of the Internal Revenue Code of 1954 is a greatly expanded version of this 1928 section. That it is the intent of Congress to preserve this doctrine cannot be questioned. The history of this provision shows it to be an expanding doctrine, the latest expansion occuring when the 1954 Code changed the law to give date of death basis to the decedent's share of jointly owned property.

This general provision has not received whole-hearted approval by the Treasury Department, as is shown in a statement of Randolph Paul, Tax Advisor to the Secretary of the Treasury.[84] This provision, as has been true of all provisions that permit income to escape taxation, is narrowly construed in an attempt to collect the greatest amount of tax. This attitude in relation to section 1014 of the 1954 Code is shown by the broadening of the concept of income of a decedent, as developed herein. It may well be that inventory assets of farmers should now be classified as within this concept. When this step receives judicial recognition, will the next step be to include inventory assets of the retail merchant? The same arguments for the inclusion of farm inventories will apply, and the additional argument that the farmer is being discriminated against. Then, will the next step be the inclusion of assets of a trade or business?

Section 691, as an exception to the general rule, is in conflict with the provisions of section 1014. Although many items can easily be placed under one section or the other, the boundary line is very cloudy and uncertain. An exact definition of "income in respect of a decedent" is impossible to prepare. The practioner must make decisions as to the proper treatment without any certainty that the courts will honor his decision. For instance, the Tax Court in the *Burnett* case found that livestock and feed raised by the decedent were simply assets of the decedent and in the

[83]The valuation of the basis is the value at date of death, or if the taxpayer elects to value the property at a lower price under INT. REV. CODE OF 1954, § 1014(a), the same value as is used for estate tax purposes.

[84]"Basis of property acquired from decedent.—Under present provisions the basis for determining gain on an asset acquired from a decedent thus becomes frozen in the basis accorded to the heir or legatee.

A large part of the capital gains inherent in the increased value of property thus escapes income tax, as the assets are handed down from one generation to the other. To remove this special privilege, it is suggested that the basis of property to the recipient for the computation of capital gains and losses be the same as it was in the hands of the decedent." *Hearings Before the Committee on Ways and Means of the House*, 77th Cong., 2d Sess. (1942).

absence of a sale (or even negotiations toward a sale) refused to find them to be income assets, saying that mere ownership of property is not enough. It is likely that the Ninth Circuit would find otherwise. Congress should be called upon to give a workable definition to the concept of income in respect of a decedent.

CONCLUSION

It is submitted that in defining this concept, the general rule should be that all items will be included as income in respect of a decedent that the accrual basis taxpayer would normally consider in determining his income. This would include interest income and accounts receivable as well as inventory items purchased or produced by the decedent whose cost would not properly be deductible as current expense by the accrual basis taxpayer. This provision would insure equitable treatment for both cash and accrual basis taxpayers, in that the basis of the decedent in inventory items would be the basis in the hands of the successor. While this would equalize the related positions of both the cash and the accrual basis taxpayers—as no taxable realization occurs until actual sale—it would not have the effect of damaging the cash position of the estate.

With this general rule as a foundation, it would then be desirable to specify other items that should be includible only because of the death of the taxpayer. Included in this category would be items such as unfinished work, employee bonuses and other income benefits, income from litigation such as patent infringement, income earned but payable over a period of years such as life insurance commissions, and any other items earned during the lifetime of the decedent which Congress believes should be included but which were not reported for income tax purposes by the decedent.

ROBERT C. JOHNSON

FILING AND PUBLICATION OF ADMINISTRATIVE RULES AND REGULATIONS IN MONTANA

Mr. Justice Jackson observed recently that, "the rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."[1] This language confirms a similar observation made in 1938 by Lester Jaffee: "Despite its many defects, administrative law threatens soon to overshadow the activities of our courts because it seems to be necessary to meet the needs of our present-day complex society."[2]

A good share of the development in the field of administrative law has come about in the last twenty five years. The New Deal, with its expansion into new areas of governmental activity, necessitated a vast increase in the number of governmental agencies and departments. While the federal government has led in the growth of administrative law, state

[1]FTC v. Ruberoid, 343 U.S. 470 (1952).

[2]Jaffee, *Publication of Administrative Rules and Order*, 24 A.B.A.J. 393 (1938).